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Putting the First Amendment in Its Place: Enhancing American Democracy through the Press

Robert M. Entman†

Achieving a “system of free expression,” as that term is conventionally understood, will not produce healthy democracy. In fact, we have already very nearly attained such a system, insofar as one can be molded and promoted under the regime of the First Amendment. The constraints on the news media that are due to legal action or government regulation are now generally minor. Yet this forbearance has not yielded news media that consistently meet the standards that Professor Sunstein suggests: a sufficient amount of attention to public issues and the expression of diverse views on these issues.¹ If we continue to constrain our discussion within traditional First Amendment parameters, it is difficult to imagine communications law and policy doing much to improve matters.

By the standards of the Hutchins Commission Report,² democracy and the press have made little progress since 1947. The Hutchins Commission’s description of the press reads much as it would if written today:

The news is twisted by the emphasis on firstness, on the novel and sensational; by the personal interests of owners; and by pressure groups. Too much of the regular output of the press consists of a miscellaneous succession of stories and images which have no relation to the typical lives of real people anywhere. Too often the result is meaninglessness, flatness, distortion, and the perpetuation of misunderstanding among widely scattered groups whose only contact is through these media.³

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¹ Cass R. Sunstein, *Half-Truths of the First Amendment*, 1993 U Chi Legal F 25, 33. See also Lee C. Bollinger, *Images of a Free Press* (University of Chicago Press, 1991).

² Commission on Freedom of the Press, *A Free and Responsible Press* (University of Chicago Press, 1947) (“Hutchins Report”).

³ *Id.* at 68.

Exactly how accurate this indictment is today can be debated, but the literature supporting similar charges against the current media is voluminous.⁴ Many observers consider today's highly competitive media scene a marked improvement over the past, and we have recently seen a significant augmentation in television news outlets with the introduction of CNN and C-SPAN. But research suggests these news sources have had little impact on the democratic process because relatively few Americans consistently watch such programs.⁵ Even assuming the quality of the press has improved, it continues to fall short in terms of at least two important measures of the impact that journalism could have on democracy.⁶ First, controlling for the increase in education, the American public appears *less* informed now than in the late 1940s.⁷ That is, college graduates today are less politically aware than college graduates in the late 1940s. Second, Americans now vote less religiously than they used to. Despite some scholarship to the contrary,⁸ these two indices suggest that the American media are not enhancing the democratic process as the Hutchins Commission hoped they would.⁹

In addition, leaving aside the quality of public input, and assessing instead the quality of government's policy outputs, we

⁴ See Kathleen Hall Jamieson, *Dirty Politics: Deception, Distraction, and Democracy* (Oxford University Press, 1992); W. Lance Bennett, *The Governing Crisis: Media, Money, and Marketing in American Elections* (St. Martin's Press, 1992); Robert M. Entman, *Democracy Without Citizens: Media and the Decay of American Politics* (Oxford University Press, 1989).

⁵ Entman, *Democracy Without Citizens* (cited in note 4).

⁶ I shall use the term "press" to encompass both print and electronic news media.

⁷ See Michael X. Delli Carpini and Scott Keeter, *Stability and Change in the U.S. Public's Knowledge of Politics*, 55 Pub Op Q 583, 607 (1991). Even without controlling for educational changes, the American public actually appears less knowledgeable now about certain subjects. See W. Russell Neuman, *The Paradox of Mass Politics: Knowledge and Opinion in the American Electorate* (Harvard University Press, 1986).

⁸ An emerging literature in political science essentially argues that while the average American voter is little interested and poorly informed, such an orientation to public affairs may be rational. These scholars suggest voters do surprisingly well at matching their likes or preferences to the candidates who fit best. See, for example, Samuel L. Popkin, *The Reasoning Voter: Communication and Persuasion in Presidential Campaigns* (University of Chicago Press, 1991); Paul M. Sniderman, Richard A. Brody, and Philip E. Tetlock, *Reasoning and Choice: Explorations in Political Psychology* (Cambridge University Press, 1991). Among the problems with this conclusion, however, is that it treats likes and preferences as autonomously determined by each individual, and ignores those who do not vote at all.

⁹ It is possible that due to some unmeasured factors, the American public would have been even less informed and less disposed to vote than they are now were it not for vast improvements in the media's performance. That, however, seems much more speculative than accepting the conventional analysis, which suggests the continued pertinence of the Hutchins critique.

might also find the government's responses and responsiveness to major problems insufficient.¹⁰ The reasons for these conditions are complex and certainly cannot be traced to the media alone. Although I focus my attention on the press in this article, I do not fail to appreciate that other elements of society, including the public education system, the political party system, campaign financing, and ideological or cultural biases, also contribute to the imperfections of American democracy.

Certainly a case can be made that American democracy is healthy, with the American press a vigorous partner in the process. Is the glass half empty or half full? Of course it is both. By the criteria I weigh most heavily, however, especially the level of the public's knowledgeable voting participation and the government's accountability, honesty, and responsiveness on policy issues vital to the quality and fairness of life in the United States, I judge the emptiness most salient, and that judgment is the basis of my analysis.

I will argue two basic propositions related to Professor Sunstein's four "half-truths":

(1) Despite the First Amendment, the government heavily influences or, in many cases, determines the information that most Americans receive via the news media. The First Amendment does not prevent government from shaping most important dimensions of the news media's messages. This relationship is rooted in the seemingly voluntary reliance of news organizations on public officials and agencies for most of the assumptions and information that frame and suffuse the news.¹¹ Although government *policy and law* have relatively little direct impact on the information that appears or does not appear in the news, government *officials* have very much to do with media content.

In Professor Sunstein's terms, the government actively discriminates in favor of some viewpoints, greatly controlling which are publicly available. What I add to Professor Sunstein's discussion of his first "half-truth"¹² is that this occurs largely outside of

¹⁰ See William Greider, *Who Will Tell the People: The Betrayal of American Democracy* (Simon & Schuster, 1992); Bennett, *The Governing Crisis* (cited in note 4).

