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PROTECTING THE PUBLIC FROM THEMSELVES: THE FIRST AMENDMENT, PUBLIC POLICY, AND OUR FAILURE TO PROTECT DISSENT

Aryn Pedowitz*

I. INTRODUCTION

News anchor David Brinkley once said, "[T]he news is whatever I say it is." The statement holds true today. The press defines the news when deciding what to investigate, what to report, and how to present information. Journalism students learn the necessity of the free press, and most Americans themselves believe in the principle of a free press. The aftermath of September 11, 2001 provided a new generation of Americans and communications students with a recent example of the inadequacy of the First Amendment's protection of the "freedom of the press."

In mid-October of 2001, National Security Advisor Con-

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2. Please note that the terms "press" and "media" are used interchangeably throughout this comment. These terms are used to describe journalism news outlets as a whole, with no distinction between the print and broadcast press unless specifically stated, and in no way are used in reference to the various forms of entertainment that the term media also encompasses. The focus of this comment is the "mainstream media," the media from which the majority of the population gets its news and information. Although alternative forms of information and news exist, the "alternative" press is not at issue in this comment.

3. This "new generation" consists of people who were infants during the Vietnam and Korean Wars and people not yet born at that time. These people may have learned about the repression of speech during past decades, but they had not seen true suppression of dissent in their lifetime.
doleezza Rice requested that television networks use caution when broadcasting Osama bin Laden's speeches. Press Secretary Ari Fleischer later told the White House press corps: "At best, Osama bin Laden's messages are propaganda calling on people to kill Americans. At worst, he could be issuing orders to his followers to initiate such attacks." This may be the closest the Bush Administration has come to censoring privately owned media. Although a request from the government is a powerful thing, it is not censorship. In fact, most of the press continued to report on the bin Laden speeches; many played portions of the tapes while others only summarized the content.

Though the government did not formally censor the press following the 9/11 attacks, the government did severely criticize many public figures for voicing unpopular opinions through the press. Bill Maher, host of the television show "Politically Incorrect," vocally expressed his dissident views. On air, Maher opined that labeling the terrorists as cowards was inaccurate since they actually stayed in the planes that hit the buildings, while we [Americans] were "lobbing cruise missiles from 2,000 miles away." In the face of public outcry, withdrawal of major sponsors and cancellation of the show by affiliates, Maher apologized on air for the statement. In response to this event the White House stated: "There are reminders to all Americans that they need to watch what they

5. See Bill Carter & Felicity Barringer, Speech and Expression; In Patriotic Time, Dissent is Muted, N.Y. TIMES, Sept. 28, 2001, at A1; see also infra Part III.B.
7. The complete statement was, "We have been the cowards lobbing cruise missiles from 2,000 miles away. That's cowardly. Staying in the airplane when it hits the building, say what you want about it, it's not cowardly." See Li, supra note 6, at 89.
8. Carter & Barringer, supra note 5.
say, watch what they do, and this is not a time for remarks like that."

The "Politically Incorrect" incident sadly reminds us that Maher's statements and the statements made by the show's guests are the types of expression that most deserve First Amendment protection. They are the dissident viewpoints that the public lacks in the majority of "mainstream" press. What is important about the incident is that Maher was not censored by the government, but by corporate America's reaction to the American public's outcry over what was said.

Although the Bill of Rights, specifically the First Amendment, protects us from the tyranny of the majority through government control, it does not protect us from that same tyranny caused by private entities. Though a literal interpretation of the speech and press clause and the theory of a free and responsible press are adequate for theoretical law and communications discussions, the debate misses how private censorship and economic market forces affect how well and responsibly the press serves democracy. In light of

11. See Trigoboff, supra note 6, at 20.
12. U.S. CONST. amend. I. "Congress shall make no law ... abridging the freedom of speech, or of the press ..." (emphasis added).
13. Cf. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784-85 (1978) (Congress recognizes that corporations have a First Amendment right to "speak" on issues which do not materially affect the corporations business interests). But cf. Bill Shaw, Corporate Speech in the Marketplace of Ideas, 7 J. CORP. L. 265, 277 (1982) ("Although the broad interpretation of corporate first amendment rights in the recent Supreme Court cases being discussed appears to encourage free expression, these decisions may actually restrict it ... [T]hey 'muffle the voices of most of us by amplifying the voices of those who have more money.'") (quoting Rembard, For Sale: Freedom of Speech, THE ATLANTIC 27-28 (March 1981)).
14. See, e.g., Robert M. Entman, Putting the First Amendment in Its Place:
the changes in the institution of the press, the question becomes whether the government should and can help protect us from ourselves.

This comment first reviews policies underlying the First Amendment and the regulations and rules that government has applied to the press, including the different treatment of print and broadcast media with regard to licensing, content and ownership. It continues by exploring the changes that the laws and the press as an industry have undergone, to illustrate the current state of the media and First Amendment protection. This comment then analyzes the press in the U.S. free-market system, the limitations imposed by the economic market, and how both the market system and its limitations hinder the policy of protecting the press, using the aftermath of 9/11 as an example. It concludes by calling for the press to be accountable for their actions in the free-market and suggests proposals for disclosure similar to those used in the National Environmental Policy Act (NEPA). This comment also suggests economic incentives, and voluntary self-regulation as a means of reducing the adverse affects of the economic market.

II. BACKGROUND

A. First Amendment Policy

Although there are many different views of the policy underlying the First Amendment, perhaps the most impor-
tant is the protection of the press as an institution. The framers recognized the catalytic role that the press has in providing diverse and controversial information and the importance this role plays in a free and democratic society. Freedom of speech and the press promotes the discovery of truth and ensures an informed self-government.

In 1919, Justice Holmes introduced the marketplace of ideas theory to America:

[M]en . . . may come to believe . . . that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes can be safely carried out.

Holmes analogized the exchange of ideas and information to the exchange of products on the market; people place their "products," in the form of ideas, on the market and "customers" will choose what to listen to and believe. This theory focused on potential benefits to the whole society rather than on benefits to the individual speaker.

In 1966, Justice Black observed, "Whatever differences may exist about interpretations of the First Amendment,

23. See David Joseph Onorato, Press Privilege for the Worst of Times, 75 GEO. L.J. 361, 366 (1986) (discussing Justice Stewart’s acknowledgement that the press was protected as an institution in order to insulate it from government pressures).

24. See A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (Harper & Row 1965) (1948) (“The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.”). See also MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.02[A] (1984) (“It is the enlightenment function which constitutes the foundation upon which the First Amendment edifice largely rests.”).


26. See MEIKLEJOHN, supra note 24, at 57.

27. See Abrams, 250 U.S. at 630.

28. Id.

29. See generally ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1941) (discussing the various rationales for free speech).
there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." 30 Justice Stewart also acknowledged the important role that the press plays in Branzburg v. Hayes, 31 by writing that the press receives protection in order to serve "the broad societal interest in a full and free flow of information to the public. It is this basic concern underlying the Constitution's protection of a free press." 32 The role of the press is imperative in ensuring "open and robust" debate and having an informed public ready to engage in discussion on politics and world issues. The press delivers to the public the information necessary for this type of debate. 33

The self-governance rational of First Amendment policy is rooted in the Declaration of Independence, which states, "governments are instituted among Men, deriving their just powers from the consent of the governed." 34 If the legitimate authority of the government truly comes from the consent of the governed, then those granting their consent must be well informed.

