

FCC REGULATION OF THE TELECOMMUNICATIONS PRESS†

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* Chief Judge, United States Court of Appeals for the District of Columbia. As will be clear from a reading of this paper, many of the points discussed herein are implicated in pending appeals in my court. I have avoided any discussion of points which might be necessary to decision of these pending cases except to the extent my discussion repeats that already published in my opinions in this area. I note that many of my previously published views repeated herein are not contained in majority opinions. I gratefully acknowledge the aid of my law clerk, Peter Hoffman, A.B. 1971, Drew University; J.D. 1974, Yale University, in the preparation of this Article.

[Ed. Note: This Article is substantially derived from Chief Judge Bazelon's *Brainerd Currie Lecture*, delivered at the Duke Law School, April 5, 1975.]

The main, main thing is The Post is going to have damnable, damnable problems out of this one. They have a television station. . . . And they're going to have to get it renewed.

Taped Statement of Richard Nixon
to H.R. Haldeman and John Dean,
Sept. 15, 1972.¹

This statement is indicative, albeit an unusual example, of the First Amendment problems raised by a comprehensive system for the licensing of speakers. Individuals who must obtain permission to engage in activity protected by the First Amendment are vulnerable to the various sub silentio pressures that prior approval permits and which Richard Nixon threatens in the statement quoted above.² They may,

THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

E. BARNOUW, A HISTORY OF BROADCASTING IN THE UNITED STATES (1968) [hereinafter cited as E. BARNOUW];

R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION (1973) [hereinafter cited as R. NOLL];

Multiple Ownership of Standard, FM and Broadcast Stations [Newspaper-Broadcast Cross Ownership], 32 P & F RADIO REG. 2D 954 (1975), *appeal docketed sub nom.* National Citizens Comm. for Broadcasting v. FCC, No. 75-1064 (D.C. Cir., Jan. 28, 1975) [hereinafter cited as Multiple Ownership];

Prime Time Access Rule, 32 P & F RADIO REG. 2D 697, *appeal pending sub nom.* National Ass'n of Independent Television Producers & Distribs. v. FCC, No. 75-4021 (2d Cir. Jan. 30, 1975) [hereinafter cited as Prime Time Access];

The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1 (1974), *appeal docketed sub nom.* National Citizens Comm. for Broadcasting v. FCC, No. 74-1700 (D.C. Cir., July 3, 1974) [hereinafter cited as The Fairness Doctrine and Public Interest Standards].

1. *Quoted in* SENATE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, FINAL REPORT, S. REP. NO. 981, 93d Cong., 2d Sess. 149 (1974). This threat nearly came true. See note 11 *infra*.

It has recently been disclosed that the litigation culminating in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), may also have had a political motivation. See *Friendly, What's Fair on the Air*, N.Y. Times, Mar. 30, 1975, § 6 (Magazine), at 11.

2. It would seem idle to suppose that the Court today is unaware of the evils of the censor's basic authority, of the mischief of the system against which so many great men have waged stubborn and often precarious warfare for centuries . . . , of the scheme that impedes all communication by hanging threateningly over creative thought.

Tolstoy once wrote:

"You would not believe how, from the very commencement of my activity, that horrible Censor question has tormented me! I wanted to write what I felt; but all the same time it occurred to me that what I wrote would not be permitted, and involuntarily I had to abandon the work. I abandoned, and went on abandoning, and meanwhile the years passed away." *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 66 & n.6 (1961) (Warren, C.J., dissenting).

See *id.* at 73-75; Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 658-60 (1955); Lockhart & McClure, *Literature, The Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 314-16 (1954). For a rare example of FCC sensitivity to this problem, see *Starr WNCN, Inc.*, 48 F.C.C.2d 1221, *stay denied sub nom.*

therefore, find it easier to tailor their views to the wishes of the licensor rather than risk its displeasure. The manner in which the licensor conveys its wishes or exercises pressure on the speaker under a comprehensive licensing scheme often is disguised in an apparently noncoercive action, which might seem innocuous to others not subject to the licensing scheme. Control of these pressures is thus particularly difficult. The motivation for communicating pressure may involve the rather crass political concerns voiced by Richard Nixon in the statement quoted above. The motivation may range from racial discrimination to a laudable desire to upgrade the quality of the particular speech involved. But under the First Amendment, the licensor's motivation should be irrelevant: the exercise of power over speech leads the government knee-deep into regulation of expression. And that, we have always assumed, is forbidden by the First Amendment. The Supreme Court has so held, time and again.³

But traditional assumptions do not apply to the regulation of telecommunications speech. The licensing scheme mandated by the Federal Communications Act⁴ permits a wide-ranging and largely uncontrolled administrative discretion in the review of telecommunications programming. That discretion has been used, as we might expect and as traditional First Amendment doctrine presumes, to apply sub silentio pressure against speech in the following instances: to discourage broadcast of song lyrics that allegedly promote the use of drugs,⁵ to halt radio talk shows that deal explicitly with sex,⁶ to discourage specialized or highly opinionated programming,⁷ to force networks to

WNCN Listeners Guild v. FCC, No. 74-1925 (D.C. Cir., Oct. 25, 1974) (Bazelon, C.J., concurring).

3. See *Steffel v. Thompson*, 415 U.S. 452 (1974); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *United States v. Robel*, 389 U.S. 258 (1967); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *NAACP v. Button*, 371 U.S. 415 (1963), and many authorities cited in these cases. See also Kalven, "Uninhibited, Robust, and Wide-Open"—A Note on Free Speech and the Warren Court, 67 MICH. L. REV. 289, 297-99 (1968).

4. 47 U.S.C. §§301 *et seq.* (1970).

5. See *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 603 (D.C. Cir.) (separate statement of Bazelon, C.J.), *cert. denied*, 414 U.S. 914 (1973).

6. See *Illinois Citizens Comm. for Broadcasting v. FCC*, No. 73-1562 (D.C. Cir. Mar. 13, 1975) (statement of Bazelon, C.J., as to why he voted to grant rehearing en banc).

7. See *Lee Roy McCourry*, 2 P & F RADIO REG. 2D 895 (1964), discussed in Robinson, *The FCC and the First Amendment: Observation on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 115, 123-24 (1967). This policy is implicit in the Fairness Doctrine. See generally *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973).

schedule "adult" programming after 9:00 p.m.,⁸ and to restrict, through Executive Office pressure, adverse commentary on presidential speeches.⁹ The methods of communicating these pressures are by now familiar to FCC practitioners: the prominent speech by a Commissioner, the issuance of a notice of inquiry, an official statement of licensee responsibility couched in general terms but directed against specific programming, setting the licensee down for a hearing on "misrepresentations," forwarding listener complaints with requests for a formal response to the FCC, calling network executives to "meetings" in the office of the Chairman of the FCC or of some other Executive Branch officials, compelled disclosure of future programming on forms with already delineated categories and imposing specific regulatory action on a particularly visible offender against this background.¹⁰ All these actions assume their *in terrorem* effect because of the FCC power to deny renewal of broadcast licenses or to order a hearing on the renewal application.¹¹ Recently, there have been indications that the threat of antitrust or Internal Revenue Service actions has served to buttress certain "raised eyebrow" suggestions.¹² I do not mean by

8. Broadcast of Violent, Indecent and Obscene Material, 32 P & F RADIO REG. 2D 1367, 1370-74 (Feb. 19, 1975).

9. See Memorandum from Charles W. Colson to H.R. Haldeman, Sept. 25, 1970, reprinted as Appendix A of this Article from SENATE SELECT COMM. FINAL REPORT, *supra* note 1, 281-84; Whiteside, *Annals of Television*, NEW YORKER, Mar. 17, 1975, at 41 *et seq.*; 120 CONG. REC. S17,502-04 (daily ed. Sept. 25, 1974) (remarks of Senator Proxmire); Cohn, *How Liberals Rediscovered Free Speech*, Washington Post, Dec. 22, 1974, § B, at 3, col. 1.

10. See sources cited in notes 5-9 *supra*. See also Jack Straw Mem. Foundation, 21 F.C.C.2d 833, *hearing ordered*, 24 F.C.C.2d 266 (1970), *license renewed*, 29 F.C.C.2d 334 (1971); Palmetto Broadcasting Co., 33 F.C.C. 250 (1962), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964). See generally *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 69-70 & nn.28-30, 77-78 (D.C. Cir. 1972) (Bazelon, C.J., dissenting), *cert. denied*, 412 U.S. 922 (1973); Scalia, *Don't Go Near the Water*, 25 FED. COM. B.J. 111 (1972). The Program Reporting Form is found at Form 303, Section IV-B, Part III, P & F RADIO REG. 98:303-18. For early uses of the "raised eyebrow" techniques, see 2 E. BARNOUW 32-33.

The recent disclosure of a political motivation for the *Red Lion* litigation, see note 1 *supra*, does not suggest any "raised eyebrow" tactics. *Red Lion* involved explicit application of established doctrine.

11. See *Citizens Communication Center v. FCC*, 447 F.2d 1201, 1214 (D.C. Cir. 1971); Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15, 20-23, 46-47 (1967); Robinson, *supra* note 7, at 111-25. President Nixon reportedly used the license renewal process for his political advantage by arranging for challenges to "unfriendly" stations by his political friends. See Whiteside, *supra* note 9, at 62; Editorial, *A Bill of Complaint*, Boston Globe, Jan. 21, 1973, § A, at 6, col. 1 (challenges to WJXT, Jacksonville, by head of the finance chairmen of the Florida Nixon Re-election Committee; and to WPLG, Miami, by a partner of Nixon and Rebozo in a real estate deal).

12. See SENATE SELECT COMM. FINAL REPORT, *supra* note 1, at 132-43, 145, 267-

recitation of these examples to alert you to a great danger or to engage in any sort of journalistic effort to inform the public. This has been fully accomplished by persons more able than myself. My only concern is with the legal implications of these examples in the context of our traditional constitutional order.

I should perhaps admit that, in at least one incident, appellate judges also have engaged in such "raised eyebrow" tactics. I speak of a speech I gave to the Federal Communications Bar on the Fortieth Anniversary of the FCC.¹³ There, as in part I do here, I criticized the performance of the broadcast media and suggested in general terms that the media devote more attention to the public interest, as they themselves know the public interest. It is certainly easy to criticize the broadcast media, and I am sure many readers of this Article have experienced the desire to "chill" the media into adopting one policy or another. I criticize not the seductiveness of this enterprise—because, after all, that is free speech too—but rather the background against which the criticism echoes and which makes the criticism, at least when made by the FCC, much more potent than its persuasiveness would require. I am aware that unless we are willing to do away with the entire system of program regulation, the line between permissible regulatory activity and impermissible "raised eyebrow" harassment of vulnerable licensees will be exceedingly vague. The fact remains, however, that the use of "raised eyebrow" tactics presents serious issues which should at least engage our undivided attention as we review communications policy and the Constitution.

Beyond these various forms of "raised eyebrow" regulation, the Federal Communications Act permits more overt forms of speech regulation: these include the Fairness Doctrine (encompassing also the equal time and editorial reply rules)¹⁴ and review of programming at

68; *Hearings Before House Comm. on Judiciary Pursuant to H. Res. 803*, 93 Cong., 2d Sess., Book 5, pt. 1, at 314-20 (1974); Whiteside, *supra* note 9, at 77-80.

