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THE CONSTITUTIONAL CHALLENGE TO DEMOCRACY AND THE FIRST AMENDMENT POSED BY THE PRESENT STRUCTURE AND OPERATION OF THE MEDIA INDUSTRY UNDER THE TELECOMMUNICATIONS ACTS

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INTRODUCTION

A brief overview of the media industry is necessary before consideration of the question of whether the structure of the media-telecommunications industry and its related statutes are unconstitutional. This overview sets the context in which the constitutional issues of Democracy and the First Amendment should be considered.[1]

Media's control of information the people perceive is unprecedented.[2] This means that particular knowledge of what

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[1] The consolidation and monopolization of the media is not examined herein. It is assumed that the reader or agent is generally familiar with the pattern of comprehensive ownership and control of the media industry by six world-wide mega corporations – Time Warner-AOL, Disney (ABC), Viacom (CBS), News Corp. (Fox), General Electric (NBC) and Bertelsmann (Random House, Knopf, Doubleday, etc.). *See e.g.*, DOUGLAS GOMERY, THE FCC'S NEWSPAPER - BROADCAST CROSS-OWNERSHIP RULE: AN ANALYSIS 10-11 (Economic Policy Institute, 2002) BEN H. BAGDIKAN , THE MEDIA MONOPOLY et seq., Sixth Edition (Beacon Press 2000).

[2] The media now includes a diverse variety of techniques which convey to the earth's population, information, viewpoints, values, consciousness and ideology. Through television, cable, motion pictures, radio, print, Internet and the growing satellite technology, media's reach is many times greater and more intense than ever before. *See generally*, Eric B. Easton, *Annotating the News: Mitigating the Effects of Media Convergence and Consolidation*, 23 U. ARK. LITTLE ROCK L. REV 143, 143 (2000).

has happened, is occurring and will be occurring in the future is spread to every corner of the earth by a highly concentrated media. Some of the information conveyed by the media has been distorted and fabricated, while other information highly relevant to the population obtaining knowledge of events and people, information necessary to enable the population to make decisions for the effective democratic governance of the country, has been concealed. The impact of the media machine is so powerful that fictional entertainment presented by the media is treated as reality. Thus, after the death of a make-believe character from NBC's "The West Wing", a fictionalized drama of the White House, the Assembly of the California legislature on May 10, 2001 actually observed a moment of silence in memory of the fictional character's death. The media, thus, have crossed the magic line of converting for the population fiction into fact, illusion into reality, by reason of the powerful persuasiveness of the media's techniques.

Along with inventing reality the media is busy in burying it. A striking example of this is found in the BBC World Service program of December 26, 1997, in which the anchorperson announced: "Christmas in Cuba: For the *first time in almost forty years* Cubans were able to celebrate Christmas and go to church." She then linked up with BBC's correspondent in Havana who reported "A crowd of two thousand have gathered in the Cathedral for midnight mass. The whole thing is rather low key, *very much like last year*." Last year was certainly not forty years ago. Rather than correcting the anchorperson's statement in the interest of truth telling, the anchorperson quickly switched to another question: "Can we expect a growth of freedom with the Pope's visit?" Here, diversity of viewpoints would certainly help to prevent the phenomena of vanished news.

The power of the mega-media machine is expressed not only in their technological reach throughout the globe and their control of knowledge by their dominance of communication but also by their ability to recreate the very consciousness of the people. Thus, the individual's identification with a group has been redefined. The concept of a "working class" has evaporated and now the media has the population viewing themselves as middle-class, homeowners, the baby-boom generation or something else. Sometimes, the media may recognize a group classified as "poor"

but always making clear that no one wants to be identified with that group. Similarly, the media have redefined our system of values. By the power and influence of television, motion pictures, radio, newspapers, magazines and internet, *wealth* and *property* have become the only true values because, as the media conveys it, they are the signals of success. Human values have been subordinated to property values. This has been accomplished by the media's message, not only through their regular programming features and entertainment shows, but also by their ubiquitous ads in which luxury cars, mansions, exclusive vacations, prosperity are what we are told we want and for which we should aim.

The consciousness of the population has also been changed by the media's role as image-maker. The real person is never presented, rather that person's image as the media desire to construct it is all the public sees – whether it is George W. Bush, Dick Cheney, the fabrication of intelligent and fair news commentators, or others. In the main, and except for dramatic and overwhelming events that cannot be ignored, the news is not about events that will affect the lives of the people and their societies; not about peace negotiations; not about sales of arms; not about destruction of the environment. Rather, the news is about celebrities and their individual roles in events which are otherwise unreported or about the celebrities' personal lives: who is going with whom, who is getting a divorce, box office and record sales, etc. Prime examples are the media's treatment of drugs where there is more information about celebrities using drugs than the international billion dollar drug trade conducted by governments, armies, large corporations, etc.[3] and the media's attention to individual shootings while the enormous global arms trade remains ignored.

In a fundamental way the media have significantly influenced reality for billions of people and have determined how people

[3] The conversion from news to celebrity gossip has been enormous. A summary of 4000 stories in both print and broadcast media over 1977 to 1997 conducted by the Project for Excellence in Journalism revealed that celebrity gossip stories had expanded from 15 percent to 43 percent of the total. As described by Dr. Jerold M. Starr: "Americans, long starved for information about the Arab world, are now getting a crash course focused mainly on personalities, not background." Jerold M. Starr, *Needed: An Independent Public Broadcasting Service*, TOMPAINE.COMMON SENSE, Oct. 5, 2001, *at* http://www.tompaine.com/feature.cfm/ID/4584.

react to what is happening around them.

THE CONSTITUTIONAL FLAWS OF THE TELECOMMUNICATIONS SCHEME

The Core Argument

The core of the argument challenging the constitutionality of the Telecommunications statutes and the structure of the media industry concerns the First Amendment and the concept of Democracy embodied in the Constitution. America's fundamental notion of democracy as enunciated in the Constitution rests upon the principle of self-governance. The opening phrase of the Preamble to the Constitution, "We the people. . .,"[4] tells us who is the governing force set up by that document. In *McCulloch v. Maryland*, 4 Wheat. 316, 403 (1819), C.J. Marshall noted that the Preamble reflects the fact that the Constitution emanated from the people and was not the act of any sovereign.[5] In addition, the Tenth Amendment speaks of powers reserved to the people and Article I, Sec. 2 refers to a reserved power which the people have decided to exercise by providing for the election of members to the House of Representatives. It is the people who decide who shall be their agents to carry out the self-governance principle that the people provided for in the Constitution.

This fundamental concept of self-governance has not been rejected, rather it has been recognized as the bedrock of our Constitution. In the seminal case of *New York Times v. Sullivan*,[6] Justice Brennan wrote in 1964 regarding the Framers' approach to the nature of the government created by the Constitution:

> [Madison's] premise was that the Constitution created a

[4] In one of history's many contradictions the Framers took the phrase "We, the people" from the Iroquois Treaty of 1520, while at the same time the Constitutional scheme excluded Native Americans from political participation. BRUCE E. JOHANSEN, FORGOTTEN FOUNDERS (Bambit Inc. 1982).

[5] Joseph Story wrote in his Commentaries regarding the Constitution's Preamble "Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them." 1 Story, Commentaries on the Constitution, ¶ 462.

[6] 376 U.S. 254 (1964).

> form of government under which "*The people, not the government, possess the absolute sovereignty.*" The structure of the government dispersed power in reflection of the *people's distrust of concentrated power*, and of power itself at all levels. . . . "If we advert to the nature of Republican Government, we shall find that the *censorial power is in the people over the government*, and *not* in the Government over the people.[7] (emphasis supplied)

In explaining the Court's view of the First Amendment as presented in *New York Times v. Sullivan*, Justice Brennan wrote a year later that the result did not rest on the "clear and present danger," "redeeming social value" or "balancing" approach.[8] Rather, "the Court examined history to discern the central meaning of the First Amendment, and concluded that that meaning was revealed in Madison's statement '"that the censorial power is in the people over the Government, and not the Government over the people."'[9]

In order to assure that the principle of democracy provided by the Constitution would work in practice the First Amendment was adopted – with some struggle and much debate. The ultimate role of the First Amendment's declaration that "Congress shall make no law. . . abridging the freedom of speech, or of the press"[10] is to *secure the diversity of information and viewpoints necessary for the people's self-governance.*[11] The Courts have recognized the role of the First Amendment in securing diversity necessary to a democratic system. In *Associated Press v. U.S.*,[12] the Court stated:

> [The First] Amendment rests on the *assumption* that the *widest possible dissemination of information from diverse and antagonistic sources* is *essential* to the *welfare* of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not

7 *Id.* at 274-75.

