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Freeing the Press from Editorial Discretion and Hegemony in Bona Fide News: Why the Revolution Must be Televised

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Freeing the Press from Editorial Discretion and Hegemony in Bona Fide News: Why the Revolution Must be Televised

Akilah N. Folami*

ABSTRACT

Broadcast journalism's foundational role of informing and engaging the American public in order to further America's self-governing democracy is in crisis. Corporate broadcast owners' efforts to maximize profits and increase advertising revenue during traditional network news and related public affairs programming have led to the closing of many investigative and correspondent television news bureaus and have arguably hastened the devolution of broadcast journalism into a depoliticized spectacle filled with political and celebrity, gossip-driven infotainment.¹ Furthermore, as viewers have abdicated their reliance on broadcast journalism as their primary source of political knowledge, they have also disengaged from professional broadcast journalists' dispassionate, impartial and aspirationally objective method and manner of presentation.² This Article contends that these definitional shifts in viewer engagement, which serve as underlying challenges to broadcast journalism's deliberative role, are the symptoms, rather than the root cause of its deliberative peril. These shifts are instead the net effect of long-standing mainstream societal norms and presumptions that led to the narrowing in scope and definition of civic engagement.

Specifically, such mainstream norms presume a disengagement between civic knowledge and participation on the one hand, and the various expressive modes (and whims) of popular culture, entertainment and discourse on the other. This assumption of a necessary disjuncture between reason and emotions, particularly with pleasure, was reflected in traditional news programming formats and personified by professional broadcast journalists during the Golden Age of

* Associate Professor of Law at Hofstra University School of Law. I wish to thank both the Hofstra Junior Faculty Forum and the organizers of the 2010 South Eastern Association of Law School Conference for opportunities to present earlier drafts of this piece and for their most helpful comments. A special thanks to Professors Eric Lane and Julie Steiner for their helpful thoughts and comments. Finally, I would like to thank Asha Edwards and Jacob Claveloux for their tireless and invaluable research assistance.

1. BONNIE M. ANDERSON, *NEWSFLASH: JOURNALISM, INFOTAINMENT, AND THE BOTTOM-LINE BUSINESS OF BROADCAST NEWS*, at x, xi (2004); GEOFFREY BAYM, *FROM CRONKITE TO COLBERT: THE EVOLUTION OF BROADCAST NEWS* 3, 5, 56 (2010).

2. BAYM, *supra* note 1, at 16, 106.

journalism. This Article posits that these norms were further solidified and reinforced by the creation and early interpretation of the bona fide newscast and news interview exemptions to the equal time rule, which absent application of any of the bona fide news exemptions, required broadcast owners to provide equal access time on a particular program to opposing political candidates if access on such programs had been granted to any other candidate running for the same office.³

In revisiting the equal time rule and bona fide news and newscast exemptions, this Article sheds light on how early interpretations of these exemptions helped to solidify network news's hegemony over who could construct, and what would be construed as, accepted political news. More specifically, this Article contends that these hegemonic presumptions and their legal reifications, as embodied in early interpretations of the bona fide news and newscast exemptions, resulted in a political culture and discourse that was aesthetically sterile. Indeed, for the first three decades following their enactment, the bona fide news and newscast exemptions were only applied to candidate appearances on network news and public affairs programming anchored by professional broadcast journalists like Walter Cronkite. The resulting political discourse was primarily constructed as a white and male one, and thus marginalized the concerns of non-whites and non-males. Furthermore, such an aesthetically limiting and sterile discourse may have impaired the participatory agency of citizens.

While this Article acknowledges that media consolidation has contributed to the hyper-commercialized and sensationalized spectacle that currently predominates broadcast news programming, it maintains that a return to the norms of the Golden Age that separated news from entertainment, and reason from the pleasurable, is not the answer to addressing broadcast journalism's peril in engaging the public. After all, to do so would simply ignore the extent to which political news presented in certain entertainment formats (like "The Daily Show") not only has become widely popular, but also has served as a key deliberative tool that attracts and engages viewers in a subversive political discourse apart from the mainstream spin. Therefore, media policy should proactively provide the political news necessary for maintaining self-governance, irrespective of whether such news is provided in a traditional news format and/or in an entertaining one. The pay and compete model discussed herein is not only a step in the direction of restoring broadcast journalism's deliberative role, but also a step towards facilitating foundational American ideals of a widely engaged and participatory citizenry.

3. Equal Time Amendment to Communications Act of 1934, Pub. L. No. 86-274, 73 Stat. 557 (codified as amended at 47 U.S.C. § 315(a) (2006)).

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*The revolution will not be televised; You will not be able to plug in,
 turn on and cop out;
 You will not be able to skip out for a beer during commercials.
 Because, the revolution will not be televised.
 There will be no highlights on the eleven o'clock news.
 The revolution will not be right back after a message.
 The revolution will not go better with Coke,
 The revolution will not fight the germs that may cause bad breath.⁴*

Television and everyday life . . . are . . . structured, contingent, and mediated by power . . . in ways that are highly complex and contradictory. Power is multidimensional and so must emancipatory strategies be To ignore power relations, not to mention the political economy of both television and everyday life, is profoundly to cripple one's capacity for critical analysis.⁵

INTRODUCTION

In an online poll conducted by *Time Magazine* in 2009, comedian Jon Stewart was voted as America's Most Trusted News Anchorman for his performance as a "fake" news journalist on his widely popular "fake" news comedy, "The Daily Show," which aired on the cable channel Comedy Central.⁶ To the surprise of many, Stewart beat out veteran and professional broadcast journalists Brian Williams, Katie Couric and Charlie Gibson, who anchored nightly news and public affairs programming televised on the three major networks, NBC, CBS and ABC, respectively.⁷ Many saw the results of the poll as a telling manifestation of the challenges broadcast journalism has faced in serving its foundational and historic role of civically attracting and engaging the American public.⁸ Some contend that broadcast journalism's demise began with corporate consolidation in media ownership and crystallized with the commoditization of news as entertainment.⁹ This commoditization arguably resulted in the descent of network news into commercialized infotainment, sensationalized and celebrity reporting and mere recitations of political sound bites rather than exhortations of critical substance.

4. GIL SCOTT-HERON, "The Revolution Will Not Be Televised," on *THE REVOLUTION WILL NOT BE TELEvised* (RCA Music Group 1988).

5. PETER DAHLGREN, *TELEVISION AND THE PUBLIC SPHERE* 40 (1995).

6. See *Now that Walter Cronkite Has Passed on, Who is America's Most Trusted Newscaster?*, TIME POLL RESULTS, http://www.timepolls.com/hppolls/archive/poll_results_417.html (last visited Mar. 1, 2011); see also Jason Linkins, *Online Poll: Jon Stewart Is America's Most Trusted Newsmen*, HUFFINGTON POST (Apr. 22, 2009), http://www.huffingtonpost.com/2009/07/22/time-magazine-poll-jon-st_n_242933.html.

7. Linkins, *supra* note 6.

8. See Roderick Spencer, *Fake News Is the Real News*, HUFFINGTON POST (Sept. 30, 2009), http://www.huffingtonpost.com/roderick-spencer/fake-news-is-the-real-new_b_305799.html.

9. ANDERSON, *supra* note 1, at x, xi, xvi; BAYM, *supra* note 1, at 3, 14.

Some feel that the primary purpose of producing broadcast journalism has become the promotion of consumption rather than civic engagement.¹⁰ As a result, some journalism and first amendment reformists champion returning to the Golden Age of journalism, an age when political news was clearly separated from entertainment, and when professional journalists, like anchorman Walter Cronkite, civically informed and guided Americans.¹¹

This Article contends, however, that the challenge facing broadcast journalism in engaging the American public long precedes the corporate consolidation of the industry and is not rooted per se in the intersection of civic news with entertainment. Instead, broadcast journalism's deliberative peril lies in its continued adaptation of long held and erroneous mainstream societal norms, which required that reason be separated from emotions and pleasure, and presumed that public and civic knowledge and participation be disengaged from popular culture and discourse. This Article revisits the equal time rule and the bona fide newscast and news exemptions to show that these presumptive hegemonic norms were further solidified and reinforced by media law and policy, namely via the creation and early interpretation of these exemptions.¹² When triggered, absent application of any of the bona fide news exemptions, the equal time rule requires broadcast owners to provide equal access time on a particular program to opposing political candidates if access on such program had been granted to any other candidate running for the same office.¹³ This Article focuses primarily on the bona fide newscast and news interview exemptions of the equal time rule and posits that their early interpretations illuminate the law's solidification of such norms.¹⁴ These norms dictated that in order to engage deliberatively, rationalism had to rise above and contain both commercial and private self-interest—and could in fact do so via an ethical code of professionalism.¹⁵

Specifically, with the creation of traditional network news programming and formats as personified by the televisual images of journalists Edward Murrow and Walter Cronkite, such presumptive norms were grafted into the political public sphere and had the effect of narrowly defining civic participatory discourse and public engagement.¹⁶ Indeed, public discourse and the distribution of political

10. ANDERSON, *supra* note 1, at x, xi, xvi; BAYM, *supra* note 1, at 3, 14.

11. ANDERSON, *supra* note 1, at 20.

12. *See infra* Part I.C.

13. Equal Time Amendment to Communications Act of 1934, Pub. L. No. 86-274, 73 Stat. 557 (codified as amended at 47 U.S.C. § 315(a) (2006)).

14. There are two additional exemptions from the equal time rule—namely, bona fide news documentaries and on-the-spot coverage of a bona fide news event. Anne Kramer Ricchiuto, *The End of Time for Equal Time?: Revealing the Statutory Myth of Fair Election Coverage*, 38 IND. L. REV. 267, 267–68 (2005). This latter exemption has been interpreted to include coverage of political debates and press conferences. *See generally* Chisholm v. FCC, 538 F.2d 349 (D.C. Cir. 1976).

15. ROBERT W. MCCHESENEY & JOHN NICHOLS, *THE DEATH AND LIFE OF AMERICAN JOURNALISM: THE MEDIA REVOLUTION THAT WILL BEGIN THE WORLD AGAIN* 140 (2010).

16. BAYM, *supra* note 1, at 170. Unless defined otherwise herein, references to “traditional news,” “network news,” “network journalism” or “broadcast journalism” refer to traditional newscast formats, style and norms developed and provided by the commercial television broadcast networks and not to local news programming or to public broadcasting.

news largely became the domain of the professionals in the 1940s when the broadcast networks (ABC, NBC and CBS) arguably adopted print journalism's professional code of responsible journalism, which required impartiality, objectivity and rationalism.¹⁷ Professionalism and rationality in turn required professionals to bracket and contain all private self-interests or experiences that, if left unchecked, undermined the objective political discourse.¹⁸ The net result of such bracketing was a rational, aesthetically sterile political culture and discourse that was construed primarily as white and male.¹⁹ Concerns and issues of other groups, including those of minorities, were marginalized during what some have ironically characterized as the Golden Age of Journalism.²⁰

Broadcast journalists were soon positioned as the gatekeepers of what was construed and accepted as political news.²¹ Through the uniform provision of network news programming, the networks imposed a unitary language on, and format for, the provision of political news.²² Aesthetically pleasing presentation styles and formats were sacrificed in the process. Indeed, broadcast owners positioned network news as the polar opposite to entertainment programming.²³ It was deemed as fostering the higher and nobler goals of deliberative discourse while entertainment programming was devalued as problematic to deliberation in that its primary purpose was to appeal to the emotions of viewers as consumers.²⁴ This Article posits that early interpretations of the bona fide newscast and news interview exemptions helped to solidify network news' hegemony over who could construct, and what would be construed as, political news.²⁵ Indeed, for the first three decades following their enactment, the bona fide newscast and news interview exemptions were only applied to candidate appearances on network news programming and to traditional network news inspired public affairs programming, such as "Meet the Press" and "Face the Nation."²⁶

17. JACK FULLER, WHAT IS HAPPENING TO NEWS: THE INFORMATION EXPLOSION AND THE CRISIS IN JOURNALISM 12–15 (2010). Unless otherwise defined herein, "political news" as used throughout this Article is best defined by Robert McChesney in his recent book:

[N]ews is what you and I need to keep our freedom—accurate and timely information on [but not limited to] laws and wars, police and politicians, taxes and toxics. Freedom is about a lot more than being able to pick your hairstyle or decide what color shirt to wear. Freedom in the deeper civic sense involves controlling one's life, one's social environment, one's future, in collaboration with other members of the community . . . Freedom [also] requires that the choices be made in a democratic fashion.

MCCHESNEY & NICHOLS, *supra* note 15, at 164 (internal quotations omitted).

18. BAYM, *supra* note 1, at 11; FULLER, *supra* note 17, at 12–15.

19. BAYM, *supra* note 1, at 49.

20. MCCHESNEY & NICHOLS, *supra* note 15, at 50–51.

21. BAYM, *supra* note 1, at 49.

22. *Id.* at 12.

23. *Id.* at 11.

24. *Id.*

25. *See infra* Part I.C.

26. Michael Damien Holcomb, Comment, *Congressional Intent Rebuffed: The Federal Communications Commission's New Perspective on 47 U.S.C. § 315(a)(2)*, 34 SW. U. L. REV. 87, 93 (2004); *see also* Jonathon D. Janow, Note, *Make Time for Equal Time: Can the Equal Time Rule Survive a Jon Stewart Media Landscape?*, 76 GEO. WASH. L. REV. 1073, 1079 (2008).

In applying bona fide news exemptions in this way, this Article contends that the Federal Communication Commission ("FCC") embraced conventional norms steeped in modernistic logic, which placed a premium on the reason and rationality typified by traditional news formats and personified by professional broadcast journalists.²⁷ Indeed, early FCC guidance exempted candidate appearances on such network news programming from equal time requirements—arguably because of the rationalism and objectivity these shows presumptively embodied given the format and the presence of the professional journalist or expert. Candidate appearances on most entertainment programs, however, did trigger the equal time requirement.²⁸ This legal reification of professionalism and the professional journalists also problematically fostered what some have coined as a thin citizenship where citizens were stripped of their own agency, and construed as needing to receive political cues from such professionals on civic discourse and engagement.²⁹ As other media and programming options became available through cable, viewers began to "tune out" from broadcast journalism, eventually becoming disinclined to follow along paternalistically as the recipients of broadcast journalism's cues.³⁰ They preferred instead to proactively engage as cocreators in the dissemination, construction and negotiation of political discourse, as arguably evidenced by the widely popular appeal of, and participatory engagement on, entertaining day time talk shows, like "Donahue."³¹ Interestingly, most legal scholarship exploring these bona fide news exemptions laments the FCC's rulings, beginning in the 1980s, which extended the exemptions beyond traditional news formats to such entertainment programs, commonly referred to as tabloid journalism.³² Such extensions are deemed as primary contributing factors to the trivialization and commercialization of the political news necessary for a self-governing public.³³

This Article contends, however, that by initially extending these bona fide news exemptions to shows generally classified as entertainment, such as "Donahue," these rulings, in theory, also challenged the long held and erroneous conventions in network journalism that bifurcated traditional news formats from entertaining ones. With such a new beginning, these rulings shifted the paradigm and had the capacity of broadening the topics, the arena and format of deliberation in the public sphere. They also drew in participants who might not have otherwise been engaged due to

27. The FCC replaced the Federal Radio Commission pursuant to the Communications Act of 1934 as the administrative body charged with regulating the nation's telecommunication and communication systems. See Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064, 1064 (1934) (current version at 47 U.S.C. § 151 (2006)); see also *infra* Part I.C.

28. Holcomb, *supra* note 26, at 88, 100.

29. BAYM, *supra* note 1, at 170.

30. See generally Holcomb, *supra* note 26.

31. DAHLGREN, *supra* note 5, at 27; JEFFREY P. JONES, ENTERTAINING POLITICS: SATIRIC TELEVISION AND POLITICAL ENGAGEMENT 149, 158, 181 (2d ed. 2010).

32. See generally Janow, *supra* note 26, at 1085.

33. See generally Holcomb, *supra* note 26; Henrik Ornebring & Anna Maria Jonsson, *Tabloid Journalism and the Public Sphere: A Historical Perspective on Tabloid Journalism*, 5 JOURNALISM STUD. 283 (2004).

lack of interest or to marginalization in the mainstream political discourse. This theoretical development was short lived in practice, however, as massive media consolidation made possible by the repeal of limits placed on media ownership and other FCC deregulatory efforts blurred traditional news and entertainment further.³⁴ Such blurring was not for the purpose of facilitating a wider participatory discourse, but rather was aimed to, and had the effect of, commoditizing political news as “infotainment” to maximize profits for new corporate conglomerate owners.³⁵

Within this conglomerated context and shift in broadcaster vision, the FCC gives deference in its current application of the bona fide newscast and news interview exemptions to broadcaster judgment.³⁶ But today, in spite of being cloaked in normative traditional news formats, broadcasters are focused on retaining viewers via sensationalized reports, celebrity coverage and by providing mere sound bites rather than “real” political news of substance.³⁷ This Article contends that, although the FCC aptly continues to retreat in its interpretation of the bona fide newscast and news interview exemption from the presumption that entertainment programming on the whole has little, if any, deliberative value, the FCC nevertheless continues to preserve presumptions that traditional news programming is itself inherently valuable as a deliberative tool.³⁸ Indeed, this Article posits that the FCC presumes such programming still engages citizens simply because it is information provided pursuant to a claimed journalistic/editorial judgment, and within a traditional network news format.

This Article explores the law’s continued assumption of such news’s deliberative value and its failure to acknowledge (or rather, to delineate as it has in entertainment programming contexts) that network news, like *some* music and other entertainment content, can also be purely entertaining and may contribute little, if any, value in informing and engaging the deliberating public with the political news necessary to sustain a self-governing democracy.³⁹ This Article also challenges media reformists’ advocacy for return to a regulatory paradigm that will bring back traditional news formats, style, and programming typified by the Golden Era. To regain and broaden broadcast journalism’s deliberative legitimacy and function, such calls for reform must recognize and yield to the power of television and not return to the top down, humdrum, deadpan and sterile format that epitomized the Golden Age of Journalism. To do so would erroneously overlook the extent to which political news, when presented in a manner that is both entertaining or aesthetically and popularly appealing (for example, on Comedy Central’s

34. ANDERSON, *supra* note 1, at 21–22; MCCHESENEY & NICHOLS, *supra* note 15, at 40.

35. ANDERSON, *supra* note 1, at x, xi, xvi, 7; BAYM, *supra* note 1, at 5.

36. Holcomb, *supra* note 26, at 94.

37. *See infra* Part II.B.1.

38. *Id.*

39. *See* *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (acknowledging political value of politically motivated satire, despite its appearance in a medium of pop culture, namely *Hustler* magazine). *See generally* Akilah Folami, *From Habermas to Get Rich or Die Tryin: Hip Hop, the Telecommunications Act of 1996, and the Black Public Sphere*, 12 MICH. J. RACE & L. 235 (2007) (discussing value of music, specifically hip hop, to deliberative discourse).

