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ABSTRACT

This analysis of First Amendment rights for the electronic media recounts the stories of the broadcasting/cable industry must-carry compromise of 1986 and the failed codification of the Fairness Doctrine in 1987. It is noted that these cases were peculiar because, in each instance, the most powerful media in the country willingly sought abridgment of their First Amendment rights. The comment is made that, although each of these attempts failed, it is likely that this disturbing practice will recur. Some causes for this curious behavior are suggested, and the paper concludes with a discussion of how the lessons learned from the must-carry and Fairness cases can contribute to the up-coming regulatory debate over telephone company video services. (GL)

Mortgaging the First Amendment: Strategic Use of the Regulatory Process and the Electronic Media

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This analysis of First Amendment rights for the electronic media recounts the stories of the broadcasting/cable industry must-carry compromise of 1986 and the failed codification of the Fairness Doctrine in 1987. These cases were peculiar because in each instance the most powerful media in the country willingly sought abridgment of their First Amendment rights. Each attempt failed, fortunately, but it is likely tnat this disturbing practice will recur. This review suggests some causes for this curious behavior and concludes with a discussion of how the lessons learned from the must-carry and Fairness cases can contribute to the up-coming regulatory debate over telephone company video services.

The analysis that follows draws on Owen an Braeutigam's[1] theory of "strategic use of the administrative process." According to the theory, rational actors avoid risks inherent in the market by seeking government regulation. Owen and Braeutigam argue that the public perceives regulatory-derived distributive allocations to be fairer those produced by the untethered market. Political support for this 'fair' regulatory allocative distribution explains the stability of regulatory regimes.

Owen and Braeutigam consider about a dozen different strategies for regulated firms, including litigation, control of information released to regulators and those representing the regulated firm, management of innovation, cross-subsidization among multiple outputs, the use of the regulatory agency as a cartel manager, and cooptation of experts.[2] Most of the mechanisms imposed upon the regulatory agencies to guarantee procedural fairness delay change, if not stifle it altogether. Consequently, those parties interested in preserving the status quo are most likely to avail themselves of the risk-averting and dilatory safeguards built into the regulatory process.

I have broadened the term Owen and Braeutigam use from "strategic use of the administrative process" to "strategic use of the regulatory process" to reflect an interest in strategic behavior in contexts broader than that brought to mind by the term "administrative

[1] Bruce M. Owen and Ronald Braeutigam, *The Regulatory Game: Strategic Use of the Administrative Process*. Cambridge: Ballinger Publishing Co., 1978.

[2] ibid., chap 1.

process." Owen and Braeutigam, of course, recognize that strategic behavior has benefits outside the strictly administrative sphere. They mention, for example, strategies for averting congressional investigations, a practice of great significance in the cases reviewed below. I will, nonetheless, expand the terminology to indicate industry efforts to elicit statutory as well as administrative relief from the vagaries of the marketplace.

The instances of strategic use of the regulatory process chronicled below differ subtly but significantly from those documented by Owen and Braeutigam. The fundamental distinction I wish to make is between strategic use of the regulatory process in which agents *exercise* their rights and instances in which agents *bargain away* their rights. In the broadcasting/cable industry must-carry compromise and in broadcasting's half-hearted opposition to the codification of the fairness doctrine, we observe the second, unjustifiable type strategic behavior. In the following sections, I will describe the must-carry and Fairness codification cases, detailing the weak public policy rationales put forth to justify what I call "mortgaging the First Amendment"—surrendering First Amendment rights in exchange for regulatory concessions on matters that have a more tangible effect on broadcasters' and cable operators' revenues. In the final section of the paper, I will look to the future of telephone company information services to see if the lessons of the broadcasting and cable industries might foreshadow telco behavior as they garner support for permission to enter the information services market.

I. The Must Carry Compromise

The recent must-carry controversy stems from the July, 1985 decision of the D.C. Circuit Court of Appeals in the Quincy-Turner case.[3] Quincy Cable TV operated a twelve-channel system midway between Seattle and Spokane, Washington. The must-carry rules required Quincy cable to carry all of the broadcast stations "significantly viewed" in the community without regard to the duplication of all three of the major networks in the two markets. Hence, Quincy was required to devote half of its capacity to carry the Seattle and Spokane affiliates of the three major networks. Quincy complained that little room was left for the entertainment, movies and sports cable services available. Turner Broadcasting System, Inc., a cable programmer, joined in the case against the FCC. Quincy and Turner argued that must-carry requirements violated cable operators' and cable programmers' First Amendment rights to free expression.