8 William J. Brennan Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 14-15 (1965).

9 *Id.* at 15.

10 U.S. CONST. amend. I.

11 Prof. Cass Sunstein came to the same conclusion when he wrote the First Amendment's "historic purpose" has been to assure "the construction of a well-functioning system of democratic deliberation " Cass Sunstein, *Is the First Amendment Obsolete,* NATION, July 21, 1997, 15 *quoted in* ROBERT W. MCCHESNEY, RICH MEDIA POOR DEMOCRACY 269 (Union of Ill. Press 1999).

12 326 U.S. 1 (1945).

> impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. *Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.* Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private parties.[13] (emphasis supplied)

In the 1994 decision in *Turner Broadcasting Sys., Inc. v. FCC*,[14] the Supreme Court stated in words of particular relevance today, the following:

> The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.[15]

In *Main Road v. Aytch*,[16] the Court of Appeals for the Third Circuit described how the First Amendment requires the government to assure diversity in the avenues of communication:

> A fundamental purpose of the First Amendment is to foreclose governmental control or manipulation of the sentiments uttered to the public. With only carefully calibrated exceptions, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' Therefore, when the government makes an avenue of communication available to the proponent of some views, the same opportunity must, absent exceptional circumstances, be afforded to others who wish to express their ideas in that manner, whether or not the governmental officials endorse or sanction the thoughts to be expressed.[17] (citation omitted)

Significantly, even the House of Representatives, in its

[13] *Id.* at 20 (emphasis added).

[14] 512 U.S. 622 (1994).

[15] *Id.* at 657.

[16] 522 F.2d 1080 (3d Cir. 1975).

[17] *Id.* at 1087 (explaining that First Amendment protection applies, without discrimination, to everyone and quoting Police Dep't of Chicago v. Mosely, 408 U.S. 92, 95 (1972)).

Committee Report accompanying the 1984 Cable Act legislation, recognized the primary purpose of the First Amendment to present a wide diversity of information sources to the public. The Report states: "A requirement of reasonable third-party access to cable systems will mean a wide diversity of information sources for the public – the fundamental goal of the First Amendment."[18]

This analysis of the First Amendment and the scheme of self-governance as the basis of America's democracy, was examined and urged by the educator and scholar Alexander Meiklejohn. Justice William Brennan described Dr. Meiklejohn's argument:

> He argued that the people created a form of government under which they granted only some powers to the federal and state instruments they established; they reserved very significant powers of government to themselves. This was because their basic decision was to govern themselves, rather than to be governed by others. This was a fundamental departure from the English and other existing forms of government and was this country's great contribution to the science of government. The first amendment, in his view, is the repository of these self-governing powers that, because they are exclusively reserved to the people, are by force of that amendment immune from regulation by the agencies, federal and state, that are established as the people's servants.[19]

To Dr. Meiklejohn, the meaning of freedom of speech, of the First Amendment, was "not [derived] from the natural or legal or constitutional rights of the individual, but from the necessities of self-government."[20] Freedom of speech "is the right of the public to hear, read, and consider all possible points of view before making up its mind."[21]

The form of government, the nature of the democracy and of free speech provided by the Constitution was recognized by the Framers to be critically different from the English form of government. The difference is found in the self-governance

[18] H.R. REP. NO. 934, at 19 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4656 (noting focus and goal of First Amendment).

[19] Brennan, *supra* note 8, at 11-12 (discussing historical context of First Amendment and its relation to principle of self-government).

[20] Laurent B. Frantz, *Alexander Meiklejohn & The First Amendment*, MEIKLEJOHN LIBRARY JOURNAL at 4.

[21] *Id.*at 6.

principle. Leonard W. Levy, describes Madison's Report on the Virginia Resolution as highlighting this different theory of governance:

> In England, with its hereditary and nonresponsible monarch, it was a maxim that the king can do no wrong, and Parliament, two thirds of whose membership was also hereditary and nonresponsible, claimed omnipotence. In America, however, the executive was not held to be infallible nor the legislature unlimited, and both, being elective, were responsible. Necessarily, therefore, a different degree of freedom of the press was contemplated by American constitution-makers. An elective, limited, and responsible government required a much greater freedom of animadversion that might be tolerated by such a government as that of Great Britain. And since the electoral process was the essence of a free and responsible government, a wide latitude for political criticism was indispensable to keep the electorate free, informed, and capable of making intelligent choices.[22]

In *Robertson v. Baldwin*,[23] Justice Harlan explained:

> The powers of the British Parliament furnish no test for the powers that may be exercised by the Congress of the United States. Referring to the difficulties confronting the Convention of 1787, which framed the present Constitution of the United States, and to the profound differences between the instrument framed by it and what is called the British Constitution, Mr. Bryce, an English writer of high authority, says in his admirable work on the American Commonwealth: "The British Parliament has always been, was then, and remains now, a sovereign and constituent assembly. It can make and unmake any and every law, change the form of government or the succession to the Crown, interfere with the court of justice, extinguish the most sacred private rights of the citizen. Between it and the people at large there is no legal distinction, because the whole plentitude of the people's rights and powers reside in it, just as if the whole nation were present within the chamber where it sits. In point of legal theory it is the nation, being the historical successor of the Folk Moot of our

[22] LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY, 275 (the Belknap Press of Harvard Univ. Press 1960).
[23] 165 U.S. 275 (1897).

> Teutonic forefathers. Both practically and legally, it is today the only and the efficient depository of the authority of the nation, and is therefore, within the sphere of law, irresponsible and omnipotent." Vol. 1, p. 32. No such powers have been given to or can be exercised by any legislative body organized under the American system. Absolute, arbitrary power exists nowhere in this free land. The authority for the exercise of power by the Congress of the United States must be found in the Constitution. Whatever it does in excess of the powers granted to it, or in violation of the injunctions of the supreme law of the land, is a nullity, and may be so treated by every person.[24]

In *McCulloch v. Maryland,* C.J. Marshall clearly described self-governance power of the people:

> The government of the Union then . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.(4 Wheat. 316, 404-405).

Recent cases have recognized serious First Amendment concerns arising in an era where means of expression have become dominated by a few mega corporations which, under the federal regulatory scheme, may prevent or circumvent communicating diverse information, viewpoints or culture to the people. Thus, in *Nat'l Citizens Committee for Broadcasting v. F.C.C.*,[25] the Court of Appeals for the District of Columbia stated:

> The Commission has recognized that a policy of diversity is central to the Communications Act, and it has denied licenses to otherwise qualified applicants on the strength of that policy. Since denying access to the airwaves to some involves a substantial though at this time necessary, restriction of speech, it follows that the Commission acts properly when it attempts to promote diversity by allocating

[24] *Id.* at 296 (Harlan, J., dissenting) (discussing limited powers of Congress and authority of American people compared to unlimited powers of British Parliament and few powers of its people) (citations omitted). The private rights provided in the Constitution were not novel principles; the political privileges -- the power of citizens to govern themselves as men had not governed themselves before -- were a "revolutionary transfer of authority." Alexander Meiklejohn, *What Does The First Amendment Mean?,* 20 UNIV. OF CHI. L. REV. 461, 478 (1953). It is the issue of authority that J. Harlan's dissent addresses.

[25] 555 F.2d 938 (D.C. Cir. 1977).