“Politically Incorrect” or “The Daily Show”), attains legitimacy as a political news source for deliberative purposes.

Moreover, this Article contends that precisely because Americans are tuning into entertaining sitcoms, tabloid talk shows, escapist soap operas, sensational reality TV, sound-bite news pundits and satirical and comedic late night talk shows, those who value and advocate for a wider, authentic, critical and participatory democracy must consider the potential of entertaining and sensational television in drawing audiences into the deliberating discourse. Television continues to grab, hold and deliver the much sought after prize, by politician and advertiser alike—the attention of the viewing and voting consumer/citizen—in the hyper-mediated, information age of the twenty-first century, be it by content provided via broadcast or cable/satellite television or via recalibration on the Internet. Challenges must continue to be mounted against the current hyper-commercialized and sensationalized spectacle that predominates broadcast and cable news programming, and is devoid of political news necessary for sustaining self-governance. Calls to revive, rescue and reshape a sustainable journalism that investigates, informs and engages the public with the necessary political news must still be televised nonetheless—and televised in a manner that capitalizes on television’s popular mass and entertaining appeal. Reform movements must account for the media saturated public sphere and the multidimensional and intersecting ways in which people are not only informed, but also civically engaged and participatory.

Part I of this Article highlights the early American history of participatory infrastructure and the values attached thereto. Part I also exposes many of the contradictions inherent in both the adoption and adaptation of a professional journalism code that elevated, for deliberative purposes, network news over most content construed as entertaining, and thus fostered what some have termed thin citizenship.⁴⁰ Part II highlights the current trend of politicized entertainment programming in enhancing political news and discourse, in contrast to the commercialization and deliberative stagnation of mainstream traditional news sources. Finally, Part III is motivated by scholar Cass Sunstein’s work urging first amendment media scholars and activists to move beyond the two juxtaposing frames—regulatory public interest and laissez-faire market incentive—that have driven broadcast regulation and policy since its inception, and to explore open ended and creative approaches to remedying the current crisis in broadcast journalism’s deliberative function.⁴¹

This final section suggests a modest remedy: the adoption of a slightly modified “pay and compete” model that factors in the equal time rule as it relates specifically to enhancing the provision of political news via candidate appearances on broadcast television. The pay and compete model would require broadcasters to pay a fee to a public entity for continued licensure of the broadcast spectrum, but also would grant them the opportunity to compete with other broadcasters to earn back the fee

40. BAYM, *supra* note 1, at 170.

41. Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 505 (2000).

by creating quality content that satisfies predetermined standards. This model blends both traditional regulatory and market based media policies, is less intrusive than traditional FCC regulation and resolves some of the market inefficiencies that have historically rendered political news vulnerable to underproduction and lacking in substance.⁴²

I. DELIBERATING INFRASTRUCTURE: FREEDOM OF THE PRESS AND THE PUBLIC SPHERE

American history reveals the early nation's firm commitment to the ideals of fostering an open, participatory and civically informed citizenry. Even before enactment of the First Amendment's pronouncement that "Congress shall make no law . . . abridging the freedom of speech, or of the press," newspapers were already in print and circulation.⁴³ Indeed, "[w]hen the First Amendment was adopted and for many years thereafter, anybody with anything to say had comparatively little difficulty in getting it published: presses were cheap; the journeyman printer could become a publisher and editor by borrowing the few dollars he needed to set up his shop."⁴⁴ In addition, although the press operated without the benefit of major first amendment protections until the beginning of the twentieth century, the marketplace of ideas, both partisan and independent, was overflowing, open and accessible.⁴⁵

An open and accessible free press was generally understood as indispensable and necessary to popular sovereignty.⁴⁶ Thomas Jefferson, in his famous letter to Edward Carrington in 1787, emphatically claimed that "were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."⁴⁷ Over 150 years later, Justice Hugo Black echoed Jefferson's sentiment in *Associated Press v. United States*, noting that it was the grave concern for sustaining a free press that prompted the very adoption of the First Amendment.⁴⁸ However, because the First Amendment's freedom of the press and freedom of speech provisions are not elaborated upon within the Constitution, long standing debates have resulted over whether the "freedom of the press" language provides privileges separate from,

42. *Id.* at 516–17 (discussing the underproduction of political news, the overproduction of fear based content and broadcasters' imitation of other broadcasters' programming to attract consumers).

43. U.S. CONST., amend. I; LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY 56 (2010).

44. BOLLINGER, *supra* note 43 (internal citation omitted).

45. ROBERT W.T. MARTIN, THE FREE AND OPEN PRESS: THE FOUNDING OF AMERICAN DEMOCRATIC PRESS LIBERTY, 1640–1800, at 4–5 (2001); MCCHESENEY & NICHOLS, *supra* note 15, at 135 ("Nearly all viewpoints would get a fair hearing in the marketplace . . . and if the existing range of viewpoints was insufficient new newspapers could be launched.").

46. MCCHESENEY & NICHOLS, *supra* note 15, at 118–19.

47. ERIC LANE & MICHAEL ORESKES, THE GENIUS OF AMERICA: HOW THE CONSTITUTION SAVED OUR COUNTRY AND WHY IT CAN AGAIN 93 (2007).

48. *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (noting that the First Amendment "rests on the assumption that . . . a free press is a condition of a free society").

and/or in addition to, those imparted as “freedom of speech.”⁴⁹

Historically, some scholars have read the freedom of the press clause as creating an institutional press that was granted a unique status with rights “distinct from individuals exercising free speech rights, and . . . from other commercial enterprises.”⁵⁰ It is clear, however, that to the extent that specialized rights were granted to the press, they were granted to the press in its capacity as a watchdog for abuses of power and as an informational tool for the deliberating public who, in turn, held leaders accountable through votes.⁵¹ Any reading of the First Amendment’s freedom of the press provision as protecting an institutional press or profession must be grounded then in the premise that such protections are based on the institutional press being imbued “with a public purpose, a systemic function as vital to American democracy as the three official branches of government The relevant metaphor . . . is that of the Fourth Estate.”⁵²

While not mutually exclusive, an equally strong and legally sound interpretation of the First Amendment’s freedom of the press provision is one that regards it as “a structural provision of the Constitution.”⁵³ One of its central goals in this paradigm is “the creation of a system of *deliberative democracy*,” intended not only for printers and their private gain but also for the fostering of civic knowledge.⁵⁴ Indeed, such a system of deliberative democracy was envisioned to provide participatory protections not only for the institutional press but also for all citizens.⁵⁵ Moreover, it was deemed necessary for the “maintenance of our political system and an open society,” and for the “solicitude not only for communication *itself*, but also for the indispensable *conditions* of meaningful

49. BOLLINGER, *supra* note 43, at 8–9. The main body of the Constitution itself contained no direct reference to freedom of speech or the press. LANE & ORESKES, *supra* note 47, at 93. Rather, the Bill of Rights was at least partially a product of the Framers’ need “[t]o win votes for ratification . . . [by offering] to support something they had originally thought was unnecessary: a bill of rights.” *Id.*

50. MCCHESENEY & NICHOLS, *supra* note 15, at 149.

51. *Associated Press*, 326 U.S. at 28–29 (Frankfurter, J., concurring). The press, as well as the public, was not, however, always consistently granted full freedom to criticize the government in order to hold them accountable. Within eight years of ratification of the Bill of Rights, the government passed “a piece of legislation, a blight on American constitutional history, known as the Sedition Act.” LANE & ORESKES, *supra* note 47, at 108. The Act “in effect criminalized criticism of the president and Congress . . . [and specifically targeted] the press.” *Id.* at 110. The Act expired before any challenge to its constitutionality could be mounted in court. *Id.* at 114–115. Justice Brennan stated later that “[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.” *N.Y. Times v. Sullivan*, 376 U.S. 254, 276 (1964).

52. BOLLINGER, *supra* note 43, at 9; *see also* Lyrissa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 848–49 (arguing that when operating as a fully functional Fourth Estate, the press’s role is to illuminate the public and indeed guide and inform public discourse).

53. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975).

54. Cass R. Sunstein, *Statement of Cass R. Sunstein*, in CHARTING THE DIGITAL BROADCASTING FUTURE: FINAL REPORT OF THE ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS 94, 97 (1998), available at <http://govinfo.library.unt.edu/piac/piacreport.pdf> [hereinafter ADVISORY COMMITTEE] (emphasis added); *see also* MCCHESENEY & NICHOLS, *supra* note 15, at 115.

55. *See* Sunstein, *supra* note 41, at 524.

communication.”⁵⁶ American press historian Robert Martin confirms this interpretation by establishing that the free press and open press doctrines of the First Amendment coexisted in America’s history, with the former referring to the institutional press defending the public liberty against abuses of power and the latter referring to the individual right of every person to air his or her views for all to consider.⁵⁷

Early government policies reveal a desire to sustain an inclusive participatory press infrastructure even at a time when private market interests showed little interest in doing so.⁵⁸ Indeed, government subsidies were instrumental to developing an institutional press, which included both independent and highly partisan papers published by political parties.⁵⁹ Such incentives were definitional in maintaining the structure of the developing industry, and exemplified “enlightened democratic policymaking, because it offered the same benefits to all newspapers regardless of their viewpoint.”⁶⁰ American public policy also favored a communication infrastructure that aimed to inform and engage a broader participatory public.⁶¹ From the outset, “[p]ublic policy . . . focused explicitly on getting the news to a wide readership, and chose to support news outlets by taking on costs of delivery [via postal subsidies] and, through printers’ exchanges, of production [via printing subsidies].”⁶² Thomas Jefferson, as the nation’s second Secretary of State, fully endorsed such government subsidies because he saw a press free to investigate and criticize the government as essential for a nation practicing self-governance.⁶³

Furthermore, to foster a more meaningful engagement of American citizenry, Jefferson also advocated for public education and libraries because “for [him],

56. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 588 (1980) (Brennan, J., concurring) (emphasis added); *Time Inc. v. Hill*, 385 U.S. 374, 389 (1967).

57. MARTIN, *supra* note 45, at 4–5.

58. MCCHESENEY & NICHOLS, *supra* note 15, at 128.

59. *Id.* at 133. McChesney and Nichols point out that journalism historians find it difficult to reconcile that the “same enlightened geniuses who crafted the First Amendment also created a partisan press system subsidized by political parties and government contracts, not to mention postal giveaways.” *Id.* at 129. Moreover, they stress that the key—then and now—to maintaining a participatory democracy with a partisan press system is, however, that “multiple competing well-funded media.” *Id.* Finally, they note that media owners, who traditionally and systematically raise laissez-faire market based arguments against any government involvement in media, often neglect to mention this particular history of government intervention via the favorable economic structural regulations that benefited their industry. *Id.* at 143. Some benefits are currently still in place, including those, for example, that exclude broadcaster advertising revenue from state sales taxes and allow them to be treated as a legitimate deductible business expense from a business’ taxable income. *Id.*

60. *Id.* at 126.

61. DAVID M. HENKIN, *THE POSTAL AGE: THE EMERGENCE OF MODERN COMMUNICATIONS IN NINETEENTH-CENTURY AMERICA* 42 (2006) (noting that the post office was significant in the lives of Americans in the eighteenth to the nineteenth century as it was the primary means of mass communication).

62. MCCHESENEY & NICHOLS, *supra* note 15, at 126. In addition, while the developing nation borrowed many of its laws and policies from Britain, American policy chose not to replicate its taxation on American editors and publishers thereby making it easier for them than for their British counterparts to start and maintain papers. *Id.* at 132.

63. *Id.* at 120–21.

having the right to speak without government censorship is a necessary but insufficient condition for a free press, and therefore democracy. It also demands that there be a literate public, a viable press system, and that people have easy access to this press.”⁶⁴ As a result, public information and the press were viewed as “the light of publicity” which lay at “the heart of democracy” and exposed, via political news and public information, those in positions of power who violated the public trust.⁶⁵ To Jeremy Bentham, such publicity was a prerequisite for the creation of an enlightened public judgment.⁶⁶ For John Stuart Mill, the light of publicity exposed and subjected government action to the will of the governed.⁶⁷ Immanuel Kant thought that publicity engaged citizens in public discourse.⁶⁸ These sentiments regarding the press’s role and function in a deliberating democracy are theoretically similar to those of German philosopher Jurgen Habermas on his theorized “public sphere.”⁶⁹ Indeed, with regard to western deliberative democratic history, Habermas has acknowledged that the press was the primary agent of publicity.⁷⁰

Habermas’s vision of the public sphere was introduced in his seminal book, *Structural Transformations of the Public Sphere*, where he examined the rise and decline in the eighteenth and early nineteenth centuries of the bourgeois public sphere in Europe.⁷¹ For Habermas, the bourgeois public sphere (like the press infrastructure envisioned by Jefferson and others) was a domain where private individuals gathered and disseminated information to educate and cultivate a collective public voice positioned to hold those in power accountable.⁷² The public sphere was not premised on a specific physical space per se, but was envisioned more as a “domain of social life in which such a thing as public opinion could be

64. *Id.* at 119.

65. BAYM, *supra* note 1, at 43–45; *see also* Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector’s Unique Role in Our Democracy*, 42 CONN. L. REV. 101, 105 (2009) (“A competitive ‘marketplace of ideas’ . . . is based on the theory that truth prevails in the widest possible dissemination of information from diverse and antagonistic sources.”).

66. Slavko Splichal, *The Principle of Publicity, Public Use of Reason and Social Control*, 24 MEDIA, CULTURE, AND SOC’Y 11–12 (2002).

67. Bruce Baum, *Freedom, Power and Public Opinion: J.S. Mill on the Public Sphere*, 22 HISTORY OF POLITICAL THOUGHT 501 (2001).

68. Simone Chambers, *A Culture of Publicity*, in DELIBERATION, DEMOCRACY, AND THE MEDIA 193 (Simone Chambers & Anne Costain eds., 2000); *see also* Splichal, *supra* note 66, at 14–15.

69. BAYM, *supra* note 1, at 44.

70. *Id.* Habermas, however, would more than likely stop far short of recognizing the press as a public sphere in its own right given his allegiance to reasoned debate as the only effective means of holding authority accountable. *See* Rosemary J. Coombe & Jonathan Cohen, *The Law and Late Modern Culture: Reflections on Between Facts and Norms from the Perspective of Critical Culture Legal Studies*, 76 DENV. U. L. REV. 1029, 1043 (1999).

71. Jurgen Habermas, *Further Reflections on the Public Sphere*, reprinted in HABERMAS AND THE PUBLIC SPHERE 421, 422 (Craig Calhoun ed., 1999).

72. Ken Hirschkop, *Justice and Drama: On Bakhtin as a Complement to Habermas*, in AFTER HABERMAS: NEW PERSPECTIVES ON THE PUBLIC SPHERE 49, 50 (Nick Crossley & John Michael Roberts ed., 2004).

formed.”⁷³ In this theoretically egalitarian space, all had access with participants bracketing differences, social inequalities and even private interests for the sake of the common good, which was to be determined by consensus of the participants and by reasoned, truthful and enlightened debate.⁷⁴ To Habermas’s dismay, private interests undermined those of the common good and cut short the maturation of his theorized public sphere and the independence of public opinion.⁷⁵ As a result, “public communication . . . [became] moderated by the demands of big business and . . . led to a regressive ‘dumbing down’ of the level of public debate.”⁷⁶

Many scholars, enticed by Habermas’s public sphere theory, have found his historical reading and interpretation of the bourgeois public sphere problematic due to the model’s inherent ideological contradictions.⁷⁷ They contend that Habermas’s bourgeois model was anything but open and accessible to all with private interests and inequalities of status bracketed.⁷⁸ In rereading eighteenth-century European history, such theorists have revealed that the period’s norms excluded women, people of color and unpropertied men from the bourgeois public sphere that Habermas idealizes.⁷⁹ By idealizing the bourgeois public sphere and its definition of civic participation, Habermas fails to appreciate the true repressive nature of this sphere, and incorrectly situated it as *the* public—ignoring the existence of alternative nonbourgeois public groups and their alternate modes of political expression and discourse.⁸⁰ Scholars have revealed that contemporaneous with the “bourgeois public there arose a host of competing counter-publics, including nationalist publics, popular peasant publics, elite woman’s publics and working class publics,” which emerged as popular movements that resonated with the same democratic fervor as the bourgeois public sphere and manifested their own distinctive cultures, norms and desires.⁸¹

73. Maria Simone & Jan Fernback, *Invisible Hands or Public Spheres? Theoretical Foundations for U.S. Broadcast Policy*, 11 COMM. L. & POL’Y, 287, 291 (2006).

74. Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE, *supra* note 71, at 109, 113. Habermas called this process the ideal speech scenario in which participants, who started out with views based on their individual experiences and self-interest, experienced a “self-revelation, whereby private needs are brought to consciousness and adjudicated through rational dialogue . . . Ideal speech must bracket off potentially distorting material forces and inequities.” Michael Gardiner, *Wild Publics and Grotesque Symposiums: Habermas and Bakhtin on Dialogue, Everyday Life and the Public Sphere*, in AFTER HABERMAS: NEW PERSPECTIVES ON THE PUBLIC SPHERE, *supra* note 72, at 28, 35.

75. Geoff Eley, *Nations, Publics and Political Cultures: Placing Habermas in the Nineteenth Century*, in HABERMAS AND THE PUBLIC SPHERE, *supra* note 71, at 289, 293.

76. John Michael Roberts & Nick Crossley, *Introduction* to AFTER HABERMAS: NEW PERSPECTIVES ON THE PUBLIC SPHERE, *supra* note 72, at 1, 6 (“[A]s the mass media began to establish itself as a viable economic market . . . it was both hijacked for the purpose of selling goods, via advertising, and became a considerable saleable commodity in its own right.”).

77. See generally Fraser, *supra* note 74, at 109–42; Mary P. Ryan, *Gender and Public Access: Women’s Politics in Nineteenth-Century America*, reprinted in HABERMAS AND THE PUBLIC SPHERE, *supra* note 71, at 259–88.