The Arab League boycott office has indicated that the Arab states intend to subject television news reporting by American networks to much more than "raised eyebrows." According to the *New York Times*, "CBS and NBC would be allowed to operate in the Arab states 'on the condition that this activity is beneficial to the Arab cause and under supervision of Arabs.'" *N.Y. Times*, March 4, 1975, at 3, col. 1. The networks rejected these conditions. *Id.*; see *The Christian Science Monitor*, March 3, 1975, at 4, col. 3; *cf. id.*, Feb. 26, 1975, at 3, col. 1 (large Mideast publisher wants to buy medium-size American newspaper).

13. Reprinted in 120 CONG. REC. S20,143-44 (daily ed. Nov. 26, 1974).

14. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *The Fairness Doctrine and Public Interest Standards; Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598 (1964). The Fairness Doctrine has been coercively applied in *Brandywine-Main Line Radio, Inc. v.*

license renewal and at assignment to determine whether past and proposed future programming meets the FCC's criteria of balance.¹⁵

I think it is beyond cavil that we would not tolerate this sort of regulation in any context other than telecommunications; the First Amendment would forbid it. But somehow telecommunications speech is different and permits, many think, a different First Amendment regime. I seek here to raise questions about this assumption through an exploration of the justifications generally offered to support this different First Amendment regime for telecommunications speech. After exploring those justifications, I will offer some alternative strategies for reforming telecommunications regulation in a manner which both eliminates present intrusion into protected speech and forwards the First Amendment interest of diversity of ideas.

I. HISTORICAL JUSTIFICATIONS FOR FCC REGULATION OF THE TELECOMMUNICATIONS PRESS

As you know, many justifications have been offered for the present First Amendment state of affairs. But most are in my view simply *post hoc*. This does not, of course, deprive them of their persuasive-

FCC, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973); *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). *See also* *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971); *Retail Store Employees, Local 880 v. FCC*, 436 F.2d 248 (D.C. Cir. 1970); *Accuracy in Media, Inc.*, 40 F.C.C.2d 958 (1973), *rev'd sub nom. National Broadcasting Co. v. FCC*, No. 73-2256 (D.C. Cir., Sept. 27, 1974).

Of course, the actual adverse decisions regarding the Fairness Doctrine provide only the tip of the iceberg; of far more consequence are the numerous complaints and proceedings before the FCC regarding specific news programming. For example, fourteen such proceedings involving recent news telecasts are cited in Brief of National Broadcasting Co., at 22-23 n.*, *National Broadcasting Co. v. FCC*, *supra*. In 1972, the FCC received 2,800 Fairness Doctrine Complaints. H. GELLER, *THE FAIRNESS DOCTRINE IN BROADCASTING* 23 (Rand Corp. 1973). *See also* 120 CONG. REC., *supra* note 9, at S17,503; *The Fairness Doctrine and Public Interest Standards* 8, *citing* *Allen C. Phelps*, 21 F.C.C.2d 12 (1969). The financial burden imposed by constant compliance efforts is itself a form of "raised eyebrow" regulation. *See* *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 69-70 (D.C. Cir. 1972) (Bazelon, C.J., dissenting), *cert. denied*, 412 U.S. 922 (1973); H. GELLER, *supra*, at 40-43. *Compare* *Grosjean v. American Press Co.*, 297 U.S. 233, 246-47 (1936). For a discussion of some recent FCC Fairness Doctrine decisions, see Comment, *The Regulation of Competing First Amendment Rights: A New Fairness Doctrine After CBS?*, 122 U. PA. L. REV. 1283, 1293-1318 (1974).

15. *See* *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 252, 278-80 & n.45, nn.59-63 (D.C. Cir. 1974) (rehearing en banc) (Bazelon, C.J., concurring in the result); *Alabama Educ. Television Comm'n*, 32 P & F RADIO REG. 2d 539, 552-56 (1975); *Children's Television Report and Policy Statement*, 50 F.C.C.2d 1 (1974); *Suburban Broadcasters*, 30 F.C.C. 1021 (1961), *aff'd sub nom. Henry v. FCC*, 302 F.2d 191 (D.C. Cir.), *cert. denied*, 371 U.S. 821 (1962).

ness, to the extent they are persuasive. However, this fact warns against viewing the justifications outside of their historical context. Thus, in discussing the justifications that have been offered, I intend to view them as historical causes and to consider them in their historical context. In this manner I hope to demonstrate the ways in which changes in historical context may further change or, indeed, eliminate the existence of at least some asserted justifications. This is simply to say that past historical necessity should not embed legal rules in concrete. To paraphrase Justice Holmes, I can think of no worse justification for a legal rule than the argument that it was necessary fifty years ago and therefore must be necessary today.¹⁶

A. Lack of Journalistic Effort in the Beginnings of the Telecommunications Press

The main factor in my mind that explains the different First Amendment regime applied to TV and radio is the lack of genuine journalistic effort in the beginning of telecommunications news.¹⁷ Radio and TV news at first was not considered a source of serious journalism; it was, many thought with justification, simply a rebroadcast of information and opinions obtained from the printed media. The main function of radio and TV was entertainment, and entertainment programming was not considered at the core of the First Amendment scheme. Indeed, for a short time the FCC declared that the licensees should not "editorialize."¹⁸ The Commission later rejected this rule but only in favor of the Fairness Doctrine, which is today the most overt form of program regulation in which the FCC engages.¹⁹ The image one gets, looking backward, is that the radio or TV licensee was a mere

16. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

17. *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 71-73 (D.C. Cir. 1972) (Bazelon, C.J., dissenting), *cert. denied*, 412 U.S. 922 (1973); 1 E. BARNOUW 138-42; 2 *id.* at 17-22, 74-83, 135-42, 146-51, 185-87, 204-05, 219, 241; 3 *id.* at 40-56, 73, 116, 155-60, 180-83, 186-87, 208, 210-11, 217-27, 244-45, 270, 301. The use of radio to communicate news during World War II may have been the turning point towards a true concept of broadcast journalism and away from simple reliance on the AP or UPI ticker. But the real growth of TV news teams and TV news technology occurred in the period from 1960 to 1963. In 1963, for the first time most Americans named TV as their major source of news. On the rise of TV news, see F. FRIENDLY, *DUE TO CIRCUMSTANCES BEYOND OUR CONTROL . . .* (1967); W. WOOD, *ELECTRONIC JOURNALISM* 1-20 (1967); P. WHITE, *NEWS ON THE AIR* 30-49 (1947).

18. See *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1941). See also BARRON, *The Federal Communications Commission's Fairness Doctrine: An Evaluation*, 30 GEO. WASH. L. REV. 1, 1-4 (1961).

19. See *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949); *Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 339-40 (1941).

conduit of news, a common carrier of sorts, and not the independent journalistic institution which the First Amendment protects as the "press."

But if this image were ever true, it surely is not true today. Independent TV and radio news and opinion teams are the main sources of information for the American people.²⁰ If they have not completely overshadowed the printed media in areas such as investigative reporting, it is not because they are mere conduits. TV and radio journalism is now an independent press surely within the intendment of the First Amendment.

The fact that the telecommunications industry still relies heavily on entertainment programming does not mean it is any less a part of the independent journalistic institution the First Amendment protects. First, entertainment programming is protected speech, and, as an individual speaker, the licensee is entitled to First Amendment protection.²¹ Second, there is no reason why the press clause of the First Amendment refers only to the political press. We do not need Professor Charles Reich²² to tell us that music, fiction and art occupy a status in the "marketplace of ideas" completely equal to political opinion. While it may have been once true that TV was not the source of high quality entertainment programming deserving of full First Amendment protection, it surely is no longer true. A different First Amendment regime cannot be justified on that basis.

B. *The Nature of the Medium*

Another factor which has gained prominence in recent years may explain the continuing vitality of the special First Amendment regime for telecommunications. This is the particularly powerful nature of telecommunications as a medium for speech.²³ TV and radio offer ac-

20. *ROPER ORG., INC., AN EXTENDED VIEW OF PUBLIC ATTITUDES TOWARD TELEVISION AND OTHER MASS MEDIA, 1959-71*, at 2 (1971); *BROADCASTING*, Nov. 2, 1970, at 48.

21. *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 76 (1961) (Warren, C.J., dissenting), citing *Winters v. New York*, 333 U.S. 507, 510 (1948); see *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 252, 271 n.9 (D.C. Cir. 1974) (rehearing en banc) (Bazelon, C.J., concurring in the result) and authorities cited. This was not always the case. See *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915).

22. Charles A. Reich is a Senior Fellow at Yale Law School and author of *The Greening of America* (1970).

23. *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 252, 275 & nn.31-32 (D.C. Cir. 1974) (rehearing en banc) (Bazelon, C.J., concurring in the result) and sources cited.

cess to immense numbers of listeners with at least part of the immediacy of person-to-person communications. This all-pervasive immediate form of press commentary gives tremendous leverage to speakers who have access to it. And for that reason, there is great pressure to expand the number of voices which have this access.

It is simply impossible to exaggerate the impact of TV in particular on our lives and the lives of our children.²⁴ It is often said, but nonetheless worthy of repetition, that TV has altered our consciousness, our manner of relating to other people and the world, our decisions about the expenditure of our wealth and the use of our leisure time. It has both broadened and numbed our experiences with persons and events outside our normal range of acquaintance. TV is an acculturizer—even more so than public schools—and thus has an immense but largely unascertainable impact on the motivations and beliefs of our children. TV has so reordered our lives that we do not yet recognize the change. And the change was wrought almost inadvertently: nobody expected it, nobody foresaw the effect, and the people as a whole did not make a democratic choice to embrace it. But it is here to stay, and its power has led many individuals to question the validity of the traditional First Amendment regime.

One might profitably compare the impact of television on human perception, learning and communication with the discovery of atomic power and with recent developments in our understanding of human genetic structure, control of the brain and human biology in general. These three Twentieth Century revolutions in our knowledge and control of ourselves and the environment in which we live are awesome, at once bringing great promises and great perils. Rational evaluation of their growth is made difficult by the speed with which these developments have come upon us. While human kind has certainly experienced in previous centuries such world-shattering developments, in no other century have so many such developments come upon us so quickly and with such devastating impact.

But what follows from a recognition of the immense power of TV (and, to a lesser extent, radio) speech? We may assume that nothing in the First Amendment prohibits a reasonable regulation of the time, place and manner of speech in order to ensure that all speakers may

24. See L. BOGART, *THE AGE OF TELEVISION* (3d ed. 1972); M. McLuhan, *UNDERSTANDING MEDIA—THE EXTENSIONS OF MAN* (1965); *SIGHT, SOUND AND SOCIETY* (D. White & R. Averson eds. 1968); 1 *TELEVISION AND SOCIAL CHANGE* (Surgeon General's Science Advisory Comm., G. Comstock & E. Rubinstein eds. 1972).

be heard.²⁵ And we might further assume that marginally protected speech which significantly impinges upon individual privacy may be forbidden consistent with the First Amendment.²⁶ But it is something else again to suggest that the force of a particular mode of speech in and of itself permits a generalized regulation of speech. To some extent, TV viewing is involuntary and thus privacy interests are involved which may justify some regulation of TV speech.²⁷ But this involuntary aspect should not be exaggerated to justify the assumption that all TV programming is an invasion of privacy which can be regulated. In the final analysis, the assumption that the power of the telecommunications press justifies regulation strikes at the root of the First Amendment's guarantee of an independent journalistic institution: this assumption argues instead that the press is too powerful to be free. But it is important to distinguish between the power gained by oligopoly in the production of news and entertainment programming for radio and TV and the power inherent in the medium. I suspect that the former is the real concern, and I address it later in this Article. The latter form of power may be amenable to regulation to the extent, and only the extent, that the power itself causes a cognizable injury which we might deem worthy of suppression. A helpful analogy would be to the limitation on the use of bull horns. But to regulate on the basis of the content of the speech because of the added power given by a particular medium of communication seems to me a wholly different proposition which, if justifiable at all, cannot be defended on the basis of the particular power of the medium alone.²⁸

25. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 311 (1974) (Brennan, J., dissenting); *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 75-78 (1961) (Warren, C.J., dissenting).

26. Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Compare *Trinity Methodist Church, South v. Federal Radio Comm'n*, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933).

27. *Banzhaf v. FCC*, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

28. *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 77-78 (1961) (Warren, C.J., dissenting):

It is true that "each method [of expression] tends to present its own peculiar problems." *Joseph Burstyn, Inc. v. Wilson* [343 U.S. 495, 503 (1952)]; see also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-87 & n.15 (1969)]. The Court has addressed itself on several occasions to these problems The Court [has] recognized that sound trucks call for particularized consideration But, the Court's decision today does not follow from this. Our prior decisions do not deal with the *content* of the speech; they deal only with the conditions surrounding its delivery. These conditions "tend to present the problems peculiar to each method of expression." Here the Court uses this magical phrase to cripple a basic principle of the Constitution. Cf. 120 CONG. REC. S18,810-12 (daily ed. Oct. 10, 1974) (remarks of Senator Proxmire) and authorities cited.

C. Scarcity of Broadcast Facilities

(1) Scarcity of Frequencies

A third factor leading to a different First Amendment regime for telecommunications, a factor which has emerged as the most widely accepted justification today, is the scarcity of telecommunications outlets and thus the scarcity of broadcast speakers.²⁹ The initial source of this scarcity was the concept of a license which in turn was caused by a limitation on the number of broadcast frequencies. Thus, as a permissible regulation of the manner of speech designed to permit all speakers to be heard, the government must allocate frequencies in order to avoid destructive interference. But the key to scarcity is the *limited number of frequencies* and not the mere existence of licensing, and it may be doubted whether today there is a scarcity of broadcast frequencies.³⁰ The emergence of cable TV, perfection of UHF technology and more efficient usage of the VHF broadcast spectrum promise an end to scarcity of broadcast frequencies.³¹ Even if one focuses only on broadcast TV, present figures indicate that a great portion of the UHF band is not presently in use.³² Of course, UHF and cable are not sufficiently developed to be an effective alternative to VHF at present. But their possibility of development does suggest that *physical limitations* on the number of frequencies are not that severe.

In 1969 the Supreme Court in *Red Lion Broadcasting Co. v. FCC*³³ found that scarcity was then still a reality. However, the figures discussed in *Red Lion* are not necessarily probative in this regard and, indeed, demonstrate a confusion inherent in discussions of scarcity. The only conclusion the figures utilized in *Red Lion* indicate is that the VHF television channels with high market penetration are completely filled. Thus the scarcity lies in this—there are very few VHF television channels linked to a nationwide network with good market penetration. This scarcity, it will be noted, is not premised on a limited number of frequencies per se. Otherwise, *Red Lion* relies only on the past—the fact that the original justification for regulation was the problem of scarcity and the resulting interference.

29. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-90, 396-400 (1969).

30. In New York City, for example, there are currently thirty-seven radio (AM) and television (VHF) stations as compared to three newspapers of general circulation. Letter to the author from Elie Able, Dean of the Columbia University School of Journalism, Feb. 27, 1975.

31. See *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 75-76 (D.C. Cir. 1972) (Bazelon, C.J., dissenting), *cert. denied*, 412 U.S. 922 (1973); R. NOLL 4.

32. See authorities cited in note 31 *supra*.

33. 395 U.S. 367, 396-400 (1969).

(2) *Scarcity of Investment Capital*

Further confusion of the concept of scarcity is suggested by the following argument advanced by Mr. Henry Geller in support of FCC program regulation: Mr. Geller notes that there are two VHF licensees for TV service in Jackson, Mississippi and without the Fairness Doctrine those licensees may well broadcast racist programming.³⁴ It is noteworthy that Mr. Geller does not mention radio, nor the fact that the stations broadcast network news. But be that as it may, another omission from his analysis is whether there are other available TV frequencies, cable, UHF or VHF, which are open to potential broadcasters in Jackson. We may assume that there are other potential frequencies (since UHF has sixty odd channels and the VHF has at least ten) but that, for presumably financial reasons, no other persons find broadcasting in Jackson to be feasible. This "scarcity," if it may be so called, is not a result of a limited number of frequencies and is indeed no different than that associated with newspapers. Scarcity of investment capital in the broadcasting industry seems hardly meet as a justification for a different First Amendment regime for TV alone. It should be added that even if Mr. Geller's argument is convincing, it justifies only program regulation in local viewing markets where there are few broadcasters. For some major markets where there are sixty or more radio stations and six TV stations, Mr. Geller's argument is inapplicable.³⁵

And this leads to a more troubling question, because all economic resources are scarce.³⁶ When we say there is a scarcity of frequencies, to what are we comparing this scarcity? In other words, what is the contrasting "multitude" that is the implicit premise of discussions of scarcity? Broadcast frequencies are scarce in relation to what? Consider the following figures: as of December 31, 1974,³⁷ there were

34. Geller, *Communications Law*, 63 GEO. L.J. 39, 46 (1974).

35. Cf. *Fidelity Television, Inc. v. FCC*, No. 73-2213, at 30-31 (D.C. Cir., Mar. 6, 1975); *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 252, 284 n.79 (D.C. Cir. 1974) (rehearing en banc) (Bazelon, C.J., concurring in the result). The observation in the text would mean that the Fairness Doctrine is not applicable to at least New York, Los Angeles, Chicago, and Philadelphia. See also Jaffe, *Program Control*, 14 VILL. L. REV. 619-20 (1969).

36. See Coase, *The Federal Communications Comm'n*, 2 J. LAW & ECON. 1, 13-19 (1959). Of course, the scarcity of investment capital in the telecommunications industry for UHF and cable development is a result partly of government controls and not solely the product of a free market.

37. BROADCASTING, Feb. 17, 1975, at 64. For figures in recent years, see *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 75 (D.C. Cir. 1972) (Bazelon, C.J., dissenting), cert. denied, 412 U.S. 922 (1973); G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* 154-57 (1974).

7,785 radio stations on the air and 952 TV stations, serving nearly every part of the country. As of January 1, 1971, daily newspapers totalled only 1,749. And the broadcast spectrum is still not completely filled. How is there a "scarcity" of broadcast frequencies? How many do we think could realistically be filled considering the capital market for broadcast facilities? Even if the previously stated figures seem "scarce" by some unknown standard, the potential of cable television is so enormous that it alone could, if properly developed, outnumber newspapers. "Scarcity," indeed!

Of course, the number of non-daily newspapers and periodicals, as well as book sales, has increased regularly in recent years.³⁸ Professor Emerson is thus led to suggest that the real comparison is not between the number of daily newspapers and the number of radio and TV stations, but between the number of printing presses and the number of broadcast frequencies.³⁹ This comparison of "theoretical" scarcity, if it may be so named, does produce a conceptual limitation on telecommunications not present in regard to the printed media. However, this conceptual limitation is really of no serious significance now that cable TV produces a "theoretical" expansion of the broadcast frequencies that must certainly parallel the "theoretical" number of printing presses for any realistic purpose we might impute to communications policy. Furthermore, most discussions of scarcity of broadcast frequencies really are premised on an "effective" scarcity and, if newspaper and the telecommunications press are to be compared, we must look also to the "effective" scarcity of newspapers, which leads inexorably to a comparison between the number of daily newspapers and the number of radio and TV stations.

So, looking only to the "effective" scarcity that *Red Lion* proved, it is clear that this is a scarcity that is not really a product of the Federal Communications Act or the forces that gave impetus to that Act. Rather, it is a result of government policies which have permitted the development of VHF television prior to perfection of technology for cable and UHF to the commercial detriment of the latter.⁴⁰ Even

38. See STATISTICAL ABSTRACT OF THE UNITED STATES, 502, 505 (1973).

39. See T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 662 (1970); cf. Fairness Doctrine and Public Interest Standards 4-7.

40. On this subject, see H. GELLER, A MODEST PROPOSAL TO REFORM THE FCC 3-12 (Rand Corp. 1974). See also Multiple Ownership 1029 (Robinson, Comm'r, concurring in part, dissenting in part).

Former FCC Chairman Newton Minow, who was kind enough to offer his comments on the arguments made in this Article, stated that the shortage of VHF outlets in the major market areas has produced a severe economic scarcity with the result that business people are virtually standing in line for an open frequency in those areas.

though the government is somewhat responsible for the dominance of the limited number of VHF licensees, the Failing Newspaper Act⁴¹ and repeated antitrust division approvals of mergers of newspapers have implicated the government in the scarcity of high circulation newspapers in major markets. But that fact was apparently not enough to institute a new First Amendment regime for newspapers.⁴²

I suggested in an opinion in 1972 that the FCC reconsider the concept of scarcity to determine whether its vitality continues undiminished in light of recent technological developments.⁴³ While the FCC has recently purported to accept my invitation, one may certainly question whether its effort was an in depth re-evaluation of the concept of scarcity.⁴⁴

(3) *Implications of Scarcity for Government Regulation*

Even assuming the existence of a scarcity of broadcast speakers, it is not immediately apparent to me why this scarcity (either in gen-

There is no such line, he points out, for newspapers in major market areas because newspapers are simply not as profitable. The true scarcity, he concludes, lies in the inability to meet the significant *demand* for VHF outlets in major market areas. A similar argument has been made by Albert Kramer in a draft report to the American Civil Liberties Union. I have no doubt about the accuracy of these arguments. My point, as developed in the text, is that this concept of scarcity is not a result of the limitation on frequencies but rather the market power gained by VHF licensees through FCC policies on allocation of frequencies and relative development of alternative technologies. My suggestions for reform discussed in Part III of this Article attempt to meet these policies head on, rather than through regulation of speech. But if such reform efforts do not move ahead, I can perceive an argument that past FCC allocation and development policies are themselves a denial of the free press rights of those whose demand for frequencies cannot be met under the present scheme. A lesser form of this argument was rejected in *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), but that case is surely not definitive. The present entrenchment of VHF licensees and the concomitant network domination of programming were, of course, the justifications I offered for a limited content regulation in *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 252, 272-76 (D.C. Cir. 1974) (rehearing en banc) (Bazelon, C.J., concurring in the result).

41. 15 U.S.C. §§ 1801 *et seq.* (1970); see *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 145 (1973) (Stewart, J., concurring).

42. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The continuing concentration of the newspaper industry—partly the result of the Failing Newspaper Act—undermines some of the assumptions of the *Tornillo* decision. Most disturbing is the fact that only 2.5 percent of American cities have more than one daily newspaper. B. BAGDIKIAN, *THE EFFECT CONSPIRACY AND OTHER CRIMES OF THE PRESS* 11 (1972); see E. SACHAR, *THE NEWSPAPER INDUSTRY—1973*, at 3-9 (1973); *N.Y. Times*, Mar. 26, 1975, at 20, col. 1. But new technology in the printing press area may reverse this trend. See E. SACHAR, *supra* at 17-22.

43. *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 75-76 (D.C. Cir. 1972) (Bazelon, C.J., dissenting), *cert. denied*, 412 U.S. 922 (1973).

44. See *The Fairness Doctrine and Public Interest Standards* 6-7.

eral or in terms of high-market penetration VHF television licensees) is ground for a different First Amendment regime for telecommunications. Here too is a significant confusion on the concept of scarcity. This confusion may be illustrated by a comparison of two perspectives on scarcity. One perspective is that scarcity produces the comparative hearing in which, by the nature of the Communications Act, the government must choose among or between speakers on the basis of the content of their speech. The second perspective on scarcity is that a limited number of speakers in and of itself (or because of some government intervention that causes the limitation) is ground for imposing public duties on the speakers. This second perspective may be coupled with a reference to a prior comparative proceeding in which the speaker was successful, this success imposing a public obligation to speak not only for himself but for the loser as well. In the language of *Red Lion*, the speaker is a fiduciary for the public and has corresponding public duties which it must meet to fulfill this fiduciary obligation.⁴⁵

The logic of this second perspective would be compelling but for the fact that the First Amendment, it would seem, does not limit its protection of an independent press to an independent *and numerous* press. When we consider the limited number of newspapers, this conclusion is clear, and the Supreme Court has just recently reaffirmed it.⁴⁶ If government involvement in the process of limitation of speakers is short of that needed to find "state action," then the existence of that much government involvement should not change this result.⁴⁷ Thus, this line of argument suggests, the existence of scarcity does not alter the constitutional provision for an independent press. Scarcity might indicate that the press should assume on its own a fiduciary obligation to the public—and I would be one who encourages them to do so—but it cannot alone justify *governmental enforcement* of that obligation.

The fact that Congress could have made the licensees common carriers and not independent programmers themselves does not permit, as *Red Lion* seems to suggest,⁴⁸ the conclusion that the independent press can be subject to public duties. To permit this logic, it would seem that any duty could be imposed upon the private press simply because of a potential legislative power. Similarly, it cannot be main-

45. 395 U.S. 367, 389 (1969).

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

47. *See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 114-21 (opinion of the court), 150-65 (Douglas, J., concurring in judgment) (1973).

48. *See* 395 U.S. at 390-91 (1969).

tained with any real force that "nothing in the First Amendment . . . prevents the government from requiring a [newspaper] to share [its space] with others and to conduct [itself] as a proxy or fiduciary with obligations to present those views"49 This suggestion would permit any kind of regulation of the press, yet it was said in *Red Lion*, and eight Justices apparently approved it, when one substitutes the word "licensee" for "newspaper" and the word "frequency" for "space."

More than this, what is the relation of scarcity to regulation of speech? The suggestion of *Red Lion* is that regulation is necessary to encourage a diversity of ideas. Thus, scarcity is apparently a problem in need of regulation because it produces less diversity. But there is no evidence that in all the various media of communication there is a deficiency of diversity. Rather, the argument is that there is a deficiency in ideas communicated *through the telecommunications media*. This suggests that the problem is not scarcity of frequencies but rather the particularly powerful nature of TV communication. Indeed, there may well be a scarcity of political pamphleteers in the nation, but we would hardly think that was cause for regulating the ones that exist. Nor would we think to worry about the diversity of ideas presented by the pamphleteers that exist. So the key to the scarcity argument is that TV produces greater access to an audience than other modes of communication, and thus it can be regulated to ensure a diversity of ideas in that medium alone. But this argument is seemingly rejected by the promulgation of the First Amendment, since newspapers have a far greater access than other speakers to an audience; this fact is inherent in the concept of a "press" which is distinct from ordinary speakers, and we are back again to the point suggested above—if the press is too powerful to be free, do we not need a constitutional amendment to alter the scheme established by the First Amendment?⁵⁰

Another problem with this second perspective on scarcity is that we are left with no understanding of what program or speech regulation is permissible. One could argue all speech is unprotected because of

49. *Id.* at 389.

50. *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 77 (1961) (Warren, C.J., dissenting):

The contention may be advanced that the impact of motion pictures is such that a licensing system of prior censorship is permissible. There are several answers to this, the first of which I think is the Constitution itself. . . . This is the traditional argument made in the censor's behalf; this is the argument advanced against newspapers at the time of the invention of the printing press. The argument was ultimately rejected in England and has consistently been held to be contrary to our Constitution. No compelling reason has been predicated for accepting the contention now.

scarcity, but the "diversity of ideas" justification for the use of the scarcity argument indicates that only nondiverse speech may be proscribed in favor of diverse speech. But FCC doctrine makes no such inquiry. Rather, it regulates in favor of diversity *within the licensee's own programming* and not in terms of the diversity in the viewing market as a whole.⁵¹ Thus the regulation supposedly justified by the scarcity argument extends well beyond the actual bounds of the real justification. One might ask whether this is an overbroad regulation of protected activity.

(4) *The Comparative Hearing*

So only the first perspective on scarcity—the choice at a comparative hearing—truly involves a concept of scarcity which is unlike that found in other branches of the press and which does not depend, in the final analysis, upon the particular nature of telecommunications speech. A choice on the basis of the content of proposed or past speech would seemingly be necessary and acceptable if the criteria are designed to advance the ultimate values of the First Amendment.⁵² But, we must be aware that the comparative hearing does not indicate that other frequencies are not available to the parties seeking the frequency in issue; rather, it may simply mean that the parties are not interested in those other available frequencies. This observation raises the question whether the concept of scarcity at a comparative hearing is entirely within the control of the parties and thus an insufficient basis for inquiry into the content of speech.

D. *Subversion of Journalistic Judgment for Business Reasons*

There is one final factor which probably has not served as an historical justification for a different First Amendment regime but is by

51. Furthermore, the FCC should, if it were really serious about diversity, attempt to discern what sorts of diversity are desired by the viewing audience. The available evidence indicates that the viewing audience wants more options on existing types of programming rather than more diverse types of programming. See G. STEINER, *THE PEOPLE LOOK AT TELEVISION* 226-49 (1963). Full exploration of this idea of diversity should lead the FCC into an examination of program *quality* and not just program categories, as a measure of diversity. See Irion, *FCC Criteria for Evaluating Competing Applicants*, 43 MINN. L. REV. 479, 489-96 (1959). This raises extremely difficult problems. See sources cited in note 71 *infra*. Commissioners Robinson and Hooks in a recent concurring statement indicated that FCC regulation of obscenity may not be justified by a scarcity concept because regulation of obscenity is not designed to create diversity. See Pacifica Foundation, *Station WBAI*, 32 P & F RADIO REG. 2D 1331, 1343 n.* (F.C.C. Feb. 12, 1975) (Robinson & Hooks, Comm'rs, concurring).

52. See *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 252, 279-81 (D.C. Cir. 1974) (rehearing en banc) (Bazelon, C.J., concurring in the result).

far the most promising candidate for the future and has as among its proponents the true aficionado of regulation. This is a factor of infinite subtlety and causes me the most concern. The economics of broadcast TV require that programming be directed to a mass audience in order to ensure a sufficient viewing audience (and hence sufficient advertising revenues) to finance the operation.⁵³ Limited or specialized appeal programming will not sell enough advertising to be economically viable. There are two important corollaries to this point. First, producers of programming must be ensured of large-scale distribution of their programs in order to make a profit. The difficulties in obtaining that distribution through individual dealings with licensees led to the use of the three networks and a few large-scale entertainment corporations such as MCA and to a lesser extent Westinghouse as brokers in the placement of programming both with advertisers and with the licensees. This development in turn led to the now well publicized "network domination" of production and placement of programming.⁵⁴ Second, news and public affairs programming does not attract as large an audience as entertainment programming. This sort of programming is thus a perennial loss leader and arguably without FCC intervention to insist upon it, a requirement found in the Fairness Doctrine,⁵⁵ licensees might just do away with it. Network evening news is apparently an exception to this economic premise of broadcasting.⁵⁶

This concern with the economics of TV programming leads us into the most difficult quagmire of all: since the telecommunications press is a business and, thus, its decisions are "business" decisions in large part, does the First Amendment, which is concerned with journalistic

53. *Id.* at 267-68; R. NOLL 49-53; Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 QJ. ECON. 194 (1952).

54. R. NOLL 59-79; Prime Time Access 724-40 (Robinson, Comm'r, dissenting).

55. See Public Communications, Inc., 32 P & F RADIO REG. 2D 319 (F.C.C., Dec. 10, 1974), *aff'g* 49 F.C.C.2d 27 (Broadcast Bureau 1974); Editorializing by Broadcast Licensees, *supra* note 19, at 1249-51; Comment, *Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine*, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 137 (1975). On the interior economic viability of news and public affairs programming, see R. NOLL 52-53 n.31, 68-69; Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 43 F.C.C.2d 1043, 1045, 1049 (1973). See also 3 E. BARNOUW 116, 244-45; Maines & Ottinger, *Network Documentaries: How Many, How Relevant?*, 11 COLUM. JOURNALISM REV., March-April, 1973, at 36. On general failure of local broadcasters to provide public affairs programming, see Renewals of Broadcast Licenses for Ark., La. & Miss., 42 F.C.C.2d 1, 16-25 (1973) (Johnson, Comm'r, dissenting); Renewal of Standard Broadcast and Licenses for Okla., Kan. & Neb., 14 F.C.C.2d 1 (1968) (Johnson & Cox, Comm'rs, dissenting).

56. See BROADCASTING, Feb. 11, 1974, at 43, for figures on the viewing market shares of network news,

judgment, protect these business judgments? Or put another way, should programming, news or otherwise, which is generated by a purely economic appraisal of the viewing "market" be enshrined as the sort of public discussion protected by the First Amendment? I have no problem conceptually with a "no" answer to these questions. The First Amendment does not sanctify the process of making money through titillating speech, and it does not protect economic propaganda of whatever form.⁵⁷ Furthermore, the networks and the licensees have demonstrated a tremendous capacity to ignore the public interest when their private economic interests are at stake. Perhaps the most graphic examples are the failure to give any news coverage to the license renewal bill that Representative Staggers did us the courtesy of killing last session of the Congress⁵⁸ and the failure to provide balanced coverage of the debate over pay TV.⁵⁹ There is the depressing but nonetheless illustrative comment of Senator John Pastore of Rhode Island, Chairman of the Senate Subcommittee on Telecommunications, who, upon observing TV cameras at his hearings into violence on TV, stated as I paraphrase: "I don't know why they bring those cameras here; I know the networks don't intend to show a single second of what goes on here." And, of course, he was right. Nothing substantial was run on the hearings. The networks just do not report what they feel is injurious to their economic interests. Douglass Cater once quoted to me the remark of a candid network executive to the effect that if a

57. Cf. *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 189-92 (1948). See also *Miller v. California*, 413 U.S. 15 (1973); *Ginzburg v. United States*, 383 U.S. 463 (1966). On the excessive commercialization of the broadcast media, see 2 E. BARNOUW 227-36; L. BROWN, *TELEVISION, THE BUSINESS BEHIND THE BOX* (1971); H. SKORNIA, *TELEVISION AND THE NEWS 11-68* (1968).

