

## BROADCASTING IN THE PUBLIC INTEREST: LESSONS FROM JAPAN

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One of my initial worries, in beginning a year-long stay in Japan, was how to pay my bills. My neighbors, mostly Japanese, counselled me on the schedule of the milkman, the rice man, the newspaper man, and the phone man. "What about NHK?" I asked. NHK is Japan's national broadcasting system. I was aware that it was supported publicly and already felt an obligation to pay: my family and I regularly watched the English-language evening newscast; my son had become a regular viewer of the daily children's show *Okaasan to issho* (Together with Mother). I had become hooked on *Dokuganryu Masamune* (The One-Eyed Dragon Masamune), the ongoing Sunday night dramatization of the life of Date Masamune, a historical warlord in northern Japan.

"Oh, the NHK man, don't worry about him," my friends advised me. "It's too much trouble for him to try to collect from foreigners."

Later that week, the doorbell rang. It was obvious that we were foreigners, because our name was spelled-out in katakana, a phonetic syllabary used almost exclusively for foreign words. My wife, who spoke almost no Japanese, opened the door. (One can do this in Japan without fear of bodily injury). There, on the other side, was a polite, uniformed representative of Nippon Hoso Kyokai. He spoke no English but presented her with a card that clearly explained, in *our* native language, what was required: 11,440 yen for a year (about \$90) or 990 yen per month. Wishing to save this man from making monthly rounds, and herself the uneasiness of monthly bilingual commercial transactions, she paid him the

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whole amount on the spot. (In Japan, you see, it also is customary to keep \$100 or so around, just in case someone like the NHK representative comes calling).

The Japanese perhaps are not quite as enthusiastic about doing their patriotic duty; no one is nearly as religious as a convert. Nevertheless, they do pay, ninety-seven percent of them anyway, more than thirty-one million households. What they get, in return, is public broadcasting of the highest order: two television channels, two AM radio stations, and one FM.<sup>1</sup>

Prior to becoming a lawyer, I had spent more than ten years working in television and radio journalism. And of course I had spent countless hours watching and listening, as have all Americans. Yet, it was not until I was exposed to NHK that I truly understood the meaning of broadcasting in the "public interest."

Even as a foreigner, with imperfect language skills, I got more out of NHK than any of the broadcasting services back home. Yet, it is in America that the law mandates broadcasting in the "public interest."<sup>2</sup> That phrase is the totem of American broadcasting regulation.

America, and Western countries in general, rely heavily on words and spend a great deal of time crafting the right ones.<sup>3</sup> The belief is that the words are the thing itself; if everyone talks enough

1. Without paying, the rest of the world may receive NHK's international service, Radio Japan. The service began in 1935 under the name of Radio Tokyo. At that time, it provided one hour of programming a day, in English and Japanese, to Hawaii and the United States. Overseas broadcasting was suspended immediately after the war but resumed in 1952, after a six-year hiatus. Today, Radio Japan estimates it reaches fifteen million people worldwide with forty hours of broadcasting per day in twenty-one different languages via the general and ten regional services. NHK's Overseas Broadcasting Service: Radio Japan, in *This is NHK* (available from Audience and Public Relations Bureau, Nippon Hoso Kyokai, 2-2-1, Jinnan, Shibuya-ku, Tokyo 150, Japan).

NHK also brings the world to Japan via its new twenty-four-hour-a-day satellite service, which features a heavy diet of news broadcasts from around the world. Part of NHK's goal, according to Managing Director Shima Keiji, is to foster a world-wide video news network. Such a network, in which broadcasters present news bulletins of foreign networks to their viewers, will lead to better understanding, he says.

Political and business leaders are restricted by national boundaries and other interests, so we in the world of journalism have the duty to get rid of all the walls that are blocking the solution of political or economic problems.

An Interview with NHK's General Managing Director, on the Start of 24-Hour DBS Service, *NHK Newsletter*, Aug. 1987, at 1, col. 1 (available from Audience and Public Relations Bureau, NHK); Shimizu, Television and the New Technologies in 1990s (NHK white paper, available from International Cooperation, Corporate Planning Headquarters, NHK).

2. 47 U.S.C. § 309(a) states that the Federal Communications Commission shall grant a broadcasting license only after determining "whether the public interest, convenience, and necessity will be served. . ." Similar language is found throughout the Communication Act.

3. The New Testament, for example, states "In the beginning was the Word." THE JERUSALEM BIBLE, John 1:1 (1970). See generally Parker, *Law, Language, and the Individual in Japan and the United States*, 7 WIS. INT'L L.J. 179 (1988).

about serving the public interest, it is considered done. Nowhere has this delusion taken hold more strongly than at the FCC during the Reagan years.

The chairmanships of Mark Fowler and his successor Dennis Patrick are most known for their deregulatory zeal. Broadcasters have been freed of almost all the responsibility of holding a public license. What's more, they've been given longer periods between license renewals,<sup>4</sup> at which point their franchises are almost automatically extended unless, in the memorable words of an ex-Louisiana governor (upon describing his own electoral invincibility), they're found in bed with a live boy or dead girl.

Deregulation, of course, has been sold with the right words. It is in the public interest, we are told, for broadcasters to be free of the dreaded fairness doctrine, a collection of rules that required licensees to engage in the onerous task of covering controversial issues fairly.<sup>5</sup> This, it is said, will allow broadcasters to be more robust in their presentation of news and public affairs by enjoying (and here come more magic words) "full first amendment protection."<sup>6</sup>

Similarly, President Reagan staved off another vicious threat to

4. Originally, broadcasting licenses were granted for three years. In 1981, however, Congress extended the license term to five years for television stations and seven for radio. 47 U.S.C. § 307(d).

5. See, e.g., *In the Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1, 30 R.R.2d 1261 (1974), in which the FCC reiterated the two basic tenets of the Fairness Doctrine: devoting a reasonable percentage of time to covering controversial issues of public importance and doing so in a manner that is fair, that is, provides contrasting views. The Commission expressed skepticism about complaints that the Doctrine imposed significant administrative burdens on broadcasters.

6. In the two years leading up to the FCC's 1974 report, the Commission received 4,280 fairness complaints, but all but nineteen were resolved in favor of the broadcasters. Of those nineteen, only eight led to a meaningful penalty against the licensee. In *The Matter of The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 58 F.C.C.2d 691, 709, 36 R.R.2d 1021 (1976) (Commissioner Robinson dissenting). See generally T. CARTER, M. FRANKLIN, J. WRIGHT, *THE FIRST AMENDMENT AND THE FIFTH ESTATE* 229-69 (2d ed. 1989).

More recently, the FCC voted to abolish the Fairness Doctrine, claiming that it actually inhibits broadcasters from presenting controversial material. That determination was upheld as reasonable by the D.C. Circuit. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

The Congress is said to be inclined to make the Fairness Doctrine part of the Communications Act, agreeing generally with former FCC Chairman, PBS Chairman, and CBS Director Newton Minow, who wrote, "The Fairness Doctrine stops no one from speaking; it simply encourages that all sides be heard. How can this policy harm the public?" Minow, *Being Fair to the Fairness Doctrine*, N.Y. Times, Aug. 27, 1985, § A at 23, col. 3. See, e.g., *The Fairness Doctrine, Congress, and the FCC*, COMMUNICATIONS LAWYER, Summer 1988, at 1.

Rep. John Dingell introduced such legislation on the first day of the 101st Congress, H.R. 315, 1st Sess. (1989). It was essentially the same as the Fairness in Broadcasting Act of

the public interest by vetoing the 1988 Children's Television Bill, which would have limited commercials during children's shows to ten and one half minutes per hour on the weekends and twelve minutes per hour during the week.<sup>7</sup> The pocket veto came after Congress, which had overwhelmingly supported the bill, was out of session and could not override it. The President said that he acted to prevent an infringement of broadcasters' first amendment rights.<sup>8</sup>

If the freedom for broadcasters to say (or not say) anything is synonymous with the public interest, then why is broadcasting in America so bad? Not all of it, of course. Everyone dutifully tips his hat to Ted Koppel and Nightline, but such shows are only a small portion of the broadcast day.