78. See Gardiner, *supra* note 74, at 29.

79. Fraser, *supra* note 74, at 109, 115–18.

80. Ryan, *supra* note 77, at 259, 284.

81. Fraser, *supra* note 74, at 116.

Nancy Fraser, for example, highlights the many ways in which Habermas's bourgeois public sphere and its cultural elitism and hegemony were challenged by what she calls "subaltern publics."⁸² Such publics were parallel discursive arenas where members of subordinate social groups invented and circulated counter-discourses.⁸³ These counter-discourses formulated oppositional interpretations of their identities, interests and needs, which in turn challenged the hegemony of the mainstream dominant public sphere.⁸⁴ For Fraser and others, "[t]o maintain an inclusive democracy . . . citizens must enter the public sphere with all their identities and roles intact, and public discourse must create spaces for a variety of cultural perspectives, epistemic resources, and social positions."⁸⁵

A. CULTURAL HEGEMONY AND PROFESSIONAL JOURNALISM

Echoing the contradictions inherent in Habermas's idealized bourgeois public sphere, mainstream America's early democratic history, including its early press history, reveals a conspicuous exclusion and marginalization of the working and lower classes, women, the nonpropertied and those deemed property.⁸⁶ Moreover, the shift to an advertisement supported institutional press and the eventual adoption and normalization of the press's professional journalism code exacerbated exclusion and marginalization.⁸⁷ The private commercial self-interests of publishers looking to increase advertising profits and the cultural elitism of the growing middle and elite classes decimated the competitive local and regional working class newspapers that often offered diverging and participatory discourses in print.⁸⁸ This shift began in the mid to late nineteenth century when the press became independently commercially viable and many government subsidies were discontinued.⁸⁹ While its commercial viability was due in part to increased popular readership and subscription, it was primarily due, however, to the growth of the advertisement industry, which itself was a byproduct of the developing industrial capitalist economy.⁹⁰

82. *Id.* at 109–42.

83. *Id.*

84. *Id.*

85. BAYM, *supra* note 1, at 59 (internal citation omitted); see also Fraser, *supra* note 74, at 120.

86. See generally Fraser, *supra* note 74, at 118–20; Michael Schudson, *Was There Ever a Public Sphere? If So, When? Reflections on the American Case*, in HABERMAS AND THE PUBLIC SPHERE, *supra* note 71, at 147–63 (noting the initial civic exclusion and later inclusion of women and Blacks). With regard specifically to Blacks in this country, Houston Baker, Jr. points out that given the exclusionary practices against Blacks, Blacks were essentially deemed as the property of the bourgeoisie class, strategically prevented from acquiring literacy and socially constructed as weak, submissive, illiterate and devoid of the very intellect and reason necessary to participate civically. Houston A. Baker, Jr., *Critical Memory and the Black Public Sphere* (1994), reprinted in THE BLACK PUBLIC SPHERE: A PUBLIC CULTURE BOOK 5, 13 (The Black Public Sphere Collective eds., 1995).

87. MCCHESENEY & NICHOLS, *supra* note 15, at 135.

88. *Id.* at 138–39.

89. DAVID PAUL NORD, COMMUNITIES OF JOURNALISM: A HISTORY OF AMERICAN NEWSPAPERS AND THEIR READERS 228 (Robert McChesney & John C. Neorne eds., 2001).

90. WILLIAM J. THORN WITH MARY PAT PFEIL, NEWSPAPER CIRCULATION: MARKETING THE NEWS 44–45 (1987); see also NORD, *supra* note 89, at 138.

With increased demand for advertising space to market products and with low barriers to enter the industry, daily newspaper publishing exploded.⁹¹ Similar to the rise of secreted commercial interests that undermined Habermas's theorized public sphere and the discourse therein,⁹² publishers downplayed the overt partisanship that marked the earlier era of newspapers (in an effort to appeal to a wider subscribing audience) while retaining instead covert associations with political parties and factions.⁹³ The views in the marketplace of ideas were theoretically plentiful; in practice, however, the *de facto* effect of newspaper reliance on advertisement soon pruned abundant and competitive markets into concentrated commercial ones.⁹⁴ Fewer and larger newspaper monopolies soon developed, thereby increasing economic barriers of new newspapers to enter and smaller ones to compete "as advertisers rationally flocked to the leading newspaper(s) that could offer the best rates and the widest reach."⁹⁵ These larger newspapers became part of the mainstream public sphere because they had "the largest audiences and [were] generally considered most important by members . . . of the political, economic and cultural elites."⁹⁶ They soon, however, drew the ire of their most ardent supporters, as did the publications of the penny press.⁹⁷

From inception, the penny press, also referred to as yellow journalism or the tabloid press, was never deemed respectable journalism by the mainstream public press or cultural elites.⁹⁸ It was disliked due to its open attempts to increase readership and advertisement revenue through human interest news, everyday life stories and coverage of "scandalous tales of sin, [and] the immoral antics of the upper class."⁹⁹ A responsible press was expected to provide "reports and comments on political happenings, and even more importantly, commercial information such as shipping news [because] the audience was the property class, not the working class."¹⁰⁰ A rereading of American history reveals that the tabloid press served as a subaltern public that "managed to attract new publics, by speaking to them about issues previously ignored [by the mainstream press]."¹⁰¹ Nevertheless, it was maligned by cultural elitists "for sensationalism and emotionalism, for over-simplification of complex issues, for catering to the lowest common denominator and sometimes for outright lies."¹⁰² To the extent larger newspapers began to adopt similar sensational reporting styles and stories in an effort to increase advertising revenue and subscription base, they too became the

91. MCCHESENEY & NICHOLS, *supra* note 15, at 133.

92. Craig Calhoun, *Introduction to HABERMAS AND THE PUBLIC SPHERE*, *supra* note 71, at 1, 39–42; Schudson, *supra* note 86, at 143, 152.

93. MCCHESENEY & NICHOLS, *supra* note 15, at 133–34.

94. *Id.* at 135.

95. *Id.*

96. Ornebring & Jonsson, *supra* note 33, at 283, 285.

97. *Id.* at 287.

98. *Id.* at 288.

99. *Id.*

100. *Id.*

101. *Id.* at 287 (noting that penny press often covered political happenings of the day).

102. *Id.*

subject of elite and middle class contempt for abdicating public servant obligations—at least as such obligations were defined by their culturally elitist norms.¹⁰³

Moreover, these larger newspapers also faced strong criticism from the progressive era inspired popular press, which, like yellow journalism, was another example of a subaltern public and counter-discourse to the mainstream press.¹⁰⁴ Indeed, “[t]oward the end of the century, the voices of Populism cried out against the economically powerful few who seemed to be responsible for crushing the many.”¹⁰⁵ Critics, including famed writer Upton Sinclair, railed against the advertisement based press structure whose growing monopolistic nature threatened to undermine the ideals of the free and open press advanced by early American interpretations of the freedom of the press clause.¹⁰⁶ Indeed, certain populist movements advocated for alternative press structures such as nonprofit or municipally owned models and/or ad-less papers.¹⁰⁷ These reform arguments have resurfaced today in light of the current concentration of the newspaper industry.¹⁰⁸ However, with the “voluntary” adoption of a professional code of journalism in the early 1920s—due in part to threats of government regulation to open up access—the commercial press evaded such growing and pressing populist concerns.¹⁰⁹ Publishers skillfully reshaped and narrowed sentiments about freedom of the press from concern regarding maintenance of an open and free communication infrastructure to consternation regarding government encroachment upon them—the news gatherers and distributors.¹¹⁰

Even while veiling commercial successes through advertising, they adopted a code that on its face addressed the articulated concerns of a growing number of culturally (and politically) middle class and elite supporters who rallied against the mainstream press’s adoption of elements of tabloid journalism.¹¹¹ Specifically, the publisher supported professional code for reporters and editors advanced the “disciplines of accuracy, disinterestedness in reporting, independence from the people and organizations reported upon or affected by the report, a mode of presentation sometimes called objective or neutral, and the clear labeling of what is

103. MCCESNEY & NICHOLS, *supra* note 15, at 138.

104. See generally *id.* at 139; Fraser, *supra* note 74, at 109–42 (discussing counter discourses as oppositional constructions of identity and interests which challenged the hegemony of mainstream ideologies).

105. FULLER, *supra* note 17, at 13.

106. MCCESNEY & NICHOLS, *supra* note 15, at 139.

107. *Id.*

108. See VICTOR PICKARD, JOSH STEARNS & CRAIG AARON, SAVING THE NEWS: TOWARD A NATIONAL JOURNALISM STRATEGY 1, 10–11 (2009).

109. MCCESNEY & NICHOLS, *supra* note 15, at 140; PAUL ALFRED PRATTE, GODS WITHIN THE MACHINE: A HISTORY OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS 1923–1993 (1995).

110. MCCESNEY & NICHOLS, *supra* note 15, at 140.

111. *Id.* Indeed, “[f]or reporters and editors, professional journalism allowed them some autonomy from direct commercial pressures as they went about their work; for publishers, professionalism made their increasing market power and dependence upon advertising legitimate, and permitted them to generate extraordinary rates of return for a century.” *Id.*

fact and what is opinion.”¹¹² The issue was recast from a struggle for an open and participatory press infrastructure, to one for maintaining political news’s legitimacy itself.¹¹³ Political news was instead now determined by respectable (and rationally objective) professional journalists rather than by trash sensationalist journalists, an encroaching government or even the popular sentiments and desires of the public.¹¹⁴ It was a recasting that was itself a reflection of the historical moment in which it arose.¹¹⁵ This progressive era sentiment, itself an extension of the historical era “generally referred to as modernity . . . was marked by twin forces of rationalization and professionalization—the dividing of social life into distinct domains and the reliance on professional expertise to identify and solve problems within those domains.”¹¹⁶

Benefitting directly then from self imposed adoption of a professional code reflecting modernity’s ideals, publishers’ commercial interests were secreted by their “high-modern journalists [who] were assumed to be informational professionals, value free experts committed to the ideals of an objective public interest and the rational pursuit of social order.”¹¹⁷ Pursuant to such code, the “distinctive and crowning claim of professional journalism was that a division could be established between the owner/advertiser on the one hand and the editor/reporter on the other hand.”¹¹⁸ Moreover, the process of becoming a professional required an eradication of “petty passions and narrowed ambitions,” which were both deemed flaws to reason.¹¹⁹ Similarly, the civically engaged participant in Habermas’s idealized public sphere was, like the professional journalist, expected to disengage from commercial pressures and bracket private self-interests to engage in reasoned debate and argument to objectively assess the common good.¹²⁰ In Habermas’s idealized public sphere, reasoned debate alone was *the* method of communicating sentiments in a deliberating democracy.¹²¹ Similarly with professional journalism, rationality, reason and refinement were cast as the polar opposite of the emotional (and hence the sensational), with the former construed as satisfying the noble, public and democratic good and the latter

112. FULLER, *supra* note 17, at 12.

113. MCCHESENEY & NICHOLS, *supra* note 15, at 135.

114. *Id.*

115. FULLER, *supra* note 17, at 12–15. Publishers and their professional code both reflected and benefitted from a citizenry coming out of the travesties of the American Civil War who found “the values of professionalism and expertise . . . attractive [because] they implied impersonality, respect for institutions as effective organizers of enterprise . . . [and the] . . . antidote to the human passions and fighting faiths that recently, as throughout history, had produced unutterable horror.” *Id.* at 13.

116. BAYM, *supra* note 1, at 11.

117. *Id.* at 11–12.

118. MCCHESENEY & NICHOLS, *supra* note 15, at 140.

119. FULLER, *supra* note 17, at 14. Indeed, implicit in the allegiance to reason is a distrust of emotions, as made clear by Justice Pound that “[i]n place of reason we have subconscious wishes, repressed desires, rooted behavior tendencies, habitual predispositions.” Roscoe Pound, *The Cult of the Irrational*, WELLESLEY ALUMNAE MAG., Aug. 1929, at 368, *quoted in* MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* 126 (1978).

120. Gardiner, *supra* note 74, at 35.

121. Habermas, *supra* note 71, at 423.

satisfying private, selfish and individualistic interests.¹²²

Although the commercial pressures from an advertisement subsidized printing press and an exacting professional code continually clashed and eventually imploded—as shown by the current economic crisis in print journalism—at the time, the adoption of the code veiled publisher private interests and staved off government interference in the news business.¹²³ Moreover, presumptive norms that developed from such code’s implementation positioned reporters and editors as the proper arbiters for determining newsworthiness and standards for political news’s distributional style, format and content.¹²⁴ Arguably, the code also assumed that professional and editorial journalistic judgments could be neutrally authoritative and without commercial (or political) influence in determining what constituted democratically valuable information.¹²⁵ The assumptions underlying these norms all came to the fore with the development and regulation of broadcast, the viewing preferences of the entertained, the commercialization of network news and the politicization of entertainment programming.¹²⁶

B. BROADCAST’S DELIBERATIVE GOALS: EARLY REGULATORY COMPROMISES, EQUAL TIME AND ACCESS AND BONA FIDE NEWS

While of negligible interest to the government for regulatory purposes in the early stages of broadcast development, by the 1920s, radio had massive appeal and was in such high demand that the government was summoned by citizens and businesses alike to regulate the chaos and cacophony on the air caused by signal interference and programming overlap.¹²⁷ In regulating broadcasting, Secretary of Commerce Herbert Hoover declared early on that “[t]he ether is a public medium, and its use must be for a public benefit. . . . The dominant element for consideration in the radio field is, and always will be, the great body of the listening public.”¹²⁸ As authorized by the Radio Act of 1912, legislation enacted due to widespread public appeals for government intervention, Hoover distributed broadcast radio licenses to citizens on a first come first serve basis at a time when spectrum availability met demand.¹²⁹ Without a legal framework for distributing such licenses, however, the airwaves became cluttered, resulting in indecipherable noise that threatened the industry’s development as a communication medium.¹³⁰

122. Ornebring & Jonsson, *supra* note 33, at 284.

123. MCCHESENEY & NICHOLS, *supra* note 15, at 44.

124. *Id.*

125. FULLER, *supra* note 17, at 12 (elaborating on the developmental principles of the Standard Model of Professional Journalism).

126. See NORD, *supra* note 89, at 10–11 (discussing a revitalized civic journalism as a possible recourse for the journalism industry’s rampant commercialization).

127. Akilah N. Folami, *Deliberative Democracy on the Air: Reinvigorate Localism—Resuscitate Radio’s Subversive Past*, 63 FED. COMM. L.J. 141, 149–50 (2011).

128. Herbert Hoover, *Proceedings of the Fourth National Radio Conference and Recommendations for Regulation of Radio*, Nov. 9–11, 1925, 1926 DEP’T OF COMM. 7.

129. See Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 (repealed 1927); ADVISORY COMMITTEE, *supra* note 54, at 18.

130. Mike Harrington, Note, *A-B-C, See You Real Soon: Broadcast Media Mergers and Ensuring*

In addition, as diverse groups vied for licensure, free speech rights became entangled in the call for better regulation on the use and licensing of the finite broadcast frequencies.¹³¹ To protect their speech interests, members of the broader public, including religious groups, labor activists and educators, rallied for a common carrier regime for broadcast licensing.¹³² Under this regime, broadcasters, including existing licensees, would have been required to allow anyone to buy airtime on a nondiscriminatory basis.¹³³ In staunch opposition to this common carrier model, existing broadcast licensees urged Congress to grant them full free speech rights, including complete editorial control over the use of the licensed spectrum.¹³⁴ Such control was deemed necessary to effectuate their commercial interests in linking local individual stations to one centralized national headquarter, an agenda in direct conflict with congressional goals to maintain local access outlets for listeners within the broadcaster's community.¹³⁵ In 1923, broadcasters developed the National Association of Broadcasters and adopted a code a few years later in hopes of self-correcting their chaotic industry and staving off government imposed regulation as the newspaper industry did with adoption of its own professional code around the same time.¹³⁶ Such self-imposed regulatory efforts were abysmally unsuccessful, as individual and commercial broadcasters often continued to collide with each other on air.¹³⁷

With passage of the Radio Act of 1927, Congress attempted to address the confusion on the air, and in doing so, also rejected broadcasters' efforts to receive the degree of first amendment editorial rights granted to the press.¹³⁸ Such rejection was due to the broadcast industry's readily apparent commercial interests in networking local radio stations.¹³⁹ Arguably, rejection was also due in part to the broadcast industry's failure to embrace and accept public trustee obligations, as newspaper owners had done (at least facially), with adoption of a professional journalism code that canonized public servant responsibilities in its requirement of objective and impartial factual reporting of political news.¹⁴⁰ Indeed, although the

a "Diversity of Voices", 38 B.C. L. REV. 497, 504 (1997).

131. ADVISORY COMMITTEE, *supra* note 54, at 18.

132. *Id.*

133. *Id.*

134. *Id.*

135. Folami, *supra* note 127, at 150–51 (discussing early congressional goals in distributing broadcast licenses broadly and locally to effectuate diversity on air rather than ceding control over the nation's airwaves in one central licensee).

136. *Id.*; ADVISORY COMMITTEE, *supra* note 54, at 46; MCCHESENEY & NICHOLS, *supra* note 15, at 140 ("In an era when concerns about monopoly power were common, the American Society of Newspaper Editors was created and as its first act formally adopted a professional code for journalism.").

137. Ricchiuto, *supra* note 14, at 267, 269.

138. Radio Act of 1927, ch. 169, §§ 4, 11, 12, 44 Stat. 1163, 1167; ADVISORY COMMITTEE, *supra* note 54, at 19.

139. See generally Paul Cowling, *An Earthy Enigma: The Role of Localism in the Political, Cultural and Economic Dimensions of Media Ownership Regulation*, 27 HASTINGS COMM. & ENT. L.J. 257, 288 (2005).

140. See also MCCHESENEY & NICHOLS, *supra* note 15, at 140.

1927 Act prohibited the imposition of any common carrier regulations on broadcast, it included a requirement that effectively limited broadcasters' first amendment editorial rights.¹⁴¹ Specifically, the Act required broadcasters to provide access to, or content on, their licensed airwaves pursuant to the interest, convenience and necessity of the public, as determined by the FCC.¹⁴² The FCC was also given broad discretion to define such obligations as time and circumstances required.¹⁴³ This Article contends that, in contrast to the press that "volunteered" and professed to serve the public in a way that sustained political discourse—even while veiling commercial and monopolistic private interests of publishers—broadcasters were now arguably subject to continued regulatory oversight pursuant to the public interest standard for failing to do the same.¹⁴⁴ In exchange for a license to broadcast for free (an item of considerable commercial value due to high public demand), broadcasters agreed to comply with the government imposed public interest obligations that required them to act as public trustees of broadcast for the benefit of the public.¹⁴⁵

The abridgement of broadcaster first amendment rights was also premised on scarcity doctrine—the idea that the broadcast spectrum is a scarce resource.¹⁴⁶ Because spectrum is scarce, government intervention was deemed necessary not only to ensure efficient use of a finite number of frequencies, but also to prevent unchecked commercial and monopolistic ventures that threatened to undermine America's deliberative infrastructure.¹⁴⁷ Indeed, despite the common carrier compromise that would have granted the public direct access to the airwaves, Congress included two common carrier-like provisions, namely the right to access and the equal time rules, which effectively required broadcasters to fulfill a

141. ADVISORY COMMITTEE, *supra* note 54, at 19.

142. *Id.*

143. *Id.* These changes were solidified with the passage of the Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064 (codified as amended at scattered sections of 47 U.S.C.) (installing effectively the seven member FCC and replacing the Federal Radio Commission as the regulatory body). Moreover, pursuant to such public interest obligations, the FCC also eventually required broadcasters to air children's educational programming and public affairs programming. *Id.* at 28–30. The FCC also interpreted such standards in a manner that prohibited broadcasters from airing obscene content and content deemed indecent during certain times of the day. Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J.L. SCI. & TECH. 1, 39–40 (2004).

