Media Chic

Presidential Television. By Newton N. Minow, John Bartlow Martin & Lee M. Mitchell. *New York: Basic Books, Inc.,* 1973. Pp. xv, 232. $8.95.

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Within a relatively short time television has grown from insignificance to nearly total pervasiveness. Since the early 1950's we have become accustomed to this new medium, using it more hours each day[1] and increasingly relying upon it for advertising, entertainment, news, and political debate. Not surprisingly, the new medium and Presidents have found over the years a mutual attraction. Presidents need television to reach the electorate, and the TV medium finds presidential words and actions great "copy" (to stretch only slightly the newspaper term).

Presidential Television[2] documents the steadily expanding use of television by incumbent American Presidents. Following an analysis of the political implications and potential dangers of this phenomenon, the authors reach what seems to be the main point of the book: a series of proposals aimed at mandating an approximate equality of simultaneous television network time among the President, the Congress, and the party in opposition to the President.

The authors point out that the concern of the Framers of the Constitution was not that the President would become too powerful, but that he would not be noticed at all among the numerous members of Congress, whose personal constituencies would make them more powerful as a group.[3] Today, the authors maintain, the President has confounded the Framers' predictions by becoming the most visible, and therefore most powerful, politician in the country. They set out

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1. Total television viewing per home has been estimated to have reached 6 hours, 20 minutes per day in the over 60 million homes in the United States having television receivers. BROADCASTING MAG., BROADCASTING YEARBOOK 12 (1974).

2. N. MINOW, J. MARTIN & L. MITCHELL, PRESIDENTIAL TELEVISION (1973) [hereinafter cited to page number only].

3. Pp. 102-03, *citing* THE FEDERALIST No. 73 (Hamilton sees a natural tendency of legislative authority to "intrude upon the rights and absorb the powers of the other departments").

to show that it is largely because of the visibility resulting from his frequent use and masterful manipulation of television that he outshines the Congress and the courts and leaves his opposition far behind.

The proposals advanced by the authors aim at correcting this situation, as they perceive it, by "balancing" presidential use of television in four ways: (1) simultaneously broadcasting live on all television networks during prime time at least four evening congressional sessions each year; (2) granting to the national committee of the largest political party opposing the President an automatic legal right of reply to presidential addresses during an election year and near the time of off-year congressional elections, under the same conditions of coverage that the President enjoyed; (3) televising voluntary debates between spokesmen of the two major parties two to four times annually; and (4) providing free time simultaneously on the three networks to all presidential candidates according to a formula giving equal time to the major party candidates and lesser amounts of time to minor candidates.[4] The authors recommend that the equal time provision[5] and the Fairness Doctrine not be applied to these broadcasts, in order to avoid legal challenges and to prevent the President from demanding more time to reply to them.[6]

I

Unfortunately, the authors confuse the causes and the effects of the phenomenon they call "presidential television." Because they deal almost exclusively with effects, their recommendations, and especially their proposed changes in communications law, smack of tinkering and manipulation rather than the redress of constitutional imbalances. The authors blame the President's frequent television appearances for what they consider his undue power over public opinion in comparison with that of Congress and the opposition party. This conclusion is inaccurate in two respects. First, the present authority and prominence of the presidency result not from television but from the historical growth of the involvement of the federal government, and thus of the

4. This last proposal was earlier developed in THE TWENTIETH CENTURY FUND COMM'N ON CAMPAIGN COSTS IN THE ELECTRONIC ERA, VOTERS' TIME (1969). This review will not discuss the proposals developed originally in that study. The authors also recommend that to preserve its judicial integrity, the Supreme Court should continue to avoid television coverage, while taking some steps to improve general press coverage of its functioning. Pp. 92-102.

5. 47 U.S.C. § 315 (1970).

6. For a summary of the authors' proposals, see pp. 161-63.

Executive, in national and international affairs.[7] Second, the President does not have control over the total amount and nature of his coverage on television, and there is no assurance that he will benefit from the exposure he does receive.