¹¹ This relationship is not truly voluntary. It is encouraged and cemented by mutually reinforcing commercial incentives, professional norms, and cultural values that make reliance upon government elites the most rational practice for news organizations. See Herbert J. Gans, *Deciding What's News: A study of CBS Evening News, NBC Nightly News, Newsweek, and Time* (Pantheon Books, 1979); David L. Paletz and Robert M. Entman, *Media Power Politics* (Free Press, 1981).

¹² Sunstein, 1993 U Chi Legal F at 26 (cited in note 1).

any legal or regulatory compulsion as these are generally understood. My point also amplifies Professor Sunstein's third half-truth, that penalizing and subsidizing speech may be difficult to distinguish in practice.¹³

(2) In recent years, the government's use of the First Amendment in policy decisions toward the media has tended to neglect the goals cited by the Hutchins Commission and others, like Professor Sunstein. Instead, the First Amendment ironically has had a chilling effect on public discourse about the legitimate tools and ultimate ends of public policies toward the communications media. Policymakers and judges should ask themselves how best to achieve the Hutchins Commission's, or some other, democratic vision, rather than uphold an interpretation of the First Amendment that ignores the government's informal influence over media content. These points elaborate on all four of Professor Sunstein's half-truths, especially the problematic assumption that content-based regulation is the gravest threat to media autonomy,¹⁴ and that content neutrality is preferable or even attainable.¹⁵

Analyzing the "free and responsible press" strictly in First Amendment terms, while natural enough for a law school forum, misses most of the forces that affect how well the press serves democracy in the United States. Taking account of larger social forces and contexts would help connect First Amendment theory more closely with the real-world production, distribution, and consumption of news, and thus with the effects that the press has on democracy. Professor Sunstein writes that we need a "thorough empirical understanding of the free speech 'status quo,' and here there is a distressingly large gap in the free speech literature."¹⁶ But in fact my disciplines of communication studies, journalism, and political science offer an enormous literature—not couched in terms of evaluating the abstract system of free speech, but empirically exploring and normatively evaluating how the news media actually influence the American democratic process.¹⁷

¹³ Id at 39-40.

¹⁴ Id at 30.

¹⁵ Id at 41.

¹⁶ Sunstein, 1993 U Chi Legal F at 33 (cited in note 1).

¹⁷ See the works cited in notes 4, 7, and 8. See also Doris A. Graber, *Mass Media and American Politics* (CQ Press, 4th ed 1993); Murray Edelman, *Constructing the Political Spectacle* (University of Chicago Press, 1988); Daniel C. Hallin, *The "Uncensored War": The Media and Vietnam* (Oxford University Press, 1986); Thomas E. Patterson, *The Mass Media Election: How Americans Choose Their President* (Praeger Publishers, 1980).

I am not saying it would be good to have government restrictions on press expression. Less still am I suggesting that government's lack of formal control over the press is irrelevant to the quality of American democracy. But this laudable constraint on government's legal power over the media has tightened since 1964 and *New York Times Co. v Sullivan*¹⁸ without noticeably enhancing democracy. To me, this indicates that conventional First Amendment law and policy may offer few ways to improve the press enough to revitalize the democratic process.

In this article, I first explore institutionalized viewpoint discrimination by the government. Next, I examine the chilling effect of the First Amendment on policy discourse. I conclude by offering recommendations on how to reduce the government's informal power to shape the news.

I. INSTITUTIONALIZED VIEWPOINT DISCRIMINATION BY THE GOVERNMENT

Professor Sunstein describes his first half-truth as the notion that the Constitution prohibits viewpoint discrimination.¹⁹ The law says "government may not distort the deliberative process by erasing one side of a debate."²⁰ Yet functionally, government does precisely this all of the time. Indeed, large staffs in the White House and throughout the Executive Branch exist solely to dominate public perceptions and debate, and empirical research shows that they often succeed.²¹ Moreover, if by "government" Professor Sunstein means the entire governmental apparatus, including the legislative and judicial branches, then most of the time government erases not just one, but most, of the potential sides of any debate. The discourse among the elites who run the three branches of the federal government frames the feasible diagnoses and options that achieve wide distribution in the national media, and in this sense

¹⁸ 376 US 254 (1964). See Rodney A. Smolla, *Suing the Press* (Oxford University Press, 1986); Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (Random House, 1991).

¹⁹ Sunstein, 1993 U Chi Legal F at 26 (cited in note 1).

²⁰ *Id.* at 27.

²¹ See Michael B. Grossman and Martha J. Kumar, *Portraying the President: The White House and the News Media* (Johns Hopkins University Press, 1981); Mark Hertsgaard, *On Bended Knee: The Press and the Reagan Presidency* (Farrar, Straus & Giroux, 1988); Samuel Kernell, *Going Public: New Strategies of Presidential Leadership* (CQ Press, 2d ed 1993); John A. Maltese, *Spin Control: The White House Office of Communications and the Management of Presidential News* (University of North Carolina Press, 1992); Entman, *Democracy Without Citizens* (cited in note 4).

government largely determines the viewpoints that reach public consciousness.²² If, despite the First Amendment, government can exert such extensive control over the distribution of ideas, the press will have a difficult time disseminating information that helps the public hold that very same government accountable.

