Fordham Law Review

Volume 44 | Issue 5 Article 1

1976

The Jurisprudence of Fairness: Freedom Through Regulation in the Marketplace of Ideas

Michel Rosenfeld

The Jurisprudence of Fairness: Freedom Through Regulation in the Marketplace of Ideas

Cover Page Footnote

B.A., 1969, M.A., 1971, Columbia University; J.D., 1974, Northwestern University School of Law.

THE JURISPRUDENCE OF FAIRNESS: FREEDOM THROUGH REGULATION IN THE MARKETPLACE OF IDEAS

*Michel Rosenfeld**

I. INTRODUCTION

Upon first impression, it may appear that political freedom is synonymous with a lack of externally[1] imposed restraints. One might think that an isolated individual is free if no human agency interferes with his choices and actions, in the sense that Robinson Crusoe was free on his uninhabited island. But such freedom is unattainable for one who lives in the society of other men. Even in a Hobbesian state of nature, where power confers right and where law has no dominion, anyone possessing the requisite power can frustrate the aims of another, effectively thwarting the possibility of freedom for all by creating an atmosphere of fear. From this follows the seemingly paradoxical conclusion that there can be no real political freedom without some form of governmental restraint,[2] or in other words, that political freedom cannot become a reality without the aid of the rule of law.

That the constituted authority of government should, through the promulgation and enforcement of laws, restrain some freedoms to safeguard other freedoms deemed paramount to the common good is a proposition that has gained near universal acceptance. Even John Stuart Mill, the vehement foe of governmental restraints, conceded that an individual could be rightfully restrained if his actions caused harm to others.[3] Mill recognized that acceptance of the proposition that governmental regulation is necessary for the preservation of political freedom gives rise to the need to define the proper limits of such governmental regulation. Too much regulation as well as too little can ultimately eliminate the very freedom that is meant to be preserved. The difficult question is, what degree of regulation is ultimately compatible with political freedom?

---

* B.A., 1969, M.A., 1971, Columbia University; J.D., 1974, Northwestern University School of Law.

1. In speaking of political freedom we are only concerned with those external restraints that can be imposed by men. Restraints of the type imposed by the laws of nature, though of great importance to questions of metaphysical freedom, play no significant part in the realm of political philosophy.

2. See S. Benn & R. Peters, The Principles of Political Thought 247 (1965) [hereinafter cited as Benn & Peters].

3. J.S. Mill, On Liberty, in Utilitarianism; On Liberty; Essay on Bentham 135 (M. Warnock ed. 1970) [hereinafter cited as On Liberty].

Mill's answer is stated in the

> principle . . . that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.[4]

Unfortunately, although Mill's "harm principle" expresses a limitation upon governmental interference with individual freedom, it provides too vague a criterion to set the boundaries of such a limitation. Although Mill proposed that the harm principle apply to a government nearing the minimal passive model, even a proponent of a government approaching the maximal active model could invoke the harm principle to control individual action, alleging that an abstract harm threatened an equally abstract "common good" or "public interest."[5]

As the laissez-faire model of society, with its predilection for governments that govern least, gives way to increasing intervention into, and regulation of areas previously considered beyond governmental reach, it becomes imperative to reappraise the traditional concepts of individual freedom. Have these concepts become obsolete as criteria for the delineation of individual freedoms within the new social order? This Article will analyze some of the implications of increased governmental regulation for liberal concepts of individual freedom, by focusing on the government's extension of its regulative powers over freedom of speech and freedom of discussion through the operation of the fairness doctrine in broadcasting.

Although the study of a single administrative agency may appear unduly limited, concentration on the manner in which the Federal Communications Commission (FCC) regulates broadcasting can be valuable. The administrative process itself provides a unique vehicle for analysis in that, unlike the judicial or legislative processes, it has no place in a laissez-faire government.[6] Also, though the average citizen may never be a party to a lawsuit, nearly everyone is affected by the administrative process in many ways on an almost daily basis. Thus, the administrative process is likely to be the most frequent locus of direct encounter between the individual and government.[7] At the

4. Id.

5. "Harm" itself is subject to such a broad variety of definitions that almost any degree of governmental control, "from a minimal, passive government restricted to reacting against crimes ('harms') already committed, to a maximal, active government that controls as much as possible of the lives of its members in the name of the common good, or the public interest, or the general welfare," might be justified by an appeal to the principle. Gewirth, Political Justice, in Social Justice 155 (R. Brandt ed. 1962).

6. See K. Davis, Administrative Law § 1.03, at 5 (3d ed. 1972).

7. Id. § 1.02, at 3.

same time, because of its unique adaptability to the formulation of precise regulations, the administrative process can be a most efficient tool of positive government.

The range of subjects coming within the administrative process extends from labor practices[8] to the wholesomeness of meat and poultry.[9] The regulation of broadcasting, however, can be singled out as the only area of direct intervention by government into the daily operations of a medium that primarily serves to disseminate constitutionally protected speech. Finally, although many of the rules, regulations and policies of the FCC may have some impact on the content of broadcasting, the fairness doctrine stands out within the regulatory scheme in that it was designed to promote public debate over the air and to insure that opposite viewpoints be heard on controversial issues of public importance. The fairness doctrine exemplifies an apparent attempt by government to pursue the very ends which Mill thought incompatible with the far-reaching activities of positive government.

II. THE PHILOSOPHICAL DIMENSION OF FREEDOM

A. *Political Freedom, "Positive" and "Negative"*

Originally, to be free meant that one had certain legal rights and duties that were contrasted with those of a slave.[10] In more modern times, however, the word "freedom" has gained such widespread political usage that it can be invoked to refer to anything from surrender to the aims of a totalitarian dictatorship to the unrestrained license to pursue one's every whim and desire. As a result of this extension of its use, in the political sphere "freedom" appears to have lost much of its force as a descriptive word, and has instead become primarily endowed with a strong prescriptive power, enabling a speaker to commend any state of affairs of which he approves, or to condemn any state of affairs of which he disapproves.[11] This use of the word "freedom" has had the effect of creating an aura of vagueness around the very concept of freedom, severing it from those states of affairs with which it had been traditionally associated. By virtue of its detachment from any concrete instances, the concept of freedom has become a useful and adaptable instrument of political manipulation that has lost its usefulness as a criterion for political conduct.

To recapture some of the descriptive usefulness of "freedom," its application must be confined within a delimited socio-political and

8. E.g., 29 U.S.C. §§ 160-61 (1970) (power of the National Labor Relations Board defined).

9. E.g., Federal Food, Drug and Cosmetic Act §§ 1 et seq., 21 U.S.C. §§ 301 et seq. (1970) (authority of Secretary of Health Education and Welfare).

10. J. Feinberg, Social Philosophy 4 (1973).

11. See Benn & Peters, supra note 2, at 230.

philosophical context. Fruitful inquiry is possible once three variables are determined: *X*, who is the subject of political freedom (for example, the individual, the proletariat as a class, a national group); *Y*, from what the subject is meant to be free (for example, governmental interference into the conduct of his daily life, his own weakness or greed, economical exploitation by a privileged class); and *Z*, for what purpose the subject is designed to be free (for example, to conduct his personal life as he pleases, to escape from the alienation created by a society divided along class interests, to reach his full potential unimpeded by weakness or greed). No matter what terms are chosen to replace these variables there is a relation which must necessarily hold between them for the sentence "*X* is free from *Y* in order to (be free to) do *Z*" to be meaningful in the language of political philosophy. This relation is that *X* has the requisite capacity[12] and inclination[13] to do *Z*, and that *Y* is a condition, controllable by human agency, such that if *Y* is in operation, *X* will be effectively prevented from doing *Z*. Moreover, for any socio-political context at any given time *Y* may be viewed in either of two ways: as an inherent and pre-existing condition which has now become subject to the control of the constituted authority and which can, therefore, become subject to removal by the adoption of some affirmative course of action; or as a condition previously put into operation by those in power, which can be removed by a simple act of repeal or by a simple refusal to make the necessary provisions for its continued existence. Furthermore, in cases where *X* finds no condition *Y* restraining his freedom to do *Z*, but where constituted authority has the power to impose such a condition *Y*, thus negating *X*'s freedom to do *Z*, *X* can remain free only so long as the government abstains from interfering in the area in question. In general, where a particular freedom depends upon some affirmative course of governmental action, it is called a "positive freedom." Where it depends upon governmental abstention or upon governmental repeal of a pre-existing impediment,[14] it is called a "negative freedom."[15]

An example of positive freedom is the freedom gained as a result of a government's promulgation of health regulations, and the expenditure

12. This capacity may be quite remote, as in the case of an individual who, though capable of eventual self-realization, is not presently capable of doing so because of inner impediments which it is the task of constituted authority to remove.