News is only one form of public interest broadcasting (and entertainment needn't be restricted to mezzo-sopranos singing nineteenth century arias), but even the news broadcasts are suffering. During the recently-endured Presidential election, everyone—network news included—decried the "sound bite campaign," but no one stopped playing along.<sup>9</sup> Every evening the sound bite of the

1987, which passed the Congress but was vetoed by President Reagan. See *Dingell reintroduces fairness doctrine bill*, BROADCASTING, Jan. 9, 1989, at 44.

7. See *Children's Television*, BROADCASTING, June 6, 1988, at 14. The Act was designed to fill the void left by the deregulatory Reagan FCC, which had decided to allow the marketplace to present adequate children's programming in appropriate circumstances. See *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987) (inadequate justification given by FCC for eliminating children's television guidelines); *Children's Programming*, — F.C.C.2d —, 53 R.R.2d 24 (1987).

Even "The Real Ghostbusters," a cartoon series, recognizes the problem. In one episode, the Ghostbusters are watching Powerguy from the Planet Paterno on television. The following dialogue occurs among the Ghostbusters:

Ray: Hey this is a terrific cartoon. It's based on a great toy.

Peter: A toy is the star of the show?

Winston: Could be worse.

Peter: How much damage can a toy do?

(At this point, the behemoth Powerguy—who has a TV set in his stomach—emerges from the screen and wreaks havoc, destroying everything in his path.)

Peter: Offhand, I'd say plenty.

8. *Reagan Vetoes Bill Putting Limits on TV Programming for Children*, N.Y. Times, Nov. 7, 1988, § A at 1, col. 1. The only nationally-broadcast children's radio program was forced off the air in 1988 for lack of funding. "Kid's America" featured games, music, and Sesame Street-style teaching. Children also were able to call the hosts on a toll-free hotline, and some 6,000 per week did. The program went national in 1985, thanks to a \$400,000 grant from the Corporation for Public Broadcasting. CPB's director of the radio program fund said the show was "a marketing failure" because only a small number of public radio stations carried it. The lack of interest by local stations is almost as disappointing as the "marketing" mentality forced upon public broadcasting by its lack of money. See *Morning Report: Radio*, L.A. Times, Jan. 4, 1988, part 6, at 2, col. 2; *Children's Radio Show is Cancelled*, N.Y. Times, Jan. 2, 1988, § 1, at 17, col. 1.

9. See, e.g., *Many reporters unhappy with campaign '88 coverage*, Christ. Sci. Mon., Dec. 9, 1988, at 3, col. 1; *TV and the Election: Debating an Ugly War*, N.Y. Times, Nov. 14, 1988, § B, at 8, col. 4; *The Made-for-TV Campaign*, TIME, Nov. 14, 1988, at 66; *1992 Elec-*

night was dutifully served up by Rather, Brokaw, and Jennings, much like a psychologically disturbed person's compulsive ritual. He insists that he hates it, but he keeps on doing it.

Over at PBS, there are other problems. As I write this, my local affiliate has just completed another marathon of begging for tablescraps. It's hard to perform when you're trying to raise money just to eat. In a few months, the beggar will play pawnbroker and hold its annual auction. And while it has resisted running commercials, the station does air "enhanced underwriting" announcements. The uninformed might mistake these for commercials, but only until learning that they are different because, after all, different words have been used to describe them. My three-year old son, for example, does not yet appreciate the distinction and views a local supermarket chain as inextricably intertwined with Sesame Street.<sup>10</sup> Might the company have had that in mind when it decided to sponsor (oops, underwrite) the program on non-commercial television?

The attentive reader knows where I'm leading. But should the United States renounce its heritage and adopt the Japanese approach to broadcasting? Surprise: the answer is no. Just imagine the PBS man trying to track us down. But can we do what the Japanese do: take something from somewhere else and adapt it to our own culture? The answer to that is yes.

Although much has been written about the differences between East and West,<sup>11</sup> Japan and America have more in common than

*tion Coverage Open to Debate*, L.A. Times, Nov. 11, 1988, part 6, at 1, col. 1; *Campaign of Sound Bites*, Newsday, Oct. 19, 1989, part II, at 13, col. 1.

In the 1984 presidential campaign, the average length of a soundbite was 14.8 seconds. In the 1988 campaign, it was reduced to only nine seconds. Kalb, *TV, Election Spoiler*, N.Y. Times, Nov. 28, 1988, § A, at 25, col. 1.

10. Upon seeing commercials for the supermarket, Daniel assumes that Sesame Street is to follow. His father and mother have had only limited success in convincing him that the business and the program are segregable.

11. In Japanese, literature about the "uniqueness" of Japan and its people, *Nihonjinron*, is one of the most popular forms of non-fiction. (Some would call it fiction, but that debate is for another day.) In the West, much of this type of writing began with Lafcadio Hearn. Hearn, born to a Greek mother and Irish father, came to the United States in his childhood and subsequently became a journalist. After winning great popularity, especially as a newspaper columnist in New Orleans, he transplanted himself to Japan. The rest of his career was devoted to exposing Occidentals to this Oriental culture. A good many of his books are still in print. See, e.g., *GLEANINGS IN THE BUDDHA FIELDS* (1971); *EXOTICS AND RETROSPECTIVES* (1971); *IN GHOSTLY JAPAN* (1971), *JAPAN: AN ATTEMPT AT INTERPRETATION* (1955); *KOKORO* (1972), *KWAIDAN* (1971), *THE ROMANCE OF THE MILKY WAY* (1972), *SHADOWINGS* (1971) (all dates are recent editions, not first publication). Another early practitioner of this genre was a British woman by the name of Isabella Bird. Bird traveled through remote regions of Japan in the early Meiji era and wrote letters back home describing her triumphs and travails. I. BIRD, *UNBEATEN TRACKS IN JAPAN* (1973) (original edition 1880).

The classic, R. BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD* (1946), was an attempt to re-educate the American public after the propaganda of the war years.

either of them may think. Much of the miracle of Japanese manufacturing is due to the teachings of Americans, especially the business consultant W. Edwards Deming.<sup>12</sup> The Japanese took these lessons to heart and learned them well, outmastering the master.

In broadcasting, too, a comparison of the Broadcast Law of Japan with its Western counterpart reveals strong similarities. Like the current Japanese Constitution, the Broadcast Law was written after the war and, as a result, was heavily influenced by Western thinking.<sup>13</sup> Indeed, in broadcasting too, the Japanese out-Americaned the Americans. Our Communication Act lists as its purpose the creation of “a rapid, efficient . . . communication service . . . at reasonable charges.” The reasons such a service is needed (other than “national defense” and protection of “life and property”) are unstated in the Act. They remain the stuff of theory and debate.<sup>14</sup>

Japan’s Broadcast Law, in contrast, clearly states what broadcasting (and the Law) is for:

- (1) To secure the maximum availability and benefits of broadcasting to the people;
- (2) To assure the freedom of expression through broadcasting by guaranteeing the impartiality, integrity, and autonomy of broadcasting;
- (3) To make broadcasting contribute to the development of healthy democracy by clarifying responsibility of those persons engaged in broadcasting.<sup>15</sup>

The irony is the Japanese, who—by our stereotype—favor the undefined and “inscrutable”—are up front about what they hope to accomplish. We, on the other hand, operate out of vague generalities and with a subtext that only the initiated would know.

Part of this results from history. Although broadcasting dates back to the 1920s in Japan, the current Broadcast Law was passed under the watchful eye of the Occupation, which presided over the country from 1945 until 1952. As even casual students of history know, the Allies were intent on breaking down the hierarchical system that had characterized Japanese government for all of its recorded history. In its place were to be put Western notions of democracy.