This informal regulatory relationship is different from and preferable to formal regulatory prohibitions against publicizing particular ideas. But to ignore the informal regulatory power is to lose touch with the media system as it actually operates. Government constantly engages in viewpoint discrimination, and such discrimination is inherent in the First Amendment regime. That is, the press is free to pass along the propaganda of the current administration in Washington, with no obligation to give equal access to the opposition party, let alone to views beyond the two parties' discursive boundaries. If an opposition party disagrees with the administration but fails to play the media spin game effectively, dissenting views may be hard to find in the news. If the Democratic and Republican parties are in accord, the chance that opposing views will receive enough visibility in the mass media to affect public opinion is even more remote.²³ In most cases, only when elites are engaged in energetic public dispute will the content of the news exhibit viewpoint diversity that the public is likely to notice.²⁴

It is true that government spokespersons and politicians may take public stands in response to, or in anticipation of, likely pub-

²² Reliance on government elites is documented in Leon V. Sigal, *Reporters and Officials: The Organization and Politics of Newsmaking* (D.C. Heath & Co., 1973); Gans, *Deciding What's News* (cited in note 11); Paletz & Entman, *Media Power Politics* (cited in note 11); Hallin, *Uncensored War* (cited in note 17); W. Lance Bennett, *Toward a Theory of Press-State Relations in the United States*, 40 J Commun 103 (Spring 1990). See also John Zaller, *The Nature and Origins of Mass Opinion* (Cambridge University Press, 1992); Robert A. Dahl, *Democracy and Its Critics* (Yale University Press, 1989). Problematic exceptions are policy experts outside official government roles, and social movements. Without going into detail, research suggests that neither of these sources gets very far in shaping public discourse unless government officials take up their cause. See Todd Gitlin, *The Whole World is Watching* (University of California Press, 1980); Robert M. Entman and Andrew Rojecki, *Freezing Out the Public: Elite and Media Framing of the U.S. Antinuclear Movement*, 11 Pol Commun 155-73 (1993).

²³ See Hallin, *Uncensored War* (cited in note 17); Entman, *Democracy Without Citizens* (cited in note 4); Bennett, *The Governing Crisis* (cited in note 4); W. Lance Bennett, *Marginalizing the Majority: Conditioning Public Opinion to Accept Managerial Democracy*, in Michael Margolis and Gary Mauser, eds, *Manipulating Public Opinion* 321 (Brooks/Cole Publishing Co., 1989).

²⁴ See Hallin, *Uncensored War* (cited in note 17); Zaller, *Mass Opinion* (cited in note 22). See also Richard A. Brody, *Assessing the President: The Media, Elite Opinion, and Public Support* (Stanford University Press, 1991).

lic or media reactions, indicating that government itself is not autonomous; there are reciprocal power flows among media, government elites, and public. But research suggests that the greatest source of power in the equation is that of government, and especially that of the executive branch.²⁵ For our purposes, the key fact is that government greatly influences news and commentary. The notion of a large realm of autonomous media production and distribution of ideas fails to square with empirical research.²⁶

When officials comment in harmony on an event or issue, the media tend to mirror the dominant line. For example, research comparing the coverage of two quite parallel civilian airliner tragedies, the Korean Airline Flight 007 attack in 1983 and the Iran Air Flight 655 attack in 1988, illustrates this worst-case scenario for media-assisted accountability.²⁷ For both events, there was virtually no debate among the government elite, and media coverage was thoroughly government scripted at the most overt and the most subtle (yet powerful) levels.²⁸

Thus, for example, the covers of both *Time* and *Newsweek* following the Korean Airline tragedy illustrated a Soviet fighter plane within a few hundred feet of the civilian airliner.²⁹ In an unconscious but effective way, these illustrations supported the American government's claim that the Soviets deliberately murdered 269 innocent men, women and children, as did the cover headlines: "Murder in the Air" and "Shooting to Kill."³⁰ Journalistic and Congressional research later revealed that the Reagan administration knowingly misled the public and the press on Soviet intentions and actions; in fact, the Soviets were unaware that the Korean plane was a civilian airliner.³¹ The important point for our purposes is that a unanimous government elite was able to control

²⁵ See Entman, *Democracy Without Citizens* (cited in note 4); Jarol B. Manheim, *All of the People, All the Time: Strategic Communication and American Politics* (M.E. Sharpe, 1991); Maltese, *Spin Control* (cited in note 21); Robert M. Entman and Benjamin I. Page, *The News Before the Storm: The Iraq War Debate and the Limits to Media Independence*, in W. Lance Bennett and David L. Paletz, eds, *Taken by Storm: The Media, Public Opinion, and U.S. Foreign Policy in the Gulf War* (University of Chicago Press, 1994).

²⁶ See Entman, *Democracy Without Citizens* (cited in note 4).

²⁷ See Robert M. Entman, *Framing U.S. Coverage of International News: Contrasts in Narratives of the KAL and Iran Air Incidents*, 41 *J Commun* 6 (Autumn 1991).

²⁸ *Id.*

²⁹ *Time* (Sept 12, 1983); *Newsweek* (Sept 12, 1983).

³⁰ *Time* (Sept 12, 1983); *Newsweek* (Sept 12, 1983).

³¹ See, for example, Seymour M. Hersh, "The Target is Destroyed": What Really Happened to Flight 007 and What America Knew About It (Random House, 1986); *Soviet Error Blamed for KAL Attack*, *Chicago Trib* 1-3 (Jan 14, 1988).

virtually every dimension of the information distributed in the mass media—the choice of nouns, adverbs, and adjectives; the visual images; and the Cold War themes and symbols.

After the Iran Air incident, the unified elite was more or less silent. Unlike its reaction to the Korean Airline affair, the press offered little moral analysis or outrage when American forces shot down a civilian airliner. In that case, the press went along with the administration's and the Pentagon's insistence—unchallenged by congressional elites—on total American innocence. Again, more recent revelations suggest a different story.³² Nevertheless, journalists at the time accepted the government's version of the events, despite the lessons of Vietnam and, more recently, of the Korean Airline story. These lessons suggest the need for deep skepticism of an administration's claims about a confusing event, the interpretation of which the administration would obviously like to control.