58. See *Public Communications, Inc.*, 32 P & F RADIO REG. 2D 319 (F.C.C., Dec. 10, 1974). On the renewal bill which would have been one of the most important amendments to the Federal Communications Act since its passage, see H.R. REP. NO. 93-961, 93d Cong., 2d Sess. (1974).

59. *National Cable Television Ass'n*, 48 F.C.C.2d 501 (1974) (Broadcast Bureau); cf. *Local 880, Retail Store Employees v. FCC*, 436 F.2d 248 (D.C. Cir. 1970). See also *National Citizens Comm. for Broadcasting*, 49 F.C.C.2d 83 (1974) (Broadcast Bureau) (joke by Johnny Carson about Crest toothpaste, an NBC sponsor, bleeped off the air); H. SKORNIA, *supra* note 57, at 82-93. On coverage of pay TV developments, see *id.* at 135-56. A particularly ominous example of advertiser censorship is the coverage of the 1974 California gubernatorial election. A forthcoming Article in the *California Journal* documents these assertions: Advertisers associated with local stations decided it was not good business to cover the gubernatorial election. Thus, there was very little coverage of the election and the candidates experienced difficulty in even buying air time. In the final week of the campaign, every TV station in San Francisco, except the public station, refused to carry a debate between the Republican and Democratic candidates.

broadcaster had to choose between the license renewal bill or abolition of the Fairness Doctrine, the broadcaster would choose the renewal bill and forego First Amendment rights. We should expect nothing else from corporations which hire as their executives not journalists or even professional broadcasters but successful businessmen. And we should also expect that every business decision will be defended as an exercise of journalistic discretion protected by the First Amendment when not one gram of journalistic discretion is involved.⁶⁰

Perhaps more important than these particular incidents of the promotion of economic self-interest to the derogation of the public interest is the existence of a network-imposed licensing scheme upon its own journalists. While this network censorship is even broader than that imposed by the FCC, it operates in a very similar fashion. I am informed that reporters from at least one network and from some major newspapers have a clause similar to the following in their contracts:

Artist recognizes that the employment hereunder is a full-time employment and that Artist's other activities must be such as never to cast doubt on the fairness or objectivity of [the network] or reflect unfavorably upon Artist or Producer. Accordingly,

- (a) From the date hereof, Artist will render services exclusively to and for Producer and Artist will not render any services to others, or on Artist's own behalf, directly or indirectly, in any capacity or media whatsoever (including without limitation granting rights to use Artist's name or likeness or both, or to use any performance or other services which Artist rendered for others prior to this agreement) and Artist shall not negotiate concerning such services with others than Producer prior to the expiration of the term hereof.

60. Perhaps the most widely known example of this behavior is the decision of CBS network TV chief John Schneider to forego live broadcast of George Kennan's testimony on Vietnam in favor of a re-run of *I Love Lucy* and *The Real McCoys*. Fred Friendly states in his book that this depressing incident led to his resignation as news president. Friendly said to Schneider: "You are making a news judgment but basing it on business criteria, and I can't do this job under these circumstances." F. FRIENDLY, *supra* note 17, at 233. See the statement of Edward R. Murrow quoted in *id.* at 250-51 as part of Friendly's letter of resignation. Such "business decisions" affected much of TV reporting on Vietnam. *Id.* at 213-65; 3 E. BARNOUW 271-303; Broadcast Bureau Actions: National Citizens Comm. for Broadcasting, 49 F.C.C.2d 83 (1974); Student Ass'n of the State Univ. of N.Y., 40 F.C.C.2d 510 (1973); Mark Lane, 36 F.C.C.2d 551 (1972); Judy Collins, 24 F.C.C.2d 741 (1970). Schneider's position was that excerpts of the Kennan testimony should be shown in the evening. This, of course, is not necessarily an unreasonable position.

On the subject of network or licensee censorship of the news, see *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 187 (1973) (Brennan, J., dissenting); *National Broadcasting Co. v. FCC*, No. 73-2256 at 2-3 (D.C. Cir., Sept.

- (b) From the date hereof, any business, commercial, professional or similar activities of Artist shall be subject to Producer's prior approval, after disclosure by Artist of full details with respect thereto.⁶¹

Like many FCC policies, this clause appears unobjectionable on its face. In operation, however, it can be used to prevent network reporters from disclosing news items which they have uncovered but which the network has decided not to report. For the reporter to disclose such items would seemingly violate this "exclusive services" clause. There are certainly many legitimate business reasons for such clauses, but the possibility of abuse is also manifest. One must consider whether such clauses, when administered to prevent a reporter from disclosing newsworthy information without economic gain to himself—or herself—are contrary to public policy represented by the First Amendment and hence unenforceable. But even if this were settled, the "chilling effect" of such clauses surely maintains the networks' monopoly on the sources as well as the actual reporting of news, and thus the network may prevent the reporting of information it considers damaging to its economic or other interests. Upon an examination of these clauses, we confront the following dilemma: an enterprise whose lifeblood is freedom of expression seeks to limit the personal freedom of expression of its employees.

But I am more than a little concerned with how the distinction between programming motivated by true journalistic integrity and programming motivated by crass economic desires can be judicially or administratively maintained without a terrible "chilling effect" on the journalists.⁶² Perhaps some of the "chilling effect" might be reduced by carefully and narrowly drawn rules designed to prevent a complete

27, 1974) (Tamm, J., dissenting); R. MACNEIL, *THE PEOPLE MACHINE* 280 (1968); H. SKORNIA, *supra* note 57, at 93-101, 123-35.

61. It is worth noting that such contracts also contain the following public morals clause:

If at any time the conduct of Artist, either while rendering services hereunder or in Artist's private life, is without due regard to the best interests of Producer and any sponsor or licensee of the programs, or to social conventions or public morals or decency, or if Artist commits any act or becomes involved in any situation, or occurrence, tending to degrade Artist in society, or to bring Artist into public disrepute, contempt, scandal or ridicule, or tending to shock, insult, or offend the community, or tending to reflect unfavorably upon Artist or producer or any sponsor or licensee of the programs, or if publicity is given to any such conduct, commission or involvement on the part of Artist, which occurred previously, Producer shall have the right to terminate this agreement. Producer may delete any credit given to Artist in connection with any services theretofore or thereafter rendered, regardless of whether Artist's services are terminated.

62. See *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 252, 272 (D.C. Cir. 1974) (rehearing en banc) (Bazelon, C.J., concurring in the result).

surrender of journalists' integrity to entrepreneurial attitudes of both network reporters and executives.⁶³ Certainly a complete failure to operate as a journalistic institution would take a licensee out of the protection of the First Amendment and would arguably be grounds for denial of a broadcasting license under the Federal Communications Act.⁶⁴ After all, it is clear that Congress intended that licensees be given air space to be journalists and not simply to sell products. But the difficulties of weeding out journalistic efforts from commercial pap are so severe that, in the normal case, the distinction is not manageable. And this fact is one reason why the First Amendment commands the government to stay out of the regulation of speech.⁶⁵

II. THE PURPOSE OF THE FREE PRESS GUARANTEE

When all these justifications are shaken down, I at least am left with the impression that they all demonstrate mostly the fragility of our First Amendment traditions. Somehow we do not really think that the press should be free; they are too powerful, they are arbitrary, they are self-serving. If the subject were a discussion of the mistakes, bad judgment and excessive commercialism of the press—both printed and electronic—I would have much to say against the press. I have said before and I repeat it now that the press has abused its tremendous power, particularly the power of TV, largely for its own private profit, at the expense of the public interest. But I do not personally believe in the efficacy of, nor do I think the First Amendment permits, government intervention to cure those abuses. Is this belief a mere relic of happier times when the press was not so powerful or so arrogant? I do not think so. I think the First Amendment retains its vitality and

63. See *id.* at 280-81 (arguing that consideration of programming proposals that meet an unfulfilled specialty need in the community in a comparative hearing may be permissible under the First Amendment). Compare *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); DeVore & Nelson, *Commercial Speech and Paid Access to the Press*, 26 HASTINGS L.J. 745 (1975) and sources cited. This specific guideline would parallel consideration of programming content justified by the scarcity rationale. See text accompanying note 52 *supra*.

64. See *KFKB Broadcasting Ass'n v. Federal Radio Comm'n*, 47 F.2d 670 (1931), *discussed in* *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 252, 277 (D.C. Cir. 1974) (rehearing en banc) (Bazelon, C.J., concurring in the result); *cf.* *Program Length Commercials*, 39 F.C.C.2d 1062 (1973), *explained*, 44 F.C.C.2d 985 (1974). It is, of course, well established that a licensee must maintain a regular broadcast schedule or forfeit his license. See 47 C.F.R. § 73.651(a) (1974); *Palladium Times, Inc.*, 43 F.C.C. 546 (1950). See also *Simmons v. FCC*, 169 F.2d 670 (D.C. Cir.), *cert. denied*, 335 U.S. 846 (1948).

65. See *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157-58 (1946); *cf.* *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943). See also note 71 *infra*.

speaks a wisdom relevant to concerns we recognize today. But I think its truly practical wisdom needs reaffirming and in the process of this reaffirmation, I think we can better understand why the Framers felt so strongly about an independent journalistic institution. There is no better beginning point than the activities of the administration of Richard Nixon. A memorandum from Charles Colson to H.R. Haldeman describing a meeting between Colson and various network executives is attached as an appendix to this Article.

There is, to be sure, more than a little bit of self-serving in Mr. Colson's description of the meeting. But even so, the point is clear enough: Richard Nixon's assistants were enforcing a "Fairness Doctrine," a doctrine which, to paraphrase *Red Lion*,⁶⁶ forces the licensees through the networks to share their frequencies with Richard Nixon. Of course, there is no reason why this doctrine should be limited to Richard Nixon; it could be extended to the NAACP or the American Civil Liberties Union or Duke University. The result, however, is always the same. By forcing the press to share its space, its medium, with persons of the government's choosing, we are restricting the journalistic discretion which it is the purpose of the First Amendment to protect. If one group has a right of access or a right to have the licensee present that group's point of view, there is no independent press; there is only a multitude of speakers. That might be permissible if the First Amendment protected only free speech. However, it also protects the press.⁶⁷ It might perhaps be feasible for the licensee to set aside an hour or so of air time of the licensee's own choice during the day for various speakers to present their points of view,⁶⁸ or to re-

66. See 395 U.S. 367, 389 (1969).

67. Address of Justice Potter Stewart to the Yale Law School Sesquicentennial Convocation, Nov. 2, 1974, entitled "Or of the Press," excerpted in *Washington Post*, Nov. 11, 1974, § A, at 20, col. 3, and reprinted in 120 CONG. REC. S19,593 (daily ed. Nov. 19, 1974):

This basic understanding [that the free press clause of the First Amendment extends protection to a journalistic institution] is essential, I think, to avoid an elementary error of constitutional law. It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They are guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy. . . . By including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two.

However, there is some doubt that entertainment programming could be characterized as a function of the "press." Thus, programming of this nature might only be protected by the free speech clause. See generally Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975).

