

Campaign Finance, Communications and the First Amendment

By BOB PACKWOOD*

Introduction

The First Amendment to the Constitution contains the most important single sentence in the history of human liberty: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."¹

The right to engage freely in all forms of communication, particularly in political expression, lies at the core of all electoral process and is the key to our First Amendment freedoms.² The language of the First Amendment is clear and emphatic. Yet, Congress and various federal agencies have, from time to time, enacted laws or promulgated regulations that have had profound consequences on freedom of expression, especially in the political context. As the courts have interpreted the language of these laws and regulations, much of the First Amendment protections have been lost and the government has gained some power to regulate freedom of expression.³

When public interests compete with fundamental civil liberties society is presented with difficult choices. Our Constitution, however, requires that the governmental power be limited: "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."⁴ This is particularly

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1. U.S. CONST. amend. I.

2. *See Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

3. As will be discussed more fully below, provisions of the Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162, and the Communications Act of 1934, 47 U.S.C. §§ 151-609), (1934) (amended 1937), as well as regulations promulgated by the Federal Communications Commission thereunder, have imposed content-related restrictions on the broadcast media. Similar restrictions have been imposed on the print media.

4. *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

true with regard to First Amendment freedoms; nevertheless, the proper boundaries of governmental action have been transgressed. One example of the government's failure in this area stems from the efforts of Congress to purge federal elections of corruptive influences by enacting campaign finance reform legislation.⁵

Freeing federal elections from corruption and giving all individuals an equal opportunity to be elected to federal office are unquestionably valid goals, and the power of Congress to regulate federal elections is well-established.⁶ Congress has usually attempted to accomplish these goals not merely by direct regulation of elections, but also by directly or indirectly regulating communications and restricting political expression.⁷ While the Supreme Court has determined that a number of these limitations impermissibly infringe on fundamental First Amendment rights,⁸ the Court has upheld many other provisions

5. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court considered constitutional challenges to various provisions of federal law which, with one exception, had their origins in the Federal Election Campaign Act (FECA) of 1971, Pub. L. No. 92-225, 86 Stat. 3, amended by the FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of 2, 18, and 26 U.S.C.). The sole exception involved the provisions for public funding of candidates in presidential general elections, which had their origin in Title VIII of the Revenue Act of 1971, Pub. L. 92-178, 85 Stat. 497, 562, amended by Public Debt Limit-Temporary Increase Act, Pub. L. No. 93-53, § 6, 87 Stat. 134 (1973). The specific provisions of these statutes will be discussed in more detail below.

6. Art. I, § 4 of the Constitution grants Congress the power to regulate the time, place, and manner of elections to the House of Representatives and the Senate. See *Smiley v. Holm*, 285 U.S. 355 (1932). This power to regulate extends to primary elections. *United States v. Classic*, 313 U.S. 299 (1941). The Supreme Court has also recognized the broad power of Congress to legislate in the areas of presidential elections. See *Burroughs v. United States*, 290 U.S. 534 (1934).

7. The Supreme Court noted that the effect of the contributions and expenditure limitations under the FECA was to "impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner regulations otherwise imposed. A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley v. Valeo*, 424 U.S. at 18-19 (footnotes omitted).

8. The Supreme Court distinguished the effect of the FECA's expenditure limitations from its contribution limits, stating that the "expenditure limitations . . . represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Buckley v. Valeo*, 424 U.S. at 19. Thus, the Court struck down those provisions relating to the \$1,000 limitation on expenditures "relative to a clearly identified candidate," 18 U.S.C. § 608(e)(1) (Supp. IV 1970); the limitation on expenditures by candidates from personal or family resources, 18 U.S.C. § 608(a)(1) (Supp. IV 1970); and the ceiling on overall campaign expenditures by candidates seeking nomination for election and election to federal office, 18 U.S.C. § 608(a) (Supp. IV 1970). These provisions, the Court stated, "place substantial and direct restrictions on the ability of candidates, citizens, and associations to

that it found to entail only "marginal restriction[s]" upon the ability to engage in free communication.⁹

With the full approval of the courts, the federal government has regulated freedom of expression in other ways as well. The courts recognize that television, radio, and other mass media are "indispensable instruments of political speech."¹⁰ Indeed, they are indispensable instruments of nonpolitical speech as well. Yet, as will be discussed more fully below, the law today does not extend the same First Amendment protections as are accorded to print communications. In essence, the government asserts the right to control the electronic media by licensing and by content.

