West German Television Law: An Argument for Media as Instrument of Self-Government

Christopher Witteman

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# West German Television Law: An Argument for Media as Instrument of Self-Government

*By Christopher Witteman*

*Member of the Class of 1984*

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I. INTRODUCTION

On June 16, 1981, at a time when pressure for the privatization of West Germany's wholly public broadcasting system was reaching a feverish intensity,¹ the German Constitutional Court² handed down its third television³ decision.⁴ It reaffirmed and complemented the court's earlier two decisions, which had resolutely claimed television for the public interest. In all three the court defined the broadcasting media as servant to the democratic process and demanded that it be responsive to society as a whole.⁵ Coming once every ten years, these decisions form a seemingly impregnable unity of policy, yet the future of West German broadcasting remains in fact uncertain.⁶

The reasons for this uncertainty are many. Foremost is the development of new telecommunications technologies, especially cable television. Claims are made that cable television will effectively remove the "frequency shortage"⁷ upon which much of German broadcast jurisprudence is based. With a large number of channels available, it is argued that television should be on essentially equal constitutional footing with the press, where a plurality of opinion is guaranteed by the marketplace.⁸

As such, there would be no need for an institution which is at the

¹. For a description of the pressures affecting German television, see infra text accompanying notes 7-21. For an overview of the German television system, see A. WILLIAMS, BROADCASTING AND DEMOCRACY IN WEST GERMANY (1976).

². For a discussion of the function of this court see, e.g., Benda, Constitutional Jurisdiction in West Germany, 19 COLUM. J. TRANSNAT'L L. 1 (1981).

³. Television and broadcasting are used interchangeably in this Note, following the practice of the Constitutional Court, and both terms include radio. But cf. W. HOFFMANN-RIEM, KOMMERZIELLES FERNSEHEN 25 (1981) (claiming that the differences between radio and television might support a constitutional distinction between the two media).


⁵. See generally A. WILLIAMS, supra note 1.


⁸. Pestalozza, supra note 7. This argument is also being made in the United States. See, e.g., Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 passim (1983). It is interesting to note that arguments about the imminent disappearance of the spectrum or technical scarcity were being pressed before the United States Supreme Court as early as 1968-69. Red Lion, 395 U.S. at 396.
heart of current German broadcasting: "internal pluralism." Under this system, the state grants monopoly charters to public broadcasting corporations and then mandates that these corporations’ boards of directors, or “broadcasting councils,” consist primarily of representatives of various “socially relevant groups.” The mechanism of internal pluralism is designed to reflect the diversity of society by recreating it inside the station.

Another challenge to the public monopoly of West German television came (at the time of the third decision) in the form of a satellite which the government of Luxembourg had planned to begin operating in early 1985, broadcasting a German-language commercial program to a large segment of West German viewers. Fears were voiced that West German public television would be so vitiated by the commercial competition as to make it no longer viable in its present form. Although Luxembourg has since abandoned this particular plan, the specter of commercial broadcasting from space, as well as from other countries, remains a long-range threat to German public television.

Perhaps the greatest danger, however, comes from inside West Germany itself. The Federal Republic of Germany (FRG) has witnessed a political shift to the right, which has placed the opponents of public television in power.
himself described the danger of private television to the German com-
monweal as "more acute and dangerous than that of nuclear power." 19

The new Christian Democratic Union (CDU) government of Helmut
Kohl speaks, in sharp contrast, of giving the media industry a "free
hand for the application of modern techniques." 20 According to the
CDU's party platform, "the existing monopoly of public law broadcast-
ing hinders new forms of information transmission." 21

The battle is being fought partly in the German Constitutional
Court and partly in the wider social and political arena. 22 It remains to
be seen which forum will be determinative and which view will ulti-
mately prevail.

This Note will describe the legal status and structure of German
broadcasting as it is today, and then closely examine the effect which
the latest German Constitutional Court decision will have on that sys-
tem. It will address the questions of whether and under what circum-
stances private broadcasting is now possible, and what the introduction
of cable television means for the future of the German system. The
Note will look at the concept and reality of internal pluralism and criti-
cize its faults.

Finally, this Note will consider what relevance the German model
has for the United States' broadcasting landscape. This consideration
will entail a critique of existing United States media law, leading to
suggestions that German media jurisprudence be the basis for a consti-
tutional amendment, and that the internally pluralistic governance
model be introduced into the public broadcasting structure in the
United States.

II. THE CONSTITUTIONAL BASIS OF GERMAN
BROADCASTING

A. Historical Background

Perhaps the most ironic aspect of West German broadcasting his-
tory is that United States occupation forces are largely responsible for

19. Id. at 39.
20. Id.
21. Medienkonzept, vom Bundesausschuss der CDU am 17.3.1975, reprinted in Braun &
Darkow, Kommunikationspolitische Konzepte, in Fernsehen und Hörfunk für die Demokra-
tie 203, 216 (J. Aufermann, S. Scharf, & O. Schlie eds. 1979).
22. See generally Gespräch mit Christian Schwarz-Schilling, 43 SPIEGEL, Oct. 25, 1982, at
55-60.
the public nature of postwar German broadcasting. After the fall of the Third Reich, during which period television had been firmly in the hands of the state propaganda machinery, the Americans, along with the French and English allies, decided that such a future one-sided monopolization of German media was to be avoided.

Two allied strategies operated in pursuit of this goal. The first was the convening of a constitutional convention. There the allies tried to instill in the framers of the German constitution a respect for democracy and individual rights, and to guide them in the direction of a decentralized federalism. As part of the effort to decentralize both administrative and economic power in Germany, the "cultural sovereignty" (Kulturhoheit—which included the power to make laws regulating broadcasting), was given to the individual German states (Länder) and not to the federal government (Bund).

The second part of the plan was to create broadcasting stations in the form of public non-profit corporations, either "through decree of the Military Governments (French and British sectors) or through laws of the Länder, on which laws the Allies exerted considerable influence." The primary objective was to keep the state out of broadcasting. But the de facto public law form of the stations seemed to indicate that the stations were also not to be delivered into the hands of private economic interests.

The political insulation intended by the public law form was supplemented by the method of financing chosen for the stations. Instead of being supported from the state treasury, the stations were funded primarily by user fees.

23. References to this history are found both in the first part of the first television decision, 12 BVERFGE at 208-12, and in A. WILLIAMS, supra note 1, at 7-18.
24. A. WILLIAMS, supra note 1, at 8-9; 12 BVERFGE at 210.
26. Id.
27. Id. at 8-10.
28. 12 BVERFGE at 210.
29. Id. It is important for the American reader to understand the distinction the Germans make here between state (staatlich, meaning government) institutions, like the post office, and societal (öffentlich, meaning public) institutions, like universities. See, e.g., infra text accompanying notes 47 and 50.
30. A. WILLIAMS, supra note 1, at 8-11.
31. The public television system in Germany finances itself largely (approximately 75%) through user fees amounting to less than six dollars a month per user. See 1979 ARD JAHRBUCH 62-63, 194-95. See also infra note 35 and accompanying text. The remaining one quarter of the broadcasting revenue comes from advertising which is confined to a one hour period in the evening, usually between 6:30 and 7:30 p.m.

The American reader may wonder why the German viewer would watch an hour of
Apart from these general precepts, the theoretical framework of German broadcasting remained somewhat vague under the Allied tutelage. It was not until the first television decision in 1961 that the Germans themselves passed on the constitutionality of that inherited framework and began to concretize it in a distinctively German manner.

B. The First Two "Television" Decisions

1. The factual settings

In 1961 the German Constitutional Court ruled on the constitutionality of Chancellor Konrad Adenauer's plan for a state-run television station. By this time, the various Länder-based stations had long since joined together into a single federation, the ARD. Adenauer, feeling that the ARD was too liberal, formed Deutschland-Fernsehen GmbH for the purposes of "representing the nation to itself" and "cultivating the continuity of tradition."

With the totalitarian misuse of German media for Nazi propaganda purposes still fresh in the national memory, the Constitutional Court rejected the new company, declaring that the German media may in no case be delivered into the hands of the state. Owning 100% of the stock in Deutschland-Fernsehen, the federal government ran commercials, but the author observed during a two year residence in West Germany that the insertion of two to three short films during the hour seems to keep people in front of the television.

A potentially more significant fact is that the German government contributes practically nothing to the stations. Several judges on the Constitutional Court have stated that such government funding would be unconstitutional because it would create a dependency relationship. The court goes on to say that a similar dependency on advertising revenues might also be unconstitutional. "[T]he one-sided commercializing of television and radio could well conflict with the protection and assertion of the public interest and commonwealth which is demanded by the public nature of the broadcasting medium." See also infra note 263 and accompanying text.

32. A. WILLIAMS, supra note 1, at 10.
33. Id.
34. 12 BVERFGE at 252.
35. A. SMITH, THE SHADOW IN THE CAVE 62 (1973). The ARD, or Arbeitsgemeinschaft für öffentlichrechtliche Rundfunkanstalten der Bundesrepublik Deutschland, was formed in 1950. A. WILLIAMS, supra note 1, at 18.
36. A. SMITH, supra note 35.
37. 12 BVERFGE at 252.
38. Id.
39. See id. at 209-10.
40. A. WILLIAMS, supra note 1, at 27; 12 BVERFGE at 262.
afoul of this proclamation.\footnote{12 BVERFGE at 263. Neither the constitutional authority of the federal government to regulate telecommunications activities (GRUNDGESETZ [GG] art. 73, \S\ 7 (W. Ger.)) nor its mandate to legislate on supra-regional affairs (GG art. 83) could justify this exercise of federal power. 12 BVERFGE at 226-31, 250-53, 264.}

Ten years later, in 1971, the Constitutional Court faced the question of whether the fees which the public broadcasting stations collect from users were not in fact business proceeds subject to tax.\footnote{31 BVERFGE at 314.} The tax authorities argued that the fees represented no more than payment for services rendered,\footnote{Id. at 319.} and that the stations were in that respect private businesses subject to tax liability. The court, however, ruled that broadcasting stations were public entities and not businesses, and hinted that the real purpose of the proposed tax might have been to reduce the competitive advantage which public broadcasting enjoyed over private mass communications such as newspapers.\footnote{Id. at 321.} The majority held that the fees did not represent a business exchange because they were collected regardless of whether the viewer/participant\footnote{It is interesting that the Germans use the word “participant” (Teilnehmer) for the word viewer, thereby strengthening the idea that broadcast speaker and broadcast listener are part of the same integrated unit. See, e.g., infra text accompanying notes 204-05.} actually watched the program.\footnote{31 BVERFGE at 330.} Broadcasting was viewed as an extension of public administration, although not a “state” activity.\footnote{Id. at 343 (Geiger, Rinck, and Wand, dissenting).}

The dissenting opinion viewed television as a public utility,\footnote{Id. at 344.} claiming that the fees did represent payment for services rendered.\footnote{Id. at 344-45; see 57 BVERFGE at 319 for the court’s characterization of the second decision.} The dissent nevertheless agreed with the majority that broadcasting was a public function and task.\footnote{Thomas, Privatfunk, Staatsfunk oder was? Zur Zukunft des Rundfunks, in DIE VERTEIDIGUNG DER RUNDFUNKFREIHEIT 91 (W. Thomas ed. 1979). As Mr. Thomas admits, and as is demonstrated in this Note (see infra text accompanying notes 113-16, 267-99), the Constitutional Court has not \textit{de jure} excluded private television, although this has been the \textit{de facto} effect of its decisions.}

The result of these two decisions—one defending public broadcasting against state co-optation, the other opposing its characterization as a commercial enterprise—was the formula: “neither state nor private.”\footnote{51. Thomas, Privatfunk, Staatsfunk oder was? Zur Zukunft des Rundfunks, in DIE VERTEIDIGUNG DER RUNDFUNKFREIHEIT 91 (W. Thomas ed. 1979). As Mr. Thomas admits, and as is demonstrated in this Note (see infra text accompanying notes 113-16, 267-99), the Constitutional Court has not \textit{de jure} excluded private television, although this has been the \textit{de facto} effect of its decisions.}
2. Article 5—its public sense and purpose

Although the structure of radio and television stations is determined by legislation at the state level, such state charters must be consonant with the principles of the federal constitution. Thus all West German media jurisprudence begins with article 5 of the German Basic Law (Grundgesetz), which is the German equivalent of the first amendment to the United States Constitution: "Everyone has the right to freely express and disseminate his opinion by speech, writing and pictures, and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by broadcast and film are guaranteed. There shall be no censorship."

It was on the "freedom of reporting by broadcast" or "broadcast freedom" clause of article 5 that the German Constitutional Court anchored its response to the first two challenges to the postwar status quo of West German broadcasting.

Both of the early decisions began by discussing the public nature of the broadcasting medium. The court opened the substantive part of the first opinion by stating: "[T]he content of article 5 of the Basic Law and the therein contained constitutional guarantee of freedom of broadcasting is of fundamental importance for the whole public, political and constitutional life in the German Länder..." The court was even more emphatic in the second decision, declaring that "the essence of broadcasting shows itself in its commitment to the general public," and "it fulfills in reality a public task... an integrating function for the state as a whole." Even the dissenting opinion concurred in this point: "Article 5 points broadcasting in the direction of society."

But this was hardly more trenchant than statements by United States legislators in 1934 and by the United States Supreme Court in 1969 that the public interest has priority in the exploitation of the

52. Snow, Telecommunications and Media Policy in West Germany, 32 J. Com. 9, 13 n.2 (1982).
53. GG art. 5, ¶ 1. All translations in this note are those of the author unless otherwise noted.
54. 12 BVERFGE at 260; 31 BVERFGE at 326.
55. 31 BVERFGE at 326.
56. 12 BVERFGE at 259.
57. 31 BVERFGE at 328. "General public" is the author's translation for Allgemeinheit.
58. Id. at 337 (Geiger, Rinck and Wand, dissenting).
airwaves. It is at this point, however, that the German Constitutional Court made its decisive theoretical step. The importance of broadcasting, asserted the court, lies in its relationship to the democratic state. It catalyzes the public process of Meinungsbildung,\(^6\) or opinion-building. This leads to a public “will-building” which finds its final form in a democratic election.\(^6\) Broadcasting is not only a “medium” of opinion-building, but an “eminent factor”\(^6\) of that process as well. In other words, broadcasting is not only a carrier of ideas, but also a catalyst which itself contributes to the growth and refining of opinion. The institution of broadcasting must therefore be protected:

As a result of developments in television technology, broadcasting has become one of the most powerful means of mass communication which, because of its wide-reaching effect and possibilities as well as the danger of misuse for one-sided propagandizing, cannot be left to the free play of [market] forces.\(^6\)

In order to protect the process of opinion-building in and through broadcasting, it had to be free both from the state\(^6\) and any overly powerful private entity.\(^6\) More importantly, article 5 commands that this process be promoted through broadcast institutions which are so structured that all socially relevant voices “get their say”\(^6\) and are “able to exert influence” on the programming of the stations.\(^6\) This is the sense and purpose of broadcast freedom.

3. Institutional and individual freedoms, objective and subjective rights

The German court compared the situation of broadcasting with the “institutional sovereignty of the press [reaching] from the locating of information to the publication of reports and opinions.”\(^6\) The healthy functioning of both institutions is seen by commentators as “constitutionally essential . . . in light of the central function of article

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\(^6\) 31 BVerfGE at 325.
\(^6\) 12 BVerfGE at 260.
\(^6\) 31 BVerfGE at 325. It is clear in context that the German phrase “freie Spiel der Kräfte” refers to the “free play of market forces”.
\(^6\) 12 BVerfGE at 260.
\(^6\) 31 BVerfGE at 325.
\(^6\) 12 BVerfGE at 262.
\(^6\) 31 BVerfGE at 326.
\(^6\) 12 BVerfGE at 260. The court makes clear that when it speaks of “freedom of reporting by means . . . of broadcasts,” it is referring to the totality of programming, from news to music, all of which is capable of “opinion-building.” Id.
5 for a vitally democratic and pluralistic community." Just as the press must be protected in its whole process, so must the broadcasting entity be secure in its insulation from outside influence.