68. See *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 75 n.51 (D.C. Cir. 1972) (Bazelon, C.I., dissenting), cert. denied, 412 U.S. 922 (1973). But see *Miami*

quire the licensee to sell advertising time without discrimination on the basis of the content of the proposed message.⁶⁹ In this case, one could argue with more force that the independent journalistic discretion protected by the First Amendment is not contravened. But to require that a licensee be "fair" in presenting opinionated programming, or present a reasonable "balance" of programming as defined by a government agency, or not offer programming which a majority of listeners do not want to hear nullifies that journalistic discretion which the Framers thought indispensable to our constitutional order.

The excerpt from the Colson memorandum amply demonstrates the reason why the Framers thought this independent journalistic discretion so important. If the government may eliminate this discretion, it has a much greater control over the information the people receive about their government and the views of their fellow citizens. As Alexander Meiklejohn has so persuasively argued,⁷⁰ the free flow of this information is absolutely essential to self-government, to democracy. A government which can dictate what is "fair" reporting can control information to the public in a manner which subverts self-government. The press must be free to tell the truth as it sees it, to criticize the government, to denounce politicians and judges, and to publish opinions.

Truth and fairness have a too uncertain quality to permit the government to define them.⁷¹ Certainly it is not fair to print that which

Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). The Court in *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 131 (1973), left open the issue of whether Congress or the FCC might legitimately impose a right of access. Professor Emerson's treatment of the First Amendment and telecommunications centers on access. See T. EMERSON, *supra* note 39, at 653-67. His arguments on scarcity are centrally linked to the access problem, and thus his defense of the Fairness Doctrine, which is not based on access, seems difficult to reconcile with his condemnation of such efforts in regard to newspapers. *Id.* at 667-71. His scarcity arguments are generally a repeat of *Red Lion* and suffer from the defects noted in Part I of this Article. There is an overtone in his discussion that access rights are permissible in any context because, like antitrust enforcement, they do not censor particular content but act to expand the multitude of voices. This is indeed a difficult First Amendment problem which is not completely closed by *Tornillo* in my mind. Cf. 418 U.S. at 258: "[The] Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors." Compare *id.* at 255-56, distinguishing *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973) and 47 U.S.C. § 315 (1970). See note 71 *infra*. My only point here is to argue that newspapers and the telecommunications press be treated as equals in analyzing the issue. See generally Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

69. Whitehead, Book Review, 83 YALE L.J. 1751, 1762-63 (1974).

70. See Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245. See also *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974), citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

71. See Multiple Ownership 1015-17 (Robinson, Comm'r, concurring in part, dissenting in part); cf. *Democratic Nat'l Comm.*, 31 F.C.C.2d 708, 712-13 (1971), *aff'd*,

you believe to be misleading, uninformative, irrational, or so lacking in factual justification as to be close to a pure falsehood. It is not fair to regard as "objective" news the propaganda of an incumbent politician. It is not "fair" to require the licensee to present a balance of only those views which the government considers "significant,"⁷² regardless of the licensee's view. In sum, in order to determine what the "other side" is, one has to have an objective concept of truth against which to compare the challenged speech. And who in this country is in possession of this objective concept of truth?

III. ALTERNATIVES TO REMEDY PRESENT FAILURES IN TELECOMMUNICATIONS REGULATION

I do not mean by the foregoing to imply that I am satisfied with the performance of either the broadcast or the printed press. The many concerns voiced about the excessive power and meager commitment to the public interest which the private press have demonstrated are not without merit. My project so far has been to indicate that the solutions relied upon at present may be unwise and contrary to our constitutional traditions. I very much believe that there are other solutions which are not only consistent with these traditions but which can be more effective in achieving the goals which many concerned citizens thought could be achieved by program regulation.

Before outlining these solutions, I think it important to state exactly what I believe to be the major problem in the broadcast media.

460 F.2d 891 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972). See also *Columbia Broadcasting Sys., Inc. v. FCC*, 454 F.2d 1018 (D.C. Cir. 1971); 120 CONG. REC. S19,449 (daily ed. Nov. 18, 1974); T. EMERSON, *supra* note 39, at 670-71; N. MINOW, J. MARTIN & L. MITCHELL, *PRESIDENTIAL TELEVISION* (1973); Jaffe, WHDH: *The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693, 1700-01 (1969). Several of these authorities cited deal with the power of the President over television and are relevant to our discussion in two different ways: on the one hand, they suggest the extremely difficult problems involved in erecting a Fairness Doctrine duty around Presidential appearances on TV and on the other hand, they demonstrate the dangers involved in this power over the private press. The President has no such access to the *Washington Post* or the *New York Times*.

72. Cf. *Black United Front*, 48 F.C.C.2d 1013, 1015 (1974), *citing* Dr. Benjamin Spock, 38 F.C.C.2d 316 (1972) (Fairness Doctrine applies only to "significant" viewpoints). See also 3 E. BARNOUW 47; F. FRIENDLY, *supra* note 17, at 3-12 (both discussing the problem facing Edward R. Murrow in his famous broadcast on the loyalty purge of Lt. Milo Radulovich, when the military refused to present the "other side" of the issue and network policy was not to telecast the program unless the two "sides" were presented). For another example, see 120 CONG. REC. S20,475 (daily ed. Dec. 4, 1974) (article by Nat Hentoff).

This problem is not "scarcity," as that term has come to be defined in First Amendment jurisprudence, but rather simple, old-fashioned concentration of economic power and ownership of TV facilities. The situation would be bad enough if we considered only the actual licensees.⁷³ But the major concentration is caused by the dominance of the networks in the programming field.⁷⁴ The dominance of the networks makes enforcement of the diversification guides and stiff cross-ownership rules, further restriction of the group ownership rules, elimination of trafficking in licenses, combined with retroactive enforcement of these new policies, an insufficient effort to deal with the concentration of economic power in TV programming. The major project for reform, then, must be an increase in programming competition. This increase in programming competition, it should be noted, attempts to deal directly with the central evil that concentration allegedly creates—a lack of diversity of ideas. More competitors producing programming will increase the multitude of tongues, and our First Amendment faith holds that the multitude of tongues unrestricted in speech will produce more diversity of ideas than if the government chooses who will speak and on what subjects.⁷⁵ Actions designed to increase competition within the press and thereby to decentralize power are consistent with the First Amendment, and the Supreme Court has so held.⁷⁶

There is one ironic aspect of efforts to reduce network domination of programming in favor of the First Amendment concept of a diversity of speakers: only the networks and the large economic organizations, like the *Washington Post* or the *New York Times*, have the power to stand up to big government efforts to "chill" their speech. I have noted before that one problem with the application of the Fairness Doctrine is that it imposes a stiff financial burden on "shoestring" operations.⁷⁷ This burden is even greater when a small licensee confronts a quasi-criminal forfeiture or revocation proceeding or confronts the poised force of the Oval Office. We are told that persons in the Nixon Administration believed that local stations were more pliable and re-

73. Bennett, *Media Concentration and the FCC: Focusing with a Section Seven Lens*, 66 Nw. U.L. REV. 159, 181-86 (1971).

74. The networks originate about sixty-four percent of all programming for their affiliated stations. The percentage is much higher during evening prime time hours. BROADCASTING YEARBOOK 70 (Broadcasting Magazine ed. 1974).

75. *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 252, 270-72 (D.C. Cir. 1974) (rehearing en banc) (Bazelon, C.J., concurring in the result); *Multiple Ownership 1007-11* (Robinson, Comm'r, concurring in part, dissenting in part).

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

77. *See Brandywine-Maiu Line Radio, Inc. v. FCC*, 473 F.2d 16, 69-70 (D.C. Cir. 1972) (Bazelon, C.J., dissenting), *cert. denied*, 412 U.S. 922 (1973). See note 14 *supra*.

sponsive to the Nixon viewpoint on the Watergate Affair; thus they sought to remove network reporters as the source of news and replace them with local journalists purportedly more attuned to the Nixon Administration world view.⁷⁸ From another perspective we might consider how a less secure economic organization would have reacted after it was publicly revealed that the President had warned that it was going to have "damnable, damnable problems" getting its radio and TV licenses renewed.⁷⁹ We know that the *Washington Post*, which suffered exactly this event, was not deterred from its presentation of the facts as its reporters saw them. But would all other licensees react similarly? The paradox I have just described may be more apparent than real since it may be partially resolved by getting the government out of the program regulation business. Without the FCC lever to manipulate, we could hope that there would be less chance that the licensees would be forced to kowtow to the wishes of an incumbent politician.

A. *Reform of the FCC Itself*

The first strategy to increase competition in the telecommunications broadcast field is to reform the FCC itself. Mr. Geller, former General Counsel of the FCC and an informed critic of the Commission's policy, has stated that the "root cause of dissatisfaction" with the FCC is its "overidentification with the industries regulated" as against the interests of "new emerging facets or technologies."⁸⁰ He is not alone in this assessment. There can be no promulgation or effective enforcement of policies designed to increase competition in programming unless we have an FCC which is not beholden to the vested interests of the VHF licensees. Mr. Geller makes what he terms a "modest" proposal that the number of Commissioners be limited to five, that they be given one fifteen-year term with no possibility for reappointment and that they be prohibited from employment in the communications field for ten years after completion of their terms.⁸¹ I am not en-

78. See Memorandum for H.R. Haldeman from J.S. Magruder, Oct. 17, 1969, ¶ 4, reprinted in Appendix B.

79. See text accompanying note 1 *supra*. Because the *Washington Post* published the Pentagon Papers it was threatened with criminal prosecution. Mrs. Graham, the publisher of the *Washington Post*, said in a television interview in 1973 that "Mr. Kleindienst [then the Deputy Attorney General] had suggested [in the summer of 1971] that if the criminal cases against The Post were successful they might jeopardize the licenses of the paper's television stations." *New York Times*, July 30, 1973, at 16, col. 1.

80. See H. GELLER, *supra* note 40, at 2.

81. *Id.* at 48-49. See also COMMITTEE FOR ECONOMIC DEVELOPMENT, BROADCASTING AND CABLE TELEVISION: POLICIES FOR DIVERSITY AND CHANGE 80-88 (1975) and authorities cited.

tirely convinced by this proposal, but it, or something like it, would seem to be in order.

B. *Increasing Private Competition in the Production and Placement of Programming*

Assuming that this first strategy is successful, a further strategy—increasing *private* competition in the production and placement of programming—comes to mind. Several measures may be taken in this regard. The first step is to limit the networks' ability to sell blocks of programming to the licensees and to increase the feasibility of new networks.⁸² Second, the Commission should act to encourage the development of cable, in both pay and nonpay forms, and the further development of UHF.⁸³ Part of the way to upgrade UHF might be to permit a return to selective de-intermixture. The ultimate aim must be

82. The FCC has been battling over this issue for the past fifteen years. *See Television Option Time*, 34 F.C.C. 1103 (1963); *Network Television Broadcasting*, 45 F.C.C. 2146 (1965), *adopted in part*, *Network Television Broadcasting*, 23 F.C.C.2d 382 (1970), *on reconsideration*, 25 F.C.C.2d 318 (1970) (codified in 47 C.F.R. §§ 73.658 (j), (k) (1973)), *aff'd*, *Mount Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971), *reconsideration of Amendments, Prime Time Access Rule*, 37 F.C.C.2d 900 (1972), *amended*, 44 F.C.C.2d 1081, *rev'd and remanded*, *National Ass'n of Independent Television Producers & Distribs. v. FCC*, 502 F.2d 249 (2d Cir. 1974), *amended again, Prime Time Access. See also Metropolitan Television Co. v. FCC*, 289 F.2d 874 (D.C. Cir. 1961); H.R. REP. No. 281, 88th Cong., 1st Sess. (1963); Barrow, *The Attainment of Balanced Program Service on Television*, 52 VA. L. REV. 633 (1966). The purpose of these rules and other proposals discussed by the Commission has been to increase the number of brokers of programming. It seems that the limited prime time access of a half hour will have little effect in that regard; prior proposals which have limited networks to only fifty percent of prime time could have had more effect. For a discussion of the limits of efforts to increase the number of brokers involved in programming distribution for television, see *Prime Time Access 724-40* (Robinson, Comm'r, dissenting); R. NOLL 58-79, 83-89. These commentaries suggest that the FCC must develop more local programming outlets before it can realistically attack the present dominance of three network brokers.