In deciding the case, the *Quincy* court first assessed whether the First Amendment principles that apply to broadcasting apply to cable. Based on differences between the technical

[3]*Quincy Cable TV, Inc., v. FCC.* 768 F.2d 1434.

and entrepreneurial characteristics of the two media, the court decided that the broadcasting regulatory model based on the scarcity rationale was not relevant to cable.

Having rejected the broadcasting First Amendment treatment for cable, the court went on to determine whether the must-carry rules could be considered an "incidental" burden on free speech. The courts have permitted "incidental" burdens on free speech in situations in which the regulations serve a "governmental interest" and are not related to the suppression or protection of a particular set of ideas.[4] In *Quincy*, though, the court doubted that must-carry rules could be considered incidental. Referring to *Tornillo*[5] and other Supreme Court decisions, the court concluded that there were some forms of free speech so sacred they could not be balanced against a "public interest."

The court was uncertain about whether or not the interest-balancing formulation of *O'Brien* should be applied to the must-carry rules. In any case, the court ruled that the FCC did not adequately justify the "substantiality of the public interest" in must-carry regulations. Specifically, the court questioned the FCC's determination that the unencumbered growth of cable would seriously damage the economic vitality of the broadcast service. The court demanded hard evidence showing that broadcasting stations would be economically endangered in the absence of must-carry rules.

The court also questioned the way in which the must-carry rules were to realize the Commission's "localism" goals. The must-carry rules forced cable operators to carry all local stations, without regard to the degree of localism in the stations' broadcasts. The FCC had not quantified the goal of localism and so it was impossible to determine whether or not must-carry achieved its goal.

Besides, in its other proceedings, the FCC had argued that free, local television broadcasting was not endangered by competition from other media (like MMDS, STV, LPTV, DBS and so forth). The FCC was in a strange position arguing in court that must-carry rules were required to solve a problem when it had elsewhere denied that there was any problem at all.[6]

But even if the must-carry rules had passed the first stage of the *O'Brien* test, they would have failed the remaining conditions. The court felt that the must-carry regulations were an

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[4]See *United States v. O'Brien*, 391 U.S. 367 S.Ct. 1681. In *Home Box Office, Inc. v. FCC*, the court said rules that are "intended to curtail expression—either by banning speech because of... its communicative or persuasive effect on its intended audience... or indirectly by favoring certain classes of speakers over others..." do not qualify for "incidental" consideration. See *Home Box Office, Inc. v. FCC*, 567F.2d 950.

[5]*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831.

[6]See, for example, the FCC's *Economic Inquiry Report*, 71 FCC 2d, 661 and *Inquiry into the Development of Regulatory Policy in Regards to Direct Broadcast Satellites*, 90 FCC 2d, 676.

inefficient and discriminatory means to effect the Commission's public interest goals. In his opinion, Judge J. Skelly Wright noted:

> Although the goal of the rules—preserving local broadcasting—can be viewed as unrelated to the suppression or protection of any particular set of ideas, the rules nonetheless profoundly affect values that lie near the heart of the First Amendment. They favor one group of speakers over another. They severely impinge on editorial discretion. And, most importantly, if a system's channel capacity is substantially or completely occupied by mandatory signals, the rules prevent cable programmers from reaching their intended audience even if that result directly contravenes the preference of cable subscribers.[7]

The must-carry rules failed all the components of the *O'Brien* test. Not only had the Commission failed to show how the rules were to support a substantial governmental interest, but the court also found the rules to be discriminating in their effect, and hence, untenable.

Thus a rule intended to protect broadcasters from 'too much' competition from the cable industry had been found to be unconstitutional. Had it not been for the First Amendment implications of must-carry regulation, it is unlikely that any court would have questioned the 'expert judgment' of the FCC on the matter. The policy/public interest rationale governing cable content regulation, if it was ever valid, was no longer acceptable by 1985. The court made clear that anyone attempting to resurrect the must-carry rules would have to argue convincingly that the new regulations were not just expedient for the parties involved.