The term "institutional freedom" had gained widespread currency as the description for this constitutional protection. In the famous Spiegel case, the German Constitutional Court held that this institutional freedom implied at least some obligation on the part of public officials to give information to the press, as well as the affirmative duty of the government "to ward off the dangers to a free press which could grow from the formation of a monopoly of opinion." In another press case, the Constitutional Court specifically addressed the economic aspects of such monopolies, declaring that "Freedom of opinion and freedom of the press protect the process of opinion building . . . in a free democracy; they . . . do not serve to guarantee economic interests."

The positive command of institutional broadcast freedom is contrasted with the defensive character of that freedom. This polarity, however, often gives way to a shorthand dichotomy between the objective and subjective elements of this or any other constitutional right.

The objective element or character of a given constitutional right refers to a guarantee independent of any given individual. It is understood as a constitutional norm, a guideline or task for the legislature, directing the lawmaker to create certain institutions in
conformance with the constitutional mandate.\textsuperscript{81} Thus, while a given broadcasting station might (as a legal person) subjectively assert the right of broadcast freedom\textsuperscript{82} the objective character of that right is found in the article 5 "guarantee" of a broadcast system capable of fulfilling its public task.\textsuperscript{83} This guarantee commands the legislature to construct a "positive order" in which all socially important information is represented within the broadcast system.\textsuperscript{84}

Because broadcast freedom is primarily oriented toward the public good,\textsuperscript{85} and designed to "serve"\textsuperscript{86} the purposes of a democratic state, its objective component is usually viewed as determinative within the broadcasting context.\textsuperscript{87} It remains unclear whether an individual right to broadcast privately is indeed a constitutionally protected right.\textsuperscript{88} Even if it is constitutionally anchored, such individual broadcast freedom (which, its proponents admit, is really the same as entrepreneurial freedom\textsuperscript{89}) could be asserted only in a situation where the "positive order" necessary to guarantee broadcast freedom was present.\textsuperscript{90}

4. Broadcasting's special situation

Many of the above observations and determinations of the nature of mass media apply to both broadcasting and the press. Beyond their commonality, however, the German court found, as did its American counterpart,\textsuperscript{91} factors which distinguish the legal status of broadcasting from that of the press. These are collectively referred to as the "special situation of broadcasting."\textsuperscript{92} These factors are, in most analyses, necessary to justify the different treatments which broadcasting receives, \textit{i.e.}, state regulation in the United States and public monopoly in the Federal Republic of Germany.

Two component factors are universally identified: 1) the shortage of broadcasting frequencies and 2) the large financial burden of start-
ing a station or producing broadcasting programming. As the German court stated:

[I]n view of the unique qualities of broadcasting and television, especially the limited number of frequencies available and the costliness of studio technology and the huge effort necessary for the production of programs, the creation of such broadcasting units cannot be left to the whim of individuals or groups, because this would surely lead to a situation where one or more well financed interests or socially powerful groups would take over the public role of broadcasting.

Opponents of the present public law structure of television in West Germany point to the coming of cable television as a phenomenon which will dissolve the special situation. In focusing on spectrum scarcity, these critics ignore the forms of scarcity which the court sees growing out of broadcasting prerequisites other than spectrum space: the equipment, expertise and capital necessary to produce broadcasting programming. They also do not take account of other unique qualities of broadcasting, including its suggestive power and central role in communal opinion building, which inform much of the court's analysis.

The court stated that the special situation would only dissolve "when all interested groups or combinations of groups could be granted a frequency." Thus the question is raised whether the simple addition of five, eight, or twelve channels to a given locality's broadcasting capacity would be enough to remove the constraints of the special situation.

5. Consequences of the special situation

The German Constitutional Court found that much more drastic consequences resulted from the special situation than did its United States counterpart. Whereas in the United States the effort was made to provide for the public interest by imposing content regulations on

93. See, e.g., id.
94. 31 BVerfGE at 338 (Geiger, Rinck and Wand, dissenting). This echoes the first decision and anticipates language in the unanimous third decision. See 12 BVerfGE at 261; 57 BVerfGE at 320.
95. See, e.g., Pestalozza, supra note 7, at 2159.
96. See supra note 94 and accompanying text.
97. See 31 BVerfGE at 325 (Geiger, Rinck and Wand dissenting). The third decision was even more emphatic. 57 BVerfGE at 325; see infra text accompanying note 203.
98. Id. at 338.
stations from the outside, in Germany the effort was directed at shaping broadcasting activity from the inside. According to the German court:

There is no state competence to influence the . . . shaping of program content . . . but rather—as long as it is necessary—the state competence lies in regulating the organizational form of the carrier of that public task. This is to be done always and only under the aegis of article 5 of the Basic Law, whereby radio and television are to be kept free from the state and, at the same time, the participation and expression of all socially relevant groups in a balanced relationship within the total radio and television industry is to be guaranteed.  

Article 5 then demands—as long as the special situation obtains—that the individual German Länder enact laws regulating the organizational form of broadcasting stations in such a way that guarantees their functioning in their prescribed public role.

6. Internal pluralism

The organizational form which the Länder have mandated is internal pluralism. It is the essential genius and central mechanism of the German model. The article 5 constitutional command of broadcasting freedom is fulfilled by state-chartered public law corporations with internally pluralistic boards of directors or broadcasting councils. Though the court’s focus has remained on internal pluralism, it has not precluded the possibility of other governance structures or modes of participation and expression for the various social groups and powers.

Although the German Constitutional Court did not elucidate all the details of the internally pluralistic mechanism, the essence of the concept was evident from the beginning: “[The broadcast council] is to be composed in a balanced manner of representatives of all world

100. See infra text accompanying notes 367-69.
101. 31 BVERFGE at 338-39. It should be noted that content regulations (fairness, objectivity, and balance) are called for in most station charters, and thus the state does, in an indirect way, shape program content. The author of this Note has chosen not to deal with them specifically both because they are subordinate to the concept of internal pluralism and because their value is seriously questioned. See W. HOFFMANN-RIEM, supra note 10, at 40-41.
102. 12 BVERFGE at 261.
103. See W. HOFFMANN-RIEM, supra note 10, at 164.
104. Id.
105. Internal pluralism is not necessarily to be identified with the public-benefit corporation. See 31 BVERFGE at 337.
views and of all important political and social groups. They are to have the power to control those who are actually making programming decisions.\textsuperscript{106} The second decision articulated further:

\begin{quote}
[The broadcasting council, the highest organ of a station, which represents the interests of the general public in the area of broadcasting, has in most stations the tasks of electing or ratifying the election of the station director (Intendant), ascertaining that editorial guidelines are observed, and approving the station's budget.\textsuperscript{107}]
\end{quote}

Thus the stations themselves were conceived as carriers\textsuperscript{108} which do not exist for their own ends.\textsuperscript{109} The dissenting opinion in the second decision went so far as to suggest that the stations themselves had no autonomy\textsuperscript{110} and that the internally pluralistic broadcasting council was merely an "instrument by which the socially relevant groups fulfill their public function" of democratic opinion-building.\textsuperscript{111} The court has subsequently rejected this view, declaring that stations are legally autonomous and the various social groups are held to possess no independent "group right" to participate on the broadcasting council.\textsuperscript{112}

7. Is private television possible under article 5?

From the beginning, the German court was at great pains to declare that article 5 does not necessarily demand the corporate form then existing:

The German Constitution especially does not demand that producers of broadcast programs be only organizations of public law. A corporation of private law might also be a carrier of this sort of programming, if in its organizational form there was sufficient guarantee that, in a way similar to the public law corporation, all relevant societal groups get to speak.\textsuperscript{113}

\textsuperscript{106} 12 BVERFGE at 262.
\textsuperscript{107} 31 BVERFGE at 328.
\textsuperscript{108} The German word for carrier—Träger—is sprinkled throughout the opinions. Although it does not exactly connote the American notion of common carrier with its implied obligation to serve all comers, the word "Träger" signifies a passive instrumentality dedicated to the common good. See 12 BVERFGE at 262, 263; 31 BVERFGE at 339, 340.
\textsuperscript{109} 12 BVERFGE at 262. It is interesting that the diffusion of editorial control has progressed so far, theoretically at least, that even the individual reporter is said to have a certain editorial autonomy. See generally W. Hoffmann-Riem, Redaktionsstatute im Rundfunk (1972).
\textsuperscript{110} See 31 BVERFGE at 340 (Rinck, Geiger and Wand, dissenting).
\textsuperscript{111} Id.
\textsuperscript{113} 12 BVERFGE at 262.
Thus the private corporation would also be essentially a carrier.\textsuperscript{114} In order to fulfill its societal task, a private station would have to meet the following requirements: 1) it would have to be independent from the state and 2) it would have to provide for the participation of all socially relevant groups.\textsuperscript{115} What this means in practice was articulated in the third decision, where the court faced a demand from a private station which claimed it had met these requirements.\textsuperscript{116}

8. The question of a public broadcasting monopoly

The issue of whether or not private stations are constitutionally permissible is alternatively stated as the question of whether public stations may constitutionally be given a monopoly. Just as the court held that there are no constitutional reasons barring the participation of private broadcasting stations under certain circumstances, the court has held that there are also no reasons barring a monopoly for public broadcasting:

It would not contradict article 5 of the Basic Law when, under the present technological circumstances, a station, equipped with such a safety device [as internal pluralism], were to be granted a monopoly \ldots in the production of broadcast programming; it is on the other hand not constitutionally necessary to create such an institution \ldots \textsuperscript{117}

\textsuperscript{114} 31 BVerfGE at 339 ([P]ublic law \ldots and private law stations [would] fulfill the same public task in the same way as commanded by article 5.” For a cogent explanation of the public law/private law duality in civil law countries, see R. SCHLESINGER, COMPARATIVE LAW: CASES, TEXT AND MATERIALS 42-89 (4th ed. 1980). It is in some ways appropriate that the electronic media should come under the aegis of public law, as Professor Schlesinger notes that public law is largely a product of the twentieth century. \textit{Id.} at 609.
\textsuperscript{115} 31 BVerfGE at 325-26.
\textsuperscript{116} \textit{See infra} text accompanying notes 177-248.
\textsuperscript{117} 12 BVerfGE at 262.
III. GERMAN BROADCASTING IN PRACTICE

A. Internal Pluralism and Station Governance

The new state charter given to Radio Bremen by the Bremen parliament in 1979118 can serve as a model for the internally pluralistic broadcasting station.119 Although incorporating a few innovations,120 it is still fairly typical of organizational form in German broadcasting stations.

Similar to other West German broadcasting laws, the form and purpose of the station are set down in the charter law. Radio Bremen is a non-profit "public benefit institution of public law" with its corporate seat in Bremen.121 It is to serve the whole population with information, education and entertainment.122 "The shaping of the broadcasts must...be free from government influence and the one-sided influences of political, economic, religious or other interest groups."123

As in most other German stations124 there are three main organs of control: the broadcasting council (Rundfunkrat), the administrative council (Verwaltungsrat), and an executive, here the Direktorium.125 The Direktorium, composed of three to five persons, replaces the single Intendant126 found in most German stations. The Breman law mandates that an Intendant be among the directors, but his or her only individual competency is to make decisions which require quick action.

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118. See Bremen Law, supra note 10.
119. It should be noted that there are two strains of internal pluralism currently being used in West Germany. One is the so-called pure pluralism, where the social groups themselves elect their representatives. Representative of this style are the Hessian Broadcast system (HR) and Radio Bremen (RB). The other strain is the so-called parliamentary model where the parliament elects the representatives of the relevant groups after they have been "nominated" by those groups. Examples of this model are West German Broadcasting (WDR) and North German Broadcasting (NDR). This latter strain does not produce the desired political independence of the broadcasting council as effectively as does the former. See A. Williams, supra note 1, at 99-111.
120. Among the innovations: 1) the replacing of the Intendant with the Direktorium (see infra text accompanying note 125) and 2) mechanisms for more comprehensive pluralism (see infra text accompanying note 130).
121. Bremen Law, supra note 10, § 1.
122. Id. § 2(1).
123. Id. § 2(2).
124. Two exceptions to the norm are the Berlin stations: Sender Freies Berlin (SFB) and Radio in the American Sector (RIAS), which have only Rundfunkrat and Intendant. See A. Williams, supra note 1, at 96; ARD Jahrbuch, supra note 31, at 148-49.
125. Bremen Law, supra note 10, § 4. See also supra text and accompanying note 118.
The directors composing the Direktorium are selected to five-year terms by the broadcasting council. Their duties consist of the daily direction of the station and determining the composition of the daily program, drafting (but not approving) the financial plan of the station, buying and selling property involved in the station operation, and the exercising of final authority in all personnel decisions.127

The administrative council consists of nine members—six elected by the broadcasting council and three by the employees of the station. Although its duties are left largely unspecified by the Bremen law, the administrative council’s competence usually consists of supervising the administrative aspects of the station.128 It is, however, forbidden from exercising any authority over program shape or content.129

Programming decisions belong on the short term to the Direktorium and over the long term to the broadcasting council. The Bremen charter specifically sets out the “relevant social groups” which are, in turn, to elect representatives to the broadcasting council.130

The specific tasks of the broadcasting council include the election (and recall) of the members of the Direktorium and administrative council, advising the Direktorium in all broadcasting questions, monitoring adherence to the editorial principles outlined in the Bremen law,

128. Wallenreiter, supra note 126.
129. Bremen law, supra note 10, § 10.
130. Id. § 5(3). The broadcasting council is to consist of:
   1) one representative of the City of Bremen, elected by the Senat of the Free Hanseatic City of Bremen;
   2) one representative of the City of Bremerhaven, elected by the Magistrat of the City of Bremerhaven;
   3) one representative of the Office of Science and Art of the City of Bremen;
   4) one representative of the city parliament of Bremen;
   5) one representative of the teachers of Bremen and Bremerhaven, elected by the personnel office of the local school boards;
   6) one representative of the parents of Bremen and Bremerhaven, elected by the local Parents’ Committee;
   7) one representative of the Bremen Commission on Continuing Education;
   8) one representative of the Bremen University Conference;
   9) one representative of the Protestant Church;
   10) one representative of the Catholic Church;
   11) one representative of the Jewish community;
   12) two representatives of the German Federation of labor;
   13) one representative of the German Office Workers Group;
   14) one representative of the local councils of employers;
   15) one representative of the local chambers of commerce;
and ratifying the station's budget. By virtue of its power to elect the members of the other control groups, it is clear that the broadcasting council, and through it the socially relevant groups which represent society itself, retains the balance of power in the broadcasting station.

B. Problems of Internal Pluralism

1. Influence of political parties

By far the biggest problem with the internally pluralistic structure is the changing influence of the political parties. The Bremen charter is unusual in that only three of the thirty-five potential members come from the political parties. Several other representatives on the council will obviously have close connections to the various political parties. It is nevertheless unlikely that the sum total of expressly political seats will rise to one-third of the total seats, which is becoming the generally accepted constitutional limit for the German stations as posited by theorists of German broadcasting.

