...caps (see John ...page). But we aren't ... since the main selling ...Owens and other Referendum C ...was that Tabor needed to be fixed, not eliminated. The vote was remarkably close considering that all of the establishment guns were lined up on one side. Taxpayers clearly understand that politicians need limits on their tax and spending habits, which helps explain the defeat of a related ballot measure that would have expanded the state's borrowing authority.

...ge that formula wi... state now has license to take the hig... level of revenue over the next five years and use that as a base in determining the revenue limit for future years.

Mr. Owens called us yesterday to say that, paradoxically, this vote means that "Tabor will never again be under attack in Colorado because the ratchet is fixed." After five years, he says, the Tabor discipline will return. We hope he's right, but voters need to be on guard when the politicians inevitably maneuver to turn this five-year Tabor "time-out" into a permanent one.

FCC Gets It (Mostly) Right

The Federal Communications Commission made the right call this week in unanimously approving the acquisitions of AT&T and MCI by SBC and Verizon, respectively. We're not thrilled by the anti-competitive conditions imposed by regulators, but they're relatively minor. Moreover, they're a function of the Bush Administration's failure to fill an open seat at the five-member agency, which means Chairman Kevin Martin doesn't have a working majority.

A final farewell to Ma Bell.

To close the deal, Verizon and SBC agreed to a temporary freeze on the rates they charge competitors to use their networks. While this is somewhat better than having regulators simply invoke their own arbitrary rates, it still amounts to price controls, which create distortions and can deter capital investment.

Another unfortunate condition prevents the companies from "bundling" traditional phone service and DSL Internet service. The FCC wants the two services offered a la carte, and that may in fact turn out to be the preference of many customers, who increasingly use their cellular phones to make calls and don't need traditional local service. But it's something for the market to decide, not the regulators.

Both provisions were pushed by the FCC's two Democratic Commissioners, and Chairman Martin, a Bush appointee, had to pay them more heed than would normally be necessary because only one other Republican serves with him on the panel. The White House can correct this problem by appointing another free-marketeer to fill the current vacancy, which has been open since March, and it's passing strange that this doesn't seem to be a priority. Then again, this Administration has had a blind spot toward any number of regulatory agencies that can do economic damage. Think FDA.

Still, the good news is that the mergers are one more step in reversing two decades of wrongheaded telecom policy initiated by the forced breakup of Ma Bell. In 1984, the local and long-distance sectors of the phone industry were separated, only to have new technologies eventually render the distinction obsolete. "Dramatic changes in the technology, the economics, and the structure of the market have mooted prior concerns" about monopolies, said Commissioner Kathleen Abernathy, Mr. Martin's lone ally. It's about time the FCC noticed.

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FCC sides with cable phone firms

Posted 3/2/2007 12:24 AM ET
By Paul Davidson, USA TODAY

In a move that's expected to bring new discount phone services to millions of rural Americans, the Federal Communications Commission ruled Thursday that local phone companies cannot block cable providers' rival Internet-based phone offerings.

"The commission must promote competition," FCC Chairman Kevin Martin said.

In an FCC petition last year, Time Warner Cable complained that rural carriers in South Carolina and Nebraska refused to set up connections so users of the company's Voice over Internet Protocol (VoIP) service and rural phone customers can exchange calls. The carriers also would not provide local phone numbers and 911 services.

Time Warner typically leases these services from MCI and Sprint, which, in turn, lease them from the rural phone companies.

The rural carriers claimed a federal law promoting competition doesn't require them to provide the services because MCI and Sprint would not serve residents directly. They also noted VoIP has not been labeled a telecommunications service. State regulators in South Carolina and Nebraska sided with the rural carriers. Similar battles are playing out in other states.

But FCC staff said wholesale providers are entitled to the same network-leasing privileges as retail companies and that VoIP's classification is irrelevant.

Cable companies have lured millions of VoIP customers from local phone giants in major cities but largely have been shut out of less-populated markets, many of which have no land-line phone alternative. "This will enable Time Warner Cable to deploy its digital phone service to areas that have been denied the benefits of competition," the company said in a statement.

VoIP requires a broadband line and sends calls over the Internet.

Analyst Jessica Zufolo of Medley Global Advisors says the ruling should let cable companies "fully penetrate these rural markets."

But Dan Mitchell of the National Telecommunications Cooperative Association, which represents rural companies, says the FCC should have first resolved how much VoIP providers must pay local phone companies to connect calls. They now often pay very little.

"They're imposing costs on our networks and not paying for it," Mitchell said. "From our perspective, that's unfair competition."

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REGULATION

Are Regulators Forward-Looking? Copper Prices and Telecommunications Networks

Jerry A. Hausman†
J. Gregory Sidak††
Timothy J. Tariff†††

Around the world, regulators since 1996 have mandated that incumbent local exchange carriers (ILECs) offer competitors access to their network at regulated prices that reflect forward-looking cost. Regulated prices for unbundled network elements are based on total element long-run incremental cost (TELRIC), which in turn is calculated using engineering models that estimate the costs of a hypothetical carrier employing the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the ILEC's actual wire centers. These cost models require detailed estimates of the equipment and installation prices of the numerous components that are used in a telecommunications network. When there is uncertainty about how these prices will change over the period for which costs and prices are required, the resulting cost estimates used for setting the regulated prices of unbundled network elements can be very inaccurate. Similarly, when regulators in other jurisdictions are considering such rates as "benchmarks," it is necessary to make adjustments to account for such large differences in critical input prices, so that the benchmark rates will be representative of the costs that actually will be incurred by efficient carriers offering unbundled elements in those jurisdictions. The precipitous rise in the price of copper since 2003 exemplifies this need to reevaluate the inputs used by regulators in their cost model, as well as the inferences drawn from those models. These increases differ from the type of constant annual expected input price growth (or decline) situation that some cost models used outside the United States have accommodated with "tilted annuity" methods. Rather than a gradual anticipated price increase, copper prices escalated rapidly and are likely to remain well above the levels that regulators used to set existing loop rates. Accounting for such evidence would change the forward-looking costs of a hypothetically efficient ILEC network that one of the most prominent U.S. state regulatory commissions—the California Public Utilities Commission (CPUC)—established in 2006. Meanwhile, in 2007, the Commerce Commission in New Zealand has similarly employed a benchmarking methodology for the pricing of unbundled loops that fails to account for the increased price of copper. A global trend may be emerging among telecommunications regulators to ignore the input requirements of their own forward-looking cost models. Such a trend would be consistent with a version of regulatory opportunism in which regulators are forward-looking only when doing so produces lower regulated prices over time.

I. INTRODUCTION

Beginning in 1996, regulators in virtually every industrialized nation started down the path of mandating that the incumbent telecommunications operator offer competitors access to its network at regulated prices that reflect the forward-looking cost of the network, rather than the incumbent's historic cost. In the United States, the Telecommunications Act of 1996 requires that incumbent

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This paper was prepared for the London Business School Global Communications Consortium Conference on Competition and Regulation in a Converging Communications Sector, held November 12-13, 2007. We thank the conference organizer, Leonard Waverman, and conference participants for helpful comments. We thank Derrick Francis for initial discussions on this topic and Katie Jones and Jesse Weiss for research assistance.

local exchange carriers (ILECs) provide certain elements of their networks to competitive local exchange carriers (CLECs).[1] Most prominent among these elements is the local loop (the connection between a subscriber and a telephone company's local switch).

The U.S. Telecommunication Act requires that these network elements be priced at cost, with the possible addition of a reasonable profit.[2] In August 1996, the Federal Communications Commission (FCC) issued rules for determining these prices.[3] The agency invented the concept of total element long-run incremental cost (TELRIC) and enshrined it into the rules for pricing mandatory access to unbundled network elements. The FCC's rules were based on a model of a hypothetical carrier that places switches in the ILEC's existing switch locations but otherwise builds an entirely new network to serve customer locations: "The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers."[4] The FCC's objective in establishing this rule was unexceptionable: to determine the "incremental costs that incumbents actually expect to incur in making network elements available to new entrants" and to adopt a pricing methodology that "best replicates, to the extent possible, the conditions in a competitive market."[5]

To say that the FCC's pricing rules proved to be controversial both in theory and practice would be an understatement.[6] Between 1999 and 2002, the Supreme Court twice interpreted the rules for mandatory unbundling[7]—and thereafter issued two more decisions in 2004 and 2007 construing the relationship of antitrust law to this new regulatory regime.[8] Much of the theoretical debate has

1. 47 U.S.C. §§ 251-52

2. *Id.* § 252(d)(1).

3. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 F.C.C. Rcd. 15,499 (1996) [hereinafter *First Report & Order*].

4. 47 C.F.R. § 51.505.

5. *First Report and Order, supra* note 3, at ¶¶ 685, 679.

6. Indeed, as we explain in more detail below, although the U.S. Supreme Court in 2002 ultimately upheld the FCC's authority to establish the TELRIC rules, in 2003 the FCC opened an investigation to reform those rules in order to (1) make them align more realistically with the underlying costs that telecommunications networks entail and (2) better achieve the important objective of promoting facilities-based competition.

7. For a detailed critique of the FCC's pricing of unbundled network elements in the *First Report and Order*, see J. Gregory Sidak & Daniel F. Spulber, *The Tragedy of the Telecommons: Government Pricing of Unbundled Network Elements Under the Telecommunications Act of 1996*, 97 COLUM. L. REV. 1081 (1997). These pricing rules, along with numerous other parts of the FCC's interconnection rules, were almost immediately challenged by ILECs and a number of state regulators. In July 1997, the U.S. Court of Appeals for the Eighth Circuit Appeals overturned the FCC's pricing rules on the grounds that the states, rather than the FCC, had jurisdiction over pricing. *See* Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997). In January 1999, the Supreme Court modified the Eighth Circuit's decision, upholding the FCC's authority to establish pricing rules (which are implemented by the states), but not ruling on the merits of the rules themselves. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999). In May 2002, the Court ultimately ruled that the FCC's pricing approach was a lawful interpretation of the (ambiguous) pricing provisions for unbundled network elements contained in the Telecommunications Act. Verizon Communications Inc. v. FCC, 535 U.S. 467 (2002).

8. Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007).

focused on establishing proper cost of capital and depreciation values that reflect the risk facing firms owning substantial amounts of capital assets that become sunk upon deployment.[9] Certain components of modern telecommunications networks typically experience steady decreases in equipment prices because of the technological progress that typifies this industry. For example, it usually costs the network operator considerably less to replace a switch or a piece of fiber electronic equipment than it did when the operator originally purchased equipment of comparable quality and capabilities. The theoretical literature explains how levelized annual cost calculations, widely used by U.S. regulators, can produce economically incorrect cost estimates in these circumstances.

This article describes another potential source of error in estimating the economic costs of network elements—an error that, despite its great practical significance, has elicited no commentary and evidently has caught regulators around the world unaware. The cost models that regulators use in practice typically require detailed estimates of the equipment and installation prices of the numerous components that are used in a telecommunications network. To represent and estimate the cost of local loop facilities, these models estimate the quantities of components—such as miles or kilometers of copper cable—as well as the purchase and installation prices for these components. Consequently, when there is uncertainty about how these prices will change over the period for which costs and prices are required, the resulting cost estimates used for setting the regulated prices of unbundled network elements can be very inaccurate. (Typically, the cost models used in regulatory proceedings essentially ignore such potential outcomes and instead implicitly assume that input prices will remain the same for the foreseeable future.) Similarly, when regulators in other jurisdictions are considering such rates as "benchmarks," it is necessary to make adjustments to account for such large differences in critical input prices, so that the benchmark rates will be representative of the costs that actually will be incurred by efficient carriers offering unbundled elements in those jurisdictions.

The precipitous rise in the price of copper since 2003 exemplifies this need to reevaluate the inputs used by regulators in their cost model, as well as the inferences drawn from those models. The recent large increases in copper prices differ from the type of constant annual expected input price growth (or decline) situation that some cost models used outside the United States have accommodated with "tilted annuity" methods. Rather than a gradual anticipated price increase, copper prices escalated rapidly and are likely to remain well above the levels that regulators used to set existing loop rates.

Part II of this article explains the data that TELRIC models require if they are to achieve their purpose of producing valid estimates of the forward-looking cost of an efficient telecommunications network. Part III documents the rapid rise in copper prices since 2003 and how accounting for such evidence would change

9. *See* Jerry A. Hausman, *Valuing the Effect of Regulation on New Services in Telecommunications*, 1997 BROOKINGS PAPERS ON ECON. ACTIVITY: MICROECONOMICS 1; Jerry A. Hausman, *Regulated Costs and Prices in Telecommunications*, in 2 THE INTERNATIONAL HANDBOOK OF TELECOMMUNICATIONS ECONOMICS (Gary Madden, ed., 2003); Robert Pindyck, *Mandatory Unbundling and Irreversible Investment in Telecom Networks*, 6 REV. NETWORK ECON. 274 (2007); Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417 (1999); Jerry A. Hausman & J. Gregory Sidak, *Did Mandatory Unbundling Achieve Its Purpose? Empirical Evidence from Five Countries*, 1 J. COMPETITION L. & ECON. 173 (2005).

the forward-looking costs of a hypothetically efficient ILEC network that one of the most prominent U.S. state regulatory commissions—the California Public Utilities Commission (CPUC)—established in 2006.[10] Part IV explains how the Commerce Commission in New Zealand has similarly employed a benchmarking methodology for the pricing of unbundled loops that fails to account for the increased price of copper.[11] Part V asks whether a global trend is emerging among telecommunications regulators to ignore the input requirements of their own forward-looking cost models. Such a trend would be consistent with a version of regulatory opportunism in which regulators are forward-looking only when doing so produces lower regulated prices over time.

II. The Data Requirements for Forward-Looking Cost Models

To attain the FCC's objective for TELRIC of determining "incremental costs that incumbents actually expect to incur in making network elements available to new entrants,"[12] the results produced by the TELRIC process must be consistent with the forward-looking business decisions that those incumbents make in designing the network that produces both the network elements provided on a wholesale basis and the incumbent's retail services. In competitive markets, such investments are made with the expectation that prices will be sufficient to recover the investments in long-lived assets typically with "lumpy" capacities over their economic lifetime, to earn a normal return, and to recover the associated direct expenses, along with some portion of the joint and common costs of the enterprise.[13] The competitive prices that are the basis for such decisions are also the economically efficient rates for any unbundled elements provided to other carriers.

10. Decision 06-03-025, Opinion Establishing Unbundled Network Element Rates and Price Floors for Verizon California and Modifying Decision 99-11-050 Regarding Monopoly Building Blocks, Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish A Framework for Network Architecture Development of Dominant Carrier Networks, Rulemaking 93-04-003, Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, Investigation 93-04-002, Cal. Pub. Util. Comm'n (Mar. 15, 2006) [hereinafter *Decision 06-03-025*]. Because of the time taken to render the decision, the circa 2003 evidentiary record for copper cable prices had been outdated by the rapid increase in prices that followed.

11. Draft Standard Terms Determination for the designated service Telecom's unbundled copper local loop network, Decision 609, New Zealand Commerce Commission (July 31, 2007) (Public Version 2.6/J10516) [hereinafter *Decision 609*].

12. *First Report and Order*, *supra* note 3, at ¶¶ 685, 679.

13. In particular, Baumol and Sidak observe:

> In recovering the cost of a lumpy plant over its lifetime, the payments should be timed as they are in any competitive market. Thus, the sum of the revenues over the lifetime of the investment should be sufficient to cover all costs, including replacement of investment when the time arrives, and the cost of capital tied up in the investment during its lifetime. This fundamental relationship means that the discounted present value of these revenues must constitute a sum equal to the discounted present value of the costs. The timing of the realization of these revenues, however, cannot be determined definitively by the regulatory agency—or by the courts of the firm's management, for that matter. The timing ultimately is affected, if not entirely determined, by the state of the market at different periods during the lifetime of the investment.

William J. Baumol & J. Gregory Sidak, *The Pig in the Python: Is Lumpy Capacity Investment Used and Useful?*, 23 Energy L.J. 383, 390 (2002).

Accordingly, evaluating whether the results produced by TELRIC approximate such efficient prices involves an assessment of the extent to which the TELRIC assumptions that merely constrain the network design to existing switch locations—but otherwise assume complete freedom to instantaneously design a new network—depart from the economic decisions that produce real networks. In fact, previous analyses have identified at least two significant ways in which the TELRIC process departs from reality.[14]

First, because of the long lives of network assets and the fact that demand can change over both space and time, network components are built over time, not instantaneously. Second, investments in assets with long lives are made in the face of uncertainty in output prices and volumes, input prices, and interest rates. Therefore, these departures from reality imply that the costs and rate produced by the TELRIC process will differ—potentially substantially—from economic costs and prices.[15]

A simple example of the bias introduced by the first factor is that the routing of loop facilities from switches to customer locations is very likely longer in the real world than what typical cost models based on TELRIC produce, because the network was built to accommodate customer locations as they evolved (for example, to new subdivisions of housing) rather than instantaneously.[16] As a result, real routes would require more cables and support structures because of

14. See, e.g., Hausman, *Regulated Costs and Prices in Telecommunications*, *supra* note 9; Timothy J. Tardiff, *Pricing Unbundled Network Elements and the FCC's TELRIC Rule: Economic and Modeling Issues,* 1 REV. NETWORK ECON. 132 (2002) (issue 2); Graeme Guthrie, *Regulating Infrastructure: The Impact on Risk and Investment,* 44 J. ECON. LIT. 925 (2006); J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES 403-26 (Cambridge University Press 1997).

15. For example, Lehman and Weisman ask how much such hypothetical costs differ from embedded costs—the actual operating costs to run a network of varying vintages of equipment, valued at the prices paid for equipment when purchased. DALE E. LEHMAN & DENNIS WEISMAN, THE TELECOMMUNICATIONS ACT OF 1996: THE "COSTS" OF MANAGED COMPETITION (Kluwer 2000). Based on simulations of embedded and hypothetical costs over a long-run period, they produce ranges within which cost differences should fall. The ranges they produce are generally smaller than the differences between embedded costs and rates actually adopted by regulators, suggesting that other factors (for example, inputs such as equipment prices, cost of capital, and depreciation rates) explain the generally lower levels of the adopted UNE rates.

There is one special case under which the TELRIC assumptions could overstate costs (apart from using upwardly-biased input prices). If the price of an asset is expected to increase over time (for example, at 2 percent annually), then properly representing economic depreciation will result in costs that are lower than those produced by TELRIC's implicit assumption of constant input prices in the early years, but higher prices later. *See, e.g.,* David M. Mandy & William W. Sharkey, *Dynamic Pricing and Investment from Static Proxy Models*, 2 REV. NETWORK ECON. 403 (2003). Such an effect would be offset by the cost increases associated with accommodating uncertainty.

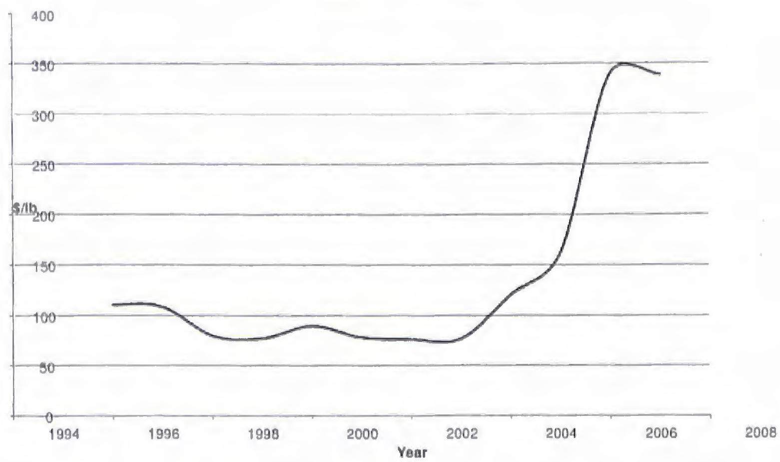
16. In fact, the FCC acknowledged that its original conception of TELRIC is likely to be unrealistic in this regard when it tentatively concluded in 2003 that TELRIC should be revised to "more closely account for the real-world attributes of the routing and topography of an incumbent's network in the development of forward-looking costs." Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers, Notice of Proposed Rulemaking, WC Dkt. No. 03-173, at, ¶ 52 (Sept. 15, 2003). Although the FCC announced this conclusion in 2003, as of October 2007 the agency had yet to complete its proceeding on the reform of the TELRIC process. Consequently, as of late 2007 it remains the case that U.S. unbundled element prices are still based on flaws that the FCC considers serious enough to require fixing.

their greater length.[17] Hausman[18] and Pindyck[19] have identified the downward biases associated with the fact that TELRIC models ignore the uncertainty under which real network investments are made. A consequence of these biases is that the TELRIC process will likely produce regulated rates for network elements that are lower than economic costs, even when all input prices are measured correctly.

III. Copper Prices and the California Public Utilities Commission

In a recent proceeding in California to establish prices for unbundled local loops, a witness for CLECs intending to lease local loops and other unbundled network elements observed that copper prices had declined by 31 percent between the passage of the Telecommunications Act in 1996 and the end of 2002.[20] The implication was that the cost of local loops, for which copper cables are a substantial component, should be expected to decrease as well. In fact, the CPUC approved new local loop rates in March 2006 using copper cable inputs from 2003.[21] Those 2003 prices turn out to be the *low point* of recent copper prices, as shown in Figure 1.[22]

Figure 1: Copper Prices



Contrary to the suggestion that copper prices were on a constant downward trend, which would justify lower local loop prices in future years, copper price

17. The shorter distance in a TELRIC model can be viewed as an artificial efficiency improvement. That is, the "production process" implied by TELRIC produces the same outputs (such as loops to customer locations) with fewer inputs. In principle, these artificial efficiencies could be mitigated by using higher rates of economic depreciation, but this adjustment would be difficult to implement in practice. Similarly, TELRIC models understate costs to the extent that they fail to anticipate the future regulatory proceedings may produce even lower rates, based on presumptively even more "efficient" hypothetical networks. *See* Guthrie, *supra* note 14, at 936.

18. Hausman, *Regulated Costs and Prices in Telecommunications*, *supra* note 9.

19. Pindyck, *supra* note 9.

20. Testimony of John Klick, California Public Utilities Commission, Proceeding I.93-04-002/R.93-04-003I.93-04-002/R.93-04-003, at 13 (Nov. 3, 2003).

21. *Decision 06-03-025*, *supra* note 10.

22. Prices for 1996-2001 are based on Klick, *supra* note 20, Exhibit JCK-5. Prices for 2002 through 2007 are the monthly average spot market prices reported by NYMEX. *See* www.nymex.com.

almost immediately began to increase in the 2003 time frame and by late 2007 were *more than four times* their 2003 level. Such an increase would have a noticeable impact on the regulated rate for an unbundled local loop.

Adjusting previously calculated unbundled element costs and rates for major changes in input prices proceeds as follows. In the United States, models that have been used to produce costs and rates for unbundled local loops typically depict such loops as consisting of the following basic components:

- a copper drop wire (and associated equipment at the customer's end of the loop);
- copper distribution cable connecting the drop wire to a cross-connect facility;
- fiber or copper cable between the cross-connect and the telephone company's switch;
- for fiber-fed loops, electronics that converts analog into digital signals;
- support structures, such as telephone poles and buried trenches over which cables are routed; and
- installation labor.