> stations to those without control over an alternative major media voice. *The Supreme Court has given its approval to a diversity policy based on First Amendment* and antitrust considerations. The First Amendment "rest[s] on the assumption that the widest possible dissemination of information from diverse antagonistic sources is essential to the welfare of the public." "The public interest' standard necessarily invites reference to First Amendment principles."[26] (Citations and footnotes omitted; emphasis supplied.)

That a narrowing of the diverse voices that can communicate over the mass media will impair the First Amendment was recognized by C.J. Bazelon when he described the enhancement of the First Amendment resulting from a broadening of those who are able to communicate their diverse information and views: "the First Amendment seeks to further the 'search for truth.'. . . Surely that search will be facilitated by government policy that encourages the maximum numbers of searches."[27]

In *Turner Broadcasting Sys. Inc. v. FCC*,[28] the Supreme Court recognized the impact of private control of the media on "the free flow of information and ideas" and that the First Amendment, rather than shielding the media from government action, has an interest in preventing the private media from restricting the flow of information and ideas to the public.[29] There, the Court stated:

> [W]hen an individual subscribes to cable the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the

[26] *Id.* at 948-49 (discussing importance of diversity upon application of First Amendment). *See id.* at 950-951 (noting purpose of First Amendment).

[27] *Id.* at 950-951 (noting purpose of First Amendment).

[28] 512 U.S. 622 (1994).

[29] *Id.* at 656-57 (discussing effect of First Amendment on media and protections it affords).

> voice of competing speakers with a mere flick of the switch.[30]

Court decisions have pointed to the critical connection between diversity and the purpose of the First Amendment, even when that diversity will impinge upon the activities of the media operator. In *FCC v. Natl. Citizens Comm. for Broadcasting*,[31] the Court found FCC regulations regarding licensing of newspaper combinations did not limit the flow of information but were aimed at enhancing the diversity of viewpoints received by the public.[32] The Court stated:

> The physical limitations of the broadcast spectrum are well known. Because of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public. In light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential, as we have often recognized. . . . No one here questions the need for such allocation and regulation, and, given that need, *we see nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the "public interest" in diversification of the mass communication media.*[33] (emphasis supplied)

Individual Justices of the Supreme Court have emphasized the importance of the First Amendment in protecting the public's right to receive information to assure an informed citizenry necessary for self-governance. In *Houchins v. KOED, Inc.*,[34] Justice Stevens, dissenting, wrote:

> The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution. It is for this reason that the First Amendment protects not only the

[30] *Id.* at 656-57 (explaining that cable providers have power to act as censors upon their subscribers and ability to restrict access of information and opinions).

[31] 436 U.S. 775 (1978).

[32] While presented as a Fifth Amendment Equal Protection case, the Court concluded a free speech component existed: the regulations were a reasonable means of promoting the public interest in diversified mass communications. *Id.* at 786, 795.

[33] *Id.* at 799 (noting importance of government regulation in broadcast area and lack of constitutional provision prohibiting such regulation).

[34] 438 U.S. 1 (1978).

> dissemination but also the receipt of information and ideas. . . . In addition to safeguarding the right of one individual to receive what another elects to communicate, the First Amendment serves an essential societal function. Our system of self-government assumes the existence of an informed citizenry.[35] (Citations omitted.)

In *Saxbe v. Washington Post Co.*,[36] Justice Powell, dissented:

> "[P]ublic debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression."[37]

In *Telesat Cablevision, Inc. v. City of Riviera Beach*,[38] a district court found:

> The public, educational, and governmental ("PEG") access requirements of the City's ordinance have been shown to be rationally related to a substantial government concern. The City has listed a variety of goals for the requirements, including: permitting fuller citizen participation in government by increasing information of government activities, encouraging the dissemination of diverse information, permitting the dissemination of information by public schools and universities to the communities in which they are located, and permitting access to the public for groups whose views might otherwise not be expressed due to limited financial resources or lack of popularity. Like the PEG channels, the requirement that cable operators provide free service to governmental buildings – schools, fire stations, police stations, and the like – *expand available sources of information, multiply the diversity of view points, and thus foster First Amendment interests.*[39] (emphasis

[35] *Id.* at 30-31 (Stevens, J., dissenting) (stressing value of First Amendment as tool for flow of information into society and distribution of various societal viewpoints).

[36] 417 U.S. 843 (1974).

[37] *Id.* at 862-63, (Powell, J., dissenting) (arguing First Amendment aids distribution and acquisition of information, which facilitates societal discussion).

[38] 773 F. Supp. 383 (S.D. Fla. 1991).

[39] *Id.* at 412. The particular and critical role of the First Amendment in securing for the public the diversity of viewpoints and information necessary for America's political system has been noted by the Supreme Court in a number of its decisions over the years. For example, the Court stated: "[T]hose guarantees [of speech and press] are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Time, Inc. v. Hill,* 385 U.S. 374, 389 (1967). The Court has also stated the First Amendment protects

supplied)

In *Time Warner Entertainment Co. v. F.C.C.*,[40] the Court of Appeals for the District of Columbia discussed the relationship between concentration of the media industry and diversity.[41] The court noted that in its earlier decision of *Time Warner Entertainment Co. v. United States*,[42] it had concluded that "Congress had drawn reasonable inferences, based upon substantial evidence, that increases in the concentration of cable operators threatened diversity and competition in the cable industry."[43] The court referred to the Supreme Court statement in the 1997 decision of *Turner Broadcasting Systems, Inc. v. F.C.C.*, that: "We have identified a corresponding 'governmental purpose of the highest order' in ensuring public access to 'a multiplicity of information sources.'"[44] The D.C. Circuit Court continued: "If this interest in diversity is to mean anything in this context, the government must be able to ensure that a programmer have at least two conduits through which it can reach the number of viewers needed for viability – independent of concerns over anti-competition conduct."[45]

Some fifty years ago, W.E.B. Du Bois described the impact of mega-corporate control of the media on democracy and its relation to America's judicial and educational institutions, both critical to realizing the self-governance principle:

> Mass capitalistic control of books and periodicals, news gathering and distribution, radio, cinema, and television has made the throttling of democracy possible and the distortion of education and failure of justice widespread. It can only be countered by public knowledge of what

"[t]he interest of the public in hearing all sides of a public issue." *Bond v. Floyd*, 385 U.S. 116, 136, (1966). In *Stromberg v. California*, the Court asserted the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." 283 U.S. 359, 369 (1931).

40 240 F.3d 1126 (D.C. Cir. 2001).

41 *Id.* at 1130 (stressing need for diversity in media and possible lack of diversity with strength of certain entities).

42 211 F.3d 1313 (D.C. Cir. 2000).

43 *Time Warner*, 240 F.3d at 1130 (granting deference to congressional findings of lack of competition in cable industry).

44 *Id.* at 1131; 520 U.S. 180, 190 (1997).

45 *Time Warner*, 240 F.3d at 1131-32 (D.C. Cir. 2001).

> this government by propaganda is accomplishing and how.[46]

The 1996 Act and Its Relationship to Constitutional Democracy and the First Amendment

This analysis of democracy and free speech poses a serious constitutional challenge to the current structure and operations of the media telecommunications industry. Here is how it unfolds:

Based on the 1996 Telecommunications Act[47] and, in particular § 202(h) of the Act, the Court of Appeals for the District of Columbia, in *Fox Television Stations Inc. v. FCC*,[48] recently reexamined two of the FCC rules restricting ownership of television stations. Briefly those rules are: (1) NTSO Rule – National Television Station Ownership Rule under which an entity is prohibited from controlling television stations with the combined potential audience reach in excess of 35% of the TV households in the nation,[49] and (2) CBCO Rule – Cable/Broadcast Cross-Ownership Rule which prohibits a cable television system from carrying the signal of any television broadcast station if the system owns a broadcast station in the same market.[50] As to rule (1), the court did not vacate the NTSO rule but remanded it to the FCC to justify the Rule's retention.[51] As to (2), the Cable/Broadcasting Cross-Ownership Rule, the court vacated the rule entirely.[52]

The D.C. Circuit Court found that while diversity is a

[46] W.E.B. Du Bois, *Negroes and the Crisis of Capitalism in the United States*, 1953 MONTHLY REVIEW 478, 480.