On a nationwide level, the figures are somewhat higher. Of the

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16) one representative of the local handworkers' guilds;
17) one representative of the local chambers of city employees;
18) one representative of the local associations of manual laborers;
19) one representative of the Bremen Youth group;
20) one representative of the Bremen Federation of Sport;
21) two representatives of women's organizations in Bremen, elected by the Bremen Women's Committee;
22) one representative of the Bremen Music Council;
23) one representative of the Bremen Journalists' Colloquium;
24) one representative of the German Journalists Union;
25) one representative of the Theater Guild of Bremen;
26) three representatives of the Bremen Parliament (elected in proportion to their representation in parliament—if not every party gets a seat, then the number of representatives will be increased to accommodate that party);
27) five representatives to be elected by the Office of Science and Art of the City of Bremen. These are to represent groups which are otherwise difficult to organize and not adequately represented in the above 26 paragraphs.

Paragraph 27 represents an innovative attempt to give representation to the under-represented or unrepresented in society. The disabled and the Turkish guestworkers are among the groups thereby envisioned. Id. § 6(2)(2). W. HOFFMAN-RIEM, supra note 10, at 44-51.

133. See A. WILLIAMS, supra note 1, at 120-23. See also Schlie, Organization und gesellschaftliche Kontrolle des Rundfunks, in FERNSEHEN UND HÖRFUNK FÜR DIE DEMOKRATIE 53 (J. Aufermann, S. Scharf & O. Schlie eds. 1979).
136. A. WILLIAMS, supra note 1, at 118.
approximately 367 members of German broadcasting councils, 130 or more belong to the executive or legislative branch of government.\textsuperscript{137} This becomes more pernicious when these members combine with others supposedly representing the socially relevant groups, but who are, in fact, also party members. Party influence is likewise extended into other areas of the station. Of the ninety members of German administrative councils, forty-nine, or fifty-four percent, are either civil servants or members of the executive or legislative branches.\textsuperscript{138}

At first blush, this level of political (and government) influence would seem to violate the constitutionally mandated "independence from the state."\textsuperscript{139} Although the Constitutional Court has consistently held that: "[A]rticle 5 does not prevent representatives of the state from taking an appropriate number of seats in the organs of the "neutralized" broadcasting carriers,"\textsuperscript{140} it is quick to add that "Article 5 does on the other hand prohibit the state from directly or indirectly dominating the station which produces broadcasting programs."\textsuperscript{141}

This is, however, exactly what is happening. The representatives of the parties combine with other representatives into large party-political coalitions.\textsuperscript{142} Before meetings of the broadcasting council, a number of council members retire to party conclaves (\textit{Freundeskreise}, or circles of friends) to confer with the party elders.\textsuperscript{143} This necessarily reduces the difference between pluralistic broadcasting stations and political parliaments to a "procedural formality,"\textsuperscript{144} and may be seen as a de facto constitutional violation.\textsuperscript{145} Plurality of opinion is trun-

\textsuperscript{137} Schlie, \textit{supra} note 133, at 58.
\textsuperscript{138} \textit{Id}. at 59.
\textsuperscript{139} 31 BVERFGE at 322.
\textsuperscript{140} 12 BVERFGE at 263.
\textsuperscript{141} \textit{Id}.
\textsuperscript{142} Schlie, \textit{supra} note 133, at 56-61. The effect is that there are Social Democratic and Christian Democratic stations.
\textsuperscript{143} A. WILLIAMS, \textit{supra} note 1, at 124-27. This politicization is precisely the danger which Hans Bredow foresaw in 1946, predicated on his experiences as one of the founders of the German Broadcasting Company (\textit{Reichsfunkgesellschaft}): "Experiences of the past have shown that the participation of political parties will lead to the carrying out of political conflicts within the broadcasting institution." Schneider, \textit{Parteieneinfluss im Rundfunk}, in \textit{FERNSEHEN UND HÖRFUNK FÜR DIE DEMOKRATIE} 116 (J. Aufermann, S. Scharf & O. Schlie eds. 1979) (quoting H. Bredow).
\textsuperscript{144} A. WILLIAMS, \textit{supra} note 1, at 125 (quoting Manfred Jenke, Director of West German Radio). Only those who see an identity between party and society (that is, certain party ideologues) do not find this development troubling. \textit{See, e.g.}, Schneider, \textit{supra} note 143, at 122.
\textsuperscript{145} Schlie, \textit{supra} note 133, at 59-60.
icated by party polarity,\textsuperscript{146} and the actual work of the station in preempted by political struggles.\textsuperscript{147}

The solution to this problem, according to at least one observer, is the complete removal of all state, civil service, and party representatives.\textsuperscript{148} The “incompatibility” between state office and parliamentary mandate on the one hand and membership in a broadcasting organ on the other “can be based on article 5 of the Basic Law and the democracy principle in conjunction with the [1961] television decision of the Constitutional Court.”\textsuperscript{149}

2. Lack of completely pluralistic representation

Another problem of internal pluralism (which the Bremen law addresses)\textsuperscript{150} is the difficulty in finding representation for all socially relevant groups. The groups which are represented in the broadcasting council are generally those with large memberships and high public profile (the unions or the chamber of commerce, for example) or those whose purpose is socially sanctioned (parents' and teachers' groups).\textsuperscript{151} West German legislators have found it troublesome to determine representative groups for those segments of society which are difficult to organize or which stand at the edge of society: the poor, the elderly, the disabled, and the foreign nationals who are in the country as “guest workers.”\textsuperscript{152}

Various solutions have been advanced. One is the purely theoretical attempt to eliminate the problem by claiming that the groups presently included in the broadcasting council will or should take as their primary task the representation of the general public, in what amounts to a variation on the parliamentary theme. Thus the groups presently seated are in themselves sufficiently pluralistic to insure the consideration of the absent and unorganized groups of society, thereby supplying the station organization with the needed democratic legitimacy.\textsuperscript{153}

\textsuperscript{146} Schneider, supra note 143, at 122.
\textsuperscript{147} See the description of the wrangling over the election of the Intendant at the ZDF and WDR stations, in A. Williams, supra note 1, at 128-29.
\textsuperscript{148} Schlie, supra note 133, at 59-60.
\textsuperscript{149} Id. at 60.
\textsuperscript{150} Bremen Law, supra note 10, § 5(3)(27).
\textsuperscript{151} W. Hoffmann-Riem, supra note 10, at 45.
\textsuperscript{152} Id.
\textsuperscript{153} See generally  Bethge, Rechtsschutzprobleme eines rundfunkspezifischen Pluralismus, 81 Archiv für Urheber-Film-Funk-und Theaterrecht 75 (1978). See also A. Williams, supra note 1, at 100-01; Schlie, supra note 129, at 55.
This overlooks the fact that power often perpetuates itself.\textsuperscript{154} As the already represented groups are, for the most part, established societal institutions, they will most likely perpetuate the status quo both in society and within the station.\textsuperscript{155} Input, feedback, and criticism from other groups and segments of society, both inside and outside the station, will probably be constrained if not suppressed.\textsuperscript{156} This contradicts the principle of a pluralistically organized democracy based on the theoretical equality of all groups in pursuing their own interests.\textsuperscript{157}

Other attempts to rectify inadequate representation of socially relevant groups include the one made in Bremen to have representatives of the underrepresented groups identified by a government office and inserted into the broadcasting council in an extra-democratic fashion.\textsuperscript{158} Pursuing this line of thought further, some experts demand a "loosening of the communication system from the power system."\textsuperscript{159} They maintain that a "given group's chances of access to the broadcasting council should be inversely proportional to its chances otherwise to participate in the public debate."\textsuperscript{160}

According to this theory of "inverse proportionality"\textsuperscript{161} or "compensatory relevance,"\textsuperscript{162} groups like the chamber of commerce or the national unions, which already have a high degree of public visibility and can attract media attention when they want it, should give way in the broadcasting councils at least partially to groups such as the poor and the guest workers, who do not have such media access.\textsuperscript{163}

3. Determination of the socially relevant groups

The determination of the socially relevant groups is of fundamental importance and of special interest to American readers who have difficulty imagining how the German system can function effectively. This problem is related to the above discussion, yet curiously is not

\textsuperscript{154} W. Hoffmann-Riem, \textit{supra} note 10, at 45.
\textsuperscript{155} Id. at 45, 49.
\textsuperscript{156} Id. at 50.
\textsuperscript{157} Id. at 59; \textit{see also} Hoffmann-Riem, \textit{Medienfreiheit}, in \textit{Sozialwissenschaften im Studium des Rechts}, 2 \textit{Verfassungs- und Verwaltungsrecht} 56, 62 (1977).
\textsuperscript{158} Bremen Law, \textit{supra} note 10, § 5(3)(27).
\textsuperscript{159} W. Hoffmann-Riem, \textit{supra} note 10, at 49 (citing Langenbacher & Mahle, \textit{Umkehrproporz und kommunikative Relevanz}, in 1974 \textit{PUBLIZISTIK} 322).
\textsuperscript{160} Langenbacher & Mahle, \textit{supra} note 159, at 328.
\textsuperscript{161} Id.
\textsuperscript{163} Hoffmann-Riem, 1976 ZRP, \textit{supra} note 162, at 294.
emphasized in the German literature.164

One approach to the identification of socially relevant groups lies in the initiative of the groups themselves. Although German law appears to hold that a person or corporate entity has no individual or subjective right to broadcast,165 that person or group may challenge the composition of the broadcasting council.166 At least one German court has held that social groups have a right to demand participation and consideration in the process of selection of broadcasting council delegates.167 Another observer has gone so far as to say that social groups, upon a showing of "relevancy" (probably equivalent here to high social profile), have an individual right to a seat on the broadcasting council.168 This view has recently been rejected by the Constitutional Court.169

Another approach is for the government or some third party to identify the social groups. The lack of generally recognized principles of selection,170 however, together with the disinclination of politicians to unleash any unnecessary societal conflict,171 makes it difficult to find representation for those social segments beyond the pale of organized and firmly established interest groups, compounding the problem discussed immediately above.172

German lawmakers do have a certain constitutional latitude in

164. One critic, Professor Hoffmann-Riem, does address the problem squarely: "Generally recognized principles of election are lacking." W. HOFFMANN-RIEM, supra note 10, at 50. For his solution, see infra text accompanying note 175.

165. See, e.g., Starck, Teilhabean sprüche auf Rundfunkkontrolle und ihre gerichtliche Durchsetzung, in PRESSERECHT UND PRESSEFREIHEIT, FESTSCHRIFT FÜR MARTIN LÖFFLER ZUM 75. GEBURSTAG 375 (1980); but see, e.g., Pestalozza, supra note 7. Here one must distinguish between the constitutionality of private broadcasting (see supra text accompanying notes 113-16), and the right of any given individual to engage in such broadcasting.

166. Starck, supra note 165, at 388.

167. Decision of August 29, 1978, Oberverwaltungsgericht [OVERWG], Lüneburg, partially reprinted in 1979 JZ 24. See also Stock, supra note 165; Stock, Neues über Verbände und Rundfunkkontrolle, 1979 ARCHIV DES ÖFFENTLICHEN RECHTS I; B. LUEMMEL, DIE BINNENPLURALITÄT DES ÖFFENTLICH-RECHTLICHEN RUNDFUNKSYSTEMS IN DER BUNDESREPUBLIK DEUTSCHLAND 27 (dissertation, Marburg 1982). This decision concerned the broadcasting council of North German Broadcasting (NDR), where members of the relevant social groups are elected directly by the parliament (of Schleswig-Holstein in this case).

168. Starck, supra note 165, at 387; but see B. LUEMMEL, supra note 167, at n.149.


170. W. HOFFMANN-REIM, supra note 10, at 50.

171. Id.

172. See supra text accompanying notes 150-63.
their determination of the relevant groups. Some German lawmakers have informally called in social and media scientists, as well as legal experts, to assist them in this effort. Nevertheless, this is a weak spot in the German model.

One media specialist suggests what amounts to a five-point plan to deal with this uncertainty: 1) an express legislative proclamation supporting the inclusion of non-established groups in the broadcasting council; 2) a series of public discussions to create a consensus on which groups are relevant; 3) the encouragement of experiments, such as the one in Bremen where a certain number of seats are reserved for unorganized groups; 4) a gradual replacing of the current legislative latitude with generally recognized criteria for the selection of the socially relevant groups; and 5) the development of a procedure to examine the further participation of those groups already included.

In order to establish recognized criteria of social relevance, a commission of social and media scientists could be formed to synthesize the results of the public hearings with the larger body of scientific knowledge. This commission, however, should be far removed from any interests in the media power they themselves will be distributing. If the committees suggested in points four and five above were to function on a continuing basis, the flexibility necessary to allow the broadcasting council to evolve with the changing social landscape would be provided.

IV. THE THIRD DECISION AND ITS CONSEQUENCES

A. Background

In its third television decision, the German Constitutional Court held that a state law permitting private television was unconstitutional because it made inadequate provision for several representation within the system. Although it is a coherent extension of the first two television decisions, the third decision is unique and important because it squarely confronts the question of how, if at all, private telev-

174. The work of Professor Hoffmann-Riem, supra note 10, is basically a long memorandum, prepared at the request of the Intendant of Radio Bremen, commenting on the constitutionality, general legality, and efficacy of the then-proposed law, which was subsequently enacted.
175. All five of the following suggestions are found in id. at 50-51.
176. Id. at 47.
177. 57 BVERFGE at 295.
sion could exist within the parameters of current West German media jurisprudence. More precisely, it defines the requirements for an effective internal pluralism.

Until 1967 there was a fair consensus among the German Länder that broadcasting operations were to be carried out by public law corporations. It was therefore a complete surprise when, on June 7, 1967, in a ten-hour session, the Saarland Parliament pushed through an amendment to its broadcasting law which made possible for the first time private German-language broadcasting in West Germany.

Shortly thereafter, on March 26, 1968, Free Broadcasting, Inc. (Freie Rundfunk AG, or FRAG) was formed for the purpose of private broadcasting in Saarland. When the government of Saarland refused to grant it a license, FRAG filed suit. After a torturous ten-year appellate history, the German Constitutional Court finally

178. This consensus was reflected in a number of inter-Länder contracts calling for common financial and programming arrangements, such as the contract funding the Second German Television network (ZDF). See Herrmann, Auswirkungen des FRAG-Urteils des Bundesverfassungsgerichts, 1981 FILM UND RECHT [FUR] 630, 631.

179. Law on the Organization of Broadcasting in Saarland, June 7, 1967, (Gesetz Nr. 806 über die Veranstaltung von Rundfunksendungen im Saarland) [hereinafter cited as GVRS or Saarland law], reprinted in SAARLÄNDISCHES AMTSBLATT 478 (1967). Under the law, anyone who wanted to produce private broadcasting programs in Saarland needed only to apply to the government for a concession. GVRS §§ 38 and 39(1). (This and other relevant sections of the Saarland law are found within the text of the third decision, 57 BVERFGE at 298-301, and partially translated infra at text accompanying notes 197 and 199.) According to section 39, there was no legal right to the concession, which the Minister Präsident of the Saarland could deny, grant, or grant with conditions attached.

180. Herrmann, supra note 178, at 631.

181. Id.

182. 57 BVERFGE at 302.

183. The appellate history is cited in the beginning of the third decision, 57 BVERFGE at 302-04, and reads essentially as follows: The administrative court dismissed the claim (Un- tätigkeitsklage) and FRAG appealed. The intermediate administrative court, on its own motion, sent the case up to the Constitutional Court in 1974 for a ruling on whether the GVRS was constitutional.

The Constitutional Court refused to rule on the constitutional issue, sending the case back down to the intermediate administrative court on March 24, 1976, for a decision on what amounted to “independent state grounds.” In May of 1976 the intermediate court ordered the Saarland government to rule on the application. In October of that year the government rejected the application on the ground that, even though the law conceived of private broadcasting media, it did not mandate it, and the government was therefore standing by the basic choice of public law stations. Furthermore, the Saarland government was restrained from doing anything which would endanger the existence of the public stations. Such a danger was foreseeable because of the expected losses in advertising revenues which the public stations would suffer when forced to compete with a private broadcaster. (See note 31, supra, for an explanation of the financing of German television).