The Industry Compromise

In a puzzling about-face, the cable industry entered negotiations with the broadcasting industry just a few months after winning *Quincy*. If in July, 1985 the cable industry was boasting about its new First Amendment status, by February, 1986 it had quietly concluded an agreement with the broadcasting industry to reinstate modified must-carry rules. What could explain the contradiction between the cable industry's rhetoric and actions on the First Amendment front?

From the format of the must-carry negotiations, it was clear where the impetus and power behind the discussions lay. The National Cable Television Association (NCTA) set *a priori* guidelines for "acceptable" must-carry rules. The broadcast industry, represented by the National Association of Broadcasters (NAB) and the Association of Independent Television Broadcasters (INTV), submitted proposals for cable industry approval. The NCTA rejected several of the broadcasters' early proposals and reissued its conditions for acceptable rules.[8]

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[7] ibid. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1453.
[8] *Broadcasting*, March 3, 1986, pp. 31-34.

In late February, 1986, after a long series of discussions in closed meetings, the NCTA, the Community Antenna Television Association (CATA—an organization of smaller cable companies), the NAB and INTV emerged with a settlement agreeable to all parties. Despite the warnings of the *Quincy* court that any new must-carry rules must meet strict standards, the industry agreement proposed a weak public policy rationale for the new must-carry rules. The industry associations argued the following: the Communications Act sets up two kinds of television distribution systems—free over-the-air broadcasting and subscription closed-transmission cable. The purpose of the must-carry rules would be to protect the public interest "in a reasonable quantum of free television being available to the public."[9]

There was, however, no foundation for the public policy rationale proposed in the agreement. The industry representatives may have been confused by the court's opinion in *Quincy,* which cited one of the "cardinal objectives" of the FCC as the development of a "system of [free] local broadcasting stations, such that 'all communities of appreciable size [will] have at least one television station as an outlet for local self-expression.'" The parenthetical "free," however, was added by the author of the *Quincy* opinion to a House of Representatives hearing on the FCC.[10] In fact, nowhere in the Communications Act is it specified that the nation's television system must be free.[11] The only possible precedent that one could discern in the industry agreement was the old (and now supposedly illegitimate) purpose of imposing content regulations on cable television to protect the economic interests of broadcasters from video services competition. The compromise also mentioned "localism" as a goal of the new laws, but there was no mention of how the new laws would demonstrably promote localism any better than did the old rules. Thus, the compromise made no effort to respond to the conditions set by the *Quincy* court.

As mentioned above, it seemed strange that the cable industry should go to the bother of fighting the must carry rules so vigorously only to turn around and ask the FCC to reimpose virtually the same rules. Could there have been some other rationale behind cable's 'compromise' besides the weak public policy rationale contained in the document?

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[9] ibid. *Broadcasting*, March 3, 1986, pp. 31-34.

[10] This is the *Quincy* court quoting the *Southwestern Cable Co.* court quoting the House of Representatives. Compare *Quincy Cable v. FCC*, 768 F.2d 1439, *United States v. Southwestern Cable Co.*, 392 U.S. 174, 88 S.Ct. 2003, and House of Representatives Report No. 87-1559, 87th Congress, 2d Session 3 (1962).

[11] For a discussion, see "Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper," *New York University Law Review* 51 (1976) 133-147.

The real objective of the cable industry appears to have been the maintenance of another ill-designed regulation that had been imposed on cable—the compulsory license. Up ur .. 1976, the cable industry held no copyright liability for the signals it carried. Broadcasters complained that cable operators were selling signals they were obtaining for free and without permission; cable operators argued that they were operating only as an extension of the consumer's antenna and could not be held responsible for copyright infringement. Congress settled the dispute by establishing compulsory licensing, under which broadcasters were compelled to license cable operators to carry their signals, and cable operators were required to make a nominal contribution to a copyright royalties pool based on a percentage of their systems' gross revenue. The compulsory licensing system was very advantageous to cable operators. By paying a nominal fee, cable operators were exempt from copyright liability for all of the signals they carried. Broadcasting and programming producers argued that the fees were set below market rates.