While questions about the official American "line" in both cases could be found in the press, public opinion polls suggest this material went unnoticed by most people.³³ Practically speaking, the government controlled the coverage. Furthermore, the failure of the media to question the administration line in both cases had significant policy consequences.³⁴

Even where oppositional claims arise and attain some publicity, they often tend to be de-emphasized as compared to official administration views. Despite the implications of much First Amendment scholarship, good or true ideas have no inherent momentum that makes them more salient and believable to the mass public; nor is there any force in the press or the journalistic process that guarantees or even raises the probability that better ideas will get wider and more prominent distribution than weaker ideas.

Research on the debate over American policy toward Iraq after its invasion of Kuwait reveals that even in a best-case scenario in which government elites engage in strong public argument, the administration enjoys a marked preference in the news coverage.³⁵ During the period immediately after President Bush announced the doubling of the American troop commitment to the Middle East, the most prominent reports in the *New York Times* and on ABC's *World News Tonight* emphasized substantive support of

³² See *Sea of Lies*, Newsweek 28 (July 13, 1992).

³³ See Entman, *Framing U.S. Coverage* (cited in note 27).

³⁴ See Hersh, *The Target is Destroyed* (cited in note 31); Entman, *Framing U.S. Coverage* (cited in note 27).

³⁵ See Entman & Page, *The News Before the Storm* (cited in note 25).

the Bush administration by nearly a three-to-one ratio.³⁶ Assuming that early coverage of an event is the most important phase of public exposure because it frames audience reactions to all succeeding information, the widespread support of President Bush's policy in the elite paper of record and on the most heavily watched network was an important achievement for the Bush administration. Had oppositional viewpoints achieved a more balanced distribution during this time, when the change to an offensive posture was just becoming known, it is conceivable that media coverage of the ensuing policy debate in Congress would have been more informative.

Instead, the Bush administration dominated coverage of what was arguably the most intense period of elite dissension regarding the use of American military force since the Vietnam War. When administration spokespersons such as President Bush, Vice President Dan Quayle, or Defense Secretary Richard Cheney made public statements, they tended to receive extensive and prominent attention in the press. When opponents, even well-known persons such as two former chairmen of the Joint Chiefs of Staff, criticized President Bush's policy during Senate hearings, they received only brief attention that slighted their substantive arguments. While editorial pages frequently called for vigorous public debate on the looming Gulf War, actual news treatments seemed to discourage the public from grasping and weighing the pro-war and pro-sanctions sides equally. In the policy debate before the Gulf War, the administration engaged in successful *viewpoint discrimination* if not absolute censorship. During the Gulf War, the administration did engage in censorship,³⁷ and the First Amendment offered little help. Meanwhile, discourse among government elites, including congressional opponents and the administration, effectively prevented the public from hearing of a third alternative to the administration-framed choice of sanctions versus war. Because no major official from either party advocated the option of initiating negoti-

³⁶ See *id.* The *Washington Post* was more critical during this period, but other media, such as *Time*, were not. On balance, it seems fair to suppose that the bulk of media coverage was either neutral or supportive of the administration. It would be impossible to list the hundreds of articles on which this statement is based. The conclusion here comes from a quantitative content analysis of all coverage of the Gulf War policy in these outlets from November 8-16 and November 27-December 5, 1990. See *id.*

³⁷ See John R. MacArthur, *Second Front: Censorship and Propaganda in the Gulf War* (Hill & Wang, 1992).

ations with Saddam Hussein, that alternative was virtually invisible in the mass media and to the public.³⁸

How should we judge such performances in terms of democracy? First Amendment scholarship focuses mostly on the production of ideas, in the apparent belief that as long as freedom of production is allowed, the free market will take care of distribution. Yet democratic theory emphasizes the distribution and use of information.³⁹ The public must enjoy easy access to information to have any hope of understanding its own interests and the way in which the government impinges on them. Too many press observers assume that if the information is published once in a single outlet, then it is genuinely visible to the entire public. In fact, however, one story appearing in a single outlet is unlikely to have any impact on the political process.

A free and responsible press should habitually offer the mass citizenry easy access to information that helps them hold government accountable for its actions. A necessary condition for modern American democracy, given the manner in which the political and policymaking systems now operate, is the wide availability of information that contextualizes and challenges the preferred positions and the existing policies or actions of the incumbent administration. The information must be displayed prominently and repeatedly in the media on which most Americans rely: the network news shows, the daily newspapers, and the weekly news magazines. Possession of such information creates the potential for people to influence government in the three primary ways that now exist: by registering opinions in surveys that may pressure government to shape policy in a certain way; by joining political groups or move-

³⁸ The editorial page of the *New York Times* did discuss the negotiation alternative, but it never penetrated the news pages, where a demonization of Hussein and a focus on the sanctions-versus-war options reigned. See Entman & Page, *The News Before the Storm* (cited in note 25). This point takes no position on whether negotiation was in fact a wise course. It was not considered an outlandish proposal in much of the European press, but the key point for this article is that the absence of a position in the public utterances of government elites created a vacuum in media content. This may be inevitable, even by some lights desirable, given the limitations on the public's ability to evaluate every conceivable policy solution. The influence of government over media content is much too complicated to probe sufficiently here. See Robert M. Entman, *Projections of Power: Media and American Foreign Policy Since Vietnam* (University of Chicago Press, 1994).

³⁹ See John A. Ferejohn and James H. Kuklinski, eds, *Information and Democratic Processes* (University of Illinois Press, 1990); Benjamin I. Page and Robert Y. Shapiro, *The Rational Public: Fifty Years of Trends in Americans' Policy Preferences* (University of Chicago Press, 1992); Zaller, *Mass Opinion* (cited in note 22); Dahl, *Democracy and Its Critics* (cited in note 22); Entman, *Democracy Without Citizens* (cited in note 4).

ments that bring organized pressure to bear; or by making more informed choices at the ballot box.