The first to go was the Emperor—not the Emperor personally but rather the notion of Emperor as a divinity. So long as that no-

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Ambassador Edwin Reischauer followed in the 1970s and 1980s with a number of insightful books, including *THE JAPANESE* (1977). With Japan’s economic success, many writers began not only to describe the uniqueness of Japan but also its “superiority.” See, e.g., R. CHRISTOPHER, *THE JAPANESE MIND. THE GOLIATH EXPLAINED* (1983); E. VOGEL, *JAPAN AS NUMBER ONE: LESSONS FOR AMERICA* (1979).

12. A. MORITA, *MADE IN JAPAN* 165 (1986).

13. The Broadcast Law, Law No. 132 of May 2, 1950.

14. 47 U.S.C. § 151.

15. The Broadcast Law, art. 1, Law No. 132 (1950).

tion was around, the Allies reasoned, true freedom (including freedom of speech) could never occur. Who could disagree with a god? As a result, the late Emperor Hirohito (now correctly called Emperor Showa, after the name of his era) was required to publicly renounce his exalted status.<sup>16</sup> It was radio that broadcast his renunciation, allowing the people of Japan to hear his voice for the first time.<sup>17</sup>

Ironically, during this time, General Douglas MacArthur took on many of the trappings of an Emperor. His was the final word, authoritative and incontrovertible. In a 1945 directive, the Supreme Command for Allied Powers decreed that "there shall be an absolute minimum of restrictions upon freedom of speech." But an "absolute minimum" was not exactly zero. "Freedom of discussion of matters affecting the future of Japan is encouraged by the Allied Powers, unless such discussion is harmful to the efforts of Japan to emerge from defeat as a new nation entitled to a place among the peace-loving nations of the world." Moreover, "The Supreme Commander will suspend any publication or radio station which publishes information that fails to adhere to the truth or disturbs public tranquility."<sup>18</sup>

Compare this directive with Article 29 of the Meiji Constitution, the Constitution in place during the War: "Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings, and associations."<sup>19</sup> And then con-

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16. In fact, Hirohito never was a god in the Western sense. Shinto, the indigenous religion of Japan, is strongly animistic, and many people and things are thought to possess the god-spirit. After his renunciation, Emperor Showa, skeptical of the divine status the Allies ascribed to him, turned to his wife and asked whether he seemed different now that he was no longer a god. *A Leader Who took Japan to War, to Surrender, and Finally Peace*, N.Y. Times, Jan. 7, 1989, at 6-7, col. 1.

Emperor Showa's sarcasm notwithstanding, it certainly is true that the Emperor was unique. Before the war, commoners would rarely look him in the eye, and some children believed that their eyes would burn if they but gazed at him. In a famous post-war incident, a worker extended his hand at a factory the Emperor was touring, hoping to shake the royal palm. Taken aback, the Emperor said, "Let us do it the Japanese way," and exchanged bows instead. *Id.* at 7. See generally, E. BEHR, *HIROHITO: BEHIND THE MYTH* (1989).

17. Coincidentally, the April 1959 marriage of Prince Akihito, now the Emperor, caused the broad-based acceptance of television in the Japanese home. NHK Television, which had been on the air since 1953, provided pool coverage of the ceremony for the commercial stations and its own. Outside the Imperial Palace, each network had its own cameras to cover the events that followed. The public was enchanted with the Empress-to-be, a commoner, and rushed to purchase receivers to see the great event. The coverage had been so impressive that by October of the same year, the number of receivers jumped from two million just before the wedding to three million. *NHK, 50 YEARS OF JAPANESE BROADCASTING 256-58* (1977). See also Klein, *Empire of the Son*, *Vanity Fair*, March 1989, at 146, 207.

18. L. BEER, *FREEDOM OF EXPRESSION IN JAPAN* 74 (1984).

19. Constitution of the Empire of Japan, 1889, art. 29. The translation is from the authoritative, although not official, H. Ito, *Commentaries on the Constitution of the Empire of*

sider Article 31 of the same document: "The provisions contained in the present Chapter shall not affect the exercises of the powers appertaining to the Emperor, in times of war or in cases of a national emergency."<sup>20</sup> The conclusion is inescapable: MacArthur had not ushered in a radically new form of communication law. Rather, he had reinforced the existing approach, simply substituting one sovereign for another, one set of taboos for another.<sup>21</sup>

Parenthetically, this may well explain why the Occupation was so successful. While power had shifted, the form in which power was exercised had remained the same in pre- and post-war Japan. Once General MacArthur proved to be a benevolent force, the Japanese became comfortable with his strong leadership and acceded to it.

Lawrence Beer, the premier Western chronicler of freedom of expression in Japan, writes that the series of "freedom orders" (including freedom of speech and press) issued immediately after the War's end, "must be reckoned among Japan's most precious constitutional documents, even though issued by foreign conquerors against whom dissent was limited."<sup>22</sup>

Moreover, Beer believes that the paradox of imposing free speech was the only way of achieving it.

Since all major constitutional documents in Japanese history . . . were handed to the people by dominant elites, the nonparticipation of a representative Japanese body in the formulation of these edicts should not be considered a wrenching departure from past practice, and was probably the only means by which a democratic revolution could have been started. The Potsdam Declaration said that Japanese people were to be free to determine their form of government, but that was impossible at the time. A majoritarian inception is much less crucial to a constitutional democracy than legitimized commitment to respect for the innate dignity of the individual and pursuant protections for freedom of expression and other individual rights.<sup>23</sup>

In other words, the Japanese people were commanded to be free. Over time, as the Occupation receded, so did the number of off-limits subjects. Still, however, the Japanese were unwilling to

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*Japan* (M. Ito trans. 1889), reprinted in *THE JAPANESE LEGAL SYSTEM* 16 (H. Tanaka ed. 1976).

20. *Id.* at 19, art. 31.

21. Emperor Meiji, as in so many things, was a reformer in expanding rights of expression. Nevertheless, by modern American standards, restrictions in the Meiji, Taisho, and early Showa eras were rather severe. By 1945, more than 1,000 books had been banned by the government under the 1893 Publications Law. The Newspaper Ordinance of 1887, as amended in 1897, freed newspapers from some prior restraints, but even so, thousands of issues were banned while prosecutions for violating press regulations were pending. The Emperor issued emergency ordinances restricting speech and press rights during the Sino-Japanese (1894-1895) and Russo-Japanese (1904-05) Wars. L. BEER, *supra* note 18, at 57-58.

22. L. BEER, *supra* note 18, at 72-73.

23. *Id.* at 73.

abandon the idea that freedom and responsibility could coexist. Like the Broadcast Law, the post-war Constitution lists a large number of individual rights, many more than does our Constitution, and much more explicitly. Article 21, for example, guarantees speech, press, and "all other forms of expression." It further states that "[n]o censorship shall be maintained."<sup>24</sup>

That provision and others like it are tempered, however, by Article 12, which states that the people "shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare."<sup>25</sup>

Thus, Japan's approach to broadcasting springs out of a social responsibility context. Freedom and discipline are not mutually exclusive; they coexist. Indeed, in Japanese society, the discipline of social responsibility makes the freedom all the more sweet.

In contrast, we Americans view the world in a bipolar manner. Either we have freedom, or we do not. Any official suggestion of self-restraint brings on a chorus of Last Days doomsayers. As an example, consider the suggestions made for holding back election night exit-polling results. Broadcast networks often can predict the outcome of a presidential election before the polls on the West Coast close. This, at best, annoys voters in that region and, at worst, destroys their incentive to participate in balloting up and down the ticket. The solution is simple: don't report other than officially-counted returns until the West Coast polls have closed. It doesn't take an Act of Congress to achieve this worthy goal, just responsible self-restraint.