The compulsory licensing issue was one under Congressional jurisdiction; the must-carry issue was under FCC jurisdiction. The cable industry reasoned that it could garner support from the powerful broadcasting industry on the compulsory license issue in exchange for trivial concessions on the must-carry issue. While the cable industry's rhetoric flaunted the its newly affirmed First Amendment rights, its actions indicated that those rights meant less than the compulsory license status quo.

Broadcasters, in exchange for the new must-carry rules, agreed not to push for the repeal of cable's compulsory license. Also, broadcasters promised not to interfere in any arrangement regarding copyright fees to which the NCTA and the Motion Picture Association of America (MPAA) might agree. While the must-carry negotiations were in progress, the MPAA and the NCTA were in unsuccessful negotiations to establish a "flat fee" for cable copyright royalty payments.

Two leading figures in the cable industry made statements revealing that the copyright issues were the central consideration of the cable industry in the must-carry negotiations. CATA (Community Antenna Television Association) President Steve Effros reasoned that if making concessions to broadcasters meant easier action for cable on compulsory license, then "why shouldn't we agree?"[12] After the MPAA pulled out of the flat fee copyright negotiations, Roy Bliss, Executive Vice-President for United Video, said there was "no compelling reason for cable to agree to a must-carry rule... With the flat fee deal out, it takes out the major impetus for any must-carry deal." [13]

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[12] *Broadcasting*, March 3, 1986, pp. 31-34.

[13] ibid., March 10, 1986, p. 39.

Despite its public stand on th. .'irst Amendment, the cable industry valued freedom from content regulation less that it valued a good deal on programming. Besides propping up the compulsory licensing system, action on the must-carry compromise would project an image of cable being "reasonable" to Capitol Hill observers. Cable was running low on political good-will in Congress. If Congress should suddenly become hostile to cable, the industry would rather expend its political capital for advantageous terms on programming than for abstract First Amendment rights.

The FCC on Must-Carry

The same FCC that declined to appeal the *Quincy* decision in June, 1986 announceo a new draft of must-carry rules in early August. Commission Chairman Mark Fowler, whose opposition to new must-carry rules had been publicly known for months, led the Commission to a unanimous approval of the new laws. What could have led a commission stacked with free-marketeers to reinstate must-carry laws? At best the new laws were a contradiction to the Commission's avowed trust in the market. At worst they were a buckling-in to pressure from broadcasting interests.

Members of Congress played an important role in forming the Commission's position on the must-carry issue. Capitol Hill shipped a considerable amount of mail to the FCC on must-carry. The most influential correspondents were the then-Senate Commerce Committee Chairman John Danforth, House Energy and Commerce Committee Chairman John Dingell, and then-House Telecommunications subcommittee Chairman Tim Wirth. Twenty-three other House Telecommunications Subcommittee members joined in on the letter sen. ./ Wirth and Dingell. The opinion from the Hill was unanimous: the Commission should act quickly on must-carry, and the industry compromise was "a good point of departure for the commission's decision." Letters from both the House and Senate urged the Commission to protect the public's access to broadcast programming.[14]

Senator Danforth gave the most detailed analysis of the must-carry problem. In his letter, the Senator presented his own version of must-carry rules, going far beyond what the industry compromise had called for in terms of protection of small broadcasters and public television. The most significant parts of the letter were, however, the footnotes. It was there that Danforth questioned whether it was wise to allow the continued "monopoly status" of most cable systems. "In 1984, Congress chose not to treat cable as a common carrier (47 U.S.C. Sect. 621). One rationale for that decision was the suggestion that direct competition between cable systems might develop. For the most part, such competition has not occurred." Danforth said that "where

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[14]ibid., June 30, 1986, p. 34

cable systems are subject to direct competition, must-carry rules should be unnecessary." Where cable has no competition and is not subject to must-carry, it is placed in the position of "gatekeeper." And cable as gatekeeper, Danforth wrote, "conflict[s] with three long-standing, substantial government interests—the public's First Amendment right of access to diverse sources of information, the preservation of vigorous competition among communications services, and the commission's statutory obligation to promote a nationwide broadcasting service built upon local outlets."[15]

Danforth dropped a bombshell on the cable industry in one footnote: "The Senate will have the opportunity to reexamine the decision of the Congress to limit the provision of cable services by telephone companies in the context of reviewing restrictions now imposed upon the Regional Bell Operating Companies. Perhaps Congress may wish to reexamine, as well, its decision allowing franchising authorities to grant exclusive cable franchises."[16] In this footnote, Danforth threatened to unleash the Bell operating companies to compete in the video marketplace. If there is one thing that sets cable operators trembling with fear, it is the prospect of competition with the phone company.