Operationally, to achieve this goal, the news media would have to offer balanced attention to competing views in all coverage, and would have to self-consciously define their primary role to be educating citizens to participate in policy discourse. The latter would yield an increase in information that is easily accessible, attractive, and well organized for consumption. In this vision, anti-administration information would be as simple to find and digest as pro-administration information, and reforms in law, regulation, and media practice would make balanced coverage their central aim. Given the constraints on media practice documented in the literature, this would, in practical terms, provide ideas endorsed by members of Congress and policy experts equal distribution with the ideas of the administration. Such a goal would not prevent the unity of coverage seen during the airliner tragedies, but it would mean that a debate such as that over the Gulf War would receive more even-handed and civically useful treatment.

To some observers, this goal might fall short; it accepts the basic regime of informal government discrimination. While some would argue the largest problem for democracy is the press's failure to transcend boundaries of conventional discourse among "responsible" elites,⁴⁰ it is quixotic as a practical matter to expect a media industry itself dominated by establishment elites to go beyond those borders for news and opinion. Such straying by journalists would not only antagonize the most powerful news sources, but would also likely displease mass audiences who are themselves steeped in conventional wisdom. Realistically, the national media cannot widely disperse those views that transcend the ideas of important leaders in the Washington elite. Only in extraordinary circumstances, such as those presented during the war in Vietnam, is there much broadening of the discourse beyond official boundaries.⁴¹ Even during Vietnam, the media were generally hostile to the anti-war cause.⁴²

⁴⁰ See Michael Parenti, *Inventing Reality: The Politics of the Mass Media* (St. Martin's Press, 2d ed 1992); Edward S. Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Pantheon Books, 1988).

⁴¹ See Gitlin, *The Whole World* (cited in note 22); Hallin, *Uncensored War* (cited in note 17).

⁴² Gitlin, *The Whole World* (cited in note 22).

II. THE CHILLING EFFECT OF THE FIRST AMENDMENT

Flaws in First Amendment analysis, and the absence of an empirical understanding of the relationships just described, have an important real-world impact on public policy towards the communications media, and thus affect how well the media serve democratic values. With government exerting so much informal power over media content, the key question becomes how law and policy might reduce that informal control, or otherwise enhance media performance. Defining the problem in this way illuminates the precise goal that formal government policy intervention might seek: to diminish media dependence on government elites and the concomitant public dependence on information that is heavily shaped by the very officials whom the public needs to hold accountable.

I suggest that the First Amendment has had a chilling effect on discourse regarding communications policy, preventing analysts from identifying this goal. The diversity, depth, and precision of debate has been reduced by the enormous rhetorical power analysts can exercise by simply invoking the First Amendment.⁴³ The position that has recently dominated deliberations at the Federal Communications Commission ("FCC"), and indeed most analytical discourse, stresses that the primary meaning of the First Amendment, and the best way to promote its values, is maximizing media owners' rights to expression unimpeded by government. The now-dominant view subsumes other interpretations of First Amendment goals in its determination to shield owners from formal government intrusion. It holds that the government should encourage competitive communication markets, because competition will yield the optimum flow of diverse ideas—or at least it is more likely to do so than any other regulatory scheme.

I believe that when government decisionmakers and judges invoke the First Amendment, they largely avoid the kind of careful analysis of costs and benefits that is practiced in virtually every other policy field in government. Leaving aside some important inconsistencies and exceptions, such as national security and indecency, policy and legal analysis has appeared to assume that any policy that might impinge on the autonomy of news organizations has infinite costs for which no benefits can be great enough. The

⁴³ See Robert M. Entman and Steven S. Wildman, *Reconciling Economic and Non-Economic Perspectives on Media Policy: Transcending the "Marketplace of Ideas,"* 42 J Commun 5 (Winter 1992). Parts of the current essay extend the argument in this article. See also Frederick Schauer, *The First Amendment as Ideology*, 33 Wm & Mary L Rev 853 (1992).

description applies best to the FCC of the Reagan and Bush administrations, quite well to courts, and less well to Congress; calibrating these judgments is a task for future research. I focus here on the FCC under Presidents Reagan and Bush, the locus of the most important communications-policy decisions in recent years. While President Clinton's appointees to the FCC could apply a different or more diverse interpretation of the First Amendment, the view identified here will remain highly influential. It has many adherents among interest groups, scholars, and experts—and in the judicial branch, where the previous administrations' judicial appointees serve for life. The FCC's recent policy and legal discourse has barely hinted at the complexities highlighted by this Symposium and by the writings of many legal scholars.⁴⁴

I formulated two hypotheses in a small pilot study to check for an empirical basis to my suspicion that the First Amendment has chilled analytical discourse in communications policy. The first hypothesis is that when the FCC, between 1981 and 1992, used the rhetoric of the First Amendment, it failed to refer to the many conflicting interpretations of the First Amendment's meaning and goals that are discernible in legal scholarship. Instead, the FCC used the First Amendment narrowly and simplistically. The second hypothesis is that during this period, the FCC ignored scholarly or scientific evidence about how the media and their audiences actually behave. The mere mention of the First Amendment obviated the need for reference to the empirical world and thereby chilled analysis of communications policy.

To test my hypotheses, I conducted a content analysis of three FCC rulings: the Fairness Doctrine,⁴⁵ the deregulation of radio,⁴⁶ and the consideration of children's television rules.⁴⁷ These are among the most far-reaching and controversial media deregulation policies since 1980, and the FCC should therefore have been on its

⁴⁴ Good sources for this sort of complicated thinking include Cass R. Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1993); Judith Lichtenberg, ed., *Democracy and the Mass Media* (Cambridge University Press, 1990); Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* (Harvard University Press, 1990); Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982); Bollinger, *Images of a Free Press* (cited in note 1). Note that the Clinton-era FCC might engage in reasoning more influenced by such considerations.

⁴⁵ *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 2 FCC Rec 17, 5272 (1987).

⁴⁶ *Deregulation of Radio*, 84 FCC2d 968 (1981).