144. See also Thomas Blaisdell Smith, Note, *Reexamining the Reasonable Access and Equal Time Provisions of the Federal Communications Act: Can These Provisions Stand if the Fairness Doctrine Falls?*, 74 GEO. L.J. 1491, 1493 (1986) ("[T]he physical limitations of the broadcast spectrum justify government supervision of programming content pursuant to the public interest convenience and necessity standard to ensure that the public is not denied the views of those not privileged with licenses and that the broadcast audience is exposed to a diverse marketplace of ideas.").

145. Tracey Westen, *Government Created Scarcity: Thinking About Broadcast Regulation and the First Amendment*, in DIGITAL BROADCASTING AND THE PUBLIC INTEREST 47, 57 (Charles M. Firestone & Amy Korzick Garmer eds., 1998).

146. See *Red Lion v. FCC*, 395 U.S. 367 (1969).

147. Kristine Martens, *Restoring Localism to Broadcast Communications*, 14 DEPAUL-LCA J. ART & ENT. L. & POL'Y 285, 291–92 (2004).

deliberative role early on in exchange for free licensure.¹⁴⁸ Drafted into the 1927 Act and affirmed in the Communications Act of 1934 at 47 U.S.C. §§ 315(a) and 312(a)(7), the right of access and equal time rules imposed affirmative obligations on broadcasters to provide candidates seeking federal office the right to purchase airtime, and to provide equal access to the airwaves for all candidates seeking an elective office once one candidate for that same office was granted access.¹⁴⁹ These two provisions were thought of as helping to invigorate and sustain political life by providing citizens access to information about candidates running for office.¹⁵⁰

Indeed, as an informational obligation on broadcasters, the inclusion of both sections manifests congressional acknowledgement of the “political potentialities of radio,” and of an intent “to encourage full and unrestricted discussion of political issues by legally qualified candidates . . . over radio and [subsequently] television.”¹⁵¹ Both sections manifest Congress’ “early recognition of the pressing need to provide the public with information regarding the functioning of the political process and the qualifications of candidates.”¹⁵² Moreover, they were enacted early on at the inception of mass media to effectuate a deliberative infrastructure that had as its goal enabling the “population to better compare the positions and qualifications of alternative candidates, [and to make] . . . more informed voting decisions.”¹⁵³

Sections 315(a) and 312(a)(7) also evidence congressional concerns about a perceived broadcaster threat to the deliberative infrastructure ideals valued in early American press history, given broadcast’s ability to influence the public.¹⁵⁴ Indeed, as expressed in Representative Johnson’s statement in 1926:

The power of the press will not be comparable to that of broadcasting stations when the industry is fully developed They can mold and crystallize sentiment as no agency in the past has been able to do. If the strong arm of the law does not prevent monopoly ownership and make discrimination by such stations illegal, American thought and American politics will be largely at the mercy of those who operate these stations.¹⁵⁵

Therefore, § 315(a) specifically provides that during an election season, when a broadcaster permits a “legally qualified candidate for public office to use his broadcast station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.”¹⁵⁶ The statute’s legislative

148. Smith, *supra* note 144, at 1491.

149. 47 U.S.C. §§ 301–26 (2006); Smith, *supra* note 144, at 1491–92.

150. Smith, *supra* note 144, at 1498.

151. S. REP. NO. 86-562, at 3 (1956); Smith, *supra* note 144, at 1497 (internal citation omitted).

152. Smith, *supra* note 144, at 1504 (discussing the writings of James Madison, author of the Bill of Rights).

153. *Id.* at 1509.

154. 47 U.S.C. §§ 312, 315.

155. 67 CONG. REC. 5558 (1926).

156. Radio Act of 1927, ch. 169, § 18, 44 Stat. 1162, 1170 (1927) (codified as amended at 47 U.S.C. § 315 (2006)).

history makes clear that its purpose is to “require a broadcaster to treat equally all candidates for a particular office . . . once the broadcaster has made its facilities available to any one candidate.”¹⁵⁷ Moreover, to ensure evenhandedness of candidate access and exposure on mass media, candidate “uses” that triggered equal time requirements were defined broadly to include “any positive appearance of a candidate by voice or picture.”¹⁵⁸ With the 1959 Amendment to the equal time rule exempting bona fide news appearances, it became clear that the use requirement was not intended to include appearances on network news programming.¹⁵⁹ On the other hand, candidate appearances on entertainment programming like children’s shows, comedy shows and rebroadcasts of movies featuring candidates did trigger, perhaps appropriately, equal time requirements.¹⁶⁰ Such shows were not seen as satisfying the factors for applying the bona fide news exemptions, which required that the show be regularly scheduled, that the broadcaster control the program, and that the broadcaster’s decisions on format, content and participants be based on newsworthiness and not on an intention to favor or harm an individual’s candidacy.¹⁶¹

As this Article asserts, however, these bona fide news exemptions and their early interpretations and application reified existing network norms that positioned the industry created broadcast journalist as gatekeeper of political news. Such norms relegated political news to network news programming and bifurcated it from entertainment programming—a separation that sought to juxtapose reason and pleasure, with the former valued and the latter not, for deliberative purposes.¹⁶² Moreover, this split between the unprofitable, but civic network news, from the profit based entertaining fare essentially replicated the bifurcation in the 1920s of the press’s professional journalism ethic from the publisher’s commercial motives to increase advertising revenues that were underlying the newspaper industry.¹⁶³ Indeed, it readily became apparent through the mass medium of television that such divisions came at the expense of fostering a more inclusive and participatory

157. Holcomb, *supra* note 26, at 88 (citing *Paulsen v. FCC*, 491 F.2d 887, 889 (9th Cir. 1974)).

158. *Id.* at 87; Codification of the Commission’s Political Programming Policies, 9 FCC Rcd. 651, 651 (1994).

159. Smith, *supra* note 144, at 1498 (citing *Paulsen*, 491 F.2d 887).

160. *Paulsen*, 491 F.2d at 890 (finding equal time requirements triggered even by candidate’s appearance on entertainment programming); Adrien Weiss, 58 F.C.C.2d 342 (1976) (finding a broadcasting of movies featuring presidential candidate Ronald Reagan would constitute a use); Walt Disney Prods., Inc., 33 F.C.C.2d 297 (1972) (finding candidate appearance on Disney’s children show, “The Mouse Factory” was a use).

161. Janow, *supra* note 26, at 1080.

162. BAYM, *supra* note 1, at 11, 40 (discussing how the network news format “sacrificed aesthetic appeal in favor of indexical realism,” and that “[i]n so doing so, it reinforced modernity’s distinctions between the political normative and the aesthetic-expressive: between news and entertainment, and ultimately between politics and pleasure”).

163. *Id.* at 11 (discussing the perception of network news as being for the primary purpose of providing information to the public even if not profitable and divorced from the larger networks “profit seeking strategies”); see ANDERSON, *supra* note 1, at 6 (discussing that initially broadcasters accepted that the provision of news was unprofitable and often over budget in its production, but provided news pursuant to their watchdog commitments).

citizenry in the mainstream political public sphere and discourse.¹⁶⁴

C. CREATING “NEWS,” AND THIN CITIZENSHIP: “MEET THE PRESS” AS BONA FIDE NEWS

In 1959, the FCC held in the *Lar Daly* decision that an incumbent’s brief appearances in a number of network news clips during election season—including one showing him greeting a foreign president and another where he solicited contributions for the March of Dimes—constituted a “use” that triggered equal time requirements.¹⁶⁵ Congress moved swiftly that year to amend the equal time rule to override such literal interpretation of the rule’s use requirement.¹⁶⁶ The 1959 amendments exempted bona fide news documentaries, on the spot news coverage of bona fide news events, bona fide newscasts and bona fide news interviews.¹⁶⁷ The purpose of the amendments was, among other things, to “restore the *understanding* of the law that had prevailed previously.”¹⁶⁸ This understanding related specifically to the presumed deliberative value of network news. The legislative history also illuminates the drafters’ concerns that these exemptions might “offer a temptation as well as an opportunity for a broadcaster to push his favorite candidate and to exclude others.”¹⁶⁹ These exemptions arguably resurrected the concerns regarding broadcast’s potential influence on the political process which were at the heart of the equal time rule’s initial inclusion in the 1927 Radio Act.¹⁷⁰

Additionally, the legislative history makes clear that Congress deemed such risk to be outweighed by appearances “presented at the initiative of the station as part of a routine news broadcast in the exercise of the station’s judgment as to newsworthy events,” because “[no] one will question that the categories of programs exempted . . . serve to enlighten the public.”¹⁷¹ While appearances on entertainment programming were presumed inherently suspect as an unsavory mold or crystallizer of public democratic sentiment, most, if not all, candidate appearances on the *same* broadcast owner’s network news were accepted as political news and in turn bona fide news.¹⁷² The implication then was that the appearances (and all content for that matter) that appeared thereupon were

164. *Id.* at 12 (providing that professional journalism norms “reduced the role of the citizens, speaking at and for them but allowing them no role in the conversation except as the audience”).

165. CBS, Inc. (*Lar Daly*), 18 Rad. Reg. (P & F) 238, *reconsideration denied*, 26 F.C.C. 715 (1959).

166. Smith, *supra* note 144, at 1498.

167. Equal Time Amendment to Communications Act of 1934, Pub. L. No. 86-274, 73 Stat. 557 (codified as amended at 47 U.S.C. § 315(a) (2006)).

168. Branch v. FCC, 824 F.2d 37, 43 (D.C. Cir. 1987) (emphasis added).

169. S. REP. NO. 86-562, at 14 (1959).

170. *Id.*

171. *Id.* at 5, 10.

172. See Paulsen v. FCC, 491 F.2d 887, 890 (9th Cir. 1974); Holcomb, *supra* note 26, at 103 (“The FCC . . . acknowledg[ed] that the Congressional intent of the 1959 amendments was to give broadcasters a ‘greater degree of editorial discretion.’” (citing S. REP. NO. 86-562, at 12 (1959))).

presumed then to be newsworthy, trustworthy, political and of inherent civic and democratic value to the viewing public. In addition, television reporters and editors were also presumed to be worthy of viewer trust, objectively separated in principle from political favoritism and the private commercial interests of their broadcast owners, and even disentangled from the slavish self-interested consumption oriented desires of the viewing public.¹⁷³

For example, although the FCC was given exceptional deference in equal time claims, Congress made clear with the 1959 amendments (which effectively reversed the FCC's *Lar Daly* decision) that it sanctioned candidate appearances on network journalism—a televisual adaptation of the professional journalism code of the mainstream commercial press.¹⁷⁴ Specifically, with the creation of the first news program on CBS in 1948, broadcast owners dug television out of the perception as a commercialized threat to democracy and ironically erected it instead, via network news divisions, as the arbiter of all that is newsworthy and hence political.¹⁷⁵ Through the personification of the printing press's professional code of journalism and the visual image of anchormen like Edward Murrow and Walter Cronkite, television was finally welcomed as an arm of the metaphorical Fourth Estate, and soon came to define it.¹⁷⁶ The networks' uniform construction of political news was sustained not only by a regulatory framework that readily accepted it as satisfaction of federally imposed public interest obligations, but also by a legal elevation of it in deliberative stature as satisfaction of the bona fide news cast and news interview exemptions.¹⁷⁷

For nearly three decades following the enactment of these exemptions, they were only applied to network news programming and to traditional news inspired public affairs programs like "Meet the Press" and "Face the Nation," where professional and political commentators often interviewed political candidates.¹⁷⁸ Although Congress did not specifically define exempted bona fide news programs, it did provide "Meet the Press" and similar public affairs programming as examples.¹⁷⁹ Such shows characteristically had professionals and experts, who interviewed politicians on selected topics of interest, and as a result, presumably informed the public.¹⁸⁰ Indeed, network news and such related public affairs

173. BAYM, *supra* note 1, at 11.

174. See Holcomb, *supra* note 26, at 91–92. The exemptions were generally granted with such appearances, absent that is, clear evidence indicating a lack of good faith on the part of the broadcaster. Smith, *supra* note 144, at 1498.

175. DAHLGREN, *supra* note 5, at 48, 62; JONES, *supra* note 31, at 149, 158, 182.

176. BAYM, *supra* note 1, at 9, 10, 30; JONES, *supra* note 31, at 158.

177. BAYM, *supra* note 1, at 11. As Baym writes:

[F]ederal regulation was built on the principle of trusteeship . . . the insistence that in order to profit from the use of the public airwaves, broadcasters were obliged to act as trustees of the air and serve the 'public interest, convenience, and necessity' . . . [F]or many local television news, that requirement was easily met by broadcasting the nightly network news.

Id.

178. Holcomb, *supra* note 26, at 93.

179. 105 CONG. REC. 17,779 (1959); Holcomb, *supra* note 26, at 93.

180. S. REP. NO. 86-562, at 14 (1959) (indicating that the civic value of such information to the public when provided as part of a news broadcast was a given).

programs were presumed to provide the reasoned information necessary for a healthy democratic culture, including information gleaned by journalists from candidate appearances on network news programs.¹⁸¹

However, this construction of political news and, by extension, bona fide news also perpetuated what some scholars have defined as a thin citizenship that limited and defined who could participate, and how one could participate, in the political public sphere and discourse.¹⁸² Indeed, such norms “offered no role for the public to play save that of passive audience, whose requirements for citizenship could be fulfilled simply by watching TV. High modern news thus encouraged a kind of thin citizenship, one . . . that confirmed the public’s psychological incompetence to participate in the culture of democratic publicity.”¹⁸³ As a result, public discourse and the attainment and distribution of political news largely became the domain of the professionals. Professionalism and rationality required a self-bracketing (or the appearance of self-bracketing) of all private interests or experiences that, if left unchecked, undermined the objective political discourse.¹⁸⁴ The net result after such bracketing was a rational, democratic and political culture and discourse that was construed as primarily white and male, a point also made by those critiquing Habermas’s idealized public sphere and its “deliberating peers.”¹⁸⁵ Concerns and issues of those that did not fit such characteristics, including those of minorities, were marginalized during what some have ironically characterized as the Golden Age of Journalism.¹⁸⁶ If not captured by the gatekeepers, the expressivity of such marginalized groups, be it in social protests or other activities, was presumed to be irrational, civically unruly and, indeed, antidemocratic.¹⁸⁷ With the advent of cable and the public demand for more of a participatory role in shaping and processing political news and political discourse, the norms and assumptions attached to the Golden Age began to buckle, thereby foreshadowing the crisis broadcast journalism now faces in deliberately engaging the public.

II. EXPOSING THIN CITIZENSHIP

With less face to face exchange and with the increase of media based negotiation, public sphere theorists now contend that the public sphere is a mediated one, and that television and its content must be understood as a

181. BAYM, *supra* note 1, at 168 (noting that high-modern journalism was assumed to be providing the citizen with factual information and reasoned interpretation of the political process); *see also* Sunstein, *supra* note 41, at 510 (contrasting traditional network news with the current culture, where there is “too little coverage of serious questions, especially during political campaigns,” and noting that “[t]he relevant coverage may involve sensationalism and ‘sound bites,’ or attention to who is ahead (‘horse-race issues’) rather than who thinks what and why”).

182. BAYM, *supra* note 1, at 170.

183. *Id.*

184. *Id.* at 11 (“[H]igh modern journalists were assumed to be informational professionals, value-free experts committed to the ideals of an objective public interest and the rational pursuit of social order.”); JONES, *supra* note 31, at 44.

185. Fraser, *supra* note 74, at 115–17.

186. BAYM, *supra* note 1, at 49; MCCESNEY & NICHOLS, *supra* note 15, at 50–51.

187. BAYM, *supra* note 1, at 49.

sociocultural invention shaped by the political culture in which it exists.¹⁸⁸ For well over four decades, until the mid-1980s, the big three networks (ABC, NBC and CBS) dominated and defined television and broadcast journalism.¹⁸⁹ Through the uniform provision of network news programming, the networks imposed a unitary language of political news as defined by their broadcast journalists and, in doing so, reinforced a psychological dependence in the viewer citizen on such journalists for public and participatory cues regarding political importance and the need for civic attention and engagement.¹⁹⁰ There was little space or relevance in the political discourse for entertainment, or for the whims and pleasures of the entertained—the viewing public. The networks then, like the newspaper monopolies that arose out of an advertisement supported press system in early American press history, seemed to become the mainstream political public sphere in mass media form. Network news typified the bourgeois political public sphere, and was likewise infused with culturally exclusionary and elitist norms.

A. DAYTIME TALK SHOWS AS SUBALTERN PUBLIC SPHERE: “DONAHUE” AS BONA FIDE NEWS

Broadcast’s hegemony over political news, political discourse and the viewing public began to unravel in the mid-1980s with cable’s introduction of alternate entertainment programming; subscribers were now no longer confined to network news during prime time evening hours.¹⁹¹ This shift signaled the beginning of the end of network news’s presumptive norms regarding broadcast journalists’ elevated status as gatekeepers of political news and discourse, of the bifurcation of political news on network formats rather than entertaining ones and of the perpetuation of a democratic culture that narrowly defined civic engagement of the viewing public as passive followers.¹⁹² As viewers began to exercise their own agency and to choose

188. DAHLGREN, *supra* note 5, at 40.

189. Sunstein, *supra* note 41, at 527 (noting that for over three decades television programming was provided by the three large networks and later public broadcasting).

190. BAYM, *supra* note 1, at 12 (discussing how the networks’ presentation of the news during the network age “imposed . . . a ‘unitary language’ . . . a singular worldview that limited the range of understandings about the nature of the political domain and the ways in which it could be represented. Reproduced each day, this worldview was taken as the self-evident expression of common sense.”); JONES, *supra* note 31, at 43; James W. Carey, *The Press, Public Opinion, and Public Discourse, in PUBLIC OPINION AND THE COMMUNICATION OF CONSENT* 390–91 (Theodore L. Glasser & Charles T. Salmon eds., 1995) (arguing that modernity’s social construction of political discourse confirmed the public’s perceived “psychological incompetence” to deliberatively engage in democratic culture).

191. BAYM, *supra* note 1, at 15 (noting that with the advent of cable, media networks “lost the tight control they used to have over where and when viewers watched particular programs”).

192. JONES, *supra* note 31, at 6. The networks:

maintained an artificial separation between politics and popular culture, specifically assigning public affairs programming to news divisions while entertainment . . . was managed by different divisions Through forced segregation . . . network executives construed politics in reductive terms, primarily handled by experts, employing a grave and serious tone This separation began to be erased, however with the advent of competition from cable and its challenge to the network oligopoly in the post-network era.