[47] Telecommunications Act of 1996, 110 Stat. 56 (1996). The 1996 Act was not centered on concern for free speech nor the necessity to secure a public policy in favor of diversity. As stated by Robert W. McChesney: "The overreaching purpose of the 1996 Telecommunications Act is to deregulate all communication industries and to permit the market, not public policy, to determine the course of the information highway and the communications system." ROBERT W. MCCHESNEY, CORPORATE MEDIA AND THE THREAT TO DEMOCRACY 42 (Seven Stories Press 1997).

[48] Fox Television Stations, Inc. v. F.C.C., 280 F.3d 1027 (D.C. Cir. 2002).

[49] *Id.* at 1034. *See* Telecommunications, 47 C.F.R. § 73.3555 (e) (2002).

[50] *Fox Television*, 280 F.3d at 1035. *See* Telecommunications, 47 C.F.R. § 76.501 (2002). This rule is subject to review on regular basis to determine its necessity as required by § 202 (h). Telecommunications Act of 1996, 110 Stat. 56, § 202 (h) (1996).

[51] *Fox Television*, 280 F.3d at 1048-9 (identifying rule as arbitrary and capricious, but refusing to vacate, because risk of disruption is low).

[52] *Id.* at 1053 (declaring FCC could find no justification compelling enough to uphold Rule).

permissible policy, the FCC did not provide an adequate basis for believing the Rules would in fact further diversification. [53] There are two major ironies in this decision which result in the strange conclusion that *further* mega-consolidation will increase free speech and press for the American public. This conclusion is based on the argument that consolidation will enable the owners of mass media to exercise their First Amendment rights more freely by having access to a wider public audience to which they can express their views. The first irony is that an increase in consolidation of the media/telecommunications industry does not mean more information will be conveyed to the public. To the contrary, it means that *less diverse* information will be given to the public. This happened in the commercial radio industry after deregulation of radio ownership rules in the 1996 Act. After deregulation, the number of owners of commercial radio stations declined from about 5,100 to 3,800, even though there are significantly more stations on the air.[54] The increase of stations has been broadly publicized, but has that promoted a greater diversity of viewpoints, or cultures? Twenty-five stations each owned by a separate entity will present greater diversity than 100 stations all owned by the same corporation. Since acquisition of media outlets requires substantial monies it is highly predictable that the future will see less owners with more stations on the dial and those owners will be rich and white individuals of the western world.

The second irony is that, on the one hand, the First Amendment has been recognized as requiring diverse sources of information.[55] On the other hand, the networks argued in the *Fox Television* case that the First Amendment was violated by the National Television Station Ownership Rule because it prevented them from reaching directly – through stations they

[53] The Court's approach appears to reflect the view that, while permissible, diversity is not a policy mandated by the Constitution and the First Amendment. This conflicts with the analysis that the First Amendment's role is to secure the diversity of information and viewpoints necessary for self-governance. *See id.* at 1045-7.

[54] GOMERY, *supra* note 1, at 12 (examining effects of deregulation of media entities).

[55] As stated by the Supreme Court, the Amendment's assumption is that "the widest possible dissemination of information *from diverse antagonistic sources* is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1944). As stated by FCC Commissioner Gloria Tristani, "a diversity of information sources – is essential to the functioning of our democratic form of government." Gloria Tristani, Departure Statement (Sept.7, 2001) *at* www.fcc.gov/speeches/ tristani/statements/2001/stgt154.html.

own and operate – 65% of the potential television audience in the United States.[56]

The issues raised by the current structure of the media industry may be conflated into the question: *To whom does the First Amendment belong*? No one can seriously challenge the maxim *that freedom of speech belongs to all of us* – to the public as a whole. How then to resolve a situation where the rights to receive certain information is precluded because another group has taken ownership of the means to communicate that information. Those deprived of the ability to receive the information claim their First Amendment rights are violated; those now owning the means of communication claim that their First Amendment rights allow them to determine how they will use the means of communication to disseminate what information.

Someday this issue will have to be resolved. Understanding the nature of the democracy created by the Constitution – self-governance requiring diverse sources of information – will help resolve this complex problem. Otherwise, we may find that the market economy has redefined democracy so as to eviscerate democracy and to destroy free speech. It is within this framework, this understanding of the Constitution and the Democracy that it constructed, that the present telecommunications structure and system will be tested and found to be unconstitutional.

Some fifty-five years ago in the celebrated work, *A Free and Responsible Press*, the Commission on Freedom of the Press (1947) ("Hutchins Commission") answered this question when it dramatically described the role of the media in communicating information needed by the public:

> Our society needs an accurate, truthful account of the day's events. We need to know what goes on in our own locality, region, and nation. We need reliable information about all other countries. We need to supply other countries with such information about ourselves. We need a market place for the

[56] The court rejected the network's argument stating that "Congress could reasonably determine that a more diversified ownership of television stations would likely lead to the presentation of more diverse points of view." The impact of this conclusion on the mandate of the First Amendment and diversity was not further considered by the Court. *Fox Television*, 280 F.3d at 1047.

> exchange of comment and criticism regarding public affairs. We need to reproduce on a gigantic scale the open argument which characterized the village gathering two centuries ago. We need to project across all groups, regions, and nations a picture of the constituent elements of the modern world. We need to clarify the aims and ideals of our community and every other.
>
> These needs are not being met. 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.
>
> . . . When we look at the press as a whole, however, we must conclude that it is not meeting the needs of our society. The Commission believes that this failure of the press is the greatest danger to its freedom.[57]

A HISTORY LESSON ON THE POWER AND ROLE OF THE MEDIA

The significance of the issue of the constitutionality of the structure and operations of the media/telecommunications industry is best understood by an examination of the history of the power wielded by the media in influencing the sentiment of the people in the decision making self-governance process. The soon to be 16th President of the United States, confronted with the country's approaching greatest crisis – civil war on its own territory – had it right when he described the overwhelming power of those who can most influence public sentiment:

> Public Sentiment is everything. With public sentiment, nothing can fail. Without it, nothing can succeed. Consequently, he who molds public sentiment goes deeper than he who enacts statutes and pronounces

[57] A FREE AND RESPONSIBLE PRESS, 67-68 the Commission on Freedom of the Press (1947) ("Hutchins Commission").

decisions.[58]

Prior to Lincoln's statement, James Madison in 1828 noted the awesome powers of an entity which controls the information furnished to the pubic:

> It has been said, that any country might be governed at the will of one who had the exclusive privilege of furnishing its popular songs. The result would be far more certain from a monopoly of the politics of the press.[59]

Making the Spanish American War

The period of the late 1890s was the golden age of "yellow journalism." Publishers exploited the fact that sensational news sold papers. Sensational news did more than sell newspapers; it also involved people in what was going on in the world and so painted those events in a particular way as to assure that the public took a particular side based upon a specific sentiment regarding these events. William Randolph Hearst and his *New York Journal* illustrate the most skillful harnessing of "yellow journalism's" power, the power to both maximize profits and fulfill a political agenda. Nothing, not even presidential will, would prove strong enough to withstand Hearst's desire for war with Spain.

William McKinley, a Civil War veteran who had fought at Antietam, won the 1896 presidential election on promises of peace.[60] His experience in the Civil War led him to believe that war should be avoided at all costs. McKinley's hard-won pacifism did not sit well with Hearst. Hearst deplored McKinley's attitude toward intervention on the world stage. Upon hearing McKinley's inaugural address, which emphasized a path of global non-interference, Hearst remarked the address had been "vague and sapless."[61] Although Hearst was most definitely partial on

[58] First Lincoln-Douglas Debates, Ottawa, IL August 21, 1858 *in* THE COLLECTED WORKS OF ABRAHAM LINCOLN 28, (Roy P. Basler, ed. Rutgers University Press, New Brunswich, NJ 1953).

[59] THE COMPLETE MADISON 296 (Saul K. Padover ed. Harper & Brothers New York 1953).