As the nation and the federal government both grew, so also did the power of the presidency. For the first 160 years of our constitutional history, this growth was unaided by television. By the dawn of the era of presidential television in 1947, when President Truman made an address from the White House to launch the Food Conservation Program,[8] the fears of the Framers that the President would be an obscure and unnoticed figure had long been put to rest.

Because of the inherent nature of the office, a Chief Executive is able to supervise or control detailed administrative matters and to act quickly and decisively in circumstances where the pace of national and international events is too rapid for the more contemplative Congress. In both situations, the pragmatic approach of Congress has been to delegate increasing authority to the President in order to allow effective action. Congress has also deliberately accepted certain methods of conducting business which allow the President to set much of its agenda; a large portion of the congressional year is devoted to consideration of the President's budget and legislative proposals. Congress has an even lesser role in international relations, where the President has a constitutional primacy.[9] Not surprisingly, much of the coverage of the President on national television has focused on foreign affairs.[10]

The coverage of the President in all the mass media, including television, reflects his importance, prestige, and newsworthiness in national and foreign affairs. The President's central role is evidenced by the fact that he regularly gets headline coverage in the more than 60 million newspaper copies printed daily in the United States,[11] as

7. The authors almost entirely ignore these factors in their concern with television. There are only occasional, brief admissions that other factors even exist. "Because he can act while his adversaries can only talk, because he can make news and draw attention to himself, and because he is the only leader elected by all the people, an incumbent president always has had an edge over his opposition in persuading public opinion. Presidential television, however, has enormously increased that edge." Pp. 10-11. "Presidential power has expanded because of the growth in national involvement in foreign affairs, because of the increasing role of the federal government in national life, especially in social services, and because television has given the president more access than Congress to the public." P. 103. Even in these statements, however, television is still portrayed as the most significant factor.

8. P. 33.

9. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

10. For one illustration that coverage is predominantly on foreign affairs, *see* note 14 *infra*. In addition, there has been extensive coverage of presidential actions in areas where Congress has delegated authority to the President, for example, wage and price regulation during the Nixon Administration.

11. U.S. DEP'T OF COMMERCE, POCKET DATA BOOK 296 (1973).

well as extensive coverage in the national news and opinion magazines. The authors recognize the fact that "[a]lmost anything the President does is news."[12] If "the modern trend in American government is towards an increasingly powerful president and an increasingly weak Congress,"[13] then television, like the other mass media, has only reflected that trend.

Furthermore, there is no evidence that the President's use of television confers any kind of political omnipotence. The political and social forces in this country are sufficiently diffuse to prevent presidential control of public opinion, and therefore, despite his use of television, the President may be defeated on unpopular policies and programs. For example, most of President Nixon's first term television addresses dealt with his Vietnam policies, which nevertheless remained less popular than most of his other domestic and foreign policies.[14] More powerful countervailing forces were acting concurrently to diminish any television advantage that the President might have enjoyed.

Despite the significant amount of attention he gets, the President does not control television coverage. He is covered by the networks and local stations at the discretion of their own independent news departments, and has no right to demand television time.[15] Furthermore, congressmen and other public figures frequently appear on television, and the views and activities of the President's opponents are regularly reported. In fact, if all programming is considered, senators and representatives appear on television much more frequently than the President.[16]

12. By virtue of his office, the President of the United States—its constitutional leader, supreme military commander, chief diplomat and administrator, and preeminent social host—obviously ranks higher in the scale of newsworthiness than anyone else—defeated opposition candidate, national party chairman, governor, congressman, senator.

. . . .

A presidential press conference is clearly news. So is his television address; a report of it will be on page 1 in tomorrow's newspapers. A presidential speech broadcast only on radio will be reported in the television news.

P. 21.

13. P. 103.

14. As of April 30, 1972, President Nixon had preempted network programming a total of 19 times to make addresses to the nation. Ten of these addresses, more than half, dealt with Vietnam or Southeast Asia policy. This subject, to which he devoted by far the most attention, never received as much public support as the authors' notion of the power of presidential television might predict.

15. At times, the President has had to bargain with the networks for a desired television time spot. The authors relate that an Eisenhower speech on the Quemoy-Matsu crisis was delayed until after prime time, while President Kennedy had to postpone a speech designed to prevent racial violence at the University of Mississippi from 8:00 p.m. to 10:00 p.m. (by which time rioting had already started). P. 35.