13. This inclination may be abstract, and unconscious in each individual, as in the case of a class or national aspiration not fully apprehended by its component members.

14. An act of repeal, though technically an affirmative governmental action, is in reality the formal expression of a decision to abstain from intervening in an area previously regulated. By instituting an abstention, the act of repeal reinstates a negative freedom.

15. For an extended discussion of positive and negative freedom see I. Berlin, Two Concepts of Liberty, in Four Essays on Liberty 118 (1969) [hereinafter cited as Berlin].

of public funds to implement a cure for a crippling disease which afflicts a significant portion of the population.[16] In this case the desired freedom cannot be attained without some positive governmental action which carries with it some legal compulsions embodied in the enacted health regulations. In other words, in this case the acquisition of one freedom can only be achieved at the expense of sacrificing some other freedom. This poses a serious problem, for although it can be argued that in our example the gain in freedom far outweighs the loss of freedom, one can imagine cases where the contrary would hold true, and where the government might impose an onerous constraint on important freedoms in the name of opening the path to a new freedom.[17]

This potential for abuse accounts significantly for the classical tradition of English political theory that interprets freedom to mean primarily negative freedom. Emphasis on the negative aspects of freedom helps to guard against the governmental abuses that can be perpetrated in the name of positive freedom, but does little to map boundaries between the areas of unrestrained freedom and those of legitimate government concern.[18] Furthermore, the absence of restraint in one area can by itself create restraint in other areas. For example, in a society which enjoys an absolute right of freedom of speech, some other freedoms, such as the freedom from libel, slander and exposure to obscenity would be sacrificed.

In the abstract, negative freedom is not better or worse than positive freedom, and neither should be viewed as an end in itself. Rather, both should be considered as means to obtain certain desired freedoms to the exclusion of other freedoms. Moreover, the decision as to which specific freedoms should be provided or allowed to be pursued without governmental hindrance, and which freedoms must be thwarted for the common good cannot be made without taking into account the particular socio-political end to be achieved. It is only after a society defines the nature of the subject of freedom and the common good or public interest sought, and determines which states of affairs stand as obstacles to the realization of political freedom, that such a decision can be made.[19] And only then might it be possible to assess whether a

16. Although a crippling disease is a restraint imposed by nature, it becomes subject to control by a human agency when men learn to exert control over it. To introduce a more political example, it may be figuratively said that for a Marxist, capitalism is a crippling condition which prevents the proletariat from escaping from the servitude of exploitation and alienation, and that the proletarian dictatorship is the positive instrumentality which will bring about the "cure" for this condition and set men free.

17. Cf. Frankel, The Jurisprudence of Liberty, 46 Miss. L.J. 561, 564 (1975)

18. Benn & Peters, supra note 2, at 249.

19. It has been argued that there is a minimum of "negative freedom" without which there

preponderance of positive freedoms or negative freedoms would best serve the aims sought to be achieved.

B. *John Stuart Mill—the Need for a Free Marketplace of Ideas*

The liberalism of John Stuart Mill, with its emphasis on relativism, has had a profound influence on the American constitutional approach to first amendment freedoms.[20] This is best illustrated by the words of the Supreme Court: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . . ."[21] The striking affinity between this view of the purpose of the first amendment and Mill's arguments in favor of freedom of speech suggests that a consideration of Mill's concept of liberty may provide useful insight into the philosophical assumptions that underlie the Supreme Court's constitutional interpretation.

Individual freedom, according to Mill, is the foundation upon which rests the possibility of social progress. The individual must be the subject of freedom not only because a decent society owes due regard to his basic dignity, but because without individuality, society would cease to progress as its potential for greatness became atrophied.[22] And individuality itself disappears when the individual is no longer in a position to make choices for himself. Ultimately, individual freedom of choice is the *sine qua non* of human vitality and progress, because in Mill's belief unless the mental and moral faculties are repeatedly used in the making of free choices, they remain underdeveloped and weak, like unexercised muscles.

> The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice. . . . He who lets the world . . . choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties.[23]

Thus, Mill adhered to the optimistic view that from the diversity of

---

can be no human dignity. If so, the point made still applies to all freedoms that stand above the bare minimum. Berlin, supra note 15, at 161.

20. See New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964); J. Barron, Freedom of the Press For Whom? 76 (1973) [hereinafter cited as Barron].

21. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); see New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Terminiello v. Chicago, 337 U.S. 1, 4 (1949); cf. Thornill v. Alabama, 310 U.S. 88, 102 (1940); Palko v. Connecticut, 302 U.S. 319, 326-27 (1937), overruled on different grounds in Benton v. Maryland, 395 U.S. 784, 794 (1969). For Mill's view, see On Liberty, supra note 3, at 141-83.

22. On Liberty, supra note 3, at 201.

23. Id. at 187.

individual experience, and from the variety of free individual and social experimentation, would emerge an originality and creativity capable of guiding an entire society on the path to progress.

The greater threat to the survival of individuality came not from government itself, but from the ascendency of public opinion in the democratic state. Although government can muster the power to destroy the negative freedom essential for the preservation of individuality, in the democracy of Mill's time it was the universal power of public opinion, with its overwhelming tendency toward conformity, that was seen as the most potent weapon against individuality.[24] Unlike the despot who thwarts individuality by imposing external restraints, conformity reaches the "inner man" in order to stunt the full development of his individual faculties.[25]

To combat the stifling flow of conformity, men's minds must be continually challenged by a diversity of opinion. Accordingly, Mill insisted on toleration of all opinion, no matter how unpopular. He maintained that "if either of . . . two opinions has a better claim than the other, not merely to be tolerated, but to be encouraged and countenanced, it is the one which happens at the particular time and place to be in a minority."[26] He accorded this preference to the minority opinion because, in his view, that opinion "represents the neglected interests, the side of human well-being which is in danger of obtaining less than its share."[27]

As a utilitarian, Mill did not believe that truth was immutable for all time, or that it could simply be deduced from reason. Rather, he thought that truth emerged piecemeal from experience, and was not likely to be contained in any one set of opinions. He pointed out that no one was entitled to think that he possessed the whole truth, lest he think himself justified in stamping out opinions contrary to his own; truth most often came to light by virtue of the combination and reconciliation of opposites. An opinion thought erroneous ought not be suppressed since,

24. Id. at 195.

25. "[S]ociety has now fairly got the better of individuality; and the danger which threatens human nature is not the excess, but the deficiency, of personal impulses and preferences. Things are vastly changed since the passions of those who were strong by station or by personal endowment were in a state of habitual rebellion against laws and ordinances, and required to be rigorously chained up to enable the persons within their reach to enjoy any particle of security. In our times, from the highest class of society down to the lowest, every one lives as under the eye of a hostile and dreaded censorship. . . . It does not occur to them to have any inclination, except for what is customary. Thus the mind itself is bowed to the yoke: . . . peculiarity of taste, eccentricity of conduct, are shunned equally with crimes: until by dint of not following their own nature they have no nature to follow: their human capacities are withered and starved . . . ." Id. at 190.

26. Id. at 175.

27. Id.

though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.[28]

Perhaps most revealing of Mill's persistent aversion to unthinking conformity is his argument in favor of free discussion in the hypothetical event that one opinion were to contain the whole truth. In such a case, erroneous opinions must be tolerated because of their important role in sustaining the vitality of the true opinion, by forcing the proponent of the truth to justify his position.[29] What emerges as most important for Mill is not truth for its own sake, but for the continuous development of human capacities, without which truth itself becomes a lifeless source of torpor and blindness.

Where there is a tacit convention that principles are not to be disputed; where the discussion of the greatest questions which can occupy humanity is considered to be closed, we cannot hope to find that generally high scale of mental activity which has made some periods of history so remarkable.[30]

To protect the free flow of all opinions so essential to his conception of a healthy society, Mill sought simply to keep the government from intervening in the marketplace of ideas, except where authority had the legitimate right to intervene to prevent harm from "inciting" speech.[31] Underlying this position, which in substance places negative freedom at the roots of individuality, is Mill's predisposition against affirmative government, and his optimistic belief that individuals can best improve themselves when left alone. Mill stressed negative freedom because he believed that man could obtain the individuality and originality necessary for social progress without the intervention of any external agency, and because he felt that positive government was always ready to act in ways that bar individuality and originality.[32]

---

28. Id. at 180.

29. Without such confrontations, the true opinion would soon become a mere commonplace and would "be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but . . . the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience." Id. at 180-81.