Id.

from a motley of viewing options made possible by the advent of cable programming that included twenty-four hour cable news and political pundit talk shows, broadcast journalism was no longer perceived as the sole authority on political news.¹⁹³

Moreover, cable's introduction and increase of entertainment programming made unsustainable broadcaster insistence on relegating political news to a format deliberately devoid of aesthetic or popular appeal and on premising continued network news viewership on a thinly defined notion of a paternalistic citizenship.¹⁹⁴ Many television viewers began to turn from network news to cable's entertainment offerings, perhaps exhibiting not only a preference for entertainment over televised news programming, but also a disconnect from, and distaste for, the imposed unitary language and presumptions underlying the provision and production of network news and, indeed, democratic culture itself.¹⁹⁵ They continued to turn to television for pure pleasure and escapism, and soon also for help in processing their everyday life experiences, which necessarily often included discursive exchanges about politics and political news.¹⁹⁶ In doing so, viewers challenged network news's and broadcast journalists' top down notions of citizen engagement and political relevance. Television steadily evolved into a medium through which human experiences and cultures were both fostered and

193. BAYM, *supra* note 1, at 13, 16 (discussing characterization of more than half of American public as "news gazers" receiving information from a motley of sources at no particular set time of day).

194. See JONES, *supra* note 31, at 210 ("Citizenship is more than membership in a society. It is a component of our identity . . . a cultural phenomenon that is conceived, negotiated, assembled, fought over . . . through our everyday interactions within that society. The segregation of citizenship from consumption, public from private, rationality from emotion . . . is no longer tenable."). The network era and modernity required a distinction between:

news and entertainment, and ultimately between politics and pleasure. It offered its viewers little incentive to tune in beyond its . . . commitment to serving the needs of citizens. As such, it depended on its appeal to the audience's sense of duty, the obligation of citizenship. In the face of burgeoning entertainment choices, . . . such an approach to news . . . [was] . . . increasingly untenable.

BAYM, *supra* note 1, at 40. Indeed, in his recent book, former journalist Jack Fuller discusses the role of emotions in aiding the brain in processing information. FULLER, *supra* note 17, at 64, 175. For Fuller, the lack of emotions could actually lead to poor reasoning while appeals to emotions can be key to helping one process and be attracted to information. *Id.*

195. BAYM, *supra* note 1, at 169; see also DAHLGREN, *supra* note 5, at 41; JONES, *supra* note 31, at 21–25 (discussing that while traditional measures of civic engagement, such as voting, voluntarily assisting in campaigning and following political knowledge declined considerably until the 2006 and 2008 campaigns, citizen's engagement became "textual" and participatory rather than formally organizational in that the public clamored, often via negotiations in the media, to define their own social, community and public identities). Indeed, such shift was also due to the shift in political and popular cultural sentiments towards politics, politicians, political talk and, in turn, network news as exemplified by the election of former actor Ronald Reagan, whose presidential campaign included calls for taking back big government from the politicians and their bureaucratic posturing. *Id.* at 48.

196. DAHLGREN, *supra* note 5, at 21; JONES, *supra* note 31, at 221–22 (providing that politics came to be viewed as something that is not attended to separately and "cordoned off from the rest of one's identity, activities or existence in the world. Politics . . . [became] . . . one of many facets of a person's life, and it too include[d] drama and humor, seriousness and entertainment, importance and triviality").

stifled.¹⁹⁷ It increasingly became a way of aiding public understanding of the everyday, the mundane, the entertaining and indeed, the political: it was the medium through which the everyday was negotiated from a variety of points, including the rational and the pleasurable, and a sometimes simultaneous comingling of the two.¹⁹⁸

The popular mass appeal of daytime talk shows, like “Donahue,” manifested such desired negotiations.¹⁹⁹ While “Donahue” and other such talk shows were created ironically as a part of broadcasters’ efforts to capitalize on growing popular sentiments to be involved in political discourses, viewers participated in setting and shaping political agendas through the studio audience and call in portions of the shows.²⁰⁰ Indeed, with former professional broadcast journalists as talk show hosts on entertainment programming, ordinary citizens brought to the fore issues of relevance to their everyday lives.²⁰¹ They also widened the mainstream political discourse by discussing political news and engaging politicians and candidates directly when they appeared on such shows—a discursive exchange once reserved only for broadcast journalists and political correspondents.²⁰² In response, mainstream broadcast journalists disapproved of such comingling of politics on entertaining formats, as their print counterparts did with yellow journalism decades earlier, and maintained their allegiance to reason, decorum and objectivity, even in the face of decreasing viewership and civic engagement.²⁰³ Viewers and their viewing choices were dismissed as apathetic, self-interested and enslaved to their prurient interests, which threatened the conceived purity and rationality of democratic culture.²⁰⁴

With the first *Donahue* decision, the FCC, under the leadership of Republican Anne Jones, implicitly seemed unwilling to acknowledge the participatory potentiality of talk shows like “Donahue,” arguably falling back instead on conventional network news norms of professionalism and the rational.²⁰⁵ Indeed, although the FCC found that there was no evidence of any bad faith to provide political advantage to any political candidate over another with respect to the appearance, in its first *Donahue* decision, the agency denied Multimedia’s original

197. DAHLGREN, *supra* note 5, at 40.

198. *Id.* Some scholars, however, in advocating for retrenchment from the market based approach to broadcast regulation and for reform of media and public affairs programming, fail to acknowledge the duality of the viewing consumer/citizen. See, e.g., Sunstein, *supra* note 41, at 514. Politicized entertainment and viewer engagement with such programs reveal, however, that the interests of the viewing public can be peeked simultaneously in his or her capacity as both consumer and citizen. JONES, *supra* note 31, at 222 (referencing the extent to which cable show “Politically Incorrect” simultaneously mingled politics and entertainment and, as a result, served as “a spark for drawing viewers toward greater discursive participation in politics—one that includes their ritualized habits and lives as cultural beings and citizens”).

199. DAHLGREN, *supra* note 5, at 62–63.

200. JONES, *supra* note 31, at 6.

201. *Id.*

202. *Id.*

203. BAYM, *supra* note 1, at 1–2.

204. See generally JONES, *supra* note 31, at 25.

205. Multimedia Program Prod., Inc. (*Donahue I*), 80 F.C.C.2d 217, 220 (1980).

request for a bona fide news interview exemption.²⁰⁶ The FCC took issue with the format because live studio “audience participation . . . takes the ‘Donahue’ format even further from the type of interview program contemplated by Congress in light of the regular participation by the studio audience and their ability to express personal views.”²⁰⁷ Specifically, the Commission found problematic the studio audience’s ability “to make statements and/or ask questions of the [political candidates] Indeed, by allowing members of the audience to make statements, the ‘Donahue’ program create[d] the very risks that Congress wanted to avoid—namely, a situation where a program could be used to advance the election of a particular candidate.”²⁰⁸ Not only did the FCC find extrapolating the unfiltered, nonbracketed opinions of the nonprofessional, studio audience problematic, but it also determined that the majority of the show’s selected topics did not fit within traditional understandings of bona fide news.²⁰⁹

Upon reconsideration four years later, the FCC reversed its original *Donahue* decision.²¹⁰ In doing so, credence was given to Multimedia’s argument in the first decision “that an evolution of innovative approaches to broadcast news programming not available when Congress enacted the news exemptions in 1959” should not preclude application of the exemption.²¹¹ In addition, still perhaps evidencing reluctance to totally unleash discourse to a nonprofessional studio audience, in *Donahue II*, the FCC noted “Mr. Donahue’s ability as a skilled professional journalist to maintain absolute control over all aspects of the unique ‘Donahue’ format,” and “to enhance the newsworthiness of individual interviews.”²¹² The Commission observed reassuringly that “Mr. Donahue cuts off any questioner who fails to comply with these procedures, and he relates questions posed by the audience in an attempt to focus upon what the licensee had determined was the appropriate journalistic approach to a particular topic.”²¹³ It concluded that a failure to recognize “Donahue” as a bona fide news interview program would send the message to broadcasters that in order to qualify for a bona fide news interview exemption, programs “should adhere only to the format of certain programs mentioned by Congress over twenty-five years ago.”²¹⁴

206. *Id.*

207. *Id.* at 222.

208. Multimedia Program Prod., Inc., 84 F.C.C.2d 738, 744 (1981); *see also* Multimedia Entm’t, Inc. (*Donahue II*), 1984 F.C.C. Lexis 2665, at *7 (1984).

209. *Donahue II*, 1984 F.C.C. Lexis 2665, at *11–12. The show’s topic lists for a three month period included shows that were deemed purely entertainment oriented, which related to, among other things, human interest stories like “The Super Mom Myth.” *Id.* After its review of the list, the FCC concluded: “[i]n total, it appears that 68% of the episodes reviewed are clearly not ‘news-type programs’ as envisioned by Congress, and do not deal with current news events.” *Id.* at *11 n.10. *See also* Cmty. Antenna Television Sys., 20 F.C.C.2d 201, 222 (1969).

210. *Donahue II*, 1984 F.C.C. Lexis 2665.

211. *Id.* at *2.

212. *Id.* at *1, *7.

213. *Id.* at *5.

214. *Id.* at *9. The FCC stressed that Congress not only referenced network news and related public affairs programs like “Meet the Press” and “Face the Nation” in the legislative history of the 1959 amendment as examples of bona fide news interview programs, but also referenced an innovative

Finally, to further effectuate congressional stated goals to “enable what probably has become the most important medium of political information to give the news concerning political races to the greatest number of citizens, and to make it possible to cover the *political news* to the fullest degree,” the FCC made clear that not only was the format immaterial, but that so also were the segments of the “Donahue” show that did not pertain “directly to the political arena, or even to current news events.”²¹⁵ If a show provided regularly scheduled news interviews with political candidates, the FCC found that the show could be entitled to an exemption from the equal time rule even if it was not specifically a regularly scheduled network news or related public affairs program.²¹⁶ Although the FCC reiterated that deference as to newsworthiness of a candidate’s appearance was to be given to the broadcaster, the FCC, within the same year, published a Political Primer on Political Broadcasting.²¹⁷ While *Donahue II* expanded the bona fide news interview exemption beyond its traditional application to network news and similar public affairs programming, the FCC, through its Political Primer, emphasized the importance of political news remaining substantive and newsworthy, irrespective of the format in which it was provided.²¹⁸

Indeed, the Primer added two additional factors to the other four to be considered when determining whether a program qualified for the exemptions under § 315(a):

(a) does the interview take place on a *bona fide news program*? If so, the interview is exempt regardless of its subject matter, the type of person interviewed or whether the news program always contains interviews . . . (b) [i]f the interview does not take place on a bona fide news program, does it take place on a bona fide news interview program?²¹⁹

More importantly, it specifically stated that “[m]any ‘interview’ and ‘talk’ programs do not qualify as news interview programs.”²²⁰ Finally, in referencing “bona fide news programs” in the Political Primer as an automatic application of the exemption, the FCC seemed to defer again to network news programming, which up until that time provided political news pursuant to—and in broadcaster acknowledgement of—broadcast journalists’ assumed watchdog and deliberative obligations.²²¹ FCC interpretations of the bona fide newscast and news interview exemptions, however, soon contradicted both the congressional intent underlying the enactment of the equal time rule and the import placed on sustaining political news and its newsworthiness in *Donahue II* and the Political Primer.²²²

While the *Donahue II* decision theoretically unraveled network news’s

program at the time called “Youth Wants To Know” that involved questions posed by *students*. *Id.*

215. *Id.* at *15; 105 CONG. REC. 14451 (1959) (emphasis added).

216. *Donahue II*, 1984 F.C.C. Lexis 2665 at *13.

217. Political Primer, 100 F.C.C.2d 1476 (1984).

218. *See id.*

219. *Id.* at 1496 (emphasis added)

220. *Id.*

221. Holcomb, *supra* note 26, at 100.

222. *See* Janow, *supra* note 26, at 1085.

deliberatively limiting modernist conventions, its full potential in drawing in wider audiences into the political discourse was cut short. It was undermined by subsequent FCC deregulatory efforts and by deference to broadcast editorial judgment that aimed to expand network news viewership to increase profits by selling viewers as a commodity to advertisers rather than to facilitate a more informed, inclusive and participatory public sphere.²²³ Indeed, inquiries relating to newsworthiness in the FCC's subsequent bona fide news cast and news interview exemptions refocused on show format and were underscored by deference to a broadcast journalism standard that was arguably slowly undone by market pressures escalated by FCC deregulatory policies and resulting consolidation in media ownership.²²⁴

B. DEREGULATION AND CONSOLIDATION

1. Professional Journalism as Spectacle

While the public sphere and political discourse had theoretically been widened by *Donahue II*'s recognition of alternate public discourse spaces (including entertainment formats), this Article posits that the potential of such rulings was stunted by the FCC's gradual and dramatic shift in its interpretation to broadcaster public interest obligations as primarily market determinative.²²⁵ President Reagan's newly appointed FCC Commissioner, Mark Fowler, was the first FCC Commissioner in the history of the FCC to advocate for the abandonment of the public trustee interpretive standard of the public interest obligation in favor of a market based approach.²²⁶ Pursuant to the market approach, the FCC gradually moved—and still continues to move—toward complete deregulation of broadcast.²²⁷ It has repealed many public interest regulations adopted to limit concentrated control over the nation's airwaves at the expense of local and diverse public viewpoints.²²⁸ Left by the wayside was the view that broadcasters were to act as public trustees of the airwaves. Instead, the public interest standard was now set by market determinants which turned on profit maximization and efficiency.²²⁹

In one such deregulatory effort, the FCC, beginning in the mid to late 1980s, adopted laws lifting the national and local caps on the number of broadcast stations

223. See generally C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS*, 25–87 (1994); see also Sunstein, *supra* note 41, at 515 (noting that broadcasters provide content to retain a certain advertiser desired demographic and to please such advertisers who “want programming that will put viewers in a receptive purchasing mood, and hence not be too depressing,” and that “[a]dvertisers also tend to dislike programming that is highly controversial or that is too serious, and hence avoid sponsoring shows that take stands on public issues” (internal quotations omitted)).

224. MCCHESENEY & NICHOLS, *supra* note 15, at 36–37.

225. See Wilfrid C. Rumble, *The FCC's Reliance on Market Incentives to Provide Diverse Viewpoints on Issues of Public Importance Violates the First Amendment Right to Receive Critical Information*, 28 U.S.F. L. REV. 793, 831–32 (1993–94).

226. *Id.*

227. See Rumble, *supra* note 225, at 834.

228. See *id.*

229. See *id.* at 832–34.

any one person or corporation could own.²³⁰ The effect of the repeal on ownership caps combined with the shift to the market approach eventually trickled down to the network news divisions as broadcast stations were bought out and taken over by large media and entertainment conglomerates.²³¹ This brought an end to the literal and proverbial division of entertainment programming and network news. With decreasing enforcement of public interest informational and watchdog obligations, new conglomerate owners abandoned public trustee obligations and focused instead on attracting viewers to increase advertising revenue.²³² The resulting pressure on broadcast journalists to retain network news's audience was intensified even more by the variety of political news and public affairs programming provided on cable.²³³ Network news was recast and commoditized, as entertainment programming had been for years.²³⁴ Broadcast journalists were also set up as celebrities and network news and political discourse were relegated to spectacle and entertainment in an effort to appeal to the viewer as consumer rather than as citizen.²³⁵

Despite the corporate squeeze behind the scenes, broadcast journalists continued to publicly swear allegiance to an ethical code of objectivity and impartiality.²³⁶ In practice, these concepts were eventually reduced to a meaning that did not resemble the watchdog functionality of the prior decades. Instead of shedding the light of publicity on abuses of power and critically holding those in power accountable, network news's ethical standards of objectivity and impartiality were reframed as fair and balanced and essentially recast as uncritical and neutral.²³⁷ Moreover, political news lost its substance and critique and was soon replaced with political sound bites and distracting broadcast journalist chatter and subjective commentary.²³⁸ Straight jacketed by commercial pressures, broadcast journalism developed into "gotcha journalism" aimed at critiquing politicians' performance and outing any inconsistencies rather than at interrogating politicians on the substance of their positions.²³⁹ Some scholars have argued that with commercial pressures looming more prominently than in the earlier era of network journalism,

230. Gregory M. Prindle, *No Competition: How Radio Consolidation Has Dismissed Diversity and Sacrificed Localism*, 14 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 279, 299 (2003).

231. Rumble, *supra* note 225, at 844–46.

232. BAYM, *supra* note 1, at 13; see Rumble, *supra* note 225, at 845–47.

233. ANDERSON, *supra* note 1, at xvii; BAYM, *supra* note 1, at 79–80.

234. BAYM, *supra* note 1, at 38 (discussing Disney's purchase of ABC and the resulting reference to ABC journalists as "cast members" of Disney's production); W. LANCE BENNETTE ET AL., *WHEN THE PRESS FAILS: POLITICAL POWER AND THE NEWS MEDIA FROM IRAQ TO KATRINA 3* (2008) (asserting that information passed off as political news has become largely governed by "pollsters, image shapers, marketers, handlers, and spin doctors," and now shapes much of the public's political communication).

235. BAYM, *supra* note 1, at 55 ("Network journalists had abandoned the role of institutional observer, and instead became characters in their own stories, their identities celebrated.").

236. See *id.* at 73 (discussing journalists' public statements on professional responsibility).

237. *Id.* at 68–69.

238. *Id.* at 55, 171 (discussing the cooptation of network news by rapid fire imagery and soundbites to "transform it into an instrument of public opinion management rather an institution of public information and accountability").

239. *Id.* at 74.

broadcast journalists are simply no longer in a position to interrogate or critique political figures.²⁴⁰ Indeed, such inquiry was stifled due in part to broadcast owners' increasing relationship with the politically powerful, who for lenient coverage and favorable treatment on the air endorsed deregulatory efforts or legislation favorable to their industry.²⁴¹ Indeed, despite efforts to effectuate reframed notions of objectivity and impartiality via fair and balanced coverage, some broadcast journalists became the targets of masterful media manipulation by politicians and, ultimately, became complicit in the manufacturing of political spectacle.²⁴²

2. Bona Fide News as Spectacle: "The Howard Stern Show" and Beyond

Just as broadcast journalists continued to reify a foregone journalism standard despite the network news's and political culture's transformation into infotainment and spectacle, FCC interpretations of the bona fide newscast and news interview exemptions, as this Article posits, seemed to follow suit. For example, "The Sally Jessy Raphael Show," which aired from 1983 to 2002, was granted the bona fide news interview exemption in 1991, even with featured shows on "'Married Men Who Act Like They're Single,' 'Cheating Wives' and 'Gay Men in Search of Rich Lovers.'"²⁴³ The FCC granted the bona fide news interview exemption to segments of the show on which a candidate might appear and decided, with one conclusory sentence, "all topics are selected on the basis of newsworthiness in the exercise of the producer's reasonable good faith judgment, with no intent to further any candidacy."²⁴⁴ Without any discussion of newsworthiness in the context of politics or the enlargement of political discourse, the FCC noted that the show's format met the factors of the bona fide news interview requirement that related to the show being regularly produced and under the control of the broadcaster.²⁴⁵ It noted also that "Ms. Raphael's 30 years of experience" in journalism "enable[d] her to control the program's format and questioning by the studio audience so as to avoid the advancement of any candidate."²⁴⁶

And in 1994, despite the warning contained in the Political Primer that not all talk shows and related content qualified as satisfying the newsworthiness requirement, the FCC granted the bona fide news interview exemption to segments of "Jerry Springer" that might have contained interviews with political

240. Rumble, *supra* note 225, at 844 (discussing consolidation of network ownership). See generally MCCHESENEY & NICHOLS, *supra* note 15, at 40.