16. In 1973 alone:

[W]ell over 150 different Congressional spokesmen appeared on the NBC Television Network in more than 1,000 separate appearances of varying lengths. By contrast,

Even if the television news departments of the three national networks failed to provide such extensive coverage of Congress, and the local TV stations on their own news shows did not cover their local senators and representatives, the Federal Communications Commission's (FCC's) Fairness Doctrine would provide a regulatory check on presidential television.[17] In 1970, the FCC recognized that the large number of presidential addresses presented an unusual situation triggering television fairness obligations even when all other programming was nearly balanced.[18]

The impression left by the authors overstates the President's television advantage over Congress and the opposition party. If television under proper circumstances can be an electronic throne for the President, it can also be an electronic booby trap awaiting a chance slip or slur in an offhand remark, thereby causing an explosion of indignation or outrage and a consequent drop in the public opinion polls.

No President has been uniformly effective in his television appearances.[19] It is perhaps the unique intimacy conveyed by television that is responsible for its capacity to betray both the serious and the super-

the President appeared approximately 148 times (of which about 20% were ceremonial occasions).

J. Goodman, President of NBC, Statement Before the Jt. Comm. on Cong. Operations, Mar. 7, 1974, at 4 (hearings to be published).

The *CBS Evening News* broadcast six nights a week to 18 million people a night included 222 interviews with or appearances by members of Congress from June 1, 1973, to last week [the week prior to Feb. 21, 1974] . . . . In addition there were hundreds of other reports of Congressional activity on the *CBS Evening News* during that period.

. . . .

In 1973, for example, there were 31 appearances by members of Congress on *Face the Nation* alone.

A. Taylor, President of CBS, Statement Before the Jt. Comm. on Cong. Operations, Feb. 21, 1974, at 2 (hearings to be published). Since June 1973, CBS has also implemented a more expansive reply policy for leading opposition figures to reply to presidential messages. *Id.* at 5.

17. The statutory basis for the Fairness Doctrine is the Communications Act, 47 U.S.C. § 315 (1970), but in reality the doctrine is an administrative concept grounded in the "public interest" standard governing broadcast regulation. 47 U.S.C. § 309 (1970). The doctrine requires that if a broadcaster gives time to present one side of a "controversial issue of public importance," he must provide a reasonable opportunity for the presentation of conflicting viewpoints. He must provide free time if paid sponsors are not available. There is no "equal time" requirement, and the broadcaster determines what time will be provided for the reply, the format to be used, and who the spokesmen for the other side will be. No individual or group has a right to time under the Fairness Doctrine, which is concerned only with the presentation of issues. *See, e.g.*, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (Fairness Doctrine held constitutional).

It should be noted that this reviewer recommends abolition of the Fairness Doctrine because of the opportunities it creates for bureaucratic and political second-guessing of editorial judgments.

18. Committee for the Fair Broadcasting of Controversial Issues, 19 P & F RADIO REG. 2D 1103 (1970).

19. *See, e.g.*, pp. 37, 40, 47, 48, 50-54, 58.

ficial weaknesses of a politician. The authors attribute the fall of Senator Joseph McCarthy in the mid-1950's to this effect.[20] On a more subtle level the authors suggest that President Johnson's continued inability to use television to bridge what became known as his credibility gap marked his failure to win support for his Vietnam policies and caused his political power to wane.[21] Perhaps this was also due to extensive television coverage of the application and effects of those policies.

Finally, having more to lose than to gain, an incumbent President nearing election time may choose to avoid the risks of television appearances in the hope that his opponent will be discredited and undermined by using television.[22] Such a practice is wholly inconsistent with the authors' notion of television's invariably favorable influence on public opinion and political forces.