⁴⁷ *Children's Television Programming and Advertising Practices*, 96 FCC2d 634 (1984).

best analytical behavior in justifying them. These rulings should be a hard test for my claim. I counted and categorized all mentions in these rulings of the First Amendment and of freedom of speech, press, or expression, in an attempt to determine how the FCC has employed these notions. Furthermore, I searched for all references in these FCC rulings to scholarly writings.

I found that when the FCC invoked the First Amendment, it almost exclusively referenced just two goals: (1) creating robust debate in a diverse marketplace of ideas; and (2) protecting the freedom of media owners from governmental intrusion into editorial decisionmaking. The following table demonstrates the results of this analysis:

INVOCATIONS OF "FIRST AMENDMENT" OR "FREEDOM OF EXPRESSION, SPEECH, OR PRESS" IN FCC DECISIONS ON THE FAIRNESS DOCTRINE, DEREGULATING RADIO, AND CHILDREN'S TELEVISION⁴⁸

<i>Decision</i>	<i>Ideas Referenced</i>		
	<i>Diverse Marketplace</i>	<i>Editorial Autonomy</i>	<i>Indefinite</i> ⁴⁹
Fairness	14	34	17
Radio	2	4	1
Children's TV	0	8	1
Total	16	46	19

The above table reveals that the FCC espoused a relatively consistent but narrow idea of the First Amendment's goals. Assuming these rulings comprise a best-case, or at least a reasonable, test, the FCC had in mind only those two goals whenever it mentioned "free expression" or "the First Amendment." Furthermore, in these three rulings, the FCC emphasized the goal of editorial autonomy much more than the goal of achieving a diverse marketplace of ideas. Both of these goals are instrumental; that is, the FCC did not reason in terms of final or end goals, a practice that again distinguishes it from other regulatory agencies. Equally important, the more strongly emphasized aim of editorial autonomy is the most clearly instrumental objective of the FCC's dual goals, and is the most distant from the ultimate values protected by the First Amendment.

⁴⁸ This analysis includes the text of footnotes but excludes the dissenting statement of Commissioner Rivera in *Children's Television*, 96 FCC2d at 634.

⁴⁹ In fifteen instances, the words were used without any contextual idea; in four cases, the words referred to other ideas.

The FCC's faith in these two instrumental goals, I believe, blinded it to the need for careful analysis of how to reach final ends such as those suggested by Professor Sunstein and the Hutchins Commission.⁵⁰ Nor do I think that Congress or the courts have done much better in recent years, although at this point, I must limit my claim to the FCC. The FCC did not demonstrate in any detail how the instrumental goals serve any final aims. Indeed, the FCC did not mention ultimate objectives at all.

This brings me to my second hypothesis. Among the footnotes to the rulings, numbering 328 altogether, just two offer (extremely sketchy) references to scholarship discussing the manner in which media organizations and audiences actually behave in idea production or consumption.⁵¹ To talk about instrumental or ultimate goals in an empirical rather than speculative way would require reliance on the scholarly literature. Instead, the FCC virtually ignored—at least in the published justifications for its decisions—research evidence about behavior and how it might change with a policy alteration.

In failing to look at empirical evidence, the FCC distinguishes itself from other regulatory agencies that follow the Administrative Procedures Act.⁵² Under the Administrative Procedures Act, other regulatory agencies must weigh their final goals, or at least are supposed to do so. For example, the EPA cannot implement a pollution regulation without empirically demonstrating a reasonable likelihood that the policy will have a net positive effect on the environment.⁵³ By contrast, citing to the First Amendment allows the

⁵⁰ See Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L J 1.

⁵¹ *Children's Television*, 96 FCC2d at 649 n 36, cites a non-scholarly article by the head of an interest group which in turn quotes an unnamed "Michigan State University study." This note also references *Television and Behavior: Ten Years of Scientific Progress and Implications for the Eighties* (National Institute of Mental Health, 1982).

Fairness Doctrine, 2 FCC Rec at 5300 n 86, cites an article by Bruce M. Owen, *The Role of Print in an Electronic Society*, in Glen O. Robinson, ed, *Communications for Tomorrow: Policy Perspectives for the 1980's* 229, 230 (Praeger Publishers, 1978). This note quotes three sentences in the Owen article that assert that the role of print news editors is to package ideas and reduce the burden of information processing on readers.

Two other footnotes mention scholarly studies concerning the marketing (not the production or consumption) of ideas: Philip Kotler, *Marketing Management: Analysis, Planning, and Control* (Prentice Hall, 1976); Joseph R. Dominick [sic, should be Dominick], *The Effects of Commercial Clutter on Radio News*, 20 J of Broadcasting 169 (1976). See also *Deregulation of Radio*, 84 FCC2d at 1004-05 n 71, n 75.

⁵² 5 USC §§ 551-559, 701-706 (1988).

⁵³ See, for example, Toxic Substances Control Act, 12 USC §§ 2605(a)-(c) (1988).

FCC to get away with decisions that might otherwise be labelled arbitrary and capricious.

The problem gets worse: this situation appears to be self-reinforcing. As suggested earlier, in the real commercial market, the media do not create an information supply that resembles the metaphorical vision of a buzzing marketplace of ideas. In its absence, consumers may not be educated to demand a diversity of information that is independent or critical of government policy—the kind of information supply envisioned in the marketplace-of-ideas metaphor and needed to fulfill democratic ideals.

Economists would call this an externality problem. Externalities are the unintended effects of market exchanges. For my purposes here, the most important externality—that is, the most important effect of market transactions in mass communications that are not part of the intended bargain—is the impact of the commercial market on civic interest and knowledge. The commercial market underproduces news that enhances citizens' political interest, knowledge, and sophistication, in large part because the commercial pressure on suppliers is to attract the largest audience possible. The average audience member does not seek complex, sophisticated information, and the mass media must target that average member. Without a more socially-useful idea supply in the mass media, consumers remain too uninformed to demand such a supply. The externality reinforces itself.