Means of expression are not static. Today, we are in the midst of a technological revolution in communications. Soon, people will be able to receive their daily newspaper through wires running to their homes or from broadcasts transmitted directly by satellite. While no one can envision exactly what the predominant form of communication will be in the distant, or even the near, future, surely it will be electronic rather than print in the sense that we now use the term.

This Commentary will discuss whether the First Amendment, as applied, is sufficient to fully protect freedom of expression, now and into the future. Included in this discussion will be an examination of some of the issues raised when government infringes on political speech through campaign finance reform legislation and on broader forms of expression through regulation in general. Further, a course of action will be proposed to meet the challenge this nation faces in ensuring that our most fundamental liberty—freedom of expression—is preserved.

I. Federal Election Campaign Reform Legislation

Until 1972, the principal statute regulating the financing of political campaigns for federal elective offices was the Federal Corrupt

engage in protected political expression, restrictions that the First Amendment cannot tolerate." 424 U.S. at 58-59.

9. See *Buckley v. Valeo*, 424 U.S. 1, 20 (1976). Finding that FECA's contributions limitations, along with its disclosure provisions, constituted "the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions . . . [without] impinging upon the right of individual citizens and candidates to engage in political debate and discussion," the Court upheld the following provisions of the Act: the \$1,000 limitation on contributions to a single candidate, 18 U.S.C. § 608(b)(1) (Supp. IV 1970); the \$5,000 limitation on contributions by a political committee to a single candidate, 18 U.S.C. § 608(b)(2) (Supp. IV 1970); and the \$25,000 limitation on total contributions by an individual during any calendar year, 18 U.S.C. § 608(b)(3) (Supp. IV 1970). 424 U.S. at 58.

10. 424 U.S. at 19.

Practices Act of 1925.¹¹ The 1925 Act was unsatisfactory because it was easy to circumvent and difficult to enforce.¹² These inadequacies led Congress to enact comprehensive legislation regulating campaign financing, the Federal Election Campaign Act of 1971 (FECA).¹³ The principal thrust of this legislation was to limit the total amount that could be expended on the use of communications media by or for candidates for federal offices. The maximum spending limit was the greater of ten cents times the voting age population in the area to be represented, or \$50,000; of the amount so determined, not more than sixty percent could be spent for broadcast media use. In addition, the 1971 Act required the reporting of much more detailed information about the source of campaign contributions than did the 1925 Act. The new law did not become effective until April 1, 1972, at which time the campaigns for the 1972 elections were already well under way.

In the wake of political abuses stemming from the Watergate break-in and the presidential campaign of 1972, Congress determined that the 1971 Act did not go far enough and enacted the 1974 Amendments to the FECA.¹⁴ There were several purposes for this legislation. First, Congress wanted to protect the integrity of elections by eliminating the actuality of or the appearance of corruption stemming from the influence of large political donations. Second, Congress sought to bring under control the skyrocketing costs of campaigning for federal office. Lastly, Congress attempted to advance the goal of political equality between wealthy and less wealthy candidates, and between incumbents and challengers, by imposing limits on contributions and expenditures.¹⁵

The 1974 Amendments sought to accomplish these goals in several ways. The legislation replaced existing limitations on media expenditures with limitations on total campaign expenditures and imposed new limitations on the amounts and sources of contributions.¹⁶ It provided for public financing of presidential nominating conventions and match-

11. 43 Stat. 1070.

12. The Supreme Court noted that past disclosure laws were relatively easy to circumvent because candidates were required to report only contributions that they had received themselves or that were received by others for them with their knowledge or consent; furthermore, the data that was reported was virtually impossible to use because there were no uniform rules for compiling reports nor provisions requiring corrections and updates. 424 U.S. at 62 n.71 (citing Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L. REV. 900, 905 (1971)).

13. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 18 U.S.C. § 608, repealed 1976).

14. Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified at 18 U.S.C. § 608, repealed 1976).