II

The authors' first proposal for ending the imbalance in television exposure is that Congress should permit television "on the floor of the House and Senate for the broadcast of specially scheduled prime-time evening sessions . . . ."[23] At least four times per year, these are to be carried live by the three major networks simultaneously. "These broadcasts should be exempt from the 'equal time' law and the fairness and political party doctrines."[24] Staging special evening sessions for television coverage appears well within the power of Congress and, at least at the outset, sufficiently interesting to warrant the three-network, simultaneous, prime-time coverage the authors seek to achieve.[25] But the wisdom and propriety of such a congressional maneuver simply to counteract the President's use of television is doubtful.

20. P. 107.
21. *See* p. 47.
22. *See, e.g.*, p. 58.
23. Pp. 122, 161.
24. Pp. 124, 161. The Fairness Doctrine is discussed in note 17 *supra*. The "equal opportunities" provision, 47 U.S.C. § 315 (1970), applies only to actual candidates during an election campaign. The political party doctrine, a creation of FCC case law, provides that if one major party is given or sold time to discuss candidates or election issues, the other party must be given, or allowed to buy, time (but not necessarily equal time). Pp. 87-89.
25. Prime time is defined as the peak television viewing hours for evening entertainment, generally 7:00-11:00 p.m. It is interesting to note that the only hour which is prime time for the entire nation is 10:00-11:00 p.m., eastern time. The suggested live sessions would have to begin late in the evening in Washington, D.C., to reach west coast viewers during prime time.

While discussing ways to give Congress access to the media, the authors never really address the question of *how* congressional television will counteract presidential television, and their conclusion that "Congress needs television"[26] is therefore without force. Since Congress is by nature pluralistic, many of the recent attempts of its members to present unified fronts have necessarily expressed only the least common denominator of their views and thus those efforts have lacked the impact of a singly-spoken presidential statement.[27] It is hard to see how the prime-time congressional specials could be much better, unless carefully staged by the majority party leaders; yet if the specials were actually staged, both viewers and news commentators might see them as contrived performances. These special congressional sessions are therefore unlikely to improve significantly the image of Congress or provide an effective means of expressing opposition to the President.

In practice, it is doubtful that this proposal would result in the long-run balance to presidential television the authors seek. More often than not, Congress and the White House have been held by the same party, a situation that could give even greater exposure to the President's position and put the opposition party at a more serious television disadvantage when it is perhaps most dangerous to do so.

The authors also suggest that the congressional coverage under their proposal be exempt from the Fairness Doctrine. If the President and the congressional majority were of the same party, the President's opponents would not be represented by the televised congressional sessions, and they would lose the opportunity under the Fairness Doctrine to have these programs balanced by presentation of conflicting views.[28] Moreover, if a broadcaster in this situation voluntarily attemped to balance the exempt congressional coverage by giving time to opponents of the President, there would be a danger that supporters of the President's policies might try to apply the Fairness Doctrine to this nonexempt coverage, forcing the broadcaster to give still more time to the presidential position.

Furthermore, this proposal seems to require the networks to broad-

26. P. 121.

27. Pp. 125, 130. In describing the attempts of Democratic party leaders to present opposition to President Nixon's Vietnam policy, the authors observe that the "quest for a consensus resulted in a watered-down response that George Reedy, President Johnson's former press secretary, said 'sounds like yapping' to most television viewers." P. 130. The authors also observe that the diversity within Congress creates severe limitations on its ability to rebut presidential television. P. 121.

28. *See* p. 1755 *supra*.

cast these congressional sessions. This raises the specter of government compelling its own coverage, a dangerous precedent. Currently, one of the checks on the political use of television is that the President and Congress can only request time, and the networks can therefore negotiate over the time of day and amount of time given.[29] This protection would be removed if either the President or Congress were permitted to demand television time.

The authors have not given sufficient weight to First Amendment interests in their proposal to broadcast congressional sessions. A better solution, if Congress wishes to be more accessible to all of the media,[30] would be to permit journalists to cover whatever congressional activities they consider newsworthy by means of print, radio, or television. Adequate television coverage of Congress could best be encouraged through improvement of congressional procedures. One proposal is to institute several reforms, including restructuring committees to remove overlapping jurisdictions, developing a more efficient method for reviewing the President's budget proposals, and coordinating the actions of the House and Senate, in the hope that such reforms would increase the visibility of Congress and make it easier for the press to cover congressional activities.[31] Constructive proposals of this nature might profitably be undertaken before Congress schedules its debut on live, prime-time television.