Did somebody say self-restraint? Unthinkable, cries the chorus. What is known is news, and news must be known by everyone as soon as possible. Hear the lament of Richard Salant, former president of CBS News, in testifying before Congress:

I suggest that even if there is a small handful of foolish people who veer away from the polls because they learn a fact—that a president has been elected—they should not be coddled by holding up that eminently newsworthy piece of information. Informing them of so important a fact doesn't disenfranchise them; they foolishly disenfranchise themselves.<sup>26</sup>

Once it is merely suggested by government officials that the media restrain themselves, all hopes for restraint are gone. To follow the suggestion, even if it is a good one, would be to knuckle

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24. The Constitution of Japan, 1946, art. 21. The quote is from the official translation, which is reprinted in *THE JAPANESE LEGAL SYSTEM*, *supra* note 19, at 3.

25. *Id.* art. 12.

26. Kinney, *Restraining Network Election Projections: Questions of Legality and Propriety*, *COMMUNICATIONS LAWYER*, Fall 1988, at 3.

under to government pressure. All self-respecting journalists resist “chills” on the first amendment with the zeal of a mother bundling up her child on the first cold day of winter. Usually the child swelters from the overprotection of the well-intentioned parent. The same can be said of the first amendment. If anything, parents—and journalists—need to “chill out.”

The first amendment is no fragile flower that must be kept in a hothouse. It can survive even if the outcome of the presidential election isn't known for a few more hours. After all, the new Commander-in-Chief doesn't take control until two months later.

What would happen if the news were held back? What public good would be devastated? What irreparable harm would occur? The answer is that nothing would happen. No policy decision would change. No life would be adversely affected. No storm-troopers would be stationed outside the nation's newsrooms. Absolutely nothing bad would happen.

Then why then all the fuss? Because of the neurosis of the news business. And in the news business, no one is more neurotic than the broadcasters. It is an affliction of absolutism, all or nothing. Either we do exactly as we wish whenever we wish, such thinking holds, or we are enslaved. Either we win and you lose, or you win and we lose.

A psychoanalyst might view this as an unresolved adolescent rebellion, the type in which the child rebels against any suggestion by the parent. The issue is really not style of hair or type of clothing. Rather, it is creation of a separate self, a self that is self-determining. The reason that rebellion is so intense is that, underneath all the bluster, the young self is actually not so sure of itself. To give in would be to admit the frightening possibility that another self might be right some of the time.

Adolescent rebellion, however, is a stage. In adulthood, the healthy self is secure and open to suggestions. It is no diminishment of one's own worth to see the worth of others. The media, however, have yet to end the fight against the Crown. Here's a news flash, though—the King is dead. Why must the struggle go on?

The point of this discussion is that we Americans and the Japanese begin from different social assumptions. For the Japanese, social responsibility—responsibility to the group (which can be anything from family to nation) is the pre-eminent value. For Americans, the complete freedom of the individual from any obligation is the ultimate. The Japanese live for relationship; we live for individual autonomy. However, within the context of their society,

the Japanese have adopted values of individual expression. To date, American broadcasting has resisted harmonization. The proposal I make later is aimed not at altering the American mindset, for that would be futile. Rather, I propose a plan to allow it to coexist with another form of broadcasting fashioned after the social responsibility model. But, I am getting ahead of our story.

A cursory examination of any broadcast law book reveals the intractable resistance of broadcasters to regulation. There is no example more compelling than the Fairness Doctrine. The Fairness Doctrine was a collection of FCC rules and regulations. Specifically, it required that "(1) the broadcaster must devote a reasonable percentage of his broadcast time to the coverage of public issues; and (2) his coverage of these issues must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view."<sup>27</sup>

These are not words on which an anti-press revolution might be begun. Nevertheless, no broadcast regulation has been so reviled, so attacked, and so pummeled as this one. Despite all this, attempts to transform the Fairness Doctrine into a battering ram against the press have been singularly unsuccessful.<sup>28</sup> Indeed, one might say that the real failure was that of not making broadcasters live up to its tenets.

Difficult as it may seem, broadcasters were able to argue against devoting time to varied discussion of public affairs while keeping a straight face. The Doctrine, they contended, actually discouraged broadcasters from serving the public interest. It is unreasonable, they contend, for broadcasters to be required to present contrasting views. Not equal time, mind you—that's only for political candidates.<sup>29</sup> Rather, the issue is only *some* time within the broadcast schedule. Because time for opposing views is required, the broadcasters asserted, stations devote less time to coverage of public affairs. Why? Because it is an onerous burden to be "fair."<sup>30</sup>

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27. In the Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1, 730 R.R.2d 1261 (1974).

28. See, e.g., T. CARTER, *supra* note 6, at 236-43.

29. 47 U.S.C. § 315 states, "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates. . . ."

30. The problem with this argument is that it admits a failure to adhere to the first prong of the Fairness Doctrine. Having spent more than ten years in the news business, I can recall no story suggestion that was ever killed because of a fear of Fairness Doctrine obligations. To be honest, I don't recall the Fairness Doctrine ever being discussed at all. The reason, I suspect, is that it only requires what good journalists do anyway: cover what's important and be fair. It certainly was not the Sword of Damocles that its detractors make it out to be.

These, of course, are the same organizations that willingly pledged to serve the "public interest" when seeking a license. They are the same ones who enjoy an exclusive license to broadcast, as well as freedom from effective competition for their license because of somnambulant FCC renewal policies.<sup>31</sup> They also are the same voices that urged government regulation of cable television when it began to compete with over-the-air broadcasting. They are the same people who caved in and willingly turned over complete control of the 1988 presidential debates to the candidates themselves, rather than allow the impartial League of Women Voters to impose some standards.

Moreover, these also are the people in control of the media and its considerable resources in shaping public opinion. Thus, it is the-atre of a high order to see them shivering from the "chill" on the first amendment.<sup>32</sup> The performance was so impressive that the

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31. The most notorious example of the FCC's "don't worry, be happy" policy toward incumbent broadcasters involved WLBT Television in Jackson, Mississippi. Viewers in Jackson, a community in which almost half the population was black, presented numerous complaints to the Commission. WLBT routinely ignored black people in its programming and consciously encouraged anti-black sentiment. In one instance, the station cut off a network program in which the General Counsel of the NAACP was speaking. The station frequently aired pro-segregation programs but refused requests for time to present the other side.

At first, the FCC refused to allow the viewers to intervene in the license renewal procedure to urge denial. It renewed the license. The D.C. Circuit ordered the Commission to listen to the public's voice and reopen the proceeding. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). The FCC did so and, again, renewed the license. Again, the case went to the D.C. Circuit. This time, the Court vacated the license and ordered the Commission to solicit new applications. *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969). Under duress, the FCC finally awarded the license to someone else.

Six years later, on facts just as extreme, the Commission did revoke a license, but only over the objection of two dissenting commissioners. *Alabama Educational Television Commission*, 50 F.C.C. 2d 461, 32 R.R.2d 539 (1975). The action, no doubt, stands only for the proposition that one may lose his broadcasting license if he intentionally slanders or ignores black people after a federal court has already ordered the FCC to revoke a license under similar circumstances. In other words, the case did not signal an end to Commission complacency.

In 1982, the D.C. Circuit observed:

[W]e are still troubled by the fact that the record remains that an incumbent television licensee has never been denied renewal in a comparative challenge. American television viewers will be reassured, although a trifle baffled, to learn that even the worst television stations—those which are, presumably, the ones picked out as vulnerable to a challenge—are so good that they never need replacing. We suspect that somewhere, sometime, somehow, some television licensee should fail in a comparative renewal challenge, but the FCC has never discovered such a licensee yet.

*Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983).

In 1984, the same court wrote, "For years, this court has urged the FCC to put some bite into its comparative hearings . . . . Indeed, we have too long hungered for just one instance in which the FCC properly denied an incumbent's renewal expectancy." *Geller v. FCC*, 737 F.2d 74, 75 (D.C. Cir. 1984).