The rules that the FCC ultimately adopted were significantly different from the rules proposed in the industry compromise. The most notable distinction between the FCC rules and the industry proposal was the FCC's requirement that cable operators make available A/B switches that would allow subscribers to switch between cable and an antenna. Cable operators would be required to notify subscribers that not all local broadcasters might be carried on cable in the future and that it was important for subscribers to maintain the ability to receive over-the-air signals. Initially, the FCC said that the switches would have to be supplied free of charge to all subscribers. In the March, 1987 amendments to the rules, cable operators could charge for switches but were still barred from charging for installation of the new switches for new subscribers.

The public policy rationale implicit in the new FCC rules was not much different from that of the earlier rules. The FCC still believed that the growth of the cable industry might adversely affect the economic viability of local broadcasters. Consequently, the FCC felt it was justified in requiring that cable systems take special measures to insure that subscribers maintain the ability to receive off-air signals. The reasoning was the same that the FCC had used for a quarter-century in justifying its regulation of cable: cable's exercise of editorial discretion could harm the system of broadcasting that the FCC had fostered.

[15]ibid., July 23, 1986, pp. 32-35.

[16]ibid., July 28, 1986, p. 34.

The FCC made little effort to respond to the concerns expressed in *Quincy*. It was thus no surprise when the D.C. Circuit Court vacated the new must-carry rules in December, 1987 in *Century Communications v. FCC.* [17] The court restated the conditions established in *Quincy* and determined that the new rules were no closer to satisfying them than were the old.

In summary, the cable industry attempted to exchange its First Amendment rights for an agreement from the broadcasting industry to not rock cable's compulsory license boat. Cable was quite comfortable with compulsory license, protected from a deregulated market for programming. Cable also hoped to gain some good-will on Capitol Hill by giving in on must-carry. Congress, for its part, was happy to accept cable's concession and pressured the FCC to accept the industry compromise. The FCC reluctantly instituted a new set of must-carry rules. Since the new rules addressed few of the criticisms of the Appeals court in *Quincy,* though, the rules were doomed from the start. Broadcasting, cable, Congress and the FCC were all willing to sacrifice the First Amendment despite the lack of a public interest in doing so. Only the courts were principled enough to prevent cable from disclaiming its First Amendment for less abstract rewards.

II. Cashing in the Fairness Doctrine

The recent spate of activity on the Fairness Doctrine front began with a September, 1986 U.S. Court of Appeals decision.[18] The DC Circuit panel, reviewing an FCC decision regarding the application of the Fairness Doctrine to teletext, determined that the Fairness Doctrine was not statutory. The court's finding made it possible for the FCC to review and discard the rules on its own, without waiting for for Congress to address the issue. Another major impact of the court's decision was to send Congressional supporters of the Doctrine scrambling to codify the rule before the FCC discarded it entirely.

The opinion of the Appeals court, filed by Robert Bork, with Antonin Scalia concurring, bucked conventional wisdom on the Fairness Doctrine. Most observers assumed that Congress' 1959 amendment of the equal time provisions of §315(a) of the Communications Act constituted codification of the Fairness Doctrine. With the court ruling that the Fairness Doctrine was "an

[17] *Century Communications Corporation v. FCC,* 835 F.2d 292 (D.C. Cir. 1987)

[18] Telecommunications Research and Action Center and Media Access Project v. FCC 801 F.2d 501 (D.C. Circuit, 1986).

administrative construction, not a binding statutory directive," the FCC was free to revise or discard the doctrine as it saw fit.[19]