When Congress does something newsworthy, it invariably receives broad coverage. All that Congress needs to do is open its doors, if it decides that the public needs "congressional television." Journalists should be left to take care of the rest. Congress has no need to demand or legislatively require television coverage.

29. *See, e.g.*, note 15 *supra*.

30. C. Edward Little, President of the Mutual Broadcasting System, points out that in 1972 congressional committees conducted 40 percent of hearings and other meetings behind closed doors. He notes encouragingly, however, that the trend towards closed meetings is being partially reversed in recent months. C. Little, Statement Before the Jt. Comm. on Cong. Operations, Feb. 21, 1974 (hearings to be published), *citing* 28 CONG. Q. ALMANAC 93 (1972).

31. Rep. J. Cleveland, Statement Before the Jt. Comm. on Cong. Operations, Feb. 20, 1974, at 5 (hearings to be published).

> But the final passage of a bill or a successful investigation are only parts of the legislative drama. The rest of the performance must also be comprehensible—both to achieve quality and to communicate effectively.
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> . . . .
>
> Reform can achieve this objective. The restructuring of committees, for example, can reduce overlapping jurisdictions, clarify responsibility, improve oversight, and encourage more rational planning—all of which would heighten the visibility of committee work and make it more accessible to the media, as well as produce a higher quality legislative product.

III

The next major proposal the authors develop is that:

> [T]he national committee of the opposition party should be given by law an automatic right of response to any presidential radio or television address made during the ten months preceding a presidential election or within 90 days preceding a Congressional election in nonpresidential years.[32]

Suggesting amendment of § 315 of the Communications Act of 1934,[33] the authors propose that every broadcaster or cablecaster who carries a presidential appearance within the expanded response period provide "equal opportunities to the national committee of the political party whose nominee for President received the second highest number of . . . votes"[34] in the most recent presidential election. The equal opportunities and fairness provisions are to be suspended for this reply by the opposition.[35] The purpose of this proposal is "to insure equality in the electoral use of television."[36]

If such a proposal were implemented, the result would be the replacement of editorial judgment in campaign coverage by a mechanical rule. It is no doubt true that fairness and objectivity are often lacking in network coverage of political parties and candidates. It seems more likely, however, that even with the limited diversity of only three networks, day-to-day news selection based on a reasoned, professional judgment is superior to the mechanical application of a law which forces broadcasters automatically to present spokesmen selected by the opposition party.

One need not peer far into the past to find examples of the potential mischievousness of such a law. When President Johnson was pursuing his Vietnam policies, most of the effective opposition was in his own party, while Republicans were generally less critical of the war. Since the proposed law would not limit the other party to the issues discussed by the President, the Republicans could have eschewed any discussion of the war and instead attacked the President on some unrelated and perhaps less important issue. Ultimately, the war would have been opposed less effectively by the President's real opposition in the time remaining to the networks for coverage of other news topics.

32. P. 161.
33. 47 U.S.C. § 315 (1970).
34. P. 161.
35. P. 162.
36. P. 153.

On the whole, granting the party out of power a right of free reply will make political debate in America more partisan and institutional rather than philosophical and issue-oriented.[37] Such a provision may lock the current political scene into law by narrowing the range of expression to established partisans. Similarly, this proposal could hurt insurgent candidates running independently of the backing of party regulars by giving each national committee the power to select party spokesmen. Television debate of political issues is not likely to be strengthened by giving so much television control to the party regulars on the national committees.

The "opposition" to the President's policies can come from many sources. Whether that opposition is the other party, a local official, or the heir apparent within the President's own party, the wiser choice is to seek conditions under which each such group can receive news coverage to the extent that it is newsworthy and can also have a right to buy television time for itself. This latter issue of access rights, which would in many ways help achieve the authors' objectives, is explored in more detail below.

IV

The authors propose also that "National Debates" among spokesmen of the national political parties be established on a voluntary basis for all concerned, with the stipulation that they be shown live during prime time with simultaneous major network coverage.[38] Designed to facilitate the development of party positions, a dubious goal in itself, the debates would more than likely lead to many of the same results as the proposals for "opposition television" that were criticized above.