32. Charles Ferris, Chairman of the FCC, from 1977-1981, has said:

Reagan FCC was convinced and eliminated the Fairness Doctrine.<sup>33</sup>

As a result of this and other actions taken by the Reagan FCC, whose motto might well have been "the public interest is whatever the public is interested in," broadcasting in the U.S. is essentially uncontrolled. Presumably the remaining technical regulations will stand, at least until it is argued that a limitation of 50,000 watts of power chills an AM radio station's free expression rights. Gone is the wisdom of Justice Byron White, who observed that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."<sup>34</sup>

In Japan, viewers and listeners have a choice, not an echo.<sup>35</sup>

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A chilling effect can only arise among broadcasters who are unwilling to air both sides of an issue, who are unwilling to act as public trustees for those with opposing views on an issue, but who lack the money needed to buy time on the airwaves. Broadcasters need only fear the consequences of decisions to sell their editorial prerogatives to an individual or group representing only one side of an issue. A broadcaster who acts according to the standards of his or her profession, on the other hand, has nothing to fear from the Fairness Doctrine, since it is only applied in the most egregious cases of imbalance and then the only remedy is to cover the issue further.

*Hearings on H.R. 1934 Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Telecommunications, 100th Cong., 1st Sess. 58, 63 (1987) [hereinafter Hearings] (testimony of Charles Ferris).*

This is not to deny that there are extreme cases in which the brute force of government may be imposed on broadcasters. In the Nixon Administration, for example, H.R. Haldeman ordered an aide to make trouble for the Washington Post's broadcast licenses. The Post, of course, had been giving Nixon trouble courtesy of Woodward and Bernstein. Surely courts are capable of dealing with this sort of abuse of position. See M. LASHER, *THE CHILLING EFFECT IN TV NEWS: INTIMIDATION BY THE NIXON WHITE HOUSE* (1984); Bazelon, *F.C.C. Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 247-51. See generally National Association of Broadcasters Memorandum Concerning the Constitutionality of the Fairness Doctrine, *Hearings*, at 217, 236, 239-40.

33. See, e.g., *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), upholding the FCC's abandonment of the Fairness Doctrine in *Syracuse Peace Council*, 2 F.C.C. Rec. 5043, 63 R.R.2d 541 (1987), based on the Commission's 1985 Fairness Report, Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Obligations of Broadcast Licenses, 102 F.C.C.2d 142, 58 R.R.2d 1137 (1985). In the 1985 Report, the Commission accepted arguments of broadcasters that the Fairness Doctrine chilled their exercise of first amendment activity.

Initially, the Commission found that Meredith, a television licensee in Syracuse, New York, had violated the Fairness Doctrine by presenting only one point of view on construction of a nuclear power plant. The imbalance was dramatic, almost ten to one. The D.C. Circuit ordered it to consider Meredith's constitutional objections to the Doctrine, such as the chilling effect. *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987). The Commission obliged and used the opportunity to eliminate the doctrine altogether. *Syracuse Peace Council*, 2 F.C.C. Rec. 5043. In upholding that decision, the Court of Appeals said the FCC's views on the chilling effect were merely predictions, that no one could be sure of its effect. Under those circumstances, the Court said it was appropriate to defer to the Commission's judgment. *Syracuse Peace Council v. FCC*, 867 F.2d at 660.

34. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

35. Apologies to Barry Goldwater for the appropriation of his 1964 presidential campaign slogan.

There is, first of all, NHK. But that is not all. The public also may choose from a wide variety of commercial television and radio stations.<sup>36</sup> As in America, when the commercial stations are good, they are very, very good. But that's not all the time. Consider a few examples of the range of content.

Fuji Broadcasting produces a daily children's program called *Ponkikki*. It is the perfect complement to NHK's kid show, *Okaasan to Issho* (Together with Mother). Both series probably do more to socialize future generations than any institution other than parents. *Okaasan* is sweet. It's filled with gentle songs, segments encouraging teeth-brushing and pajama-donning, Oriental exercises, and a kind of romance about the traditions of Japan. *Ponkikki*, on the other hand, is street smart. It teaches kids about riding the trains and making their way through the crowded metropolis that much of Japan has become. Imaginary monsters sometimes make appearances (only to be felled by the youngsters, in one instance playing the game of "janken," which is like the "rock, paper, scissors" game in America). One repeating segment is particularly illustrative. In a song entitled "kamatte," a group of children entreat their parents to look after them. All of the attention, it seems, is being paid to a new baby, and the older kids feel neglected. Perhaps this is not the stuff of revolution, but it is a challenging theme for a preschool program.

On the other hand, Fuji's evening news is the rival of any of the tabloid TV shows that have proliferated across the screens in the U.S. Each story is punctuated with a musical "stinger", making the broadcast sound more like radio in Mexico than television in "tranquil" Japan. The newscaster follows each stinger with a breathless rendition of the event in question.<sup>37</sup>

The morning news program on Fuji is even more curious. In-

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36. Almost eighty percent of Japanese households can receive more than four commercial television stations, in addition to the two NHK channels and the new NHK direct broadcast satellite service. Six prefectures are served by six commercial channels. Nine prefectures have four. Another nine have three, and ten areas have two. *Ministry of Posts and Telecommunications, Report on Present State of Communications in Japan 30-31* (The Japan Times ed., fiscal 1986) [hereinafter *Report*]. The main networks are Nippon Television Network (NTV), with twenty-seven affiliates; Tokyo Broadcasting System (JNN) and Fuji Telecasting Co. (FNN) with twenty-five each; and Asahi-National Broadcasting Co. (ANN) with twelve. Each of the first two networks reach approximately ninety percent of all households; the other two about eighty percent apiece.

What's more, the commercial stations make money. The one hundred thirty-eight commercial broadcasting companies enjoyed profits of 1.4 trillion yen in 1986, more than ten billion dollars (at current exchange rate of 130 yen = one dollar). Shimizu, *Public Service Broadcasting in Japan: How NHK Prepares for the 21st Century*, at 2 (available from NHK).

37. Many newspapers and magazines in Japan follow the tabloid style of journalism as well. See Davis, Whipple, & Sakakibara, *The Keepers of the Gate*, TOKYO J., Aug. 1988, at 4.

variably, the program begins with scenes of some kind of misery: a death, a scandal, or some misfortune. The hosts of the show somberly but excitedly delve into every detail. Videotape of people crying is a regular attraction, usually near the beginning of the broadcast. The show's name is *Ohayoo* (Good morning) *Nice Day*.

During the day, game shows, talk shows, and soap operas abound, all interrupted by endless strings of commercials, which seem even longer because each spot often lasts only fifteen seconds. In the evening, sports (especially baseball) are a mainstay of commercial stations. Late night brings Night Hit Studio Deluxe, a program featuring pop music (often performed live via satellite) from around the world. All in all, a mixed bag.

Then there is NHK. It is the most-watched network in Japan. A recent survey, for example, revealed that sixty percent of the public considers NHK's news broadcasts to be the most reliable. In times of peril—earthquakes, for example—as many as seventy percent turn to NHK for the latest bulletins.

Imagine a television network that produces and broadcasts three full-length documentaries a week in prime time; attracts fully half of the viewing audience for elegant and exciting historical dramas; garners seventy percent of the audience for an annual pop music program "Year-End Hit Parade"; keeps the country captivated with live broadcasts of the six major sumo tournaments of the year, each lasting two weeks; supports, records, and broadcasts its own symphony orchestra; operates the world's first twenty-four-hour direct broadcast satellite service, featuring, among other things, programs from nations around the world; leads the world in developing new technology, such as High-Definition Television (HDTV); and shares its expertise by training representatives of developing countries.

There's nothing else like it in the United States, or in Japan for that matter, and that's the point. NHK can succeed because it has both a respectable income and independence from both government and business. The basis of this independence is the receiving fee, which is a flat rate. In many ways, the system resembles that used by the BBC and other Western nations, but there are differences.

In Western countries the concept that the right to use the radio waves belongs to the state and that the State transfers the right of transmission to broadcasting bodies and the right to receive broadcasts to the people is generally prevalent. This forms the basic attitude which considers the receiving fee as a fee given in exchange for permission to receive. Under the present Japanese broadcasting system, however, there is no such concept.