These cost models derive unit costs by (1) estimating the quantities of equipment needed to serve end-users (for example, lengths of copper cables of various sizes, number of telephone poles, etc.) as well as the associated labor cost for installing that equipment, (2) deriving the total investment associated with the equipment and its installation by multiplying quantities by current unit input prices (for example, the price per foot for 25-pair copper cable), (3) converting investments into annual (or monthly) capital costs necessary to recover the initial investments, pay the associated income taxes, and earn a return on those investments over the economic lives of the assets, (4) adding the annual direct (for example, maintenance) costs and some portion of shared and common costs, and (5) dividing the result by the number of units expected to be in service.

In the case of unbundled loops, if the price of a particular input changes and the other prices remain constant, the resulting change in the output price can be approximated as follows:

$$ALC = OLC \times \left((1 - w) + w \frac{P_N}{P_O} \right)$$

where ALC is the adjusted loop cost that results from the change in the input price, OLC is the original loop cost, w is the proportion of total cost accounted for by the input whose price has changed, P_O is the input price used to determine the original loop cost, and P_N is the current price of the input in question. This approximation ignores the possibility that, if a particular input becomes more expensive, there may be some substitution towards other inputs. For example, if the price of copper increases, it may become economic to deploy more fiber in the feeder. In the particular California outcome discussed (the effect of the quadrupling of copper prices on unbundled loop costs and rates), this substitution effect is small. Even at the lower prices, the model in question depicted a predominantly fiber-fed network. Therefore, copper feeder accounts for very little of the total investment in the loop.

Returning to the recent California example, copper cable accounted for about 12 to 13 percent of total loop costs in the CPUC's calculations. Therefore, increasing copper cable input prices by the factor of 4.4 that the spot market price for copper increased between June 2003 and June 2006 would increase the loop cost by a factor of 0.12 to 0.13 × (4.4 – 1), or about 40 percent from $14 to about $19 to $20.[23] This estimate assumes that the increase in the price of raw copper passes through directly into the price of copper cable.[24]

IV. Copper Prices and the New Zealand Commerce Commission

Although the record evidence upon which the CPUC's March 2006 decision did not account for the sharp increases in the market price of copper in its forward-looking pricing of local loop unbundling (LLU), the New Zealand Commerce Commission explicitly and erroneously ignored such evidence in 2007. To understand how the Commerce Commission made that mistake, it is useful to examine first its benchmarking methodology for setting prices for unbundled local loops.

A Biased LLU Benchmark Estimates

In this section, we will assume that the Commerce Commission's analysis is based on valid forward-looking data. The Commerce Commission attempts to solve a well-posed problem in econometrics. Given the characteristics of local loops in New Zealand, what is the best prediction using the available overseas data? Econometrics (or, more generally, statistics) has developed a well-accepted procedure to answer this question. Prediction based on a linear regression model given the local loop characteristics in question yields the "best linear unbiased predictor," or BLUP. Thus, if the models are restricted to be linear and unbiased, prediction from a regression model is "best" in the sense that it minimizes the variance of the prediction.[25] Econometricians typically limit consideration to unbiased (consistent) estimation procedures because unbiasedness means that the prediction has an expected error of zero. The BLUP result follows directly from the Gauss-Markov theorem, the fundamental theorem of regression, which has been known for over a century. Thus, the correct procedure for the Commerce Commission to employ in a benchmark approach is to estimate a regression

23. Ideally, consistent with AT&T Communications of Ill. v. Illinois Bell Telephone Co., 349 F.3d 402 (7th Cir. 2003), had the CPUC chosen to update copper input prices, other prices, such as depreciation and the cost of capital, would be updated to 2006 values as well. However, because the very large increase in copper prices is very likely much larger in magnitude than potential offsetting factors that would lower the loop cost, the loop costs adopted by the CPUC was most likely immediately out-of-date and, consequently, would no longer serve as a reliable benchmark for loop costs in other jurisdictions.

24. For example, if the price of copper cable reflects other aspects of transforming raw copper into ready-to-install cable (for example, production, warehousing, and the like), then the cost increase could differ from the trend in raw copper prices. For example, if the price of cable increased by a factor of 2.5 (rather than the 4.4 increase in the copper spot price), the change in the loop price would be 0.12 to 0.13 x (2.5 – 1), or 18 to 20 percent.

25. Of course, nonlinear transformations of the variables all fit within this category, although sometimes consistency replaces unbiasedness.

model and use it to predict the LLU prices, given the characteristics of local loops in New Zealand or the particular geographic region in question.

However, the approach that the Commerce Commission used to develop benchmark rates did not follow this correct approach. Instead, the Commerce Commission used a series of bivariate analyses of "potential comparators" to determine "the relationship between each particular indicator and UCLL rates."[26] This approach leads to biased results because each bivariate regression suffers from the "omitted variable" problem.

Two examples demonstrate the omitted variables problem. Suppose one wanted to predict the performance of an incoming student to the MIT graduate economics program. If one used a bivariate regression of actual student performance on the student score on the graduate record exam (GRE) economics section, one would find a positive relationship. However, if instead one used a multivariate regression model and included undergraduate grade point average, performance on the GRE math exam, and performance on the GRE economics exam, one would find no significant relationship with the GRE economics exam. Indeed, MIT economics admission disregards this variable, performance on the GRE economics exam. If the other two variables are omitted, the GRE economics exam result is found to be important, but that is because it is positively correctly with the other two omitted variables. Conversely, if one used a bivariate relationship to consider the effect of the GRE English exam on graduate student performance, one likely would not find a relationship. However, if one included it with grade point average and GRE math exam, one would likely find a positive and significant relationship. Thus, using bivariate regression models leads to both kinds of errors: finding a variable to be important when it is not important in a multivariate relationship and finding a variable not to be important when it is important in a multivariate relationship.

The Commerce Commission approach for determining benchmark rates is to consider a number of demographic and economic factors that may be significant determinants of local loop costs so that they are reflected in LLU rates. The Commerce Commission carried out a bivariate regression analysis "to determine the relationship between each individual comparability indicator and local loop rates . . . ."[27] This bivariate regression analysis identified urban population and, less strongly, teledensity and population density.[28] These three variables were then used "to identify countries comparable to New Zealand."[29] An arbitrary range for each of the three variables was used to choose a sample of seven U.S. states, and Australia, Finland, Norway and Sweden, for a total of eleven sample observations. After converting the rates to New Zealand dollar, the Commerce Commission used the median of the eleven observations of NZ$20.77. If, instead, the average were used, it would lead to $NZ21.48.

Taking a median (similar to an average) is an incorrect econometric procedure. Only if the eleven observations were a random sample from a population "similar" to New Zealand would unbiased results occur. However, a table in the Commerce Commission's decisions shows that the sample used violated this criterion.[30] The median (and mean) of urban population in the

26. *Decision 609, supra* note 11, at 97.
27. *Id.* at 25.
28. *Id.*
29. *Id.* at 26.
30. *Id.* at 25, table 4.

Commerce Commission data is 0.77, while for New Zealand the urban population variable is 0.86.[31] Because the Commerce Commission found urban population to be the most important variable, the Commerce Commission approach is likely to generate a biased estimate of LLU rates.

Sidak and Singer, whom the Commerce Commission reference, criticize the Irish regulator for using the mean of EU countries to set Ireland's benchmark LLU rates.[32] Sidak and Singer recommend using a regression model as a superior approach to taking the sample mean.[33] In Ireland, they found a downward bias of 42 percent because the regulator used the sample average rather than the regression model prediction.[34]

B. Long-Term Benefits to End Users and Distortion of Investment Incentives

Before turning to a regression analysis, we briefly consider the Commerce Commission's consideration with regard to the criterion of "long-term benefits to end users." We do not agree with the economic analysis underlying the decision. We begin with the observation that in Canada and in many U.S. states (including California and a number of other large states) local telephone rates have been deregulated since 2006 or 2007.[35] These jurisdictions determined that deregulation was appropriate when pay TV cable based telephone and cellular (mobile) competed with the landline carrier.

Most economists agree that competition leads to superior results for consumers than "regulation forever." Thus, when the Commerce Commission considers "additional incentives for access seekers to replicate and bypass Telecom's local loop infrastructure" they are mistakenly considering that an access seeker might decide to build a new copper based network. This outcome is extremely unlikely (and probably would never happen). The relevant question is how low access rates affect the economic incentives to invest in alternative technologies—for example, a pay cable network that will compete with the landline network or new technologies such as WiMax.[36]

Our academic research has determined that low LLU rates decrease economic incentives for investment in alternative competing technologies.[37] Further, because LLU rates do not correctly account for the sunk and irreversible nature of network investment, they are too low to create incentives for efficient

31. The medians and means of the other two variables, teledensity and population density, are relatively close.

32. *Decision 609, supra* note 11, at 24 n.8 (citing J. Gregory Sidak & Hal J. Singer, *How Can Regulators Set Non-Arbitrary Interim Rates? The Case of Local Loop Unbundling in Ireland*, 3 J. NETWORK INDUS. 273 (2002)).

33. Sidak & Singer, *supra* note 32, at 289.

34. *Id.* at 289-90.

35. For a discussion, see Jerry A. Hausman & J. Gregory Sidak, *Telecommunications Regulation: Current Approaches with the End in Sight*, in ECONOMIC REGULATION AND ITS REFORM: WHAT HAVE WE LEARNED? (Nancy L. Rose, ed., National Bureau of Economic Research & University of Chicago Press, forthcoming 2008).

36. Sprint is currently building a WiMax network in the United States. *See, e.g.*, http://www2.sprint.com/mr/news_dtl.do?id=15000.

37. *See, e.g.*, Hausman & Sidak, *Did Mandatory Unbundling Achieve Its Purpose?*, *supra* note 9.

investment.[38] Because investors in competing technologies (such as cable networks or WiMax networks) will be required to take account of the sunk and irreversible nature of network investment, the Commerce Commission's claim of possible "inefficient by-pass" is incorrect.[39] The Commerce Commission needs to consider competitive outcomes in Canada and the United States, as well as the investment incentives and investment risks faced by potential competing network providers in New Zealand.

Our previous research has also demonstrated that the incumbent's investment is determined by its expected rate of return. This fact is especially important in the current situation because most new investment in telecommunications networks is sunk and irreversible. Indeed, the U.S. experience demonstrates that the incumbents decided to invest in residential fiber optic networks once they received the FCC's guarantee that it would not mandate that competitor have access to these new networks at uneconomic rates artificially suppressed by regulation. Currently, Verizon and AT&T are investing in these new networks at a cost exceeding US$10 billion.[40] Thus, to the extent that New Zealand will depend on its own incumbent, Telecom New Zealand, to be an important provider of new technology requiring new investment, it is important (if it is not to forbear from mandating access to new networks entirely) that the Commerce Commission establish regulated rates for mandatory access that make this investment economic in the sense of having a high enough expected rate of return.

C. Benchmark Rates Predicted from a Regression Model

We now estimate a regression model where the left left-hand side variable is the logarithm (log) of price and the right-hand side variables are log of population density, log of urban population, and log of teledensity. We do not argue that this regression model should be used to determine LLU benchmark prices, as the rates used in the model are not forward-looking. Rather, the value of the model is to demonstrate the downward bias in the Commerce Commission's approach.

Our first sample has 51 observations from U.S. states (and the District of Columbia) that are contained in the Commerce Commission data base. (We begin with U.S. states because they share a common technology arising from the Bell System before 1984 and from Bellcore thereafter.) The results appear in Table 1.

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38. We have discussed this point in numerous academic papers, and it has been accepted by the U.S. Federal Communication Commission. *See, e.g.*, Hausman, *Regulated Costs and Prices in Telecommunications, supra* note 9.

39. *Decision 609, supra* note 11, at 30.

40. Despite the fact that U.S. incumbents continue to make unbundled copper loops available (or the equivalent functionality on fiber loops) after such upgrades are complete, a number of competitors have requested that the FCC and U.S. state regulators not allow incumbents to retire copper facilities. Such a perpetuation of copper facilities (especially if unbundled loop prices have not been updated to reflect recent developments in world copper markets) would harm the incentives of both incumbents and providers of competing platforms to invest.

Table 1: Log Regression Model: U.S. States

ln_llu_nz	Coef.	Std. Err.	T	P>|t|
ln_popdensity	-0.056	0.023	-2.43	0.02
ln_urbanpop	-0.229	0.083	-2.75	0.01
ln_teledensity	-0.089	0.077	-1.15	0.26
_cons	3.203	0.154	20.77	0.00
Number of obs.	51.000			
R-squared	0.581			
Root MSE	0.147			

Table 1 indicates that population density and urban population are highly significant, and that teledensity has the expected sign.[41] The root MSE is 14.7 percent, and the R^2 is 0.58; so the model has good properties. Using the values for New Zealand given by the Commerce Commission,[42] the regression model predicts a median of \$23.61 with a standard error of prediction of 15.3 percent. This prediction is unbiased and is 13.7 percent higher than the Commerce Commission's median result.[43] Thus, we conclude that the Commerce Commission's median rate is downward biased by a statistically significant amount (at the 10 percent level).

We now consider another regression model that includes all the U.S. states as well as the four additional countries used in the Commerce Commission analysis, Australia, Finland, Norway, and Sweden. The results appear in Table 2.

Table 2: Log Regression Model: United States Plus Four Other Countries

ln_llu_nz	Coef.	Std. Err.	t	P>|t|
ln_popdensity	-0.031	0.020	-1.52	0.13
ln_urbanpop	-0.303	0.078	-3.88	0.00
ln_teledensity	-0.154	0.075	-2.05	0.05
_cons	3.013	0.133	22.71	0.00
Number of obs	55.000			
R-squared	0.548			
Root MSE	0.154			

The model does not fit quite as well as the previous model, as the Root MSE increasing to 15.4 percent. Teledensity now becomes significant, while population density is no longer significant. The median prediction for New Zealand is now \$22.31, which is 7.4 percent higher than the Commerce Commission's prediction.[44] This result again demonstrates the bias in the

41. Although teledensity is not individually significant, it improves the predictive power of the model.

42. *Decision 609, supra* note 11, table 3.

43. *Id.* at 31, table 6.

44. *Decision 609, supra* note 11, at 31, table 6.

Commerce Commission's econometric approach. The standard error of the prediction is 15.8 percent, which again demonstrates that the regression model prediction has excellent properties.

We conclude that the Commerce Commission's approach to estimating benchmark LLU rates for New Zealand does not follow accepted econometric practice. Further, a regression model is able to give quite precise predictions for New Zealand based on a sample of U.S. states plus the foreign countries used by the Commerce Commission. The results of the regression model demonstrate a downward bias in the Commerce Commission results, as Table 3 summarizes.

Table 3: Commerce Commission Estimate and Regression Estimates

Source of Estimate	Median	% Bias Of Commerce Commission Est
CC Median Estimate	$20.77	---
Regression Model U.S. States	$23.61	13.7%
Regression Model: U.S. + Foreign	$22.31	7.4%

D. Benchmark Data That Are Not Forward-looking

The Commerce Commission states that the LLU rates should be "forward-looking."[45] We agree. However, the data used by the Commerce Commission to set benchmark rates are not forward-looking. Between 2001 and 2007, the price of copper increased by approximately 343 percent—from US$1578 per metric ton in 2001 to US$6985 in 2007. Although one of the most significant costs of a local loop is the copper cable, this increased price of copper is not reflected in the data upon which the Commerce Commission relied. In this respect, the Commerce Commission benchmark data are not forward-looking, and those data consequently cause downward bias in estimates of the forward-looking LLU price. Our unbiased median estimate of the correct LLU price for New Zealand, which is forward-looking because it takes account of the increased price of copper, is NZ$32.78. The Commerce Commission estimate is not forward-looking because it does not account for the increased price of copper. Table 4 shows the LME yearly copper price from 2001 to 2006.[46]

45. *Id.* at 21.

46. We note that the price pattern in Table 4 differs somewhat from the data used in Figure 1. For example, using the June values of the NYMEX data to construct price indices with 2001 = 1 produces slightly different indices than shown in Table 4.

Table 4: Price of Copper, 2001-2007 (US$ per Metric Ton)

Year	Price	% Increase From 2001
2001	1,577.56	
2002	1,557.88	-1.2%
2003	1,779.73	12.8%
2004	2,867.96	81.8%
2005	3,683.81	133.5%
2006	6,725.33	326.3%
2007	6,985.22	342.8%

Source: London Metal Exchange, series LCPCASH~U$.

Because copper is a storable commodity, the current spot price is an excellent estimate for the expected future price. Thus, no reason exists to believe that the copper price will return to "normal" lower levels in the future. It would be incorrect to take a long-run average for the copper price given the economic factors that determine the price of copper. Even though the New Zealand exchange rate may be subject to cyclical volatility, no reason exists to believe that the world price of copper is subject to cyclical volatility given its characteristic as a resource with an upward-sloping cumulative supply curve over time. As Table 4 and Figure 1 indicate, the price of copper has increased exponentially, driven largely by the growth of the Chinese economy.

We can now relate the decision of New Zealand's regulators in 2007 to that of California's regulator in 2006. We have analyzed 2003 data used in the 2006 CPUC decision that adopted rates for local loops averaging about US$14 for Verizon California. As noted earlier, using 2006 copper prices instead of 2003 levels, the resulting loop rate could have been more than 40 percent. Copper cable accounted for about 12 percent of total loop investment in the CPUC's calculations. Therefore, increasing copper cable input prices by the factor of 4.4 that the spot market price for copper increased between June 2003 and June 2006 would increase the loop cost by about 40 percent, resulting in an estimate of about US$20 instead of US$14.

Is the increased price of copper reflected in the Commerce Commission's benchmark data set? The share of copper cost in total LLU cost consistent with the CPUC's cost model implies an estimated coefficient in a log-log regression model of approximately 0.12. We took the data set consisting of the U.S. states and 3 of the 4 other countries and put in the price of copper in the year of the decision, under the hypothesis that the LLU estimates are forward-looking, as required by the Commerce Commission.[47] The results are in Table 5.

47. We exclude Norway from the sample because we cannot tell what year of data the LLU price was based on.

Table 5: Log Regression Model with Copper Price

ln_llu_nz	Coef.	Std. Err.	T	P>|t|
ln_popdensity	-0.045	0.020	-2.22	0.03
ln_urbanpop	-0.238	0.079	-3.01	0.00
ln_teledensity	-0.139	0.072	-1.93	0.06
ln_coppermt	-0.202	0.091	-2.22	0.03
_cons	4.782	0.794	6.02	0.00
Number of obs	54.000			
R-squared	0.594			
Root MSE	0.147			

Contrary to the expectation that the estimated coefficient of the log copper price should be positive and approximately 0.12, the regression results find a *negative and statistically significant coefficient of -.202.* Thus, the Commerce Commission's sample of LLU prices does not reflect correctly the exponential increase in the copper price during the sample years. Instead, that sample demonstrates that regulators, at least in the United States, continued to decrease the LLU rates over time to attempt to encourage more competitive entry.[48] This attempt largely failed. Many states, including California, have now deregulated local landline prices, as competing technologies constrain the price of local telephone service.

Thus, the increased price of copper is not reflected in the data relied on by the Commerce Commission. The Commission recognizes this potential problem, as it concedes that "costs may evolve over time and regulated rates may become outdated."[49] However, the Commerce Commission did no economic or econometric analysis to determine whether the international rates it used reflected costs (for example, copper prices) that have, in fact, evolved over time. In particular, when one examines the August 2006 decision of the Australian Consumer and Competition Commission (ACCC) on LLU, *Assessment of Telstra's ULLS Monthly Charge Undertaking*,[50] which the Commerce Commission used in its own estimate, one can find no reference to taking into account the increased price of copper, which should be included in a forward-looking price determination. Thus, the ACCC decision does *not* appear to be forward-looking, contrary to the Commerce Commission's determination.

However, we note that Telstra, the incumbent network operator in Australia, is well aware of the effect of the increased price of copper. In an August 2006 submission to the ACCC, Telstra noted a 76 percent increase for the prices of copper and brass and a 48.8 percent increase in the price of electric cable and

48. A regression model with yearly indicator variable (rather than copper prices) finds a monotonic decreasing LLU rate across years after controlling for the three variables used in the regression specification. This finding is consistent with regulators decreasing LLU rates over time to attempt to encourage more entry.

49. *Decision 609, supra* note 11, at 22.

50. Australian Consumer and Competition Commission, Assessment of Telstra's ULLS Monthly Charge Undertaking, (Aug. 2006), *available at* http://www.accc.gov.au/content/index.phtml/itemId/759855/fromItemId/721622.

wire over the previous four years, using data from the Australian Bureau of Statistics website.[51] The submission then estimated an "implied price escalators" for distribution conduit and trenching, main conduit and trenching, distribution cable, and main cable.[52] Each escalator exceeded 20 percent over the previous four-year period.[53] Overall, Telstra's filing estimated a 22.7 percent increase over the previous four years for the prices of "composite for network assets."[54] This evidence—drawn from the Australian government's own statistical sources—counsels the ACCC to recheck the plausibility of its estimates of the forward-looking costs of Telstra's network.

As it currently stands, the Australian data used in New Zealand by the Commerce Commission are not forward-looking, and they lead to downward bias in the estimates of the forward-looking LLU price. The failure of regulated LLU rates to accurately capture the most important input cost, other than labor, demonstrates that the benchmarking approach cannot lead to accurate LLU estimates. However, to the extent that the Commerce Commission must estimate benchmark LLU rates, we suggest the Commerce Commission take the geometric average of the regression model estimate, NZ$22.95, and then apply a 42.8 percent adjustment factor using the LME copper price in June 2007 because the modal date for the data is 2003. Using this copper adjustment factor leads to an adjusted median estimate of NZ$32.78.[55] Otherwise, the Commerce Commission estimate will not be forward-looking because it will not account for the increased price of copper.

V. REGULATORY OPPORTUNISM AND THE FAILURE TO RECTIFY THE KNOWN DEFICIENCIES OF TELRIC PRICING

TELRIC pricing was originally adopted at a time when U.S. regulators appeared widely to believe that unbundled elements would not only "jump start" competition, but also would be a major source of competition by themselves. Accordingly, it is not surprising that regulators have often regarded the growth in the number of competitors' lines as an important metric of the success of competition policy, regardless of the investments required to provide those lines.[56] As a result of a circuitous legal and regulatory path, greater emphasis on

51. The Matter Undertakings Dated 23 December 2005 Provided by Telstra Corporation Limited to the Australian Competition and Consumer Commission in Respect of Unconditioned Local Loop Service, Price Indices Supplement Statements ¶ 9 (citing (ABS.gov.au), *available at* http://www.accc.gov.au/content/index.phtml/itemId/771159/fromItemId/743667).

52. *Id.* at ¶ 12.

53. *Id.*

54. *Id.* at ¶ 16.

55. The change in the copper price from June 2003 to June 2007 is used for the adjustment. We make all adjustment using constant New Zealand dollars. Ideally, if data on the change in the price of copper cable from 2003 to 2007 were available (for example, from carriers participating in the regulatory proceeding), a more refined adjustment to the benchmark would result.