Political debates have always been voluntary for both participants and broadcasters. There has seldom been any hesitancy on the part of broadcasters to stage debates. The problem is that the incumbent, usually much better known, is often understandably reluctant to help provide an equal forum for his opponents. The National Debates would frequently meet the same obstacle. It is likely that they would never take place except when the strategies of all candidates coincide. Such debates therefore could never play a major role in balancing presidential television appearances.

37. The present Fairness Doctrine, in contrast, requires a balance of issues, not personalities or parties.

38. Pp. 155, 162.

The authors would vest in the national committees of each party the power to choose the spokesmen who will participate in these debates. They suppose that the "most arresting personalities and best debaters will be chosen."[39] More likely, the division within the national committees will often lead to compromise spokesmen noted only for their lack of further political ambition.[40] Without the charismatic figures that television seems to require, the debates would probably languish very low in viewer popularity—except for those few occasions when they would have been interesting enough to command coverage anyway.

V

In developing their recommendations for giving television reply time to Congress and the opposition party, the authors almost completely ignore the question of allowing a private right of access.[41] Giving access to groups other than Congress and the opposition party would make it possible to provide exposure for a wider range of political opinions. Had the authors considered the access issue in light of theories of broadcasting regulation and the requirements of the First Amendment, their recommendations might have been far different.

Despite the demand for some form of access by private groups, the Supreme Court ruled in *Columbia Broadcasting System v. Democratic National Committee*[42] that broadcaster refusal to allow paid access to the airwaves in the form of "editorial advertisements" did not violate the First Amendment or the broadcasters' statutory duty[43] to act "in the public interest." The Court, in considering the possibility of creating such a private right of access, said that it was necessary to weigh the interests in free expression of the public, the broadcaster, and the individual seeking access. It then held that the Congress was not unjustified in concluding that the interests of the public would be best served by giving full journalistic discretion to broadcasters, with the only check on the exercise of that discretion being

39. P. 155.
40. Conversely, if each party chose several spokesmen to represent various wings of the party, the debates could become little more than intraparty quarrels.
41. "Private right of access" refers to the practice of allowing individuals and groups to purchase television time to broadcast their views on politics or other subjects.
42. 412 U.S. 94 (1973). The Court overturned a ruling by the court of appeals that a flat ban on paid editorial announcements violates the First Amendment, at least when other sorts of paid announcements are accepted. Business Executives Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971).
43. 47 U.S.C. § 309 (1970).

the FCC's public interest regulation of broadcasters. The majority opinion pointed out that choosing a method of providing access to individuals and private groups that relied on detailed oversight by a regulatory agency would simply increase government interference in program content, in view of the need to create regulations governing which persons or groups would have a limited right of access.[44] The Court stated, however, that the access question might be resolved differently in the future: "Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable."[45]

The appearance of *Presidential Television* revives the concerns that took *Democratic National Committee* to the Supreme Court. The growing role of broadcasting in American politics, together with the increasing clamor for some form of access, may justify legislative reexamination of whether the broadcaster should be required in selling his commercial time[46] to accept all paid announcements without discrimination as to the speaker or the subject matter.[47] In this way, paid editorial announcements would stand on an equal footing with paid commercials and paid campaign advertisements. The broadcaster would sell advertising time exclusively on the basis of availability, the same way that newspapers and magazines sell advertising space. All

44. 412 U.S. at 126-27. The Supreme Court distinguished this type of "right of access" from enforcement of the Fairness Doctrine, which the Court described as involving only a review of the broadcaster's overall performance and "sustained good faith effort" to inform the public fully and fairly. However, the Court apparently was unaware of the gradual shift away from general enforcement of the Fairness Doctrine towards specific, case-by-case and issue-by-issue implementation. *See* Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes*, 23 FED. COM. B.J. 75 (1969); Goldberg, *A Proposal to Deregulate Broadcast Programming*, 42 GEO. WASH. L. REV. 73, 88 (1973); Robinson, *The FCC and the First Amendment: Observations on Forty Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967); Scalia, *Don't Go Near the Water*, 25 FED. COM. B.J. 111, 113 (1972), *quoting* Paul Porter from *Hearings on the Fairness Doctrine Before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce*, 90th Cong., 2d Sess., at 153 (1968). In effect, this shift in the method of enforcement has made the Fairness Doctrine similar to the type of "right of access" mechanism that the Court in *Democratic National Committee* said would regiment broadcasters to the detriment of the First Amendment. 412 U.S. at 127.