241. Rumble, *supra* note 225, at 844 (discussing in detail how the conglomerates that took over the networks, including network news divisions, "depend[ed] on the government for a broad range of policy support, including favorable business taxes, interest rates, labor policies, and enforcement and nonenforcement of the antitrust laws").

242. BAYM, *supra* note 1, at 171.

243. Walter Goodman, *Critic's Notebook: 3 Queens of Talk Who Rule the Day*, N.Y. TIMES, July 29, 1991, at C11.

244. Multimedia Entm't, Inc. (*The Sally Jessy Raphael Show*), 6 FCC Rcd. 1798, 1798 (1991).

245. *Id.*

246. *Id.*

candidates.²⁴⁷ The ruling cited the oft-repeated statement that the host, Jerry Springer (like Sally Jessy Raphael), was an experienced broadcast journalist, who was able to prevent the advancement of a political candidate by the studio audience.²⁴⁸ It again summarily concluded that all topics were selected based upon the broadcaster's good faith judgment as to newsworthiness.²⁴⁹

More telling of the value placed on newsworthiness by the Political Primer, however, is the fact that most of these decisions were granted in the context of a declaratory ruling and without evidence that a single political candidate had even been interviewed on such shows or, at the very least, even appeared on one.²⁵⁰ In addition, in 2003, the FCC declared that the radio broadcast of "The Howard Stern Show" qualified as a bona fide news interview program exempt from the equal time rule.²⁵¹ The show has since moved to Sirius satellite radio in a purported effort to bypass FCC indecency broadcast regulations and fines.²⁵² It continues, however, to air programming similar to that once aired on broadcast radio (and that often ran afoul of FCC indecency regulations), such as "win a night with a porn star, fathers taking off their daughters' clothes if they get an answer wrong, homeless jeopardy, [and] evaluating women to see if they're good enough for [P]layboy."²⁵³ Moreover, without referencing or discussing any evidence of actual interviews with political candidates, the FCC also implicitly absolved itself of future inquiries as to whether political news was advanced by the appearance (should there actually be one). Indeed, in the decision, the FCC provided that "we emphasize that licensees airing programs that meet the statutory news exemption . . . need not seek formal declaration from the Commission that such programs qualify as news exempt programming."²⁵⁴

The FCC went on to grant the bona fide newscast exemption to those segments of the shows "Entertainment Tonight" and "Entertainment This Week" on which a

247. Multimedia Entm't, Inc. (*The Jerry Springer Show*), 9 FCC Rcd. 2811 (1994). There was no evidence in the record, however, or in a perusal of episode listings of "Jerry Springer" that it had ever conducted such interviews with political candidates. *Id.* This fact notwithstanding, the FCC granted the show the bona fide news interview exemption. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. Infinity Broad. Operations Inc. (*The Howard Stern Show*), 18 FCC Rcd. 18603 (2003).

252. Krysten Crawford, *Howard Stern Jumps to Satellite*, CNN (Oct. 6, 2004, 3:38 PM), http://money.cnn.com/2004/10/06/news/newsmakers/stern_sirius/.

253. HOWARD 101, <http://www.sirius.com/howard101> (last visited Aug. 5, 2010); *Show Overview: The Howard Stern Show*, TV.COM, <http://www.tv.com/the-howard-stern-show/show/2217/summary.html> (last visited Mar. 30, 2011) (describing the filmed version of Howard Stern's broadcast radio show) (pdf on file with author).

254. *The Howard Stern Show*, 18 FCC Rcd. at 18604; see also Ricchiuto, *supra* note 14, at 283. Ricchiuto writes:

This directive by the FCC seems to be urging broadcasters not to bother with petitioning for an exemption, but to rely on their independent judgment as to whether the exception applies to them—not merely as to specific broadcasts, but for their programs as a whole. The signal sent to broadcasters . . . is that all but the most outrageous requests will be granted—allowing more and more media outlets to ignore equal time..

Id.

candidate appeared; the FCC made clear that it would not delve into defining news or valuing one type of news over another, but would defer such determinations instead to a broadcaster's judgment.²⁵⁵ In doing so, it continued to punt to broadcaster judgment that aimed to retain viewers as a saleable commodity to advertisers rather than to civically engage them with political news or by facilitating political discourse. To the FCC, any news of current events sufficed to satisfy the bona fide newscast exemption—based in part on the fact that the format of both shows utilized “the same methods and journalistic guidelines typical of traditional newscasting.”²⁵⁶ It concluded that absent bad faith, an appearance alone “by legally qualified candidates during [these newslike shows] . . . should be accorded the bona fide newscast exemption.”²⁵⁷ This decision essentially endorsed the notion that political appearances alone on a program similar in format to traditional network news are sufficient to meet the exemptions requirement, even absent a discursive exchange in some way related to political news or the enhancement of political discourse.²⁵⁸ Ironically, the FCC asserted that an appearance on such an entertaining show should be as exempt as it would be on a traditional televised newscast program, which as a result of recent industry developments now also covered religion, business, sports and other entertaining content.²⁵⁹ In doing so, the FCC again tapped away at the erroneous presumptions underlying the division of network news formats and entertainment programming for deliberative purposes and reaffirmed that an entertainment format alone should not preclude the granting of these exemptions.²⁶⁰

Finally, in the midst of the chaos caused by broadcast journalism's conversion to spectacle, politicians capitalized on the confusion and began to appear on entertaining shows not only for popular cultural appeal and mass exposure, but also for presumptive softball interviews with little depth on political news or interrogation into the issues.²⁶¹ Indeed, beginning in 1992, candidates regularly announced their candidacies on several talk shows, and noticeably avoided news programming and the “gotcha journalism” into which network

255. Paramount Pictures Corp. (*Entm't Tonight*), 3 FCC Rcd. 245 (1988).

256. *Id.* at 246.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* In contrast however, the implication of the FCC's decision to grant “The 700 Club” bona fide newscast exempt status on the news portions of its show is that a network news format alone, if provided in a way similar to and consistent with “journalistic news principles,” is sufficient, irrespective of whether the actual information provided is political news. *Id.* Indeed, because “The 700 Club's” newscast segments include anchors and reporter interviews, the show qualifies for the bona fide newscast exemption as it “report[s] some news of some area of current events, in a manner similar to more traditional newscasts.” The Christian Broad. Network for Declaratory Ruling, 23 FCC Rcd. 7165, 7166 (2008) (internal quotations omitted). See generally Clay Calvert, *Toxic Television, Editorial Discretion & the Public Interest: A Rocky Mountain Low*, 21 HASTINGS COMM. & ENT. L.J. 163 (discussing the law's distinguishing protection of violent content in *news programming* but not entertainment programming, even when provided to retain viewers for rating purposes).

261. JONES, *supra* note 31, at 178.

journalism had developed.²⁶² However, Arnold Schwarzenegger's announcement of his candidacy for a second term as governor of California on his friend Jay Leno's "The Tonight Show" garnered much controversy and resulted in a complaint being filed with the FCC by one of the many other gubernatorial candidates demanding equal airtime on the show.²⁶³

The FCC aptly rejected the distinctions the complainant made between the show's entertainment format and network news formats, and between Jay Leno as a comedian and the journalists-come-talk-show-impresarios who hosted other entertainment type shows previously granted the bona fide news interview exemption.²⁶⁴ In addition, the FCC downplayed the newsworthiness issue by reframing it as related solely to whether Schwarzenegger's invitation to appear on the show was evidence of political partisanship, given his close relationship with Leno and Leno's public support of Schwarzenegger during his first term as governor.²⁶⁵ In dismissing the claim of political partisanship as speculative (it was grounded only on evidence that the two were friends), the FCC summarily concluded that the appearance was scheduled pursuant to the broadcaster's good faith broadcast judgment as to newsworthiness.²⁶⁶ The FCC noted favorably that Schwarzenegger discussed his views on "immigration reform, bipartisan legislative activities in California, and the war in Iraq."²⁶⁷

Problematically, it went on to state, in the same paragraph that summarily settled on the broadcaster's good faith judgment, that Schwarzenegger's national celebrity status as a movie star was of interest to the program's national audience and was, therefore, evidence of nonpartisanship and of the newsworthiness of his appearance.²⁶⁸ The implication then is that political news, and not just the format in which it is provided, can be reduced to a commoditized product and, as a result, can be stripped and diluted of the critical information necessary for self-

262. ANDERSON, *supra* note 1, at xiii. Indeed, both John Kerry and George W. Bush solicited votes by appearing on the "Dr. Phil" show during their presidential campaigns. JONES, *supra* note 31, at 178.

263. The Tonight Show with Jay Leno, 21 FCC Rcd. 11919 (2006).

264. *See id.* at 11924.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* In addition, in citing its "Entertainment Tonight" decision, the FCC distinguished Jay Leno's satirical monologue at the beginning of the show as pure entertainment and therefore not sufficient to satisfy the bona fide news exemption, and also determined that "brief skits," "live performances from entertainment talent," "music, comedy, or other forms of pure entertainment" are not sufficient to meet the congressional intent for the bona fide news interview exemption. *Id.* While the FCC here distinguishes pure entertainment from entertainment that performs a deliberative function, this Article posits that the FCC, however, has not created a similar delineation with regard to the interview itself in furthering the provision of political news or the deliberative process or with regard more broadly to network news facilitation of the same goals. Moreover, while this Article does not ultimately advance the idea that the FCC should determine what constitutes a substantive discourse of political news, the point instead is that political news, irrespective of the format on which it is provided, must be cautiously guarded and advanced via a deliberative infrastructure that promotes its critical and substantive, rather than solely commercial development. *See infra* Part III (proposing remedies to creating and sustaining it as such).

governance. This Article contends that diluting, commoditizing or manipulating political news itself for any reason, including for profit, threatens the deliberative structure on which the First Amendment stands and directly contravenes the purposes underlying the enactment of the equal time rule and its bona fide news exemption.²⁶⁹ It also maintains that such manipulation exceeds the broadened application of the bona fide newscast and news interview exemptions to entertaining formats permitted by *Donahue II* and the Political Primer. By continuing to summarily defer to a broadcasters' good faith judgment in these decisions, the FCC has presumed that such interviews and appearances—on either network news or entertainment formats—were conducted with the same investigative and interrogatory watchdog tenacity and commitment embraced in the earlier public trustee era of broadcast journalism. As a result, the FCC and the current spectacle of network news became complicit in the manipulative political media climate in which such calculated interviews and appearances are advanced.

The development of shows like “Politically Incorrect” and “The Daily Show” establishes, however, that the key to reviving a critical and engaging broadcast journalism is not necessarily a return to the network era formats, or even to ethics of old.²⁷⁰ While embracing public trustee obligations, network era journalism norms still perpetuated a narrowed and exclusionary public sphere that insisted, among other things, on separating political news and network news programming from entertaining programming, and ultimately aided in turning its audience away. Shows like “The Daily Show” establish, however, that both can coexist without devaluating each other. Indeed, at times, both are needed to draw in and connect with participants in the current hyper-commercialized and sensationalized media-rich environment of the twenty-first century, where grabbing the attention of the public is key.

3. Politicized Entertainment as Subaltern Public: “Politically Incorrect” as Bona Fide News

While network news floundered in retaining viewers to sustain advertising

269. Author Harry Frankfurt appeared on “The Daily Show” two weeks after Ari Fleisher, former Bush Press Secretary, appeared on the show and admitted that the Bush Administration actively controlled the information provided to the public. BAYM, *supra* note 1, at 117. Frankfurt discussed his book, *On Bullshit*, and his disdain for the marketing of political speech and spin. He distinguished “bullshit” from lying and argued that the latter was a willful misrepresentation of the truth while the former was worse and evidence of a lack of concern for whether the statement was true or false. *Id.* For Frankfurt, bullshit was “a more insidious threat to society because it undermines respect for the truth, while political spin was nothing more than a form of bullshit where speakers are “engaged in the enterprise of manipulating opinion, not in the enterprise of reporting the facts.” *Id.* at 118. To him, bullshit was speech lacking in sustenance and nutritive informational value. See HARRY G. FRANKFURT, *ON BULLSHIT* (2005).

270. See generally JONES, *supra* note 31, at 172 (discussing how “The Daily Show’s” Jon Stewart regularly made clear that “[j]ournalistic adherence to norms of objectivity generally prevent[ed] many reporters and anchors from looking across specific events to explicitly point out repeated patterns of deception or misjudgment by politicians and government officials (unless the reporting occurs in investigative or opinion-editorial pieces)”).

revenues, cable—cushioned by subscription fees—took greater creative risks in attracting viewers.²⁷¹ Building on the same popular participatory sentiments targeted earlier by the producers of daytime talk shows, cable introduced “Politically Incorrect” in 1993 on the Comedy Central channel.²⁷² With comedian Bill Maher as host, the show bridged the gap between purely entertaining late night fare and political pundit talk shows and ushered in a new era of politicized entertainment on television.²⁷³ Bill Maher and his nonexpert guests, usually including at least one celebrity, often discussed political and social issues of the day like the Clinton-Lewinsky scandal.²⁷⁴ In doing so, like “Donahue” decades earlier, it more closely resembled the language and public opinion of everyday citizens than those of the experts on mainstream network news or cable pundit talk shows.²⁷⁵ Indeed, such discussions were:

in a language resembling more of what would be found in a bar, basement, or barbershop than what occurs at the National Press Club or on Meet the Press—a common vernacular that is accessible and familiar [with] commonsensical notions to what politics means than the conventional elite discourse on television that is largely derived from insider knowledge and concerned with political maneuvering.²⁷⁶

Through common sense and humor, which was “lacking on most political talk shows . . . [and which] . . . became an important tool of political critique,” “Politically Incorrect” mixed entertainment and popular culture with politics and the rational realm.²⁷⁷ In doing so, it encouraged the viewing audience to look beyond the arbitrary boundaries traditionally drawn between the two.²⁷⁸

Moreover, in satirizing the Clinton-Lewinsky scandal, “Politically Incorrect” pointed out that politics, like anything else, was a performance filled with drama and spectacle, and made clear that politics was not just a “special preserve for those who traffic in insider knowledge and employ a specialized language.”²⁷⁹ When it moved from cable to ABC’s network in 1997 to attract the advertiser desired age eighteen to forty-nine demographic in the late night market, the show gained wider visibility for this new highly popular genre of television.²⁸⁰ The show flung open “the doors of political talk, challenging normative conceptions of acceptable

271. JONES, *supra* note 31, at 65.

272. *Id.*

273. *Id.* at 64.

274. *Id.* at 67. Celebrities represented to the viewing public outsiders to the political machine and bureaucracy, who, like the viewing public, most likely did not follow news as closely as the insiders and pundits. *Id.* Interestingly, the show’s top viewers requested, and received in the show’s run from 1999–2000, a regular citizen, called a “Citizen Panelist,” as a nonexpert guest. *Id.*

275. *Id.* The show represented “a hybrid blend of politics and social issues, humor and serious discourse, comedic monologues and group discussions, celebrities and less well-known public personalities, and lay and elite discourses.” *Id.* at 68.

276. *Id.* at 66.

277. *Id.* at 66–67.

278. *Id.* Common sense has been defined as “a means through which publics think through and discuss deeper ‘ideological dilemmas’ that often lie at the heart of public issues and events.” *Id.* at 66.

279. *Id.* at 70.

280. *Id.* at 67.

political discourse, including who exactly was allowed to talk about politics,” and insisted that “any citizen had the right to talk about political life, even if for entertainment purposes.”²⁸¹ In 1999, the FCC affirmed once again that an entertainment format alone was not prohibitive to the bona fide news exemption, when it granted the exemption to the entire show and not just segments of the show on which a candidate appeared.²⁸² In citing *Hustler v. Falwell*, where the Supreme Court found political cartoons and satire relevant to political discourse, the FCC also made clear that “the presence of satire as an element . . . should not prevent the program from being considered bona fide in terms of good faith news judgment.”²⁸³ It also determined that “satire in the form of a broadcast monologue about news of the day or during discussion of such issues does not appear less important in the realm of political debate than political cartoons.”²⁸⁴

Despite the favorable FCC ruling, “Politically Incorrect” was cancelled—largely due to the withdrawal of major advertising sponsorship in response to boycott threats by members of the public who were offended by Maher’s statements about the September 11, 2001 bombings.²⁸⁵ Maher returned to television in 2003 on the cable channel HBO on “Real Time with Bill Maher,” which was somewhat removed from advertiser and broadcast censorship.²⁸⁶ The new, slightly altered show now featured three guests at a table facing Maher alone.²⁸⁷ With his return, he was obviously afforded increased respect as an interviewer and political commentator; high profile politicians now appeared on the show, arguably due in no small part to the popular success of “The Daily Show,” which had surfaced

281. *Id.* at 71. Arguably, this new genre of politicized entertainment seems different from “Donahue” and similar day time talk shows of the early 1980s in that political news may have been discussed on those programs, but was not discussed necessarily for the purpose of entertaining while also informing, as is, or has been, the case and/or effect of “Politically Incorrect” and later, “The Daily Show.”

282. In the FCC’s “Jay Leno” decision, it did not grant the entire show, as here, the bona fide news exemption because Leno’s monologue was deemed as pure entertainment and not directly connected to the interview of the political candidate. See *The Tonight Show with Jay Leno*, 21 FCC Rcd. 11919 (2006). Here, the implication of the “Politically Incorrect” decision is that the FCC found deliberative value in this entertainment format as it relates specifically to political discourse, as is evident in its granting of the exemption to the entire show with Maher’s comingling of political news and satire. See ABC, Inc. (*Politically Incorrect*), 15 FCC Rcd. 1355, 1359 (1999); see also *supra* Part II.B.2.

283. *Politically Incorrect*, 15 FCC Rcd. at 1359 (referencing *Hustler v. Falwell*, 485 U.S. 46, 54 (1988)).