FRAG immediately appealed the government’s decision, again to the lower administrative court, which in 1978 sent the case, as did the intermediate court before them, up to the
agreed to rule on the constitutionality of the Saarland law. 184

During this time, the pressure for private law television in West Germany was continually building. 185 The newspaper publishers claimed that they needed to have access to the new media in order to survive. 186 The ministers of the various German Länder had reached an accord on the introduction of four cable television pilot projects, 187 and further agreed that one of the four projects would make room for the participation of private broadcasters. 188 The Luxembourg government was proceeding with its plans to lift a satellite into orbit, from which to broadcast a commercial program in the German language. 189 Simultaneous with these technological developments, there were constant reports from expert commissions, 189 parliamentarian debates, 190 position papers from the various political parties and unions, 192 scientists’ affidavits, 193 and meetings of various technologically, ideologically, and economically interested groups. 194

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Constitutional Court which this time agreed to rule on the constitutionality of the Saarland law. In sending the case up for this ruling, the administrative court said that if the law was declared constitutional, it intended to rule that FRAG should be granted a concession. FRAG had apparently fulfilled all the legal requirements, and therefore, the lower court claimed, the government was not entitled to resort to very general considerations about the desirability of private television, which in any case had been negated by the legislative decision incorporated in the Saarland law. If, on the other hand, the law was unconstitutional, FRAG would have no law on which to base its claim, and the case would be dismissed.

For an overview of West German court structure, see generally Meador, Appellate Subject Matter Organization: The German Design from an American Perspective, 5 HASTINGS INT’L & COMP. L. REV. 27 (1981).

184. 57 BVERFGE at 305.
187. Roeber, supra note 185. The four pilot projects (in Ludwigshafen, Munich, Dortmund, and Berlin) have recently come to fruition. See also infra notes 302-36; Kabelfernsehen, supra note 6; Hoffmann-Riem, Modellversuch als Scheintest, 1980 ZRP 31, (claiming that these pilot projects are really preparatory to the introduction of an already determined private system rather than a true test of that system’s capabilities).
188. See infra notes 315-16 and accompanying text.
189. Löffler, supra note 14. But see infra text accompanying notes 342-48 (the satellite project was subsequently abandoned).
190. Roeber, supra note 185.
191. Id.
192. Set out in Braun & Darkow, supra note 21, at 218-35.
193. See supra note 174.
194. Roeber, supra note 185.
B. The Issue Defined

The lower administrative court requested a ruling in particular on whether four specific sections of the Saarland law195 (Gesetz über die Veranstaltung von Rundfunksendungen im Saarland, hereinafter GVRS) were consonant with the article 5 guarantee of broadcasting freedom.196 The sections of GVRS in question were:

1) section 38, which provided that “anyone who wants to privately produce broadcasting programs needs a concession;”

2) section 40(1), which determined that the producer would have the form of a private corporation with its seat in Saarland; and

3) sections 46 and 46b(1), which together legally defined the form of internal pluralism to be required in all concessionaire stations.197

Section 46 declared, under the heading of “special conditions,” that the concession could only be given to those companies “whose articles of incorporation . . . give the advisory council the participatory rights envisioned by this law . . . .”198 Section 46b(1), under the heading of “Advisory Council—Tasks,” named those participatory rights:

The general public is to be represented vis-a-vis the program producer by an advisory council. The members of this council are required to look after the total interests of the producer and of the broadcasting consumer. They are not bound by any mandate or instruction. The advisory council watches over the observance of the legal requirements for broadcasting as well as the observance of the company’s own bylaws. The advisory council advises the program producer and the supervising authority of any corresponding violations. It discusses all questions which are of basic importance to the producer. It counsels the producer in the shaping of its programming.199

The law made only the barest determinations about membership in this council, specifying simply that the Catholic and Protestant churches should each send one representative.200 Nowhere was the council given

195. See supra note 179.
196. 57 BVERFGE at 304.
197. Id.
198. Id. at 299.
199. Id. at 299-300.
200. GVRS § 16(2), reprinted in id. at 301. Twenty additional representatives are to be elected by the parliament on the suggestion of the Committee (Ausschuss) for Cultural Policy and Youth Problems. This is similar to the “parliamentary” version of internal pluralism, inherited and practiced by the stations in the former British zone, whereby the social groups nominate, and parliament affirms, the representatives of the socially relevant groups.
any power beyond that of advising, discussing and watching over the station.\textsuperscript{201}

The lower administrative court further requested that the Constitutional Court, should it find these four sections unconstitutional, declare whether this unconstitutionality was fatal to the law as a whole.\textsuperscript{202}

C. The Ruling

1. Sense and purpose of article 5

Like the earlier decisions, the court started with an analysis of article 5. It introduced, however, a structuralist's refinement, setting broadcasting freedom in the context of the other article 5 guarantees. "Freedom of broadcasting serves the same purpose as do all of the guarantees of article 5: free individual and public opinion building."\textsuperscript{203} Broadcasting freedom must then be understood in reference to freedom of expression, freedom of information, freedom to disseminate an opinion, freedom of the press, and freedom from censorship. Relevant especially are freedom of expression and freedom of information, which together comprise one loop.\textsuperscript{204} It is the whole \textit{process} of communication which is the object of the freedom of broadcasting guarantee.\textsuperscript{205} This refinement brought the concept of institutional freedom into full bloom.\textsuperscript{206}

The court then reiterated its command to the state legislators that they provide a legal structure sufficient to guarantee that this institutional freedom, this "free and comprehensive opinion building,"\textsuperscript{207} is possible in broadcasting. "The need is much more for a positive order which guarantees that the diversity of existing opinion finds its largest possible breadth and completeness through broadcasting."\textsuperscript{208} The court thus brought home the full radicality\textsuperscript{209} of its media conception, a con-

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\textsuperscript{201} & \textit{Compare} note 119. The critical difference between this model and the "pure" model is that in the pure model the social groups themselves are the ultimate deciding force. Both of these differ essentially, however, from the \textit{GVRS} model where the social groups do not even have a nominating function, (although they are to be "heard").
\textsuperscript{202} & 57 BVerfGE at 304-05.
\textsuperscript{203} & \textit{Id}. at 319.
\textsuperscript{204} & \textit{Id}.
\textsuperscript{205} & The court then states that the opinion building process, protected by the freedom of broadcasting, occurs in every "transmission of information or opinion" (\textit{id}.), thereby alluding back to the earlier ruling that music and entertainment also transmit information contributing to the opinion building process. 12 BVerfGE at 326 (quoted \textit{supra} note 69).
\textsuperscript{206} & \textit{See supra} text accompanying notes 72-84.
\textsuperscript{207} & 57 BVerfGE at 320.
\textsuperscript{208} & \textit{Id}. (emphasis added).
\textsuperscript{209} & Both United States and German law premise the existence of broadcasting on the
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\end{footnotesize}
cept which seeks to guarantee that any idea should be able to pass from any point in society through television or radio to any other point in society.

2. Beyond the special situation of broadcasting

By 1981 a situation was imminent where a vastly increased number of frequencies would be available for broadcasting. The opponents of public broadcasting claimed that the special situation of broadcasting no longer obtained and that broadcasting must thenceforth be treated like the press. Internal pluralism, they argued, must give way to an external pluralism or market system, similar to the one in the United States. The "integration model" (all social groups integrated into one or several stations) would then be replaced by the "coordination model" (diversity secured by a multitude of competing stations).

At no point in the decision did the Constitutional Court state that scarcity—be it of frequencies, expertise, or capital—was no longer a situation that set broadcasting apart from the print media. Instead, the court was concerned that "a sufficient number of frequencies [did] not stand ready to be used." It referred again to the large expenditure of money involved.

The court also discussed the possibility that other factors might contribute to the special situation of broadcasting. One of these factors is the distinct historical situation of broadcasting. The press has developed to the point where a "limited" balance of information is guaranteed by external or market pluralism. No such claim could,
however, be made for broadcasting, which has matured as a public law institution and which, if privatized, would be released as an innocent into a fully developed market system.\textsuperscript{218} This could lead to a "concentration of opinion-making power and the danger of misuse for the purpose of a one-sided influencing of public opinion."\textsuperscript{219}

Another factor which informs the court's thinking is the inherent powers of television and radio, and above all their immediacy.\textsuperscript{220} The immediacy and pervasiveness of the media is one reason why broadcasting assumes the role of "eminent factor and medium" in public opinion building.\textsuperscript{221} One critic calls broadcasting an "instrument with the suggestive force of 'being there,' a medium which quietly implies its own objectivity."\textsuperscript{222} He continues: "That broadcasting is . . . not to be equated with the press is clear: broadcasting—especially in the form of television—has, apart from the above mentioned advantage of credibility, also an advantage in comfortability, a premium of actuality, and, above all, broadcasting has up to two-thirds other content."\textsuperscript{223}

But, rather than rule on the inherent powers of the broadcast media or whether the number of frequencies available and the economics involved would allow the various social groups access to the media, that is, whether the "special situation" per se still existed, the German Constitutional Court shifted the ground of the argument. The court held: "\textit{Even if} the previous limitations [on broadcasting] were to disappear, . . . it could not be guaranteed with sufficient certainty that a

\textsuperscript{218} Id.
\textsuperscript{219} Id. The court is quite possibly thinking here of the newspaper empire of Axel Springer (see supra note 186) which controls about 40% of the German newspaper trade. See Groß, \textit{Das dritte Rundfunkurtell des Bundesverfassungsgerichts}, 1982 DVB1 561, 564; see also Report, \textit{Monopolkommission zum Privatfunk}, 1981 FuR 657 (saying that at a local level there is often little or no diversity in the press). Springer is poised, along with the Union of German Newspaper Publishers, to move into the new electronic media. See F. Hymmen, \textit{supra} note 99, at 75.

\textsuperscript{220} 57 BVerfGE at 320. Cf. \textit{supra} note 94 and accompanying quotation. When the court speaks of the frequency shortage and the financial barrier, it is arguably using these terms only as examples of more widespread and essential differences between the print and broadcast media. See also Roeber, \textit{supra} note 185, at 625 (noting television's stronger ability to influence opinion as a third component of the "special situation").

\textsuperscript{221} In the United States, the average child watches six, the average adult two and one-half, hours of television per day. A. Smith, \textit{supra} note 35, at 215-16. The average citizen has seen three years of television before reaching his or her teens, seeing between a quarter and a half million commercials. \textit{Id.} In Germany, the figure is less, one and one-half television hours per day (as compared with average newspaper reading of 32 minutes). Broadcasting \textit{Yearbook} 12 (1974).

\textsuperscript{222} F. Hymmen, \textit{supra} note 99, at 95. For an American version of this theory, see generally M. McLuhan, \textit{Understanding Media} (1964).

\textsuperscript{223} F. Hymmen, \textit{supra} note 99, at 95.
comprehensive program offering would be produced by the unwritten laws of the marketplace." The court's suspicion of the marketplace was reflected in its reference to diversity in the newspaper market as "limited."

In sum, the German Constitutional Court rejected the idea, so prevalent in American media thinking, that the commercial marketplace and the marketplace of ideas are co-extensive. If the efficacy of the market system is so questionable, the court reasoned, then great care should be taken in releasing the media into that market system because, once done, it would be almost impossible to reverse.

In focussing on the potential of marketplace failure, present in both broadcasting and the press, the court removes the special situation, as presently understood, from its central role in broadcasting jurisprudence. Although special situation theories are far from dead, their dislocation again poses the question of how to distinguish between the broadcast and print media.

One answer is the historical approach suggested in passing by the third television decision. The court indicated that the differences between media were simply the result of a historical process which had brought them to a point where the press is structured as an institution of private law and broadcasting as an institution of public law. Another (and related) possibility is to avoid the question entirely. At least one critic has read into the court's pronouncements on this point a de facto "mass media separation of powers." Such a separation, while not constitutionally compelled, nonetheless "serves as a principle for securing a . . . large variety of information offerings."

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224. 57 BVERFGE at 322 (emphasis added).
225. Id. at 323. The German phrase is begraenze Vielfalt meaning "limited variety," and is read to mean that diversity in the newspaper world is barely adequate. See Gross, supra note 219, at 563-64.
227. 57 BVERFGE at 323. "It is therefore uncertain [in a system of private television] . . . whether all or at least a significant part of the social groups and philosophical views would actually get to participate, whether a true market of opinions would result in which the diversity of world views would find their unedited expression." Id.
228. Id.
229. See supra notes 214-19 and accompanying text.
230. 57 BVERFGE at 322-23. See also Hoffmann-Riem, The Freedom of Communications and the Future of Broadcasting in West Germany (in English) in 17 STUDIES IN BROADCASTING (1981).
231. Hoffmann-Riem, supra note 230.
232. Id. For an American version of this concept, see L. Tribe, AMERICAN CONSTITUTIONAL LAW 700 (1977).
Finally, a possible solution might be to emphasize the television’s unique and vast potential. Such a teleological approach, hinted at in various court statements, is in one sense a forward-looking variation on the special situation theory.

Rather than redefine the special situation, however, the court based its decision in the FRAG case primarily on the logic or marketplace failure. The special situation of broadcasting is relegated to a secondary role in the court’s thinking. Regardless of how many new broadcasting technologies or channels become available, the German lawmaker has the continuing constitutional duty to provide a framework within which broadcasting can function as a public institution.

3. The Saarland law: how much pluralism is enough?

The Saarland law (GVRS) failed primarily, the court said, because the mechanism for societal representation within the station was defective. In looking at the inadequacies of this version of internal pluralism, one can glean an understanding of what structures might provide sufficiently pluralistic representation within the station, and therefore be constitutionally permissible.

The weakness of this attempt at internal pluralism was evident even from the name of its representative organ. “Advisory council” (Beirat), the court noted, was not nearly as specific, determinative or commanding as “broadcasting council” (Rundfunkrat). The form of internal pluralism set out at GVRS sections 46 and 46b(1) was indeed ineffective in two respects.

First, the court found insufficient provisions for full societal representation. Only two social groups were identified apart from the parliamentary representation. The remaining ten members of the advi-

233. See, e.g., 31 BVerfGE at 325 (quoted supra text accompanying note 64).
234. 57 BVerfGE at 320-22.
235. Id. at 305. Other defects which the court cites are: 1) the GVRS makes no provision for application procedures which private firms would follow in pursuit of the franchise, and no statement about the requirements of the applicants or the standards to be applied in judging the application; and 2) the law does not specify any procedure for the eventuality that more than one firm would apply for a given frequency or time-slot. Id. at 326-27.
236. The demands on internal pluralism organs are similar for public and private organizations, although in the latter case the societal participation would have to be more strictly provided for because of the dangers of “profit-oriented thinking” and self-serving propagandizing. Id. at 305.
237. Id. at 331.
238. See supra notes 197-99 and accompanying text.
239. 57 BVerfGE at 331.
240. Id. at 330 (quoting GVRS § 16(2)).
sory council were to be selected directly by the Saarland Parliament from a group selected by the state government’s Committee for Cultural Policy and Youth Problems.241 During the selection process, the larger “communities of public life” were to be heard.242 Thus the social groups themselves had no determinative input in the selection of the board members who were supposed to represent them.243

The second problem with this attempt at internal pluralism is that the advisory council does just that—it advises, it counsels, it discusses, it watches over.244 Nowhere does the law provide the council with any determinative influence. It has no power to impose sanctions when its recommendations are not followed.245 In short, it has no clout.