As NHK's receiving fees are based on the premises that payment of the fees will be borne equally by all those who own the means of receiving its broadcasts, we

may consider that fundamentally an equal share of the expenses required to support the running of NHK's operations is borne by all members of its audience, even though we cannot fully dismiss the character of the fees as payment given in exchange for programs.

The report of the Provisional Investigating Committee on the Law Related to Broadcasting, which examined the Japanese broadcasting system [in September 1964] said as follows . . . "[T]he present NHK can be considered to have been established by the people, the receivers, by law as their own broadcasting body, and the NHK authorities should therefore be placed in a position to carry out their operations, having received the mandate of the people."<sup>38</sup>

More than thirty-one million households and institutions have receiving contracts with NHK, almost all of them for color reception. This generates about 330 billion yen, approximately 2.5 billion dollars.<sup>39</sup> This is by far the largest source of revenue, but not the only one. NHK actively markets books and other materials associated with its products (for example, an English language instruction videotape for children, starring the characters from *Okaasan to Issho*), and licenses the broadcast programs to other markets. This brings in another 2.3 billion yen, about eighteen million dollars. Together with all sources of income, the NHK budget for fiscal 1986 totaled three hundred forty-one billion yen, 2.6 billion dollars. In 1987, it rose to three hundred fifty-two billion yen, 2.7 billion dollars.<sup>40</sup> This is the money with which NHK operates two television channels, three radio channels, a satellite service, and its network of local and regional stations throughout the country.<sup>41</sup>

In contrast, total funding for all of public television, including income of all three hundred twenty-seven local stations in the United States, was one billion dollars in fiscal 1987—less than half as much for a country that is almost twice as populous and twenty-five times as large. The federal government accounted for only eighteen percent of that income. State governments were responsible for 19.1 percent. Businesses and foundations together contributed more than either level of government, as did members of the public through subscriptions.<sup>42</sup> Still, it is certainly true that far more people watch public broadcasting than pay for it.

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38. Business Activities, in *This is NHK*, *supra* note 1.

39. *Id.*

40. Budget for the Fiscal Year 1986-87, in *id.*; Shimizu, *supra* note 36, at 1. Even at this, the income of Japan's one hundred thirty-eight commercial stations is four times that of NHK. *Id.*

41. An Outline of NHK's Activities, in *This is NHK*, *supra* note 1. In addition to its main headquarters in Tokyo, NHK operates regional headquarters in Sapporo, Sendai, Nagoya, Osaka, Hiroshima, Matsuyama, and Kumamoto. In addition, it has more than sixty other local stations. Regional Broadcasting in *id.* Altogether, it employs some 15,000 people. An Outline of NHK's Activities in *id.*

42. *Facts about PBS 7* (1988) (available from PBS, 1320 Braddock Place, Alexandria, VA 22314).

Some may say that spreading the cost of public broadcasting across the population is "un-American." That is, that it forces payment on many who do not choose to use its services. One might say that it is at least as abhorrent under our system to allow people to get something for nothing. The better argument, however, is that spending for the overall public good is the kind of thing government does everyday. Not everyone has children in the public schools, but everyone benefits from the presence of such institutions in society. The same could be said for a strong system of public television.

As everyone in the United States has a television and radio, everyone could be required to pay for a new national broadcasting service. Yet, we need not mimic Japan in the details of such a system. The American style is different from the Japanese; perhaps our financing should be different, too.

In Japan, NHK is remarkably successful in securing payment from users. Although many people now pay by automatic bank transfer, the system still depends on an army of collectors marching door to door and a society in which someone is always home to answer. In the U.S. it's hard enough to get census takers once every ten years to ask for information, let alone recruit people to demand money. Think about some of the dangerous areas in your town and wonder how successful such an enterprise might be.

Undoubtedly, ways could be found to overcome the collection problem. A more substantial issue remains, however. In the United States, the distribution of income is much wider than in Japan.<sup>43</sup> Yet the need for access to public broadcasting is perhaps greatest among those who can least afford to pay for it. This is especially so as more and more programming—not the least of which is the national pastime—emigrates to pay-cable systems.<sup>44</sup> A graduated payment schedule would require an entity such as the

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43. For example, in 1985 the unemployment rate in the U.S. was 7.1 percent; in Japan—2.6 percent. Morita Akio, the Chairman of Sony Corp., asserts that there are far fewer rich people in Japan than in the United States. In 1982, for example, only twenty-nine thousand Japanese had earnings exceeding \$85,000. Moreover, inheritance laws discourage vast transmission of wealth. In part, he says, this perpetuates the work ethic of the population; everyone must make his own way. A. MORITA, *supra* note 12, at 149-53.

44. Beginning in 1990, the ESPN cable network will carry one hundred seventy-five regular season games, for which it bid four hundred million dollars for four seasons. The number of games on local pay cable stations will be slightly more than one thousand in 1989, two hundred more than in 1985. The number of local free TV games also has increased by two hundred, to more than one thousand six hundred, since 1984. CBS paid 1.1 billion dollars for the four-year rights to air baseball via free network television, but that amounts to only twelve regular season games. The rest of CBS's rights are for the special events: the World Series and League Championships. The trend, clearly, is away from free broadcasts and toward subscription and fee-paid cablecasts. See, *The future of baseball and 'free TV'*, BROADCASTING, March 6, 1989, at 42.

Internal Revenue Service to administer. We don't need another IRS, and it would be terrible public relations for the broadcasting fee to be collected by a taxing agency.

In appearance and in fact, this broadcasting service must be insulated from government pressure and decisionmaking. It cannot be dependent on Congress for a piece of the general revenue pie. Without an independent source of revenue, the service would lack both credibility and the ability to make decisions free of political considerations.

I think all these factors lead us to a new kind of financial structure, one that also impacts the regulatory structure. Currently, broadcast stations are licensed to serve the public convenience, interest, and necessity. The quid pro quo for the opportunity to make lots of money is service to the community. You don't have to watch American television very long, however, to conclude either that almost no one takes the public service pledge seriously or that the definition of public service is so low as to be meaningless.

The credo of broadcasters in the U.S., through organizations such as the National Association of Broadcasters and the Radio-Television News Directors Association, is freedom from all content-based regulation.<sup>45</sup> Complete freedom, but no responsibility, save that dictated by the marketplace. The time has come to let them have their way.

This would mark the end of the scarcity/trustee theory that was best articulated in *Red Lion*. "When there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish," Justice White wrote.<sup>46</sup> "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 . . . ."<sup>47</sup>

Whether or not one believes that scarcity no longer exists,<sup>48</sup> it

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45. There are some notable dissenters, not the least of which is the Westinghouse Broadcasting Corporation, which support the Fairness Doctrine. "Implicit in the public interest standard of the Communications Act is the fundamental obligation of broadcasters to provide the public with contrasting viewpoints on controversial issues of public importance. If the statutory public interest standard does not encompass such a requirement, the standard would be virtually meaningless." Comments of Group W, Inc., In re Complaint of Syracuse Peace Council against Television Station WTVH, Feb. 25, 1987, at 4. See also, Comments of Russ Coughlan, President and Editorial Commentator, KGO Television, San Francisco, in *Fairness Doctrine Forum*, 10 COMM/ENT L.J. 921 (1988).

46. *Red Lion*, 395 U.S. at 388.

47. *Id.* at 389.

48. Cable television is often cited as evidence that scarcity no longer exists. Some cable

certainly remains true that no individual has an exclusive right to any particular broadcasting frequency. We, the people, through our government, are the landlords. The broadcast spectrum is our shopping center. We may offer leaseholds to would-be tenants, but we have no obligation to give them away.

Thus, for those who choose to use broadcasting to express themselves and sell advertising, the time has come to charge rent: a spectrum fee. As in commercial real estate, a base rent should be established with an additional payment computed as a percentage of sales. In broadcasting, the base rent may vary with the size of the market; the remainder with income.