This again marks communications policy as a unique field. In other areas, such as the environment or consumer safety, the externalities are not self-reinforcing; on the contrary, they tend to call forth strong and sometimes overzealous political demands for correction. In communications, however, the externality has the effect of suppressing both economic demand within the market and political demand outside the market for solutions. Because of this unique quality alone, communications policymakers ought to be hyperconscious of the connection between and among policy instruments and final goals. Because of the chilling effect of the First Amendment, I believe policymakers at the FCC have neglected to make these connections. Indeed, the FCC seemed unaware that when it intervened to reinforce the power of the commercial market by deregulating broadcasters, it may have actually reinforced the externality just described. In this sense, the FCC may have acted unwittingly to reduce demand for enhanced civic content in the media.

As a specific example, the failure of the three major broadcast networks to devote much coverage to the presidential nominating

conventions in 1992 reflects the deregulatory mood at the FCC. The FCC, having ceased to enforce the public-trustee concept of licensing, could not conceivably threaten license renewal for neglecting to cover the conventions gavel-to-gavel. Yet research has shown that the conventions, when covered heavily, offer important learning opportunities for a public not terribly interested in or informed about politics.⁵⁴ Absent that opportunity, their knowledge may deteriorate further. Perhaps more important, the networks' decision to broadcast sitcoms and detective shows rather than political conventions conveys a deeply cynical message about the political process and its relevance to individual citizens' lives. Hence the self-reinforcing phenomenon: the decrease in the public's political interest and knowledge stemming from the failure to cover political conventions might further reduce audience demand and render it even less profitable for the networks to cover the conventions and other important political events fully in the future.

Among other worrisome effects, a less politically aware public is less likely to realize how government policy has allowed, and even encouraged, the major broadcast networks to reduce their convention coverage, thus diminishing their political awareness still further.⁵⁵ Communications policy may therefore influence the distribution of preferences in the political process, in this case, for communications policy decisions themselves. Such indirect government effects on the content of the public's demands upon the government appear no more compatible with First Amendment ideals than direct intervention to promote or restrict ideas. These effects lend further support to Professor Sunstein's half-truth analysis of the defects in assuming that government cannot and does not engage in viewpoint discrimination.⁵⁶

The identification of the possibility that communications policy indirectly and inadvertently shapes the distribution of ideas suggests questions about the FCC's second instrumental goal, maximizing the freedom of media owners from government regulation. The problem is that in practice, even when ostensibly acting to free expression from constraints, as it did in *Fairness Doctrine*,

⁵⁴ See Dean E. Alger, *The Media and Politics* 217 (Prentice Hall, 1989).

⁵⁵ In 1992, political candidates used other formats for conveying political information, such as talk-show appearances and "infomercials." Research has not yet established whether the use of these vehicles significantly increased the public's political sophistication. Ratings for these outlets, however, do suggest that millions of Americans demanded more than they found in traditional newspaper and television news coverage.

⁵⁶ See Sunstein, 1993 U Chi Legal F at 26-30 (cited in note 1).

Deregulating Radio, and *Children's Television*, government may actually be turning regulatory power over to the commercial market. As another of Professor Sunstein's half-truths suggests,⁵⁷ this means that deregulation might well be interventionist in its own way: the policy of deregulation, by exposing media owners to the full force of market competition and consumer demand, greatly affects the ideas that broadcasters can practically choose to produce and distribute if they want to stay in business. The idea of a competitive market is precisely premised on the notion that consumer demand constrains the options of suppliers. In other words, it may be that by deregulating the media, the FCC does not prevent intrusion into the autonomy of the media, but instead merely changes the mix of intruding forces.

Most analysts find it acceptable for the public to "vote" through the economic market, and thus to limit and guide media expression.⁵⁸ If the market is efficient, this means minority tastes will be served by marginal outlets. Unpopular ideas will be functionally invisible to most of the public, which will be saturated by the conventional and the popular. This situation is the predictable result of market constraints on the expression of mass communication outlets. In this light, by deregulating broadcasting and substituting market pressures, government may not be acting in a genuinely content-neutral way.⁵⁹ Yet most analysts now hold that it is impermissible for the public to vote through representative government institutions to affect media expression and ameliorate these conditions.⁶⁰ Is this because government has more resources than the market to pressure and put a medium out of business or to induce a change in management and its practices? Assuming the current First Amendment regime, the answer is surely no; the market can and does achieve that much more effectively.

Forces arising from the private market can pose as great a threat to free expression as government. If energetic and diverse public debate is the goal, then government regulation might be de-

⁵⁷ See id at 34-35.

⁵⁸ See Lichtenberg, ed, *Democracy and the Mass Media* (cited in note 44).

⁵⁹ This is true unless one assumes a Rawlsian original position under which an endogenous and natural distribution of ideas and preferences exists. That notion seems effectively dispatched by Professor Sunstein, who points out that the existing press system relies upon a set of prior government policy decisions regarding private property rights which themselves may have content-relevant implications. Sunstein, *Democracy and the Problem of Free Speech* (cited in note 44).

⁶⁰ The essays in Lichtenberg, ed, *Democracy and the Mass Media* (cited in note 44), debate this proposition thoroughly. See especially Owen M. Fiss, *Why the State?* at 136-54; Lee C. Bollinger, *The Rationality of Public Regulation of the Media* at 355-67.

sirable in this context; intervention might even promote expression by protecting the media from the full censorious powers of the market. On the other hand, we will have to deal with the problem cited by Ithiel Pool: in practice, broadcast regulation in the old days never did enhance public debate very much.⁶¹

If government really wanted to nurture speakers' ability to express diverse ideas and have them heard (that is, widely distributed), it would have to transcend conventional First Amendment approaches. Forcing speakers to find private investment or charity funds, and advertisers or paying customers to support the production and distribution of their ideas, is not genuinely content-neutral, if indeed such a thing is possible. Such a system restricts expressors' freedom to be heard and raises the costs to the disengaged mass audience of finding more diverse and independent views.