The case that led to the FCC's repeal of the Fairness Doctrine was that of *Syracuse Peace Council v. WTVH*, a Syracuse television station. Syracuse Peace Council (SPC) complained to the FCC that WTVH had violated the Fairness Doctrine when it refused to give free air-time to SPC to rebut commercials advocating the use of nuclear power. The Meredith Corporation, the owner of WTVH, countered by challenging the constitution- -y of the Fairness Doctrine. The FCC ignored Meredith's constitutional challenge and decided for SPC on the facts of the case. Meredith appealed the FCC's procedural decision. The appeals court found in Meredith's favor and remanded the case to the FCC for consideration of Meredith's constitutional challenge of the Fairness Doctrine.[20]

Encouraged by the court, the FCC took it upon itself to review the justification for the Fairness Doctrine. The Commission had already expressed grave doubts about the defensibility Doctrine in its 1985 Fairness Report.[21] Now the FCC knew it had the authority to repeal the Doctrine, and did so in August, 1987.[22] In discarding Fairness, the Commission found that the rationale for the Doctrine, spectrum scarcity, was no longer as serious a constraint as it had once been. The Commission also asserted that the Fairness Doctrine had a "chilling effect" on broadcast news coverage, and that more diverse viewpoints would be available without the Fairness Doctrine than with it.

Meanwhile, Congress began work on codification of Fairness shortly after the courts affirmed the administrative foundations of the doctrine. On the Senate side, Ernest Hollings, Chairman of the Communications Subcommittee was the most staunch supporter of the Fairness Doctrine. Senators Inouye and Danforth cosponsored Hollings bill that would codify the Fairness Doctrine. The "Fairness in Broadcasting Act" passed by a vote of 59 to 31 in April, 1987. In June, the House Fairness bill, backed by Ed Markey, Chairman of the Telecommunications and Finance

[19]Actually, the court ruled, the passage usually cited as codifying the Fairness Doctrine only *ratified* the doctrine. The court interpreted the language of the passage to indicate that observance of the Fairness Doctrine was obligated by the authority of the FCC, not of Congress. See Telecommunications Research and Action Center (TARC) v. FCC. 801 F.2d at 517 (DC Circuit, 1986) and 47 U.S.C. §315(a)

[20]Meredith Corp. v. FCC 809F.2d 863 (DC Circuit, 1987). See also the FCC's final ruling on the Meredith case: *Memorandum Opinion and Order In Re Complaint of Syracuse Peace Council against Television Station WTVH, Syracuse, NY.* 2 FCC Record 5043 (v. 17, 1987)

[21]*Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC 2d 143 FCC (the "1985 Fairness Report") 102 FCC 2d 145 (1985).

[22]*Report of the Commission's Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees.* 2 FCC Record 5272 (v. 17, 1987)

Subcommittee, passed by a wide margin of 302 to 102. Fairness looked like it was well on its way towards codification. One obstacle stood in the way—a President adamantly opposed to any type of Fairness legislation.

Bargaining Away the First Amendment on Fairness

The broadcast industry was divided on the issue of the doctrine. Some segments of the industry supported print-model First Amendment rights for broadcasters; others in the industry thought that Fairness afforded broadcasting shelter from more onerous regulation. In the end, the NAB executive board decided not to fight Fairness codification vigorously. After the codification bill passed both Houses of Congress, the NAB reportedly asked President Reagan "to please *not* veto [the bill]."[23] Why were powerful segments of the broadcasting industry so willing to take upon itself the content regulations that it had fought since the inception of radio?

The NAB's official position on the Fairness codification bill was probably a response to threats from Capitol Hill that broadcasting would have to accept Fairness codification if it wanted Congress to give in on other issues that broadcasting valued highly. The broadcast industry was divided on the Fairness issue, and the threats from Capitol Hill made the intra-industry divisions even sharper. The NAB board decided to acquiesce on Fairness—codification of the Doctrine was a small enough price to pay for favorable treatment on issues with a more tangible impact on broadcasters' bottom lines. The NAB had been hoping that the Fairness issue could be settled by the courts, leaving the Congressional supporters of Fairness less bitter than if Fairness were defeated by a Presidential veto.[24]

The NAB was afraid to speak up for principles and hoped that the Fairness controversy could be disposed of as painlessly as possible, even if it meant codification. Others, though, were willing to stand up for broadcasters First Amendment rights. Both the Justice and Commerce departments recommended a Presidential veto. The President himself seems to have felt strongly about the issue,[25] and despite the expectations of some in Congress that the President would give in on codification as a gesture of good will (the Congress had, after all, just approved funding for the Contras,) Reagan vetoed the bill June 20, 1987.