**B. Regulation of Media: Differences in Licensing and Ownership**

Although the government has never subjected the newspaper industry to legislation, 35 the government has regulated the broadcast industry since its inception. 36 Congress justi-
fied the intrusion based on the limitations of the broadcast spectrum and decided to regulate the spectrum as a limited resource to ensure diversity. Congress later created what is now the Federal Communications Commission (FCC) to regulate the spectrum and license broadcasters.

1. Licensing of Broadcasters Based on Content

Since the Communications Act of 1927, the government has awarded licenses in accordance with "convenience, public interest, [and] necessity." The Federal Radio Commission (FRC), which enforced the Act, described the system as one where broadcasters "must be operated as if owned by the public." Acting as public trustees, broadcasters had to deal fairly with important public issues by airing all viewpoints and treating all candidates equally and without bias during elections.

To renew their licenses, broadcasters had to show that they adhered to the standards of content and behavior that the Commission promulgated. The FCC replaced the FRC with the passage of the Communications Act of 1934, but the regulatory duties and enforcement remained unchanged.

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38. See id. at 213-26 (discussing the rational behind the Act).
43. The FRC, and later the FCC, set the criteria on which applicants should initially receive and, later, be eligible for renewal of their licenses. See Erwin G. Krasnow & Jack Goodman, The "Public Interest" Standard: The Search for the Holy Grail, 50 FED. COMM. L.J. 605, 606-07 (1998) (discussing the origins of the public interest standard).
44. See generally, 47 U.S.C. § 303 (1994). Though the 1934 Act replaced the FRC with the FCC, the objectives of communications regulatory legislation have
The Supreme Court reviewed the constitutionality of the FCC's licensing regulations in *National Broadcasting Co. v. United States* and found that "the right of free speech does not include . . . the right to [broadcast] without a license." The FCC revised its guidelines in 1960 and outlined fourteen of the "major elements usually necessary to meet the public interest." The Commission eventually specified that these general guidelines include a minimum amount of time for news, public affairs, and other non-entertainment programming. They also required adherence to the fairness doctrine, and programming rules for prime-time.

Beyond FCC regulations, the National Association of Broadcasters articulated standards of professionalism in the Television Code. The NAB Code created a means of self-

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remained substantially unaltered since 1927. *See also Nat'l Broad. Co.*, 319 U.S. at 214 (1943).

45. 319 U.S. 190 (1943).

46. *Id.* at 227.

47. Report and Statement of Policy Research: Commission en banc Programming Inquiry, 44 F.C.C. 2303, 2314 (1960). The elements are: (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, (14) entertainment programs. *Id.*

48. *See Amendment to Section 0.281 of the Commission's Rules: Delegations of Authority to the Chief, Broadcast Bureau, 59 F.C.C.2d 491, 493 (1976).*

49. In brief, the fairness doctrine required broadcasters to attend to public issues and to ensure a diversity of views. In practice, it seems to have done the opposite. *See infra Part II.B.


regulation and provided a feeling of community responsibility. Roughly seventy percent of stations subscribed to the NAB Code, and the Association denied violators the right to post the Seal of Good Practice on the station’s transmittal. In 1982, thirty years after the NAB Code’s creation, a portion of the NAB Code, relating to advertising, was outlawed on antitrust grounds. Shortly thereafter, in January 1983, the National Association of Broadcasters abolished the NAB Code.

The elimination of the NAB Code coincided with a significant period of broadcasting industry deregulation during the Reagan Administration. The FCC and the courts largely eliminated the fairness doctrine and removed many of the specific public interest requirements. However, if a broadcaster sells airtime to a political candidate, it must sell simi-
lar time to opposing candidates.\textsuperscript{58} Congress codified this requirement\textsuperscript{59} in a longstanding provision that requires a broadcaster offering to sell time to do so at the "lowest unit charge"; however, some of these requirements remain such as limiting the unit rate of political advertising during the forty-five days before a primary election and during the sixty days before a general or special election.\textsuperscript{60}

During 1997 and 1998, a presidential advisory committee met to discuss digital television broadcasters' public interest obligations.\textsuperscript{61} The committee recommended that a voluntary code be adopted and went so far as to include a model.\textsuperscript{62} The code was never implemented.

2. Different Levels of Protection and Content Regulation

Two cases established the differing First Amendment protection for broadcasters and print media: \textit{Red Lion Broadcasting Co. v. FCC}\textsuperscript{63} and \textit{Miami Herald Publishing Co. v. Tornillo}.\textsuperscript{64} In \textit{Red Lion}, the Supreme Court held that regulations mandating a right-of-reply in broadcasting served First Amendment goals and were constitutionally acceptable.\textsuperscript{65} At

\begin{itemize}
\item \textsuperscript{58} See 47 U.S.C. § 315 (1994).
\item \textsuperscript{59} Id.
\item \textsuperscript{60} 47 U.S.C. § 315(b).
\item \textsuperscript{61} The Advisory Committee was charged with developing recommendations concerning public interest obligations to be imposed on television stations as they convert to digital television. See Exec. Order No. 13,038, 62 Fed. Reg. 12,065 (1997).
\item \textsuperscript{62} The Committee even included a model code drafted by Professor Cass Sunstein. See Angela J. Campbell, \textit{Self-Regulation and the Media}, 51 Fed. COMM L.J. 711, 712 (1999).
\item \textsuperscript{63} 395 U.S. 367 (1969). The broadcaster carried a program series titled "The Christian Crusade." Id. at 371. During the program, Rev. Billy Hargis criticized a reporter who wrote an unflattering biography of Barry Goldwater. Id. at 371. The station refused to allow the reporter an opportunity to reply to the attack in violation of the fairness doctrine. Id. at 372. The Supreme Court unanimously endorsed the right to defend oneself and stated the importance of the public's access to ideas and their right to be fully informed. Id. at 379-86.
\item \textsuperscript{64} 418 U.S. 241 (1974).
\item \textsuperscript{65} See \textit{Red Lion}, 395 U.S. at 367.
\end{itemize}
issue in *Red Lion*, the fairness doctrine provided that “broadcasters have certain obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.” In practice, the doctrine required that broadcasters present discussion of public issues and ensure balance in the discussion of public issues. Because the Court found that the regulation served a paramount issue of public importance, the Court allowed the FCC to ignore broadcasters’ editorial judgment and control the content of broadcasts.