284. *Id.*

285. See Bill Carter, *ABC to End ‘Politically Incorrect’*, N.Y. TIMES, May 14, 2002, at C8. In a discussion with conservative panelist guest Dinesh D’Souza where both were critiquing President Bush’s labeling of the September 11 bombers as cowards, Maher stated, “We have been the cowards, lobbing cruise missiles from 2,000 miles away. That’s cowardly. Staying in the airplane when it hits the building, say what you want about it, it’s not cowardly.” JONES, *supra* note 31, at 73. While Maher later attempted to explain that he was referring to American military conduct during the Clinton administration, Maher was roundly attacked and accused of being unpatriotic during a time of uncertainty and instability in American political culture and sentiment. *Id.* Seventeen networks affiliates dropped his show along with two major advertisers, namely Sears and Federal Express. *Id.*

286. *Id.* at 84.

287. *Id.*

during Maher's hiatus.²⁸⁸ "The Daily Show," with host Jon Stewart, had stepped into the politicized entertainment void left by Maher in 1999, and with its "fake" news program ironically became the interrogating force attacking what was professed as truth by political pundit talk shows and broadcast journalists.²⁸⁹ It adopted a fake network news format but used entertaining satirical comedy to critique and shed much needed light on the political spectacle created by politicians, network news and political pundit talk shows.²⁹⁰

During Stewart's interviews with notable political guests, he "explore[d] background and context of current events, [with] some explain[ing] basic institutional processes—the kind of information essential to understanding public affairs but usually missing in most forms of [network] news."²⁹¹ In addition, he also exposed "the lack of honesty in political talk and the proclivity among public figures to adhere strictly to the talking points and partisan spin that turn public discourse into marketing."²⁹² Moreover, in between the "masterful information management techniques and fear-mongering by the Bush administration and a television news media that helped facilitate these deceptions and ruses through its weak reporting and tendency toward patriotic spectacle," "The Daily Show" "became the perfect format for questioning the faux 'reality' that was increasingly being created through the manipulations, distortions, and outright lying of the Bush administration and a compliant, sloppy, and sensationalistic news media."²⁹³ Notably, unlike broadcast journalism's continued claim to being the sole

288. *Id.* at 85.

289. BAYM, *supra* note 1, at 7.

290. *Id.* at 105. Moreover, in 2005, Comedy Central introduced another "fake" news show—"The Colbert Report," itself a spin off of "The Daily Show"—that took aim at the right wing political pundit talk programs and Fox News and their blatant appeal to feelings over truth and facts (referred to by Stephen Colbert, the show's host, as "truthiness"). *Id.* at 80. While "The Daily Show" satirized the news, "The Colbert Report" satirized those who cover the news, how they talk about it, and how it should be processed. JONES, *supra* note 31, at 185. Ironically, six months after the show aired, Colbert was invited to President Bush's White House Correspondents' Association Dinner in which he appeared in character and proceeded, unbeknownst to the attendees, to satirically offer a scathing critique of Bush and his press corps for providing what amounted to "truthiness" to the public. See *Colbert Roasts Bush*, YOUTUBE, http://www.youtube.com/watch?v=BSE_saVX_2A (last visited Feb. 9, 2011) (although Colbert's "tribute" received little mainstream press coverage, this video posted on the Internet of Colbert roasting Bush at the White House Correspondents' Association Dinner on August 26, 2007 spread quickly and indicates that it received well over one million viewer hits).

291. BAYM, *supra* note 1, at 116.

292. *Id.* at 117. Interestingly, David Chang has argued that to the extent broadcasters provide information only for purposes of attracting viewers as a commodity to advertisers, they should not be granted first amendment protections since the First Amendment's goal in preserving speech rights is to advance deliberative discourse by parties engaged in speech for that purpose and not for the purpose of marketing infotainment to retain viewers for advertising revenue purposes. See generally David Chang, *Selling the Market-Driven Message: Commercial Television, Consumer Sovereignty, and the First Amendment*, 85 MINN. L. REV. 451 (2000).

293. JONES, *supra* note 31, at 75. Indeed, in his interview with former Bush Press Secretary Ari Fleischer, Stewart got Fleischer to unapologetically admit that President Bush and his administration controlled and restricted the flow of information to the public more so than any other presidency. See *Interview with Ari Fleischer*, THE DAILY SHOW WITH JON STEWART (Oct. 14, 2008), <http://www.thedailyshow.com/watch/tue-october-14-2008/ari-fleischer>.

gatekeeper of the objectively truthful political news, "The Daily Show" was "fake" in that it refused to profess to be the authority on what was true.²⁹⁴

To Stewart, his show was in fact about not knowing what the truth was or about whether the truth was even discoverable. It was instead, "as with most social and political satire [and] humor . . . a means of reestablishing common sense truths to counter the spectacle, ritual, pageantry, artifice, and verbosity that often cloak the powerful."²⁹⁵ His show exposed how "slavish devotion to certain factual reporting can create conditions where truth becomes lost in the process."²⁹⁶ In an interview with veteran network journalist Ted Koppel on ABC's news program "Nightline," Stewart argued that the news media must be committed to processing rather than "simply repeating what politicians say and, in effect, becoming willing or unwitting conduits for dis(information)."²⁹⁷ More importantly, for Stewart, it must "play a role in questioning and poking holes in public rhetoric without insisting that the audience adopt its own truths."²⁹⁸ Stewart's show, "Politically Incorrect" and its reincarnate, "Real Time with Bill Maher," do just that through the entertaining "use of satire, parody, and humor as a means of getting at deeper truths within the news-politics dialect, including questioning the authority of the agents within that dialect."²⁹⁹ While these shows entertain and generate a laugh, "their deeper thrust is subversion, an attack on the conventions and pretensions of contemporary television news."³⁰⁰ Moreover, they reveal the duality of entertainment, which is not only to amuse or give pleasure, but also to engage with and to consider.³⁰¹ Indeed, viewers of these shows are both entertained and invited to consider the current spectacle of democratic political culture and current news programming, as exposed on these shows' own rights of publicity.

III. SUGGESTED REMEDIES TO BROADCAST JOURNALISM'S DELIBERATIVE PERIL

Despite the explosion of the blogosphere and the ease and accessibility of the

294. JONES, *supra* note 31, at 182 ("The Daily Show' is fake only in that it refuses to make claims to authenticity. But being fake does not mean that the information it imparts is untrue.").

295. *Id.* at 182-83. Indeed, in Stewart's much anticipated appearance on the public affairs program, "Crossfire," Stewart, to the dismay of "Crossfire's" host who assumed Stewart would engage in the light banter and humor typified on his show, instead accused "Crossfire" of being fake with "a contrived bit of political theater that indulged in partisan spin while posing as a viable public affairs program." BAYM, *supra* note 1, at 103.

296. JONES, *supra* note 31, at 78.

297. *Id.* at 76.

298. *Id.*

299. *Id.* at 86. In addition, these show are markedly different from a short lived genre of commoditized politics produced on cable public affairs and news programs channels, like CNN's "Chocolate News" with comedian D.L. Hughley, which represented the reverse process of the "entertainmentization of news channel programming [where] news channels have employed news and current events as the content for crafting low-cost entertainment programs that can 'lighten their more serious programming schedule, [and] attract younger audiences.'" *Id.* at 87-90.

300. BAYM, *supra* note 1, at 113.

301. *Id.* at 120.

Internet in distributing information, the popularity of these shows confirms the continued mobilizing ability and mass appeal and reach of television in a mediated public sphere. They also establish television's continued relevance to and potential for facilitating a more robust and participatory discourse. America (especially the country's younger generations) is tuned into these shows, which have widened the political discourse through entertaining programming that often includes political candidate appearances.³⁰² They have also enhanced critical and substantive public knowledge and inquiry.³⁰³

Broadcast journalists, in contrast, have exposed the fallacy of their own claims to being gatekeepers of the authenticated and objective truth through their very own public blunders involving fabricated and unverified news stories.³⁰⁴ The informational and participatory value of hybrid political entertainment talk shows highlight the need for a wider, more interactive and critical journalism infrastructure to advance the principles of the First Amendment as reflected in America's early press and deliberative history.

While there is much still to be learned from such shows regarding the deliberative value of television and entertainment, two or three shows alone are simply insufficient to sustain the requisite watchdog and critical journalism infrastructure that is necessary for a self-governed society.³⁰⁵ "The Daily Show" and "Real Time" take much of their lead from the network news's and political pundit talk shows' stories of the day, aptly exposing inaccuracies, folly and manipulation as mainstream investigative reporting begins to face challenges.³⁰⁶ However, they rarely uncover new political news—often unearthed by costly and timely investigative journalism—or discuss local political news or information not brought to national attention.³⁰⁷ In addition, their searing satirical critique of the news media and politics is not accessible to those segments of the population who may either be unwilling or unable to pay the monthly premium for cable or Internet in order to view them.³⁰⁸ More importantly, they too are subject to the whims of

302. *Id.* at 111, 113.

303. *Id.* at 6. Indeed, recent studies have revealed that while most Americans are now news gazers who acquire political news and information from a motley of sources, the public reportedly received more political news and information from "The Daily Show" than any other network news programming, political pundit talk shows or other public affairs programming. *Id.* Moreover, another study suggested that among some groups Jon Stewart was deemed one of the most reliable journalists on television, standing alongside many veteran network journalists. Michiko Kakutani, *Is Jon Stewart the Most Trusted Man in America?*, N.Y. TIMES, Aug. 17, 2008, <http://www.nytimes.com/2008/08/17/arts/television/17kaku.html?pagewanted=all>.

304. JONES, *supra* note 31, at 181 (discussing story fabrication by Jason Blair at the *New York Times* and Stephen Glass at the *New Republic* and poor fact checking on President Bush's Air National Guard records by Dan Rather as negatively effecting public trust in professional journalists).

305. Scholars have noted, documented and lamented the "steady decline in civic understanding . . . [that is] . . . producing a dangerous spiral of frustration and disenchantment." LANE & ORESKES, *supra* note 47, at 203–04.

306. See generally MCCESNEY & NICHOLS, *supra* note 15, at 96–99; see also LANE & ORESKES, *supra* note 47, at 203–04.

307. See *supra* Part II.C.

308. Sunstein, *supra* note 41, at 528. Indeed,

the market and the targeted demographic, as the cancellation of "Politically Incorrect" reveals.³⁰⁹

Many scholars have convincingly argued that political news is a public good that should not be subject to the variability of the market, given its necessity for sustaining a self-governing democracy.³¹⁰ Supporters also point out that market externalities and inefficiencies will always lead to insufficient or narrowed coverage and provision of political news because of, among other things, the unequal weight given to the preferences of the desired viewing demographic, which often turns primarily on race, gender and socioeconomic status.³¹¹ Congressional attempts to amplify broadcast television's deliberative capacity by imposing public interest obligations on broadcasters in exchange for their free use of the spectrum have been quite challenging and, at times, an administrative nightmare to enforce.³¹² For example, the equal access rule requires broadcasters to provide airtime to qualifying candidates at rates discounted from those charged to advertisers, a requirement that broadcasters might arguably evade or minimally meet, if at all, since to do so undercuts profit maximization.³¹³ In addition, the bona fide news exemptions, particularly the bona fide newscast and news interview exemptions, often require the FCC to review and decide individual complaints and declaratory requests to ascertain whether the exemptions are met.³¹⁴

Current FCC interpretation of the bona fide news exemptions has failed the broader congressional goal of enhancing broadcast television's deliberative role in facilitating public discourse through political candidate appearances. This Article contends that it erroneously continues to defer to the broadcast judgment that now provides uncritical political spin as news, usually clothed either in the guise of traditional news programming or as a candidate appearance on an entertainment show.³¹⁵ Such content panders to advertisers and no longer seeks to serve the traditional informational and watchdog goals of broadcast journalism; financial pressures may, in fact, render it entirely unable to serve these goals. Proposals to

broadcasters will continue to be seen by a disproportionate number of people . . . [who] . . . will continue to have access only to broadcasters; this significant subgroup is important partly because of its sheer size and partly because it includes an especially high percentage of people, including children, who are poor and poorly educated.

Id.

309. See Carter, *supra* note 285, at C8.

310. See, e.g., MCCESNEY & NICHOLS, *supra* note 15, at 102; see also Sunstein, *supra* note 41, at 517.

311. MCCESNEY & NICHOLS, *supra* note 15, at 103–04; Angela Campbell, *Toward a New Approach to Public Interest Regulation of Digital Broadcasting*, in DIGITAL BROADCASTING AND THE PUBLIC INTEREST, *supra* note 145, at 15–18.

312. Henry Geller, *Implementation of "Pay" Models and the Existing Public Trustee Model in the Digital Broadcast Era*, in DIGITAL BROADCASTING AND THE PUBLIC INTEREST, *supra* note 145, at 232–34.

313. Steven S. Wildman & D. Karen Frazer, *A Structure and Efficiency Approach to Reforming Access and Content Policy*, in DIGITAL BROADCASTING AND THE PUBLIC INTEREST, *supra* note 145, at 213.

314. See Janow, *supra* note 26, at 1078–80.

315. See *supra* Part II.B.2.

remedy this lack in broadcast journalism presume that broadcasters should continue to be subject to public interest obligations that grew out of the scarcity doctrine set forth in the *Red Lion* decision—a doctrine that has consistently been under wide-ranging attack since its inception and especially since the development of other media and communications outlets.³¹⁶

The primary premises underlying the development of the scarcity doctrine remain true in that the broadcast airwaves themselves are still scarce, that the demand for broadcast licenses continues to far surpass supply and that broadcast licenses remain in the hands of a consolidated and monopolizing few.³¹⁷ Indeed, even today with the explosion in media options ranging from cable and satellite to the Internet and portable MP3 players, a handful of corporations control a majority of the nation's air waves.³¹⁸ Moreover, *Red Lion* is still good law, such technological developments notwithstanding.³¹⁹ In addition, even in the face of decades of attacks on the scarcity doctrine, Congress affirmed broadcasters' public interest obligations in the Telecommunications Act of 1996, where it also granted existing broadcasters free licensure of the newly developed and highly valuable digital spectrum.³²⁰ In addition, three years after the passage of the Telecommunications Act, President Clinton commissioned an Advisory Committee study, referred to often as the Gore Commission, to ascertain what broadcast public interest obligations should be (not whether they should continue) in light of the pending digital transition.³²¹ Any proposed remedies to revive and enhance television's deliberative capacity must, however, take into consideration what broadcasters will and can do. FCC regulatory approaches thus far have expected broadcasters, as corporate entities, to operate in such a way that in essence conflicts with their profit making bottom line.³²² Moreover, any calls for increased regulatory obligations (as advanced in some respects by the Advisory Committee) must also consider that the FCC is already overwhelmed with keeping pace administratively with existing regulatory demands.

Therefore, this Article contends that a revised funding and regulatory scheme is needed to foster television's deliberative capacity, especially as it relates to

316. See *Red Lion v. FCC*, 395 U.S. 367 (1969).

317. *Id.* at 388, 390–91.

318. ANDERSON, *supra* note 1, at 7.

319. See Thomas W. Hazlett, et al., *The Overly Active Corpse of Red Lion*, 9 NW. J. TECH. & INTELL. PROP. 51, 51–52 (2010).

320. Sunstein, *supra* note 41, at 503 (discussing the free digital licensure to broadcasters as a huge giveaway of a “\$70 billion national asset” (citing 47 U.S.C. § 336(a) (2006))). Broadcasters were also allowed to hold on to their analog licenses until they decided how to use, and/or had fully developed uses for, the digital spectrum. 47 U.S.C. § 336(f)(4). On June 13, 2009, all analog signals on broadcast television transitioned to digital, which required analog broadcast television viewers to purchase a digital receiver in order to watch broadcast programming on their television sets. DTV Delay Act, Pub. L. No. 111-4, § 2(a)(1), 123 Stat. 112 (codified at 47 U.S.C. § 309 (2009)).

321. See ADVISORY COMMITTEE, *supra* note 54, at 1–2. This new digital technology grants broadcasters the opportunity to amplify their channel and programming options far above those permitted technologically pursuant to analog transmissions. *Id.* at 3–5.

322. Henry Geller, *Public Interest Regulation in the Digital TV Era*, 16 CARDOZO ARTS & ENT. L.J. 341, 348 (1998).

broadcasters' provision of political news, substantive interviews and exchanges with those seeking political office. Concurrent with the study undertaken by the Advisory Committee, scholars of the Aspen Institute Communications and Society published a report that analyzed not only: 1) the enhanced public trustee model, subsequently endorsed by the Gore Commission, but also four other models, namely 2) the spectrum fee model, 3) the pay and access model, 4) the pay or play model and 5) the pay and compete model.³²³ Although arguments supporting continued regulation of broadcast television are perfectly sound and plausible given the continued scarcity of the medium and the importance of political news, this Article ultimately endorses the adoption of a quasi-deregulatory approach via a slightly modified pay and compete model that factors in the equal time rule, as it relates specifically to enhancing the provision of political news via candidate appearances on television programming.³²⁴ The pay and compete approach is ultimately a superior scheme to the either/or approach that historically and currently underlies most broadcast public interest regulation and policy. Moreover, it is also superior to the other proposed models because it addresses their gaps and deficiencies.

A. EXPLORING AND CRITIQUING OTHER PROPOSED APPROACHES

1. Enhancing Public Interest Obligations

While the proposal for increased public trustee obligations would be the easiest to implement because such a structure is theoretically already in place, the proposal is problematic as it relates specifically to the provision of political news for a number of reasons—some of which have already been discussed above. The proposal not only overlooks the historic challenges in enforcing such a regulatory scheme, but also overlooks the probable political resistance to a scheme that more than likely will heighten FCC powers to regulate content. Moreover, it sidesteps the need for increased public broadcasting funding (“PBS”) while the other pay-based models address this need directly by diverting fees in some fashion to PBS.³²⁵

323. See generally THE ASPEN INST., DIGITAL BROADCASTING AND THE PUBLIC INTEREST, *supra* note 145.

324. See generally Wildman & Frazer, *supra* note 313, at 193; see also Folami, *supra* note 127, at 187 (discussing regulatory remedies to open up access to the nation's broadcast radio airwaves for subverted discourse found in the music of the marginalized within the context of conglomerated ownership).