Besides the administration, the courts and the Reagan-appointed FCC were also lined up against the Fairness doctrine. In 1984 Justice William Brennan suggested that it may be time to review the Fairness Doctrine; in 1985 the FCC's Fairness Report concluded that the Doctrine "no

[23]See the editorial in *Broadcasting,* June 29, 1987.

[24]See *Broadcasting,* June 1, 1987.

[25]See the interview with Ronald Reagan, ibid.

longer served the public interest."[26] Shortly after the President vetoed the Fairness bill the FCC announced its decision in *Meredith* and issued the Report explaining the decision to repeal the Fairness Doctrine. The attempt to codify the Fairness Doctrine had failed, and the FCC's administrative rules on Fairness were now gone. Several Congressmen took offense at the FCC's "unilateral" repeal of the doctrine, hoping that it might have been possible to work out a compromise with the Commission to avoid completely abandoning of the doctrine.

Ernest Hollings attempted to tack another Fairness Doctrine bill on to "must pass" legislation in late 1987. The Senator offered Fairness as an amendment to an appropriations bill that the Congress had to pass before leaving on Christmas vacation, but President Reagan's veto threats were enough to convince the holiday-rushed legislators to drop the amendment.[27]

In the broadcasters' half-hearted effort to defeat the codification of the Fairness Doctrine, an industry once again attempted to barter its First Amendment rights for regulations that would have allowed license owners to reap profits more easily. Congress and the industry were willing to compromise, but the President saved the day for electronic free speech. Senator Hollings and other Fairness supporters have not given up, though. Between the Fairness Doctrine and radio talk show hosts' involvement in the Congressional pay-raise fiasco, Congress is not expected to pass much legislation favorable to broadcasting. At this year's NCTA conference, Congressional staff members hinted that new comparative renewal legislation would not be forthcoming until the Fairness Doctrine was codified. Other issues of interest to broadcasting, like must-carry, might also be held up until Fairness supporters are satisfied.[28] The First Amendment could conceivably face a double whammy at the hands of the industries and Congress: a deal codifying must-carry in exchange for codification of Fairness.

III. The Next Victim: Video Services?

The most likely candidates to mortgage the First Amendment next are the telephone companies. The telcos will be involved in a difficult struggle to gain support for investments in fiber optics in the local loops. Since video services are likely to be the only broadband service of mass appeal for some time to come, the struggle to install fiber to the home will also be a struggle

[26]See *FCC v. League of Women voters of California,* 468 U.S. 364, 104 S.Ct. 3106 and *Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees,* 103 FCC 2d 145 (1985).

[27]*Broadcasting,* December 28, 1987.

[28]*Broadcasting,* May 8, 1989.

by the telcos to enter the video distribution business. Depending upon the regulatory model imposed, telco entry into video services could mark a significant transition of telcos from common carrier to editorially-empowered cable operators. But before federal and state regulators bestow editorial status on telcos, they may exact heavy First Amendment concessions from the would-be cable system operators.

At present, there are three regulatory and legal obstacles to telco entry into the cable television business: the FCC's 1970 crossownership rules prohibiting phone companies from operating cable systems in their service areas; the provision of the Cable Act of 1984 that codified the FCC prohibition; and provisions of the Modification of Final Judgment that broke up the Bell System. Before telcos will be able to deliver video services, all three of the injunctions against their participation in the cable industry will have to be repealed.

Congressional attitudes towards telco-cable crossownership vary inversely with Congressional attitudes towards the cable industry. When Congress is offended by cable activities, it threatens to reconsider the Cable Act or enact legislation that would return full control of the telephone industry to the FCC (which is more likely to entertain telco requests to provide information services than Judge Greene has been.) Given that some of the Congressional ire raised by the cable industry has been over First Amendment issues (like must-carry), it is possible that the Congress may wish to craft rules for telco-operated cable systems that are more intrusive than those that the cable industry has had to tolerate. The institutional and professional backgrounds of telephone industry executives could make them more inclined to make concessions on editorial control if it will promote the cause of "fiber to the home."