[60] MICHAEL BLOW, A SHIP TO REMEMBER: THE MAINE AND THE SPANISH-AMERICAN WAR 78 (William Morrow & Co., 1992).

[61] *See id.* at 79.

the matter of intervention in Cuba, he was hardly the only one in America to support the cause of "Cuba Libre" and Cuba's independence from Spain. Hearst, however, had at his disposal the resources of a newspaper empire to influence the American population.

In January of 1898, Hearst's *New York Journal* published a stolen private letter from the Spanish minister to Washington. In the letter, Minister Dupuy de Lome ridiculed President McKinley as "weak and catering to the rabble, and besides, a low politician."[62] McKinley at that moment had been working toward negotiating a peace treaty between Spain and Cuba.[63] In great part because of the *Journal's* subsequent "de Lome Go Home" campaign, the Spanish Minister was forced to resign.[64] De Lome's resignation was celebrated by a cartoon in the *Journal* showing the Spanish minister being booted out of the country by Uncle Sam. "The flag of Cuba Libre ought to float over Morro Castle in a week," the caption predicted.[65] Although it took a bit more than a week, the United States would soon be involved in a war in Cuba. By giving the letter maximum publicity, Hearst increased the pressure on McKinley to prove himself to be other than the buffoon ridiculed by de Lome. Hearst had effectively put McKinley where he wanted him – in the position of having to save face for himself – and brought the entire country that much closer to war. But even with Hearst's success with the de Lome letter scandal, the United States might never have entered into war with Spain without the tragic events of February 15, 1898 and the sinking of the *Maine* in Havana harbor under mysterious circumstances.

The sinking of the *Maine* could not have come at a worse time for McKinley and his plans for peace. Popular support for McKinley's leadership was eroding. The humiliating words of the

[62] This was just one of a series of ill-advised comments made in the letter, which Milton called a "political bombshell." JOYCE MILTON, THE YELLOW KIDS: FOREIGN CORRESPONDENCE IN THE HEYDAY OF YELLOW JOURNALISM 214 (Harper & Row 1989).

[63] In fact, the President had directed Secretary of State John Sherman to inquire as to the possibility of "Cuban separatists accepting a U.S.-guaranteed settlement, based on home rule. *Id.* at 207.

[64] BLOW, *supra* note 60, at 90 (noting that de Lome anticipated visit from Assistant Secretary of State, Judge William R. Day, and cabled his resignation to Madrid prior to Day's arrival).

[65] The *Journal* was rather pleased with this result, as it was the recipient of the first facsimile of the fateful letter and had eagerly published it. MILTON, *supra* note 60, at 214.

Spanish were being trumpeted in the *Journal* while sensational news stories, many of them half truths and some outright concoctions, continued to pour out of Cuba and into the 'yellow' papers of the day. The day after the sinking of the *Maine*, a Wednesday, Theodore Roosevelt, then Assistant Secretary of the Navy, briefed his boss, Secretary Long. In private, Roosevelt confided to a friend that he firmly believed the Spanish had sunk the *Maine* and that he felt that war with Spain was the only response. Yet, in his briefing to Long, he wrote "It may be impossible to ever settle definitely whether or not the *Maine* was destroyed through some treachery on the part of the Spaniards. . ."[66] In contrast, the Wednesday evening edition of the *Journal* carried the headline of "Growing Belief in Spanish Treachery" and on Thursday "Destruction of the Warship Maine was the Work of an Enemy." The Thursday evening edition was even clearer: "War! Sure! Maine Destroyed by Spanish; This Proved Absolutely by Discovery of the Torpedo Hole."[67] No serious examination of the wreckage had yet taken place.[68] Despite the *Journal's* conviction, the mystery of what actually blew up the *Maine* remains until today. A naval court convened soon after the sinking of the *Maine*, reached a finding that a mine had caused the fatal explosion.[69] But they made no speculation about who might have planted it or why. McKinley presented the conclusions of the court to Congress and laid out a plan of patience and diplomacy, trusting "the sense of justice of the Spanish nation will dictate a course of action suggested by honor." By no means was Hearst the only one dissatisfied with McKinley's cautious plan of action. But again, it was the *Journal* which provided the script for an entire nation to read when the paper's headline coined a phrase that the people still recited one hundred years later: "Remember the *Maine*! To hell with Spain."[70] War ensued soon after.

[66] BLOW, *supra* note 60, at 110 (stating that as Assistant Secretary of Navy, Roosevelt felt obligated to brief Long on preparedness).

[67] *See id.* at 110-11 (observing that doubts regarding identity of perpetrators disappeared rapidly).

[68] *See id.* at 112 (noting that conclusion may have been premature).

[69] *See id.* at 169 (explaining that explosion below ship, on its port side, caused forward decking and superstructure to blow up and aft).

[70] The *Journal* was not alone in its war cry – *The Chicago Tribune* ridiculed the President's "desperate defiance of the popular will;" *The World* demanded the sending of a fleet to bombard Havana, and the *New York Herald* called for action. *See id.* at 172.

Creating Threats and Scares

Not only does the press have the power to give or withhold information from the American public thereby shaping public opinion and ultimately governmental policy, it also consciously plays a role in *creating* intense interest and fear in the public about some danger previously unknown – whether or not these dangers actually exist. This media orchestrated heightening of awareness has come to be known as a scare.

For a period of a few months in 1920, San Francisco newspapers ran many articles detailing a serious threat to the safety of the community caused by an easily obtainable item that could make sane people do insane things: Ouija boards. The *San Francisco Chronicle* of March 6, 1920 reported that a policeman had come under the influence of a Ouija board, and along with accomplices, and with superhuman strength, hijacked a car, robbed a bank and injured two bank guards. A March 4 article in the *Chronicle* reported that a fifteen-year-old girl had used the board to gain power over the other participants in the game. The police were required to take into custody those who had become insane from Ouija board use. The Ouija board scare was taken very seriously by the entire community and many were arrested and jailed. "Newspapers spoke of a 'wave of insanity' caused by the Ouija boards that had grown to 'national prominence.'"[71]

Criminalization of Public Activity and Molding Law Enforcement Policies

Sometimes a scare is created purely by the media, as in the Ouija board scare, possibly to boost circulation using sensational stories. Sometimes a scare is created through a partnership between a governmental agency or a mega-corporation and the media. Often the effects of media-created scares stay with us. A prime example of the media's power to create a perception leading to a nation-wide long-lasting scare is marijuana.[72]

[71] This comment is made in the context of the "scare" phenomena, be it related to drugs, Communists, or Ouija boards. CRAIG REINARMAN & HARRY G. LEVINE, CRACK IN CONTEXT: AMERICA'S LATEST DEMON DRUG 14 (Craig Reinerman & Harry G. Levine, eds., Univ. of California Press 1997).

[72] The role of the media in fostering the current anthrax scare furnishes a present day example of the power of the media to create perceptions and mold public opinion and law enforcement policies. *See, e.g.,* Larry Elliott & David Teather, *The State of the States:*

In 1936, marijuana was still to a large extent unknown in New York, so much so that agents of the Federal Bureau of Narcotics (FBN) had to show police officers what it looked like in its plant and dried stages so that they could learn to recognize it.[73] The FBN was in the midst of a campaign to pressure the states to adopt the uniform Narcotics Act and finally achieve uniform criminalization of marijuana.[74] A partnership between the FBN and the American press was incredibly effective in achieving the goal of placing marijuana under the same regulatory schemes as opium and cocaine, something that had proved to be difficult when the FBN acted alone.