30. Id. at 161.

31. Id. at 184. Cf. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

32. This conclusion was a product of Mill's view of history and his observations about his own times. He found that tyrants, despots and social institutions had been prone to suppress ideas perceived by them as threatening to the preservation and expansion of their powers. On Liberty, supra note 3, at 149-59, 165-66. Mill found contemporary democratic governments to function primarily as organs for the propagation of conformist mass opinion. Id. at 195.

The notion of a free marketplace of ideas was of such paramount importance for Mill that the negative freedom which sustains it transcended the harm principle that defined the boundary separating the realm of freedom from that of authority. To give the harm principle concrete applicability, Mill classified individual actions into two categories: the first, self-regarding and concerning merely the individual, or at best having a remote and indirect impact on others; the second, concerning others and somehow likely to have a direct impact on their well-being.[33] With actions of the first category, the state or society as a whole had no legitimate right to interfere. The state could rightfully intervene in the second category if there existed the likelihood of harm to the interests of others. Freedom of expression, although "belong[ing] to that part of the conduct of an individual which concerns other people,"[34] was nevertheless to remain unqualifiedly immune from government regulation, because it was "almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, [was] practically inseparable from it."[35] Freedom of expression thus stands above the harm principle, or—if one prefers to remain within the area in which the harm principle is meant to operate—the benefits of a free marketplace of ideas are such that no harm can outweigh them.

C. *The Emergence of Broadcasting's Positive Free Marketplace of Ideas*

Although in Mill's time the possibility of a free and self-regulating marketplace of ideas may have been real, the communications revolution of our own century has foreclosed the realization of such a possibility. In Mill's time, as in 1791 when the first amendment was enacted, this marketplace was presumably open equally to all those who could speak, write or publish.

> Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers. A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.[36]

With the emergence of broadcasting, however, those few who could make use of the limited availability of the airwaves could effectively drown out the voices of all to whom access was denied. A mere

33. Id. at 135.
34. Id. at 138.
35. Id.
36. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 248 (1974) (footnote omitted).

absence of restraints no longer could make entry into the electronic marketplace of ideas a realistic possibility for all who desired access. This new impediment, stemming from the very nature of the broadcasting medium, could only be removed by creating a new positive freedom, whereby the government would be granted authority to remove the impediment unforeseen by Mill. Such a course of action would inevitably negate some of the negative freedoms previously enjoyed by broadcasters. Congress adopted such a course of action when it mandated that the broadcasting medium be used to serve the "public convenience, interest, or necessity."[37]

Before reviewing the congressional formulation of policy in this area, and analysing the operation of the administrative scheme, a further reference to Mill is in order. Certainly, the proposition that government regulation is necessary to ensure the existence of a free marketplace of ideas would have horrified Mill. That in itself, however, does not establish conclusively that the ultimate ends which Mill sought can never be achieved by means that include government regulation. What is crucial in a free marketplace of ideas is a forum that allows equal opportunity for all opinions, and not, a priori, the means through which the forum was established. Mill notwithstanding, it need not follow that a government of limited powers *cannot* regulate such a forum without thereby eventually destroying it. The potential danger of establishing a positive freedom is not that it does not promote freedom efficiently, but rather that by its very nature it must sacrifice some freedom in order to establish some other freedom.[38] Since Mill seems to have held to the position that freedom of expression is not limited by the harm principle, it should follow that the benefits of a "positive" freedom of expression can clearly outweigh the sacrifices associated with the loss of some other freedom(s). Finally, although it is obvious that any regulation of broadcasting reduces the scope of the broadcaster's freedom of expression, this need not constitute sufficient grounds to reject regulation, so long as the broadcaster's freedom of expression does not become more limited than that of the non-broadcaster.[39] Indeed, if one of the aims of a free marketplace of ideas is to provide an equal right of access for all expression, the broadcaster is not necessarily entitled to more access than the non-broadcaster.

Keeping in mind this philosophical hypothesis as a possible theoretical justification for the congressional imposition of governmental regulation in the pursuit of a free marketplace of ideas in broadcasting, and

37. 47 U.S.C. § 307(a) (1970).

38. See Frankel, The Jurisprudence of Liberty, 46 Miss. L.J. 561, 602 (1975).

39. See note 168 infra and accompanying text.

given the Supreme Court's view that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount [and] [i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here,"[40] we can proceed to consider the role of the fairness doctrine in its attempt to promote the access of ideas over the airwaves and ensure a balanced presentation of controversial issues in the public interest.

III. "FAIRNESS" AND THE PUBLIC INTEREST IN THE MARKETPLACE OF IDEAS

A. *The Origins of the Fairness Doctrine*

Although the fairness doctrine did not become incorporated into the statutory scheme of the Federal Communications Act until 1959,[41] its origins can be traced to the public debate generated by the collapse, in the mid 1920's, of the regulatory scheme provided under the Radio Act of 1912.[42] Once it became apparent that a limit was needed upon the number of persons who could be allowed to broadcast, legislators were faced with the challenge of devising a regulatory scheme whereby the existing frequencies could be made available for private operation, while ensuring that the necessary selection process avoided favoritism among competing applicants. Since it was impossible to provide radio station privileges to all who desired them, it was decided that no one would be permitted to use the scarce radio frequencies to promote his private interests.[43] The public interest was to be paramount to any

40. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); see Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 953 (1963).

41. 47 U.S.C. § 315(a) (1970), amending 47 U.S.C. § 315 (1958), provides, in pertinent part: "Nothing in the [exemptions] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

42. Act of Aug. 13, 1912, ch. 287, 37 Stat. 302. See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 103-14 (1973); Red Lion Broadcasting Co. v FCC, 395 U.S. 367, 375-86 (1969); NBC v. United States, 319 U.S. 190, 210-17 (1943); Houser, The Fairness Doctrine—An Historical Perspective, 47 Notre Dame Law. 550 (1972); Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation, 52 Minn. L. Rev. 67, 69-70 (1967) [hereinafter cited as Robinson].

43. That there is indeed a scarcity of available frequencies is a central assumption of Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 397 n.20, 399 (1969). But see Blake, Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes, 23 Fed. Com. B.J. 75, 87 (1969); Comment, The Limits of Broadcast Self-Regulation Under the First Amendment, 27 Stan. L. Rev. 1527, 1541-43 (1975).

"right of selfishness."[44] It was necessary therefore to decide who was to be entrusted with the responsibility of choosing which programs should be aired. The then Secretary of Commerce, Herbert Hoover, stated:

> We cannot allow any single person or group to place themselves in position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should ever be placed in the position of censoring this material.[45]

Both the Radio Act of 1927[46] and the Communications Act of 1934[47] required that the sole responsibility for determining the form and content of program material be left to the private licensee, and that in making such determination he could not ignore the interests of the public whom his license was designed to serve.[48] Congress specifically rejected proposals that would have imposed an obligation on broadcasters to turn over their facilities to persons wishing to speak out on public issues.[49] Instead, Congress provided that "a person engaged in

---

44. 67 Cong. Rec. 5479 (1926) (remarks of Mr. White).

45. Hearing before the House Comm. on the Merchant Marine and Fisheries, 68th Cong., 1st Sess. 8 (1924), quoted in Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 104 (1973).

46. Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162.

47. Act of June 19, 1934, ch. 652, 48 Stat. 1064.

48. Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10,416, 10,425 (1964) [hereinafter cited as Fairness Primer].

49. An exception to this is the "equal time" provision of the Communications Act, 47 U.S.C. § 315(a) (1970), as amended, 47 U.S.C.A. § 315(a) (Supp. 2, 1975). Because politicians enjoy some rights of access to respond to the views of their opponents, the licensee has less discretion in dealing with access demands of politicians than he has when confronted by other segments of the public. The equal-time provisions apply to candidates for political office, and operate independently of the fairness doctrine. However, the Commission has supplemented the equal-time provision with some "quasi-equal opportunity" requirements under the fairness doctrine.

The Commission has held that where a station sells time to the spokesman of a candidate, or to a group or an organization supporting him, and such time was utilized to urge his election, or discuss campaign issues or criticize his opponent, then fairness requires the station to sell "comparable" time to spokesmen of the opposing candidate, even when the politician himself has not appeared on the air. Nicholas Zapple, 23 F.C.C.2d 707, 708 (1970).