83. *See* R. NOLL 101-04, 129-82. The present inferiority of UHF can be arguably overcome if UHF were connected with a cable system (to create a better signal) and if the FCC would finally adopt a policy of de-intermixture (to overcome the entrenched advantage of the VHF licensees). Noll, Peck and McGowan are not sanguine about the possibilities of UHF development, largely because they think, with good reason, that the FCC will never take the actions necessary to overcome the present inferiority of UHF. *Id.* at 272-76. For some of the more visionary works on cable television and its possibilities, see SLOAN COMM'N ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE (1971); R. SMITH, THE WIRED NATION (1972); Barnett, *State, Federal, and Local Regulation of Cable Television*, 47 NOTRE DAME LAW. 685 (1972); Barnett & Greenberg, *Regulating CATV Systems: An Analysis of FCC Policy and an Alternative*, 34 LAW & CONTEMP. PROB. 562 (1969). For a more pessimistic analysis, see Branscomb, *The Cable Fable: Will It Come True?*, 25 J. COMMUN. 44 (1975).

to equalize as much as possible the economic potential of the various bands of TV broadcasting. The broadcast industry is sure to fight these two suggestions tooth and nail. The industry was successful in crippling UHF development in the 1950's and today is battling to prevent pay cable from achieving economic self-sufficiency.⁸⁴ As with earlier industry efforts to restrict the competitive position of cable through local origination requirements, the issues are not simple. Creating more competition for advertising dollars might reduce the amount of genuine journalistic and artistic commitment that exists today.⁸⁵ It might create only a commercial monster larger than that now extant, resulting in the telecasting of more commercial pabulum and not the production of serious TV. We just do not know. The wisdom of the First Amendment is, however, that a multitude of tongues will produce the diversity of ideas and artistic achievement we all desire. In the absence of knowledge gained from experience with greater competition, I would follow this wisdom for the present.

C. Public Broadcasting

A third strategy was suggested many years ago by Max Lerner⁸⁶—it is to create a “yardstick” public broadcasting company to compete

84. On the crippling of UHF, see H. GELLER, *supra* note 40, at 3-12. For present restrictive FCC policies on cable television, see *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); 47 C.F.R. § 76 (1973). On present controversies over pay cable, see 47 C.F.R. § 76.225 (1973); *Cablecasting of Programs for Which a Per-program or Per-channel Charge is Made*, 35 F.C.C.2d 893 (1972); *Program Origination by Cable Television Systems*, 23 F.C.C.2d 825, 828 (1970). These rules require pay cable to abide by the restrictions on broadcast pay TV, upheld in *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). The Commission has recently called for further briefing and argument on even more restrictive conditions on the development of pay cable. 48 F.C.C.2d 453 (1974). Commissioner Robinson has criticized the restrictions on pay cable. *Prime Time Access 740* (Robinson, Comm'r, dissenting). However, the Commission has recently relaxed to some extent the local origination requirements on cable TV. *Program Origination by Cable Television Systems*, 32 P & F. RADIO REG. 2d 123 (F.C.C. 1974).

85. See *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 252, 271 (D.C. Cir. 1974) (rehearing en banc) (Bazelon, C.J., concurring in the result); *Multiple Ownership 1014-17* (Robinson, Comm'r, concurring in part, dissenting in part).

86. Lerner, *Propaganda's Golden Age*, 149 *THE NATION* 522 (1939), excerpted in *NEW DEAL THOUGHT* 179 (H. Zinn ed. 1966). See also *CARNEGIE COMM'N ON PUBLIC TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION* (1967); R. NOLL 208-44; H. ASHMORE, *FEAR IN THE AIR* 89-111 (1973); Branscomb, *A Crisis of Identity: Public Broadcasting and the Law*, 3 *PUBLIC TELECOMM. REV.* 10 (1975). On present provisions for Public Broadcasting, see 47 U.S.C. §§ 390-99 (1970). For recently proposed amendments, see S. REP. No. 1113, 93d Cong., 2d Sess. (1974); 120 *CONG. REC.* S13,552 (daily ed. July 29, 1974). Two alternative systems for financing public broadcasting in a manner which prevents political interference of the sort

with VHF licensees and the networks. This idea has to some extent been consummated by the public broadcasting or noncommercial stations now in existence. But more should be done. First, these stations should have access to the VHF band, since now they are almost entirely relegated to the less powerful UHF bands. Second, there should be provision for common carrier public stations or common carrier time periods on regular public stations, to which access may be had by lottery or through bidding. This concept has already been applied to a limited extent in the cable TV regulations.⁸⁷ Third, public TV should take a more active role in producing programming. This requires either more government funds or a limited form of pay television. But it can be done, and if it is, there is the promise of a new outlet for creative and diverse programming.

D. *Altering the Economic Structure of the Telecommunications Industry*

A fourth strategy would be to directly attack the economics of TV programming and the institutional structure which creates that economic reality. The most obvious effort would be to increase the viability of minority taste programming by introducing some form of subscriber TV service.⁸⁸ At present, programming is paid for only by advertisers, unlike the material in newspapers which is partially paid for by subscribers, and unlike movies which are wholly paid for by subscribers. The result is that the dictates of the advertisers—mass circulation—are the prime factor in evaluating the economic viability of programs. A limited form of subscriber TV would alter this situation, since at least in part the programming would be directed to those who would be willing to pay and who would most likely comprise a highly motivated, minority audience, instead of the low motivation, mass audience gained by so-called "free" TV. Government subsidy of programs for the poor might be necessary. Another line of attack would be to limit drastically the amount of commercial time which may be sold on television.⁸⁹ This approach would of necessity reduce the dominance

demonstrated in regard to present broadcast TV are (1) an excise tax on all TV and radio sets sold in the country; and (2) allocation of a portion of revenues from communications satellites. On satellites, see R. NOLL 245-55.

87. See 47 C.F.R. § 76.251(a) (1973).

88. See R. NOLL 32-33, 50, 129-34; Minasian, *Television Pricing and the Theory of Public Goods*, 7 J. LAW & ECON. 71, 75 (1964).

89. See Jaffe, *supra* note 71, at 1693, 1700-01. David Sarnoff suggested in the twenties that advertising be banned from telecommunications. F. FRIENDLY, *supra* note 17, at 266. See generally *id.* at 266-300. The FCC presently employs a case-by-case analysis of the amount of commercial time broadcast by a licensee. See Commercial

of advertising concerns and force programmers into a search for alternative sources of cash.

If these strategies are diligently pursued, they and others like them offer an opportunity to turn away from program regulation in all the diverse forms in which the FCC presently employs it in favor of a direct attack on the vested power of the VHF licensees and the networks. This change in policy direction is strongly supported by the First Amendment interests that are involved in program regulation. So, we would in effect be vindicating the First Amendment in two ways—by avoiding program regulation and by increasing the number of speakers in order to realize First Amendment values more fully. If these strategies I have discussed are effective, I think the FCC can confidently dismantle the entire system of program regulation it has erected in the past forty years and thereby recognize the broadcast media as true components of the American press. If these strategies are not pursued, there will continue to be pressure to impose public duties on these monopolistic entities, the networks and the licensees—pressure which will come under the guise of “fiduciary duty” or “scarcity of frequencies” or “power of the medium” but which will be essentially a traditional fear of monopoly power. I think the fear is reasonable but should be confronted on its own ground and not chased back

Advertising Standards, 1 P & F RADIO REG. 2D 1606 (F.C.C. 1964).

Still another effort would be to explicitly license the networks as brokers and limit their involvement in programming to this brokerage role. This brokerage role of the networks is described by Commissioner Robinson, dissenting in *Prime Time Access 724-40*. It has been noted that the market in programming *production* is reasonably competitive (sixty-five to seventy firms sold regular series; mortality of firms is high; no firm has more than ten percent of the network series programming). R. NOLL 5, 44-49. This observation suggests that the problem of market dominance lies in distribution. The propriety of some FCC jurisdiction over networks is established by *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). See *Mount Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971).

With explicit recognition of the networks' roles as programming directors, many duties now somewhat mechanically imposed upon licensees could be realistically imposed on the networks. These duties would include the “ascertainment requirement,” *Suburban Broadcasters*, 30 F.C.C. 1021 (1961), *aff'd sub nom. Henry v. FCC*, 302 F.2d 191 (D.C. Cir.), *cert. denied*, 371 U.S. 821 (1962), and the various “balanced programming” responsibilities discussed at the beginning of this Article. This suggestion assumes that the constitutionality of such requirements is established. To legitimize this brokerage role, the FCC would have to back away from its traditional support of “local service.” See R. NOLL 99-120. Furthermore, the FCC might in such circumstances be given the authority to regulate the network brokerage fees which are today enormous and which result in the very high profits of the industry. *Id.* at 15-17. The suggestion made here to license the networks as brokers might free up competition in the production of programming and permit minority program producers to have a better shot at a nationwide distribution.

into the hoary swamps of government regulation of speech.⁹⁰

IV. APPENDICES

Appendix A

FOR: HERB KLEIN

FROM: CHUCK COLSON

FYI—EYES ONLY, PLEASE

September 25, 1970

MEMORANDUM FOR H.R. HALDEMAN

The following is a summary of the most pertinent conclusions from my meeting with the three network chief executives.

1. The networks are terribly nervous over the uncertain state of the law, *i.e.*, the recent FCC decisions and the pressures to grant Congress access to TV. They are also apprehensive about us. Although they tried to disguise this, it was obvious. The harder I pressed them (CBS and NBC) the more accommodating, cordial and almost apologetic they became. Stanton for all his bluster is the most insecure of all.
2. They were startled by how thoroughly we were doing our homework—both from the standpoint of knowledge of the law, as I discussed it, but more importantly, from the way in which we have so thoroughly monitored their coverage and our analysis of it. (Alfin's analysis is attached. This was my talking paper and I gave them the facts and figures.)
3. There was unanimous agreement that the President's right of access to TV should in no way be restrained. Both CBS and ABC agreed with me that on most occasions the President speaks as President and that there is no obligation for presenting a contrasting point of view under the Fairness Doctrine (This, by the way, is not the law—the FCC has always ruled that the Fairness Doctrine always applies—and either they don't know that or they are

90. *Cf.* Prime Time Access 740 (Robinson, Comm'r, dissenting):

Unless the Commission confronts the issue of network *economic power* head-on, it will simply sit as a constant arbitrator among groups competing for the scarcity rents which it has created by its allocation plan and the current access rule. . . . [The Commission] should carry out its authority to increase competitive outlets in a manner which prevents the development of monopoly power.