56. For example, during the time when the unbundled element platform (UNE-P) was being offered in the United States, state regulators generally lowered its price. At its peak—at the time the FCC was beginning to respond to court directives that ultimately ended the availability of UNE-P at favorable regulated rates—over 60 percent of the competitive lines in the US were obtained at wholesale from the incumbents and involved no use of competing network facilities. *See, e.g.*, Timothy J. Tardiff, *Changes in Industry Structure and Technological Convergence: Implications for Competition Policy and Regulation in Telecommunications,* 4 INT'L ECON. & ECON. POL'Y 109 (2007), *available at* http://www.springerlink.com/content/wg612681347lk809/.

full facilities-based competition—typically over platforms other than traditional copper loops—is becoming increasingly prominent at the same time that competition from providers reselling all or parts of incumbent networks has receded. However, the regulatory reform of TELRIC pricing that would naturally accompany this shift in direction has stalled. This and other sources of regulatory lag have resulted in TELRIC prices that are still based on a methodology that the FCC—its sponsor—has tentatively concluded is in need of reform. Perhaps more important, extant values of critical components such as unbundled loops are based on inputs that are out of date because of the changes in copper prices (and perhaps other markets supplying telecommunications inputs).

With these developments, the challenge of developing economically proper regulated input prices (either through full blown cost studies or benchmarking other jurisdictions) becomes increasingly challenging. Under these circumstances, it is important that artificially low input prices not be maintained by failure to adjust out-of-date costs in the hopes that they would give the appearance of more competition, under the guise of greater volumes supplied not by competitors actually investing in network technologies, but by carriers that continue to resell the older technology of incumbent providers.

VI. CONCLUSION

Regulated prices for unbundled network elements have based on total element long-run incremental cost, which in turn is calculated using engineering cost models that require detailed estimates of the equipment and installation prices of the numerous components that are used in a telecommunications network. When there is uncertainty about how these prices will change over the period for which costs and prices are required, the resulting cost estimates used for setting the regulated prices of unbundled network elements can be very inaccurate. Similarly, when regulators in other jurisdictions are considering such rates as "benchmarks," it is necessary to make adjustments to account for such large differences in critical input prices, so that the benchmark rates will be representative of the costs that actually will be incurred by efficient carriers offering unbundled elements in those jurisdictions.

The precipitous rise in the price of copper since 2003 exemplifies this need to reevaluate the inputs used by regulators in their cost model, as well as the inferences drawn from those models. Accounting for such evidence would change the forward-looking costs of a hypothetically efficient ILEC network that one of the most prominent U.S. state regulatory commissions—the California Public Utilities Commission (CPUC)—established in 2006. Meanwhile, in 2007, the Commerce Commission in New Zealand has similarly employed a benchmarking methodology for the pricing of unbundled loops that failed to account for the increased price of copper. In order for the input requirements of their own forward-looking cost models to be satisfied and economically proper network element prices attained, it is important for regulators to resist the opportunistic policy of employing forward-looking costs only when doing so produces lower regulated prices over time.

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Land Economics, Vol. 51, No. 3. (Aug., 1975), pp. 235-246.

Stable URL:
http://links.jstor.org/sici?sici=0023-7639%28197508%2951%3A3%3C235%3ADSTFAC%3E2.0.CO%3B2-H

Land Economics is currently published by University of Wisconsin Press.

Domestic Satellites, the FCC, and Competition in Domestic Telecommunication†

Richard W. Nelson*

The development of satellite communication technology in the 1960s raised the potential for technical change in domestic, long-distance telecommunications.[1] It also raised the potential for change in market structure. The effect on market structure, which was made possible by the emergence of a new group of potential suppliers of long-distance telecommunication services and a changed set of conditions of production, is the subject of this paper. It is shown that the development of satellite technology touched off forces leading to an increase in the number of actual suppliers, the development of more intense rivalry among existing suppliers, and increased significance of the threat of entry as a force in shaping market behavior. All of these changes in market structure herald increased competition.

The potential for increased competition in long-distance telecommunications followed from a change in technology that was essentially exogenous to the industry.[2] Interest in the new technology reflected the evaluation by firms that satellite operations would be profitable and, in the case of new suppliers, that a challenge to existing producers and the development of new markets were warranted. However, in actual practice, change in technology and market structure did not follow automatically from nor solely as a result of the interest of commercial enterprises. Because domestic telecommunication is regulated by the Federal Communications Commission (FCC), the potential forces for change inherent in the commercial interest in satellite communication translated into an actual effect only after the FCC

†I am indebted to Merton J. Peck, Yale University, for his encouragement for this study, which initially was conducted as part of a doctoral program under his direction and supported by the National Science Foundation. Of course, responsibility for content is strictly my own.

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[1] Long-distance telecommunications is used in this paper to refer to that part of domestic, point-to-point telecommunications involving transmission between urban areas.

[2] The feasibility of utilizing satellites in domestic telecommunications hinged on developments in rocketry making it possible to place and maintain large payloads in orbit, advances in miniaturization of electronic components, and advances in the durability and reliability of electronic equipment. The latter two advances involved refinements in technology rather than radical changes in the type of technology, since satellite communication systems continue to use the same basic radio technology incorporated in terrestrial communication systems.

The underlying advances in technology were largely exogenous to the communication industry itself, rather being spin-offs of the federal government's space program. Of course, private firms were involved in the federally sponsored research, and once the underlying technology had been developed sufficiently to bring implementation of satellite systems within the grasp of potential telecommunications suppliers, they took interest in the new technology and began to carry on the work for commercial purposes.

ruled that development to be in the public interest, as defined in the Communications Act of 1934.[3]

ESTABLISHED INDUSTRY STRUCTURE

In 1972, prior to the implementation of satellite technology in domestic telecommunications, the supply side of the domestic, long-distance telecommunication market was dominated by a single communication common carrier, the American Telephone and Telegraph Company. That company operated an extensive nationwide system for long-distance transmission as an extension of its local telephone operations. A second, much smaller common carrier, Western Union, and in addition a number of specialized common carriers serving limited geographical areas and providing specialized services also were suppliers in the long-distance telecommunication market. Finally, there were several very small private operators maintaining long-distance facilities solely for their own use. The common carriers involved in domestic, long-distance telecommunications and their revenues from that activity in 1972 are presented in Table 1.

Near monopoly clearly was the major characteristic of the supply side of long-distance telecommunications within the United States. Fully 91 percent of total long-distance revenues of the industry were accounted for by AT&T and its subsidiaries. The long-distance transmission requirements of this demand, plus that of the additional five percent of total industry revenues accounted for by the independent telephone companies, all were served by the long-distance facilities maintained by AT&T.[4] Moreover, these figures, which serve well to demonstrate the overall dominance of AT&T, do not reveal the underlying absolute monopoly existing in major submarkets, owing to effective segmentation of demand. Thus, in long-distance message telephone service, accounting for 86 percent of total industry revenues, AT&T was the only supplier of long-distance transmission services. Western Union had an effective monopoly in meeting the requirements of switched message telegraph service, accounting for three percent of total industry revenues. Only in the market for private line service, accounting for 11 percent of total industry revenues, were there competing long-distance systems in existence offering consumers a choice of supplier.

The market for private line service itself was diverse. It included the demand for program distribution, largely by the major television networks. The long-distance requirements of this demand were served almost entirely by AT&T, though small, specialized common carriers provided some service in areas of low population density. AT&T also was the dominant supplier of private line service in the voice, data, and record area, where it accounted for about 84 percent of total revenues. However, Western Union also was well established in this field of long-distance telecommunications, operating major leased systems for the Department of Defense and the General Services Administration of the fed-

[3] U.S. Public Law 73-652, Communications Act of 1934, 73rd Congress, June 19, 1934.

[4] Total long-distance revenues include the local service required to connect long-distance systems with their customers as well as actual long-distance transmission. Variance among firms and types of communication service in the amount of local service supporting long-distance transmission makes a breakdown of total revenues by firm or service type an imperfect measure of the distribution of demand for actual long-distance transmission.

TABLE 1

LONG-DISTANCE TELECOMMUNICATIONS COMMON CARRIERS: 1972

	Total Long-Distance Revenues	
	$ Millions	% of Market
By Supplier		
American Telephone & Telegraph Company	9.983	91
Independent Telephone Companies	603	5
Total: Telephone Companies	10,586	96
Western Union Telegraph Company	389	4
Specialized Common Carriers	11	–
Total: All Common Carriers	10,986	100
By Type of Service		
Message Telephone Service	9,463	86
Message Telegraph Service	319	3
Private Line Service	1,204	11
Total: All Categories	10,986	100

Source: Federal Communications Commission, *Statistics of Communications Common Carriers* [1972]; also FCC, *Annual Report to Congress* (Fiscal year 1973).

eral government, as well as systems designed to meet private demand. On individual routes along which demand was highly concentrated, intense competition also had been posed by the emergence of specialized common carriers, following a 1971 decision of the FCC.[5] On one of these routes, linking Chicago and St. Louis, one of the specialized common carriers was reported to have taken 80 percent of the private line market, primarily from AT&T.[6] Despite their success on individual routes, the nationwide impact of the specialized common carriers still was small in 1972. However, these carriers were expanding their operations at a rapid rate and were bound to gain importance over time.[7]

Physical integration with the local telephone system is a second important characteristic of the supply of long-distance telecommunication services. A

[5] First Report and Order, FCC Docket No. 18920, 29 FCC 2d 870 (May 25, 1971).

[6] *Wall Street Journal*, March 5, 1974.

[7] MCI Communications Corp., the first specialized common carrier to challenge the general common carriers in the private line market, projected its revenues upon completion of its initial nationwide system at $55 million. (See First Report and Order, FCC Docket No. 18920, 29 FCC 2d 870.) Data Transmission Co., the second of the two most important of the specialized common carriers, anticipates revenues of $40 million upon completion of its initial nationwide system in 1976. The combined revenues of these firms clearly will be significant, but still their operations will be small relative to the private line operations of AT&T.

very large part of total long-distance demand is generated by customers of the local telephone systems, and the presence of natural monopoly conditions in the provision of local services, on which the long-distance systems are dependent for interconnection with their customers, makes physical integration of the local and long-distance systems mandatory for the achievement of efficient operations. It clearly is uneconomic, for example, for nonintegrated long-distance suppliers to construct custom local facilities providing the capability for switched service to all customers of the local telephone systems, as this would require duplication of the entire switching facilities of the local telephone systems as well as the local loops to the current telephone subscribers. Much demand for nonswitched, private line service, too, is handled most efficiently through the local telephone systems, owing to the undesirability of constructing even duplicate local loops. Thus, a very large block of long-distance demand, in both the message and private line areas, had to utilize the local telephone system for interconnection with the long-distance systems. Only for the very largest customers requiring private line service is it even possibly economic to construct private local links independent of the telephone systems, thus potentially breaking the chain of physical integration.

Although long-distance systems operated by AT&T, Western Union, and many of the specialized common carriers all were linked with the local systems of the telephone companies, such physical integration was not universal. AT&T operated a long-distance system to meet the needs of the television networks for program distribution that was totally independent of the systems serving telephone demand. Some of Western Union's operations similarly did not rely on the local telephone systems for interconnection, and the privately owned systems generally provided end-to-end service. The specialized common carriers took different approaches toward interconnection, some providing independent local loops, owned by either the carrier or the customer, and others relying largely on the local telephone systems for interconnection.

AT&T's position as the dominant supplier of local telephone services and also the largest producer of long-distance services created a very high degree of vertical integration in ownership as well as in physical integration between local and long-distance systems.[8] This fact also made AT&T an essential supplier to firms that competed with it in the long-distance market. As a result, AT&T had considerable potential power vis-a-vis its competitors in determining the division of this demand. By establishing rates for interconnection, as well as rules establishing the conditions on which service would be provided, AT&T could effectively determine its own share of demand dependent on its local facilities for interconnection. Thus, in 1972, the unavailability of interconnection with AT&T's switched local facilities guaranteed AT&T long-distance transmission business of the subscribers of its local, switched telephone service. The total demands of these customers, including local interconnection, amounted in 1972 to an estimated $8.7 billion, or 79 percent of the long-distance revenues of the

[8] Subsidiaries of AT&T operate local telephone systems supplying over 80 percent of the total telephones installed in the United States, and generating almost 95 percent of total local revenues of the telephone industry.

entire industry. This is to be contrasted with the private line area, where interconnection with AT&T's local facilities was permitted and where other suppliers had made significant penetration of the market.

POTENTIAL IMPACT OF SATELLITE TECHNOLOGY ON THE SUPPLY OF TELECOMMUNICATION SERVICES

Satellite technology introduced a new set of cost conditions in long-distance telecommunications which had significant implications for the market structure of the domestic long-distance telecommunication industry. The primary impact of the new technology was to reduce the significance of economies of scale in long-distance transmission. This change was rooted in two cost characteristics of satellite communication. First, with satellite technology, the cost of communication was independent of distance.[9] Second, the ability of a single satellite to serve a wide geographic area, possibly the entire continental United States, meant that demand sufficient to utilize efficient equipment could be pooled nationwide rather than simply along particular routes linking individual local markets. Given indivisibilities in transmission equipment on the same order as those existing in terrestrial systems, the new capabilities of satellite systems clearly implied a reduction in the relevance of economies of scale in the industry since the market that could be served by any individual piece of equipment would be broadened considerably. This effect would be especially relevant along routes having less concentrated demand. Of course, there also was some change in the nature of the transmission equipment utilized in production. However, the two technologies shared to a great extent the same radio technology, and any change in the extent of indivisibilities appeared to be in the direction of lesser rather than greater economies of scale.[10]

A direct implication of a diminution of the significance of economies of scale was that a greater number of suppliers could operate efficiently on a nationwide basis.[11] Any actual increase in the number of suppliers in the market was likely to be affected by the monopsonistic elements on the demand side of long-distance telecommunications. AT&T, General Telephone and Electronics, Western Union, and the television networks each controlled large blocks of demand and were unlikely to divide these respective demands among more than one supplier. This limitation was especially significant in the case of the

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[9] Even with satellite technology, the independence of cost with distance applies only to a point. The nature of the geostationary orbit utilized for communication satellites allows one satellite to serve any two points within 8,000 miles of each other on the face of the earth. Beyond this distance, service would require the use of two satellites, with a corresponding increase in cost. In domestic telecommunication, this situation results only in the case of certain service between Hawaii and the mainland.

[10] Since satellite technology is new, there exist no operating systems on which to base a cost analysis. However, for an analysis of the cost estimates of the firms involved in the FCC's inquiry, see Richard W. Nelson [1971], pp. 85–111.

[11] The applications filed with the FCC by firms interested in domestic satellite communication suggested that nationwide operations could be established for an investment of as little as $50 million and operated profitably with revenues of $15 million annually. The total market for long-distance services that could be served economically by satellite is considerably smaller than the $ 11.0 billion of total long-distance revenues of the common carriers in 1972, since the latter includes local interconnection and also shorter routes on which satellite technology would not be efficient. However, natural monopoly did not appear to be involved.

telephone companies owing to the size of the demand that they controlled, although it was possible that revised practices regarding interconnection would alter the extent of their control considerably. In any case, in light of the near monopolization of the industry prior to satellite communication, the limits thus imposed did not prevent a significant expansion in the number of firms operating in the industry.

Accompanying the potential increase in the number of firms was a potential increase in the rivalry among suppliers of long-distance telecommunication services. The ability of Western Union and the specialized common carriers to expand the scope of their operations, using the new satellite technology, gave them a greatly enhanced ability to challenge the industry leader. Much more vigorous rivalry thus was possible in the private line market. Especially susceptible was the service to the television networks, where AT&T's almost total penetration had previously been accepted passively by the other telecommunication suppliers. Not so obvious but equally susceptible to increased rivalry was the demand for long-distance telephone service, both on a message and private line basis. Long-distance message telephone service was the monopoly of AT&T prior to 1972, and accordingly no rivalry had existed at all. In the private line area, rivalry had previously been restricted to routes having dense demand, and might be extended considerably under satellite technology.

A corollary of the reduced significance of economies of scale was that nationwide operations could be established with a much smaller total investment than was possible previously. The reduced minimum investment, coupled with the diminished dominance of the market by AT&T that was likely to follow from the increase in the number of firms and rivalry among existing firms, would have the effect of reducing the level of barriers to entry into the industry. This effect would be reflected not only in the initial structure of the industry, after the introduction of satellite technology, but also in the years following the establishment of the initial systems. Thus, in the long run, the introduction of satellite technology also was likely to lead to an increased threat of entry into the industry, raising another potential impact on market structure and behavior.

The emergence of new potential suppliers of domestic, long-distance telecommunication services proposing to establish satellite systems, as well as the decision by existing suppliers to convert to the new technology, was to a great extent a reflection of the change in cost conditions initiated with the new technology. The increase in the number of potential suppliers can be viewed as a market response to reduced barriers to entry, and to the opportunity for additional firms to share in the supply of the domestic, long-distance telecommunications market, without sacrificing efficient production. Of course, changes in the regulatory environment, discussed in the following section, also must be considered in interpreting the increase in the number of potential suppliers. However, in this context, it is important to note that the initial commercial interest in domestic satellite communication was expressed in 1965 and 1966, prior to the liberalization of the FCC's standards as regards entry by specialized common carriers in the private line market.

POTENTIAL ROLE OF REGULATION

The fact that domestic telecommunication was regulated meant that change potentially brought about by the development of satellite technology had to be approved by the FCC before it actually could be effected. The FCC's influence encompassed changes in the number of firms, rivalry among suppliers, and the threat of entry, and would result through application of entry control, policy toward interconnection, and rate regulation.[12]

The FCC's statutory authority over the operations of communication common carriers and over use of the radio spectrum by all nongovernment users gave it effective control over whether any firms would establish satellite communication systems and, if so, how many would do so, who they would be, and what segment of the market each would serve. Entry control could have been administered so as to preclude the use of satellite communication technology altogether, or to ensure that it was introduced only by existing suppliers of long-distance telecommunication services. In the former case, even technical change would have been precluded. In the latter case, technical change could have occurred but the impact on the market structure of domestic telecommunication would have been limited to the possibility of increased rivalry among existing suppliers converting to the new technology. Alternatively, by authorizing entry by new domestic telecommunication firms proposing satellite systems as well as conversion to satellite technology by existing producers, the FCC would permit the development of an increased number of firms in the long-distance market and an increase in rivalry among them.

Entry control also would affect the threat of entry into the industry, though this effect would depend not on the number of firms that the FCC permitted to enter but rather on the manner in which it chose to exercise its authority over entry control. Should the Commission simply grant certificates or construction authorizations to a specified number of satellite applicants, including some new entrants, there would result an increase in the number of firms but no change in the threat of entry facing those that became established. Suppliers of long-distance telecommunications would remain protected against competition by the umbrella of the FCC's entry control as long as subsequent new entrants would have to be able to prove to the Commission that their entry was socially desirable.[13] Alternatively, the FCC could allow the number of firms in the industry to increase simply by abandoning or relaxing significantly its use of entry control so as to permit all interested firms to enter the market. In this case, not only would there result an increase in the number of firms, but those

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[12] The FCC also had authority to regulate the location of the satellites. Given that there are a limited number of "orbital slots" available, the method by which they were allocated could have a significant effect on the evolution of the industry. However, at least initially, the number of slots was more than sufficient to accomodate the satellites of all interested suppliers.

[13] This was a traditional practice in the industry. Under the doctrine of "economic exclusivity," a new supplier would not be granted a certificate or construction authorization unless it could prove (1) that it would generate sufficient revenues to make its operations profitable (i.e., that it was economically viable), and (2) that these revenues would not be gained at the expense of an established supplier. The latter condition clearly is very restrictive, but the former also is difficult to prove for a firm proposing new types of service.

firms would operate under an increased threat of entry posed by the existence of potential entrants who were uninterested or unsuccessful in the first round of establishing satellite communication systems.

Regulation of interconnection is seated in the FCC's authority to regulate the service offerings and tariffs of the local telephone carriers. Liberal rules of interconnection would increase the number of firms that could be expected to enter domestic satellite communication, by reducing the control of the telephone carriers over significant blocks of demand. Of course, the threat of entry into these submarkets, that otherwise would be the protected monopolies of the integrated telephone carriers or their chosen suppliers, also would be increased, opening the way for challenges by new entrants as well as existing telecommunication carriers. Such interconnection by the local telephone companies was essential if nonintegrated firms were to tap a very large part of the long-distance market in challenge to the dominant, integrated producer (AT&T). The protected demand included that of customers requiring telephone, record, and data service on a switched-message basis and also that of customers of leased line service too small to warrant construction of private interconnection facilities. AT&T had an obvious incentive to deny or restrict interconnection with its extensive local telephone network so as to force its customers to utilize its own long-distance facilities. Accordingly, policy in this area was a very relevant force in the development of domestic satellite communication.

The FCC's authority to regulate rates extends to all common carriers and thus potentially to all satellite communication firms except those that lease entire systems to single customers. Rate regulation had a very significant potential impact on the direction in which long-distance telecommunications evolved in response to the development of satellite technology. Maintaining rates at existing levels would have discouraged entry, since new entrants would have been unable to attract customers from the established suppliers by offering reduced cost service. In such a case, there would be less incentive for customers to take the risk of changing suppliers.[14] Of course, given the number of firms entering, price regulation also could undermine the potential price rivalry among suppliers, possibly directing whatever rivalry should remain toward service quality. Moreover, should the FCC maintain prices at established levels, thereby effecting a cartel, any new entry that might occur would tend not to increase competition but rather to create excess capacity, as new firms would enter to share existing markets despite sufficient existing supply. Such a development would be discouraged were established suppliers allowed to cut prices so as to forestall uneconomic entry.

ACTUAL REGULATORY POLICY

The FCC's decision in its domestic satellite communication inquiry, adopted in June 1972, set the course of regulatory policy toward the use of the new technology.[15] Summarized very

[14] Because satellite technology was new, there were risks involved in changing from an existing terrestrial supplier to a satellite supplier. This was especially true for those large customers, such as the television networks, which probably would have to contract for service in advance of construction.

[15] Second Report and Order, FCC Docket No. 16495, June 16, 1972.

briefly, that decision established two broad policies. Under a policy of "affording a reasonable opportunity for entry into the domestic satellite field by qualified applicants," in effect all interested firms meeting certain qualifications as to financial and technical expertise were allowed to establish satellite systems, regardless of the impact on other established suppliers.[16] As to the use of those systems, the FCC indicated its willingness to allow entry even in the long-distance message telephone area, which traditionally had been treated as a natural monopoly, though here the FCC envisioned that market segmentation rather than direct competition would develop.[17] Simultaneously with its ruling on entry, the FCC established a second broad policy under which AT&T and other suppliers of local telephone service would be required to provide interconnection for the long-distance systems of satellite suppliers, under reasonable tariffs, so as to allow the development of competitive supply in the private line area to subscribers of the local telephone systems.

The issue of price competition, which also had very important implications for the development of the industry, was not explicitly treated in the FCC's domestic satellite decision. However, the Commission seemed to carry forward the spirit of the specialized common carrier decision, which it quoted repeatedly. In that earlier decision, it was established that the specialized common carriers would not be protected through the imposition of minimum rates from competition by other specialized carriers or general common carriers. This policy apparently would be continued in domestic satellite communication.

The FCC's decision to allow new firms to enter the long-distance telecommunication field and all firms to utilize satellite technology, and to establish liberal rules of interconnection so as to discourage extension of the local monopoly of the telephone companies into long-distance telecommunication, in effect released the potential forces of change in domestic telecommunications described in the preceding sections of this paper. These potential changes—increased number of suppliers, increased rivalry, and heightened threat of entry—stimulated by the availability of satellite communication technology, would occur simultaneously with changes in market structure resulting from the independent but related growth of the specialized common carriers, which had already begun to establish domestic systems using the existing, terrestrial technology. The latter movement, generally limited to the shorter routes, represents solely a response to conditions of demand and change in the regulatory environment. However, the two channels of influence on market structure are interrelated. Satellite technology greatly enhanced the potential capability of the specialized common carriers, which as a result were likely to incorporate satellites in their operations.