The FCC has shown an openness to the idea of telco cable operations. The Commission issued a Notice of Inquiry into telephone-cable crossownership in August, 1986. Nothing significant has come from the Inquiry yet, but a pro-competitive practices FCC would probably consider allowing crossownership as a positive step towards letting the market decide who shall deliver video services. Since Congress codified the crossownership ban in the Cable Act, the responsibility for repeal rests on Capitol Hill. The FCC can comfortably sit back and wait for Congress to make the tough decisions on this issue.

The U.S. Court of Appeals also has a say in telco entry in the cable television business. Judge Harold Greene has maintained his jurisdiction over the Bell breakup for seven years, with no end in sight. Congressional action could preempt his authority, but Congress has made no attempt to wrest control from the Judge for almost two years now. Judge Greene has made a few concessions to the phone companies on the information services question recently, though he still denies the telcos access to the video services business.

State and local governments will also have some influence on the conditions by which telcos are granted access to the video services market. State public utility commissions will continue to oversee telco investments, and the transition from copper to fiber, which by all accounts will be a costly one, will attract much attention in the state capitals. Local governments, within the limits set by the Cable Act, will be able to bargain with telcos over the details of cable service via their franchising authority. In both the state and local arenas, the possibilities for political compromises involving the First Amendment are much less extensive than at the national level, but they exist nonetheless.

All in all, the First Amendment could take it on the chin before the controversy concerning telco-cable crossownership is resolved. The cable industry itself may make preemptive First Amendment concessions to head off telco competition. Congress may continue to leech away cable's rights while threatening the industry with telco competition. Broadcasting may offer its political opposition to telco cable operations in exchange for further cable concessions like must-carry.

IV. Conclusion

In the two case studies presented above, broadcasters and cable operators sought to exploit the relationships among the executive, legislative and administrative bodies of government overseeing the mass media industry to their financial advantage. That industry should act in its self interest is not surprising—only the most naïve would suspect that regulators, industries and interest groups engage in the regulatory process without their own interest in mind. In fact, classical liberal and interest group theories of government assert that the greatest public good comes out of the conflict of competing self-interested parties. But not all strategic moves can be allowed if the political system is to preserve itself. In the must-carry and Fairness codification episodes, the parties to the conflict were surrendering not some economic good but one of our most fundamental and cherished political rights.

Our nation's founders believed certain rights to be inalienable. Indeed, most observers would agree that under a just political order, people would not be permitted to sell themselves into slavery, would not be allowed to transfer their right to vote to others, or would not be permitted to auction their vital organs to the highest bidder. Absent a substantive public policy rationale for broadcasting or cable to relinquish their free speech rights, industry efforts to bargain away free speech constitute just such a transfer of "inalienable" rights, and must not be tolerated.

In several senses, the rights that broadcasters and cable operators tried to barter were not just their own. Broadcasters ready to part with the First Amendment were dealing away not only their own rights, but also those of all future broadcast licensees. A similar argument holds for future cable system operators. And if one accepts the concept of the First Amendment as a public good (since public debate, and hence public life in general benefit from the freest excnange of ideas, so that any individual's surrender of the First Amendment hurts others,) then one should object to the unjustified surrender of political rights by any individual or group.[29]

The lessons learned from the must-carry and Fairness cases should help us prevent othors from mortgaging the First Amendment, but the task will require some vigilance. The Fairness Doctrine still pops up in conversation on Capitol Hill from time to time, despite the judicial and administrative consensus that it is no longer in the public interest. Must-carry, while less emotional an issue than Fairness, has lingered stubbornly. Telephone companies and cable operators wil probably be tempted to deal away the First Amendment for advantage in their pending competition. With luck, the media will learn to deal with their inclination to bargain away their rights before it is too late.

29 I do not consider here whether there might be some just arrangement to provide broader access to the media that would justify curtailing some speakers' First Amendment rights. If there is a good public policy rationale for enhancing certain individuals' First Amendment rights at the expense of others', it has not come up in the must-carry or Fairness debates.