Nor is the institutional freedom mandated by article 5 supplied by the other provisions of GVRS: that it be a publicly held corporation where no shareholder may hold more than fifty percent of the stock; that there exist a government supervisory council, to which two members of the advisory council belong; or finally that the state have the power to grant or deny a concession.246

The fact that there are no adequate provisions for ensuring that society is adequately represented within the station was fatal, and the whole of the Saarland law was therefore found void.247 The German Constitutional Court thus showed that it is resolute about claiming the electronic media for the public interest.248

D. Critique and Consequences

1. Reaction to the decision

The FRAG decision unleashed a largely negative response in the legal journals of West Germany.249 The critics accused the Constitutional Court of an insufficient understanding of the technical develop-

241. Id. (citing GVRS §§ 46(c)(2), 16(4)).
242. Id.
243. Id. at 331.
244. Id. (citing GVRS § 46(b)(1)); for a translation see supra text accompanying note 199.
245. Id.
246. 67 BVerfGE at 332-33.
247. Id. at 334.
ments occurring in the electronic media.250 Supporters of the decision noted its consonance with the two earlier television decisions,251 as well as the increasingly unimportant role of technological developments per se in the philosophy of West German media jurisprudence.252

The criticism of the FRAG decision centered on the court's evaluation of the market dynamic.253 This evaluation was said to be composed of only "vague allegations" which could not be a guide for the "serious lawmaker."254 It was not adequate "to the primacy . . . of communicative autonomy,"255 and only hindered the "experiment of freedom."256

The court's supporters pointed out that the court's distrust of the "free play of [market forces]"257 was indeed based on more than speculation.258 Since the late 1960s, five government reports had noted the increasing degree of economic concentration in the newspaper industry.259 It was rational for the court to conclude that the same process would occur in a laissez-faire broadcasting market.260

These findings were affirmed by a new study of the Federal Republic's Monopoly Commission which appeared after, and was occasioned by, the release of the FRAG decision.261 Because of the high degree of concentration existing in the print media, the report recommended a complete bar on ownership by the newspaper industry of any future private broadcasting facility.262 It also cited the experience of United States television as proof that advertiser-supported television, because it is so oriented to a high audience share, could not supply the constitutionally demanded level of program diversity.263

250. Scholz, Das dritte Fernsehurteil des Bundesverfassungsgerichts, 1981 JZ 561, 562; Pestalozza, supra note 7, at 2158.
251. See, e.g., Hecker, supra note 249, at 420.
252. See, e.g., Groß, supra note 219, at 562.
253. See supra notes 224-28 and accompanying text.
254. Pestalozza, supra note 7, at 2163.
255. Scholz, supra note 250, at 564.
256. Pestalozza, supra note 7, at 2163-64.
257. 57 BVERFGE at 323.
258. Groß, supra note 219, at 563-65.
260. See, e.g., Hecker, supra note 249, at 423.
262. Id. See also Groß, supra note 219, at 563-64.
263. Snow, supra note 52.
Other commentators suggest that user fees, similar to those in the present West German public law system, would supply a more neutral fundament for broadcasting activity even within a private law system. Advertising, to the extent on which it is relied, should be confined to a limited amount of airtime and subject to thorough content regulation.

2. Is any form of private television now possible?

Although the court stated in the FRAG decision that it was not going to rule on whether there was an individual constitutional right of private media ownership, its acute distrust of the marketplace left great doubt whether private stations would, in practice, be constitutionally permissible. Critics also note that the court phrases its warning against private monopolies in stronger terms than it previously had used. This new formulation speaks of the danger of delivering media into "one or several" hands, which is a small but important amplification of "neither to the state nor any one societal group."

The one point of consensus in Germany today seems to be that the court's decision did effectively outlaw an American style laissez-faire approach to the media. In any future West German system there will have to be more wide scale social participation than is currently demanded under the United States Constitution.

Beyond that, the question becomes what is meant by the word "private." German television is to a certain extent already "privatized," in the sense that a significant part of its programming is bought from private outside sources, including those in the United States.
Thus the word “private” has various postures, levels, and degrees of meaning, each implying a certain form of broadcasting organization.

The third decision presents the legislator with a series of choices. The first choice, or level of choice, is between the internally pluralistic station and the externally pluralistic system.275 “The legislature must determine what is necessary to secure broadcast freedom . . . the Basic Law does not prescribe any specific form of organization.”276 Thus the lawmaker must decide between an “internally pluralistic structure . . . in which the influence of the relevant social groups is transmitted internally through organs of the program producer,”277 and an “externally pluralistic diversity” where the “total offering of domestic programs corresponds to the existing diversity of opinion.”278 While the former model has been specifically sanctioned by the court from the date of the first decision,279 a legislative decision for external pluralism would probably need to be constitutionally supported by a scientific prognosis280 to the effect that all social groups and world views would likely be accounted for in the new system.281

The West German Constitutional Court was aware that individual

with it a larger importation of American programming, which they see (correctly in the author’s opinion) as lowering the general quality of German television. See Schultz-Keil, Kojak, Colombo und andere, in Ein anderer Rundfunk - Eine andere Republik 63-64 (M. Thomas ed. 1980).

275. Herrmann, supra note 173, at 638. But see Pestalozza, supra note 7, at 2164, who claims that as soon as the frequency shortage is remedied, the legislature has no choice but to provide for private broadcasting without restraint or organizational or programmatic balancing. This position is typical of those critics who see the frequency shortage as the only essential difference between broadcasting and the press and who are unable to find anything but an individual right of self expression in the Basic Law guarantee of broadcast freedom. Thus they see the public law’s internally pluralistic structure as a “continuing suspension of constitutional rights” rather than a safeguarding of them. Pestalozza, supra note 7, at 2160.

276. 57 BVerfGE at 321.
277. Id. at 325.
278. Id.
279. Id. (citing 12 BVerfGE at 205, 262).
280. Herrmann, supra note 178, at 643. Critics are, however, skeptical about the scientific neutrality of such research, fearing its potential politicization and noting that telecommunications research is generally predisposed to the telecommunications industry. See Address by W. Hoffmann-Riem, Policy Research on Telecommunications in West Germany, 4-7 American Telecommunications Conference, in Annapolis, Maryland (1983) (The text of this speech is available from the Hans Bredow Institute for Radio and Television, Universität Hamburg, W. Ger.).

281. Herrmann, supra note 178, at 643. Herrmann, although he understands and approves of the logic behind such a ruling, finds it strange in the application. “Will there always be an equal number of red and black, left and right, progressive and reactionary station applications in order to achieve a total balancing of broadcast programming.” Id.
and public or objective rights collide within the broadcast realm. The court's solution was simple. "It is the task of the legislator to bring such collisions into balance." From the public function which broadcasting plays, it is clear that such balancing will be predisposed to the group right.

Another possible choice for the legislature, and a possible outcome of the court's balancing, might be a mixed system, where the public sector maintains primary importance in a gradually developing, partially privatized broadcasting landscape. To the extent that this thesis would place the onus of diversity on the public law stations, it ignores some fairly clear language in the third decision. The fact that all "important social groups get to participate within the realm of public law television and that the citizen recipient can thereby comprehensively inform himself" would in no way free potential private television stations from the constitutional demand for a well balanced diversity of opinion. An "additional one-sided consideration of single opinion-carriers in private broadcasting" would "disturb that balance . . . if not eliminate it." Thus, a mixed system would only be possible if that balance of diversity were preserved, if that balance were either implanted within the private station, or imposed on the whole system from without.

A legislative decision to implant diversity within the private station would almost certainly entail some form of internal pluralism within that station's governance structure. This theoretically posited mixed form for broadcasting stations is denounced by private television advocates as "unauthentic" and a "shell game of legal forms." It is argued that no entrepreneur would want to invest his or her money in an organization where he or she did not have complete decisional autonomy.

This argument overlooks several factors. First, the internally pluralistic broadcasting council only makes long term editorial decisions;

282. 57 BVERFGE at 321; see supra notes 78-84 and accompanying text.
283. 57 BVERFGE at 321.
284. Hoffmann-Riem, supra note 230, passim.
285. See, e.g., Oppermann, supra note 249, at 729.
286. 57 BVERFGE at 324.
287. Id.
288. "Private" in the sense that they would receive their revenues from either a "pay-TV" system or from advertising. See Report, Monopolkommission zum Privatfunk, 1981 FuR 657.
289. Roeber, supra note 185, at 628.
291. Roeber, supra note 185, at 624; Herrmann, supra note 178, at 643.
the short term editorial decisions and general administration of the station would still be in the station owner's hands. Furthermore, the court itself notes that businesspeople participate in other areas where their activities are highly regulated, such as banking and insurance. In such a mixed station form, businesspeople would still find room for business opportunity and for expression and dissemination of their opinion, albeit within a more defined organizational matrix. Thus, a mixed station form might very well be the result of the balancing which the court has posited.

Various other mixed models have been put forward which would synthesize elements of both private and public law institutions. In the "Pribag" model, an internally pluralistic broadcasting council would actually share in the ownership of the station. Another model would integrate "private law structures under a public law roof." In the Ludwigshafen cable television pilot project, a public law internally pluralistic umbrella organization was formed to coordinate and administrate the input of several private as well as public feeder corporations.

Should some form of constitutionally acceptable private law television be developed, the Constitutional Court hints about further regulations which might be instituted in order to secure the public interest. Among these are regulations on financing, stock ownership, state supervision of content regulations, as well as provisions, where necessary, for internal pluralism.

3. The "normative power of the factual"—cable television pilot projects and new media laws

The Constitutional Court was fully aware of the rapidly evolving technological state of the broadcasting art, especially as such changes were contemplated within the framework of the four planned cable pi-

292. See supra notes 129-30 and accompanying text.
293. 12 BVERFGE at 262.
294. See F. HYMMEN, supra note 99, at 76.
295. Id.
296. Kleinsteuber, supra note 186, at 118. See also infra text accompanying notes 315-41.
298. 57 BVERFGE at 324.
299. Id. at 332.
300. Id. at 326. Although the demand for "balance" might be dropped in an externally pluralistic system, the command of comprehensive and truthful broadcasting would still be present. Id.
301. Id. at 330-31.
302. Oppermann, supra note 249, at 722.
The necessity of a legislative basis and parliamentary decision also applies to experiments which are limited in a temporal and geographical sense. These have the same constitutional posture as do more permanent arrangements, although they may be granted somewhat more latitude because their very purpose is to gather new data.

The court’s decision nonetheless left many essential issues untouched or undecided, and in other problem areas entrusted decision-making discretion to the lawmaker. The proponents of private television have seized upon these uncertainties and used their legislative discretion to its full extent in order to “create facts” which have moved the country as a whole closer to private television.

The new facts include: 1) The West German Post Office’s ongoing project to lay a nationwide cable net; 2) the manner in which the cable pilot project in Ludwigshafen has been carried out; 3) the Rhineland-Palatinate media law which provides the legal basis for the Ludwigshafen project; 4) the research project which accompanies the Ludwigshafen project; 5) the report of the Experts Commission on New Media and the ensuing proposed media law for Baden-Württemberg; 6) the proposed law for Lower Saxony, and 7) various satel-

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303. Herrmann, supra note 178, at 640.
304. 57 BVERFGE at 324. In so stating the case, the court seems to answer affirmatively the question “is cable television ‘broadcasting’ in a constitutional sense?” F. HYMMEN, supra note 99, at 81.
305. Among the many questions left undecided were: 1) whether an individual has a right to broadcast privately (see Hoffmann-Riem, supra note 187, at 32; supra note 267 and accompanying text); and 2) how many cable stations it would take to create a true external pluralism (see supra notes 209-12). But such talk of numbers begs the central question, which is whether any market system, regardless of how many stations, could account for and to the plurality present in society. See, e.g., Groß, supra note 212, at 566; see also supra notes 217-20, 268-84 and accompanying text.
306. See supra notes 275-78, 285-88 and accompanying text.
307. See, e.g., Groß, supra note 219, at 564, 566-67 and passim.
308. Blüthmann, Gaul, & Hoffmann, Im Kabel verfangen, DIE ZEIT, January 27, 1984, at 17, col. 4. This relatively new development represents a frontal attack on public broadcasting in West Germany. Although nominally compatible with public law broadcasting, the cable net in reality represents “expensive preparatory work for commercial TV producers.” Id.
309. See generally Hoffmann-Riem, supra note 187.
310. Id.
311. Id.
312. See Hoffmann-Riem, Ein Anlauf zum privaten Rundfunk, 1981 ZRP 177. See also Oppermann, supra note 249, at 724; Groß, supra note 219, at 568-69.
313. See Oppermann, supra note 249, at 723.
lite and other extra-territorial broadcasting projects.\textsuperscript{314}

A short examination of the Ludwigshafen project will flesh out the effects of the \textit{FRAG} decision, indicate the cable project's potential unconstitutinality, and illuminate the political process in West Germany today. The roots of the four cable projects lie in the 1976 Telecommunication Report of the Commission for the Expansion of Technical Communications Systems (\textit{KtK}),\textsuperscript{315} which recommended the testing of new communications technologies in the form of pilot projects.\textsuperscript{316} In 1978 the Minister-presidents of the various German states agreed to four such projects—in Berlin, Dortmund, Munich, and Ludwigshafen—and that some degree of private participation would be allowed in the Ludwigshafen project.\textsuperscript{317}

The legislature in Rhineland-Palatinate took full advantage of this opportunity to enact a media law for Ludwigshafen which foresaw the substantial participation of private broadcasters.\textsuperscript{318} The law and the project have been hailed (and criticized) as a "Copernican change . . . from internal to external pluralism."\textsuperscript{319}

Under the Ludwigshafen law, each person (or corporation) has an individual right to broadcast or cablecast.\textsuperscript{320} There are no regulations as to the structure of station management and no responsibility on the part of the program producer to create a balanced or diverse program.\textsuperscript{321} Balance and diversity are to be supplied by the "sum of all the unbalanced programs"\textsuperscript{322} and enforced by a pluralistically consti-

\textsuperscript{314} See infra notes 342-48 and accompanying text.


\textsuperscript{316} Hoffmann-Riem, supra note 187.

\textsuperscript{317} Id. In North Rhine-Westphalia (Dortmund) and Bavaria (Munich), the state legislators decided to incorporate the projects into the existing public law structures and therefore no "founding law" was constitutionally required. Oppermann, supra note 249, at 725. In Berlin, the project was to be very limited, consisting only of interactive videotext. Id.

It is interesting to note that the people of Bavaria, often reputed to be the most conservative in Germany, reacted in 1978 to government plans to introduce private television by voting for an amendment to the Bavarian Constitution (art. 111a) which expressly and unconditionally forbids such private broadcasting. Id. at 723.


\textsuperscript{319} Oppermann, supra note 249, at 725.

\textsuperscript{320} Id. Unless otherwise indicated, "broadcasting" will imply and include "cablecasting."

\textsuperscript{321} Hoffmann-Riem, supra note 187, at 35.

\textsuperscript{322} Groß, supra note 219, at 567.
tuted institutional assembly, the so-called "public law roof or umbrella." Critics of the Ludwigshafen model claim that this public law umbrella lacks the power to effectively create a plurality in the total television offering. The assembly does have the power to limit the amount of time a broadcaster is given, and to enforce certain fairness-type regulations. Thus it is perhaps more effective than the station which was the subject of the Constitutional Court's latest decision, although the very power which the Commission has seems to contradict the autonomy which is promised to the broadcasters under law. There are also no mechanisms—no application procedures or standards—in the new statute to secure a balanced and diverse pool of participants from the very beginning of the system. Observers fear that a model of this type creates nothing more than an external regulatory instance, similar to the United States Federal Communications Commission (FCC), which is relatively impotent in the face of economic concentration and programming homogeneity.