Undoubtedly, the protests will come. Such protestors should be invited to choose one of the other forms of expression in which to make profits, if they do not find this one sufficiently attractive. This is true content-neutral regulation. As Aldous Huxley told us, "You pays your money and you takes your choice."<sup>49</sup>

The rent collected then would go to support the national flagship broadcasting network. It naturally would rise with inflation, as the profits of stations rose. Thus, the network would be freed from the necessity of going to Congress or the public with outstretched hands. In return, the commercial stations would be freed from most of the requirements of broadcast regulation, save the technical matters (e.g., the size of the store). Of course, like tenants, the commercial broadcasters would remain obligated not to destroy the premises, but that is all many of them now do anyway.

Moreover, this proposal will bring over-the-air broadcasting in line with cable systems. Currently, cable television operators must pay a franchise fee to local governments and often finance training for citizens who wish to learn to use the access channels.<sup>50</sup> In most

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systems can offer more than one hundred channels. The problem, however, is that one company has the ability to choose who may use those channels, save for a few citizen access options. Moreover, in most cities, there is only one cable television franchise, or at least only one per section of the city. Thus, no one has affirmative right to a channel within the cable system or the right to operate a system. See *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) (first amendment interest in right of access to available utility poles to operate competing cable system must be balanced against competing social interests); *Central Telecommunications v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986) (cable television a natural monopoly). Several district courts have reached contrary results. See, e.g., *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987); *Century Federal Inc. v. City of Palo Alto*, 645 F. Supp. 1465 (N.D. Cal. 1986).

49. A. HUXLEY, *BRAVE NEW WORLD* xiv (1939).

50. 47 U.S.C. § 542 authorizes franchise fees up to five percent of gross revenues. *But see Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987), in which a district court invalidated access channel requirements in a cable company's franchise.

House Commerce Committee Chairman John Dingell also has questioned the logic of allowing broadcasters to use the spectrum free when cable operators must pay up to five

cities, apart from the training funds, this money simply goes into the general coffers. Under my proposal, both cable and broadcasters would pay a type of franchise fee, but the money from broadcasting would support public television and radio, not the local sewer plant.<sup>51</sup>

The need for better funding of public television is not a new revelation. Since the mid-1960s, the Carnegie Commission and the Ford Foundation have been on record supporting independent financing. Carnegie recommended an excise tax on new receivers from two to five percent.<sup>52</sup> The Ford Foundation looked to cost savings of a domestic satellite system.<sup>53</sup> Other methods considered included a license fee for receivers, advertisements on public television, a public television service available only to those who pay, as well as the spectrum fee or profits tax on commercial broadcasters.<sup>54</sup>

A 1983 task force came up with some additional possibilities, including, a tax on cable and satellite operators; a tax on the transfer of licenses; a tax on electric or telephone usage; a tax credit for contributions, a check-off line on income tax forms similar to that used for presidential campaigns. Some people have even proposed a national lottery.<sup>55</sup>

The problem is that public broadcasting finds itself squeezed between the demands of government and those of industry. If ever there has been a chill on broadcasting, it has been the public broadcasting system that has shivered, not the commercial broadcasters.

PBS, for example, once cancelled a segment of "The Great American Dream Machine" that was critical of the FBI. The cancellation was viewed as an attempt to mollify the Nixon Administration, but to no avail. The next year, 1972, President Nixon

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percent for their medium. *See, Dingell lays out his cards before broadcasters*, BROADCASTING, Mar. 7, 1988, at 33.

51. I am not convinced that cable television is different in kind from over-the-air broadcasting. Although its signals are delivered via utility poles and conduits on municipal land, it receives most of its programs via the airwaves—sometimes from satellites, other times from somewhat distant broadcast signals. As a result, Congress would be justified in instituting a fee-splitting statute, directing some of the current "franchise fee" to the public broadcasting fund. The statute might also allow, as an alternative, dedication of this part of the fee to support local access program production and training.

52. PUBLIC TELEVISION: A PROGRAM FOR ACTION, THE REPORT AND RECOMMENDATIONS OF THE CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION 68-70 (1967).

53. Public Policy Issues: Reply Comments of the Ford Foundation in Response to the Commission's Notice of Inquiry of October 20, 1966, FCC Docket No. 16495 (summarized in 22 F.C.C.2d 86, (1970)).

54. *See* R. NOLL, M. PECK, & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 208-44 (1973).

55. *Needed: a new funding formula for public television*, CHRIST. SCI. MON., Nov. 3, 1986, at 29, col. 1 [hereinafter *Needed*].

vetoed a bill that would have increased funding for the Corporation for Public Broadcasting.<sup>56</sup> More recently, a news and public affairs program officer at CPB was taken to task by top management for a university lecture he gave, criticizing Reagan Administration efforts to restrict information flow. Such remarks, he was told, would cause "embarrassment" next time CPB had to ask for its appropriation.<sup>57</sup>

Corporations, too, often are unwilling to finance programs that are counter to their own interests. In one infamous example, KUHT in Houston chose not to broadcast a PBS program about the Saudi royal family, "Death of a Princess." The program explored the 1977 execution of a Saudi princess and her commoner lover for adultery. The royal family vigorously objected to the program and used every lawful form of persuasion to get stations not to air the show. Houston, of course, is the capital of the oil business, and it goes without saying that the oil companies, to which the station looked for financial support, would have been distressed by a program that offended one of their major suppliers.

But the plot is thicker than that. The decision at KUHT was made not by the program director or general manager, but rather by a vice-president for public information and university relations of the University of Houston, to which the station was licensed. This person had never made a programming decision before, although he was nominally the university official empowered to do so. In a press release, the university official defended his decision because of "strong and understandable objections by the government of Saudi Arabia at a time when the mounting crisis in the

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56. Wiley, "Political" Influence at the FCC, 1988 DUKE L.J. 280, 280; R. NOLL, *supra* note 54, at 218-20. Congress's solution to reducing the dilemma was to prevent editorializing by public broadcasters. In that way, it was thought, stations would not be able to put themselves in a situation of direct conflict. The Supreme Court struck that provision down, however, as an unconstitutional abridgment of journalistic freedoms. The majority believed that the problem, if problem there be, could be dealt with in a less restrictive manner. FCC v. League of Women Voters, 468 U.S. 364 (1984).

Not all the Justices were so sanguine:

The court jester who mocks the King must choose his words with great care. An artist is likely to paint a flattering portrait of his patron. The child who wants a new toy does not preface his request with a comment on how fat his mother is. Newspaper publishers have been known to listen to their advertising managers. Elected officials may remember how their elections were financed. By enacting the statutory provision that the Court invalidates today, a sophisticated group of legislators expressed a concern about the potential impact of Government funds on pervasive and powerful organs of mass communication. One need not have heard the raucous voice of Adolph Hitler over Radio Berlin to appreciate the importance of that concern.

*Id.* at 408-09 (Stevens, J., dissenting).

57. Wicklein, *Time for a Public Broadcasting Overhaul*, N.Y. Times, Feb. 26, 1989, § 2, at 35, col. 1.

Middle East, our long friendship with the Saudi government and U.S. national interests all point to the need to avoid exacerbating the situation.”<sup>58</sup>

When a viewer sued the station to compel broadcast, the university official testified that he had been in charge of university fundraising for twenty-one years and that a major portion of private contributions came from oil companies and persons in the oil industry.<sup>59</sup> Still, the station won, because making programming decisions is what program directors are for. If the notion of payola isn't broad enough to include such conduct,<sup>60</sup> it surely ought to be.

At the other extreme, corporate sponsors sometimes want to force the presentation of certain programming. AT&T, for example, wanted credit for making possible the first hour-long network newscast. It was willing to pay \$10 million a year to get it. As a result, public television station managers went along with the expansion of “MacNeill/Lehrer” to an hour, even though a large majority previously opposed such a move.<sup>61</sup>

Executives from Exxon, which sponsored “Great Performances,” apparently liked the TV business better than their own. A number of them went to Europe to scout dance, opera, and orchestral groups and then insisted they be showcased.<sup>62</sup> Their taste may have been good, but the system is reminiscent of the bad old days of commercial broadcasting, when sponsors controlled all aspects of their shows.