In contrast, the *Miami Herald* court held that the First Amendment protected print media from the effects of the fairness doctrine. The Supreme Court held that content regulation in the form of a right-of-reply is unconstitutional when applied to the print media due to the infringement on editorial discretion. While recognizing economic barriers on entry into the industry, the Court rejected economic scarcity as justification for content regulation. Ignoring the precedent and rational of *Red Lion*, the Court noted the importance of gathering information from diverse and antagonistic sources. Interpreting the speech and press clause literally,

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67. See *Red Lion*, 395 U.S. at 378.
68. See id. at 389.

There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community.... It is the right of the viewers and listeners, not the broadcasters, which is paramount.

*Id.* at 389-90.

69. *Miami Herald*, 418 U.S. 241, 248. The Florida statute under review provided that when newspapers attacked the character of a political candidate, they were required to provide free and equal space in the paper for the candidate to reply. *Id.* at 244.

70. See *id.* at 248-58.

71. See Stephen J. Shapiro, *One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation*, 8 MEDIA L. & POLY 1, 4 (1999) (“The Court made no mention of *Red Lion*, which had been decided only five years prior.”).

the Court further stated that any imposition on editorial control was clearly unconstitutional.\textsuperscript{73} Though economic scarcity did not justify the content regulation of newspapers, the argument proved successful in justifying content regulations for cable programming in Berkshire Cablevision v. Burke.\textsuperscript{74} The district court stated that the distinction between economic and allocational scarcity\textsuperscript{75} becomes immaterial if the scarcity results in the removal of the means of expressing ideas from all but a small group.\textsuperscript{76} Distinguishing Miami Herald, the court explained that when access is denied, a pamphlet or other publication provides an alternative within the same medium as a newspaper, but the medium of cable offers no similar solution.\textsuperscript{77}

3. Ownership Regulations

Although antitrust laws regulate ownership in the newspaper industry,\textsuperscript{78} the Supreme Court has held that ownership caps\textsuperscript{79} and prohibitions on co-ownership\textsuperscript{80} are constitutionally
acceptable when applied to broadcasters. The Court determined that structural regulations like these protect diverse and antagonistic news sources that serve the public interest in obtaining diversity, and therefore further First Amendment objectives. In Storer Broadcasting Co., the Court held that limitations on the number of broadcast stations held by a single owner were constitutional.

Similarly, in *FCC v. National Citizen's Committee for Broadcasting*, the Supreme Court determined whether the FCC could prohibit a single party from owning both a broadcast station and a newspaper in the same community. The Court stated: "[I]t is unrealistic to expect true diversity from a commonly owned broadcast station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run." Since the regulation did not entirely prevent one's ability to publish a newspaper, the Court found that it raised no First Amendment issues.

C. The Evolution of the Press: Changes in Ownership and Regulations

Although the language of the First Amendment has not changed, the press has undergone dynamic changes in recent decades. The marketplace of ideas is now an economic mar-

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82. See Nat’l Citizens Comm. for Broad., 436 U.S. at 798-801.
84. Id. at 201.
86. Id.
87. Id. at 797 (quoting *In re* Amendment of Sections 73.34, 73.240 and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Memorandum Opinion and Order, 53 F.C.C.2d 589 (released June 5, 1975)).
88. See id. at 776.
The institution of the press has grown from independently owned newspapers to oligopolies in newspapers and broadcast media. With this change in structure, the media no longer competes in a theoretical marketplace of ideas, but in a true economic marketplace. The press no longer searches for listeners, but for circulation and viewer numbers that will attract advertisers and raise profits.

1. The Newspaper Industry

The number of daily newspapers in America has fallen steadily from 2,600 in 1909 to approximately 1,800 today. In 1940, eighty percent of the newspapers in America were independently owned, but by 1989 corporations owned eighty percent. In 1992, only twenty corporations owned fifty percent of the industry. Because of the trend toward concentration and the economies of scale available to large corporate owners, ninety-eight percent of cities have just one daily newspaper. This concentration of ownership has both affected the industry and altered the content of the news. The creation of a powerful lobby, a change in coverage, and the presentation of a corporate perspectives resulted from this concentra-

90. See Peter L. Kahn, *Media Competition in the Marketplace of Ideas*, 39 Syracuse L. Rev. 737, 780 (1988) (“As a market-oriented industry, content had to be structured to appeal to a mass readership.”).

91. See BAGDIKIAN, supra note 89, at 4 (“At the end of World War II, for example, 80 percent of the daily newspapers in the United States were independently owned, but by 1989 the proportion was reversed, with 80 percent owned by corporate chains.”).

92. See id.

93. See infra Part II.C.1.


96. See id.

97. See BAGDIKIAN, supra note 89, at 8.

98. See id. at 12-17.
In 1969, the seven largest newspaper companies lobbied for the Newspaper Preservation Act, which allows publishers of competing newspapers to merge their operations if one of the newspapers is failing. The Department of Justice opposed the passage. The president of Company Publishing wrote a letter to President Nixon stating that “many ... important publishers and friends of your administration” were pushing for the passage of the bill and relying on the President's support. The administration reversed its stance and the bill passed. However, not all newspapers supported the legislation. Among other newspapers, the *New York Times* lobbied against it and the *Courier-Journal* called it a “governmental favor” that threatened “the independence of the press.” News lobbies continue to have significant influence due to its control of hundreds of media outlets.

Corporate management style has altered the content coverage of newspapers, skewing coverage in favor of corporate values. The management of newspapers now resembles the management of a corporation and shares the same goal:

99. *See discussion infra Part II.C.1.*
101. *See id. § 1802(2).*
104. *See id.* Cox and Scripp-Howard gave Nixon full support and were major beneficiaries of the Act. These papers also suppressed damaging Watergate stories. *See id.*
106. *Id. at 12-13.*
107. *Id. at 13.*
109. *See BAGDIKIAN, supra note 89, at 212.*
maximize profits in order to please shareholders. Local news coverage suffers because it has become more expensive to produce. Though the coverage has changed, the use of resources has become more efficient. Newspaper chains can take the work of a journalist in one city and syndicate it in the rest of their newspapers throughout the country. Newspaper chains can also purchase international news, cartoons, and features through news services. According to one study, independent newspapers contained twenty-three percent more local and national news than corporately-held newspapers.

In addition, the press in the economic market lacks coverage on corporations and newspapers themselves and issues affecting corporate interests. Journalists have stated that corporate owners fear reporting on themselves and their financial peers. A survey conducted by the American Society of Newspaper Editors found that thirty-three percent of all editors working for media conglomerates said they probably would not run a story that damaged their parent corporation. This response is reasonable considering that every year corporations fire editors and journalists for reporting stories that their parent corporation did not like. Nonetheless, some newspaper chains do continue to operate with sound and autonomous management in their pursuit of quality content.