This ruling was extended in Committee for the Fair Broadcasting of Controversial Issues v. Republican Nat'l Comm., 25 F.C.C.2d 283 (1970), where the Commission held that when a spokesman for one political party appears in a program that is " 'person or party' oriented rather than issue oriented," id. at 300 n.25, the licensee must grant the other party time in a "quasi-'equal opportunities' fashion." Id. at 300. Basic to the quasi-equal time rule is the dual role of the President as party leader and as chief executive. When the President wears his chief executive hat he is a government spokesman addressing a controversial issue, and the fairness requirements triggered by his appearance are those which apply to any ordinary case. On the other hand, when the President appears on television wearing his party leader hat, then a quasi-equal opportunity must be given to spokesmen of the other party.

Although the distinction between the President's role as the Chief Executive and his role as a party leader may be sound theoretically, it is difficult to see how the two can fairly be separated in actual practice. For example, recent FCC rulings that broadcasters could cover press

radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."[50] To ensure that the broadcaster operate in the public interest, the Commission was given authority to issue renewable licenses,[51] and to promulgate rules and regulations governing their use.[52] Any right of censorship was specifically denied.[53]

Congress intended "that the air waves be used as a vital means of communication, capable of making a major contribution to the development of an informed public opinion."[54] To effectuate this purpose, and to deny any one person or group the role of censor, the statutory scheme struck a compromise between private and public control of broadcasting. The private licensee retained control over his

conferences of President Ford and other announced candidates for political offices at all levels of government without giving equal time to their opponents, but that equal time would be due upon presentation of a public service message by the President on behalf of the United Way, led Senator Proxmire to observe that "[t]he Government through one of its agencies has no business making those kinds of decisions." 121 Cong. Rec. S20,308 (daily ed. Nov. 18, 1975). See Comment, Presidential Politics and Political Prerequisites: The Application of Section 315 and the FCC's Fairness Doctrine to the Appearances of Incumbents in Their Official Capacities, 39 Fordham L. Rev. 481, 496 n.124, 497 (1971).

The most serious consequence of quasi-equal time is the continuance of the communications imbalance that presently exists between the executive and legislative branches of government. The President can get prime time access on the three networks almost at will, while the networks will usually not honor such a request from any other spokesmen.

In its 1972 Political Broadcasts Report, The Handling of Public Issues Under the Fairness Doctrine, 36 F.C.C.2d 40 (1972), the FCC noted that the President's unique role in the American political system made it inevitable that he receive more coverage than any other American. Id. at 46. The Commission refused to extend the "quasi-equal time" requirement to Presidential appearances, stressing that any such action on its part should be left to the Congress. The Commission stated that any increase in its regulation in this area would militate against robust, wide open debate. Id. at 48. Commissioner Johnson disagreed, noting that the President has an "overpowering advantage going into the 'marketplace of ideas,' " over the party out of power and the legislative branch. Id. at 56. In the absence of any significant voluntary broadcaster action to rectify this unfairness, and given his view that Congress was "too political" to take action in this area, Commissioner Johnson thought that administrative action could appropriately restore some of the lost balance. Id. at 60-63. In any event, to increase political debate over the air is not likely to result in any harm to the public interest. To the extent that the networks tend to act as common carriers of the President's messages while retaining journalistic discretion over the appearance of other government figures, an excessive imbalance will exist in political debate over the airwaves.

50. 47 U.S.C. § 153(h) (1970); see Note, Fairness Doctrine: Television as a Marketplace of Ideas, 45 N.Y.U.L. Rev. 1222, 1226 n.28 (1970).

51. 47 U.S.C. § 307 (1970).

52. Id. § 303(f).

53. Id. § 326 provides: "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." See, e.g., James G. Morris, 23 F.C.C.2d 50 (1969).

54. Fairness Primer, 29 Fed. Reg. 10,415, 10,425 (1964).

station, but his freedom was mitigated by the responsibility to give representation to the interests of the citizenry who themselves could not be granted a voice over the air.

Before the articulation of the fairness doctrine in 1949,[55] the Commission had in effect outlawed broadcast editorials. For example, in *Great Lakes Broadcasting Co. v. FRC*,[56] the Commission denied an application for modification of license because the licensee had broadcast only one point of view:

> In so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views . . . .
>
> . . . .
>
> There is not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station, its mouthpiece in the ether. If franchises are extended to some it gives them an unfair advantage over others . . . . It favors the interests and desires of a portion of the listening public at the expense of the rest. Propaganda stations . . . are not consistent with the most beneficial sort of discussion of public questions. As a general rule, postulated on the laws of nature as well as on the standard of public interest, convenience, or necessity, particular doctrines, creeds, and beliefs must find their way into the market of ideas by the existing public-service stations, and if they are of sufficient importance to the listening public the microphone will undoubtedly be available.[57]

Similarly, in *Mayflower Broadcasting Corp.*,[58] where the licensee had promoted his own ideas and the political candidates of his choice, the Commission observed:

> A truly free radio cannot be used to advocate the causes of the licensee. . . . It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.
>
> Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in a public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias. The public interest—not the private—is paramount.[59]

In 1949 the Commission changed its position prohibiting broadcast

---

55. See note 60 infra and accompanying text.

56. 3 F.R.C. Ann. Rep. 32 (1929), rev'd on other grounds, 37 F.2d 993 (D.C. Cir.), cert. denied, 281 U.S. 706 (1930).

57. Id. at 33-34. FRC decisions denying renewals of licensees who advanced their private interests rather than those of the public were consistently approved by the courts. E.g., Trinity Methodist Church v. FRC, 62 F.2d 850 (D.C. Cir.), cert. denied, 284 U.S. 685 (1932) (use of license to defame Catholics, Jews, judges and others); KFKB Broadcasting Ass'n v. FRC, 47 F.2d 670 (D.C. Cir. 1931) (licensee broadcast medical advice and prescribed his own preparations).

58. 8 F.C.C. 333 (1940).

59. Id. at 340.

editorials. Its study of the problem resulted in release of "Editorializing by Broadcast Licensees,"[60] which is the FCC's most comprehensive articulation of the fairness doctrine to date. In essence, the Editorializing Report defines the role of the licensee as trustee of the public airwaves. He is not free to broadcast as he sees fit, or to ignore issues of public importance.[61] The Commission imposes an affirmative duty on the broadcast licensee "to provide a reasonable amount of time for the presentation over their facilities of programs devoted to the discussion and consideration of public issues."[62] The implementation of this obligation carries with it a further affirmative duty to encourage and afford reasonable opportunity for the presentation of contrasting views on all issues of public importance.[63]

Although the licensee's freedom to operate his station is somewhat restricted by these affirmative duties, the Commission made it clear that the licensee was to remain the sole judge with respect to the determination of the subjects to be considered, the different shades of opinion to be aired, and the spokesmen for each point of view.[64] Moreover, in response to fears that the Commission's enforcement of the fairness doctrine would inevitably draw it to take a stand on the merits of particular issues, the Editorializing Report made it clear that the FCC's role in this area would be limited to a consideration of the licensee's overall program service, provided that the licensee act in good faith and make reasonable determination as to particular issues. "The question is necessarily one of the reasonableness of the station's actions, not whether any absolute standard of fairness has been achieved."[65]

In the area of licensee editorializing, the Commission in effect reversed its *Mayflower* decision. Noting that "the public has less to fear from the open partisan than from the covert propagandist,"[66] the Commission reasoned that given the obligation to afford a balanced presentation on issues covered by his editorials, the expression of his

60. 13 F.C.C. 1246 (1949); see Robinson, supra note 42, at 143. The 1959 Amendments to the Communications Act of 1934, as amended, 47 U.S.C. § 315(a) (1970), provide the statutory basis of the fairness doctrine. The doctrine is explained in Fairness Doctrine Primer, supra note 48, 29 Fed. Reg. 10,416 (1964), and in Handling of Public Issues Under the Fairness Doctrine, 48 F.C.C.2d 1 (1974) [hereinafter cited as Fairness Report].

61. 13 F.C.C. at 1247-48.

62. Id. at 1249.

63. Id. at 1250-51. See Obligations of Broadcast Licensees Under the Fairness Doctrine, 23 F.C.C.2d 27, 29 (1970) (duty to seek out appropriate spokesmen when none come forward); John J. Dempsey, 43 F.C.C. 454 (1950).

64. 13 F.C.C. at 1251.