See also Multiple Ownership 1011, 1014-17 (Robinson, Comm'r, concurring in part, dissenting in part). Senator Proxmire has recently introduced a bill to remove the FCC from the program regulation business. S. 2, 94th Cong., 1st Sess. (1975).

willing to concede us the point.) NBC on the other hand argues that the fairness test must be applied to every Presidential speech but Goodman is also quick to agree that there are probably instances in which Presidential addresses are not "controversial" under the Fairness Doctrine and, therefore, there is no duty to balance. All agree no one has a right of "reply" and that fairness doesn't mean answering the President but rather is "issue oriented." This was the most important understanding we came to. What is important is that they know how strongly we feel about this.

4. They are terribly concerned with being able to work out their own policies with respect to balanced coverage and not to have policies imposed on them by either the Commission or the Congress. ABC and CBS said that they felt we could, however, through the FCC make any policies we wanted to. (This is worrying them all.)
5. To my surprise CBS did not deny that the news had been slanted against us. Paley merely said that every Administration has felt the same way and that we have been slower in coming to them to complain than our predecessors. He, however, ordered Stanton in my presence to review the analysis with me and if the news has not been balanced to see that the situation is immediately corrected. (Paley is in complete control of CBS—Stanton is almost obsequious in Paley's presence.)
6. CBS does not defend the O'Brien appearance. Paley wanted to make it very clear that it would not happen again and that they would not permit partisan attacks on the President. They are doggedly determined to win their FCC case, however; as a matter of principle, even though they recognize that they made a mistake, they don't want the FCC in the business of correcting their mistakes.
7. ABC and NBC believe that the whole controversy over "answers" to the President can be handled by giving some time regularly to presentations by the Congress—either debates or the State-of-The-Congress-type presentations with both parties in the Congress represented. In this regard ABC will do anything we want. NBC proposes to provide a very limited Congressional coverage once or twice a year and additionally once a year "loyal opposition" type answers to the President's State of the Union address (which has been the practice since 1966). CBS takes quite a different position. Paley's policy is that the Congress cannot be the sole balancing mechanism and that the Democratic leadership in Congress should have time to present Democratic viewpoints on legislation.

(On this point, which may become the most critical of all, we can split the networks in a way that will be very much to our advantage.)

Conclusion:

I had to break every meeting. The networks badly want to have these kinds of discussions which they said they had had with other Administrations but never with ours. They told me any time we had a complaint about slanted coverage for me to call them directly. Paley said that he would like to come down to Washington and spend time with me anytime that I wanted. In short, they are very much afraid of us and are trying hard to prove they are "good guys."

These meetings had a very salutary effect in letting them know that we are determined to protect the President's position, that we know precisely what is going on from the standpoint of both law and policy and that we are not going to permit them to get away with anything that interferes with the President's ability to communicate.

Paley made the point that he was amazed at how many people agree with the Vice-President's criticism of the networks. He also went out of his way to say how much he supports the President, and how popular the President is. When Stanton said twice as many people had seen President Nixon on TV than any other President in a comparable period, Paley said it was because this President is more popular.

The only ornament on Goodman's desk was the Nixon Inaugural Medal. Hagerty said in Goldenson's presence that ABC is "with us." This all adds up to the fact that they are damned nervous and scared and we should continue to take a very tough line, face to face, and in other ways.

As to follow-up, I believe the following is in order:

1. I will review with Stanton and Goodman the substantiation of my assertion to them that their news coverage has been slanted. We will go over it point by point. This will, perhaps, make them even more cautious.
2. There should be a mechanism (through Herb, Ron or me) every time we believe coverage is slanted whereby we point it out either to the chief executive or to whomever he designates. Each of them invited this and we should do it so they know we are not bluffing.
3. I will pursue with ABC and NBC the possibility of their issuing declarations of policy (one that we find generally favorable as to the President's use of TV). If I can get them to issue such a policy statement, CBS will be backed into an untenable position.

4. I will pursue with Dean Burch the possibility of an interpretive ruling by the FCC on the role of the President when he uses TV, as soon as we have a majority. I think that this point could be very favorably clarified and it would, of course, have an inhibiting impact on the networks and their professed concern with achieving balance.

5. I would like to continue a friendly but very firm relationship whenever they or we want to talk. I am realistic enough to realize that we probably won't see any obvious improvement in the news coverage but I think we can dampen their ardor for putting on "loyal opposition" type programs.

I have detailed notes on each meeting if you'd like a more complete report.

Charles W. Colson

Appendix B

MEMORANDUM

THE WHITE HOUSE

Washington

October 17, 1969

MEMORANDUM FOR:

H.R. HALDEMAN

FROM:

J.S. MAGRUDER

RE:

The Shot-gun versus the Rifle

Yesterday you asked me to give you a talking paper on specific problems we've had in shot-gunning the media and anti-Administration spokesmen on unfair coverage.

I have enclosed from the log approximately 21 requests from the President in the last 30 days requesting specific action relating to what could be considered unfair news coverage. This enclosure only includes actual memos sent out by Ken Cole's office. In the short time that I have been here, I would gather that there have been at least double or triple this many requests made through various other parties to accomplish the same objective.

It is my opinion this continual daily attempt to get to the media or to anti-Administration spokesmen because of specific things they have said is very unfruitful and wasteful of our time. This is not to say that they have not been unfair, without question many situations that have been indicated are correct, but I would question the approach we have taken. When an editor gets continual calls from Herb Klein or Pat Buchanan on a situation that is difficult to document as to unfairness,

we are in a very weak area. Particularly when we are talking about interpretation of the news as against factual reporting.

The real problem that faces the Administration is to get to this unfair coverage in such a way that we make major impact on a basis which the networks-newspapers and Congress will react to and begin to look at things somewhat differently. It is my opinion that we should begin concentrated efforts in a number of major areas that will have much more impact on the media and other anti-Administration spokesmen and will do more good in the long run. The following is my suggestion as to how we can achieve this goal:

1. Begin an official monitoring system through the FCC as soon as Dean Burch is officially on board as Chairman. If the monitoring system proves our point, we have then legitimate and legal rights to go to the networks, etc., and make official complaints from the FCC. This will have much more effect than a phone call from Herb Klein or Pat Buchanan.

2. Use the anti-trust division to investigate various media relating to anti-trust violations. Even the possible threat of anti-trust action I think would be effective in changing their views in the above matter.

3. Utilizing the Internal Revenue Service as a method to look into the various organizations that we are most concerned about. Just a threat of an IRS investigation will probably turn their approach.

4. Begin to show favorites within the media. Since they are basically not on our side let us pick the favorable ones as Kennedy did. I'm not saying we should eliminate the open Administration, but by being open we have not gotten anyone to back us on a consistent basis and many of those who were favorable towards us are now giving it to us at various times, i.e., Ted Lewis, Hugh Sidiy [*sic*].

5. Utilize Republican National Committee for major letter writing efforts of both a class nature and a quantity nature. We have set-up a situation at the National Committee that will allow us to do this, and I think by effective letter writing and telegrams we will accomplish our objective rather than again just the shot-gun approach to one specific senator or one specific news broadcaster because of various comments.

I would liken this to the Kennedy Administration in that they had no qualms about using the power available to them to achieve their objectives. On the other hand, we seem to march on tip-toe into the political situation and are unwilling to use the power at hand to achieve our long term goals which is [*sic*] eight years of a Republican Administration. I clearly remember Kennedy sending out the FBI men to wake-

up the Steel Executives in the middle of the night. It caused an uproar in certain cases but he achieved his goal and the vast majority of the American public was with him. If we convince the President that this is the correct approach, we will find that various support groups will be much more productive and much more cooperative; and at the same time I think we will achieve the goals this Administration has set out to do on a much more meaningful planned basis.

PRESIDENT'S REQUEST—

TO:	ITEM:	DATE:
P. Flanigan	President's request that you take action to counter Dan Rather's allegation that the Hershey move was decided upon because of the moratorium. (Log 1733)	October 17
J. Ehrlichman	President's request that you talk to Ted Lewis concerning the present status of discipline within the Administration. (Log 1699)	October 15
P. Buchanan	President's request for a report on what actions were taken to complain to NBC, <i>Time</i> and <i>Newsweek</i> concerning a recent article coverage on the Administration. (Log 1688)	October 14
H. Klein	President's request for letters to the editor of <i>Newsweek</i> mentioning the President's tremendous reception in Miss. and last Sat. Miami Dolphin football game. (Log 1627)	October 10
H. Klein	President's request that you take appropriate action to counter biased TV coverage of the Adm. over the summer. (Log 1644) CONFIDENTIAL	October 14
H. Klein	President's request that you ask Rogers Morton to take action to counter Howard K. Smith's remarks concerning the three House seats lost by the GOP this year. (Log 1558)	October 8
P. Buchanan	President's request that appropriate columnists be informed of the extemporaneous character of Presidential press conferences. (Log 1551)	October 10

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| H. Klein | President's request that you demand equal time to counter John Chancellor's commentary regarding the Haynsworth nomination. (Log 1559) | October 7 |
| H. Klein | President's request for a report on what action is taken concerning Sen. Muski's [<i>sic</i>] appearance on the "Merv Griffin Show." | October 8 |
| A. Butterfield | President's request for a report what [<i>sic</i>] resulted from our PR efforts following up the Friday Press Conference. (Log 1496) | October 3 |
| H. Klein | President's request that we have the CHICAGO TRIBUNE hit Senator Percy hard on his ties with the peace group. (Log 1495) CONFIDENTIAL | October 3 |
| H. Klein | President's request for letters to the editor regarding <i>Newsweek's</i> lead article covering the President's U.N. speech. (Log 1443) | September 30 |
| H. Klein | President's request that we counter Ralph Nader's remarks regarding Virginia Knauer accessibility [<i>sic</i>] to the President. (Log 1404) | September 29 |
| H. Klein
Ron Ziegler | President's request that you attack <i>Life Magazine's</i> editorial accusing the Administration of creating a Coherence Gap. (Log 1366) | September 27 |
| H. Klein | President's request that you contact Howard K. Smith and give him the true record on what the Administration has done. (Log 1367) | September 26 |
| A. Butterfield | Sen. Kennedy's Boston speech alleging that the war in Vietnam remains virtually unchanged. (Log 1292) | September 23 |
| P. Flanigan | Ralph Nader's charge that the President pays little attention to consumer affairs. (Log 1293) | September 24 |
| Dr. Kissinger | Article by Jack Anderson which alleges that some U.S. officers in Vietnam favor Thieu's hard line over the President's moderate policy and are sabotaging the truce efforts. (Log 1281) | September 23 |

- H. Klein President's request that you inform Walter Trohan about our substantive programs and that you place the blame for inaction on the Democratic Congress. (Log 1246) September 20
- J. Ehrlichman President's request for a report on possible answers to Evans-Novak charge of an Administration retreat on tax reform. (Log 1224) September 23
- Dr. Kissinger President's request for a report on Walter Cronkite's comment that the South Vietnamese did not observe the truce resulting from Ho Chi Minh's death. (Log 1154) September 16