110. See id. at 90-92.
111. See id. at 212.
112. See id.
113. See id.
114. SQUIRES, supra note 105, at 216-17.
116. See BAGDIKIAN, supra note 89, at 30-45.
117. See id. at xvi (commenting on the coverage of corporate America).
118. See id. at 30, 217.
119. See id. at 36-37.
120. ISAACS, supra note 96, at 21.
2. The Broadcast Industry

In recent years, broadcast regulations have allowed more concentration of ownership.\(^{121}\) Approved in 1943,\(^{122}\) the scarcity rationale distinguished broadcast from print media and justified the industry's regulation.\(^{123}\) Technological innovation and the onset of cable television have made the broadcast spectrum less limited.\(^{124}\) In 1984, the Supreme Court acknowledged difficulties with justifying broadcast regulations on scarcity,\(^{125}\) but would not reconsider the rationale without some official indication from Congress.\(^{126}\) In 1987, the FCC recognized the diminished value of the fairness doctrine and terminated the doctrine's use, finding it did not serve the public interest and went against First Amendment principles.\(^{127}\) In its report, the FCC commented on the increase of

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121. *See infra* Part II.C.2.

122. *See Nat'l Broad.*, 319 U.S. 190 (introducing the scarcity doctrine).

123. The theory developed due to the situation of the broadcasting industry before 1927. *Id.* at 213. Many people wanted to broadcast, but the Secretary of Commerce had no power to impose restrictions or deny licenses to qualified applicants. *Id.* at 212. As a result, people who had a license in an area with no available broadcast band broadcasted on any frequency they wanted, regardless of the interference they caused. *Id.* Confusion and chaos ensued, with everybody on the air and no one being heard. *Id.* As a means of communication, radio had limited facilities and the spectrum was not large enough to accommodate all who want to use it. *Id.* at 213. In other words: "There is a fixed natural limitation upon the number of stations that can operate without interfering with one another." *Id.* at 212-13.


125. Federal courts recognized the weakness of the scarcity rationales. Loveday v. FCC, 707 F.2d 1443, 1459 (D.C. Cir. 1983). "The number of broadcast stations . . . rivals and perhaps surpasses the number of newspapers and magazines . . . ." *Id.*

126. The Court recognized that the doctrine was widely criticized, noting that even the Chairman of the FCC questioned its validity. *See* FCC v. League of Women Voters of Cal., 468 U.S. at 364, 376 n.11 (1984).

broadcast stations and stated that broadcasting was no longer a scarce resource.\textsuperscript{128}

The Telecommunications Act of 1996\textsuperscript{129} became the first large-scale modification of telecommunications laws in sixty-one years. Although the Act addressed some of the concerns over the rise of digital television, the strong lobbying effects of the media oligopolies\textsuperscript{130} changed the broadcast and cable industries.\textsuperscript{131} Though President Clinton and others wrote that “the legislation should protect and promote diversity of ownership and opinions in the mass media,”\textsuperscript{132} the Act loosened the antitrust laws in the television and radio industries\textsuperscript{133} by raising ownership and audience-reach limits.\textsuperscript{134} The

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\textsuperscript{130} An oligopoly is a market condition in which sellers are so few that the actions of any one of them will materially affect price and hence have a measurable impact on competitors. \textit{The American Heritage Dictionary} 916 (High School ed. 1982). Since so few corporations own so much of the press, they are considered an oligopoly. \textit{See} BAGDIKIAN, \textit{supra} note 89, at 13 (“[N]ot only because the limited number of owners, but because in most cities the dominant stations have virtually guaranteed high profits . . .”).


\textsuperscript{132} Cheryl Heuton, \textit{Radio’s Deregulation Dilemma: Politicians, Stations Turn Up the Volume on Ownership Limits Debate}, \textit{MediaWeekly}, Nov. 13, 1995, at 12 (stating that competition is important to the free expression of ideas and will be lost if there are too few owners).

\textsuperscript{133} \textit{See} MEIKLEJOHN, \textit{supra} note 24, at 37.

\textsuperscript{134} \textit{See} Krattenmaker, \textit{supra} note 131, at 131 (discussing § 202(a)-(b)(1) of the Act). The Act eliminated a twelve station ownership limit on national radio broadcasters and raised the number of stations that one broadcaster could own in any one market. \textit{See id.} The Act also increased the national audience reach limit for a single television broadcaster from twenty-five percent of homes to thirty-five percent of homes. \textit{See} Fox TV Stations, Inc., at 1034 (D.C. Cir.}
FCC also eliminated national radio ownership caps from their rules. They did, however, preserve local ownership restrictions.

The 1996 Act also addressed concerns over the emerging digital television industry. Congress chose not to sell or auction the right to broadcast digital television, but effectively gave the right to existing broadcasters for free. The result has been described as a "huge giveaway" of a "$70 billion national asset." Congress also declined to address digital public interest obligations and delegated to the FCC the decision of whether and in what form to impose such obligations. The Act has accelerated concentration of media outlets and magnified the power held by media oligopoly by allowing the existing media owners to acquire more channels of communication.

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2002), modified, 293 F.3d 357 (D.C. Cir. 2003) (citing Amendment of Multiple Ownership Rules, Report & Order, 100 F.C.C.2d paras. 4, 108-12). In June 2003, the FCC raised the national audience reach limit to forty-five percent. See FCC Adopts New Rules that Generally Permit Companies to Own More Media Businesses Than They Could Before, 25 ENT. LAW REP. 2 (July 2003). The public response was the largest outcry against the FCC in its history. See Louis Jacobson & Bara Vaida, Broadcast Blues, NAT'L J., Aug. 9, 2003. Congress is working to pass a bill that repeals the FCC decision. Id.


136. See id. at 110-11.

137. See id. at 114.

138. See 47 U.S.C. § 336(a) (1997); see also Dugger, supra note 95, at 37.


141. See Jay Harris, What's Missing from Your News?, in THE BUSINESS OF JOURNALISM 147-49 (William Serrin ed., 2000). For example, Time Warner owns twenty-four magazines, several cable stations, including CNN, TNT, HBO, CNN-SI, and part of Court TV, and owns cable monopolies in twenty-two of the largest markets, as well as movie studios, various book publishers and record labels; Disney owns the ABC television and radio stations, ten other ma-
3. The Scarcity Doctrine Applied to News Media

The scarcity issues presented by the broadcast medium justify the differing First Amendment protection of print and broadcast. Regulation of the broadcasting industry is constitutional because the scarcity of the medium requires regulation to achieve the diverse viewpoints contemplated by the First Amendment. Although this rationale creates the public interest obligation in the regulation of broadcast, the Supreme Court has justified regulation using two different scarcity rationales: numerical and allocational. Although the government adopted the scarcity doctrine in response to allocational scarcity, technological advances have increased the spectrum, causing a shift from an allocational scarcity rationale to a numerical scarcity rationale. Though the broadcast industry has moved toward deregulation, history has shown that without regulation, media concentration is inevitable. Even though the newspaper industry does not suffer the technological limitations that create allocational scarcity, it has become a numerically scarce industry. When the rationale was first adopted, the United States had 2,043 daily
newspapers, compared to a total of 967 radio stations.\(^\text{150}\) By 1987, the number of newspapers had dropped to 1,646, but the number of radio stations had increased to 6,519.\(^\text{151}\) In addition to the numerical scarcity faced by the print media, high economic barriers make it challenging to start a newspaper, thereby creating economic scarcity.\(^\text{162}\)

### III. THE PROBLEM: THE PRESS IN THE ECONOMIC MARKETPLACE

#### A. The Economic “Marketplace of Ideas”

Although objectivity, or lack of bias, is one of the most fundamental goals in the ethics of journalism,\(^\text{153}\) objectivity tends to hide the effects of economic competition.\(^\text{154}\) In *Miami Herald* the Supreme Court recognized that the press makes decisions necessarily based on subjective editorial judgments,\(^\text{155}\) and the ability to make these choices give the media enormous power to "manipulate public opinion and change the course of events."\(^\text{156}\) The problem arises when the media does not represent extreme views; and therefore, public debate misses some important perspectives that could play an important role in self-governance.\(^\text{157}\)


\(^{151}\) See U.S. DEP’T OF COMMERCE, HISTORICAL STATISTICS, *supra* note 150, at 810.