65. Id. at 1255. See, e.g., Gary Lane, 39 F.C.C.2d 938 (1973).

66. 13 F.C.C. at 1254.

personal views could not unduly interfere with the public's right to be fully informed on important issues. Nevertheless, the Commission cautioned the licensee that freedom to express his views on controversial issues did not justify distortion or suppression of "basic factual information upon which any truly fair and free discussion of public issues must necessarily depend."[67]

Thus, use of the broadcasting media is structured around three focal points: the general public, the private licensee and the government. Their interrelation features a predominantly passive role for the general public, and an essentially dual role to be played by both private licensee and government. The public, intended to be the main beneficiary of the mass media, is denied any right of direct access to the airwaves,[68] save in cases involving personal attacks,[69] and must rely upon the mediation of the licensee for the propagation of its ideas, and upon the intervention of the FCC for the redress of its grievances. The licensee is both a trustee operating for the benefit of his audience and a journalist operating much in the same manner as his counterpart in the printed press. As a trustee he is answerable to the FCC, though as a journalist he is presumably entitled to enjoy the liberties accorded to the printed press.[70] For its part, the government acts as both guardian of the public's interest and as the spokesman for its own interests. Acting in its first capacity, through the FCC, it interprets and enforces the "public interest" standard[71] and adjudicates fairness controversies arising from complaints made by the public.[72] Acting in its second

67. Id. "No discussion of the issues involved in any controversy can be fair or in the public interest . . . in a climate of false or misleading information . . . ." Id. at 1255.

68. E.g., RKO General, Inc., 46 F.C.C.2d 240, 243-44 (1974) (licensee refusal to broadcast religious program upheld); see Availability of Network Programming Time to Members of the Congress, 40 F.C.C.2d 238 (1972).

69. 47 C.F.R. §§ 73.123, .300, .598, .679 (1975).

70. "Broadcast journalism is no less a part of the press—no less entitled under the first amendment to show through such investigative journalism that substantial segments of society are flouting a particular law . . . ." WBBM-TV, 18 F.C.C.2d 124, 134 (1969) (documentary dealing with college marijuana use). See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 116-21 (1973) (opinion of Burger, C.J.). It was Justice Douglas' view that television's rights under the first amendment should be the same as those of other media. Id. at 148 (Douglas, J., concurring in the judgment); see generally Barrow, The Fairness Doctrine: A Double Standard for Electronic and Print Media, 26 Hastings L.J. 659 (1975).

71. See 47 U.S.C. § 303 (Supp. III, 1973); Comment, The Federal Communications Commission and Program Regulation—Violation of the First Amendment?, 41 Neb. L. Rev. 826, 827-30 (1962).

72. See Swartz, Fairness for Whom?—Administration of the Fairness Doctrine, 14 B.C. Ind. & Com. L. Rev. 457 (1973). The Commission has recently made an effort to inform the public of available complaint procedures. Broadcast Procedure Manual, 49 F.C.C.2d 1 (1974).

capacity, through various spokesmen, it occasionally attempts to influence the industry in furtherance of its own interests.[73]

B. *The Controversial Meaning of "Controversy"*

The FCC imposes on broadcasters the duty to make a "reasonable" determination whether a given presentation raises a controversial issue so that a fairness obligation is triggered. To illustrate that its standard is not overly vague, the FCC has provided a hypothetical example: a controversial bill is pending before Congress and the record shows that the licensee has permitted advocates of the bill to use his facilities while denying access to opponents. The Commission would determine that the licensee had been unreasonable without considering the merits of the bill.[74] The choice of this example is interesting, for it presents the rare situation where the existence of the controversy and the issue in controversy are self-evident. Furthermore, that the issue is one of public importance is rendered evident by the very fact that it is before Congress. Unfortunately, most real-life issues will not yield to such automatic application of the reasonableness standard. Failure to comply with the fairness doctrine violates the statutory requirement that broadcasters serve the public interest,[75] and may lead to revocation of the license or denial of a renewal application.[76]

A fairness complaint has a very limited chance of success, and the remedy granted is usually mild.[77] The complainants' difficulties can be ascribed to the Commission's application of the reasonableness standard.[78] When a licensee denies that a given program presented a controversial issue, the Commission must determine for itself whether the licensee's contention is a "reasonable" one. To do so, the Commission must first frame the issue presented by the broadcast. Whether the issue is framed as encompassing only that which is *explicitly* stated

73. E.g., Address by Clay Whitehead, Director of Office of Telecommunications Policy, Dec. 18, 1972, discussed in Broadcasting, Jan. 1, 1973, at 18, col. 1. See Goldberg, A Proposal to Deregulate Programming, 42 Geo. Wash. L. Rev. 73, 73-74 (1973).

74. 13 F.C.C. at 1256. See Fairness Report, 48 F.C.C.2d 1, 12-13 (1974).

75. 47 U.S.C. § 315(a) (1970); 47 C.F.R. § 73.24(K) (1974); see Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 (1969).

76. 47 U.S.C. § 312(a) (1970).

77. The Commissioner reported that in fiscal year 1971 the "commission received more than 2000 fairness complaints, which generated 168 commission inquiries—an inquiries-to-complaints ratio of about 8%. And of the inquiries, . . . 69 resulted in staff or commission rulings, with no more than five adverse to the licensee." Broadcasting, July 2, 1973, at 34, col. 3. See Comment, The Fairness Doctrine and Broadcast License Renewals: Brandywine-Main Line Radio, Inc., 71 Colum. L. Rev. 452, 458 (1971).

78. "If a licensee's determination is reasonable and arrived at in good faith . . . we will not disturb it." Fairness Report, 48 F.C.C.2d at 13 (emphasis omitted).

rather than encompassing also that which has been *implicitly* stated may be determinative of the result that the Commission reaches.[79] The Commission has recognized that its "mechanical approach"[80] in determining whether a controversial issue has been raised led to the "great mistake"[81] of applying the fairness doctrine to cigarette advertisements in *WCBS-TV*,[82] and to advertisements for high-powered cars in *Friends of the Earth v. FCC*.[83] In the cigarette advertising case, the licensee argued that the commercials in question raised only the issue of whether cigarette smoking is a pleasurable activity—the explicit message being that cigarette smoking is pleasurable. Thus it was "reasonable" for the broadcasters to conclude that the advertisements were not controversial. If, however, the statement "cigarette smoking is pleasurable" implies that "cigarette smoking is desirable," then the broadcasters were unreasonable in their conclusion, given the overwhelming scientific evidence that cigarette smoking poses a serious threat to the public health.[84] In other cases, however, the implicit message of a statement may not be sufficiently obvious, and its impact may depend more upon the subjective impression produced by the message. And this subjective impression may depend significantly on the political, philosophical or emotional biases of the observer.

In *San Francisco Women for Peace*,[85] the complaint alleged that certain radio and television stations had violated the fairness doctrine by broadcasting armed forces recruitment messages as a public service, while refusing to broadcast messages presenting opposing viewpoints. To substantiate the allegation that the recruitment announcements raised a controversial issue, the complainants asserted that "many groups in the San Francisco area . . . do not believe it is beneficial to the individual or society at large for people to [join] the armed

79. See, e.g., National Broadcasting Co., 25 F.C.C.2d 735, 736-38 (1970); Boalt Hall Student Ass'n, 20 F.C.C.2d 612, 615-16 (1969) (FCC will not substitute its judgment for that of licensee, when the latter has acted reasonably and in good faith); Californians Against the Tax Trap Initiative, 19 F.C.C.2d 507 (1969); Madalyn Murray, 40 F.C.C. 647, 648-50 (1965); see Note, The FCC Fairness Doctrine and Informed Social Choice, 8 Harv. J. Legis. 333, 342 (1971).

80. Fairness Report, 48 F.C.C.2d 1, 24 (1974).

81. Id. at 26.

82. 8 F.C.C.2d 381, stay and reconsideration denied, 9 F.C.C.2d 921 (1967), aff'd sub nom. Banzhaf v. FCC, 405 F.2d 1082 (1968), cert. denied, 396 U.S. 842 (1969).

83. 449 F.2d 1164 (D.C. Cir. 1971).

84. 9 F.C.C.2d at 938-40. Ultimately, Congress banned cigarette advertisements from the airwaves. See Public Health Cigarette Smoking Act of 1969, § 6, 15 U.S.C. § 1335 (1970); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), aff'd, 405 U.S. 1000 (1972) (congressional prohibition against cigarette advertising not violative of broadcasters' first and fifth amendment rights).