15. *Buckley v. Valeo*, 424 U.S. at 25-26.

16. *See* 18 U.S.C. § 608 (1974).

ing funds to pay for presidential primary campaigns.¹⁷ The 1924 Act established a Federal Election Commission (FEC) to supervise the administration of campaign laws.¹⁸

Under the new contribution limits, individuals were prohibited from giving more than \$1,000 to a candidate for an election campaign or more than \$25,000 overall to individuals, groups and parties during a single year.¹⁹ Political committees were limited to contributions to candidates of no more than \$5,000 per election.²⁰ Under the restrictions on campaign expenditures, candidates were limited in the amount of personal funds they would spend on their own campaigns;²¹ a ceiling was also imposed on the total amount that a candidate and the candidate's campaign organization could spend to advance his or her candidacy.²² Finally, the new law limited to \$1,000 the independent expenditures an individual or organization could make in support of a "clearly identified candidate" for federal office.²³

II. Constitutional Challenges to the 1974 Amendments to the FECA

The constitutionality of virtually every provision of the 1974 Amendments to the FECA was challenged in *Buckley v. Valeo*,²⁴ a suit brought by then-Senators James L. Buckley and Eugene J. McCarthy,

17. See 26 U.S.C. § 6096 (1974) and I.R.C. §§ 9001-9042 (1974).

18. 2 U.S.C. § 437 (1974).

19. 18 U.S.C. § 608(b)(1)(3) (1974) (repealed 1976).

20. 18 U.S.C. § 608(b)(2) (1974) (repealed 1976).

21. The limit of a candidate's use of personal monies varied with the federal office he sought. Presidential candidates could spend \$50,000; candidates for Senate, \$35,000; and House candidates, \$25,000. 18 U.S.C. § 608(a) (1974) (repealed 1976).

22. Presidential candidates could spend \$10,000,000 in seeking nomination for office and an additional \$20,000,000 in the general election campaign. 18 U.S.C. § 608(c)(1)(A), (B) (repealed 1976). The ceiling for Senate campaigns was dependent on the size of the voting age population of the State. In Senate primary elections, the limit was the greater of eight cents multiplied by the voting age population or \$100,000; in the general election the limit was increased to 12 cents multiplied by the voting age population of \$150,000. 18 U.S.C. § 608(c)(1)(C), (D) (1974) (repealed 1976). The 1974 Act imposed blanket \$70,000 limitations on both primary campaigns and general election campaigns for the House of Representatives, with the exception that the Senate limit was applied in states entitled to only one representative. 18 U.S.C. § 608(c)(1)(C)-(E) (1974) (repealed 1976). These ceilings were to be adjusted each year in relation to the rise in the consumer price index for the 12 preceding months. 18 U.S.C. § 608(d) (1) (1974) (repealed 1976).

23. 18 U.S.C. § 608(e)(1) (1974) (repealed 1976). An independent expenditure is one that is made neither with the cooperation of nor in coordination with the candidate or his campaign organization.

24. 424 U.S. 1 (1976).

together with ten co-plaintiffs.²⁵ Of primary importance for this Commentary are the contentions of the plaintiffs that the contribution and expenditure limits violated the First Amendment by infringing the free speech rights of candidates, individuals, and political groups.²⁶

These First Amendment challenges were flatly rejected in the Court of Appeals.²⁷ The court found that Congress had "a clear and compelling interest"²⁸ in preserving the integrity of the electoral process, and therefore concluded that the substantive provisions of the 1974 Act were constitutional. The Court of Appeals upheld the constitutional validity of the Act's contribution and expenditure provisions after determining that those provisions should be viewed as regulating conduct, not speech.²⁹ In so holding, that court relied on *United States v. O'Brien*,³⁰ a case which involved the claim that First Amendment protections prevented the prosecution of defendant for burning his draft card because his act was "symbolic speech," and therefore protected by the First Amendment.³¹ The Supreme Court rejected this argument and sustained the conviction because it found "a sufficiently important government interest in regulating the nonspeech element" that was "unrelated to the suppression of free expression."³²

The Supreme Court, in a per curiam opinion, treated the *Buckley* case far differently than the Court of Appeals. The Court upheld the 1974 Act's limitations on contributions as appropriate legislative weapons against the reality or appearance of improper influence stemming from large campaign contributions. However, the Court invalidated the Act's ceilings on overall campaign expenditures, the limitations on

25. The other plaintiffs were: then-Representative William A. Steiger; Stewart R. Mott; the Committee for a Constitutional Presidency—McCarthy '76; the Conservative Party of the State of New York; the New York Civil Liberties Union; the American Conservative Union; Human Events, Inc.; the Mississippi Republican Party; the Libertarian Party; and the Conservative Victory Fund.