\(^{152}\) See Miami Herald v. Tornillo, 418 U.S. 241, 251 (1974) (describing the economic barriers to starting a newspaper enterprise, but ultimately rejecting the economic scarcity argument as justifying newspaper regulation).


\(^{155}\) See *Miami Herald*, 418 U.S. at 256.

\(^{156}\) Id. at 249.

\(^{157}\) Many Supreme Court decisions dealing with freedom of the press adopt the view that the media operates as a “fourth estate” that serves as a check on government. See, *e.g.*, Richmond Newspapers v. Virginia, 448 U.S. 555, 587.
It is reasonable for the American public to question whether the “marketplace of ideas” provides enough choices within the market to warrant calling it a “market.” The narrow views presented in the media, as well as the reasons for that self-censorship, remain a reality. The press’s actions in the aftermath of September 11 are not unique, but they do provide an excellent example of the dangers of this self-censorship when taken to an extreme.

B. September 11 as an Example of Self-Censorship

Patriotism flourished in the wake of September 11. People hung flags and wore pins, some to show their support for the Administration or the war effort, and others simply to show patriotic sentiment and solidarity. The criticism of the Bush Administration stopped temporarily, and the public attacked anyone who did criticize. Journalism responded. Publishers and networks, more silent than usual, acted on their perception that the majority of the public believed in the suppression of speech critical of the government.

In an article for The New Yorker, Susan Sontag criticized television stations’ coverage of the event, calling it “self-

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158. See generally Kahn, supra note 90.

159. See discussion infra Part III.B. For an additional example, see Office of Comm. of the United Church of Christ v. FCC, 359 F.2d 994, 997-98 (D.C. Cir. 1966). The case concerns a Mississippi broadcast television station refusing to broadcast pro-integration programming but allowed segregationist programming. Id.


162. See id.

163. See id.

righteous drivel and outright deceptions."\textsuperscript{165} As a result, the public severely condemned her.\textsuperscript{166} After the University of California at Berkley's student-run newspaper published a political cartoon of two Muslims entering hell and celebrating their arrival, the students protested and demanded a front-page apology.\textsuperscript{167} The paper refused, and in response the student senate eliminated the paper's funding.\textsuperscript{168}

Some media outlets did not wait for the public to respond to provocative dissent and started to censor their reporters to avoid conflict. \textit{The Daily Grant Courier} fired columnist Dan Guthrie after he called the President an embarrassment and criticized his absence in Washington on September 11.\textsuperscript{169} \textit{Texas City Sun} fired columnist Tom Gutting after he criticized Bush’s actions after the attack.\textsuperscript{170} In effect, the anticipation of the public's failure to tolerate different views of current events silenced the dissent necessary for a working democracy and prevented the news from presenting a more balanced perspective of events.\textsuperscript{171}

\section*{IV. ANALYSIS}

Free-market theorists understand that profit driven media corporations respond to market forces like any other

\textsuperscript{165} \textit{Id.}

\textsuperscript{166} \textit{See} Celestine Bohlen, \textit{Think Tank; In New War on Terrorism, Words Are Weapons, Too}, N.Y. TIMES, Sept. 29, 2001, at A11.


\textsuperscript{168} \textit{See id.}


\textsuperscript{170} \textit{See} Bill Carter & Felicity Barringer, \textit{Drums of Patriotism Drown Voices of Dissent}, PITT. POST GAZETTE, Sept. 30, 2001, at A21. Gutting stated that Bush was “flying around the country like a scared child, seeking refuge in his mother's bed after having a nightmare.” \textit{Id.}

\textsuperscript{171} \textit{See} Edward Herman & Noam Chomsky, \textit{Manufacturing Consent} 17 (1988) (“[W]ith increasing market pressure for financial performance and the diminishing constraints from regulation, an advertising-based media system will gradually increase advertising time and marginalize or eliminate altogether programming that has significant public-affairs content.”).
profit driven corporation. Criticizing the FCC's efforts to improve the quality of broadcast programming, professors Krattenmaker and Powe state: "[Q]uality is a function of viewer's desires and broadcasters' resources, elements the FCC cannot control." Judge Posner also supposes that networks develop and select programming in a capitalistic fashion, illustrating his idea in a hypothetical:

If one company owns all the television stations in an area, it would put on a variety of shows in each time slot so as to appeal to every available group. If there were two stations (and no cable) and 90 percent of the market wanted to watch comedy from 7 to 8 p.m. but 10 percent wanted to watch ballet at that time, the company would broadcast each program on different channels to gain the 100 percent audience. If there were two competing companies each would broadcast comedy from 7 to 8 p.m. because the expected audience share would be 45 percent, which is greater than the 10 percent that want to watch ballet. The same slot on each station would be filled with "popular" programming and minority tastes would go unserved.

For the corporate executives, professionalism demands programming and printing decisions that will maximize revenue. Usually the decisions of advertisers to buy time

172. See Thomas G. Krattenmaker & Lucas A. Powe, Jr., Regulating Broadcast Programming 74 (1994) (arguing that regulation of the broadcast industry should be based on the same principles used for print media, where control of editorial content lies in private hands rather than the government).