45. 412 U.S. at 131.

46. This proposal is limited to time reserved for paid commercials, not program time. A broadcaster would not be compelled to preempt regular programming. Commercial time on television falls generally in the range of 9 to 16 minutes per hour. The voluntary code of the National Association of Broadcasters allows nine minutes per hour during prime time, BROADCASTING MAG., *supra* note 1; the amount of commercial time is greater during other times of the day.

47. Under present government regulation, the broadcaster is legally responsible for his commercial time as well as his program material. In a system of paid access, it may be sufficient that individuals and groups are civilly liable for slander, obscenity, false or deceptive advertising, incitement to riot, or other offenses, and therefore the broadcaster should perhaps be relieved of liability for any infractions of law by users of the station's facilities.

persons able and willing to pay would have an equal opportunity to present their views on television.[48]

This kind of access right would be compatible with the policy concerns of the Supreme Court in *Democratic National Committee*.[49] This proposal would require no additional government administration or interference. Exempting access announcements from the Fairness Doctrine would cause a minimum of dislocation to the broadcaster's regular programming.[50] Moreover, broadcasters would not give up any significant control over substantive programming if the right of access were limited to commercial time. Both the journalistic freedom of the broadcaster and the interest of members of the public in obtaining television time are therefore protected by the creation of this limited right of access.[51]

By meeting some of the public demand for an electronic forum, developments in communications technology such as cable television will in the future almost surely reduce the hazards, real or imagined, from

48. This should not cause an unfair discrimination against groups which lack funds. Considering the amount of contributions which television appeals can attract, it is likely that any group with something important to say could raise money for the announcements by an on-the-air appeal. *See, e.g.*, p. 118 (an antiwar group paid $60,000 for time, but received $400,000 in contributions). Small, unpopular, or extremist groups might have trouble raising funds, but regrettably some of these groups probably would also be denied time under the present Fairness Doctrine. Poor groups whose views were not represented on programming time would be able to compel at least some coverage of their views through enforcement of the broadcaster's statutory responsibilities.

49. In fact, this would conflict less with *Democratic National Committee* than would the authors' proposals, which show little regard for the public interest or the journalistic freedom of the broadcaster. The authors would take from the broadcaster control over large blocks of time now devoted to program material, and give it to groups which the FCC could not hold accountable under the public interest standard. This was one reason the Court accepted the FCC's refusal to require public access in *Democratic National Committee*. 412 U.S. at 125.

50. If the Fairness Doctrine were applied to paid political advertisements, the broadcaster might be forced to provide free time for replies during regular programming time. 412 U.S. at 123-24 (the Court apparently did not decide whether the FCC would be permitted or required to extend the Fairness Doctrine to paid political advertisements). This possibility would be avoided by explicitly exempting these announcements from the Fairness Doctrine as part of the proposal. Such an exemption, of course, need not affect application of the Fairness Doctrine to product advertisements. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). In addition, this proposal would leave the license renewal process available as a recourse in cases of extreme program imbalance.

The Fairness Doctrine, moreover, is not the source of this right of access. To use the Fairness Doctrine to justify a private right of access is to give it a function for which it was never intended.

51. In contrast, giving an unlimited right of access during regular programming time could remove a large amount of time from the control of the broadcaster and give it to individuals or groups. Since even proponents of access agree that this would be undesirable, they recommend more "limited" rights of individual access. But then it would be necessary to have detailed FCC-enforced regulations and standards to determine who would be entitled to time and which time slots would be made available. A right of access so constrained would result in the same type of governmental control over program content that was condemned in *Democratic National Committee*, 412 U.S. at 126.

presidential television.[52] In the meantime, the more limited medium of broadcast television must be made more responsive to individuals and groups seeking to express their points of view. The method by which this is done is crucial. Access can either be given on an ad hoc basis to those groups powerful enough to command it legally (such as Congress and the opposition party), as the authors suggest, or it can be sold on a nondiscriminatory basis. Only the latter proposal would be an improvement over the present system.