The FCC's domestic satellite communication decision did not go as far in

[16] Some conditions were imposed on individual entrants in an attempt to ensure fair competition. Thus, AT&T and other telephone carriers were precluded from using satellites for private line service for a period of three years. Conditions also were placed on Comsat, although these were lifted in the subsequent Memorandum Opinion and Order on December 21, 1972.

[17] The only applicant proposing long-distance message telephone service was General Telephone and Electronics, which would serve the long-distance needs of its own local subscribers rather than directing this demand through AT&T's long-distance facilities, as previously practiced.

the direction of authorizing change in market structure as was possible. It was implicit in the decision that, with the exception of GT&E's system, which involved only market segmentation, interconnection with local telephone systems to tap switched, message demand would not be permitted. This, in effect, would preclude the development of competition in the largest area of the market, maintaining the existing monopoly of AT&T and the other telephone carriers. Though protection of monopoly in this area has traditionally been based on the presence of natural monopoly conditions, those conditions were clearly evident only in local service. Thus, this important area would remain as it was, marked by technical change within existing market structure.

The interest of AT&T and GT&E in satellite communication raised the issue of cross-subsidization of the long-distance operations of these firms from their protected, monopoly operations in local markets. Under traditional rate-making practices, such cross-subsidization could arise even from a competitive response by AT&T in the long-distance area, which could force it to set long-distance rates at less than required to generate the allowable rate of return on its invested long-distance capital (part of which would be less efficient, terrestrial equipment). In a similar situation, an unregulated supplier facing competitive markets for all of its services would have to accept a diminished profit until it could convert entirely to the new technology. The FCC treated this issue implicitly by imposing conditions on the operations of AT&T and GT&E designed to ensure a fair opportunity for new entrants to compete for private line demand. Further, the philosophy behind the Commission's decision implied an unwillingness to allow cross subsidization to occur. However, an explicit settlement of the issue of cross-subsidization awaited future decisions of the FCC.

EVOLVING STRUCTURE OF DOMESTIC SATELLITE COMMUNICATION

The initial structure of domestic satellite communication, representing the initial reaction of commercial firms to the FCC's 1972 decision, had only begun to emerge as of October 1974, since there is a lag of several years in implementing satellite systems owing to the use of custom-built equipment. Two companies, RCA and Western Union, had begun offering satellite services within the domestic market.[18] Both offered private line service, meeting voice, data, and video demands. Western Union also used its system to support its operations in the area of record communications. Although Western Union's operations represented technical change within its already established domestic telecommunication system, RCA's position in satellite operations reflected the addition of a new competitor in the market.

Several other firms still were in the planning or construction stages of establishing satellite communication systems as of October 1974. One of the proposed systems would be jointly owned by AT&T, GT&E, and Comsat, and would

[18] RCA was the first company to begin offering satellite services in the domestic market, in January 1974. RCA used its own earth terminals but rented satellite circuits on the Canadian domestic satellite, planning to replace the latter after launching its own satellite, which was under construction. Western Union was the first firm to offer satellite service utilizing its own satellites, beginning in July 1974.

be used solely by AT&T and GT&E to support the long-distance message demand of the local telephone systems as well as to provide private line service for those companies' customers. Comsat and IBM had agreed on a joint venture in domestic satellite communication. Finally, Hughes Aircraft (through a subsidiary, National Satellite Corp.) and Fairchild Industries and Western Union International (through a joint venture, American Satellite Corp.) also had satellite systems under review.[19]

The initial structure of domestic satellite communication thus would have at least two and possibly up to seven firms selling satellite communication services. The impact of satellite technology on the submarket for long-distance, message telephone demand would be to give GT&E a role in that area but not to increase competition. Similarly, switched record communication would still be served by Western Union. However, all of the satellite communication firms would be represented in the private line market, offering voice, data, and television transmission, and in this area there would definitely result an increase in the number of suppliers in addition to technical change.

Arrangements for interconnection with the local telephone systems had not been settled as of October 1974. AT&T protested having to supply interconnection giving long-distance private line customers of other firms access to switched, local service, as required in a FCC ruling in 1974. This action of the Commission had been appealed to the courts, where it was pending, and served to highlight the importance of government action in the area of interconnection.

The extent of vertical integration in ownership of the satellite systems in operation or under construction was varied. Thus, the proposal of AT&T, GT&E, and Comsat involved dividing ownership of the satellite and earth terminal segments of the satellite system between independent firms, but integrating ownership of the terminal segment with the local telephone systems. RCA's interim use of the Canadian domestic satellite for satellite circuits and AT&T for interconnection produced a case where three independent entities were involved in providing end-to-end service. Finally, Western Union provided some integrated end-to-end services using solely its own equipment.

Though the structural impact of satellite technology was just beginning to unfold in 1974, some competitive effects had already appeared. Western Union and RCA filed tariffs for coast-to-coast, private line circuits that cut AT&T's charges by about one-half. AT&T, responding to the increased rivalry from specialized common carriers, including satellite firms, filed a revised tariff structure for its entire private line service. Departing from the historical nationwide rate averaging, AT&T proposed to set its rates more in line with costs by lowering its charges to customers along high-density routes, raising those on all others. This response by AT&T also raised the question of cross-subsidization

[19] The status of these systems varied as of October 1974. AT&T and GT&E had received authorizations for independent systems in September 1973, but their joint venture had not received FCC approval by October 1974. The system proposed by Comsat and IBM also had not received approval, and additionally had been challenged on antitrust grounds by the FTC. The status of the systems proposed by National Satellite and American Satellite was unclear, although both had received approval by the Commission. National Satellite, which originally had agreed to provide satellite circuits to GT&E as part of its system, had been adversely affected by GT&E's decision to merge its satellite operations with AT&T.

as a practical issue. It remains to be settled by the Commission.

The impending change in market structure following the introduction of satellite technology also has had an effect on the program distribution segment of private line demand. No change of supplier had resulted as of October 1974, but negotiations between the networks, their existing supplier (AT&T) and potential suppliers among the satellite applicants had been underway for several years. A new tariff by AT&T, in 1974, lowered significantly the cost of program distribution to the three networks, again apparently the direct result of the new competition that followed the introduction of satellite technology in the domestic market.

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Duke Law Journal

VOLUME 1975 | MAY | NUMBER 2

FCC REGULATION OF THE TELECOMMUNICATIONS PRESS†

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OUTLINE

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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,

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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:
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> "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 Act[4] 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

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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

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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

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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 Reich[22] 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-

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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

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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]

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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.

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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

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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 Act[41] 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-

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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 concommitant 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

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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

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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 Q.J. 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 Congress[58] 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,
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> (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.

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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

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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-

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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.J., 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

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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-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). 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 Lerner[86]—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

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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

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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. (Allin'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 appraoch.

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, *Time* and *Newsweek* concerning a recent article coverage on the Administration. (Log 1688)	October 14
H. Klein	President's request for letters to the editor of *Newsweek* 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

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 [*sic*] appearance on the "Merv Griffin Show."	October 8
A. Butterfield	President's request for a report what [*sic*] 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 *Newsweek's* 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 accessability [*sic*] to the President. (Log 1404)	September 29
H. Klein Ron Ziegler	President's request that you attack *Life* Magazine's 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

Tuesday, 15 February, 2000, 09:01 GMT

Trustbusters: A history lesson

By BBC News Online's Steve Schifferes

In the US, the law is one of the main avenues in which social conflicts take place - and get resolved.

Both businesses and individuals are far more likely to revert to the law to settle disputes.

One consequence of this is that the US has some of the strongest laws concerning competition of any industrialised country.

Under laws dating back to the 1890s, a conspiracy in restraint of trade is a criminal offence - and companies are treated like individuals, with their bosses personally responsible for their firms' actions.

But the strength of anti-trust laws is also a reflection of the strength of business interests in a country which lacked other powerful groups, like the political elites which existed in Europe.

The anti-trust laws currently struggling to regulate and control the excesses of big business are a product of 100 years of conflict.

Milestones in US Anti Trust History

1867: formation of Standard Oil
1890: Sherman Anti Trust Act
1902 Northern Securities case
1911: Standard Oil case
1914: Federal Trade Commission set up
1934: Securities and Exchange Commission set up
1969-1982: IBM case
1974-1984: AT&T case
1998- : Microsoft:

The Muckrakers and the Trusts

Internet links:

US Department of Justice - Antitrust division
Antitrust.org - online academic resources on antitrust issues
OECD competition law and policy division
EU Competition Directorate
Federal Trade Commission

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Attitudes re: competition
see also Danielian

In the late 19th Century, the booming US economy entered a period of rapid consolidation.

"Trusts" (or holding companies) were created to bring together all the firms in a particular industry - The Sugar Trust, The Tobacco Trust, The Steel Trust. These trusts were vast enterprises that dominated their industry and in some cases production worldwide.

No trust was bigger than Standard Oil, owned by John D. Rockefeller.

In 1910 Mr Rockefeller's net worth was equal to nearly 2.5% of the whole US economy, the equivalent of nearly $250bn in today's terms, or at least twice as much as Bill Gates.

Practices banned by US antitrust law

Monopolies "in restraint of trade"
"Predatory pricing" at below cost to drive out competitors
"Price-fixing", an agreement among several competitors to fix prices or restrict output
"illegal business practices" including restriction on opening hours, resale price maintenance, and tie-in sales

The opposition to the trusts, particularly among farmers who protested against the high cost of rail transport to take their products to the cities, led to the passage of the first anti-trust law - The Sherman Act - in 1890.

But it was more than 20 years later, after a campaign led by 'muckraking' journalists, when Standard Oil was brought before the courts.

The historic 1911 decision broke up Rockefeller's company into six main entities, including Standard Oil of New Jersey (Esso, now Exxon), Standard Oil of New York (Socony, now Mobil), Standard Oil of Ohio, and Standard Oil of Indiana (now Amoco, part of BP) and Standard Oil of California (now Chevron) - and opened the way for new entrants like Gulf and Texaco, which discovered oil in Texas.

But in the oil business even the "Seven

Sisters" turned out be marriage prospects.

First Chevron acquired Gulf in 1984 in what was then the largest corporate merger in US history.

Then, in an ironic twist, the 1990s has seen the oil industry come back together, with Exxon merging with Mobil, another part of the old Standard Oil empire, to form a company twice as big as its nearest rival - BP Amoco, which also consists of two old Standard Oil companies (Amoco and Standard Oil of Ohio) and has been trying to merge with a third (Arco, formerly Atlantic Petroleum of Pennsylvania).

The three big oil companies now control almost as much of the market as Rockefeller did.

But the blocking of the deal to give BP Amoco control of America's largest oil field in Alaska, by acquiring Arco, shows that a backlash is beginning to bite.

The New Deal's ambiguous legacy

Trust busting went out of fashion in the middle years of the century.

The New Deal encouraged big companies to combine in order to boost prices and output, although it did pass legislation forbidding holding companies of the sort that had created the early trusts.

The belief that big was beautiful in the corporate sector was given another boost by America's experience in World War II, when it was the big companies like Ford, GM and GE that were seen to have helped win the war by their extraordinary increase in wartime production.

By the 1950s, the US Secretary of Defence, a former GM boss, could say "what was good for GM was good for the United States".

But by the l960s, the change in the political climate, with the turmoil of the Vietnam War and the civil rights movements, opened the way for a new round of government trust-busting.

Target: Big Blue and Ma Bell

This time, the targets were two of America's biggest companies - IBM and AT&T.

IBM, nicknamed Big Blue, was the technology colossus of its day with its mainframes dominating the world of computers before the introduction of the PC.

AT&T, Ma Bell, was the monopoly telephone supplier for almost every household in America.

But the two cases had very different outcomes.

The goverment's slow-moving case against IBM never made much headway before it was dismissed in 1982.

By that time IBM was under threat from personal computers and networked office systems. The whole case is cited by those who say there is no point in the government intervening in antitrust cases, because technology changes too fast.

But the case of AT&T might lead to the opposition conclusion.

Two years after the IBM case collapsed the US government succeeded in breaking up the telephone monopoly.

Under court supervision, seven regional telephone companies - so called "Baby Bells" - were set up to provide local telephone services.

AT&T became the long-distance operator and soon faced competition from Sprint and MCI - now part of WorldCom

The spur of competition led to a modernisation of the sector -which has become one of the most dynamic parts of the US economy.

But the seven "Baby Bells" have now

become just three giant telecoms corporations, as Congress modified the law to allow local companies and the long-distance operators to compete with each other.

Lessons

The anti-trust legacy in the United States is ambiguous.

Although seemingly tough laws have been passed, they have been enforced only sporadically.

Political fashion has driven many enforcement actions.

And even when companies have been prosecuted, there have been very different outcomes to the cases.

In many cases the remedies have actually increased the power of companies in the long-run by legitimising the regulation of their industry.

The US model has been widely copied in other countries, as diverse as Japan, Mexico, and Poland.

But outcomes have varied enormously, with companies often able to bend local anti-trust laws to their advantage.

That demonstrates once again that it is not the letter of the law, but the social context, that determines how it is enforced in practice.

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Antitrust

From Wikipedia, the free encyclopedia

The neutrality of this article is disputed.
Please see the discussion on the talk page.

Antitrust laws, or **competition laws**, are laws which prohibit anti-competitive behavior and unfair business practices. The laws make illegal certain practices deemed to hurt businesses or consumers or both, or generally to violate standards of ethical behavior. Government agencies known as competition regulators regulate antitrust laws, and may also be responsible for regulating related laws dealing with consumer protection.

The term "antitrust" derives from the U.S. law which was originally formulated to combat "business trusts", now more commonly known as cartels. Other countries use the term "competition law". Many countries including most of the Western world have antitrust laws of some form. For example the European Union has its own competition law.

Contents

Prohibited anti-competitive behavior

A business with a monopoly over certain products or services may be in violation of antitrust laws if it has abused its dominant position or market power. Although not all anti-competitive behavior which is subject to antitrust laws involve illegal cartels or trusts, the following types of activity are generally prohibited.

- Bid rigging - A form of price fixing and market allocation, and involves an agreement in which one party of a group of bidders will be designated to win the bid
- Predatory pricing - The practice of a firm selling a product at very low price with the intent of driving competitors out of the market, or create a barrier to entry into the market for potential new competitors
- Price fixing - An agreement between business competitors selling the same product or service regarding its pricing
- Tying - The practice of making the sale of one good conditional on the purchase of a second distinctive good
- Vendor lock-in - Is a situation in which a customer is so dependent on a vendor for products and services that he or she cannot move to another vendor without substantial switching costs, real and/or perceived
- Geographic allocation - An agreement between competitors not to compete within each other's geographic territories.
- Walker Process fraud - Illegal monopolization through the maintenance and enforcement of a patent obtained via fraud on the Patent Office (the term comes from the Supreme Court case Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965).

Consumer protection

Consumer protection laws seek to regulate certain aspects of the commercial relationship between consumers and business, such as by requiring minimum standards of product quality, requiring the disclosure of certain details about a product or service (e.g., with regard to cost, or implied warranties), or prescribing financial compensation for product liability. Consumer protection laws are distinct from antitrust. Some consumer protection laws are enforced by the U.S. Federal Trade Commission, which also has antitrust responsibilities. However, many competition agencies -- including the Justice Department antitrust division and the European Commission Directorate General for competition -- lack authority over consumer protection.

Rationale

Antitrust laws prohibit agreements in restraint of trade, monopolization and attempted monopolization, anticompetitive mergers and tie-in schemes, and, in some circumstances, price discrimination in the sale of commodities.

Efficiency-oriented economists reject the goal of competition and instead argue that antitrust legislation should be changed to primarily benefit consumers. No Congress or administration has supported this position. These economists largely ignore the political issues that motivated the laws in the first place.

Anticompetitive agreements among competitors, such as price fixing and customer and market allocation agreements, are typical types of restraints of trade proscribed by the antitrust laws. These type of conspiracies are considered pernicious to competition and are generally proscribed outright by the antitrust laws. Resale price maintenance by manufacturers is another form of agreement in restraint of trade. Other agreements that may have an impact on competition are generally evaluated using a balancing test, under which legality depends on the overall effect of the agreement.

Monopolization and attempted monopolization are offenses that may be committed by an individual firm, even without an agreement with any other enterprise. Unreasonable exclusionary practices that serve to entrench or create monopoly power can therefore be unlawful. Allegations of predatory pricing by large companies can be the basis for a monopolization claim, but it is difficult to establish the required elements of proof. Large companies with huge cash reserves and large lines of credit can stifle competition by engaging in predatory pricing; that is, by selling their products and services at a loss for a time, in order to force their smaller competitors out of business. With no competition, they are then free to consolidate control of the industry and charge whatever prices they wish. At this point, there is also little motivation for investing in further technological research, since there are no competitors left to gain an advantage over.

High barriers to entry such as large upfront investment, notably named sunk costs, requirements in infrastructure and exclusive agreements with distributors, customers, and wholesalers ensure that it will be difficult for any new competitors to enter the market, and that if any do, the trust will have ample advance warning and time in which to either buy the competitor out, or engage in its own research and return to predatory pricing long enough to force the competitor out of business.

From an economics perspective, the relatively recent industrial organization research has focused on construction of microeconomic models that predict and/or explain the prevelance of imperfectly competitive markets and deviations from competitive behavior, partly as a response to the criticisms of antitrust laws and policies by the Chicago School and by members of the law and economics school of thought.

Criticism

There are two main kinds of monopolies: de jure monoplies, which are those that are protected from competition by government actions and de facto monopolies which are not protected by law from competition and are simply the only supplier of a good or service. Advocates of laissez-faire capitalism advocate that the only type of monopoly that should be broken up is a coercive monopoly, which is the persistent, exclusive control of a vitally needed resource, good, or service such that the community is at the mercy of the controller. There are no suppliers of the same or substitute goods to which the consumer can turn. In such a monopoly, the monopolist is able to make pricing and production decisions without an eye on competitive market forces and is able to curtail production to price gouge consumers. Laissez-faire advocates argue that such a monopoly can only come about through the use of physical coercion or fraudulent means by the corporation or by government intervention and that there is no case of a coercive monopoly ever existing that was not the result of projectionist intervention.

Free market economist Milton Friedman states that he initially agreed with the underlying principles of antitrust laws (breaking up monopolies and oligopolies and promoting more competition), but came to the conclusion that they do more harm than good. [1]

Critics also argue that the empirical evidence shows that "predatory pricing" does not work in practice, and is better defeated by a truly free market than by anti-trust laws (see Criticism of the theory of predatory pricing).

Thomas Sowell argues that even if a superior business drives out a competitor, it doesn't follow that competition has ended:

> In short, the financial demise of a competitor is not the same as getting rid of competition. The courts have long paid lip service to the distinction that economists make between competition — a set of economic conditions — and existing competitors, though it is hard to see how much difference that has made in judicial decisions. Too often, it seems, if you have hurt competitors, then you have hurt competition, as far as the judges are concerned.[2]

Alan Greenspan argues that the very existence of antitrust laws discourages businessmen from some activities that might be socially useful out of fear that their business actions will be determined illegal and dismantled by government. In his essay entitled *Antitrust*, he says: "No one will ever know what new products, processes, machines, and cost-saving mergers failed to come into existence, killed by the Sherman Act before they were born. No one can ever compute the price that all of us have paid for that Act which, by inducing less effective use of capital, has kept our standard of living lower than would otherwise have been possible." Those, like Greenspan, who oppose antitrust tend not to support competition as an end in itself but for its results --low prices. As long as a monopoly is not a coercive monopoly where a firm is securely insulated from *potential* competition, it is argued that the firm must keep prices low in order to discourage competition from arising. Hence, legal action is uncalled for, and wrongly harms the firm and consumers. [3]

Proponents of the Chicago school of economics are generally suspicious (and critical) of government intervention in the economy, including antitrust laws and competition policies. Judge Robert Bork's writings on antitrust law, along with those of Richard Posner and other law and economics thinkers, were heavily influential in causing a shift in the U.S. Supreme Court's approach to antitrust laws since the 1970s.

Thomas DiLorenzo found that the "trusts" of the late 19th century were dropping their prices faster than the rest of the economy, and holds that they were not monopolists at all.[4]

History of antitrust in the United States

The antitrust laws comprise what the Supreme Court calls a "charter of freedom," designed to protect the core republican values regarding free enterprise in America. The main goal was never to protect consumers, but to prohibit the use of power to control the marketplace. Although "trust" had a technical legal meaning, the word was commonly used to denote big business, especially a large, growing manufacturing conglomerate of the sort that suddenly emerged in great numbers in the 1880s and 1890s. Indeed, at this time hundreds of small short-line railroads were being bought up and consolidated into giant systems. (Separate laws and policies emerged regarding railroads and financial concerns such as banks and insurance companies.) Republicanism required free competition and the opportunity for Americans to build their own businesses without being forced to sell out to an economic colossus. As Senator John Sherman put it, "If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life." The Sherman Antitrust Act passed Congress almost unanimously in 1890 and remains the core of antitrust policy. The Act makes it illegal to try to restrain trade, or to form a monopoly. It gives the Justice Department the mandate to go to federal court for orders to stop illegal behavior or to impose remedies.

Business consolidation roared along in the 1890s and 1900s. As a result the Progressive Era put anti-trust high on the agenda. President Theodore Roosevelt sued 45 companies under the Sherman Act, while William Howard Taft sued 75. In 1902, Roosevelt stopped the formation of the Northern Securities Company which threatened to monopolize transportation in the northwest.

The most notorious of the trusts was the Standard Oil Company; John D. Rockefeller in the 1870s and 1880s had used economic threats against competitors and secret rebate deals with railroads to build what was called a monopoly in the oil business, although in fact he always had nominal competition. In 1911 the Supreme Court agreed that in recent years (1900-1904) Standard had violated the Sherman Act. It broke the monopoly into three dozen separate companies that competed with one another, including Standard Oil of New Jersey (later known as Exxon and now ExxonMobil), Standard Oil of Indiana (Amoco), Standard Oil Company of New York (Mobil, again, later merged with Exxon to form ExxonMobil), of California (Chevron), and so on. In approving the breakup the Supreme Court added the "rule of reason": not all big companies, and not all monopolies, are evil, and the courts are to make that decision (not the executive branch). To be harmful a trust had to somehow damage the economic environment of its competitors.

Roosevelt for his part distinguished between "good trusts" and bad ones allegedly on the basis of their contribution to the economy. Such arbitrariness gives business leaders reason to believe that they will be prosecuted if they do not cultivate political support for their business.

United States Steel Corporation, which was much larger than Standard Oil, won its antitrust suit in 1920 despite never having delivered the benefits to consumers that Standard Oil did. In fact it lobbied for tariff protection that reduced competition and so contending that it was one of the "good trusts" that benefitted the economy is somewhat doubtful. Likewise International Harvester survived its court test, while other trusts were broken up in tobacco, meatpacking, and bathtub fixtures. Over the years hundreds of executives of competing companies who met together illegally to fix prices went to federal prison.

One problem under the Sherman Act was that businessmen did not know what was allowed or not. Therefore in 1914 Congress passed the Clayton Act which prohibited specific business actions (such as price discrimination, tie-in sales, exclusive dealership agreements, mergers, acquisitions, and interlocking corporate directorships) if they substantially lessened competition. At the same time Congress established the Federal Trade Commission (FTC), whose legal and business experts could force business to agree to "consent decrees" which provided an alternative mechanism to police anti-trust. However the law is still very unclear. For instance there is no clear definition of what constitutes a "market". In the words of Isabel Paterson "As freak legislation, the antitrust laws stand alone. Nobody knows what it is they forbid.".