85. 24 F.C.C.2d 156 (1970).

forces."[86] Furthermore, they contended that it was impossible to divorce recruitment ads from the war in Vietnam, where most recruits were likely to be sent. Consequently, they sought to inform young men, through their advertisements, that a more desirable course of action was open to them, namely deferment from military service as provided for by Congress. The licensees denied that the military recruitment ads raised a controversial issue.

The FCC majority held that the licensees had not been unreasonable, likening the military recruitment ads to similar recruitment ads for policemen, firemen, Peace Corps volunteers and others, noting that the power of the government to raise an army had not been questioned. Rather, the thrust of the complaint was an objection to the use made of the armed forces.[87] That issue—though admittedly controversial in 1970—had not been raised by the broadcast of the recruitment messages.

In his dissent, Commissioner Johnson disagreed with the majority's perception of the issues raised by the recruitment messages. As he saw the advertisements, they could no more be separated from the Vietnam war than the cigarette commercials could be separated from the health hazards associated with smoking.[88]

Ultimately, whether the recruitment messages "directly or by necessary inference" addressed the propriety of the Vietnam war is for the most part subjectively dependent upon the emotional and political inclinations of the observer. To one outraged by the war, the armed forces appeared to be the instrumentality through which an abhorrent policy was perpetrated. Conversely, to one not so emotionally or politically inclined, the portrayal of the armed forces as a positive factor in society did not necessarily imply approval of military activity in Asia.

However objectively the reviewing body tries to act, it must formulate a judgment on the impact of what has been broadcast. In addition, it might be argued that the more public emotions become polarized over an issue, the more the Commission's determination of the implicit message of a statement will depend upon its subjective response to the statement. Ultimately, the views of those whose emotional and political outlook are furthest from those held by the FCC are most likely to be excluded by the application of unreliable standards. The subjective sensitivity of the FCC and of the broadcast industry—particularly those television broadcasters who must appeal

86. Id.
87. Id. at 157-58.
88. Id. at 161 (Johnson, Comm'r, dissenting).

to the mood of the majority—is most likely to fall within the mainstream of public perception.[89] Therefore, it is to be expected that ideas which stray furthest from this middle ground of subjective perception will be least likely to gain access to the airwaves. Viewed in this light, the Commission's reasonableness standard leaves too much leeway in the hands of the licensee,[90] and may contribute to the narrowing of public debate over the airwaves.

The Commission has admitted its error in the cigarette advertising case, but for a different reason:

> [W]e do not believe that the usual product commercial can realistically be said to inform the public on any side of a controversial issue of public importance. It would be a great mistake to consider standard advertisements . . . as though they made a meaningful contribution to public debate. It is a mistake, furthermore, which tends only to divert the attention of broadcasters from their public trustee responsibilities in aiding the development of an informed public opinion.[91]

C. *Fairness and the Suppression of Controversial Views*

In *Brandywine-Main Line Radio, Inc.*[92] the Commission refused to grant a renewal of a licensee who had failed to comply with the fairness doctrine. When a group headed by Dr. Carl McIntire applied for renewal of its licenses to two radio stations in Media, Pennsylvania, numerous civic and religious organizations sought denial of the application.[93] The FCC reversed its Hearing Examiner, holding that

---

89. The FCC had intended to limit fairness doctrine scrutiny of product commercials to cigarettes alone. Fairness Report, 48 F.C.C.2d 1, 25 (1974); see WCBS-TV, 9 F.C.C.2d 921, 958 (1967) (Johnson, Comm'r, concurring), aff'd sub nom., Banzhaf v. FCC, 405 F.2d 1082 (1968), cert. denied, 396 U.S. 842 (1969). Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971), extended a fairness requirement to the pollution issue raised by advertising for high-powered cars and comparisons between high-test and regular gasoline. Further application of the doctrine to "ordinary product commercials" was not permitted. Consumers Arise Now, 23 P & F Radio Reg. 2d 955 (1971); see Fairness Report, 48 F.C.C.2d at 26. Cf. Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 777-78 (1972).

90. The FCC has denied application of the fairness doctrine for lack of a controversial issue in Peter C. Herbst, 48 F.C.C.2d 614, reconsideration denied, 49 F.C.C.2d 411 (1974), aff'd sub nom., Public Interest Research Group v. FCC, 522 F.2d 1060 (1st Cir. 1975); David C. Green, 24 F.C.C.2d 171 (1970), aff'd, 447 F.2d 323 (D.C. Cir. 1971); Alan F. Neckritz, 24 F.C.C.2d 175 (1970), aff'd, 446 F.2d 501 (9th Cir. 1971); Citizens Communications Center, 21 P & F Radio Reg. 2d 1222 (1971); see Swartz, Fairness for Whom? Administration of the Fairness Doctrine, 14 B.C. Ind. & Com. L. Rev. 457, 460 (1973).

91. 48 F.C.C.2d at 26. The First Circuit has denied a claim that the Commission has exceeded its authority in denying precedential value to its cigarette and automobile holdings. Public Interest Research Group v. FCC, 522 F.2d 1060 (1st Cir. 1975).

92. 24 F.C.C.2d 18 (1970), aff'd, 473 F.2d 16 (D.C. Cir. 1972) (per curiam).

93. 24 F.C.C.2d at 18 n.1.

Brandywine's violations of the fairness doctrine and personal attack rules[94] required denial of the renewal application.[95]

What is perhaps most ironic about *Brandywine* is that although WXUR undoubtedly had propagated a religious and political philosophy offensive to most, it had offered vigorous debate on controversial issues. Moreover, there was ample evidence that the station had offered a variety of opinions on a great number of issues.[96] As the Hearing Examiner noted, "it is almost inconceivable that any station could have broadcast more variegated opinions upon so many issues than WXUR."[97] The sheer number of viewpoints expressed over the air made it futile to attempt to determine whether opposing viewpoints had been presented in a balanced proportion:

> There was an attempt, however inept, to allow wide-swinging utterance of all shades of thought. This met the first mandate of the Fairness Doctrine calling for broadcast of divergent viewpoints but it ran head-on into the second commandment of protecting persons and groups against attacks.[98]

The Commission rejected Brandywine's contention that call-in programs, where listeners expressed their views over the air, had fulfilled WXUR's fairness obligations, on the grounds that opposing views were forced to be given in an antagonistic setting.[99] It objected to Brandywine's failure to establish any procedure for previewing, monitoring or reviewing its broadcasts—a failure that prevented Brandywine from having full knowledge of what was being broadcast over its station—and objected to Brandywine's failure to make public announcements inviting the presentation of contrasting views.[100] The FCC refused to take into account McIntire's offers of time for appearances which were not accepted. The Commission rejected the argument that Brandywine's transgressions had been mitigated by its small staff and lack of financial resources, and concluded that Brandywine had been

> indifferent to its affirmative obligation "to encourage and implement the broadcast of all sides of controversial public issues" . . . and indeed, it was hostile to such

94. 47 C.F.R. § 73.300 (1975).

95. 24 F.C.C.2d at 21. Although the FCC found Brandywine to have misrepresented its program plans and to have failed to make a reasonable effort to ascertain and serve the need of its listeners, "[a]t the heart of this proceeding [was] the question of compliance with the Fairness Doctrine." Id.

96. Id. at 131.

97. Id. at 130.

98. Id. at 135.

99. Id. at 22-23. See Telephone Interview Programs, 22 P & F Radio Reg 2d 1803 (1971); Council for Better Transportation Planning, 32 F.C.C.2d 302 (1971).

100. 24 F.C.C.2d at 22.

broadcasts. This serious Fairness Doctrine violation warrants a denial of Brandywine's renewal applications.[101]

Chief Judge Bazelon, dissenting from the court's affirmance, aptly summarized the case against the Commission's decision in his dissent from his court's affirmance of the FCC decision:

> The Commission's strict rendering of fairness requirements, as developed in its decision, has removed WXUR from the air. This has deprived the listening public not only of a viewpoint but also of robust debate on innumerable controversial issues. It is beyond dispute that the public has *lost* access to information and ideas. This is not a loss to be taken lightly, however unpopular or disruptive we might judge these ideas to be.[102]

Indeed, if the *raison d'être* of the fairness doctrine is to increase public exposure to the presentation of divergent ideas, the Commission's sanction was a serious blow to the ideal which the fairness doctrine was designed to serve.