173. Id.


175. Id. This is a paraphrase of the actual hypothetical given by Posner. See id.

176. Id.

177. Id.

178. Id.

179. See id.

180. Edward Rubin, Television and the Experience of Citizenship, 68 Tex. L. Rev. 1155, 1158 (1990). "Television executives certainly do not see themselves as opinion leaders. They live in terror of ratings and perceive their basic task as predicting the public's response." Id.
and space during the programs and newspapers in question generate this revenue.\textsuperscript{181} Maximum audiences attract maximum dollars from advertisers.\textsuperscript{182} Thus, advertising dollars are the network's objective,\textsuperscript{183} since corporate officers owe a fiduciary duty to shareholders to make business decisions that will maximize profits.\textsuperscript{184}

Due to advertising, the free-market system tends to drive out the media companies that depend on revenue from sales alone.\textsuperscript{185} The economic survival of each publication and station depends on its ability to secure an audience with consumer interests that attract the attention of advertisers.\textsuperscript{186} This is necessary because advertisers want to buy space and time in media that their customers, and more importantly, potential customers read and watch.\textsuperscript{187} Concerned with attracting audiences with buying power,\textsuperscript{188} media's corporate owners make editorial judgments based on what they think this segment of the audience wants to see or hear.\textsuperscript{189} Thus the need for advertising can cause the media to avoid controversial issues.\textsuperscript{190}

As the media becomes more concerned with staying competitive, its objective changes: it must not alienate the public.\textsuperscript{191} The news becomes more mainstream as it presents political speech from the middle of the political spectrum.\textsuperscript{192} Since advertisers can pull support from the media in re-

\begin{footnotesize}
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\item\textsuperscript{181} See id.
\item\textsuperscript{182} See Jacobson & Vaida, supra note 134.
\item\textsuperscript{183} See TODD GITLIN, INSIDE PRIME TIME 24-5 (1983).
\item\textsuperscript{184} See United States v. Byrun, 408 U.S. 125, 138 (1972) (stating that directors have a fiduciary duty to promote the interests of the corporation and have a responsibility to stockholders).
\item\textsuperscript{185} See HERMAN & CHOMSKY, supra note 171, at 14.
\item\textsuperscript{186} Id. at 16.
\item\textsuperscript{187} See SQUIRES, supra note 104, at 214-16, 218-19.
\item\textsuperscript{188} See id.
\item\textsuperscript{190} See Kahn, supra note 90, at 739.
\item\textsuperscript{191} See supra Part III.A.
\item\textsuperscript{192} See id. at 758.
\end{enumerate}
\end{footnotesize}
response to content that may alienate the audience, the press often avoids controversy and debate by presenting opinion that is acceptable to the general public. Though the press does present some open debate by featuring analysts and columnists with different views, these people often do not represent the full spectrum of opinion. They represent the segment of ideas that will not alienate the majority of society.

The state of the media immediately following September 11 illustrates this analysis. Reporters are patriotic and after September 11 many television news reporters wore pins and ribbons to show their support. The problem arises when reporting itself becomes biased or even appears to be biased. For example, a local television station in Ohio ran promotional advertisements announcing, “We want you to know we stand 100 percent behind the President.” If the press does not question the government and discover potential problems, the general public may not do so either. In matters of opinion, people tend to believe what the people around them believe. If the press does not present outside opinions, existing opinion cannot change. ABC spokesman Jeffery Schneider said it best:

Especially in a time of crises, the most patriotic thing journalists can do is to remain as objective as possible. That does not mean journalists are not patriots. All of us are at a time like this. But we cannot signal how we feel about a cause, even a justified and just cause . . .

Immediately following the terrorist attacks, the press re-

193. See supra Part I (describing the cancellation of Bill Maher’s Politically Incorrect).
194. See HERMAN & CHOMSKY, supra note 171, at 17, 305.
195. See Riefkohl, supra note 154, at 464.
196. See id.
197. See Gellman, supra note 160, at 93.
199. See Gellman, supra note 160, at 93.
200. See HERMAN & CHOMSKY, supra note 171, at 297.
ported speculation on the next bomb attack, the responsible party, and the possibility of winning this "war." boosting both ratings and profits, the press exploited the public's emotions of grief and shock. Although the nation knew of al Qaeda due to previous bombings and bombing attempts, many had no idea that an entire region of the world despised the United States and everything it represented. Certainly, the press is not the sole reason for this educational deficit. The public has an obligation to keep itself informed and ask questions, but without the tools necessary to ask those questions, the public cannot protect itself, and everyone loses.


203. See Phyllis Kaniss, Bad News: Too Few Reporters, AM. JOURNALISM REV., Sept. 1993, at 20. The old joke about local news is that "if it bleeds, it leads." But it is the corollary that should concern us: If it doesn't bleed - or choke with emotion - it doesn't air. Unfortunately, most matters of public consequence fail to pass the blood-and-tears litmus test of local television news. Id. See also Jacqueline E. Sharkey, The Television War, AM. JOURNALISM REV., May 2003, at 18.

204. While the American public was mostly unaware of these feelings before 9/11, press coverage on the subject flourished afterwards. See, e.g., John F. Burns, America Inspires Both Longing and Loathing in Arab World, N.Y. TIMES, Sept. 16, 2001, at A4; Sohail Hashmi, The Terrorists' Zealotry Is Political Not Religious, WASH. POST, Sept. 30, 2001; Salman Rushdie, Yes, This Is About Islam, N.Y. TIMES, Nov. 2, 2001; Stephen W. Bosworth et al., Why Do They Hate Us?, BOSTON GLOBE, Sept. 16, 2001, at D1, D2.

205. For example, the condition of the United States educational system is constantly under attack for not adequately educating the nation's youth. See, e.g., Glenn Delk, Schools' Dismal Record Shows Need for Choice, ATLANTA J. & CONST., Aug. 14, 2003, at 15A (reporting on the disparity in education between schools); Kimberly Miller, 88% of Schools Flunk Under U.S. Law, PALM BEACH POST, Aug. 9, 2003, at A1A (discussing the disparity between state educational standards and the federal "No Child Left Behind" Act, 20 U.S.C. § 6316 (2003)). For the 2003 school year, Florida schools were required to have only thirty-one percent of students reading on grade level and thirty-eight percent in math on grade level in order to meet state standards. Id.

206. See HERMAN & CHOMSKY, supra note 171, at 297.
The First Amendment protects the press, and ultimately the public, from government control but provides no protection from private censorship. This in no way makes the latter less important or dangerous than the former. Current First Amendment doctrine provides no help by protecting corporate speech at the expense of the public's right to know. If the chief policies underlying "freedom of the press" is ensuring that the public remains objectively informed and is provided with a variety of ideas to self-govern, the media in an economic market directly conflicts with this purpose. Consequently, the American public must protect this fundamental value. Many of the consumers in this marketplace do not know that they must demand information both critical and independent of government policy. The goal of robust public debate, signifies that governmental regulation of the market has finally become beneficial.

Perhaps the time has come for the government to regulate the market, protect it from unavoidable censorship, and ensure the elimination of oligopolies so that different opinions compete with one another in a fair way. Although this ide-

207. The Constitution, and the First Amendment, apply only to state and federal government. They do not apply to private individuals. See, e.g., Associated Press v. United States, 326 U.S. 1, 20 (1945) ("Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."). For the First Amendment to apply to private individuals, they must be acting on behalf of the state. See, e.g., Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (stating that to find state action, deprivation of right must be caused by an exercise of right or privilege created by state or rule of conduct imposed by the state, and the party charged with deprivation must fairly be considered to be acting on behalf of the state).

208. See Gellman, supra note 160, at 89 (discussing the First Amendment's role as a "safety valve on a majority-rules democracy"). Compare Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 657 (1994) ("The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.").