America adjusted to bigness after 1910. Henry Ford dominated auto manufacturing, but he built millions of cheap cars that put America on wheels, and at the same time lowered prices, raised wages, and promoted efficiency. Ford became as much of a popular hero as Rockefeller had been a villain. Welfare capitalism made large companies an attractive place to work; new career paths opened up in middle management; local suppliers discovered that big corporations were big purchasers. Talk of trust busting faded away. In the 1920s and 1930s the threat to the free enterprise system seemed to come from unrestricted cutthroat competition, which drove down prices and profits and made for inefficiency. Under the leadership of Herbert Hoover, the government in the 1920s promoted business cooperation, fostered the creation of self-policing trade associations, and made the FTC an ally of respectable business. This reduced competition and may have helped lead to the Great Depression. During the New Deal, likewise, attempts were made to stop cutthroat competition, attempts which appeared very similar to cartelisation which would be illegal under antitrust laws if attempted by someone other than government. The National Recovery Act (NRA) was a short-lived program in 1933-35 designed to strengthen trade associations, and raise prices, profits and wages at the same time. The Robinson-Patman Act of 1936 sought to protect local retailers against the onslaught of the more efficient chain stores, by making it illegal to discount prices. To control big business the New Deal policy makers preferred federal and state regulation--controlling the rates and telephone services provided by American Telephone & Telegraph Company (AT&T), for example--and by building up countervailing power in the form of labor unions.

By the 1970s fears of "cutthroat" competition had been displaced by confidence that a fully competitive marketplace produced fair returns to everyone. The fear was that monopoly made for higher prices, less production, inefficiency and less prosperity for all. As unions faded in strength, the government paid much more attention to the damages that unfair competition could cause to consumers, especially in terms of higher prices, poorer service, and restricted choice. However there is no evidence that antitrust prosecutions were or are dictated by the damage to consumers. It is not the policy of the antitrust division to estimate the damage to consumers and then prioritise prosecutions on the basis of that damage. In 1982 the Reagan administration used the Sherman Act to break up AT&T into one long-distance company and seven regional "Baby Bells," arguing that competition should replace monopoly for the benefit of consumers and the economy as a whole. The pace of business takeovers quickened in the 1990s, but whenever one large corporation sought to acquire another it first had to obtain the approval of either the FTC or the Justice Department. Often the government demanded that certain subsidiaries be sold, so that the new company would not monopolize a particular geographical market. In 1999 a coalition of 19 states and the federal Justice Department sued Microsoft. A highly publicized trial found that Microsoft had strong-armed many companies in an attempt to prevent competition from the Netscape browser. In 2000 the trial court ordered Microsoft split in two to punish it, and prevent it from future misbehavior. In his defense, CEO Bill Gates argued that Microsoft always worked on behalf of the consumer, and that splitting the company would diminish efficiency and slow the pace of software development.

Exemptions to Antitrust Laws

Labor unions

Public utilities - electric, gas, and telephone companies

Professional baseball

Cooperative activities among U.S. exporters

Hospitals

Public transit and water systems

Suppliers of military equipment

Joint publishing arrangements in a single city by two or more newspapers

See also

- AFL-NFL Merger
- Bid rigging
- Chicago school (economics)
- Commissioner Andrew L. Harris
- Coercive monopoly
- Competition policy
- Concentration ratio
- Consumer protection
- Competition regulator
- Contestable market
- Criminal Executives, List of Corporate Executives Charged with Crimes
- DRAM price fixing
- Duopoly
- Economic regulator
- EU competition law
- Federal Trade Commission
- Government-granted monopoly and government monopoly, the opposite of competition law
- Herfindahl index
- Hart-Scott-Rodino Antitrust Improvements Act
- Law and economics
- Limit price
- Market anomaly
- Market concentration
- Market dominance strategies
- Market failure
- Market power
- Market share
- Mergers and acquisitions
- Merger control
- Monopoly
- Monopsony
- Monopolization
- Ordoliberalism
- Patent pool
- Price fixing
- Product bundling
- Resale price maintenance
- Robinson-Patman Act
- SSNIP Test
- Trade Practices Act 1974 - Australian antitrust legislation
- Trust (disambiguation)
- Trust-busting
- Unfair competition
- U.S. Industrial Commission of 1898
- United States v. Continental Can Co.
- United States v. E. C. Knight Co.
- United States v. Microsoft

External links

Governmental

- United States Department of Justice Antitrust Division homepage (http://www.usdoj.gov/atr/)
- United States Federal Trade Commission: Antitrust and Competition division (http://www.ftc.gov/ftc/antitrust.htm)
- Official European Union Antitrust site (http://ec.europa.eu/comm/competition/index_en.html)
- Canadian Competition Bureau (http://www.competitionbureau.gc.ca/)
- Other (http://www.internationalcompetitionnetwork.org/members.html)

Academic

- *Antitrust Policy As Corporate Welfare* by Clyde Wayne Crews Jr (http://www.cei.org/pdf/1615.pdf) "It is hoped that policymakers will come to recognize that government cannot protect the public from monopoly power, because it is the source of such power."
- Cornell University review of antitrust law (http://straylight.law.cornell.edu/topics/antitrust.html)
- *The Protectionist Roots of Antitrust* by Donald J. Boudreaux and Thomas J. DiLorenzo

(http://www.mises.org/journals/rae/pdf/rae6_2_3.pdf) "antitrust was a protectionist institution from the very beginning; there never was a "golden age of antitrust" besieged by rampant cartelization"

- Institute of Mergers, Acquisitions and Alliances (MANDA) M&A (http://www.manda-institute.org) An academic research institute on mergers & acquisitions, including antitrust issues

Other

- Antitrust Review (http://www.antitrustreview.com/) , a group blog
- The American Antitrust Institute (http://www.antitrustinstitute.org/)
- International Competition Network (http://www.internationalcompetitionnetwork.org/)
- OECD Competition Home Page (http://www.oecd.org/competition)
- German antitrust law (http://www.antitrust.de/)
- Articles on Austrian antitrust law (http://www.dbj.co.at/phps/start.php?noie=1&lang=en&content=publikationen_liste.php&fach_nr=7&navi=publikationen)
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- *Antitrust* (http://www.econlib.org/library/Enc/Antitrust.html) by Fred S. McChesney - "The popular view that cartels and monopolies were rampant at the turn of the century now seems incorrect to most economists."
- The Antitrust Monitor (http://www.diaz-law.com/) , a law blog

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The Protectionist Roots of Antitrust

Donald J. Boudreaux and Thomas J. DiLorenzo*

I. Introduction

Economists and legal scholars have studied the effects of antitrust policy for decades, but it is only within the past several years that the origins of antitrust have received much scholarly attention. In *The Origin of the Sherman Act* (1985) George Stigler was among the first to reexamine "the problem of why the United States introduced an affirmative competition policy." He tested an agrarian interest hypothesis—that "the Republicans passed the Sherman Act to head off the agrarian . . . movements" for price controls and other interventions—against a self-interest hypothesis that small businesses wanted a law to protect them from their larger, more efficient rivals. He found little, if any, empirical support for either hypothesis.

DiLorenzo (1985) examined the origins of the Sherman Act from a public choice or interest-group perspective and provided evidence that industries accused of being monopolized in the late 1880s were in fact dropping prices and expanding output faster than the rest of the economy. The Sherman Act might have been a political smokescreen to pave the way for the McKinley tariff, which was passed just four months after the Sherman Act and was sponsored in the U.S. Senate by Senator John Sherman himself.

In an early analysis of the origins of antitrust, Robert Bork (1966) claimed to have found evidence in the *Congressional Record* that the

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The Review of Austrian Economics Vol.6, No. 2 (1993): 81–96
ISSN 0889-3047

"legislative intent" of Congress in passing the Sherman Act was consumer protection.

The public interest interpretation of the origins of antitrust—that the law was passed as a benevolent response by Congress to a form of market failure—is by far the predominant view among economists and legal scholars. This viewpoint is so widely believed that attempts to explore the alternative, self-interest hypothesis are sometimes met with indignation and dismissed out of hand. For example, when Robert Bradley recently (1990, p. 737) explored the self-interest hypothesis he was chastised by a referee for his "cynical explanation of the passage of the Sherman Act, a view not shared by most contemporary economists." Similar statements were once made about law and economics, public choice, and many other out-of-the-mainstream research programs.

Despite the predominance of the public-interest view of the origins of antitrust, there are reasons to be skeptical of this view. This paper reexamines the genuine roots of antitrust—the state-level antitrust laws that were enacted several years prior to the 1890 Sherman Act. In the mid 1880s, strong political movements emerged at the state level of government in favor of "anti-monopoly" legislation that eventually took the form of antitrust statutes. Although some analysts, such as Stigler (1985) and Thorelli (1955), have noted the existence of these state statutes, no one to our knowledge has thoroughly investigated the possible relation between these movements and the Sherman Act.

The Sherman Act was not enacted in a Washington, D.C. political vacuum. It emanated from the same economic and political forces that gave rise to state antitrust legislation. It is particularly relevant that in 1890 state legislatures still directly elected U.S. Senators, and that the Sherman Act was introduced in the U.S. Senate, not the House.

Section II discusses the economic and political forces at work during the emergence of state antitrust legislation in the late-nineteenth century by focussing on one state, Missouri, which was representative of the states that enacted antitrust legislation during this period. With the exception of Maine, all states that enacted antitrust statutes in 1889 were located in or near the Mississippi valley (see appendix table 1). Section III contains a summary.

II.
Interest-Group Politics and the Missouri Antitrust Law

Close study of late nineteenth-century politics in Missouri suggest that farmers there were a major special interest behind state antitrust legislation. There is evidence that farmers did indeed view large-scale enterprise as a competitive threat and sought antitrust laws to protect them from competition.

The Missouri Farm Lobby

The "Farmer's Alliance" was the most powerful political coalition in Missouri in the years preceding the enactment of the 1889 antitrust law. Democrats affiliated with the Alliance dominated the 1888 state elections. The Democrats were very farm conscious. There were farmer-lawyers, farmer-bankers, farmer-teachers, farmer-preachers, farmer-editors, and farmer-druggists. The Alliance confronted candidates for the state legislature with a card containing the following pledge: "I pledge myself to work and vote for the [Farmer's Alliance's] demands irrespective of party caucus or action" (Drew 1891, p. 303). The pledge card was widely distributed to farmers who were instructed: "If any candidate refuses to sign . . . vote against him and use your influence to elect those who sign, irrespective of party."

Of the 174 state senators and representatives, 140 signed the pledge, as did all of the congressmen-elect headed for Washington and the winners of all three statewide races in that year.

Antitrust and the Missouri Farm Lobby

One reason Missouri farmers wanted an antitrust law was that many of them were being *under*priced by larger, more-efficient farms. The Farmer's Alliance repeatedly warned of the dangers of "the land concentrating in the hands of capitalists" (Clevenger 1940, chap. VI). For example, at a 1889 meeting of the National Farmers Alliance in St. Louis, a Declaration was issued that first urged "care for the widows and . . . orphans," and then called for legislation to "suppress . . . all unhealthy rivalry" (Drew 1891, p. 786). Farmers were bitter about the low and falling agricultural prices, and they blamed the trusts for the decline in their economic position. They complained of "our depressed condition" because of the fact that "the price of the farmers' grain is below the cost of production." As David D. March wrote in his *History of Missouri* (1971, p. 1169), "Just as the low price of raw cotton spurred the expansion of the Southern Alliance, so low grain prices in the late 1880s caused thousands of farmers in the wheat belt . . . to join the National Farmer's Alliance."

To the extent that agricultural prices were falling, the notion that the Missouri antitrust law enhanced consumer welfare is suspect. Missouri farmers were an appropriate special-interest group to launch an antitrust policy on grounds of self-interest if it could be expected that an "antitrust" statute would be enforced and interpreted as an anti-*bigness* statute to protect some producers from the competition of larger and more-efficient rivals.

III.
Missouri Agriculture in the Late-Nineteenth Century: Monopoly or Competition?

If the consumer-welfare interpretation of antitrust legislation explains Missouri's experience with such laws, the following trends should be evident in the economic data on Missouri's agricultural sector for the 1870s and 1880s: (1) the real price of farm outputs should have been rising (or not falling); (2) the volume of farm outputs should have been falling (or not rising); and/or (3) the real price of farm inputs should have been rising.

However, if the real prices of farm outputs and inputs fell—and if the volume of output rose—the protests against supposed monopolization are inconsistent with what was actually happening in Missouri's agricultural economy. Indeed, if real prices decreased and outputs increased, the cries against monopolization are more plausibly interpreted as rent-seeking attempts of less-efficient producers to protect their markets from the increasing competition of more-efficient producers.

During the 1880s, cattle was Missouri's single largest agricultural output in terms of percentage of the state's agricultural gross output (Klepper 1978, p. 320). In 1889, nearly one-quarter of all agricultural output in Missouri was cattle production. Hog production was a close second, accounting for more than 20 percent of Missouri's agricultural gross product. Wheat was the state's third-largest agricultural product, representing more than 13 percent of Missouri's agricultural gross product in 1889. Cattle, hogs, and wheat together account for almost 60 percent of Missouri's total agricultural production in 1889.[1] Appendix table 2 shows the market value of Missouri-raised cattle and hogs per head from 1879 through 1891, as well as the price of wheat in Missouri for these years.

[1]Missouri was the fourth largest cattle-producing state in the United States (behind Texas, Iowa, and Kansas), the nation's third largest hog-producing state (behind, Iowa and Illinois), and the nation's fifth largest wheat producer (behind California, Illinois, Indiana, and Ohio). See *Abstract of the Eleventh Census: 1890*, U.S. Bureau of the Census (Washington, D.C.: U.S. Government Printing Office, 1896), Table 4 and Table 7.

Cattle

Although a simple comparison of, say, the 1879 per-head value of Missouri cattle with the 1889 value shows a slight increase, a different and more significant picture emerges by examining the trend of cattle values from the mid 1880s to the end of the decade. Compared to the peak value in 1884, the per-head value of cattle in Missouri in 1889 was 28.8 percent lower (and it was to fall even further by 1890). Looked at another way, the average value of cattle per head for the years 1887–89 was 18.8 percent less than was the average value per head for the years 1882–84. This decline in cattle values—which affected all the major cattle-producing states—was accompanied by a steady increase during the 1880s of the quantity of cattle entering into the gross national product. Measured in pounds of live weight, cattle supply during the 1880s increased by about 50 percent for the United States as a whole, while the price per hundredweight received by cattlemen in the United States fell from an average of $5.69 in 1880 to $3.86 in 1890–a 15 percent decrease.

This increased supply and reduced price of cattle resulted in *lower* prices of beef (and beef by products) for final consumers. According to economic historian Mary Yeager (1981, p. 70), the average price of beef tenderloins in the United States fell nearly 38 percent between 1883 and 1889.

Hogs

As with cattle, the market value of hogs in Missouri peaked in the early-to-mid 1880s. The 1889 value of a Missouri-raised hog was approximately 19 percent lower than it was six years earlier. The average value of hogs in the state for the 1887–89 period was more than 15 percent lower than it was in 1882–84.

The nationwide output of hogs and hog products increased during the 1880s while the price per hundredweight of hogs fell precipitously—from $6.07 in 1880 to $3.60 in 1890—a decrease of more than 40 percent.[2]

Wheat

The trend of prices for Missouri wheat was also downward during the 1880s, although as in much of the midwest during the late nineteenth century, wheat prices in Missouri fluctuated a good deal.[3]

[2]The 1870 price per hundredweight of hogs in the United States was, at $6.80, even higher than it was in 1880.

[3]McGuire (1981) ranked 14 states according to the extent of variability from year-to-year in their wheat prices. Missouri is ranked eighth.

The 1889 price of wheat in Missouri was 34.7 percent lower than it was a decade earlier. The average price of wheat in Missouri during the 1882–84 period was 97 cents per bushel as compared to 72 per cents per bushel on average for the 1887–89 years. The latter price is almost 27 percent lower than the price of wheat earlier in the 1880s.

These data do not support the notion that Missouri agriculture was becoming monopolized during the 1880s. Moreover, it is doubtful that "predatory pricing" was taking place, for prices fell for the entire decade (and, indeed, since 1870). Predatory pricing for that length of time would be irrational.

Farm-input costs

The farm input that first comes to mind as possibly having been monopolized in the late nineteenth century is transportation by railroad. Although rail rates did fluctuate over time[4]—and varied from region to region and from shipper to shipper—there is broad agreement among economic historians that railroad rates fell dramatically during the several decades following the Civil War (North 1966, pp. 139–40). According to Stigler: "[a]verage railroad freight charges per ton mile had fallen by 1887 to 54 percent of the 1873 level, with all lines in both the eastern and western regions showing similar declines" (1885, p. 2). Henry Varnum Poor found that railroad rates fell from an average charge per ton-mile of $2.90 in 1865 to $0.63 in 1885—a rate decrease of over 78 percent.[5]

Consistent with the significant railroad-rate reduction was the equally significant increase in the quantity of rail services during the latter part of the nineteenth century. According to Poor, total ton-miles carried by U.S. railroads increased by 700 percent between 1865 and 1885 (Hilton 1966, p. 89). In Missouri, there were 4,234 miles of railroad track in 1880; by 1889 this figure increased by almost 45 percent to 6,118 miles of track (Clevenger 1940).[6] No evidence that we know of exists to support the belief that railroad rates were monopolistically high during the period leading up to the passage of antitrust legislation in Missouri.[7] All evidence points in the opposite direction.

[4]Stanley Lebergott (1984, pp. 284–85) argues that the variability of rail rates during the late nineteenth century was an effect of keen competition among the railroads.

[5]Poor, quoted in Hilton (1966), pp. 89–90.

[6]Clevenger (1940) reports that in 1879 Missouri had 27 counties without railroad service, but by 1891 only 11 counties remained unserviced by the railroads.

[7]In fact, the intensity of the competition among the railroads, and the resulting continual downward trend in rail rates in the decades following the Civil War, is considered to be the reason underlying the passage of the 1887 Act to Regulate Interstate

Nor is the evidence consistent with the farmers' contention that financing costs increased during the late nineteenth century. In fact, real interest rates fell dramatically during the 1880s. In the midwest region of the country, defined to include Missouri, real interest rates on farm mortgages fell from an average of 11.41 percent in 1880 to 7.84 percent in 1889. This fall represents a 31 percent reduction in real interest rates during the 1880s.[8]

As for the prices of farm machinery, we were unable to find specific data on farm-machinery prices in Missouri. However, Clevenger reports that, although the 1880s was a period of falling input, output, and consumer-goods prices in Missouri, downward adjustments in farm-output prices usually occurred before downward adjustments in the prices of consumer goods. But, the decreases in the prices o/f farm outputs in Missouri was generally *preceded* by decreases in the prices of farm inputs. "In terms of bushels of wheat, oats, or corn, a mowing machine, binder, or cultivator could be bought for less in 1892 than in 1882" in Missouri (Clevenger 1940, p. 46).

Clevenger's claim that the price of farm inputs in Missouri decreased in real terms during the 1880s is consistent with the trends in farm-machinery prices for the United States as a whole during the latter part of the nineteenth century. This trend was downward during the decades following the Civil War. Towne and Rasmussen (1960) constructed an index of U.S. farm-machinery prices (in constant 1910–14 dollars) and found that this index fell from 251 in 1870 to 124 in 1880 and to 101 by 1890. This index shows that farm machinery was 2.5 times more costly in 1870 than it was in 1890.[9] There is no reason to believe that the trend of farm-machinery prices in Missouri differed significantly from the nationwide trend.

Missouri's economy was undoubtedly becoming more and more commercialized and competitive in the post-Civil War era. The rapid economic growth of Missouri's economy and its increasing integration with other states is reflected in the number of railroad carloads of general merchandise unloaded or loaded in St. Louis. In 1870, 20,542 cars were unloaded or loaded. By 1880 this figure had nearly quadrupled to 125,939, and by 1890 this figure had more than doubled again to 323,506 (Thelen 1986, p. 32). These data question the

Commerce. Sponsors of this Act hoped that the Interstate Commerce Commission would effectively cartelize the railroads. See, e.g., Kolko (1963), MacAvoy (1965), and Hilton (1966).

[8]Jeffrey G. Williamson (1974, p. 153).

[9]This index fell to 94 by 1900.

contention that the Missouri economy was falling into the consumer welfare-reducing grips of monopolists.[10]

In short, available data on the economic factors pertaining to Missouri's agricultural sector in the decades leading up to the enactment of the 1889 antitrust statute contain no clear evidence of monopolization. Indeed, every sector of Missouri's economy—especially its agricultural sector—shows signs of being highly competitive during the last three decades of the nineteenth century.

What, then, did the agrarians in Missouri have to gain from the passage of an antitrust statute? Agrarians and local merchants in Missouri (as elsewhere) correctly perceived that the larger producers were responsible for the downward pressures on the prices of their outputs (Thelen 1986). Because economies of scale caused a decrease in the optimal number of producers of any particular commodity, the economy *looked* as if it were becoming more "monopolized." As such, in their attempts to protect their local markets from the lower-priced and/or higher-quality goods being shipped to towns and countrysides on the railroads from the increasingly centralized production locations, politically-organized agrarians complained of the evils of "monopoly." But "monopoly," as used by the agrarians, referred only to the larger and more efficient firms who were driving many small farmers and merchants out of their traditional lines of work and business.[11]

Our interpretation of anti-monopoly sentiment in Missouri as being rooted in local-producer opposition to the more intense competitive pressures resulting from "big" firms and the growing commercialization of Missouri's economy is more consistent with the data presented above than is the public-interest interpretation.[12]

[10]Thelen, a historian who is sympathetic with populist ideals and goals, reports that "[r]ailroads transformed the size and shape of [Missouri's] market economy, forcing businessmen and farmers to produce at unprecedented rates to survive the new competition" (p. 32).

[11]Our interpretation of the anti-monopoly protests of the late nineteenth century is, of course, not novel. For example, Dudden, argues that "in the United States by the middle of the nineteenth century, monopoly was generally deplored as *hampering opportunity*. . . . [T]he anti-monopoly spirit of the Guilded Age took shape as a widespread but essentially middle-class protest against the *centralizing* tendencies in transportation, land tenure, business, and industry, which characterized the period" (1957, p. 588; emphasis added).

[12]For further evidence in support of our interpretation of the political motivation behind antitrust legislation in the case of Missouri in particular, see Clevenger (1940), Piott (1985) and Thelen (1986). Dudden (1957), Wiebe (1967), Mayhew (1972), and McDonald (1974) are only a handful of the historians who interpret nineteenth century agrarian political protests—including the agrarians' ubiquitous calls for antimonopoly legislation—as an attempt to stave off the increasing commercialization of their occupations and lives.

However, a more complete understanding of the specific forces at work in Missouri in the late 1880s requires a discussion of the livestock and meat-packing industry. Producers in this industry played a key role in the passage of Missouri's 1889 antitrust statute.

IV.
Cattlemen, Butchers, and Other Rent Seekers

The agrarian interest group that seems to have exerted the greatest pressure for passage of Missouri's 1889 antitrust statute was comprised of cattlemen and local retail butchers who were agitated over the allegedly monopolistic practices of the "beef trust"—the centralized butchering and meat-packing firms that emerged in Chicago in the early 1880s as a result of the development of an economical refrigerated railroad car. The four largest Chicago meat packers during the 1880s were Swift, Armour, Morris, and Hammond, collectively known as "the Big Four."