Perhaps rather than antipathy, we should only harbor pity for those who work in public broadcasting. Without an independent source of funding, what else can they be expected to do? One British television executive, at a conference sponsored by the Aspen Institute, was aghast when he learned of America's way of funding public broadcasting. “A vision of hell, if ever I heard one,” he

58. *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1037 (5th Cir. 1982) (en banc) (consolidated with *Barnstone v. University of Houston*).

59. *Id.* n.5.

60. 47 U.S.C. § 317(a)(1) states:

All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person. . . .

In this instance, it would be negative payola: continued money in exchange for an agreement not to broadcast a particular matter. The interest is identical: protection of the public from programming decisions that masquerade as having been made on the merits. Perhaps KUHT should have said, “The originally scheduled program will not be seen courtesy of a grant from the following oil companies.”

61. Wicklein, *supra* note 57.

62. *Id.*

said.<sup>63</sup> The inferno is still hot. Early in his administration, President Bush vetoed a budget increase for the CPB and a \$200 million appropriation to replace its soon-to-be-inoperative satellite system.<sup>64</sup> It is doubtful that this reflects any partisan animus; only an attempt to keep an unbalanced federal budget from getting any worse.

What to do? A blue-ribbon panel called the Working Group for Public Broadcasting is pushing a two percent tax on imports and factory sales of consumer electronics and broadcasting equipment. This, it estimates, would provide at least \$600 million a year for programming alone and save the government at least \$242 million, the figure at which the Administration wants to freeze public broadcasting.<sup>65</sup>

Placing the tax on manufacturers rather than broadcasters may be the result of political prudence. The broadcasters' lobby is notoriously powerful, as it controls airtime, the lifeblood of every elected official. As Senator Fritz Hollings, author of a defeated bill that would have imposed a transfer fee on the sale of radio and television stations, said, "We live and breathe by television, and that is our reelection. . . . If the local broadcaster calls, you are going to do him a favor. You are not worried about . . . the President. You are worried about your own re-election."<sup>66</sup>

I do not oppose this proposal, but I don't believe it is the best possible. It addresses one problem, but there are two that need attention. Funding of public broadcasting is one; creation of a true market system for commercial broadcasting is the other. The approach I favor, a spectrum fee, would resolve both.

The voice of commercial broadcasters has been heard loud and clear. They want a market-based system, one that places them in the same position as other publishers. I am willing to give them that. Of course, when such rhetoric is used, it is aimed at freedom from all access and public interest requirements. I say, however, let us yield completely to the logic of their position. In any other business, the company must pay for the means of distribution of his product. Newspaper and magazine publishers, for example, must pay for the paper on which they print their news, for the vehicles that transport it, the boxes in which it is displayed, and the news-

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63. *Needed, supra* note 55.

64. *Public Broadcasting fights Bush budget freeze*, Chicago Tribune, Mar. 30, 1989, § 5, at 13, col. 4.

65. Wicklein, *supra* note 57.

66. *Public, Commercial Broadcasters in Head-to-Head Battle*, L.A. Times, Dec. 14, 1987, part 6, at 1, col. 5. See E. KRASNOW & L. LONGLEY, *THE POLITICS OF BROADCAST REGULATION* 38-43 (1978).

stand owners who sell it. This is in addition to the presses that print it. Broadcasters, on the other hand, have paid only for their analogue of the printing presses: the transmitting equipment. They are completely insulated from the market for the means of distribution. The only quid pro quo ever required of them was the public service commitment, including the Fairness Doctrine. For years, enforcement of the Doctrine has been all but nonexistent, and now broadcasters demand its complete abolition.<sup>67</sup>

The time has now come to introduce commercial broadcasters to what the market is really like. The government, representative of the owners of the airwaves—all of us—should charge rent for use of those frequencies. As a rational self-maximizer, it will settle upon a price that reflects the frequencies' market value. That is, the price will be that at which market participants can make a sufficient return to justify their investment in that business: not too high or too low.

Broadcasters will undoubtedly howl that this is unfair. The government controls all the spectrum space, which is limited. There is no opportunity to gain access from a competitor. Previously, we might have believed such an argument. Thanks to the impassioned teaching of the National Association of Broadcasters, and former FCC Chairman Mark Fowler,<sup>68</sup> however, we now know that is not true. There is no scarcity, we have learned, because there is a multiplicity of media in the marketplace. If one cannot gain access to a broadcasting frequency, he can do just as well by resorting to cable or newspapers or magazines or handbills.<sup>69</sup> Thus, we now know that it is no imposition to tell those broadcasters to go elsewhere, if they feel they cannot make enough money under the new system. The fact that until now they have been allowed to use it for free is no defense for maintaining the status quo. To the contrary, half a century of a free ride is long enough.<sup>70</sup>

The creation of a true free market in broadcasting is an issue

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67. Former FCC Chairman Charles Ferris says broadcasters' opposition to the Fairness Doctrine codification is "wanting something for nothing." Without the Fairness Doctrine, he says, "the license would be a sham—an empty shell—it would be a grant without an obligation. The Fairness Doctrine is the heart and soul of the public interest standard." *Hearings*, *supra* note 32, at 62.

68. See generally, *The Federal Communications Commission 1981-1987: What the Chairman Said*, 10 COMM/ENT L.J. 409 (1988) [hereinafter *Chairman*].

69. Fowler, Address to Radford University, April 4, 1986, reprinted in *id.* at 443.

70. Compare L.A. POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* (1987) (original decision to treat broadcasting differently than printed press erroneous), with Geller, *Book Review*, 5 CONST. COMM. 510 (1988) (regulation appropriate but ineffective). Broadcasters may be tempted to argue that what they provide, in exchange for the free spectrum, is free broadcasting to the public. The answer to that argument is that there are also many publications that are purely advertiser-supported, and they too provide free informa-

separate and distinct from financing of public broadcasting. The imposition of a spectrum fee is desirable in and of itself. What the government chooses to do with the proceeds is simply another policy issue. The best policy would use this revenue as a stable source for public broadcasting, which will assume all legal responsibility for broadcasting in the public interest. To the extent that the commercial industry prospers by using the public airwaves, the public broadcasting system will too, free of pressures from government or industry. Former FCC Chairman Fowler, whom I have portrayed as somewhat of a villain, himself advocated a spectrum fee several years ago.<sup>71</sup> Fowler, however, had a more limited vision, for his fee "wouldn't even cover all of [the public broadcasters'] program expenses."<sup>72</sup> Perhaps he didn't realize just how valuable a license to broadcast can be.

I have a vision of a public broadcasting system that can be bold and excellent: one that can hire the best people, provide them with the best resources, and give them the time to do their best work. A public broadcasting system that can live side-by-side with commercial competitors, each filling a need. A public broadcasting system that is so good that the public will think first about turning to it, not only if "there's nothing else on." The vision is real. It lives from snow-filled forests to sun-drenched beaches, from sea to shining sea. It exists under a constitution that guarantees freedom of speech and press. It is watched by a people whose literacy is among the greatest in the world. It is found in a country whose economy is the marvel of the international community and whose culture is one of civilization's great treasures: Japan.

Someday, if we insist, America too.

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tion to the public. Unlike broadcasters, however, those publications must pay for their means of distribution.

71. Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

72. Fowler, Speech before the National Radio Broadcasters Assoc., Sept. 13, 1982, reprinted in *Chairman*, *supra* note 68, at 451-52. In the same speech, Fowler exhibits a cynical attitude about the public service commitment of broadcasters. "In the past, [the license requirements] consisted of promises about programming or other forms of good citizenship. But these Dudley Do-Right pledges had very little to do with what a community actually wanted to listen to." *Id.* at 451.