26. Appellants asserted that both expenditure and contribution limits restricted the use of money for political purposes; since virtually all meaningful political communications in the modern setting involve the expenditure of money, appellants argued that these restrictions violated the First Amendment. *Buckley v. Valeo*, 424 U.S. at 11. They also argued that the contribution ceiling contravened the Fifth Amendment by discriminating against candidates opposing incumbent officeholders and against minor party candidates. *Id.* at 24. In addition, appellants contended that the contribution limitations had to be invalidated because bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with "proven and suspected quid pro quo arrangements." *Id.* at 27.

27. 519 F.2d 821 (D.C. Cir. 1975).

28. *Id.* at 841.

29. *Id.* at 840.

30. 391 U.S. 367 (1968).

31. *Id.* at 376-77.

32. *Id.* at 376.

a candidate's expenditures from his personal funds, and the independent expenditure ceiling.

At the outset, the Court stated, "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression" ³³ The Court went on to reject the view of the Court of Appeals that *O'Brien* set forth the applicable standard:

The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment. ³⁴

Having reasoned that campaign contributions and expenditures were speech and not conduct, the Court upheld the contribution limits in spite of its declaration that the First Amendment affords political expression the broadest protection. In part, the Court accomplished this by distinguishing between contributions and expenditures.

The Supreme Court rationalized that restrictions on expenditures necessarily reduced "the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." ³⁵ Its analysis was based on the realization that "virtually every means of communicating ideas in today's mass society requires the expenditure of money" ³⁶ and that "the electorate's increasing dependence on television, radio and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." ³⁷ Thus, the limitations in the 1974 Amendments on campaign expenditures, a candidate's expenditure of personal funds, and independent expenditures represented "substantial rather than merely theoretical restraints on the quantity and diversity of political speech," ³⁸ and as such, were constitutional.

33. 424 U.S. at 14.

34. *Id.* at 16. *Cf.* *Bigelow v. Virginia*, 421 U.S. 809, 820 (1975); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

35. 424 U.S. at 19.

36. *Id.*

37. *Id.*

38. *Id.*

Since the *Buckley* decision, the Supreme Court has expanded the constitutional protection afforded political expenditures. In *First National Bank of Boston v. Bellotti*,³⁹ the Court struck down a Massachusetts statute prohibiting corporations from making expenditures promoting a candidate or seeking to influence the public on issues not directly related to the corporation's business interests. The Court reasoned that the statute was an unconstitutional restriction on the free flow of political information.⁴⁰ In *Common Cause v. Schmitt*,⁴¹ the Court held that a federal law limiting independent expenditures by a political committee in a presidential campaign on behalf of a candidate who had accepted public financing violated First Amendment protections of political expression.

In *Buckley* the Supreme Court categorized campaign contributions as a form of political speech not worthy of the same protection guaranteed to expenditures under the First Amendment. It reasoned that a contribution "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."⁴² The Court concluded that a contribution limitation "entails only a marginal restriction upon the contributor's ability to engage in free communication,"⁴³ and found these restrictions on expression to be constitutionally permissible.

The distinction drawn by the Court between campaign expenditures and contributions, and the different First Amendment protections that each form of regulation receives, has been subjected to considerable criticism.⁴⁴ Justice Blackmun stated that he was not persuaded that "the Court makes, or indeed is able to make, a principled constitutional distinction between the contributions limitations . . . and the expenditure limitations"⁴⁵ involved in *Buckley*. Chief Justice Burger agreed. In his separate opinion, he stated "[t]he contribution limitations infringe on First Amendment liberties and suffer from the same infirmities that the Court correctly sees in the expenditure ceilings."⁴⁶ According to the Chief Justice,

39. 435 U.S. 765 (1978).