The criminalization of marijuana was achieved in two stages: (a) the adoption by the states of a Uniform Narcotics Act which included marijuana as a narcotic (for the first time) and (b) the adoption of federal regulations such as the Marijuana Tax Act. In both cases the foundation for criminalization was based primarily on sociological reasons including prohibition, scapegoating of immigrants (especially Mexicans) and a general reaction on the part of American law enforcement to an increase in crime and a decrease in public morale.[75] The foundation for criminalization, however, was not a firm link between the increase in crime and an increase in marijuana use or the widespread use of marijuana in many parts of American society.[76]

When the newly created Federal Bureau of Narcotics was campaigning for the passage of the Uniform Act and the Marijuana Tax Act, the FBN and its commissioner Henry J. Anslinger, relied heavily on the press to manipulate the public about the evils of marijuana and to create the perception, where

The Perfect Storm Tears Heart out of the US Economy: Americans Held Their Breath in Fear That the New York Air Crash Marked the Start of a New Terrorist Assault on their Country, THE GUARDIAN, Nov. 14, 2001, at 26 (noting that media coverage of anthrax scare is at its saturation point); Kim Ode, *The Sky is Falling! Or Was That an Acorn?; These Vague Warnings Keep Us From Being on High Alert or Living Normally*, STAR TRIBUNE, Nov. 4, 2001 at 4E (noting that media does not help situation by referring to it as "anthrax scare" instead of "incident" or "concern").

73 RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES 94-95 (Univ. Press of Virginia 1974).

74 *See id.* at 97-98.

75 REINERMAN & LEVINE, *supra* note 71, at 7 (noting public policy considerations behind two remedial statutes).

76 BONNIE & WHITEBREAD, *supra* note 73, at 162-63 (stating claims of marked increase in marihuana use was unsupported).

none had existed before, of a marijuana epidemic insinuating itself into schools and homes everywhere. The FBN promoted a link between crime and marijuana, which at best was thoroughly anecdotal and unscientific, and at worst a rehash of myths and legend about the ability of marijuana and hashish to turn men into killers.[77]

For example, Anslinger presented a paper to the League of Nations Advisory Committee and its Cannabis subcommittee on the Trafficking of Opium and other dangerous drugs. The subcommittee stated that it was expanding its coverage because of facts which had come to its attention, including evidence of the "spread of crime amongst young persons [that has] . . . assumed proportions in the United States of America which have seriously alarmed public opinion and medical circles."[78]

The FBN was promoting a link between marijuana use and crime by whatever means necessary, not to combat a real threat to the safety of the American people but in order to further its agenda of criminalization. In this, the press was a willing and crucial partner. For example, newspapers all over the country helped pave the way for the adoption of the Uniform Act by creating the alarm they purported to be reporting. One Hearst editorial of 1935 was typical of the FBN creating a perception embraced by the public at large: "In recent years, the insidious and insanity producing marihuana has become among the worst of the narcotic banes, invading even the school houses of the country, and the Uniform State Narcotic Law is the only legislation yet devised to deal effectively with this horrid menace."[79] In 1937 Hearst was officially commended by a narcotics conference "for pioneering the national fight against dope."[80]

National magazines played a significant role in not only shaping but also *creating* public opinion about marijuana. While the nation was concerned about what to do about supposed rising marijuana use, dramatic press coverage swayed public opinion to accept comprehensive criminalization as the only solution. There was no real evidence of a national phenomena of rising

[77] *See id.* at 110-112 (noting scare tactics directed at women's organizations).
[78] *Id.* at 146.
[79] *Id.* at 101.
[80] *Id.* at 101.

marijuana use, much less of a public outcry about marijuana linked to crime. Any national marijuana crisis that existed was a product of intensive press coverage in service of an anti-drug policy coming from the government, not the people. Between 1922 and 1936 there were seven articles about marijuana. In 1937, the year the FBN began its campaign for *federal* regulation of the drug, twenty six articles appeared. Anslinger himself penned some of the marijuana education material which appeared in the press, like "Marihuana: Assassin of Youth" published in *American Magazine* in 1937. "The FBN files contain over fifty letters addressed to the commissioner which say, 'Your article was the first time I ever heard of marihuana.'"[81]

Not only was the FBN manufacturing the public outcry through the media, the scientific and statistical basis on which public policy would be expected to rest was scandalously absent. The facts about marijuana were effectively withheld by both the press and the government from becoming part of the public discourse:

> On the eve of the Marihuana Tax Act, there was no scientific support for a significant statistical association between marihuana use and major criminal behavior. There was little evidence of increased motor excitement attending acute intoxication, much less the release of violent tendencies. There was only anecdotal evidence generated by local law enforcement officials and a persuasive belief that the people who used marihuana, Mexicans and other ethnic minorities, represented the anti-social elements in society.[82]

The Anti-Communist Perception and Red Scare as Creating the Public's View of Political Issues

Mass media also played a pivotal role in the creation of the public's perception of a critical major political issue – the nature and threat of different economic and social systems. There is no doubt that without the role of the media, the public's view of what would be beneficial to the country in terms of a political system and a market economy would have been different and expressed itself differently in elections, etc. The "Red Scare" of

[81] *Id.* at 98.
[82] BONNIE & WHITEBREAD, *supra* note 73, at 151.

the late 1940s and 1950s reached new heights with a 1950 speech by Senator Joseph McCarthy. McCarthy famously announced that he had in his hand a list of the names of 205 Communists who had infiltrated the United States government. Many years later, William Randolph Hearst Jr. had this to say about McCarthy and his list:

> "Joe gave us a call not too long after the speech. And you know what – he didn't have a damned thing on that list. Nothing. He said, 'My God, I'm in a jam . . . I shot my mouth off. So what am I gonna do now?' Well, I guess we fixed him up with a few good reporters."[83]

Hearst Jr. was referring to the staff of the *Journal-American* of which he was the editor. Joseph Brown Matthews was the assistant to Hearst Jr. and the *Journal-American's* house consultant on subversive activities.[84] Matthews was a remorseful ex-Communist who had testified before Martin Dies's House Committee on Un-American Activities. He subsequently went to work for the Dies investigation as Chief Researcher.[85] When Matthews later went to work for Hearst he brought with him Committee records including an unpublished list of 100,000 people who were alleged to have Communist ties. Matthews and others with similar credentials were enlisted to assist McCarthy in preparing his report for the Senate Foreign Relations subcommittee.[86] The subcommittee, headed by Senator Millard Tydings, ultimately found McCarthy's claims to be

> "the most nefarious campaign of half-truths and untruths in the history of the republic . . . . [F]or the first time in our history, we have seen the totalitarian technique of the 'big lie' employed on a sustained basis."[87]

[83] LINDSAY CHANEY & MICHAEL CIEPLEY, THE HEARST: FAMILY AND EMPIRE - THE LATER YEARS 128 (Simon & Schuster, 1981) (referring to persuasive power of media in times of mass hysteria, regardless of legitimacy).

[84] *See id.* at 130 (noting Matthews' variety of credentials and experience).

[85] *See id.* at 129 (citing previous affiliation with Communist party and subsequent work experiences).

[86] *See id.* at 130 (explaining that attention is paid to where media desires it to be).

[87] *See id.* at 132.

Two days after the subcommittee made its finding public, sixteen Hearst newspapers carried the identical editorial:

> "The Tydings Committee's majority report on the McCarthy charges of Communist influence in the State Department is probably the most disgracefully partisan document ever to emanate from the Congress of the United States. As a public paper prepared in parlous times, it verges upon disloyalty."[88]

Hearst and fellow publishing titan Henry Booth Luce also played other important roles in the development of the perception and ideology of anti-socialism and anti-communism. Using their nationwide publishing media outlets, they literally created Billy Graham as a personage of national influence; a figure who could be counted on to bring their anti-Communist message to huge audiences under the guise of moral and religious authority. Although Graham claimed political neutrality, on the issue of Communism he felt that the conflict between Communists and anti-Communists was literally one of a religious nature. Between Communism and Christianity it was "a battle to the death – either Communism must die or Christianity must die because it is actually a battle between Christ and Anti-Christ."[89]

In 1949, Billy Graham, who would later meet with many foreign heads of state and become a confidant of President Nixon, was still a struggling preacher who at one point considered closing up his revival in Los Angeles due to poor attendance.[90] It was at that time that Hearst gave his order to "Puff Graham"[91] This was not the first time that Hearst had ordered his papers to give free publicity to Graham. In 1946, the order had been to "Puff YFC [Youth for Christ]," Graham's crusade.[92] With Hearst fully behind him, Graham almost instantaneously became a household name.[93] Along with stories in Hearst newspapers,

88 *See id.* at 132 (noting extent to which media influence can grow).