To be sure, the constraining force of the audience, its interests, capabilities, and prejudices, exists under any system of free expression and information distribution. Moreover, the dangers of political pressure from government agents are real. Yet analysts should always weigh the risks of a policy against its likely benefits and, in this case, against the market alternative under which economic pressures are guaranteed to constrain the production and distribution of ideas.

Additionally, this critique of the FCC's conventional First Amendment wisdom leaves aside many other issues. For example, the FCC's version of the First Amendment has neglected the role and professional autonomy of journalists. Journalists have no First Amendment expressive rights within their media organizations, and that may have major impacts on the circulation of ideas. Recent research⁶² suggests reasons to fear for reporters' and even publishers' autonomy, with advertising revenues stagnating or shrinking and news organizations being forced to become more responsive to advertiser complaints. Indeed, the implication of the FCC's reasoning, which relied almost exclusively on media owners' motivations and decisions to animate the "marketplace of ideas," is precisely that media owners constantly oversee and interfere with the journalists who actually produce or disseminate ideas. Otherwise, the FCC's reasoning would logically have to focus on

⁶¹ See Ithiel de Sola Pool, *Technologies of Freedom* (Belknap Press, 1983). See also Henry Geller, *Mass Communications Policy: Where We Are and Where We Should be Going*, in Lichtenberg, ed, *Democracy and the Mass Media* at 290 (cited in note 44).

⁶² C. Edwin Baker, *Advertising and a Democratic Press*, 140 U Pa L Rev 2097 (1992).

other parties'—including journalists'—freedom in addition to that of media owners.

This point brings me back to my basic theme. Despite the complexities in the relationships of government policy to the production and consumption of ideas, the main use of the First Amendment in legal and policy analysis has been as an analytical stopper, a chiller of discourse. If a proposed communications law or policy seems to violate the First Amendment, little additional investigation into its actual impact occurs. We need to root debates over the First Amendment in the way that the media and audiences actually behave, not in an abstracted ideal that neglects what scholars and practitioners of journalism know about the real world. Relatedly, we should strip the First Amendment of its sacred status. We should treat it as a malleable embodiment of ideals for the media's role in democracy rather than as a clear guide to policy that has the single meaning of mandating minimal government intervention in communications markets.

III. RECOMMENDATIONS

The foregoing analysis does not yield a recommendation for traditional government regulation. The social-science understanding of the news process cautions that we cannot compel audience interest and attention to any mandated content. That is the key problem with ignoring market forces. This conundrum is one that those who favor traditional government intervention have not yet dealt with satisfactorily, one that becomes more critical as communications outlets proliferate and grow more competitive. The future will pose more difficulties for intervention, as the audience will be scattered over many more media outlets. Already the cable alternatives have reduced newspaper penetration and the ratings of the network news. Audience fragmentation may limit the practical utility of traditional government regulations like the Fairness Doctrine.

If traditional policies designed to affect content and distribution are less likely to be effective, arguably the most important policies to facilitate First Amendment or Hutchins Commission values will be those that expand the telecommunications infrastructure to ensure that no information gap develops between the rich and poor. This means subsidizing citizens' access to the ever-increasing information stores that are being produced and that will soon be distributed not in traditional mass-media form, but on telecommunications networks. With the very notion of a "mass medium" in flux, we need to have a vigorous and unfettered discussion about

ultimate democratic goals, one unchilled by the First Amendment. Major transformations in the news industry provide all the more reason to be clear on how journalism might contribute to the democratic process.

In practice, we really do not want strict content-neutrality; we want some discrimination in the distribution of information, if only because government resources and, perhaps more important, people's time and attention are scarce. The market is a good mechanism for content discrimination in distribution. Thus, a practical scheme might adapt and expand upon Dean Bollinger's idea of a mixed system⁶³ and Professor Sunstein's ideas on a new deal for free expression,⁶⁴ wherein some media persist as profitmaking entities, some more regulated than others, and other news organizations receive public subsidies.

A mixed system should be keyed to the information media just now emerging—information will probably be delivered by telephone or cable companies accessed via a multimedia personal computer offering a combination of video and text. If this is the information network of the future, some form of "information stamps" or vouchers analogous to food stamps might provide a way of combining the best features of subsidies and markets. Government might fund information production and its availability on the information network; distribution would be determined by consumers themselves using, if necessary, their information vouchers. Clearly, more thought is needed to prevent such a mechanism from simply duplicating the outcomes of the existing market. And other policy mechanisms also worth exploring can be examined once we free ourselves from the First Amendment's chilling effect on analyzing and achieving the ultimate goals of our democracy.

A newly free and diverse debate on how to realize First Amendment goals might yield such other proposals as these:

- Subsidize newspapers so that they drop their politically potent opposition in Congress to the telephone companies' provision of information in new and potentially democracy-enhancing forms. Meanwhile, the subsidy might allow the newspapers to keep their per-household circulation from shrinking.
- Subsidize the broadcast networks' practice of broadcasting the party nominating conventions so that obligations to stockholders, to maximize advertising revenues, will not force them to neglect an

⁶³ See Lee C. Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 Mich L Rev 1 (1976).

⁶⁴ Sunstein, *Democracy and the Problem of Free Speech* (cited in note 44).

important opportunity to educate the public about presidential candidates.

- Forbid the broadcast of short television political advertisements or of poll results within one month of an election, so as to preserve the widest ambit for autonomous public decisionmaking.

Such policies would not directly reduce the government's informal power to shape the news. Nevertheless, they could accomplish a marginal improvement in the political sophistication of the American citizenry. In turn, this heightened political awareness might increase demand for higher quality civic information—and for communications policies that make furthering the health of democracy a higher priority.