40. *Id.* at 792.

41. 455 U.S. 129 (1982).

42. 424 U.S. at 21.

43. *Id.* at 20.

44. See, e.g., Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982).

45. 424 U.S. at 290 (Blackmun, J., concurring in part and dissenting in part).

46. 424 U.S. at 235 (Burger, C.J., concurring in part and dissenting in part).

[C]ontributions and expenditures are two sides of the same First Amendment coin. . . . The Court's attempt to distinguish the communication inherent in political *contributions* from the speech aspects of political *expenditures* simply "will not wash." We do little but engage in word games unless we recognize that people—candidates and contributors—spend money on political activity because they wish to communicate ideas, and their institutional interest in doing so is precisely the same whether they or someone else utters the words.⁴⁷

If there is truly to be a free marketplace of ideas as intended by the First Amendment,⁴⁸ then there must be a free marketplace of communications.

III. Government Regulation of the Electronic Media

As the court noted in *Buckley*, political campaigns now make extensive use of the electronic media.⁴⁹ Yesterday's tree stumps and soapboxes have given way to today's electronic boxes as candidates have turned to radio, television, and cable to bring their names and views to the attention of the voting public. Because the electronic media are so intertwined with the political process, our national communications policies are often manipulated in attempts to achieve political reforms. In addition to direct regulation of candidates, Congress regulates the broadcasters and cablecasters that carry campaign advertisements and cover campaign activities. The Communications Act of 1934,⁵⁰ the primary repository of communications law and policy, has always contained special provisions governing the relationship between broadcasters and political candidates. The recent reform efforts, especially the Federal Election Campaign Act of 1971,⁵¹ have further extended and refined the regulation of political communications. The list of regulations now governing what is loosely called "political broadcasting" demonstrates how the Congress and the Federal Communications Commission (FCC) have used communications policy in an effort to advance political reforms.

Congress has attempted to control the cost of political campaigns by limiting the rates that broadcasters may charge politicians for their advertisements. The "lowest unit charge" rule insures that during the forty-five day period preceding a primary election and the sixty day

47. *Id.* at 244 (emphasis in original).

48. *See* 435 U.S. at 810 (White, J., dissenting).

49. *See* 424 U.S. at 19.

50. 47 U.S.C. § 151-69 (1934) (amended 1937).

51. *See supra* note 13 and accompanying text.

period preceding a general election, a station may not charge a legally qualified candidate more than a station's most favored commercial advertiser.⁵² At all other times, a station may not charge a legally qualified candidate more than the rate charged to other advertisers for "comparable use."⁵³

Congress has enacted several provisions designed to insure that candidates get "on the air." Broadcasters can have their licenses revoked "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."⁵⁴ A second access obligation is the "equal opportunities" rule, which provides that once a candidate obtains time on a station, all other candidates for the same office must be afforded equal opportunities to use that station.⁵⁵ The FCC also requires "quasi-equal opportunities": if a station affords time during an election to supporters of or spokespersons for a candidate in order to discuss campaign issues or criticize opponents, then the station must afford comparable time to representatives of those opponents.⁵⁶

The FCC has limited the ability of broadcasters to freely editorialize during campaigns. The "political editorial" rule provides that if a station broadcasts an editorial endorsing or opposing a candidate for office, then candidates for the same office who are not endorsed or who are opposed must be sent: a) notification of the dates and times of the editorial; b) a script or tape of the editorial; and c) an offer of an opportunity to respond over the station.⁵⁷ The "personal attack" rule is similar. If a station attacks the honesty, character, integrity, or like personal qualities of an identified person or group during discussion of a controversial public issue, then the person or group attacked must be sent: a) notification of the date, time and program on which the attack was made; b) a script, tape, or summary of the attack; and c) an offer of a reasonable opportunity to answer the attack over the station.⁵⁸

A final aspect of regulation of the electronic media is the Fairness Doctrine, which sets forth the general obligations of broadcasters.⁵⁹

52. 47 U.S.C. § 315(b)(91) (1934) (amended 1937).

53. 47 U.S.C. § 315(b)(2) (1934) (amended 1937).