Although Gustavus Swift was not the first entrepreneur to ship slaughtered cattle by refrigerated railroad car, he was the first to do so economically, shipping his first refrigerated car full of beef from Chicago to Massachusetts in the fall of 1877. The "refrigeration" of this 1877 shipment of dressed beef was little more than open doors on a railroad car being hauled in cold weather. However, Swift saw profits in being able to slaughter meat in a centralized location served by several railroads (i.e., Chicago) and shipping it out year round to cities and towns across the country. The successful development of an economically viable refrigerated car allowed Swift to begin year-round shipments of dressed meats in 1879 (Clemens 1923, pp. 235–36).

In addition to integrating forward into wholesaling and retailing, Swift and his rival Chicago meat packers created markets for beef and hog by-products that had never before existed, thus extracting more profit from each cow or pig slaughtered than was being extracted by local butchers. When this less wasteful use of the whole cow or pig is combined with the great economies of scale that were made possible by the centralization of butchering and shipping, it is not surprising that the price of meats to consumers fell throughout the 1880s (Yeager 1981, p. 70).

The average quality of beef also improved during the 1880s. This quality improvement is closely connected with the fall in the price of cattle that occurred from the mid 1880s through the early 1890s. The fall in cattle prices, in turn, was responsible for the decline of the range-cattle industry beginning in the mid 1880s.

In the wake of the decline of the range-cattle industry there emerged, for the first time in the midwest and the west, rumors of a "beef trust." Range-cattle producers, whose product—live grass fed cattle shipped by rail to wholesale or retail butchers or sold directly to butchers in nearby towns—simply could not compete with the much less expensive and higher-quality dressed meats shipped from Chicago. Cattlemen contended that "the Big Four" meat packers were conspiring to *depress* the price of range cattle (Yeager 1981, pp. 172–73).

In May 1886 the "National Butchers' Protective Association of the United States of America" was formed in St. Louis. The goal of this organization of butchers "was to destroy the dressed meat industry, which was shipping meat from Chicago to eastern cities and selling it for less than the meat killed by local butchers" (Clemens 1923, p. 243).

The complaints of the range-cattle producers and of the local butchers prompted the first investigation of the meat-packing industry by the U.S. Congress (Clemens 1923, p. 479). Responding to these complaints, the Senate in May 1888 appointed a commission to investigate the cause for the *low* price of cattle seemingly spawned by "the Big Four."

Senator George Vest of Missouri was appointed to chair this committee.[13] From its inception to the delivery of its final report in May 1890, the Vest Committee—comprised of five midwestern and western Senators (from Illinois, Kansas, Missouri, Nebraska, and Texas)—sympathized strongly with its cattle-raising constituents. The Vest Committee concluded in its final report that "the principle cause of the *depression* in the prices paid to the cattle raiser and of the remarkable fact that the cost of beef to the consumer has not decreased *in proportion*, comes from the artificial and abnormal centralization of markets, and the absolute control by a few operators thereby made possible" (Senate Report No. 829 [commonly referred to as the Vest Report], p. vii).

The Vest Committee did not deny that the price of beef to consumers had fallen, only that this price did not fall "in proportion" to the reduction in the price of range cattle. Consumer welfare is increased, of course, when the price of a consumer good falls—especially when the quality of the good rises simultaneously—regardless of whether the price of an input fell by more or less than in proportion to the reduction of the price that the consumer must pay for the good.

The Vest Committee found no evidence of collusion by the major Chicago meat packers. Instead, the Committee *inferred* the existence

[13]The Vest Committee began its hearing in St. Louis in November of 1888, "this place being chosen because the International Cattle Range Association and the Butchers' National Protective Association were in session there" (Clemens 1923, p. 749).

of collusive action among the major packers in the buying of cattle from the fact that cattle prices fell during the mid and late 1880s. The Vest Committee reported that "Mr. P. D. Armour testifies at Washington that no such [collusive] agreement existed between himself and other packers *and we do not contradict this statement*. . . . [However] it is difficult to believe that with the most apparent motive for such action the same parties, or their subordinates with their knowledge, do not avail themselves of the opportunity presented by the centralization of markets to combine for the purpose of lowering the price of cattle" (Vest Report, p. 6; emphasis added).

Several state legislatures also attempted to take action against the "beef trust." Late in 1888, Governor Lyman Humphrey of Kansas called on the governments of the states in the Mississippi valley region to send delegates to a conference for the purpose of framing statutes that could be passed by all states in the region.[14] The ultimate goal of this conference of state legislators was uniform state statutes designed to "protect the stock-grower and farmer against the manipulations of such alleged [beef] trust."[15] It eventually adopted a model antitrust statute to meet this goal. There was no mention during the convention or in the proposed statute of the need to protect consumers from high prices; only to protect stockgrowers and farmers from lower-priced competitors.

The model antitrust statute declared all "trusts" to be in violation of the state corporate charter. Significantly, this model antitrust statute included in its definition of a trust the ability of "a combination of capital, skill or acts by two or more persons, firms, corporations or association of persons. . . . [t]o limit or reduce the production, or increase or *reduce* the price of merchandise or commodities" (emphasis added).[16] The statute that was eventually enacted in Missouri was entitled "An Act for the punishment of pools, trusts and conspiracies." It passed by a vote of 98 to 1 in the House, and by 27 to 4 in the Senate.[17]

Missouri's legislation prohibited "restraints of trade" in the form of pooling, forming trust companies, interlocking directorates, and so

[14]Piott (1985, p. 26).

[15]*Journal of the Senate of Missouri*, 35th General Assembly, 1889, p. 165. The entire text of this joint resolution of the Kansas Senate and House calling for a conference of midwestern state legislators, as well as Missouri Governor Francis's message to the Missouri General Assembly, can be obtained from the authors upon request.

[16]Ibid., p. 407. On the prevalent nineteenth century view that the proper and legal means for controlling the size and manufacturing activities of corporations was the state corporate charter, see McCurdy (1979).

[17]*Journal of the House of Missouri*, 35th General Assembly, 1889, pp. 952–53, and *Journal of the Senate of Missouri*, 35th General Assembly, 1889, pp. 410–11.

on, the effects of which were "to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold" in Missouri.

This statute also prohibited actions intended "to *limit* or fix the price" of outputs (emphasis added).[18] Although the wording of the proscription against actions intended to "limit" the price of outputs is subject to interpretation, one plausible meaning of the verb "to limit" as it is used in this statute is "to reduce" or "to keep from rising." This interpretation of the statute as prohibiting actions intended to reduce prices is consistent with (1) the downward trend of prices in Missouri during the 1870s and 1880s; and (2) the support given by Missouri's Governor Francis and by Missouri's farmer-dominated General Assembly to the St. Louis beef-trust conference of March 1889 in light of the fact that this conference adopted a model antitrust statute that explicitly prohibited price reductions.

Our interpretation of the political events in Missouri during the winter and spring of 1889 is that Missouri's agrarian-dominated General Assembly passed antitrust legislation in 1889 as part of an attempt to shield politically powerful producer groups—especially range-cattle producers and independent retail butchers—from the intense competitive pressures being exerted by the centralized, vertically integrated meat-packing firms headquartered in Chicago. (Recall that cattle was Missouri's single largest agricultural output during the 1880s.) No evidence exists to suggest that consumers in Missouri (or anywhere else in the United States) were harmed by the so-called beef trust. In fact, as shown above, the evidence suggests just the opposite: The centralization of meat packing generated substantial benefits to consumers in the form of lower prices and higher quality meat, as well as greatly expanded use of meat by-products which, until the 1880s, were discarded as waste. However, the growth of the centralized meat packers did result in lower prices for range-cattle producers and, of course, for independent local butchers whose services ran head to head in competition with the services being performed more efficiently in the Chicago slaughtering and packing houses.

III.
Conclusions

The political and economic roots of antitrust are at the state level of government. Numerous states passed antitrust laws before the 1890

[18]*Laws of Missouri*, 35th General Assembly, 1889 (Jefferson City, Missouri, 1889), pp. 96–97; emphasis added.

Sherman Act, itself initiated in the U.S. Senate which, at that time, was directly elected by state legislatures.

The political impetus for some kind of antitrust law came from the farm lobbies of mostly midwestern, agricultural states, such as Missouri. Rural cattlemen and butchers were especially eager to have statutes enacted that would thwart competition from the newly centralized meat processing facilities in Chicago. The evidence on price and output in these industries, moreover, does not support the conjecture that these industries suffered from a monopoly in the late nineteenth century, if monopoly is understood in the conventional neoclassical way as an organization of industry which tends to restrict output and raise prices. These industries were fiercely competitive because of relatively free entry and rapid technological advances such as refrigeration.

As Armentano (1982) has shown, for over a century the antitrust laws have routinely been used to thwart competition by providing a vehicle for uncompetitive businesses to sue their competitors for cutting prices, innovating new products and processes, and expanding output. This paper has argued that, moreover, antitrust was a protectionist institution from the very beginning; there never was a "golden age of antitrust" besieged by rampant cartelization, as the standard account of the origins of antitrust attests.

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Appendix Table 1
State Antitrust Laws by Date of Passage

State	Year of Passage
Maryland	1867
Tennessee	1870
Arkansas	1876
Texas	1876
Georgia	1877
Indiana	1889
Iowa	1889
Kansas	1889
Maine	1889
Michigan	1889
Missouri	1889
Montana	1889
Nebraska	1889
North Carolina	1889
North Dakota	1889
South Dakota	1889
Washington	1889
Kentucky	1890
Louisiana	1890
Mississippi	1890
Alabama	1891
Illinois	1891
Minnesota	1891
California	1893

Source: George Stigler, "The Origin of the Sherman Act," *Journal of Legal Studies* 14 (January 1985): 1–11.

Appendix Table 2
Prices of Missouri's Three Leading Agricultural Products, 1879–1891

	Cattle (per head)	Hogs (per head)	Wheat (per bushel)
1879	$22.95	4.36	1.01
1880	$25.06	5.59	0.89
1881	$27.03	6.29	1.19
1882	$29.01	7.68	0.85
1883	$31.18	7.99	0.88
1884	$32.61	6.75	0.62
1885	$31.05	5.75	0.77
1886	$28.60	5.44	0.63
1887	$26.49	5.83	0.62
1888	$25.65	6.71	0.88
1889	$23.22	6.48	0.64
1890	$21.86	5.44	0.83
1891	$21.92	5.40	0.80

Source: Robert Klepper, *The Economic Bases for Agrarian Protest Movements in the United States, 1870–1900*. New York: Arno Press, 1978.

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The Rise of Big Business

Why Business Grew previou

Period: 1880-1920

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By 1906, six large railroad systems controlled 95 percent of the nation's n
As early as 1904, the 2,000 largest firms in the United States made up les
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Why did business grow bigger? The classic explanation stresses such facto

- the shift from water-powered to coal-powered factories, which freed manufacturers to locate their plants nearer to markets and suppliers
- transportation improvements that meant that firms could distribute products to regional or national markets.
- the development of new financial institutions--such as the stock mai commercial banks, and investment houses--that increased thee ava of investment capital.

One of the pacesetters of the "new economy" was Montgomery Ward, the
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To list these factors makes business growth seem like an orderly process.
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they were known. Violent contractions gripped the country from 1873 to 1
and from 1893 to 1897. There were briefer contractions in 1884, 1888, 19

1907, and 1911. During the panic of the mid-1870s, 47,000 businesses w bankrupt. In hard times, the competitive marketplace became a jungle an businessmen sought to find ways to overcome the rigors of competition.

Competition to monopoly

Faced with recurring business slumps, mounting competition, and declinin profits, the boldest businessmen experimented with new ways of creating financial stability. The first attempt to overcome destructive competition w formation of pools or cartels. These were agreements among competitors divide markets and forbid price cutting. As early as the 1870s, pools were to divide markets, fix production quotas, and set prices. Over the years, p became trade associations, which devised methods for dividing markets a assisting failing firms.

The problem with pools was that they rarely survived an economic contrac Financial depressions tempted some firms to cut prices and seek a larger the market.

Pools were too weak to solve the problem of competition because they we voluntary agreements. An alternative was the trust, under which owners c firms assigned their stock to a single board of trustees in return for non-v interest-bearing certificates. The trustees then fixed prices and marketing for all the companies. John D. Rockefeller's Standard Oil Company was the trust. Half a dozen industries followed, including alcohol distilling and suga refining.

Trusts faced intense legal challenges on the grounds that they illegal restr trade and violated the corporate charters of the participating firms. In 18 Congress adopted the Sherman Anti-Trust Act, which declared trusts illega Trusts were then supplanted by a new legal entity, the holding company. was a company with the power to purchase other companies. Perhaps the famous holding company was General Motors, which purchased a number automobile manufacturers.

A great surge in mergers took place in the American economy after 1897, many of the largest corporations in such industries as steel and railroads created. The number of mergers rose from 69 in 1897 to 303 in 1898 and in 1899. By 1900, there were 73 combinations worth more than $10 millio thirds had been established in the previous three years.

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The Rise of Big Business

Why Business Grew

Period: 1880-1920

By 1906, six large railroad systems controlled 95 percent of the nation's mileage. As early as 1904, the 2,000 largest firms in the United States made up less than one percent of the country's businesses. Yet they produced 40 percent of the nation's goods. By the early twentieth century, many important sectors of the American economy were dominated by a handful of firms, a condition that economists call "oligopoly."

Why did business grow bigger? The classic explanation stresses such factors as:

- the shift from water-powered to coal-powered factories, which freed manufacturers to locate their plants nearer to markets and suppliers.
- transportation improvements that meant that firms could distribute their products to regional or national markets.
- the development of new financial institutions--such as the stock market, commercial banks, and investment houses--that increased thee availability of investment capital.

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To list these factors makes business growth seem like an orderly process. But this was not the way the process was experienced. The emergence of the modern corporation came largely as a response to economic instability.

During the late nineteenth century, business competition was cutthroat. In 1907, there were 1,564 separate railroad companies in the United States, and two years later there were 446 companies manufacturing steel. The challenges of competition were compounded by frequent economic contractions, or panics as they were known. Violent contractions gripped the country from 1873 to 1878 and from 1893 to 1897. There were briefer contractions in 1884, 1888, 1903, 1907, and 1911. During the panic of the mid-1870s, 47,000 businesses went bankrupt. In hard times, the competitive marketplace became a jungle and businessmen sought to find ways to overcome the rigors of competition.

Faced with recurring business slumps, mounting competition, and declining profits, the boldest businessmen experimented with new ways of creating financial stability. The first attempt to overcome destructive competition was the formation of pools or cartels. These were agreements among competitors to divide markets and forbid price cutting. As early as the 1870s, pools were formed to divide markets, fix production quotas, and set prices. Over the years, pools became trade associations, which devised methods for dividing markets and assisting failing firms.

The problem with pools was that they rarely survived an economic contraction. Financial depressions tempted some firms to cut prices and seek a larger share of the market.

Pools were too weak to solve the problem of competition because they were voluntary agreements. An alternative was the trust, under which owners of rival firms assigned their stock to a single board of trustees in return for non-voting, interest-bearing certificates. The trustees then fixed prices and marketing policies for all the companies. John D. Rockefeller's Standard Oil Company was the first trust. Half a dozen industries followed, including alcohol distilling and sugar refining.

Trusts faced intense legal challenges on the grounds that they illegal restrained trade and violated the corporate charters of the participating firms. In 1890, Congress adopted the Sherman Anti-Trust Act, which declared trusts illegal. Trusts were then supplanted by a new legal entity, the holding company. This was a company with the power to purchase other companies. Perhaps the most famous holding company was General Motors, which purchased a number of automobile manufacturers.

A great surge in mergers took place in the American economy after 1897, when many of the largest corporations in such industries as steel and railroads were created. The number of mergers rose from 69 in 1897 to 303 in 1898 and 1,208 in 1899. By 1900, there were 73 combinations worth more than $10 million. Two thirds had been established in the previous three years.

Mr. Hanback having presented the following resolution: Resolved, That the Committee on Expenditures in the Department of Justice be, and is hereby, empowered to make full inquiry into any expenditure upon the part of the Government relative to the rights of the Bell and Pan-Electric Telephone companies; and for the purpose of this investigation, and to the end that the people may be fully advised, the committee is granted the right to send for persons and papers, all expenses to be audited and accounted for upon approved vouchers, and when so approved to be paid out of any moneys in the Treasury not otherwise appropriated--

At the end of line 12 on page 12 insert: ``Provided further, That no part of this appropriation shall be expended for telephone service in any post-office where the postmaster is required, by order of the Postmaster-General or otherwise, to use no other telephone service than that of the Bell Telephone Company or any of the telephone companies connected with or controlled, in whole or in part, by said Bell Telephone Company."

The paragraph under consideration contains an appropriation of $225,000 ``for necessary miscellaneous and incidental items directly connected with first and second class post-offices." The Chair understands that under the statutes a part of this money may be expended for telephone service. The amendment offered by the gentleman from Minnesota provides that no part of the appropriation shall be expended for telephone service in any post-office where the postmaster is required, by order of the Postmaster-General or otherwise, to use only one kind of telephone. Now, the Chair would call the attention of the gentleman from Indiana, chairman of the Post-Office and Post-Roads Committee, to the fact that this amendment is not put in as a limitation upon the use of the entire sum appropriated in this paragraph of $225,000. This limitation is merely a limitation upon the amount which the Postmaster- General may use for telephone services authorized by law, and this amendment simply says in effect, in order that this amount may be available, the Postmaster-General must refrain from saying to the postmaster that he must use one single telephone. The Chair therefore is of opinion that this amendment comes within the rule, and it is simply a limitation upon the expenditure of a part authorized by this paragraph for telephone services, and therefore the Chair overrules the point of order.

Sec. 5905 5905. To a bill relating to laying of conduits for telephone wires, an amendment relating to the prices to be charged for services was held not to be germane.--On May 26, 1902,\1\ the House was considering the bill (H. R. 12865) to provide for the removal of overhead telegraph and telephone wires in the city of Washington, for the construction of conduits in the District of Columbia, and for other purposes, when Mr. Thetus W. Sims, of Tennessee, proposed the following amendment: Add to the bill a new section, to be section 8, to read as follows: ``Any telephone company operating under the provisions of this bill shall charge not to exceed $50 per year for telephones."

5413. On March 19, 1900,\4\ the House was considering the bill (H. R. 9047) to incorporate the Washington Telephone Company, etc., and had ordered it to be engrossed and read a third time, under the operation of the previous question. The bill having been read a third time, Mr. William H. Moody, of Massachusetts, moved to recommit the bill with instructions. Mr. Joseph W. Babcock, of Wisconsin, moved that this motion be laid on the table.

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The Rise of Big Business

J.P. Morgan

Period: 1880-1920

During the Gilded Age, J.P. Morgan stood astride the nation's financial world like a colossus. His banking house erected the structure of the most prominent American industries in the Gilded Age beginning with the railroad. Convinced that cutthroat competition had to give way to order, he consolidated competing railroad lines and many other industries. He organized syndicates to float bond and stock issues that gave birth to such companies as AT&T (which dominated the nation's telephone industry for decades), General Electric, and U.S. Steel (the world's largest steel manufacturer). A voracious collector, he also spent $60 million on paintings, sculptures, rare books, and manuscripts.

His critics considered him a ruthless capitalist pirate, the personification of the oppressive power of Wall Street that would crucify mankind on a cross of gold. But his goal was to replace cutthroat competition with economic stability. Morgan was instrumental in helping to create the modern American economy. After the Panic of 1893, he reorganized many bankrupt railroads and industrial companies. He assembled U.S. Steel, the world's first billion-dollar corporation, and helped establish International Harvester and General Electric. He believed that the combination of rival interests into rational systems was necessary to stabilize the U.S. economy and to prevent harmful price wars.

During a financial panic in 1907, which threatened to trigger a run on the nation's banks, Morgan took charge. He assembled the leading bank presidents in his library and locked the door. At 4 a.m., his lawyer read them an agreement stipulating how much each must pledge to the bailout package. "There the place..." Morgan told one banker, "and here's the pen."

When he decided to buy the Carnegie Steel company on the way to forming United States Steel, he asked Andrew Carnegie to name his price. Carnegie wrote $480 million on a sheet of paper. Morgan glanced at the paper and said, "I accept this price."

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The Rise of Big Business

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Period: 1880-1920

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Between 1869 and 1910, the value of American manufacturing rose from :
billion to $13 billion. The steel industry produced just 68,000 tons in 1870
4.2 million tons in 1890. The central vehicle of this surge in economic proc
was the modern corporation.

In recent years, Americans have often been told that we have entered a "
economy." The older industrial economy, it is said, is giving way to a new
economy based on computers, the Internet, telecommunications, and
entertainment. This is not the first new economy in American history. Follo
the Civil War, a new economy emerged in the United States resting on ste
powered manufacturing, the railroad, the electric motor, the internal comt
engine, and the practical application of chemistry. Unlike the pre-Civil War
economy, this new one was dependent on raw materials from around the
and it sold goods in global markets.

The transformations that took place in American business following the Civ
involved far more than a change in industrial techniques or productivity. B
organization expanded in size and scale. There was an unparalleled increa
factory production and mechanization. By the beginning of the twentieth c
the major sectors of the nation's economy--banking, manufacturing, meat
packing, oil refining, railroads, and steel--were dominated by a small num
giant corporations.

The rise of big business was accompanied by the emergence of a new clas
millionaires. At the beginning of the Civil War, there were only 400 million
the United States. By 1892, the number had risen to 4,047.
The emergence of the modern corporation was accompanied by many pos
developments. Through mechanization, standardization, and economies of
economic productivity soared. Between 1890 and 1929, the average urbar
worker put in one less day of work a week and brought home three times
much in pay. The proportion of families confined to the drudgery of farm l
declined by half. Families enjoyed comforts and conveniences that were

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unimaginable before 1890. By 1929, nine out of ten Americans had electri indoor plumbing; four-fifths had automobiles; two-thirds had radios; and ı half refrigerators and phonographs. At the same time, infant mortality fell thirds, and life expectancy increased by twenty years. Said the president (Chicago, Burlington, and Quincy Railroad:

> Have not the great merchants, great manufacturers, great inventors done more for the world than preachers and philanthropists? Can there be any doubt that cheapening the cost of necessaries and conveniences of life is the most powerful agent of civilization and progress?

Yet the rise of the big business also produced many anxieties. Corporation accused of abusing workers, corrupting the political process, and producin shoddy, unsafe products. Many feared that corporate power allowed comp fix prices and influence government decision-making.

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The Rise of Big Business

The Corporate Revolution previou

Period: 1880-1920

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During the late nineteenth century, a radical transformation took place in in which American business was structured and operated. The most obviou contrast involved the corporation's larger size and capitalization. The typic business establishment before the 1870s was financed by a single person several people bound together in a partnership. As a result, most business represented the wealth of only a few individuals. As late as 1880, the aver factory had less than $1,800 in investment. Even the largest textile factor represented less than a million dollars in investment. In contrast, John D. Rockefeller's Standard Oil Company was worth $600 million and U.S. Stee valued at $1 billion.

Another contrast between the new corporate enterprises of the late ninete century and earlier businesses lies in the systems of ownership and mana Before the Civil War, almost all businesses were owned and managed by t same people. In the modern corporation, actual management was increas turned over to professional managers. Within corporations, a managemen revolution took place.

In the days before big business, business operations required little in the management and administration. Companies usually involved only a few p and clerks. Usually, an owner oversaw all of a business' operations. To ins honesty in a distant office, a merchant might staff it with a relative.