Furthermore, the allowance of twenty percent of a station's total airtime for commercials, and the resultant dependency on advertising, is said to create a flattening dynamic, which might quash any further potential for diversity. At least two observers have declared the project unconstitutional. One expert questions whether the pilot project is really a test at all, or whether it is just a political ploy to prepare the public for the eventual nationwide introduction of private television. The scientific re-

323. Hoffmann-Riem, supra note 187, at 33.
324. Groß, supra note 219, at 567.
325. Id. at 567-68.
326. Hoffmann-Riem, supra note 187, at 36.
327. See supra notes 235-48 and accompanying text.
328. Hoffmann-Riem, supra note 187, at 36.
329. Groß, supra note 219, at 567. Dr. Groß notes that it is further unclear how the assembly would decide which broadcasters would be limited should the assembly find a state of unbalance. Id.
330. Id. at 564; Hoffmann-Riem, supra note 187, at 35.
331. Groß, supra note 219, at 567.
332. Id. at 570; Hoffmann-Riem, supra note 187, at 38. The Rhineland-Palatinate law is declared by another observer to be "not as unconstitutional" as the Saarland law. Herrmann, supra note 178, at 640. Dr. Herrmann is also of the opinion that, should cable television be thrown open for private investment, the newspaper publishers would have less right than others, instead of more, as they claim, for a license to operate this new media. This is because the danger of "media concentration" would be more acute in the case of the publishers who already control much of West German media. Id. at 637.
333. Hoffmann-Riem, supra note 187, passim.
search projects which accompany the project are claimed to be pre-programmed to validate its success. Finally, the project will create entities (a cable net, large private investments which would be negated in the unlikely event that the test were to be declared a failure, and the companies themselves) which will in turn make it difficult for any future legislative or judicial body to do anything but "passively ratify the actual change."  

The proposed laws in Baden-Württemberg and Lower Saxony offer essentially the same model: private companies under a public law roof. They differ from the Rhineland-Palatinate law for Ludwigshafen in that they are conceived of as a permanent framework for future television activity. Critics have noted that the report of the \textit{Expertenkommission Neue Medien}, which underlies the Baden-Württemberg law, did not even consider how the existing internally pluralistic system could be improved. It did offer warnings about the dangers of economic concentration and questioned the need for more mass media programming, but only along the way to its final recommendation that television be opened to private producers and that a vast number of new stations be made available.

For one observer, the "Copernican change" from internal to external pluralism represents a turning away from the principles of the \textit{FRAG} decision: "Broadcasting freedom is understood [in these new proposals] as freedom for the producer and the entrepreneur, not however for the communicator and recipient."

4. Satellite and other extra-territorial broadcast projects

The questions presented by the planned Luxembourgian satellite have for the present become moot. In April, 1983, the French govern-
German television jurisprudence is, however, still in danger of being compromised by the invasion of commercial television signals from extra-territorial sources. Together with the large German publisher, Bertelsmann, Luxembourg has recently begun broadcasting a nightly five hour, private, German-language entertainment program from a large transmission tower on Luxembourg's border with West Germany. Bertelsmann is also part of a consortium of West German publishers, including the Springer press, which plans to broadcast a private domestic program from the European telecommunications satellite, ECS-1, scheduled for launch in September of 1985.

5. In summary

The third decision represents the West German Constitutional Court's clearest affirmation to date of the public character of the broadcasting system in Germany. Its strong rejection of the market system, its more qualified perception of diversity in the newspaper world, the "new formulation" of the danger posed by private monopolization and the emphasis placed on the "institutional freedom of broadcasting" all contribute to the impression that the court firmly believes in television as a public servant.

Some observers see in the treatment which the court accords to broadcasting signs of a new order appearing, a de facto separation of

343. Id.
344. Löwer, supra note 14, at 733-34.
345. Id.
346. The Cabling of Europe, supra note 16, at 37.
348. Id. at 61.
349. See supra notes 224-28 and accompanying text.
350. See supra note 217 and accompanying text.
351. See supra notes 269-71 and accompanying text.
352. See supra notes 207-08 and accompanying text.
powers, wherein broadcasting and the press would fulfill different functions within society. Only time will tell whether a public consensus develops around this view. Judging by past patterns, the FRAG decision should stand as the court's definitive media pronouncement for the next ten years or so. But with so many other powerful forces at work, it remains to be seen whether the Constitutional Court will indeed have the last word.

V. COMPARISON AND CONTRIBUTION OF THE GERMAN MODEL TO AMERICAN MEDIA LAW

A. Introduction

The German system, its premises and its values, are so conceptually different from those of the American system that the American observer finds such a system and its possible domestic application difficult to imagine. United States constitutional theory is in the grip of a conception of the First Amendment as guarantor solely of individual rights. Furthermore, the average American may find it difficult to imagine an internally pluralistic system in practice. Finally, a belief in the efficacy of the marketplace is central to the political self-understanding of the United States. Taken together, these factors may preclude visions of an American broadcasting structure with greater democratic legitimacy and function.

This Note takes the position that the consideration and implementation of some German media ideas and organizational forms could contribute much to the vitality of American radio and television. This section will first consider a few general constitutional principles of United States media law, comparing and contrasting them with their West German counterparts. Strategies for introducing West German

353. See supra notes 231-32 and accompanying text.
354. Herrmann, supra note 173, at 643.
357. See, e.g., FCC v. WNCN Listeners' Guild, 450 U.S. 582 (1980); United Church of Christ v. FCC, 707 F.2d 1413, 1436 (deregulation of radio).
358. Critics have lauded West German television, which, among other things, has taken an active role in funding and producing the "New German Cinema," as well as works by prominent directors throughout Europe. See Kaufman, Velvet Gloves, THE NEW REPUBLIC Aug. 29, 1983, at 21 (suggesting that West German television might "turn out to be the Medici family of contemporary European film . . ."). This, of course, is only one aspect of media vitality.
media jurisprudence into the American system, including a constitutional amendment, will be discussed. Although the idea is intriguing, this section will not look at any specific application of internal pluralism to commercial broadcasting in the United States. The premises of the two systems are so fundamentally different that such a discussion would devolve into an examination of the property rights of the individual station owner, a subject beyond the scope of this writing. This section will conclude by looking at the possible applicability of the West German model within the United States' public broadcasting system.

B. Internal Pluralism as a Form of Access

The West German idea of internal pluralism fits roughly into the spectrum of access mechanisms which in the United States have been used or considered in the name of public interest. "Access mechanism" is here understood in a very general sense, meaning any instrumentality designed to increase the diversity of voices in the media, instead of its more common and limited usage referring only to the right of a specific speaker to have his or her message broadcast.

The forms of access fit into two large categories. First there are mechanisms designed to control the structure of the market, the totality of television offerings in what the West Germans would call an externally pluralistic setting. They include provisions against common

359. It would, however, be interesting to explore the application of the internal pluralism concept with regard to the FCC. As it now exists, most of the commissioners have close ties to industry, and the "revolving door" is the prevalent career pattern. See Robinson, The Federal Communications Commission: An Essay on Regulatory Watchdogs, 64 Va. L. Rev. 169, 170 (1978); see also B. Cole & M. Oettiger, supra note 209.

360. It is interesting to note that in 1924 the U.S. Senate passed a bill which in effect nationalized the airwaves: [T]he ether and the use thereof for the transmission of signals, words, energy, and other purposes... is hereby reaffirmed to be the inalienable possession of the people of the United States and their Government, but privileges to enjoy such use may be granted as provided by law for terms not to exceed two years. S. 2930, 68th Cong., 2d Sess. (1924). Although this view still informs our licensing scheme and surfaces occasionally in Supreme Court opinions (see, e.g., CBS v. Democratic Nat'l Comm., 412 U.S. 94, (1973) (Brennan, J., dissenting)), the public's sense of proprietary connection to the airwaves is tenuous indeed. From the very beginning of American broadcast history, large business interests have dominated the medium. See W. Hoffmann-Reim, supra note 3, at 173 (Westinghouse, General Electric, United Fruit Co., and American Telephone and Telegraph Co. were "pioneers" in the field).

361. An example of the traditional limited usage of "access" may be found in the Court's discussion of leased access in CBS v. Democratic Nat'l Comm., discussed infra at notes 386-400.

362. See, e.g., supra notes 275-81 and accompanying text.
ownership of multiple stations;\textsuperscript{363} a policy in favor of local ownership of broadcasting licenses;\textsuperscript{364} licensing provisions in general, which provide for licensing "as public convenience, interest, or necessity require;"\textsuperscript{365} and antitrust initiatives to break up network dominance in the field of television production.\textsuperscript{366}

Second there are the program-oriented or content-based access statutes, regulations, or policies,\textsuperscript{367} to which the word access more commonly refers, such as the Fairness Doctrine\textsuperscript{368} and the candidates' access rule.\textsuperscript{369}

The internal pluralism model has characteristics of both these categories. Because public television in West Germany has at present a monopoly,\textsuperscript{370} internal pluralism operates to control the contours of the total program offering. Although in that sense it is an external structural safeguard, its real genius—and hence its name—is that it achieves its aims functioning within the station structure. In this, it has no American equivalent.

Internal pluralism also has aspects of program-oriented access regulations. Unlike such American rules as the Fairness Doctrine or the candidates' access rule, internal pluralism does not provide immediate access to the airwaves for a certain viewpoint or speaker. It is rather mediate access, access to the organizational structure of the individual station. Thus internal pluralism, although it shares some characteristics of American access mechanisms, is really \emph{sui generis}, a unique contribution of West German media theory and practice.

\textbf{C. Internal Pluralism and the United States Constitution}

Internal pluralism, as it is theoretically justified by the German Constitutional Court, is a function of article 5 broadcast freedom, which in turn is informed by the article 5 freedoms of expression and information.\textsuperscript{371} Article 5 protects the entire communicative process,

\begin{itemize}
\item \textsuperscript{363} See, e.g., 47 C.F.R. \S 73.636(a) (1982).
\item \textsuperscript{364} See Mid-Florida TV Corp., 33 F.C.C.2d 1 (1972).
\item \textsuperscript{365} 47 U.S.C. \S\S 303, 307 (1976).
\item \textsuperscript{366} See United States v. NBC, 449 F. Supp. 1127 (C.D. Cal. 1978).
\item \textsuperscript{367} See generally the discussion in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).
\item \textsuperscript{368} 47 U.S.C. \S 315(a) (1976). There is some argument whether section 315(a) is really a "codification" of the doctrine. Nonetheless the section contains all the operative words of the doctrine.
\item \textsuperscript{369} 47 U.S.C. \S 312(a)(7) (1976).
\item \textsuperscript{370} See supra note 117 and accompanying text.
\item \textsuperscript{371} See supra notes 203-05 and accompanying text.
\end{itemize}
the speaker as well as the information recipient. The object of the broadcast freedom guarantee, then, is the communicative function of the broadcasting institution. It is not only a guarantee of broadcasting independence from the state; it is also a positive command that the state provide the organizational prerequisites for public access to a whole spectrum of information.

Because the United States Constitution's first amendment contains no express guarantee of access to information or institutional broadcast freedom, it is not surprising that it is interpreted primarily as a guarantee against government interference. The right of the speaker is sacrosanct and primary. Freedom of speech is set in the context of the individual rather than the social process of communication. It is a "natural right" of human beings, necessary to their full self-development in the search for truth. The rights of the general public as listeners, readers, and information recipients are nowhere mentioned, certainly not within the text of the Constitution. The societal need for comprehensive access to information is left to the marketplace. Thus the marketplace of ideas is equated with the commercial marketplace.

The forms of program-oriented access discussed above, and, a fortiori, internal access to the management of a station, "challenge the laissez-faire premises of the First Amendment." Demands for access pose the question whether a largely unregulated commercial market should give way to some sort of government regulation of that mar-

372. Id.
373. Id.
374. See, e.g., supra notes 65-67, 78 and accompanying text.
376. See Barron, supra note 355.
379. Cf. id. at 665. But see Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972), where the Court referred to a first amendment right to receive ideas and information. See infra notes 462-70 and accompanying text.
380. See, e.g., supra note 357 and accompanying text.
The answers of the courts of the United States have been mixed. In \textit{Red Lion Broadcasting Co. v. FCC}, the United States Supreme Court, in declaring the Fairness Doctrine to be constitutional, seemingly reversed the traditional American fixation on the rights of the speaker. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." The Warren Court continued, sounding almost like the German Constitutional Court laying the groundwork for a system of internal pluralism: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.

Four years later, however, Chief Justice Burger, writing for a majority in \textit{CBS v. Democratic National Committee}, re-installed the right of the broadcast speaker as the favored right. "Congress and the [Federal Communications] Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many." The Chief Justice thus refused to mandate "leased access" or the right of an individual or group under the first amendment to get their message broadcast for the market advertising rate. In so ruling, the Court stressed the congressional rejection of any effort to view broadcasters as common carriers.

\textit{CBS} clearly reveals the Burger court's antipathy to the idea of media access, as well as the Court's lack of theoretical unity in this vital area of first amendment law. Three justices found no state action, and hence no first amendment violation, in the broadcaster's refusal to accept a paid political announcement. The justices were swayed neither by the fact that a government license is the sine qua non of a broadcaster's existence, nor by the fact that broadcasters supposedly

\begin{itemize}
\item 382. \textit{Id.}
\item 383. 395 U.S. 367 (1969). \textit{See also supra} text accompanying notes 7 and 59.
\item 384. 395 U.S. at 390.
\item 385. \textit{Id.}
\item 387. 412 U.S. at 125.
\item 388. \textit{Id.} at 108-09.
\item 389. \textit{See generally} Emerson, \textit{supra} note 377, at 440 ("On the whole [the Burger Court] has refused to press first amendment doctrine forward but rather has tended to withdraw, frequently by taking advantage of openings in Warren Court decisions. The lack of a coherent theory has persisted.").
\item 390. The Chief Justice, and Justices Stewart and Rehnquist.
\item 391. 412 U.S. at 121.
\item 392. \textit{See id.} at 175 (Brennan, J., dissenting).
\end{itemize}
operate as public trustees. These three justices also refused to hold
that television stations are public forums.

Three more justices assumed arguendo that the government was
significantly involved enough in the broadcasting scheme to warrant
first amendment review. For them, a broadcaster's relative auton-
omy—above and beyond the regulatory nexus with government—was
both consonant with the First Amendment and in the public interest.
Justice Douglas, as the seventh justice concurring in the majority's
holding, flatly identified television and radio with the press and strictly
endorsed a laissez-faire regime for all three.

Nowhere, as the dissent points out, was the concept of listeners' rights seriously addressed. The doctrines of Red Lion were ignored.
The majority seemed locked into a wooden conception of the
first amendment as guarantor solely of individual rights, and then only vis-a-vis government intrusion. Only the dissent discussed the holistic
dimension of first amendment protection and the public role which tele-
vision plays in modern society.

The ideology of CBS was buttressed one year later in Miami Her-
ard Publishing Co. v. Tornillo, where the Court held a "right to re-
ply" access statute for newspapers violated the first amendment rights of the newspaper publisher. Although the Court acknowledged the ongoing process of economic concentration in the press industry, which
creates in effect a form of private censorship, the Court said it was powerless to do anything about this. Miami Herald held that the first amendment could not operate as a sword to impose obligations on the
owners of the press, but only as a shield to protect them from govern-
ment regulation.