54. 47 U.S.C. § 312(a)(7) (1934) (amended 1937).

55. 47 U.S.C. § 315(a) (1934) (amended 1937).

56. This is also known as the "Zapple Doctrine." See Nicholas Zapple, 23 F.C.C.2d 707 (1970); 47 C.F.R. § 73.1930 (1982).

57. 47 C.F.R. § 73.1930 (1982).

58. 47 C.F.R. § 73.1920 (1979).

59. Fairness Report, 48 F.C.C.2d 1 (1974). See also 47 U.S.C. § 315(a) (1934) (amended 1937).

Radio and television stations must devote a substantial amount of time to the discussion of important, controversial public issues; a station that presents one side of an issue must provide a reasonable opportunity for the presentation of contrasting views on that issue.

IV. The Practical and First Amendment Problems Created by Government Regulation of the Media

It is an open question whether the political broadcasting rules have accomplished the results intended by political reformers. These rules, however, have created a number of problems that should persuade Congress to reject future attempts to manipulate communications laws to achieve political reforms.

First, the government has opened the gates to a flood of sensitive political disputes. The political broadcasting rules are loaded with ambiguities, terms of art, exceptions, and qualifications, all of which call for frequent intervention by the FCC and the courts. Every election brings forth clashes between candidates and broadcasters over their competing rights and interests.

Once these inevitable disputes arise, they are not always decided by apolitical, disinterested parties. The FCC, which has formulated many of the political broadcasting requirements and which sits in judgment on violations of these requirements, is itself politically oriented. The commissioners are nominated by the President and confirmed by the Senate according to their party affiliations.⁶⁰ Furthermore, the Commissioners are constantly subjected to a variety of political pressures once they take office.⁶¹

As a result, some observers have recognized at least the appearance of bias in the FCC's political campaign decisions. Justice Stevens referred to this problem in his dissenting opinion in *CBS v. FCC*.⁶² In *CBS*, the Supreme Court upheld the FCC's finding that the three national television networks had violated the access requirements of the Communications Act by refusing the Carter-Mondale Presidential Committee's request for airtime. Justice Stevens noted:

The possibility that Commission decisions under § 312(a)(7) may appear to be biased is well illustrated by this litigation. In its initial decision and its decision on the networks' petitions for reconsideration, the Commission voted 4-3 in favor of the Carter-

60. 47 U.S.C. § 154 (1934).

61. See E. KRASNOW, L. LONGLEY & H. TERRY, *THE POLITICS OF BROADCAST REGULATION*, ch. 3 (3d ed. 1982).

62. 453 U.S. 367, 419 (1981) (Stevens, J., dissenting).

Mondale Presidential Committee. . . . In both instances, the four Democratic Commissioners concluded that the networks had violated the statute by denying the Committee's request for access; the three Republican Commissioners disagreed.⁶³

The mere possibility that some of the FCC's decisions may be politically biased should cause the Congress to reject further political "reforms" which involve manipulation of communications policy.

A more fundamental problem is that these political broadcasting rules give the federal government enormous power over the content of information disseminated by the electronic media. The government can directly and indirectly tell broadcasters what information they may distribute. The government certainly has no such power over the content of the print media—the First Amendment prevents that. Why, despite the First Amendment, can the government regulate the electronic media?

The government's power over the electronic media can be traced back to the conditions accompanying the development of commercial AM radio broadcasting in the 1920's. Radio was largely unregulated in its infancy; as more and more stations came on the air, interference among stations increased. The federal government stepped in to bring order out of the resulting chaos by regulating the use of the spectrum of frequencies: Congress passed the Radio Act of 1927,⁶⁴ and later revised that effort with the Communications Act of 1934. Thus, the blueprint of our national communications policy was laid out in a time when spectrum scarcity was a primary concern and when radio was more of a novelty than an established and vital source of information. The conventional wisdom of that day held that "the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another."⁶⁵ Therefore, to select those who were to be granted licenses and thereby permitted to use the spectrum, the FCC employed the measuring stick of the "public convenience, interest, or necessity."⁶⁶

It was the notion of radio spectrum scarcity combined with the public interest obligations that were imposed upon those who received licenses which led to the political broadcasting regulations and other content controls that exist today. These regulations have expanded with the growth of communications methods and now cover television,

63. *Id.* at 419.