As businesses grew larger, new bureaucratic hierarchies were necessary. business' success increasingly depended on central coordination. To addre challenge, businesses created formal administrative structures, such as purchasing and accounting departments. Various levels of managers were established, clear lines of authority were devised, and formal rules were c to govern the company's operations. The managerial revolution helped to "new" middle class. Unlike the older middle class, which consisted of farm shopkeepers, and independent professionals, the new middle class was m of white collar employees of corporations.

Yet another sweeping change in business operation was the corporation's increased size and geographical scale. Before the 1880s, most firms opera single town from a single office or factory. Most sales were made to custo the immediate area. But the new corporate enterprises carried out their fu in widely scattered locations. As early as 1900, General Electric had plants cities

In addition to carrying out business in an increasing number of locations, t corporations also engaged in more kinds of business operations. Prior to tl War, merchants, wholesalers, and manufacturers tended to specialize in a operation. But the late nineteenth century, greatly expanded their range c operations.

During the late nineteenth century, businesses typically grew as a result o vertical and horizontal integration. When a company integrated vertically, brings together various phases in the process of production and distributic U.S. Steel took iron ore from the ground, transported it to its mills, turn it steel and manufactured finished products, and shipped the products to wholesalers. Somewhat similarly, the great meat packing houses like Swif had 4,000 employees, and Armour, with 6,000, combined the business of slaughtering, transporting, and wholesaling meat. Swift developed a fleet refrigerator railroad cars, which allowed it to bring cattle and hogs to a ce packing house in Chicago, where the company could make use of every pa the animal "except the squeal."

When a company integrated horizontally, it expanded into related fields of business. In the 1850s, an iron furnace might produce a single product su cast iron or nails. But U.S. Steel produced a vast array of metal goods.

During the last third of the nineteenth century, the American economy wa dramatically transformed. After thirty years of periodic economic crises ma by high unemployment and large numbers of business failures, business b consolidate into progressively larger economic units.

Mythmakers sometimes look back on the late nineteenth century as the g age of free enterprise. But it is important to emphasize that the rise of a n economy did not take place easily. Working conditions in many factories w appalling. Labor conflict was intense. Businesses were accused of price fix stock watering, and other abuses.

In the end, these abuses would bring about a political reaction. To addres problems of corporate power, the federal government instituted new form regulation in the late nineteenth and early twentieth centuries.

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SCHOOL OF JOURNALISM, UNIVERSITY OF MISSOURI AT COLUMBIA
MARCH, 1977

FREEDOM OF INFORMATION CENTER REPORT NO. 368

GOV'T REGULATION OF BROADCASTING

John Tyler is a doctoral candidate in Political Science at West Virginia University.

Editor's Note:

The Office of Telecommunications Policy, now headed by acting director William Thaler, is being re-examined (Washington Star, 2-17-77) *by President Jimmy Carter as part of a broader reorganization within the executive branch. The White House is considering several plans to restructure OTP. Although no decisions have been made, one possibility is eliminating OTP and delegating its functions among various existing agencies and departments. Opposition to such a proposal is strong among congressmen who do not want OTP abolished or its power reduced. And Congress will have a say in the future of OTP because of its power to veto Carter's plans. A determination of whether or not OTP will remain an independent agency responsible for advising the President on telecommunications matters is crucial because of a number of communications issues that must be dealt with soon, among them substantial revision of the Communications Act of* 1934.

Introduction

The First Amendment to the United States Constitution provides, in part, that Congress shall make no law abridging freedom of speech or the press. The importance of these freedoms to our scheme of government hardly needs to be emphasized. Supreme Court Justice Benjamin Cardozo said that freedom of thought and speech "is the matrix, the indispensable condition, of nearly every other form of freedom."[1] And the English jurist Sir William Blackstone said "liberty of the press is indeed essential to the nature of a free state. . . ."[2]

But these freedoms, while essential to a free state, are nevertheless not without limits. Freedom of the press is limited by laws prohibiting the publishing of obscene or libelous material. Even Blackstone admitted that a person "must take the consequences" if he "publishes what is improper, mischievous or illegal. . . . ."[3] Freedom of speech is also limited; a person cannot say whatever he wants whenever he wants. Justice Oliver Wendell Holmes said: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[4] Justice Edward Sanford agreed: "It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom."[5]

So even though the First Amendment prohibits Congress from passing laws abridging or limiting freedom of speech or the press, governmental limitations can be, and are, placed upon those who speak or publish. The question confronting us is: How far can government limitations extend before the freedoms of speech and press are severely curtailed, perhaps rendered meaningless?

This paper discusses how government limits freedom of the press. Specifically, it is about the mass communication medium where governmental regulations are most numerous—television.

The first section of the paper shows why Congress, in spite of the specific prohibition of the First Amendment, is permitted to regulate television. It examines Supreme Court rulings that state electronic journalism is a medium "affected" by a First Amendment interest, but not immune from strict governmental regulation.

The second section deals with federal agencies directly involved in regulating broadcasting. It examines the development of the Federal Communications Commission (FCC) following passage of the Radio Act of 1927, itself an outgrowth of the Radio Act of 1912. It also examines how, for many years, governmental regulations centered only on the technical or engineering aspects of the broadcasting industry. Not until 1948, long after federal agencies regulating broadcasting were created and the fairness doctrine and license renewal requirements were established, was the Supreme Court asked to interpret whether broadcasting was indeed a form of "press" as used in the First Amendment, and therefore not subject to substantive regulation.

Until the early 1950's, the President had no effective voice in communications matters. Communications policy formulation belonged solely to the FCC, a congressionally

Summary:

Supreme Court interpretations of the First Amendment have allowed congressional regulation of broadcasting. The author traces broadcast regulation from these Supreme Court decisions, examining the federal agencies that have been involved in regulation and the part played by the executive branch in telecommunications policy formulation.

established independent regulatory agency. The third section of this paper considers the gradual change that took place after 1950. It examines the Office of Telecommunications Policy (OTP), established in 1970 as the President's principal advisor on communications matters. (Telecommunications includes all forms of communications—satellite, cable, television, radio, to name only a few.) It also looks at agencies created prior to the establishment of the OTP that helped coordinate communications efforts in the executive branch. The major emphasis of this section is on an attempt by the OTP to change, through legislation, the FCC's license renewal process, as well as the fairness doctrine. The OTP attempted to enter the area of broadcast regulation and failed.

Supreme Court Sets the Stage

Chief Justice of the United States Supreme Court Warren Burger was asked in an interview with the United States Information Agency (USIA) whether he thought freedom of the "press," as the word is used in the First Amendment, applied uniformly to the broadcasting media and the print media.[6] The Chief Justice said it did not. He said that since broadcasting requires the use of airwaves, which are "part of the public domain, public property," it is subject to a form of regulation that "would be found unacceptable with respect to the print media." Burger cited the fairness doctrine as an example of the difference in treatment given broadcasters and persons in the print media.

But Burger said that regulation of the broadcasting industry does not extend to content "in any specific detail." Although the possibility for abuse exists in a system in which broadcasting is licensed by the government, Burger said the courts provide a defense against such abuse.

Burger's comments echo two Supreme Court decisions he authored concerning governmental regulation of the press. In *Miami Herald Publishing Co. v. Tornillo* he ruled that access through a right of reply statute is not permissible in newspapers.[7] In *Columbia Broadcasting System v. Democratic National Committee* Burger said that access through the fairness doctrine is a proper means of assuring that both sides of controversial issues will be presented over broadcast facilities.[8]

In *Tornillo*, a Miami, Florida newspaper had published articles critical of a candidate for state office. A statute passed by the Florida legislature requires that a political candidate be given a chance to reply to newspaper articles about him. Under this "right of reply" statute, the candidate requested an opportunity to respond, but the newspaper refused. The case was ultimately appealed to the Supreme Court. Chief Justice Burger said in his opinion:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[9]

But in relation to governmental regulation of television (as Burger noted in his interview with the USIA), the Supreme Court has felt otherwise. Before examining Burger's decision in the *CBS* case, it is necessary to go back to the first case in which the Supreme Court dealt with First Amendment use of the word "press," and its relationship to other forms of communication. A 1948 opinion written by Justice William O. Douglas in *United States v. Paramount Pictures* said: "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."[10] While the Court was specifically addressing a question involving the motion picture industry, it is clear from the opinion that the word "press" was interpreted as including broadcasting (at that time only radio).

Again writing for the Court in 1954, Justice Douglas said in *Superior Films v. Department of Education of Ohio*: ". . . the First Amendment draws no distinction between the various methods of communicating ideas."[11]

A third case involving this issue, *Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, was decided in 1959. In an opinion written by Justice Hugo Black, the Court said: "Thus, expressly applying the country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the [Federal Communications] Commission to exercise any power of censorship over radio communications."[12]

During the next 10 years, through changes in the Court's membership, the growth of television (especially news programming), and the evolution of the FCC's fairness doctrine and license renewal process, the Supreme Court came to rule that broadcasting was *not* entirely included within the meaning of the word "press" as used in the First Amendment. The central question that confronted the Court was whether the fairness doctrine could stand, in light of its earlier decision. If broadcasting *was* included within the meaning of the word "press," then the fairness doctrine could not stand. If, however, broadcasting was *not* included within the meaning of the word "press," then the fairness doctrine could stand. The Supreme Court ruled in favor of the FCC, upholding the fairness doctrine.

The first of two cases involving this ruling came in 1969. In *Red Lion Broadcasting Co. v. Federal Communications Commission*, the Court said in an opinion written by Justice Byron White: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[13] White went on to say: "Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of news media justify differences in the First Amendment standards applied to them."[14] This opinion differs from Justice Douglas' opinion that the First Amendment draws no distinction between the various methods of communicating ideas.

The second case, *Columbia Broadcasting System v. Democratic National Committee*, was heard in 1973. This was the second Supreme Court decision concerning government regulation of the press authored by Chief Justice Burger. A national organization opposed to American involvement in Vietnam filed a complaint with the FCC, charging that a radio station had refused to sell time to the organization so it could express its views on the war. The Democratic National Committee (DNC) requested the FCC to rule that broadcasters may not refuse to sell time to organizations who wish to comment on public issues. The FCC rejected the DNC's request and the case was ultimately appealed to the Supreme Court. Speaking for the Court, Chief Justice Burger said: "It was reasonable for Congress to conclude that the public interest in being informed requires periodic accountability on the part of those who are entrusted with the use of broadcast facilities, scarce as they are."[15] Burger felt that the right of paid access, on a first-come-first-served basis, would favor the wealthy. This reason, among others, persuaded the Chief Justice to rule that the fairness doctrine was a proper instrument for handling access to television or radio.

Justice Douglas, who wrote two of the opinions contrary to *Red Lion* and *CBS v. DNC*, did not participate in the Red Lion decision. However, he did participate in the CBS case and filed a dissent which said:

> I did not participate in [Red Lion and] would not support it. The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or benevolent ends. . . . That may argue for a redefinition of the responsibilities of the press in First Amendment terms. But I do not think it gives us carte blanche to design systems of supervision and control nor empower Congress . . . acting directly or through any of its agencies such as the FCC [to] make "some" laws "abridging" freedom of the press. . . . [In my opinion] TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of "press" as used in the First Amendment. . . .[16]

Thus, while the Supreme Court at one time interpreted the word "press" as used in the First Amendment to include broadcasting, in recent years the Court has said that broadcasting is a medium only "affected" by a First Amendment interest. Under such an interpretation, governmental regulation such as the fairness doctrine is permissible.[17]

But long before these Supreme Court decisions, government agencies were already regulating broadcasting. The second section of this paper examines why and how these agencies were created and their role in regulating broadcasting.

Early Regulation by Federal Agencies

From almost its beginning, broadcasting has been regulated by the federal government. The Radio Act of 1912, the first comprehensive piece of broadcasting legislation enacted by Congress, made it illegal to operate a transmitting station without first securing a license from the Secretary of Commerce. But the only requirement for obtaining a transmitting license was "application therefor" by any interested party. Walter B. Emery said in his book *Broadcasting and Government* that the Secretary "had no authority to specify particular frequencies, power, hours of operation or the period of a license."[18] And Sydney Head said in *Broadcasting In America* that "all who want-

ed to and had a good reason to could be allowed to operate radio stations."[19]

This legislation meant little real control over broadcasting, for there were far too many persons who applied for, and were granted, a license. According to a House report on a bill to amend the 1912 Act:

> On December 27, 1922, there were in operation in the country 21,065 transmitting radio stations. Of these 16,898 were amateur stations, 2,762 were ship stations, 569 were broadcasting stations, 39 were coast stations, 12 were transoceanic stations, and there were a few others not necessary to be enumerated.[20]

This rapid growth of broadcasting stations prompted Congressman Wallace H. White of Maine, author of the above House report, to say:

> There must be an ordered system of communication in the air into which all users of the ether must be fitted or there can be no intelligible transmission by this means. . . . A schedule for transmission of messages in the air is as essential as a schedule for the movement of trains upon land.[21]

However, the House and Senate could not agree on new legislation in 1923 and the transmitting situation grew worse. Although Secretary of Commerce Herbert Hoover attempted to withhold the granting of licenses from some applicants, a federal court ruled that the 1912 Act required him to issue the licenses. In *Hoover v. Intercity Radio Company*, the District Court ruled that

> the duty of issuing licenses to persons or corporations coming within the classification designated in the act reposes no discretion whatever in the Secretary of Commerce. The duty is mandatory; hence the courts will not hesitate to require its performance.[22]

Defeated at court, Secretary Hoover did take one step to ease the situation. The Commerce Department placed all broadcasting stations in a band from 550 to 1350 kilocycles and assigned other frequencies for amateur, government, and marine use.[23]

Sydney Head says that "Secretary of Commerce Hoover, an ardent believer in free enterprise, had hoped that the [broadcasting] industry would be able to discipline itself without government regulation."[24] But many broadcasters hoped that the federal government would step in and help coordinate transmission frequencies. And, according to Emery, Hoover "became convinced . . . that the serious impediments to effective broadcasting . . . could not be removed until the government was given actual and not nominal authority to regulate the . . . industry."[25] Therefore, from 1922 to 1925, Secretary Hoover called four national radio conferences to discuss solutions to the overcrowded spectrum problem. These conferences set the stage for passage of the badly needed regulatory act.

President Calvin Coolidge was also instrumental in getting new regulatory legislation passed. In a 1926 message to Congress, President Coolidge said that, due to federal court decisions and attorney general opinions, the authority of the Secretary of Commerce to effectively regulate the broadcasting industry had been severely curtailed.[26] He recommended that appropriate remedial legislation be passed; the resulting legislation was the Radio Act of 1927.

The passage of the Radio Act of 1927 not only resolved the crowded spectrum problem, but also established guidelines to permit the government to withhold the granting of a transmitting license.[27] And it established a requirement that the public interest, convenience, or necessity be shown before a license is granted or renewed. The act began not only technical, but also substantive, regulation of broadcasting. It is usually considered the basis of current broadcast regulation.

Up until passage of the Radio Act of 1927, all authority for regulating the broadcasting industry rested in the Secretary of Commerce. This put broadcasting regulatory authority in the executive branch. But passage of the act greatly reduced the authority and role of the executive branch in formulating communications policy: That authority now rested in a new, independent regulatory agency —the Federal Radio Commission (FRC).

The Radio Act of 1927 established that:

1. a commission of five members, to be called the Federal Radio Commission, would be created with the authority to grant, renew or revoke station licenses;
2. the broadcasting spectrum belonged to the public and a broadcaster acquired no ownership rights when he was granted a license;
3. a person or corporation would be granted a license if they could show that the public interest, convenience or necessity would be served;
4. the federal government, not private industry, would set rules for the technical operation of broadcasting stations;
5. a right of appeal to a federal court would be permitted on decisions and rulings made by the FRC; and
6. free speech applied to broadcasters.[28]

What the act did *not* say is as important as what it *did* say. Section 29 provided that the FRC would not have the power of censorship over radio communications nor would it interfere with the right of free speech by means of radio communications. However, the section did not specifically state that the FRC should not interfere with the broadcasters' right to broadcast or transmit information. The applicability of freedom of the press to broadcasting was not mentioned.

Section 21 provided that the FRC "may grant such [radio construction] permit if public convenience, interest, or necessity will be served by the construction of the station."[29] However, the act did not specify criteria to be used in determining whether a station had fulfilled the public interest.

The 1927 Act operated more or less successfully for the next six years. But on February 26, 1934, President Franklin Roosevelt recommended that Congress restructure the FRC and "create a new agency to be known as the Federal Communications Commission. . . ." because, "there is today no single Government agency charged with broad authority [over communications matters]."[30] The President's recommendation was based on a study by a government committee appointed by the Secretary of Commerce. The committee found that the FRC regulated radio broadcasting, the Interstate Commerce Commission (ICC) regulated interstate telephone and telegraph carriers, the Postmaster General had control over wire services, and the Secretary of Commerce was involved in miscellaneous communications matters.[31] Accepting the President's recommendations, Congress passed the Communications Act of 1934.

The 1934 Act incorporated the major provisions of the 1927 Act. However, instead of a federal radio agency there was now a Federal Communications Commission (FCC). The FCC had the same duties as the FRC and more. The FCC was authorized to grant or renew a license if it should find the public convenience, interest, or necessity would be served. It established strict guidelines as to how this requirement could be met. These guidelines set the number of hours of religious programming, news programming, public service programming, etc., that a broadcaster must air. (These types of programs are considered to serve the public convenience, interest, or necessity.) This is one area in which the FCC has gone beyond technical regulation of broadcasting.

Another area where the FCC has gone beyond regulation of the technical or engineering aspects of broadcasting is the fairness doctrine. While not a specific part of the Communcations Act of 1934, the fairness doctrine involves a detailed set of FCC rules, as well as federal court decisions, insuring that broadcasters present fairly both sides of controversial issues of public importance.[32]

Executive Branch and Policy Formation

The 1927 Act had reduced the role of the executive branch in communications policy formulation, and the 1934 Act all but eliminated it. The President did have the power to appoint members of the FCC, but the advice and consent of the Senate was required. And no more than four members of the seven-member commission could be members of the President's political party.

Presidents could, and often did, propose legislation affecting broadcasting. But there was no central agency in the executive branch responsible for formulating communications policy for the President.

Section 305 of the 1934 Act authorized the President to assign all radio frequencies to be used by the federal government. In 1951, President Harry Truman delegated to the FCC (subject to certain specific limitations) the authority vested in him with respect to transmitting stations other than those owned and operated by the federal government.[33] Federal transmitting stations were placed under the control of the heads of the departments with which the stations were concerned.

Beginning with President Truman in 1951, the chief executive sought to gain a more effective voice in communications policy matters. President Truman created the position of telecommunications advisor in the executive office, the first position established within the executive branch that dealt specifically with helping the President on telecommunciations matters.[34] The advisor was appointed by the President to assist him:

1. in the formulation of telecommunications policies and the coordination of planning for pro-

grams designed to assure the greatest possible national advantage for the United States' telecommunications efforts;
2. in assigning radio frequencies to Government agencies under the provisions of section 305 of the Communications Act . . .[35]

The position of telecommunications advisor lasted nearly three years; his duties were transferred to the Office of Defense Mobilization (ODM) in 1953. In addition to these duties, the ODM was responsible for:

1. coordinating the development of telecommunications policies and standards;
2. assuring high standards of telecommunications management;
3. coordinating the development by Government agencies of telecommunications plans and programs designed to assure maximum security to the United States in a time of national emergency with a minimum interference to continuing nongovernmental requirements;
4. assigning radio frequencies to Government; and
5. developing Government frequency requirements.[36]

The functions of the ODM were relinquished to the Office of Civil and Defense Mobilization in 1958. This office combined the Federal Civil Defense Administration with the Office of Defense Mobilization.

In 1962, President John Kennedy directed that an assistant director of another federal agency, the Office of Emergency Planning, become the Director of Telecommunications Management. The duties of the director were essentially the same as those of the Office of Civil and Defense Mobilization, abolished by this executive order. The position of director of telecommunications remained in effect until 1970, when it was abolished by Reorganization Plan No. 1.

In 1970 the Secretary of Commerce also returned to the communications scene, when he created an Office of Telecommunications. According to the 1974-75 *United States Government Organization Manual*, a "major objective of the Office is to help reduce uncertainty with regard to the development of new, high-technology telecommunications systems and services, either by government or by the private sector."[37] The office does not enter the area of telecommunications policy formulation for the President. Its main function is to help standardize, among the various private communications companies and the federal government, technological innovations affecting the telecommunications industry.

Several other events also lead to the establishment of the Office of Telecommunications Policy in 1970. In a 1967 message to Congress concerning communications President Lyndon Johnson pointed out that there existed no agency in the executive branch with the responsibility to help coordinate and recommend telecommunications policy for the President. The Office of Telecommunications, like the agencies that had preceded it, dealt primarily with the governmental side of the telecommunications industry. There was no agency in the executive branch to work alongside the FCC to promulgate the rules and regulations affecting private broadcasting. President Johnson wished to create such an agency. He requested the Bureau of the Budget, and a special communications task force he appointed, to make reports "of existing governmental organization in the field of com-

munications and to propose needed modifications."[38]

The Bureau of the Budget's report, released in December of 1968, recommended that a "new and strengthened central policy and long range planning organization for telecommunications . . . be established in the executive branch."[39] The nucleus for this agency would be the Office of Telecommunications Management. The President's Task Force on Communications also released its report in December of 1968, recommending that:

> the Executive Branch . . . have a strengthened capability to address the broad range of policy questions of concern to the Executive. It should have adequate technical and financial resources to make appropriate long range studies; to give useful advice on specific issues to the FCC, to state governments, to various Executive Branch agencies, and to private groups and industries; to explore new applications of telecommunications; and above all to coordinate Executive roles in telecommunications leading to development of coherent and forward looking policies guiding Executive action.[40]

President Richard Nixon authorized the continuation of the Task Force's recommendations after a study by advisor Clay Whitehead. Whitehead's report was released in December of 1969 and the Office of Telecommunications Policy was established according to the guidelines it contained.

Office of Telecommunications Policy Established

There are a number of reasons for examining closely the Office of Telecommunications Policy. It is the central agency in the executive branch with responsibility for formulating telecommunications policies for the President. It is the agency that attempted to rival the FCC in communications regulation. And it not only established its own policy guidelines concerning the fairness doctrine and license renewal procedures, but attempted to get legislation through Congress implementing these policy recommendations. Furthermore, an understanding of this agency is necessary to an understanding of the relationship between the Nixon Administration and the press.

On February 9, 1970, President Richard Nixon announced that he was establishing a new office in the executive branch, the Office of Telecommunications Policy. Through Reorganization Plan No. 1, the new agency would consist of a director, a deputy director and an administrative staff. Both the director and deputy director would be appointed by the President with the advice and consent of the Senate. The Office of Telecommunications Management would be abolished and its functions transferred to the OTP. The President said he would assign additional duties to the director after the reorganization plan went into effect.

The President said the OTP would:

1. serve as the president's principal advisor on telecommunications policy and help formulate governmental policies and programs concerning both domestic and international telecommunications issues;
2. help formulate policies and help coordinate telecommunications operations for the federal government.[41]

These two functions were essentially the same as those assigned to all the previous telecommunications agencies in the executive branch. But the OTP would have one additional function:

> Finally, the new office would enable the executive branch to speak with a clearer voice and to act as a more effective partner in discussions of communications policy with both the Congress and the Federal Communications Commission. This action would take away none of the prerogatives or functions assigned to the Federal Communications Commission by the Congress. It is my hope, however, that the new Office and the Federal Communications Commission would cooperate in achieving certain reforms in telecommunications policy, especially in their procedures for allocating positions of the radio spectrum for government and civilian use.[42]

Thus, the President made it clear that he wanted the OTP to take an active role in "procedures for allocating positions of the radio spectrum." In other words, the President said the OTP would take a role in the license granting procedures established by the FCC.