89 WILLIAM MARTIN, A PROPHET WITH HONOR: THE BILLY GRAHAM STORY 165 (William Morrow & Co., Inc. 1991) (analogizing social regime with religion, middle America's lifeblood, in order to further fan flames of controversy).

90 *See id.* at 116 (noting that several committee members supported terminating production).

91 *See id.* at 117 (describing backing conferred by Hearst's publication team).

92 *See id.* at 117 (stating that Hearst publications had previously assisted Graham).

93 *See Id.* at 118 (conveying that instant public notoriety followed for Graham as a

Graham also received major coverage by the Luce empire, including articles in *Time* and *Life*.[94]

The power of the press is not limited to shaping public opinion in support of government policies. When needed, the media industry could and did use its power directly to shape *government policy to suit its needs*. No public middleman was needed. In 1969 Richard Berlin, representing a powerful group of newspaper chain owners, lobbied President Nixon personally for a change in federal law that would greatly affect the profit line for all newspaper chain owners. Berlin was the president and chief executive officer of the Hearst Corporation. He asked the President to grant an exemption to anti-trust laws that prevented newspapers (and all other businesses) from engaging in price-fixing with their competitors. Berlin suggested that exceptions be made for newspapers that were in financial trouble. He mentioned the support he and other media chain owners had shown Nixon in the previous election and clearly expected a *quid pro quo* from the administration. The meaning was clear that if Nixon were to expect newspaper support in the next election, he would be wise to grant the exemption they sought.[95] This exemption had been repeatedly rejected by the Johnson administration.[96] However, after receiving the letter from Berlin, the White House changed its opinion and supported the newspaper exemption.[97] This arrangement can be seen dramatically in the lack of information reported by the media regarding the White House scandals of 1972. That summer, the first news of White House corruption was being reported in only a small number of newspapers.

> A study of major papers around the country – dailies with a quarter of all national circulation, including papers in the Hearst, Scripps-Howard, and Cox chain – showed that in the months before the election "pro-Nixon papers had a much higher tendency to suppress damaging Watergate stories than papers making no endorsements." These included the papers who had obtained their antitrust favor from

result of Hearst backed publicity).

94 *See id.* at 118 (discussing subsequent media recognition devoted to Graham).

95 BEN H. BAGDIKIAN, THE MEDIA MONOPOLY, 93 (Beacon Press 1983) (revealing tactical strategy underlying Berlin's contact with Nixon).

96 *See id.* at 98 (asserting prior attempts at such aims proved unsuccessful).

97 *See id.* at 100 (denoting reversal of viewpoint by Nixon administration).

> Nixon . . . In 1972 Richard Nixon received the highest percentage of newspaper endorsements of any candidate in modern times.[98]

Tobacco – The Silent Issue

It would seem that the press would not pass up the opportunity to use a sensational story to exploit public fears and increase circulation, so long as the story would not hurt the bottom line. The Ouija board industry never advertised on the same scale as the tobacco industry. When the public most needed the press to expose tobacco as a health threat that would kill millions, the American press was mute for decades; meanwhile, *the tobacco industry became the second largest advertiser in print media* and in 1997 alone the industry spent 5.7 billion dollars on advertising.[99] Advertising dollars from the tobacco industry have, for many years, determined what information the public would receive about the risk of smoking. *Editor and Publisher*, a trade publication, complained in 1954 that public health reports on the dangers of tobacco, including the Surgeon General's report, were "scare news" and that:

> "[these reports cost newspapers] much lineage and many dollars to some whose business is to promote the sale of cigarettes through advertising – newspaper and advertising agencies."[100]

While newspapers had significant reports of the link between cigarettes and cancer as far back as 1936, it was in the financial interest of newspapers (and other media outlets) to keep the story as invisible as possible in order to avoid offending their cigarette advertisers, who as noted, are the lifeblood of print advertising. In 1936 a study that found that smoking dramatically shortened life expectancy was presented to the New York Academy of Medicine. Out of eight New York newspapers,

[98] *Id.* at 101 (indicating dichotomy of Nixon treatment between papers favoring administration and those that did not).

[99] *See* The Oral Cancer Foundation, *The Advertising and Promotion of Tobacco, available at http://www.oralcancerfoundation.org/advertising_tobacco.htm* (n.d.) (highlighting annual advertising expenditures for 1997).

[100] BAGDIKIAN, *supra* note 95, at 175 (revealing that reports unfavorable to cigarette industry had adverse effect on expenditure of advertising dollars).

only two covered the story and those two buried it inside.[101]

Normally, a story this sensational would eventually leak out over three decades. But a study by R.C. Smith, published in the *Columbia Journalism Review* showed that seven years after tobacco advertising was banned from television, not one magazine article had been published about the health risks of smoking, though smoking was estimated as being the cause of one in every seven deaths in the United States.[102] Consequently, multiple surveys in 1980 found that the American public was disturbingly misinformed about the dangers of smoking. For example, 40% of people did not know that smoking caused 80% of lung cancer deaths every year and 50% of teenagers did not know that smoking might be addictive.[103]

The Crack Cocaine Scare

Starting in 1986, the nation experienced another scare event whose vocabulary and issues recalled the manufactured marijuana crisis of the 1930s. However, the difference here was that crack cocaine was already illegal when the nation underwent the "crack scare." The effect, though, was the same. A media blitz created public concern. The crack scare was framed by the media in such a way as to present crack use without a context. By neglecting to report on the true context of crack use: entrenched poverty, joblessness and homelessness, the public had no choice but to accept "recriminalization" of crack as the sole way out of the crisis.

By the early 1980s, the high cost of cocaine had resulted in its use primarily among the middle and upper class.[104] But with the introduction of crack, what had once been known as the 'champagne of drugs' – cocaine – became widely available to even those with meager economic resources. Crack was a repackaging of cocaine which allowed users to spend less money to obtain a

[101] *See id.* at 171 (indicating reluctance newspaper groups maintained towards publishing any derogatory tobacco industry information).

[102] *See id.* at 173 (explaining likewise reluctance of magazine publishers as print anti-cigarette industry data).

[103] *See id.* at 175 (highlighting findings of studies conducted by several research agencies).

[104] *See* John P. Morgan & Lynn Zimmer, *The Social Pharmacology of Smokeable Cocaine, in* CRACK IN AMERICA 133 (Craig Reinarman & Harry Levine eds., Univ. of California Press 1997) (attributing prevalence of cocaine use among middle and upper classes to its relatively high price).

'high' which was more intense, though briefer, than that obtained by ingesting powder cocaine intranasally.[105] The cost differential was astonishing; while a gram of cocaine cost $100 in the early 1980's a rock of crack might cost as little as $2. Although crack became popular due to its cheap, intense highs, the often used term 'epidemic' to describe crack use was misleading. A drug use survey in 1991 showed that while 4 million respondents had tried crack, 24 million respondents had tried cocaine.[106] The story behind crack was not one of a quantitative jump in consumption but a demographic shift in markets: the sudden availability of a drug once reserved for the wealthy to those who previously had been unable to afford it – meaning primarily non-white and inner city residents.

A very different set of facts was presented to the American people. The media created a scare, a scare that drastically overstated the physiological effects of crack, overstated the penetration of crack into communities, and created a belief in a link between crack and crime that necessitated disproportionately stricter sentences for crack users and dealers as opposed to cocaine users and dealers. One 1986 article in *U.S. News and World Report*, for example, reported that, "illicit drugs pervade American life . . . [a] 'situation that experts compare to medieval plagues – the No. 1 problem we face."[107] A *New York Times* story reported that in suburban Long Island, the antithesis of inner city New York, "the use of crack has reached epidemic proportions."[108] Tom Brokaw, reporting for NBC Nightly News, also reported in 1986 that crack was "flooding America" and was now "America's drug of choice."[109] In 1989, President Bush gave a speech-blaming crack for "turning our cities into battle zones and murdering our children." He held a bag of crack obtained from a park across from the White House to drive the point home. If not even the President's neighborhood

[105] *See id.* at 134 (explaining that smoking delivers drug more efficiently than snorting).