64. 44 Stat. 1162.

65. *National Broadcasting Co. v. United States*, 319 U.S. 190, 213 (1943).

66. *See, e.g.*, 47 U.S.C. § 307 (1934).

cable, and the soon-to-arrive direct broadcast satellite services. Although broadcasters have challenged content regulations on First Amendment grounds, these controls have been upheld by the courts.

The most famous of the cases involving the constitutionality of content regulations governing the broadcast media is *Red Lion Broadcasting Co. v. FCC*,⁶⁷ the landmark Supreme Court decision upholding the constitutionality of the FCC's personal attack rule.⁶⁸ Reasoning that different First Amendment standards would apply to the electronic media because they possess characteristics different from the print media, the Court held that the Fairness Doctrine⁶⁹ did not violate broadcasters' First Amendment rights.⁷⁰ The primary difference cited was the scarcity of the radio spectrum:

It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgement of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions.⁷¹

Five years after *Red Lion*, the Supreme Court was again faced with a First Amendment challenge to a personal attack law. In *Miami Herald Publishing Co. v. Tornillo*,⁷² however, the law was directed at newspapers rather than broadcasters, and was struck down. The language of the Court's unanimous opinion stands in sharp contrast to *Red Lion*:

The Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.

A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of

67. 395 U.S. 367 (1969).

68. For a description of the personal attack rule, see *supra* note 58 and accompanying text.

69. See *supra* note 59 and accompanying text.

70. 395 U.S. at 367, 386-401.

71. *Id.* at 394.

72. 418 U.S. 241 (1974).

editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.⁷³

Our nation's media now operate under distinctly different sets of First Amendment rules—one for print, and another for electronic media. Although both forms of media perform identical roles in our society—they inform, they entertain, they act as watchdogs over government institutions—the content of only the electronic media can be regulated. The time has come for a reassessment of this regulatory model, if for no other reason than because advances in communications technology no longer permit old assumptions and old rationales to go unchallenged. We live in an era of rapid and explosive communications development. Scarcity may have been a reasonable concern during the 1920's and 1930's, but today's problem is keeping track of communications abundance.

Radio broadcasting, of course, has grown far beyond the confines of its infancy, and newer methods of communication seem to be appearing at an ever increasing rate. More than 9,000 radio stations and over 1,100 television stations are presently licensed to broadcast in the United States.⁷⁴ Systems using coaxial cable can provide hundreds of additional channels; future systems utilizing optical fibers could provide even more. Low-power broadcasting, microwave channels and direct satellite-to-home broadcasting will further expand communications options. Communications technology is advancing at such a rapid rate that even experts cannot predict what the future will bring. They stress, however, that scarcity is no longer an issue. Any limitations on communications abundance will be caused by economic constraints or by government regulations, rather than by technological shortcomings.⁷⁵ Spectrum scarcity simply cannot be used to justify government controls that fly in the face of First Amendment ideals.

In addition to undermining the validity of scarcity-based regulation of the electronic media, technological advances may prove dangerous for the heretofore unregulated print media. Technology is blurring the once clear line between what is printed and what is electronic. So long as the printed press has been just that, the First Amendment has afforded virtually unlimited protection. Newspapers, however, are increasingly turning to electronic methods of gathering, transmitting, and

73. *Id.* at 258.

74. *See Broadcasting*, Dec. 20, 1982, at 72.

75. *See Hearings on Freedom of Expression Before the Senate Comm. on Commerce, Science and Transportation*, 97th Cong., 2d Sess. (1982).

distributing information. As the press moves into the electronic realm, can it remain safe from government regulation?