While Congress as a whole did not disapprove of the President's reorganization plan, one congressman did; Cornelius Gallagher (D—N.J.) voiced his objection in a House resolution. During House subcommittee hearings on Reorganization Plan No. 1 and his resolution (HR 841) Gallagher said:

> My concern, and the basis of my disapproval is simply that we cannot talk of increasing the efficiency and economy of Federal communications without, at the same time, focusing on the issue of computer privacy and the integrity of the data flow along communications lines.[43]

Gallagher thought the OTP *would* be able to deal directly with the complex problems of cable television, satellite use, spectrum allocation, and other communications matters. But he wanted the plan disapproved "unless the issue of computer privacy [would become] a part of the new Office of Telecommunications Policy."[44]

The House subcommittee recommended to the Committee on Government Operations that Reorganization Plan No. 1 be received favorably. The committee accepted the recommendation and the OTP went into effect April 20, 1970. A vote was not taken in either house against the plan.

The man nominated as director of the new office was Clay T. Whitehead—the presidential advisor whose report had recommended establishment of such an office. During Whitehead's confirmation hearings and the first few months of the OTP's existence, questions were raised concerning the relationship between the OTP and the FCC. President Nixon had said in his reorganization speech that the new office would work *with* the FCC and not take away any of its functions or prerogatives. The OTP would make studies and report its findings to the FCC.

Chairman of the FCC Dean Burch said he had "absolutely no fear of either actual or possible undue influence by the White House on the Commission by virtue of this office."[45] He said "the Commission does not intend to relinquish any of its powers because of this new office. We intend to make our own judgments based on our own concept of what is in the public interest."[46]

White House press secretary Ron Zeigler said that the FCC "will remain independent" and will "not be bound" by the views expressed by the OTP.[47] And FCC Commissioner Kenneth Cox described Reorganization Plan No. 1 as "harmless."[48] He said the FCC could accept or reject any views expressed by the OTP.

But others felt the OTP would play more than an advisory role. The New York *Times* reported (2-10-70):

> The recommendation of an executive office for communications constitutes formal recognition that the F.C.C., often preoccupied with quasi-judicial proceedings, has lacked the staff and, according to some, the inclination to chart innovative policy at a time of dramatic change and challenge in communications.

Whitehead was among those who felt the FCC was not coping adequately with the problems confronting the communications industry. Whitehead's position is clear in an exchange with the chairman of a Senate subcommittee on appropriations:

> Mr. Steed: I get the feeling as I listen to you that some of the problems we have stem from what appears to be either economics or failure on the part of the Federal Communications Commission to move in and make determinations. Is this because they are lacking authority or lacking in policy direction which would justify their moving?
>
> Has the state of the art gone beyond the enabling legislation that set up the FCC and outlined its rights and powers? Is that one of the problems we have?
>
> Mr. Whitehead: I think that is one of the problems. The major enabling legislation for the FCC is extremely bad and, as a result, the Commission finds little guidance from the Congress on many policy issues that were not even foreseen at the time the 1934 Communications Act was passed.
>
> Mr. Steed: Do you contemplate, among other things, that you may be able to devise suggested legislation that would firm this up, modernize it, make it more effective for a commission to deal with recurring problems?
>
> Mr. Whitehead: Yes, sir; that is one of the things we are actually looking at.[49]

Broadcasting reported:

> Dr. Whitehead also made it clear that if the commission did exercise its option to reject a proposal advanced by OTP—and OTP felt strongly enough about the matter—it would not simply go away. OTP might go to Congress or, conceivably the courts in attempts to reverse the commission.[50]

The same *Broadcasting* article quoted Whitehead as saying: "The weight of the President can be presumed to be behind everything OTP does." Statements such as this were a factor in the problems the OTP had later with the press and Congress.

The Office of Telecommunications Policy has helped coordinate the federal government's use of communications systems and services; it has established a policy whereby the OTP relies on private industry for communications system designs, engineering, operation and maintenance; it has drafted legislation affecting the cable television industry, as well as helping to develop cable as a viable communications medium; it has drafted legislation providing long-range federal funding for the Corporation for Public Broadcasting; and it has had an interest in international communications and a global satellite system for providing communications to civilian ships at sea. But no activity has caused as much controversy as the OTP's interest in license renewal and the fairness doctrine.

Whitehead Takes a Stand

Whitehead's first major statement on license renewal and the fairness doctrine came in a speech to the International Radio and Television Society in 1971. Whitehead said it was time to redefine "the relationships in the Communication Act's triangle of government, private industry, and the public."[51] He advanced three proposals which he said would help redefine these relationships:

> One, eliminate the Fairness Doctrine and replace it with a statutory right of access; two, change the license renewal process to get government out of programming; and three, recognize commercial radio as a medium that is completely different from TV and begin to de-regulate it.[52]

Whitehead said he would replace the fairness doctrine with a system of paid access similar to that used in magazines (i.e., a person purchases space for his message). Television time would be bought without rate regulation by the federal government, on a first-come-first-served basis.

Whitehead also said he would do away with the formula or quota system currently used by the FCC in license renewal determinations. He advocated a renewal process whereby the licensee would be judged on whether he had made a good-faith effort to discern the needs of his community and a good-faith effort to fulfill those needs. Whitehead also favored extending the license period. He said these proposals were his own, but reflected the "broad thinking of the administration."[53]

Reaction to the speech was mild. Most broadcasters wanted a more detailed presentation of Whitehead's ideas before they would comment. One NBC spokesman did say that he thought the proposals were "bold, innovative and like a breath of fresh air," and that broadcasters "would support most of them, although they include some points that need further study and clarification."[54]

On January 1, 1973, *Broadcasting* reported that, "For most of his two years as the first director of the Office of Telecommunications Policy, Clay T. Whitehead's visibility ranged from moderate to zero."[55] But that all changed December 18, 1972. On that date Whitehead made a speech to the Indianapolis chapter of Sigma Delta Chi in which he severely criticized network news and made bold proposals advocating changes in the license renewal process and the fairness doctrine. This speech expanded the ideas in his 1971 license renewal/fairness doctrine speech.

Whitehead began by saying that local broadcasters could "no longer accept network standards of taste, violence, and decency in programming."[56] He recommended:

> If the programs or commercials glorify the use of drugs; if the programs are violent or sadistic; if commercials are false or misleading, or simply intrusive and obnoxious; the stations must jump on the networks rather than wince as the Congress and the FCC are forced to do.[57]

Whitehead referred to the fact that the major broadcasting networks are beyond the direct control of the federal government in communications matters. The networks are private corporations and therefore not subject to FCC regulations. Each major network is permitted to own and operate no more than five television stations. The FCC has only nominal authority over these stations. Since the federal government could not directly regulate the networks, Whitehead advocated that the local affiliates be responsible for the network programming on their channels.

Whitehead went on to say that "station owners and managers cannot abdicate responsibility for news judgment. . . . [They] have final responsibility for news balance —whether the information comes from their own newsroom or from a distant network."[58] And he warned, "Station managers and network officials who fail to act to correct imbalance or consistent bias from the networks— or who acquiesce by silence—can only be considered willing participants, to be held fully accountable by the broadcaster's community at license renewal time."[59]

Whitehead still advocated elimination of the fairness doctrine. He said "the First Amendment is meaningless if it does not apply fully to broadcasting."[60] He also called for longer license periods and a restructuring of the license renewal process. He said the OTP was preparing legislation for Congress that would bring about these changes.

According to *Broadcasting* magazine, reactions to Whitehead's speech were on the whole unfavorable.[61] Sen. Vance Hartke (D-Ind.) and Rep. Jerome Waldie (D-Calif.) regarded the speech as an effort to have the networks produce news to suit the Nixon Administration. NBC News President Reuven Frank called the speech a "threat" to network broadcasting. And FCC Commissioner Nicholas Johnson said, "It appears that young Clay Whitehead is to provide us with 'four more years' of Nixon's war on the networks. . . . ."

For the next few months, Whitehead attempted to explain the purpose of his Indianapolis speech. He said the speech "was intended to remind licensees of their responsibilities to correct faults in the broadcasting system that are not (and should not) be reachable by the regulatory process of government."[62]

OTP Legislation Before Congress

On March 13, 1973, Rep. Harley Staggers (D-W.Va.) introduced the OTP legislation in the House.[63] The bill's first provision extended the period of a license from three years to five years, which Whitehead felt would reduce the opportunity for governmental interference in broadcasting.

The second provision eliminated the FCC's requirement of a hearing for every application for the same broadcasting service. Under the OTP bill, there would be one comparative hearing in which all parties interested in the action would participate. Whitehead felt that numerous hearings not only lengthened the renewal process but also were very costly.

The third provision prohibited the FCC from restructuring the broadcasting industry through the license renewal process. Any major changes needed in the industry could be made only by specific FCC rulings.

The fourth, and perhaps most important provision, prohibited the FCC from using, as it now does, predetermined categories, formats, quotas, or guidelines for evaluating the programming performance of license renewal applicants. Although the 1934 Communications Act provides that a license may be granted or renewed if the public interest, convenience, or necessity would be served, it does not indicate how this requirement can be met. Whitehead felt that the FCC should decide from a community standpoint whether the public interest would be served by a broadcaster, rather than trying to define at the national level what the public interest should be. And Whitehead said, "If a station can't demonstrate meaningful service to all elements of his community, the license should be taken away by the FCC."[64]

While Whitehead advocated abolishing the fairness doctrine, the OTP bill did not specifically deal with the fairness doctrine requirement. Technically, the fairness doctrine is not a criterion in the license renewal process. Issues involving the doctrine are usually handled separately, on a case-by-case basis. However, under the OTP bill, the fairness doctrine (or, as Whitehead liked to call it, the "fairness obligation") would be included in the renewal process determination. Whitehead felt the fairness doctrine should not be a requirement on broadcasters rather, it should be "obligatory." The license renewal process would be structured differently under the OTP bill. As Whitehead explained it:

> One, the broadcaster must be substantially attuned to community needs and interests, and respond to those needs and interests in his programming—this is known as the ascertainment obligation; and two, the broadcaster must provide reasonable opportunity for discussion of conflicting views on public issues—this is known as the fairness obligation.[65]

As Whitehead said, those who failed to meet these two requirements faced losing their licenses. However, he gave no indication of how a broadcaster could determine all the needs of his community.

Reaction to the OTP bill was unfavorable. Major newspapers (many owning television stations), news magazines, and columnists were critical. Tom Wicker of the New York *Times* said (12-21-72) the "American people will be the losers if the managers of the local stations that run network news are to be made so nervous that they harass the networks to be less controversial. . . ." The Washington *Post* said (12-22-72) the bill was "the administration's hostility to free and vigorous journalism particularly as practiced by the networks." The *Christian Science Monitor* said (12-22-72) "the legislation which the White House proposes would convert American television into what the French had during the deGaulle era—a vehicle for the views of government which would never be questioned or doubted—an official, government-controlled channel for government propaganda." The Los Angeles *Times* said (12-24-72) the legislation "may be nothing more than a mask for an effort to intimidate network news and programming."

However, John Schneider, President of CBS/Broadcast Group said that the bill would "appear to be very much in the public interest as well as that of broadcast licensees."[66]

Whitehead's reaction to all of this? "The whole goddam press corps rose up in arms against a bill that any broadcaster or newspaper that owns a TV station would think is a damn good bill."[67]

The House Subcommittee on Communications and Power held extensive hearings during the summer of 1973 on twelve license renewal bills, including the OTP bill. It was apparent that the time had come for major license renewal legislation.

On February 27, 1974, the subcommittee sent to the Committee on Interstate and Foreign Commerce its version of a license renewal bill—HR 12993—and on March 6 the committee reported favorably on it. The bill was sent to the House and on May 1 passed 379-14. The OTP bill was dead in the House, but there was still a chance of getting it passed through the Senate when the House bill was considered.

Whitehead had introduced the OTP bill in the Senate early in 1973, as a precaution against its defeat in the House. He defended the OTP bill at hearings held by the Senate Commerce Committee's subcommittee on communications, but, unlike the House subcommittee hearings, he was questioned very little. Not unexpectedly, the subcommittee reported favorably on HR 12993 and the Senate Commerce Committee unanimously supported it. That bill passed the Senate October 8, 1974, and was referred to a joint conference committee. The OTP bill was officially dead.

Why the OTP Bill Died

One factor that perhaps helped contribute to the bill's demise was the relationship between the OTP, the White House and Congress. First of all, the OTP was on shaky ground with Congress. Both houses were competing with each other to make large budget cuts in OTP's relatively small budget. Then, Sen. John Pastore (D-R.I.) said he was dismayed by the OTP's failure to develop an over-all national policy on telecommunications.[68] Pastore felt such a national policy was essential and considered that the main reason for establishing the OTP in the first place. However, Whitehead reminded him that, during his confirmation hearings, he had said that it would be difficult to establish such a national policy. But this did not improve relations between Whitehead and Pastore.

Whitehead also had problems in the House. He had received rough treatment during license renewal hearings, especially from House subcommittee chairman Torbert Macdonald (D-Mass.). Macdonald was an adversary of Whitehead and the OTP's license renewal bill. He felt that Whitehead's Indianapolis speech was an attempt by the Nixon Administration to control television programming.

At this time, Whitehead became aware that many in Congress had come to associate the Nixon Administration's attitudes on the press with those of the OTP. These congressmen remembered that after the OTP was established Whitehead had said that everything the agency did had the authority of the President behind it. He had said his 1971 license renewal/fairness doctrine speech was based on the broad thinking of the White House. And during the House subcommittee's license renewal hearings, Whitehead said, "I am speaking for the administration on these matters."[69] On still another occasion, Whitehead said: "My job is to take the positions and say the things that the President wants me to, and to espouse my views after studying the issues."[70]

Because of this confusion as to whose attitudes the OTP actually represented, Whitehead suggested that the agency be taken out of the executive branch and made nto an independent agency, something like NASA. Nothing, however, came of this suggestion.

The OTP was viewed with disfavor by congressmen other than Pastore and Macdonald. Sen. Lowell Weicker (R-Conn.) felt the OTP should be abolished and its functions transferred to the FCC. Weicker called the agency "a danger to the freedom of the press which is guaranteed in the First Amendment."[71] Weicker and Sen. Abraham Ribicoff (D-Conn.) introduced legislation on November 9, 1973 to have the OTP abolished. The bill was reported to the Committee on Government Operations, but had little effect in the Senate. Faced with the energy crisis, Watergate, and a host of other problems, Congress was too occupied to consider the Weicker-Ribicoff bill. As far as can be determined, it was never reported out of committee and no hearings were held.

On October 8, 1974, Whitehead resigned (N.Y. *Times*, 8-9-74), the same day President Nixon announced he was resigning. Deputy Director John Eger became temporary head of the OTP.

Future Unknown

The Office of Telecommunications still exists, although it was almost abolished again in 1975. Early that year, President Gerald Ford wanted to reorganize the executive office. The reorganization would abolish the OTP and transfer its functions to the Department of Commerce. The OTP was still experiencing budget problems with Congress. It was felt that abolishing OTP would not only help to reorganize the executive office, but would also help the executive office in its relations with Congress. However, a few weeks after this reorganization plan became known, White House sources stated (N.Y. *Times*, 1-18-75) that the OTP would not be abolished. According to the sources, the President changed his mind partly because of congressional pressure. Sen. Howard Baker (R-Tenn.) felt that Congress had approved the formation of the OTP in 1970 (at least, they didn't disapprove it), and that Congress should have an opportunity to be heard if abolishing the agency was being considered.

In June, 1975, the White House said the OTP would play a diminished role in policy-making, at least as far as radio and television were concerned.[72] The agency's main function would be concentrated on management of the governmental side of the broadcasting industry. This decision returned the agency to the same functions held by all the previous agencies in the executive branch.

In 1976, the OTP maintained a low profile in the telecommunications policy area. Its functions were those that the White House said it would have. It still did not have a permanent director. Perhaps under a new president, and with a permanent director, the OTP can smooth its relations with Congress and become effective as an agency in the executive branch concerned with telecommunications policy formulation for the private sector.

FOOTNOTES

1. *Palko v. Connecticut*, 302 U.S. 319 at 327 (1937).
2. Blackstone's *Commentaries*, 4:151-52.
3. *Ibid.*
4. *Schenck v. United States*, 249 U.S. 47 at 52 (1919).
5. *Gitlow v. New York*, 268 U.S. 652 at 666 (1925).
6. "Broadcasting Not on Equal Footing with Print Media: Burger," *Broadcasting*, Oct. 6, 1975, p. 50.
7. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).
8. *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973).
9. 418 U.S. 241 at 258.
10. *United States v. Paramount Pictures*, 334 U.S. 131 (1948) at 166.
11. *Superior Films v. Department of Education of Ohio*, 346 U.S. 587 (1954) at 589.
12. *Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959) at 529-30.
13. *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969) at 388.
14. 395 U.S. 367 at 386.
15. 412 U.S. 94 at 125.
16. 412 U.S. 94 at 154, 159-60.
17. A recent book dealing with this topic in more detail is Fred W. Friendly's *The Good Guys, The Bad Guys and the First Amendment: Free Speech vs. Fairness in Broadcasting* (New York: Random House, 1975-1976).
18. Walter B. Emery, *Broadcasting and Government: Responsibilities and Regulations* (East Lansing: Michigan State University Press, 1961), p. 17.
19. Sydney Head, *Broadcasting in America: A Survey of Television and Radio*, 2d ed. (New York: Houghton Mifflin, 1972), p. 156.
20. House Report No. 1416, Jan. 16, 1923.
21. *Ibid.*
22. *Hoover, Secretary of Commerce v. Intercity Radio Co.*, 286 Fed. Rpt. 1003 at 1007 (1923).
23. Emery, p. 18.
24. Head, p. 159.
25. Emery, p. 17.
26. See *United States v. Zenith Radio Corporation*, 12 F.2d 614 (1926); 29 Attorney General Opinions 579 (1912); and 35 Attorney General Opinions 126 (1926).
27. 44 Stat. 1162 (1927).
28. *Ibid.*
29. *Ibid.*
30. 78 *Congressional Record* 3181, Feb. 26, 1934.
31. Emery, p. 23.
32. It is not the purpose of this paper to trace the development of the fairness doctrine or the FCC's license renewal process. See Frank J. Kahn, ed., *Documents of American Broadcasting* (New York: Appleton-Century-Crofts, 1968). Also see *Freedom of Information Bulletins* 206, 251, 253, 278 and 323 (published by Freedom of Information Center, University of Missouri School of Journalism, Columbia, Missouri 65201).
33. 16 Fed. Reg. 12452 (1950). This procedure has been changed over the years by various executive orders. The point here is that the authority no longer belonged to the President.
34. 16 Fed. Reg. 10329 (1951). This discussion of the evolution of the various telecommunications agencies in the executive branch is extremely simplified. Numerous other duties and functions that belonged to these agencies are not pertinent to this paper.
35. *United States Government Organization Manual: 1952-53* (Washington: Government Printing Office, 1952), p. 59. (Referred to hereafter as *Government Manual*.)
36. *Government Manual: 1953-54*, p. 68.
37. *Government Manual: 1974-75*, p. 142.
38. *Public Papers of the Presidents: Lyndon B. Johnson*, Book II (Washington: Government Printing Office, 1968), p. 763.
39. U.S. Congress, House, Committee on Government Operations, Subcommittee on Executive and Legislative Reorganization, *Reorganization Plan No. 1 of 1970 (Office of Telecommunications Policy)*, Hearings, 91st Congress, 2d Session, March 9-10, 1970, p. 79.
40. "Final Report," *President's Task Force on Communications Policy, December 7, 1968* (Washington: Government Printing Office, 1968), pp. 25-26.
41. Executive Order 11556 (35 Fed. Reg. 14193), 1970.
42. *Ibid.*
43. House subcommittee hearings on Reorganization Plan No. 1 of 1970, p. 66.
44. *Ibid.*, p. 67.
45. *Ibid.*, p. 51.
46. *Ibid.*, p. 61.
47. "White House Plans New Policy Office," *Broadcasting*, Feb. 16, 1970, p. 36.
48. *Ibid.*, p. 38.
49. U.S. Congress, House, Committee on Appropriations, Subcommittee on Treasury, Post Office, and General Government Appropriations, *Appropriations—Fiscal Year 1972*, Hearings, 92nd Congress, 1st Session, Pt. 4, pp. 187-88.
50. "A Hot New Breath Down FCC's Neck," *Broadcasting*, Sept. 28, 1970, p. 24.
51. U.S. Congress, House, Committee on Interstate and Foreign Commerce, Subcommittee on Communications and Power, *Broadcast License Renewal*, Hearings, 93rd Congress, 1st Session, Parts 1 and 2, p. 861.
52. *Ibid.*, p. 863.
53. "Whitehead Calls for a New Deal," *Broadcasting*, Oct. 11, 1971, p. 14.

54. *Ibid.*
55. "The Dust Hasn't Settled After Speech by Whitehead," *Broadcasting*, Jan. 1, 1973, p. 18.
56. *Broadcast License Renewal*, p. 866.
57. *Ibid.*
58. *Ibid.*
59. *Ibid.*, p. 867.
60. *Ibid.*, p. 865.
61. "The Dust Hasn't Settled," p. 18.
62. "Whitehead: Try the Renewal Bill, You'll Like It," *Broadcasting*, Feb. 5, 1973, p. 30.
63. H.R. 5546, *Broadcast License Renewal*, pp. 1-5.
64. *Broadcast License Renewal*, p. 866.
65. *Broadcast License Renewal*, p. 795.
66. "Macdonald Takes a Poke at OTP, Urges Broadcasters to Fight for Rights," *Broadcasting*, Jan. 22, 1973, p. 23.
67. "A Beleaguered Whitehead and Battered OTP," *Broadcasting*, Sept. 17, 1973, p. 16.
68. *Ibid.*
69. *Broadcast License Renewal*, p. 813.
70. "A Beleaguered Whitehead," p. 16.
71. "Weicker Sets Out to Abolish OTP, Calls it Threat to Press Freedom," *Broadcasting*, Nov. 12, 1973, p. 7.
72. "Lower Profile," in "Closed Circuit" section, *Broadcasting*, June 23, 1975, p. 19.

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Source:	N/A
Peer-Reviewed:	N/A
Publisher:	N/A
Publication Date:	1977-03-00
Pages:	11
Pub Types:	Reports - Research

Abstract:

Supreme Court interpretations of the First Amendment have allowed congressional regulation of broadcasting. This report discusses governmental regulation of the mass communication media, especially in the area where restrictions are most numerous--television. Specifically, the following topics are examined: Supreme Court litigation regarding broadcasting, early regulation of broadcasting by federal agencies, the role of the executive branch in policy formation, the establishment of the Office of Telecommunications Policy (OTP), actions taken by Clay T. Whitehead (the first director of the OTP), OTP legislation before Congress, and the demise of a bill which would have necessitated a strict review process for broadcasting-license renewal. Although movement has been made to abolish the OTP, it is hoped that, under a new administration, and with a permanent director, the organization can smooth its

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