The Court thus solidified editorial control in the hands of the owner, and identified ownership with free speech. This philosophy is

393. Id. at 117-18. For Justice Stewart, it was critical to avoid equating broadcaster ac-
tion with government action, because this would inevitably lead to the necessity of labeling
broadcasters as common carriers. Id. at 140.
394. See, e.g., id.
396. 412 U.S. at 147.
397. Id. at 148, 160-61.
398. Id. at 196 (Brennan, J., dissenting).
399. Id. at 197.
400. Id. at 189, 195.
402. Id. at 248-54.
403. Id. at 254-59.
404. Id. at 251, 254.
similar to the equation of political spending with free speech, as espoused by the Court recently in *Buckley v. Valeo*,\(^4\) and *First National Bank of Boston v. Bellotti*.\(^5\) Both of these decisions invalidated laws,\(^6\) or portions of laws,\(^7\) which limited campaign spending. Such restrictions are “incompatible with the First Amendment.”\(^8\) Critics have been quick to point out that the *Buckley* decision validates a conception of pluralism as the brute clash of “highly organized and wealthy groups,”\(^9\) and endangers the equality of participation upon which democracy is built.\(^10\)

The discounting of first amendment rights in the listener and general public continued with the Court’s decision in *FCC v. Midwest Video Corp.*\(^11\) and *Community Communication Co. v. City of Boulder*.\(^12\) The Court in *Midwest Video* held that the FCC had gone beyond its statutory authority when it imposed access regulations on cable television operators.\(^13\) In the *Boulder* case, the Court found that the City of Boulder had engaged in a restraint of trade when it enacted an “emergency” ordinance prohibiting for three months the expansion of a local cable franchise so that the city council could draft a model

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411. *Wright, Politics and the Constitution: Is Money Speech?*, supra note 410, at 1017. Judge Wright points out that this model of pluralism (certainly very far from that of West German TV) is a mechanistic conception which empties the term “public interest” of any meaning apart from the outcome of the pressure group process.
412. See J. RAWLS, A THEORY OF JUSTICE 204 (1971). Rawls argues that the liberties protected by the principle of participation lose much of their value when those who have greater private means are permitted to use their advantage to control the public debate. *Id.*
415. 440 U.S. at 696-709.
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416. 455 U.S. at 57.

417. The Court in Midwest Video said that the first amendment issue was "not frivolous." 440 U.S. at 709. The court in Boulder did not even address the issue, ignoring completely a lower court decision in which the first amendment rights of the Boulder public were discussed at length. Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1376-79 (10th Cir. 1981).

418. But cf supra note 402 and accompanying text

419. For a description of the tyranny of Nielsen numbers see L. Brown, Television: The Business Behind the Box 15, 33, 35 and passim (1971).

420. Specialty channels have either failed (CBS "culture" cable, see Rothbart & Stoller Cabe at the Crossrads, Channels, July/August 1983, at 32) or they have merged with other specialty channels to garner the larger audience which they need to survive (e.g., Daytime and Cable Health Network). See Showtime Purchases Spotlight, Broadcasting, Dec. 19, 1983, at 37.

421. This is shown, perhaps most cruelly, by the fact that black and poor neighborhoods are historically the last neighborhoods and/or parts of cities to be wired. See Rothbart and Stoller, supra note 420, at 36-37.

422. See, e.g., Fred Friendly's (past president of CBS news) description of sponsor reaction to Edward R. Murrow's "Harvest of Shame" broadcast. F. Friendly, Due to Circumstances Beyond Our Control 12-25 (1967).

423. See supra notes 259-63, 366, and 402 and accompanying text.
deregulatory campaign.\textsuperscript{424}

In view of the general tenor of the Court's recent media decisions, a demand for \textit{internal} access to a station's management seem clearly beyond that which is permissible under the United States Constitution. The German model implies for the electronic media a degree of common carrier or public utility status which the Supreme Court rejected in \textit{CBS}.\textsuperscript{425} Thus, internal pluralism represents in practice a subordination of the individual broadcast speaker's rights to the rights of the general public, and that is clearly inconsistent with current first amendment interpretation.\textsuperscript{426}

D. Internal Pluralism and the United States Constitution—an Alternative Analysis

The first amendment protects unpopular and unconventional viewpoints from suppression.\textsuperscript{427} While the courts have generally been vigilant about government incursion on free speech, it is seldom mentioned that the commercial marketplace is also capable of suppressing opinions which it finds inconvenient.\textsuperscript{428} As Justice Brennan stated in his dissenting opinion in \textit{CBS v. Democratic National Committee}:

\begin{quote}
Stated simply, angry customers are not good customers and, in the commercial world of mass communications, it is simply "bad business" to espouse—or even to allow others to espouse—the heterodox or the controversial. As a result, even under the Fairness Doctrine, broadcasters generally tend to permit only established—or at least moderated—views to enter the broadcast world's "marketplace of ideas."\textsuperscript{429}
\end{quote}

Because traditional first amendment analysis focuses only on the right of the speaker,\textsuperscript{430} there are many ideas which never get heard.

The idea that the first amendment primarily protects the speaker becomes considerably less persuasive on closer analysis. As the cases cited above indicate, there is no consistent theory of the speech and

\textsuperscript{424} See supra note 357 and accompanying text; infra note 548 and accompanying text.

\textsuperscript{425} See supra notes 47-48, 386-400 and accompanying text.

\textsuperscript{426} W. Hoffmann-Riem, \textit{supra} note 3, at 50-56.


\textsuperscript{429} 412 U.S. at 187-88.

\textsuperscript{430} See supra note 355 and accompanying text.
press clauses of the first amendment.\textsuperscript{431} The actual text of the first amendment is so scant that the "words simply do not yield a simple exegesis."\textsuperscript{432} History likewise is of little help. In considering the intent of the framers, the only firm conclusion which can be made about the first amendment is that the framers seem to have "had no coherent theory of freedom of speech."\textsuperscript{433}

In order to develop a coherent first amendment theory, it becomes necessary to inquire into the values which have informed its interpretation. In the course of 200 years of United States constitutional history, four separate but interrelated theories of free speech have coalesced:\textsuperscript{434} 1) free speech as individual self-fulfillment;\textsuperscript{435} 2) freedom of speech leading to the discovery of truth;\textsuperscript{436} 3) free speech as the predicate of democratic self-government;\textsuperscript{437} and 4) free speech as a steam valve to let off excess societal pressure and preserve the balance between stability and change.\textsuperscript{438}

Of these values, it is only the self-fulfillment function which has no social setting,\textsuperscript{439} which is "non-purposive."\textsuperscript{440} Yet, in its consolidation of first amendment protection in the broadcast speaker,\textsuperscript{441} the Supreme Court has given to the self-fulfillment value the leading role in first amendment interpretation.

If on the other hand, one takes the approach of the structuralist\textsuperscript{442} and looks at the first amendment in the context of the whole Constitution, one sees the free speech guarantee as instrumental in effecting all the other goals articulated therein. The Constitution as a whole "estab-

\textsuperscript{432} Id. at 306.
\textsuperscript{433} Bork, \textit{Neutral Principles and Some First Amendment Problems}, 47 IND. L.J. 1, 22 (1971).
\textsuperscript{434} A good general discussion of these four theories is found in Emerson, \textit{supra} note 377, at 423-28.
\textsuperscript{435} \textit{Compare} notes 254-55 and accompanying text.
\textsuperscript{436} The classic statement of this is found in Justice Holmes' dissenting opinion in Abrams v. United States, 250 U.S. 616, 630 (1919): "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."
\textsuperscript{437} Dr. Alexander Meiklejohn was the first to fully elaborate this point of view in A. MEIKELJOHN, \textit{FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT} (1948).
\textsuperscript{438} Emerson, \textit{supra} note 377, at 428.
\textsuperscript{440} L. TRIBE, \textit{supra} note 232, at 576.
\textsuperscript{441} See e.g., \textit{supra} notes 386-400 and accompanying text.
\textsuperscript{442} BeVier, \textit{supra} note 431, at 308. \textit{See also supra} note 203 and accompanying text.
lishes a representative democracy, thus establishing an experiment in "self-government [which] can only exist insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express." Such a view incorporates the truth-finding and steam-valve functions under the primacy of self-government.

So analyzed, the first amendment does not protect the right "to speak," but the freedom of "speech." It refers to the process of speaking and listening as a unity, as "those activities of thought and communication by which we 'govern.'" An individual must be able to "hear all sides of the question, consider all alternatives, test his judgment by exposing it to opposition, and make full use of different minds."

The right of the speaker, then, is not absolute in this analysis, but must be balanced against other rights. In the case of broadcasting, the other right, that of the listener, is arguably not extraneous to the first amendment, but included in its sense and purpose. Indeed, the Court in Red Lion talked specifically of first amendment rights of the listener. This general line of argument has spawned an alternative and almost underground tradition of United States media jurisprudence, first announced to the world by Professor Jerome Barron in his 1967 Harvard Law Review article, Access to the Press—a New First Amendment Right.

Seen in this light, the first amendment not only allows the government to provide access to the airwaves for diverse groups, it requires it. The idea of internal pluralism, therefore, may not be as incompatible with the United States Constitution as it first appears.

E. Implementing Access to Information and Access to the Media

Having arrived at the conclusion that a plurality of voices in the electronic media realizes important first amendment goals, the question becomes how to achieve that plurality. For this purpose, talking of me-
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dia access is nearly equivalent to talking of access to information. An increase in the diversity of media speakers will necessarily result in enhanced public access to a variety of information.

1. Media access through case law?

The connection between the first amendment and ideas of media access, however, is at best unstable. The Court in Red Lion did indeed suggest the relationship: “It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”

Nevertheless, the authority for the broadcast regulation of the Communications Act of 1934 and its subsequent amendments and regulations is usually found in the commerce clause and other police powers of the government rather than in the first amendment. If the first amendment is viewed as protecting the whole process of speech, however, it, and not the commerce clause, is the more logical authority for media access.

Apart from Red Lion, several cases have briefly raised hopes that a judicially cognized public right of access might be in the making. In Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., the Supreme Court extended the public forum concept from streets and parks to privately owned land which had many of the characteristics of the traditional public forum. It held that a local shopping center could not exclude peaceful picketers from its property. Any hope that the principles of Logan Valley might be extended to the electronic media, however, was dashed in 1973 when the Court in CBS strongly suggested that radio and television are not public forums. Logan Valley itself was severely limited in 1972 and was fully overruled in 1976. Of the same cloth was Lehman v. City of Shaker Heights wherein the Court upheld a prohibition of political advertis-

452. 395 U.S. at 390.
453. W. Hoffmann-Reim, supra note 3, at 49 (citing Malone, Broadcasting, the Reluctant Dragon: Will the First Amendment Right of Access End the Suppressing of Controversial Ideas?, 5 U. Mich. J.L. Ref. 194 (1972)): “The federal control exercised over broadcast licensees is an intermingling of the police power, the economic power over commerce, and so much of the judicial power as is delegated in the establishment of administrative process.”
455. Id. at 309.
456. See supra text accompanying note 394.
ing in municipal transit facilities, holding that they were not public forums.\(^{460}\)

Although the Court has since made a few obliquely positive statements about the value of "public discussion and participation in the electoral process,"\(^{461}\) it is safe to say that the public forum concept is no longer a viable means of access to the electronic media.

A second line of cases developed the concept of a right to know or freedom of information.\(^{462}\) In the 1965 case of *Lamont v. Postmaster General*,\(^{463}\) the Supreme Court upheld the right of citizens to receive "foreign communist propaganda" from abroad without first having to register with the government. Four years later, in *Stanley v. Georgia*,\(^{464}\) the Court stated that "it is now well established that the Constitution protects the right to receive information and ideas,"\(^{465}\) going on to uphold the right of persons to read or see pornography in the privacy of their homes.\(^{466}\) Finally, in holding that commercial advertisement received a form of first amendment protection, the Court has posited that "society . . . may have a strong interest in the free flow of commercial information.\(^{467}\)

But the "right to know" line of cases has apparently also found its limits. In *Kleindienst v. Mandel*,\(^{468}\) the Court recognized the *Red Lion* right of the general public to have "access to social, political, esthetic, moral, and other ideas and experiences."\(^{469}\) It nevertheless gave this right no weight vis-a-vis the discretion of the Attorney General to exclude under the Immigration and Nationality Act of 1952\(^{470}\) those who advocate "world communism."

And in *Houchins v. KQED*,\(^{471}\) the Court again narrowed the public's right to know. In view of a public television station's attempt to obtain access to a local prison which had been the site of a suicide and numerous complaints about conditions, the Court held that "[n]either

\(^{460}\) Id. at 304.
\(^{461}\) Buckley v. Valeo, 424 U.S. 1, 92-93 (1976).
\(^{463}\) 381 U.S. 301 (1965).
\(^{465}\) Id. at 564 (citing, *inter alia*, Lamont v. Postmaster General, 381 U.S. 301 (1965)).
\(^{466}\) Id. at 567-68.
\(^{468}\) 408 U.S. 753 (1972).
\(^{469}\) Id. at 763 (citing *Red Lion*, 395 U.S. at 390).
\(^{471}\) 438 U.S. 1 (1978).
the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control.\textsuperscript{472}

Thus the right to know, postulated in \textit{Lamont v. Postmaster General} and its progeny, also seems to be barren of any power to mandate media access and information freedom.

2. Media access: a constitutional amendment?

In his seminal article on media access, Professor Barron suggested a statutory solution to the problem of media access.\textsuperscript{473} Apparently attempting to preserve editorial sovereignty in the broadcaster or publisher, he recommended the "modest" statutory requirement that "denial of [media] access not be arbitrary but rather be based on rational grounds."\textsuperscript{474} Professor Barron found constitutional authority for such a freedom of expression statute in the due process\textsuperscript{475} and enforcement clauses of the fourteenth amendment.\textsuperscript{476} The constitutional test for such a statute would be the "sensitive" inquiry: "Does the statute prohibit or provide for expression?" rather than the "wooden" and inflexible question: "Does the statute restrain the press?"\textsuperscript{477} Standing to challenge access denials would be given according to the standard for FCC license challenges set forth in the first Office of Communication of the United Church of Christ v. FCC: "responsible spokesmen for representative groups having significant roots in the listening community."\textsuperscript{478}

Although this approach is laudatory, it has become somewhat unrealistic in view of the interim developments in first amendment interpretation. The West German concept of broadcast freedom would perhaps offer a stronger theoretical basis for achieving diversity in the airwaves.

As the first amendment was enacted in 1791, its framers found reference more in the tyranny of George III than in the possible concentration of mass media power.\textsuperscript{479} It is further obvious that a writing 200 years old would be less adequate to the modern situation than a docu-

\textsuperscript{472} \textit{Id.} at 15.
\textsuperscript{473} Barron, \textit{supra} note 355, at 1670.
\textsuperscript{474} \textit{Id.}
\textsuperscript{475} \textit{Id.} at 1674 (citing Gitlow v. New York, 268 U.S. 652 (1925)).
\textsuperscript{476} \textit{Id.}
\textsuperscript{477} \textit{Id.} at 1673.
\textsuperscript{478} 359 F.2d 994, 1005 (4th Cir. 1966).
\textsuperscript{479} M. FRANKLIN, \textit{supra} note 378, at 7.
ment from post-World War II Europe. The framers of the Constitution simply could not have foreseen the development and effect of mass electronic communications. Being almost wholly a product of the late twentieth century, West German media jurisprudence is bound to be more sensitive than the United States Constitution to the dynamics of modern society and to the power of the mass media.

It is for these reasons that this Note suggests a simple constitutional amendment: the insertion into the first amendment of a clause guaranteeing the institutional freedom of the broadcast media, and making specific the included notion of public access to the full spectrum of opinion and information.

Because the article 5 guarantees have been field-tested in a modern constitutional democracy, future American courts and legislators would not be without guidance in the implementation of the proposed amendment. The amendment would hopefully anchor a public right to know and an institutional freedom for broadcasting services without at the same time eviscerating the right of an individual to get up on his or her soapbox. To the contrary, such a proposed amendment could well make the soapbox a ubiquitous electronic phenomenon. The author believes that this is consistent with the intent of the framers and responsive to the needs of the twentieth century.