325. See generally Wildman & Frazer, *supra* note 313; see also Campbell, *supra* note 311, at 24. When compared with other industrialized nations, the American contribution to public broadcasting is significantly lower. For example, the American government spends only about \$1 per capita on public broadcasting, exponentially less than other nations, such as Britain, which currently spends \$38 per capita on public broadcasting. DANIEL C. HALLIN & PAOLO MANCINI, COMPARING MEDIA SYSTEMS 229–30 (2004); see also Enrique Armijo, *Media Ownership Regulation: A Comparative Perspective*, 37 GA. J. INT'L & COMP. L. 421 (2009) (comparing public interest broadcast ownership by nation). Indeed, less than fifty percent of the current funding for PBS actually comes from government sources. HALLIN & MANCINI, *supra*, at 229–30. Instead, current public broadcasting is heavily subsidized by charitable

2. Spectrum Fee as Waiver of Public Interest Obligations

With regard to the second approach—the spectrum fee, which serves as the basis of the other pay models—its proponent, former FCC General Counsel Henry Geller, contends that broadcasters “should be relieved of public interest programming responsibilities and [should] instead pay public broadcasters to serve these non-market public interest goals with high-quality programming.”³²⁶ Given their continued free use of the spectrum and the general failure of the public trustee approach thus far, he proposes that they should pay a minimal fee of three percent of broadcasters’ gross advertising revenues.³²⁷ The government would then funnel this money to the Corporation for Public Broadcasting (“CPB”) or a similar entity.³²⁸ That entity would in turn then have the financial ability to produce higher quality public programming.³²⁹ Under this model, broadcasters would still be beholden to certain minimal standards, including payola and indecency restrictions, closed captioning and sponsor identification.³³⁰ Critics have asserted that the major problem with the spectrum fee model is that it promotes a monopoly by putting most, if not all, of the production of such programming in the hands of the PBS network, which could lead to the inefficient use of its resources due to lack of competition.³³¹ It could also lead to increased attacks of cultural elitism or leftist bias, which could in turn pose a threat to continued government subsidization.³³² Furthermore, by relegating political news and public affairs

contributions from both individuals and corporations. *Id.* Therefore, merely enhancing the current public trustee model may obligate the government to bear some of the cost (through general or specific taxes), although under nearly all of the models, it appears the candidate, e.g., politicians, will retain at least partial responsibility for the cost of their own messages. This portion of the cost allocation has historically touched upon issues of campaign finance reform, and some, including the Advisory Committee, have advocated doing away with LUR fees entirely, and instead requiring broadcasters to allocate free airtime for candidates. See Tracy Westen, *A Proposal: Media Access for All Candidates and Ballot Measures*, in *DIGITAL BROADCASTING AND THE PUBLIC INTEREST*, *supra* note 145, at 335, 342.

326. Campbell, *supra* note 311, at 3, 17.

327. *Id.* at 18. Some scholars have proposed variations on Geller’s original spectrum fee model, such as charging the spectrum fee not as a portion of gross revenues, but instead as a transfer tax whenever a station changes hands. *Id.* Some view this form of fee collection as more palatable to broadcasters, as they may now incorporate this tax into their future contracts and negotiations prior to any transfer of ownership, rather than being charged a new fee on something, which they may have already owned for many years without such fee. *Id.* at 28.

328. Varona, *supra* note 143, at 92. Other proposed modifications to Geller’s original concept include having the fees collected and distributed by a new organization, modeled after the National Endowment for the Arts or the Ad Council, which would be in place to specifically serve the purpose of enforcing the public interest standard and would be responsible for collecting fees and buying and redistributing public interest programs and fees. Campbell, *supra* note 311, at 28. This idea for a new entity to oversee public interest enforcement also resonates in the pay and compete model. See *infra* Part III.B.

329. Varona, *supra* note 143, at 92.

330. Campbell, *supra* note 311, at 18; see also Geller, *supra* note 312, at 230–31.

331. Wildman & Frazer, *supra* note 313, at 214.

332. Legislators have been among those alleging public broadcasting’s leftist leanings which could, as in the past, pose a threat to any sources of government funding to PBS and hence a threat to the provision of political news and public interest programming premised solely on PBS producing it.

programming to public broadcasting, it could have the de facto effect of once again bifurcating political news from other television content, of discouraging broadcasters from voluntarily airing such programming and of limiting the political discourse to those that are self-inclined to follow it on public broadcasting without drawing in those that are not so inclined.³³³

3. Pay a Fee Plus Broadcast Access to Political Candidates

The third proposed approach—the pay plus access model—is a “hybrid of the spectrum fee and public trustee approaches.”³³⁴ It attempts to address one of the critiques of the spectrum fee model, namely that it would fail to draw in broader participatory audiences.³³⁵ By retaining the right to access rule, which requires broadcasters to give candidates access to the airwaves for a fee during election season,³³⁶ the pay plus access model could theoretically achieve that goal.³³⁷ More specifically, under this model, broadcasters would in a sense be required to allow political candidates to bring the message to the people via discounted paid advertisement aired during regular broadcast programming. However, the pay plus access model does not address another major criticism of the spectrum fee model, namely the potential monopolization of public interest programming, because the fee under this model is still paid to a public broadcast entity that would be delegated the sole responsibility for providing such content.³³⁸

Varona, *supra* note 143, at 93–94; *see also* Robert Corn-Revere, *Self-Regulation and the Public Interest, in* DIGITAL BROADCASTING AND THE PUBLIC INTEREST, *supra* note 145, at 63, 74 (discussing the history of the prevailing conservative viewpoint that PBS is “biased toward the left”).

333. Campbell, *supra* note 311, at 29.

334. Wildman & Frazer, *supra* note 313, at 204.

335. *See id.* at 205.

336. *Id.* In addition, this model proposes free, rather than discounted, access. Wildman & Frazer, *supra* note 313, at 204–05. In doing so, it address the unequal exposure of candidates that results when access was based on paying (albeit at a reduced rate) for political airtime to campaign. *Id.* Policy analyst, Tracey Westen, has written considerably on the idea of universally accessible media access for all candidates/ballot measures to address campaign finance inequities in purchasing airtime. *See generally* Westen, *supra* note 325. This model does not, however, address the problems that some have highlighted regarding the poor quality and content of such ads that focus on sound bites rather than substance, a problem that is beyond the scope of this Article. In response to this problem, others have suggested that candidates be required to personally appear in such ads to discuss their position on the issues themselves and to not purchase any additional airtime. Geller, *supra* note 312, at 235.

337. Campbell, *supra* note 311, at 30 (“It promotes the ideal of a public square, that is, to have some basic level of common knowledge in society.”). Moreover, to encourage more of a participatory discourse, others have extended on the “access” portion of this model by advocating that broadcasters be required to promote and advertise public interest programming on their airwaves and to allocate “a certain amount of time . . . for leasing by third parties to promote a diversity of viewpoints.” *Id.* Because, however, the FCC would have to retain a prominent role in enforcing lease access time, it is unlikely the FCC could meet this demand, given its past failures at enforcing similar policies currently in effect. *See* Donna N. Lampert, *Cable Television: Does Leased Access Mean Least Access?, in* CABLE TELEVISION LEASED ACCESS (The Annenberg Washington Program in Comm’n Policy Studies of Northwestern Univ. ed., 1991) (discussing the failure of the current leased access scheme to effectively serve the public interest in any meaningful way).

338. Campbell, *supra* note 311, at 30

4. Pay a Fee or Fulfill Public Interest Obligations

The fourth approach—the pay or play model—potentially avoids such centralization, however, by introducing some flexibility into the spectrum fee/pay plus access models. Specifically, it provides broadcasters the option of retaining some of their traditional deliberative role by fulfilling predetermined public interest obligations themselves, or of waving such obligation and paying another entity, like public broadcasting, for doing so.³³⁹ There are two different versions of the pay or play model: the “spectrum check-off” variant and the “tradable obligations” version.³⁴⁰ Moreover, market oriented proponents and critics of the enhanced public trustee or spectrum fee approaches would more than likely appreciate a corporations’ ability, under this model, to bargain for the most efficient end.³⁴¹

While the pay or play approach seems to promote efficiency because a broadcaster in the best position to meet certain public interest obligations would end up doing so under the tradable obligations approach, the net result could again be a provision of critical information through one or very few sources.³⁴² If broadcasters repeatedly traded obligations or paid their way out of their obligations under the spectrum check off approach to the few stations most inclined to air political messages or public interest programming, such content could eventually appear solely on those stations, thereby potentially reaching again only a small portion of the viewing public.³⁴³ Finally, with little incentive to produce quality public interest programming, broadcasters may produce inferior content to avoid having to pay another; this hazard would introduce the need for strict quality control regulations regarding content that might run afoul of first amendment protections.³⁴⁴

339. *Id.*

340. Wildman & Frazer, *supra* note 313, at 206. The tradable obligations variant is based primarily on its success in implementing the 1990 Clean Air Act Amendments. Campbell, *supra* note 311, at 31 (“[The Clean Air] Act established a scheme for reducing sulfur dioxide emissions by allocating firms a fixed number of ‘emission allowances’ that they could use, bank for future use, buy from other companies, or sell to other companies”).

341. Campbell, *supra* note 311, at 32–33. The government would need to be heavily involved in oversight of the trading of obligations. Wildman & Frazer, *supra* note 313, at 206. This model has, however, gained supporters because it also has the potential of encouraging public and private broadcasters to negotiate and work together in new and inventive ways. Campbell, *supra* note 311, at 33.

342. Wildman & Frazer, *supra* note 313, at 206, 207 (“[T]he obligations check-off model . . . has the potential to fail completely in this regard, should broadcasters decide to buy their way out of these obligations entirely.”).

343. *Id.* at 207.

344. Campbell, *supra* note 311, at 33–34 (discussing some of the first amendment implications of enforcement of programming standards upon broadcasters). Some have convincingly asserted that public trustee regulation falls within constitutional bounds as it is currently enforced. *See, e.g.,* Geller, *supra* note 312, at 237–42. Other scholars remain concerned that more aggressive public interest regulation measures may run afoul of the “First Amendment [which] forbids government from deciding what material citizens ‘shall read and see’ or ‘distinguish[ing] between good novels and bad ones.’” Corn-Revere, *supra* note 332, at 72.

B. ADOPTING A SLIGHTLY MODIFIED PAY TO COMPETE APPROACH

With the pay and compete model endorsed by this Article, many of the positive qualities of all of the previous models are retained while the gaps in efficiency and effectiveness are filled, all without sacrificing broadcast's traditional deliberative function of sustaining an engaged and informed electorate.³⁴⁵ This model takes the "play" option out of the fourth approach—the pay or play model, which allowed a broadcaster to fulfill public interest obligations itself in lieu of paying another entity to do so. By removing the play option, this model essentially then converts the scheme back to the spectrum fee model that required a broadcaster to pay a fee to a public broadcasting entity for its license to continue broadcasting on the nation's airwaves.³⁴⁶ Similarly, under this model, the fee would be paid to a public authority that would operate as "a buyer of public interest programming and access time, spending from a budget comprised of broadcaster payments plus funds available from other sources, such as government funding and private donations."³⁴⁷

In addition, under this model, although the "play" option is removed, it is replaced by the "compete" component, which provides the broadcaster the opportunity to earn back fees paid by choosing to compete in the creation of high quality public interest programming.³⁴⁸ With such market incentive, the pay and compete model erases the efficiency concern of the pay or play model where broadcasters had no incentive in fulfilling such obligations and could possibly relieve themselves of such obligations by buying out of them completely and transferring such obligation, for a fee, to a public broadcasting entity. Under this model, the broadcaster is incentivized by the option to earn back fees paid. An additional plus is that it increases healthy competition to produce quality content. Under this model, if broadcasters choose to compete to earn back fees they find themselves in competition with other broadcasters attempting also to earn back fees paid, as well as with the public broadcaster. A public broadcaster might initially

345. Geller, *supra* note 312, at 242–43 (maintaining that the greatest public interest need is twofold: "broadcasting and education, and broadcasting and the political arena"); *see also* Westen, *supra* note 325, at 350.

346. Wildman & Frazer, *supra* note 313, at 218.

347. *Id.* at 218–19 ("[A] public interest authority [will be] commissioned to develop and oversee public interest programming. This is pay-plus-compete for a public buyer."). While the exact nature of such public authority needs a bit more analytical development, some have postulated that it could be "a specially designated nonprofit entity as well as a government agency." *Id.* at 225 n.14. Another suggestion is that it could be made up of smaller authorities all drawing from the same budget and operating as branches of the larger public system with each unit designated its own area of public interest broadcasting specialty. *Id.* This Article suggests that it could also promote other traditional FCC public trustee policy goals like local, diverse and children's educational programming. Others envision a newly retooled (though perhaps entirely independent) Corporation for Public Broadcasting. *Id.* at 218–19, 225 n.14. Still others suggest the inclusion of an IRS accounting and oversight facet to any new organization tasked with evaluating public broadcasting. *See* MCCHESENEY & NICHOLS, *supra* note 15, at 202 (discussing the Internal Revenue Service's involvement in operating a citizen media voucher program where the public receives government funds to donate to their desired public affairs program, which thereby necessitates IRS involvement).

348. Wildman & Frazer, *supra* note 313, at 219.

have the upper hand since it has traditionally produced such programming and might, as a result, be in a better position initially to receive the much needed funds.³⁴⁹ The authority could commission the broadcaster (public or commercial) deemed most suitable to produce such programming or could compensate a broadcaster to the extent it created such programming. Moreover, the pay and compete model most effectively strikes the careful balance between a corporation's profit driven interests and the need to inform and engage the public through verifiable, critical and engaging broadcast journalism.³⁵⁰

Finally, with such built in incentives and criteria for earning back paid fees, there would be no need then to retain the bona fide news exemptions; broadcasters would be more inclined to provide political news with the prospect of being paid back for doing so. Any program, whether presented in a traditional news programming or public affairs format or in an entertaining one, can qualify the broadcaster to earn back their fees. Such program must, however, provide political news which meets the basic criteria ultimately established by the public authority, and must receive a designated amount of broad-based viewership support as established by ratings data or by public charitable donations.³⁵¹ As it relates specifically to the provision of political news, the public authority could use various criteria (such as audience viewership, verifiability of information and diversity in viewpoints and opinions) on which to judge potential public interest programming provided on varied and creative formats that not only inform, but also engage and widen the public sphere.³⁵²

As a precautionary note, however, it is suggested that the right to access and equal time requirements be retained to ensure that politicians are guaranteed access to the airwaves and are granted access to it equally. Such access fees should be fully subsidized by the public authority in return for a political candidates' promise not to purchase any additional airtime.³⁵³ Additionally, the broadcaster should be

349. *Id.*; see also MCCHESENEY & NICHOLS, *supra* note 15, at 104 (discussing the successes attached to engaging and sustaining the political discourse when there is a viable public broadcasting system aptly poised to compete with commercial broadcasters).

350. Wildman & Frazer, *supra* note 313, at 219 ("The primary advantage of the pay-plus-compete for a public buyer model is that it turns public service obligations into opportunities for profit that would enlist the natural incentives of competitive markets on behalf of the goals served by public interest broadcasting.").

351. MCCHESENEY & NICHOLS, *supra* note 15, at 201–02 (considering the concept of the "Citizenship News Voucher" where the government would issue \$200 vouchers to the public who in turn donates it to their public interest programming of choice or the public authority in support of such programming). *But see* Adam Thierer & Berin Szoka, *The Wrong Way to Reinvent Media, Part 3: Media Vouchers*, PROGRESS ON POINT 17.4, Apr. 2010, at 5 (illustrating the opposition to McChesney and Nichols's plan, and denying that informative media should be recognized as a public good akin to education).

352. MCCHESENEY & NICHOLS, *supra* note 15, at 191; see FULLER, *supra* note 17, at 210 (discussing a potential industry created self regulating criteria for developing and sustaining political news); Wildman & Frazer, *supra* note 313, at 219.

353. The pay and compete model allows for a better common ground between broadcaster's profits and the need for sufficient political campaign time, without reverting to LUR or forcing candidates to skirt campaign finance reform efforts. See Wildman & Frazer, *supra* note 313, at 219–20. This model creates a transparency that is lacking in any of the previously mentioned models, "requir[ing] the public

required to disclose any such candidate's use to all of the other qualifying candidates.³⁵⁴ This model builds successfully upon the foundations of the previous models and the traditional public trustee approach to television's public interest obligations. It allows corporations to operate with their own bottom lines in mind while also creating incentives for television broadcasters to both retain and engage viewers and to create high quality public interest programming without being offered the option of buying out of such obligations upfront, as with the pay for play model.³⁵⁵ Paying a fee upfront should spark sufficient creativity from enterprising broadcasters interested in earning back their fees and perhaps earning even more profit in the process.³⁵⁶ Moreover, the pay and compete model should not raise any first amendment concerns, given that the government is not determining what commercial broadcasters can air appropriately as public interest programming. Instead, the public authority would be commissioning programs from broadcasters, who choose to participate or opt out on their own accord.³⁵⁷

IV. CONCLUSION

The slightly modified pay and compete model, which retains the right to access and equal time requirements, is consistent with first amendment ideals. As discussed herein, the First Amendment, specifically via the early Republic's interpretations and implementations of the freedom of the press and speech clauses, enshrines the protection not only of communication itself but also of the deliberating and participatory infrastructure that makes such communication possible. This Article joins with those who view political news as a public good and also ultimately joins in the call for a revived investigative journalism, which is now in peril due to the spectacle that predominates network news and to the growing loss in viewers.³⁵⁸ It stops short of endorsing a call for a renewed allegiance to a foregone journalistic standard that insists on separating political news or traditional news programming from entertaining formats. The point instead is that the format alone is, and should not be, dispositive in determining the deliberative value of information provided on such format, lest times revert back to a top down "Uncle Walter" determination of what the news is or what it should look like.³⁵⁹ The answer also does not lie in gutting the very vitality and substance

authority to pay market-negotiated prices for access." *Id.* at 219. Under the pay and compete model, the public authority may actually be in the unique position of being able to subsidize (at least partially) the ad time needed for candidates, thus allowing the broadcaster to receive the full market value of the airtime, while still allowing the candidate the opportunity to air their message potentially for free. *Id.* at 220.

354. Sunstein, *supra* note 41, at 531.

355. Wildman & Frazer, *supra* note 313, at 218–19.

356. *Id.* at 223.

357. See Westen, *supra* note 145, at 59 n.1 (discussing the difference between "affirmative" and "negative" broadcast regulation as it relates to first amendment permissibility).

358. MCCHESENEY & NICHOLS, *supra* note 15, at 102.

359. Michael Ventre, *Cronkite Was America's Favorite Uncle*, MSNBC (July 17, 2009), <http://today.msnbc.msn.com/id/9600957/ns/today-entertainment/>.

of political news, or by rubber stamping the current commercialization and spectacle of network news.³⁶⁰ This Article posits that the law should instead proactively facilitate the provision of political news, be it in a traditional news format and/or an entertaining one, and the development of a media infrastructure that best serves the nation's democratic and participatory goals. Adopting the pay and compete approach to facilitating such deliberative goals on broadcast is a step in that direction.³⁶¹

360. BAYM, *supra* note 1, at 176 ("It seems unlikely and undesirable [to] revert to an older posture of professionalism, that top-down paradigm of dispassionate informational expertise.").

361. While this Article has focused primarily on broadcast television, the hope is that giving due attention to this medium and its deliberative potential will have positive reverberations for a more inclusive public sphere and a political news and journalism infrastructure that is inclusive of the Internet, cable/satellite and even, optimistically, print.