Those who feel that this is a fanciful concern should look more closely at the *Miami Herald* case. While the Supreme Court decision is a ringing affirmation of newspaper freedom, this decision overturned a very intriguing holding by the Florida Supreme Court.⁷⁶ The Florida court unanimously upheld the state's right of reply statute, and anchored its decision in part on principles borrowed from broadcasting law:

Newspapers are not wholly dependent on electronic media as were the broadcasters in *Red Lion Broadcasting Co. v. FCC*, However, we have no difficulty in taking judicial notice that the publishers of newspapers in this contemporary era would perish without this vital source of communications. The dissemination of news other than purely local is transmitted over telegraph wires or over air waves. This not only includes dissemination of news but also in chain newspaper operations so prevalent today, the *Miami Herald* being one; even editorials are prepared in one place and transmitted electronically to another. Therefore, the principles of law enunciated in *Red Lion Broadcasting Co. v. FCC* . . . have been taken into consideration in reaching our opinion.⁷⁷

Newspapers, of course, breathed easier when the Florida decision was overturned, but they should not become complacent. The Florida Supreme Court used this reasoning a decade ago when the *Miami Herald* was much less dependent upon electronic communications than are newspapers today. And tomorrow, Congress, the courts, and the FCC may be faced with even more persuasive arguments in favor of applying broadcast-type content controls to newspapers.

Teletext and videotext are two new services that have the potential to be the "newspapers" of the future. These services will transmit textual information over wires or by broadcast signals into homes and offices where the information can be read off a video screen. When an editorial can arrive as easily on a videoscreen as on a doorstep, how will the government react? Will newspapers that use videotext delivery fall under government content controls? Or will newspaper protections be extended to all media?

76. *Tornillo v. Miami Herald Publishing Co.*, 287 So. 2d 78 (1973).

77. *Id.* at 86-87.

Conclusion

We should not wait until new technologies force "either-or" choices upon Congress, the courts, or the FCC. Freedom of expression is a fundamental liberty that should not be left subject to further uncertainty. We must act now to insure that our government has no power to regulate the content of any media, print or electronic.

The most lasting and complete way to guarantee freedom of expression for all media is to amend the Constitution. When the author proposed that method, however, he found that there was not enough support to proceed. Some of the strongest opponents of a constitutional amendment were members of the print media. They were sympathetic to the underlying philosophy of a constitutional approach, but feared the amendment process would be used to restrict, rather than expand, press freedoms in the present climate of anti-press sentiment.

Thus, the most practical solution appears to be legislation that would eliminate the federal statutory underpinnings of content regulation of the electronic media. The author has introduced a bill that amends the Communications Act in order to accomplish that goal.⁷⁸

78. S. 1917, 98th Cong., 1st Sess. (1983). The text of the act is as follows:

Sec. 1. "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as the 'Freedom of Expression Act of 1983.'

FINDINGS

Sec. 2. The Congress finds that—

- (1) free and unregulated communications media are essential to our democratic society;
- (2) there no longer is a scarcity of outlets for electronic communications;
- (3) the electronic media should be accorded the same treatment as the printed press;
- (4) regulation of the content of information transmitted by the electronic media infringes upon the First Amendment rights of those media;
- (5) regulation of the content of information transmitted by the electronic media chills the editorial discretion of those media and causes self-censorship, thereby dampening the vigor and limiting the variety of public debate; and
- (6) eliminating regulation of the content of information transmitted by the electronic media will provide the most effective protection for the right of the public to receive suitable access to a variety of ideas and experiences.

PURPOSES

Sec. 3. The purpose of this Act is to extend to the electronic media the full protection of the First Amendment guarantees of free speech and free press.

AMENDMENTS TO THE COMMUNICATIONS ACT OF 1934

Sec. 4. The Communications Act of 1934 is amended—

- (1) in section 312(a) by—
 - (A) adding 'or' immediately at the end of paragraph (5);
 - (B) striking out the semicolon and 'or' in paragraph (6) and inserting in lieu thereof a period; and
 - (C) striking out paragraph (7);
- (2) by repealing section 315;

This legislation should attract the broad support necessary to become law. It may take several years to achieve passage in both houses of the Congress, but the fight is worthwhile. Freedom of expression is our most precious right, and we must make certain that it is fully protected in our modern society.

(3) by amending section 326 to read as follows:

'Sec. 326. Nothing in this Act shall be construed to give the Commission the power to—

- (1) censor any communication;
- (2) review the content of any completed communication; or
- (3) promulgate any regulation or fix any condition which shall interfere with the right of free speech, including any requirement of an opportunity to be afforded for the presentation of any view on an issue.' "