VI. PUBLIC BROADCASTING

A. "Neither State Nor Private?"

The public broadcasting system in the United States was created in 1967 for many of the same reasons which animate West German broadcasting as a whole. The congressional declaration of policy states that the new system "will be responsive to the interests of people both

481. Professor Hoffmann-Riem speaks of article 5 as being more empirically oriented than the United States first amendment. W. HOFFMANN-RIEM, supra note 3, at 58.
482. Apparently Professor Meikeljohn (cited supra at notes 437, 444) also proposed a first amendment revision, adding the words "Congress . . . shall have power to provide for the intellectual and cultural education of all of the citizens of the United States." Ferry, MassCOMM as Education, 35 AM. SCHOLAR 293, 301 (1966).
483. See supra notes 61-63 and accompanying text.
484. See supra notes 72-77 and accompanying text.
485. This Note will not deal with the problems which the German court sees in a "mixed" system of private and public stations. See, e.g., supra notes 285-87 and accompanying text.
in particular localities and throughout the United States . . . and will constitute an expression of diversity and excellence." 487 The public broadcasting system was to supply the quality and diversity of which the commercial networks were incapable. 488 

Not only was the new public system supposed to be independent of the marketplace, but it also was designed to be independent of governmental influence. 489 Congress sought to insulate public broadcasting from politics by creating the Corporation for Public Broadcasting (CPB) through which federal funds would be channelled. 490 Its goal was "maximum protection from extraneous interference and control." 491 

To a certain degree Congress has failed in both regards. 492 The system is neither insulated from political pressure, 493 nor does its programming reflect the diversity of the American populace. 494 The second Carnegie Report filed twelve years after the inception of CPB, found that

[T]here is a widespread and growing perception among many groups on the periphery of public broadcasting that it is a system which is closed, unwilling to change, and afraid of criticism and controversy. The testimony we have heard from representatives of minority constituencies, independent producers, and avant-garde innovators was filled with such assertions. 495 

This perception is borne out by the spate of complaints to the FCC which charge that public broadcasting stations 496 were not responsive

491. 47 U.S.C. § 396(a)(7). For an excellent description of congressional concern for the independence of the new system, with excerpts from the congressional report, see Community Service Broadcasters of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1108-10 (D.C. Cir. 1978); see also Carnegie Commission on Educational Television, Public Television, A Program for Action 36-37 (1967) [hereinafter cited as Carnegie I].
492. For a European view of this failure, see W. Hoffmann-Reim, supra note 3, at 116-25.
495. Id. at 281.
496. Because it was prohibited by Congress from interconnecting the public broadcasting stations into a fourth network, CPB established a new private entity in 1970, the Public Broadcasting System (PBS), to operate and facilitate a common program for all the stations. For an overview of the complex relations between CPB and PBS, see Carnegie II, supra note 428, at 31-51.
to minority "interest, convenience and necessity." In his dissent to the *Puerto Rican Media Action* decision, FCC commissioner Benjamin Hooks put the matter succinctly:

> By styling itself, preponderantly, as an electronic Harvard liberal arts course, public broadcasting has forsaken those less privileged and influential. . . It has overlooked the intellectual needs and sensitivities of that core of the population which, after years of third-rate education and cultural repression is just emerging from the chains of the eighteenth and nineteenth centuries. By disproportionately featuring the refinements of Western European heritage, it has slighted those whose heritage derives from Africa, Latin America and the Orient.

Furthermore, public broadcasting has not been able to insulate itself from political pressure. This was shown most spectacularly when President Nixon vetoed the 1972 funding appropriation for CPB. As a result, most of the programs which Nixon objected to were dropped. Public television therefore has today come to avoid controversial topics in favor of more generally entertaining programs: concerts, theater, historical documentation, and reports on nature and life in other countries instead of the potentially explosive domestic diversity. Attempts to manipulate CPB from above are still current, as evidenced by President Reagan's recent attempt to seat a member on the CPB Board of Directors without the requisite congressional approval.

There has been political pressure exerted on television stations not only from the federal government but also at the state and local level. In 1974, Public Broadcasting Service (PBS) member stations changed their program selection practices, removing decisional compe-

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498. Puerto Rican Media Action, 51 F.C.C.2d at 1199.


500. *Id.* at 43-44.

501. W. Hoffmann-Riem, *supra* note 3, at 124. The atrophying of public broadcasting has obviously not occurred just as a result of the Nixon veto or of the flawed governance structure, but also as a result of the financing structure. Instead of a "dedicated tax" on the sale of television sets or a levy on the commercial stations for their use of the spectrum, Congress has decided to appropriate the money for PBS out of the general fund.


503. *See supra* note 496.
tency from their national board, which had often forced program choices on the member stations. The stations instead instituted the Station Program Cooperative (SPC), through which they collectively and democratically decided on the programming of PBS. Although designed to protect public television decision-making from national political influence, this development left the stations wide open to influence from state and local governments. Such influence is almost inevitable in view of the fact that the majority of public television stations are connected in some way with those local bodies: although private parties can and do own and operate public television stations, “of the approximately 285 public television stations in this country today, 132 are licensed to state or municipal instrumentalities, and 77 are licensed to colleges or universities, most of whom are affiliated with government.”

That individual stations, as well as the whole PBS system, are subject to political pressure, was shown by the matter at issue in *Muir v. Alabama Educational Television*. There the controversial “Death of a Princess” was banned from the air for fear of Arab reprisals in the oil-sensitive gulf coast area.

Not only did the court in *Muir* fail to protect the integrity of the public broadcasting process, it also revisited without success the whole question of broadcaster autonomy versus listeners’ rights. Justice Douglas, in his concurring opinion in *CBS*, had declared that “public broadcasting ... raises quite different problems from those tendered by [commercial] TV,” and strongly suggested that he saw state action and a public forum in public broadcasting. The Court in *Muir*, however, rejected that approach. Although it held that the two broadcasting licensees involved were “state instrumentalities” it ruled that these stations were not public forums, and that the station licensees had the same editorial sovereignty as their private counter-

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504. The local stations did and do have representation on the national board, but this was not sufficient to give them a significant voice there. *Carnegie II*, *supra* note 428, at 48.
505. *Id.* at 154-56. *See also* Barnstone v. University of Houston, 514 F. Supp. 650, 672-73 (S.D. Tex. 1980), wherein the whole history of SPC is recounted.
506. 514 F. Supp. at 683.
507. 688 F.2d 1033 (5th Cir. 1982) (en banc) (decision consolidates the appellate court’s reversal of Barnstone, 660 F.2d 137 (1981), and its affirmation of the district court’s unpublished opinion in *Muir*, 656 F.2d 1012 (5th Cir. 1981)).
509. *Id.* at 149.
510. *Id.* at 150.
511. 688 F.2d at 1041.
512. *Id.* at 1042.
parts.\textsuperscript{513} The effect of the decision was to discount listener/viewer rights\textsuperscript{514} and arguably to hold those rights hostage to the political exigencies of each local government unit.

Finally, the autonomy of public broadcasting decision-making bodies is vitiated by commercial interests. By 1977, private corporate sponsors (not including foundations) provided twenty-two percent of the total PBS budget.\textsuperscript{515} In 1981, Congress additionally sanctioned an experimental program of advertising (logo and product identification) on public television.\textsuperscript{516} Advertisers are only too happy to pay high rates for this \textit{de minimis} exposure because public television effectively delivers that segment of the audience most attractive to them—the so-called upscale influence\textsuperscript{517}als. This dynamic naturally creates pressure on public broadcasting decision-makers not to program any fare which might scare away the desired viewers.\textsuperscript{518}

\section*{B. Internal Pluralism and Public Broadcasting—A Modest Proposal}

Existing public broadcasting governance structures are essentially inadequate to their task.\textsuperscript{519} The Corporation for Public Broadcasting is run by a board of ten directors, all of whom are appointed directly by the President “with the advice and consent of the Senate.”\textsuperscript{520} The only meaningful condition on their election is that no more than six be members of the same political party.\textsuperscript{521} Beyond that, it is suggested that they be
eminent in such fields as education, cultural and civic affairs, or the arts, including radio and television; [they] shall be selected so as to provide as nearly as practicable a broad representation of various regions of the country, various professions and occupations, and various kinds of talent and experience appropriate to the functions and responsibilities of the Corporation.\textsuperscript{522}

\begin{thebibliography}{99}
\bibitem{513} Id. at 1043.
\bibitem{514} Id. at 1041.
\bibitem{515} \textit{Carnegie II}, \textit{supra} note 428, at 105.
\bibitem{517} This audience is the natural result of the upscale programming described \textit{supra} in text accompanying note 498.
\bibitem{519} \textit{Carnegie II}, \textit{supra} note 428, at 13.
\bibitem{521} Id. There are also requirements stated that they all be citizens of the United States but not regular full time employees of same.
\bibitem{522} \textit{47} U.S.C. § 396(c)(2).
\end{thebibliography}
This organizational suggestion is obviously inadequate to insulate the board of directors from political influence. The fact that all of the appointments flow from the President actually invites such undue influence. This was illustrated again during the Nixon presidency. President Nixon’s eleven appointments to the board of directors (the total number was then fifteen) were able to sow considerable dissension in the ranks of public broadcasting, leading to an open split between CPB and PBS in 1972-73.

Nor is this form of organization, empirically seen, equal to the task of representing the diversity called for in the Public Broadcasting Act. Although the law mandates variety, experience teaches that most of the presidential appointments come from the same pool of well-educated, well-heeled, white citizens.

The Public Broadcasting Service, whose decisional competency resides more at the station level, fares no better. The boards of the individual stations are generally staffed with the same affluent upper-middle class citizens who staff the national board and who have the luxury of free time necessary for this generally volunteer activity.

The second Carnegie Report tacitly recognizes this problem. It recommends “public involvement in station governance through the use of any of a wide variety of participation mechanisms including elected governing boards, citizen advisory committees, open board meetings, and volunteerism.” This Note takes the position that the introduction of an internally pluralistic governance model would
bring about a public broadcasting system that is more responsive to the diverse cultures within United States society and more insulated from political and economic pressures. The problem of identifying the relevant social groups would be especially acute in this country, which has a much more diverse population than West Germany. This is, however, not an insurmountable obstacle, especially in light of some of the techniques suggested above.\textsuperscript{533}

The model could be introduced both at the national CPB level and at the local level of each PBS member station. At the national level, internal pluralism would be a coherent extension of the spirit of the CPB governance statute already in place.\textsuperscript{534} Such an amendment to the present law would shift the appointment capacity from the President to groups in the wider societal sphere.\textsuperscript{535} At the local level, internally pluralistic boards could be made a pre-condition of the CPB community service grants going to local PBS member stations.\textsuperscript{536}

Internally pluralistic station governance also solves the censorship argument which has so bedeviled access theorists. Instead of forcing media to cover all viewpoints and setting up a bureaucracy of "petty public officials"\textsuperscript{537} to monitor their performance, the pluralistic broadcasting council represents the rights of the public inside the broadcasting station. It creates a legitimacy separate from that of the local government unit.\textsuperscript{538} It also renders moot the question of broadcaster autonomy versus listener rights, as these two terms are substantially merged in an internally pluralistic environment.

\section*{VII. CONCLUSION}

An understanding of the West German media debate has much to offer to the American discussion. First, on a theoretical level, it brings an awareness of the unique potentials and dangers of broadcasting, especially public broadcasting.\textsuperscript{539} An exposure to West German media jurisprudence will hopefully un hinge the American legal scholar from his or her fixation on the first amendment as solely a guarantor of

\footnotesize{533. See supra notes 174-75 and accompanying text.} 
\footnotesize{534. 47 U.S.C. § 396(c)(1), (2) (1976).} 
\footnotesize{535. This assumes the adoption of the direct or "pure" internal pluralism. See supra note 119.} 
\footnotesize{536. For an explanation of the community service grants, see \textit{Carnegie} 2, supra note 428, at 124-26.} 
\footnotesize{537. T. Emerson, supra note 447, at 671.} 
\footnotesize{538. See supra notes 148-49 and accompanying text.} 
\footnotesize{539. See, e.g., supra notes 220-22 and accompanying text.}
speakers' rights. \( ^{540} \) It might also make the American reader a little more skeptical about the adequacy of the marketplace to regulate the flow of information and opinion in modern society. \( ^{541} \) The West German discussion could also point the way beyond the frequency shortage for United States lawmakers as they grapple with the distinction between the broadcast and the print media. \( ^{542} \)

On a more concrete level, the West German model suggests two changes which the United States might make in its law to better realize the full potential of the broadcast media. One is the insertion of a clause into the first amendment guaranteeing the right of free access to information through broadcasting. \( ^{543} \) The other is a change in the governance structure of the public broadcasting system. \( ^{544} \) Internally pluralistic boards of directors, both at the national and the local level, would go a long way towards realizing the initial promise of the public television.

Were the United States lawmakers to integrate some of the West German media concepts into the American media system, there would be a certain historical and poetic justice to the act. It would be the reaping of fruit from a tree which the Americans helped plant some thirty-five years ago in West Germany. \( ^{545} \)

Yet to write of the broadcasting media in a utopian vein is somewhat of a quixotic venture in the year 1984. Both in West Germany and in the United States, the voices demanding complete deregulation of the media are becoming louder. \( ^{546} \) In both countries, the proponents of deregulation cloak themselves in the language of populism: give the mature citizen (\textit{mündiger Bürger}) \( ^{547} \) what he or she wants; let the public decide by its marketplace choices what it wishes to see and hear. \( ^{548} \) Those who would question the efficacy of the market are dismissed as elitist and paternalistic. \( ^{549} \)

What is at stake here, however, is the "control of information in a

\( ^{540} \) See, e.g., \textit{supra} note 355 and accompanying text.

\( ^{541} \) See \textit{supra} notes 524-28 and accompanying text.

\( ^{542} \) See \textit{supra} note 230-34 and accompanying text.

\( ^{543} \) See \textit{supra} note 482 and accompanying text.

\( ^{544} \) See \textit{supra} note 531 and accompanying text.

\( ^{545} \) See \textit{supra} notes 23-24 and accompanying text.

\( ^{546} \) See \textit{supra} notes 7 and 357 and accompanying text.


\( ^{549} \) Letter of Erwin G. Krasnow, Senior Vice President of the National Association of Broadcasters, in \textit{CHANNELS}, May/June 1983, at 6 ("Stripped to its essentials, the [opposition to deregulation] advocates an elitist, 'force them to eat cake' approach of a paternalistic
democratic society” and the marketplace is simply not an effective and neutral disseminator of that information. Populist formulas place at a disadvantage those with information needs different from the market majority. More importantly, such formulas truncate the scope of political and social discourse.

Perhaps the essential difference between United States and West German media law is that the West German jurisprudence takes the insufficiency of the market mechanism as one of its major premises. From the West German point of view, it is remarkable to what extent our first amendment has become a guarantee of media ownership rather than of democratic communication.

This Note recommends that the electronic media, as constitutive of and essential to democratic self-government, be placed at some distance from the rigors of the marketplace. The logic of media as instrument of self government is compelling when one considers the immense potential of broadcast technology, as the second Carnegie Commission did:

By providing a uniquely constructed special window on society, television and radio shape it and define it. Public broadcasting can easily bring together, face to face, people who might otherwise never meet in daily life. Such communication provides breathtaking potentialities for our sense of community. It can harmonize us in our local concerns. It can bind a nation together by constructing a common catalog of the best in our own society and world culture. A hundred years ago, such experiences were the preserve of a wealthy elite. Now they can be made available to all. The determination to do so is necessary.

See also Krasnow, Cole & Kennard, FCC Regulation and Other Oxymorons: Seven Axioms to Grind, 5 COMM/ENT L.J. 759, 761-65 (1983).


550. CARNEGIE II, supra note 428, at 28.