209. See Dugger, supra note 95, at 39.

210. See Entman, supra note 14, at 76.

211. See id. at 78, 79.

212. See Nat'1 Broad., 319 U.S. at 196.
ology appears to be in direct conflict with the literal meaning of the press clause, only print journalism is given a literal application of the clause, and regulating the industry in order to preserve diversity could conform with the framers' intent in drafting the clause.\textsuperscript{213} Justice Brandeis expressed it best:

To justify government suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.\textsuperscript{214}

V. PROPOSAL: CAN THE GOVERNMENT SAVE US FROM OURSELVES?

Though the trend has been toward deregulation of the broadcast media,\textsuperscript{215} the answer to protecting the “freedom of the press” from the effects of competition may lie in the regulation of the press as an industry, rather than treating the different types of media differently.\textsuperscript{216} Three proposals of government regulation of the press follow: disclosure, which is based in part the National Environmental Policy Act (NEPA);\textsuperscript{217} economic incentives, also based upon regulation in the environmental industry,\textsuperscript{218} and voluntary self-regulation,

\begin{itemize}
  \item \textsuperscript{213} See Turner Broad. Sys., Inc., 512 U.S. at 622, 657.
  \item \textsuperscript{214} Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).
  \item \textsuperscript{215} For a discussion of regulation of the broadcast media, see infra Part I.B.
  \item \textsuperscript{216} But see LEE C. BOLLINGER, IMAGES OF A FREE PRESS 85 (1991) (suggesting that the different regulatory regimes for the broadcast and print media are well-suited).
  \item \textsuperscript{217} 42 U.S.C. §§ 4321-4370 (1994).
  \item \textsuperscript{218} A number of countries use pollution taxes and tax credits to create economic incentives to help the environment. These incentives take various forms: credits for utilizing particular technologies, taxes on the use of certain raw materials that contribute to environmental contamination, taxes on the use of certain environmentally unfriendly technologies, taxes on products that do not meet certain environmental standards when utilized, and taxes on the quantity of a pollutant discharged. For an overview of the various types of taxes and the countries that are utilizing them, see DAVID ROODMAN, THE NATURAL WEALTH OF NATIONS: HARNESING THE MARKET FOR THE ENVIRONMENT 144-66 (Linda
\end{itemize}
A. Disclosure

Many statutes and regulations require the disclosure of information. The most famous of these is the National Environmental Policy Act (NEPA). The goal of the NEPA is to require the government to compile and disclose environmentally-related information before going forward with any projects having a major effect on the environment. The NEPA does not require the government to weigh specific factors or act to reduce the possible effects. The purpose is to trigger safeguards. The NEPA assumes that if the public is indifferent, it will speak out, and the government will have to respond.

A viable alternative to direct regulation, information disclosure costs far less and operates more efficiently than direct regulation. Imposing this type of regulation on the press

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219. See NAB Code, supra note 51.


224. See id. at 227 ("NEPA, while establishing 'significant substantive goals for the Nation,' imposes upon agencies duties that are 'essentially procedural.'" "NEPA was designed 'to insure a fully informed and well-considered decision ...' " (quoting Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978))).

225. The NEPA is predominately a policy act which sets a course for public action but is not a regulatory, self-enforcing statute; it requires action by Congress and the President. See Lynton K. Caldwell, Beyond NEPA: Future Significance of the National Environmental Policy Act, 22 HARV. ENVTL. L. REV. 203, 204 (1998). This supposes that the public will speak out to their representatives, unless the effect on the environment would be so egregious that Congress and the President have no choice but to act. See id.

226. See ANTHONY OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY
industry would hopefully have the same type of effect on the public as that of NEPA: for example, every quarter broadcasters could be required to fully disclose their range of public interest and public service activities and the amount of times opposing viewpoints were presented. The FCC could require completion of a simple form to ensure accurate and uniform accounting and could sanction those that failed to do so.

Planning for the same response from the public as the NEPA assumes, this type of disclosure would create public pressure for improvement and accountability.\textsuperscript{227} The success of this type of regulation depends upon the existence of monitoring and the power of the monitors to impose harms on those with poor records.\textsuperscript{228} For example, environmental groups have mobilized when disclosure shows high levels of toxic emissions. Anticipating this mobilization, some companies reduced emissions voluntarily.\textsuperscript{229} Of course, it is impossible to predict whether the effect of voluntary change would occur in the press industry. Disclosure works best if market or political pressures are likely to result in significant costs for those with poor performance. In the environmental context, disclosure worked most effectively when companies feared the consequences.\textsuperscript{230} In the media context, if the FCC has the ability to revoke or refuse broadcast licenses to those who do not promote the public interest, companies would likely ensure their actions conformed with the public interest.\textsuperscript{231}

\textsuperscript{121-49 (1994).}
\textsuperscript{228. See Neil Gunningham et al., Smart Regulation: Designing Environmental Policy 296-300 (1999).}
\textsuperscript{229. See Robert V. Percival et al., Environmental Regulation: Law, Science and Policy 612-16 (2d 1996).}
\textsuperscript{230. See id. at 68-69.}
\textsuperscript{231. This section ignores print journalism, because the comment assumes that the industries are not regulated in the same way. Assuming that print is treated like broadcast, a similar proposition for license revocability would be appropriate.}
B. Economic Incentives: Taxes, Licenses, and "Play or Pay"

Ronald Coase's work on efficiency, free trades, and transaction costs originated in communications, but has greatly influenced the environmental area. In that area, as in the press industry, rigid government controls dissatisfy the public, which wants a movement toward more flexible economic strategies in the form of pollution fees and tradeable emission rights. The educational programming and free advertising for presidential election requirements in the broadcast industry illustrate how this proposal would work in the media. Suppose one station is in a better position of providing educational programming than providing free air time and another station is in the opposite position. The government could allow them to each pay a fee, or tax, relieving the stations of the requirement of providing one of these programs. Alternatively, the government might allow one station to sell the other station its required obligation. This approach creates a problem with determining a formula to calculate how much tax the respective stations should pay.

The easiest way to administer a flexible requirement system is a "play or pay" approach. Despite reservations, this approach succeeded in the environmental area. People objected that it would legitimize avoidance or result in "hot spots." These reservations have proved unconvincing.

233. See GUNNINGHAM, supra note 228, at 391-421.
235. This is the tradeable emission right model.
236. This approach is where media still has a presumptive obligation to provide public interest content, but can buy its way out by paying someone else to provide the content instead.
239. These "hot spots" occur when the trades at issue result in a concentra-
Using environmental protection regulations as broadcast regulations would create a system where those who fail to serve their public interest obligations must pay a fee is preferable because it offers more flexibility than uniform obligations.241 The concentration of all public interest requirements in a small number of media may pose a problem,242 but the industry and the government could agree to take steps to avoid this problem. A preventative action could include limitations on the number of these transactions per year.