The decision cannot be divorced entirely from the unpopular and often offensive views which were presented over WXUR.[103] In light of previous Commission practice in this area,[104] it is appropriate to ask whether the FCC would have given such emphasis to the ratio of licensee views versus opposing views had the licensee's views been more bland. In any event, the lesson of *Brandywine* is that the more time a licensee devotes to public debate, and the more his views deviate from the mainstream of public opinion, the less likely he will be able to retain his license to broadcast.[105] This threat to the marginal, off-beat broadcaster may serve to diminish public debate over the air while offering only additional blandness in its place.[106]

D. *Fairness and the News*

Although the Commission does not review the accuracy of news reporting in its enforcement of the fairness doctrine,[107] fairness com-

---

101. Id. at 25.

102. 473 F.2d 16, 69-70 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) (footnote omitted).

103. See Mallamud, The Broadcast Licensee as Fiduciary: Toward the Enforcement of Discretion, 1973 Duke L.J. 89, 119.

104. See note 90 supra.

105. "The suggestion that constitutionally protected speech may be banned because some persons may find the ideas expressed offensive is, in itself, offensive to the very meaning of the First Amendment." CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 194-95 n.35 (1973) (Brennan, J., dissenting).

106. See Note, The Listener's Right to Hear in Broadcasting, 22 Stan. L. Rev. 863, 886 (1970) (significance of economic pressures that are exerted upon broadcasters to air only generally accepted views).

107. Mrs. J. R. Paul, 26 F.C.C.2d 591 (1969).

plaints are often accompanied by charges of news distortion,[108] and the FCC has warned that permission to editorialize does not justify distortion, slanting or suppression of the facts underlying the issues for public debate.[109] Accuracy of news reporting and fairness are conceptually related, in that debate on controversial issues obviously must require exposure to the facts underlying the issues. Broadcasters have insisted that some allegations of news media bias are motivated by the belief that they can yield politically useful results.[110] What may appear to government as a one-sided presentation of issues may seem to broadcast journalists but a reasonable presentation of facts.[111]

Commission policy in regard to allegations of distortion, slanting, fabrication and staging of the news has been to refuse to take any action unless the complainant submits "substantial extrinsic evidence or documents that on their face reflect deliberate distortion."[112] This burden is so great that as a practical matter, the FCC rarely challenges the discretion of the broadcaster with respect to these matters. A second, more difficult problem was addressed in *Accuracy in Media, Inc.*[113] The complaint alleged that NBC had violated the fairness doctrine in its presentation of *Pensions: The Broken Promise*.[114] In the eyes of Accuracy in Media (AIM), NBC engaged in "advocacy journalism," by "taking sides and rigging your story in order to influence public opinion to support the side that you think to be right."[115] AIM's position was equivalent to a charge that NBC hid behind the shield of investigative journalism in order to editorialize, without having to

---

108. See, e.g., Bernard T. Callan, 30 F.C.C.2d 758 (1971); J. Allen Carr, 30 F.C.C.2d 894 (1971).

109. See note 112 infra and accompanying text.

110. See Lowry, Agnew and The TV News: A Before/After Content Analysis, 48 Journalism Q. 205 (1971).

111. Broadcasting, Oct. 8, 1973, at 31, col. 1.

112. Fairness Report, 48 F.C.C.2d 1, 21 (1974); see, e.g., CBS Program "The Selling of the Pentagon," 30 F.C.C.2d 150 (1971); Bernard T. Callan, 30 F.C.C.2d 758 (1971); Mrs. J. R. Paul, 26 F.C.C.2d 591 (1969); Network Coverage of the Democratic Nat'l Convention, 16 F.C.C.2d 650 (1969).

113. 40 F.C.C.2d 958 (1973), vacated and remanded for dismissal of complaint on ground of mootness sub nom., NBC, Inc. v. FCC, 516 F.2d 1101, 1180 (D.C. Cir. 1975) (per curiam), cert. denied, 44 U.S.L.W. 3471 (U.S. Feb. 23, 1976) (No. 75-670).

114. Aired in September of 1972, the Peabody Award-winning program showed workers who told of losing pension income through a variety of misfortunes—pre-retirement dismissals, company closings or mergers, the collapse of pension funds because of mismanagement. Correspondent Edwin Newman noted near the end of the hour-long broadcast that "there are many good" pension plans. But his conclusion was downbeat: "The situation, as we've seen it, is deplorable." 516 F.2d at 1107. The text of the entire program is set out in an appendix to the District of Columbia Circuit Court of Appeals opinion. 516 F.2d at 1134-46.

115. Accuracy in Media, Inc., 44 F.C.C.2d 1027, 1032 (1973).

comply with its trustee duty to afford an opportunity to the "other side" to be heard.

From NBC's standpoint, application of the fairness doctrine to investigative reports would have meant the emasculation of effective broadcast journalism. According to the network, the program was designed to expose the public to certain facts about the performance of some private pension plans, without addressing the issue of what percent of pension programs fail to perform as expected, and without offering any answers to the problems exposed by the documentary.[116] Under these circumstances, application of the fairness doctrine would amount to an intrusion into the broadcast journalist's most essential liberty, that of gathering and disseminating news free of governmental interference.[117]

NBC argued that governmental invasions of the broadcaster's primarily journalistic function is particularly dangerous since the government is so often the subject being investigated, and is an act inconsistent with the historical dissociation of government and press.[118] The FCC rejected NBC's claim that application of the broadcaster's public trustee duties to investigative reporting would in the long run render broadcast journalism meaningless:

> NBC has a journalist's role; it has an additional role as a public trustee of providing a forum for diverse views on public issues. The two roles are not incompatible.[119]

Obviously, the fairness problems posed by investigative reporting do not lend themselves to any easy solutions. Even if it were always possible to sort out the facts from the underlying issues, the possibility remains that a straightforward presentation of selective facts could have the same effect as a one-sided expression of opinion. Thus, a broadcaster might conceal editorial advocacy under the guise of a purely factual report. On the other hand, if every piece of investigative reporting must be balanced, "television news must never examine a problem in American life without first ascertaining that [the network] had piled up enough points on the other side."[120]

In the last analysis, collection and dissemination of the news, the

116. Id. at 1028-29; see 516 F.2d at 1117.

117. In the past, the Commission had rejected similar charges against other news programs. See, e.g., CBS Program "The Selling of the Pentagon," 30 F.C.C.2d 150 (1971); CBS Program "Hunger in America," 20 F.C.C.2d 143 (1969).

118. Thomas Jefferson stated that "[i]f left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate for a moment to prefer the latter." C. Bowers, Jefferson and Hamilton—The Struggle for Democracy in America 108 (1925).

119. 44 F.C.C.2d at 1043.

120. Reuven Frank, quoted in Time, Feb. 4, 1974, at 59, col. 2.

most purely journalistic functions of the broadcast licensee, may not readily lend themselves to the requirements of the fairness doctrine, despite the networks' virtual monopoly in determining which newsworthy facts will be seen on the nightly news. Of course one cannot minimize the enormous power of those who select which of the day's events will be brought to the attention of the viewing public, and what form these events will take to fit within the format of a half-hour presentation. To allow the government to enter the newsroom would not provide a solution to any of the foregoing problems, but, quite to the contrary, would compound them by adding a more pernicious form of censorship—government censorship—to the already existing forms of private censorship. Consequently, there is a strong case for the proposition that the journalistic activities of broadcasters—like those of the printed press—should be explicitly declared beyond government reach.[121] The District of Columbia Court of Appeals' reversal of the FCC, later vacated for mootness, offers at least a step in the right direction: the FCC's authority in administering the fairness requirements of broadcast journalism is to be limited to "correcting the licensee for *abuse* of discretion."[122] The great danger posed by affirmative government intervention into this area is that, while such action may be formulated in terms of criticism of the broadcaster's conduct as a trustee and purport to be made in the name of the public interest, it may nevertheless be little more than an assault on the broadcaster's conduct as journalist when such conduct is perceived as detrimental to the interests of those in power.

E. *Entertainment and Fairness: Should Fiction Be Balanced?*

Although most entertainment[123] programming offered on television can be characterized as a deliberate effort to avoid touching upon controversial issues of public importance, recent fictional heroes such as Archie Bunker and Maude have espoused highly controversial positions on various issues of current public interest.[124] Fairness com-

121. See Network Coverage of the Democratic Nat'l Convention, 16 F C C 2d 650, 654-56 (1969); Note, The First Amendment and Regulation of Television News, 72 Colum. L. Rev. 746, 767-71 (1972). The Supreme Court held the first amendment applicable to mass communications media in United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

122. NBC, Inc. v. FCC, 516 F.2d 1101, 1120 (D.C. Cir. 1974), vacated, 516 F 2d 1180 (D.C. Cir. 1975) (per curiam).

123. For purposes of this section, "entertainment" will be understood to denote presentations of fictional characters and situations, other than those used to convey the message of an advertiser.