VI

The thrust of all of the authors' proposals is toward dictating to television viewers what they are to see, with paternalistic disregard for their actual desires. In doing so, the authors have lost sight of the substantial journalistic function that broadcasters share with publishers. Newspapers devote their space to those issues and events that the editors feel the readers will find most important. The more important the event, the more prominent is its position in more newspapers. No one tells a newspaper how many column-inches to devote to a certain topic, and certainly there is no law requiring the periodic coverage of specified events regardless of their newsworthiness.

To be sure, the "broadcasters' First Amendment" has come to be viewed[53] as an abridged version of the original one.[54] It is crucial, however, that intrusions on journalistic expression be severely limited. Most of the authors' proposals would impinge on free journalistic expression at a time when ways should be found to help preserve that expression. Indeed, the inevitable arbitrariness and complexity of such proposals provide the best arguments against legal controls over the use of television. The proposals go well beyond what is necessary to achieve many of the authors' goals and, unfortunately, fail to concentrate on the development of a general system of access that would be better designed to achieve those goals.

The major criticism of the authors' proposals, though, is that they

52. While the authors include cable systems in their suggestions, it is doubtful that anyone, including the President, should appear simultaneously on all of the potentially numerous networks in a medium of channel abundance like cable. It is also doubtful that all cable network organizations should be required to give free time to Congress or opposition parties, since there should be sufficient time for sale to accommodate everyone. Cable television, therefore, should be exempt from the programming requirements proposed by the authors.

53. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969) (the right of the viewers and listeners is paramount to that of the broadcaster).

54. The First Amendment commands that "Congress shall make no law . . . abridging freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

would impair rather than expand the ability of television to evolve into a medium reflecting a wide range of perspectives on the American social and political scene. With the extreme economic concentration of control over television programming by the three national networks[55] and the growing scope of FCC programming regulations,[56] we are already moving toward control of national television programming by a familiar coalition of big business and big government. Proposals such as those in this book serve only to entrench such a system and to constrain the diversity and free choice that should characterize American television.

Presidential Television provides an interesting and valuable addition to the literature on national politics by documenting the successes and failures of the evolving strategies that Presidents have devised in their efforts to adapt to the new television medium. But in the end, the authors fail to demonstrate the validity of their assertion that television has significantly and permanently altered the ebb and flow of America's political forces. We are left with presidential television as a still-evolving form, mastered neither by news departments nor Presidents, clearly something different from presidential radio and presidential headlines, very much a part of our political process, but hardly a fundamental threat to our constitutional system. The authors have discovered the dangers inherent in excessive concentration of presidential power. But, in seeking to check this power, they have chosen a course at variance with our most fundamental First Amendment principles, undermining the ultimate check on political power—an electorate that informs itself through a press unrestrained by government prescription.

55. The three networks originate about 64 percent of all programming for affiliated stations. BROADCASTING MAG., *supra* note 1, at 70. The percentage is higher during evening prime-time hours. Of the 700 commercial stations operating as of April 30, 1974, BROADCASTING MAG., June 3, 1974, at 40, only about 80 are not affiliated with the networks. Station ownership is also highly concentrated:

> Each of the networks owns the legal maximum of 5 VHF stations. Since these are in the largest cities, networks reach 25 to 35 percent of all TV homes with their own stations.

R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 16 (1973).

56. *See, e.g.*, Notice of Inquiry in Docket No. 19154, 27 FCC 2d 580 (1971) (recommended percentages of certain types of programming); Further Notice of Inquiry in Docket No. 19154, 31 FCC 2d 443 (1971) (same); Report and Order Docket No. 19622, 29 P & F RADIO REG. 2D 643 (1974) (prime-time access restrictions on network programming).