C. Voluntary Self-Regulation

Many industries have attempted a voluntary self-regulation to avoid additional government oversight.243 Self-regulation could be implemented through a “code of conduct” similar to the one the National Association of Broadcasters imposed for many years.244 The FCC and the Supreme Court eliminated the NAB code for antitrust reasons, the self-regulation it provided played a role in many aspects of media policy.245 Although antitrust laws exist for good reason, perhaps the government should not invoke them too readily or grant an exemption so as to make a code of conduct possible. Otherwise, the government would prevent an industry from providing the kinds of benefits that provided, more crudely and expensively, by direct regulation.246

In many nations, including the United States, coopera-

240. See Stavins, supra note 237, at 82.
242. This concentration would be the converse of the environmental area’s “hot spots”; there would not be enough public interest representation in a majority of the media.
244. See infra, Part I.B.
245. See Campbell, supra note 62, at 715-37.
tive action has played a beneficial role in reducing the adverse effects of the economic market.\footnote{247} For the press, it provides flexibility and relieves the government from the role of big brother.\footnote{248} The press, and not the government, will define what does and does not constitute acceptable behavior for the institution as a whole. The press will make a “public announcement of the principles and practices that the industry presumptively accepts as a guide to appropriate conduct and also as a basis for evaluating and criticizing performance.”\footnote{249}

Enforcement of a code could be conducted as the previous NAB Code was,\footnote{250} by the associations subscribing to it. At the time of license renewal, the press would give a form to the FCC to show compliance or to show the continuance of non-compliance with the code. If the various media associations are unwilling to enforce a code of this kind,\footnote{251} a private group could take the initiative and, if given the authority by industry associations, sanction them according to the guidelines in the code.

A code, by itself, would be a private set of guidelines, raising no First Amendment concerns.\footnote{252} Furthermore, the Department of Justice and district courts have indicated that

\footnote{247} Many international bodies attempt to certify quality in a kind of cooperative action designed to reduce adverse effects of market pressures. \textit{See} Micheal Prest, \textit{Profit Bows to Ethics}, INDEPENDENT (London), Oct. 26, 1997, at 3.


\footnote{250} \textit{See supra} Part I.A.

\footnote{251} For example, the National Association of Broadcasters decided not to oppose the idea of a code, but did suggest serious concerns about government enforcement of editorial freedom. \textit{See} Paige Albinak, \textit{Preparing for Battle}, BROAD. & CABLE, July 6, 1998, at 22.

\footnote{252} This situation, however, assumes that the government does not mandate implementation and acceptance of the code, which would create a First Amendment issue.
provisions like these would not violate the antitrust laws.\footnote{253} As previously mentioned, the prior broadcast code was eliminated as a result of an antitrust action in which the Department of Justice alleged that certain code provisions violated the Sherman Act.\footnote{254} In that instance, the complaint was narrow and the ruling\footnote{255} would not invalidate a code of the sort suggested here.\footnote{256}

VI. CONCLUSION

One cannot argue that the current press is truly free or that it is thoroughly providing fuel for lively debate and consideration of ideas.\footnote{257} The press has become the slave of an economic market,\footnote{258} answering to shareholders and advertisers.\footnote{259} Although the population consistently disapproves of the state of the press, nothing can change in an unregulated economic market until the “customers” stop buying the product.\footnote{256} This is unlikely to occur; even if the majority of the


256. Both the complaint and the ruling dealt with the NAB Code’s limits on advertising air time. Though the court found the effect and result to be “artificial manipulation of the supply of commercial television time, with the end result that the price of time is raised,” the court never passed judgment on the standards relating to programming. See id. at 152-53.

257. See supra Parts II-IV.

258. See HERMAN & CHOMSKY, supra 171, at 303.

259. See BAGDIKIAN, supra note 89, at 119, 265-66 (describing an average 17.1% return of equity for publicly traded newspaper companies in 1980 and a five year average profit margin of 18.3%).

population believes that minority views are entitled to presentation, they are unlikely to demand those views in the news and are more likely to change the channel if presented with those views. This does not, however, mean that the press can ignore its responsibility of educating the public about the world.

Not all of the press folds to the pressures of the market.\textsuperscript{261} Seemingly objective sources of information provide sufficient information for the public to question government actions. However, many media outlets have to succumb to the significant market pressures in order to survive.\textsuperscript{262} The questions surrounding September 11 epitomize the deficiencies in the press. Many Americans had no idea that other nations and terrorist groups hated the United States until after the 9/11 attack, which is surprising since it is not the first time Al Qaeda and terrorism have been linked together.\textsuperscript{263} They also could not fathom why that hatred was so extreme. If the press does not inform the public as to the repercussions of U.S. foreign policy or even the meaning of that policy, how can the public protect itself from those in power and from those nations that the policies have enraged?

Currently, the government and the courts do not give the

\textsuperscript{261} See Dugger, supra note 95, at 48.
\textsuperscript{262} See GERALD J. BALDASTY, THE COMMERCIALIZATION OF NEWS IN THE NINETEENTH CENTURY 127-34 (Univ. of Wisconsin Press 1994) (1992) (describing the de-emphasis of politics in newspapers in accordance with market demands); see also C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS 28-29 (1994) (analyzing historical evidence and commentary to demonstrate that advertising played a significant role in the decline of partisanship in American newspapers).
\textsuperscript{263} While the American public was mostly unaware of these feelings before 9/11, press coverage on the subject flourished afterwards. See, e.g., John F. Burns, After the Attacks: International Memo; America Inspires Both Longing and Loathing in Arab World, N.Y. TIMES, Sept. 16, 2001, at 1-4; Sohail Hashmi, The Terrorists' Zealotry Is Political Not Religious, WASH. POST, Sept. 30, 2001; Salman Rushdie, Yes, This Is About Islam, N.Y. TIMES, Nov. 2, 2001, at A25; Stephen W. Bosworth, Why Do They Hate Us? The Reasons Are Many, the History Long "Because We are so Big, so Powerful", BOSTON GLOBE, Sept. 16, 2001, at D1.
press clause in the First Amendment its literal meaning,264 except when applied to the print media.265 Yet the legislature will not amend the language to state what the nation actually interprets the language to mean.266 If the focus of First Amendment doctrine shifts from freedom of the corporate press to compete with each other to the policy underlying the amendment, the current state of First Amendment doctrine will fail. If the policy behind the amendment is to provide a marketplace of ideas and ensure an informed self-governance, the industry needs protection from private as well as government forces.

A First Amendment jurisprudence animated by a robust marketplace of ideas might actually require governmental intervention to preserve that diversity of ideas. Commercial by nature, the institutional media may be over-responsive to the popularity of speech and may not give sufficient exposure to unpopular opinions absent such governmental intervention to protect those ideas... [it] may most effectively fulfill its function as a fourth estate only when affirmatively prodded and encouraged to do so.267

In light of the dangers of an economic marketplace of ideas, the government needs to restructure the regulation of the press. Without a change in the current informational system, the public has little hope of governing itself by making informed choices.

264. Laws penalizing perjury, bribery of government officials, excessive corporate contributions to political candidates and the spread of classified military information to foreign governments are all considered constitutional and yet these laws violate a literal reading of the First Amendment.
265. See supra Part II.B.
266. See Scordato & Monopli, supra note 161, at 191.
267. Id. at 202.