[106] *See id.* at 134.

[107] *See* Craig Reinarman & Harry Levine, *The Crack Attack*, *in* CRACK IN AMERICA 36 (Craig Reinarman & Harry Levine eds., Univ. of California Press 1997) (quoting conclusions from magazine article).

[108] *Id.* at 3-4 (quoting assertions made in June 8, 1986 newspaper article).

[109] *See* Reinarman & Levine, supra note 107, at 36.

was safe, no neighborhood was.[110] Finally, one of the most disturbing symbols of the devastating potency of crack was the crack baby. The crack baby was not only an innocent victim of the crack epidemic, it was regularly reported in the media that crack babies would grow up to be an enormous financial burden on the government. One hundred thousand (100,000) crack babies in the oft cited report by the Department of Health and Human Services, would cost society twenty (20) billion dollars every year.[111]

None of these stories turned out to have any truth to them. Crack was not spreading into every kind of community. Even in 1989, the *New York Times* had to admit that crack "is confined mainly to poor urban neighborhoods." The story of the White House and crack was made up. The crack President Bush claimed had been purchased in Lafayette Park turned out to be imported. A crack dealer from another part of Washington had been enticed there by Federal agents because no one, in fact, dared sell crack across the street from the White House.[112]

While it is true that crack was related to increases in violence, that relationship had much to do with the fact that the extremely lucrative business of selling crack created a need for incredibly violent "self-policing" among competing dealers. As one study of the relation between drugs and homicide in New York City noted, "the vast bulk of crack related homicides occurred between dealers or dealers and users."[113]

Though drug economy related violence is hardly an insignificant social problem, crack related violence just did not live up to the hype. For example, *babies are not born addicted to crack*. Moreover, the press ignored this story coming out of the war on crack. It turned out that the crack baby, the most innocent of victims of America's crack crisis, never existed. In fact, the fetal abnormalities most often seen with mothers who

[110] *See id.* at 22-23 (describing series of contrived events leading up to the President's statement).

[111] *See* Morgan & Zimmer, *supra* note 104, at 151 (referring to sensational statistics contained in report often cited by media).

[112] *See* Reinarman & Levine, *supra* note 101, at 23 (explaining actual events behind the supposed seizure of drugs across street from White House, and explaining why that location would not be desirable for selling crack).

[113] *See* Paul J. Goldstein et al., *Crack and Homicide in New York City, in* CRACK IN AMERICA 118 (Craig Reinarman & Harry Levine eds., Univ. of California Press 1997) (quoting conclusion from the study).

used crack during pregnancy are also consistent for mothers who did *not* smoke crack but who share the same level of economic impoverishment and lack of proper health care.[114]

So while much of the crack coverage of the 1980s had no substantial relation to the truth, a constant stream of crack stories in the news had made a deep impression on Americans and ultimately paved the way for the institution of crack related drug policies and legislation which were sharply racially biased. Once again the media had painted a picture that became a fact, albeit fabricated, for the public. Once again, the most vulnerable members of American society, poor, non-white youths, became the victim of the powerful, non-accountable media.

In 1985, a year before the media began its intense coverage of crack, a *New York Times*/CBS poll asked Americans what they felt was the most important problem facing them. The poll showed 23% said war or nuclear war and less than 1% said drugs.[115] The next year saw a change of priorities by both the media and the public.

> In July 1986 alone, three major TV networks offered seventy-four evening news segments on drugs, half of these about crack. In the months leading up to the November elections, a handful of national newspapers and magazines produced roughly a thousand stories discussing crack. Like the TV networks, leading news magazines such as *Time* and *Newsweek* seemed determined not to be outdone; each devoted five cover stories to crack and the "drug crisis" in 1986 alone.[116]

In 1986, more people picked drugs over war or nuclear war as the most important problem.[117] By 1989, the same poll showed that an astounding 64% of Americans found drugs to be the most important problem, with war or nuclear war at 1%.[118] Media attention had successfully created the perception of an epidemic

114 *See* Morgan & Zimmer, *supra* note 104, at 153-54.

115 *See* Reinarman & Levine, *supra* note 107, at 23-24 (noting relatively low level of public concern over drugs according to opinion poll taken in 1985).

116 *See id.* at 20 (reviewing specific examples of 1986 explosion of media coverage of crack "crisis") (references omitted).

117 *See id.* at 40 (observing increasing public concern, after commencement of media coverage, over drugs as reflected in opinion poll).

118 *See id.* at 24 (using statistics to show Americans believed drugs more important than war).

against which the nation had few weapons save extreme policing and sentencing. The truth was drug use, including cocaine, was actually declining during the years of the crack scare,[119] but this truth and the lessons from it were ignored by the media. It was not the story they wanted the American public to believe.

Without the media barrage of crack related stories, all of which asserted the same basic untruths, it was unlikely that there would have been popular support for drug law alterations which essentially targeted one particular community and resulted in shocking differentials for black and white offenders.

> "In 1986, before the mandatory minimum sentences for crack offenses became effective, the average sentence [in all drug cases] was 6% higher for blacks than for whites. Just four years later, in 1990, the average sentence was 93% higher for blacks."[120]

Duster attributes this to many factors, most notably a policing focus on street level transactions, where poor people and non-whites are most likely to be involved, as opposed to targeting drug sales in more private places (homes, business offices and hotels) where whites are more likely to be offenders. Furthermore, cocaine is most likely to be bought and sold by whites while crack is bought and sold by non-whites. For the same federal crime of possession with intent to distribute five grams, a cocaine offender may get ten to thirty-seven months as opposed to the crack offender who will be facing a mandatory *minimum* of 5 years (60 months).[121] By creating and perpetuating the myth of crack penetration into every corner of American society, even the President's neighborhood, the media played an important role in building public support for the large scale incarceration of one segment of the population.

CONCLUSION

Understanding the lessons of history will be the best assurance of securing continued vitality to America's unique self-

[119] *See id.* at 28 (examining drug use in America).

[120] Troy Duster, *Pattern, Purpose, and Race in the Drug War: The Crisis of Credibility in Criminal Justice*, *in* CRACK IN AMERICA 260, 266 (Craig Reinarman & Harry Levine eds., Univ. of California Press 1997).

[121] *See id.* at 266 (comparing severity of crimes).

governance principle. Remembering history and the activities of the United States media will help assure that democracy and the First Amendment will not be lost in the economic market activities of the media industry. As stated by Prof. Alexander Meiklejohn:

> What, then . . . is the purpose of the first amendment, as it stands guard over our freedom? That purpose is to see to it that in none of these three activities [deciding on issues, associating with others to compare information, voting] of judging shall the voter be robbed, by action of other, subordinate branches of the government, of the responsibility, the power, the authority, which are his under the Constitution. . . To do this is to violate the Constitution at its very source. We the people of the United States, are self-governing. That is what freedom means.[122]

The role of the First Amendment and its crucial contribution to the people's self-governance is reflected in the reference to the media as the "*fourth estate.*" It is not an idle reference but rather a recognition of the nature of the government established by the Constitution. Without the intended functioning of the media the tri-parte nature of the judiciary, executive and legislative branches of the government would be ineffective and the government established by "we the people" would be nonexistent.[123]

[122] ALEXANDER MEIKLEJOHN: TEACHER OF FREEDOM TESTIMONY ON THE MEANING OF THE FIRST AMENDMENT, 240 (Cynthia Stokes Brown ed. Meikeljohn Civil Liberties Institute 1981).

[123] The major political issues concerning the media: their relationship to and as part of the wealthy and those who rule the country and their functional relationship to the government and its sources of information have not been examined herein. Resolution of the Constitutional issue could have a powerful impact on these political issues. However, whether the forces opposed to the self-governance principle and its accompanying definition of the role of the First Amendment, could prevent such a resolution is a battle yet to be fought.