124. E.g., Diocesan Union of Holy Name Soc'ies, 41 F.C.C.2d 297 (1973) (demand to reply to

plaints have demanded that time be provided for spokesmen opposing the positions taken by the fictional characters.[125] Although these complaints have neither been numerous nor successful,[126] they are likely to continue so long as the networks find that controversial fictional programming attracts a sizable portion of the viewing public. To date, the FCC has neither addressed the substantial issues raised by these complaints nor specifically stated that the fairness doctrine applies to the points of view expressed by the fictional characters appearing in fictional productions.[127] Nevertheless, since application of the fairness doctrine to entertainment programming might place the Commission in a position of drama critic,[128] this area should be considered.

Entertainment programming can raise one side of a controversial issue either explicitly or implicitly.[129] Examples of the former are provided by *All in the Family* and *Maude,* where the characters express controversial views on a variety of subjects. An example of the latter is the series *Bridget Loves Bernie,* which in having depicted the happy marriage of a Catholic to a Jew could be viewed as implicitly approving interfaith marriage.[130]

The *Bridget Loves Bernie* controversy, which was central to cancellation of the program, took place without the aid of the fairness doctrine or the intervention of the FCC.[131] Had balance been sought instead of suppression, and had it been sought under the fairness doctrine, the FCC would have had to decide how to apply the doctrine to issues raised by implication in a fictional series which avoids explicit controversy.[132] Application of the doctrine would call for FCC deter-

---

pro-abortion position taken on "Maude"); Robert S. Gelman, 29 F.C.C.2d 34 (1971) (demand to respond to Archie Bunker's alleged personal attack against lawyers of the Jewish faith).

125. See note 134 infra and accompanying text.

126. E.g., Diocesan Union of Holy Name Soc'ies, 41 F.C.C.2d 297 (1973). Only one such complaint was made during a six-month period in 1973. See H. Geller, The Fairness Doctrine in Broadcasting: Problems and Suggested Courses of Action 114-32 (1973) [hereinafter cited as Geller].

127. See Note, The Fairness Doctrine and Entertainment Programming: All in the Family, 7 Ga. L. Rev. 554, 559 n.34 (1973).

128. See New England Coastal Schaghticoke Indian Ass'n, 35 F.C.C.2d 868 (1972) (FCC will not censor allegedly false depiction of American Indian by "Daniel Boone" program).

129. See notes 79-84 supra and accompanying text.

130. At least, this is the view expressed by several Jewish organizations that urged CBS to drop the series. Broadcasting, Feb. 12, 1973 at 62, col. 1.

131. Jewish groups who found the series' implied message objectionable negotiated directly with the network, threatening a boycott of products advertised on the show. At first, CBS stated that "intermarriage was the peg for the series and to drop it would be to lose the point of the series," and that to cancel the show would "do a disservice to the millions who obviously like it." Id. at col. 2.

132. If the portrayal of a happy interfaith couple constituted advocacy of the proposition that

mination of what types of programming could reasonably provide balance to the implied message of the series.

Can a licensee demonstrate balance in its overall presentation[133] other than by fictional presentations on behalf of the other side of the issue? If each episode of *Bridget Loves Bernie* impliedly endorsed intermarriage, then a single program opposing intermarriage might not suffice. On the other hand, a presentation by anti-intermarriage forces every three or four weeks would seem unwarranted in light of the fact that the series refrained from expressly articulating a pro-intermarriage position.[134]

Explicitly uttered controversial statements prompted a fairness complaint against CBS for airing a two-part episode of *Maude* wherein Maude learns that she has become pregnant and decides to have an abortion. The complainants alleged that the programs in question "espoused a pro-death position by promoting abortion."[135] The complainants requested "that 'fairness' and 'personal attack' time be afforded for the presentation of a 'pro-life' program 'within the framework of the *Maude* show,' " or that time be made available by CBS for the presentation of "pro-life" views during the time slot normally reserved for the airing of *Maude*.[136] The network contended that " '[i]n light of the obviously fictional and satirical context of the

intermarriage is desirable, then any bland entertainment program might trigger a fairness obligation if the issue raised were of sufficient public controversy. See Polish Am. Congress v. FCC, 520 F.2d 1248, 1254-55 (7th Cir. 1975), cert. denied, 44 U.S.L.W. 3472 (U.S. Feb. 23, 1976) (No. 75-593) (FCC denial of fairness complaint over broadcast of Polish joke material affirmed: neither the proposition that Poles or Polish Americans are "inferior to other human beings," nor that "broadcasting Polish jokes is desirable" constitutes a controversial issue of public importance). A program portraying the friendship of a black person and a white person might imply that there is harmony between the races, and a vapid domestic situation comedy might implicitly endorse the inequality of the sexes. But see Anthony R. Martin-Trigona, 22 F.C.C.2d 683 (1970) ("mere passing reference to an issue" not deemed such advocacy that fairness obligation triggered); cf. National Organization for Women, 48 F.C.C.2d 497 (1974) (licensee determination that fairness doctrine inapplicable to commercial promoting "Bridal Fair" held not unreasonable).

133. The FCC ordinarily applies an "overall programming" standard to a station's fairness obligation. E.g., Black Efforts for Soul in Television, 24 F.C.C.2d 429 (1970) (both sides of controversy met in the course of licensee's overall programming).

134. The "best" solution would seem to lie in the presentation of a fictional series depicting an unhappy interfaith marriage, thereby impliedly expressing disapproval of intermarriage. This solution would have the merit of countering the emotional appeal generated by the association of interfaith marriage and happiness with the emotional distaste caused by the association of intermarriage and unhappiness. Such a solution serves to underscore the practical difficulties encountered in providing balance to the implied messages of entertainment programming.

135. Diocesan Union of Holy Name Soc'ies, 41 F.C.C.2d 297 (1973). In support of their contention, the complainants cited the following lines of dialogue: "Carol: . . . We're free. We finally have the right to decide what we can do with our own bodies. . . . And it's as simple as going to the dentist. . . . There's no reason to feel guilty and there's no reason to be afraid." Id.

136. Id. at 298.

series,' the programs in question were 'solely intended for entertainment and not for the discussion of viewpoints on controversial issues of public importance.' "[137]

Although the FCC did not reach the merits of these contentions, the weakness of the CBS argument is apparent. Fiction and satire not only can be appropriate vehicles for the transmission of controversial messages, but often provide a most effective outlet for such messages. A forceful satire may be worth more than ten explanatory speeches, and an audience does not automatically lose its receptiveness to controversial viewpoints because it is being entertained.

A better argument for CBS might have been to admit that the fictional characters took a stand on a controversial issue of public importance, but to insist that, in light of the fictional and satirical nature of the program, it would be inappropriate for the FCC to decide which side of a controversial issue was promoted by the program. Even if it were conceded that an administrative agency could appropriately pass judgment on the impact of a fictional presentation, successful controversial fictional characters are often different things to different people, since an utterance by a character perceived as being ridiculous might have the effect of promoting the opposite of what the character has endorsed.[138] Given the subtlety of fictional presentation, CBS might argue that it is preferable to exempt entertainment programming altogether from the requirements of the fairness doctrine than to allow the government to impose an official interpretation on comedy and satire.

F. *Fairness Versus Access:* CBS v. DNC

Four years after its failure to have the fairness doctrine declared unconstitutional in *Red Lion Broadcasting Co. v. FCC*,[139] the broadcasting industry was successful in using the doctrine to bar an attempt to establish a constitutional right of access to the electronic media in *Columbia Broadcasting System, Inc. (CBS) v. Democratic National Committee (DNC)*.[140] In determining whether a licensee's flat ban on editorial advertising came under his role as public trustee, or whether it fell within the discretion afforded a journalist, the broad premise of *Red Lion* that "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experi-

137. Id.

138. Surveys are said to show "that a substantial portion of the regular audience identifies with—not against—Archie Bunker." W. Key, Subliminal Seduction 159 (1973) (emphasis omitted).

139. 395 U.S. 367 (1969). See notes 40-43 supra and accompanying text.

140. 412 U.S. 94 (1973).

ences . . . ."[141] could provide only a starting point. *CBS v. DNC* raised the possibility that the fairness doctrine might be supplemented by at least a limited right of access to the airwaves.

Two cases were consolidated in *CBS v. DNC*. In *Business Executives' Move for Vietnam Peace (BEM) v. FCC*,[142] a national organization opposed to United States involvement in Vietnam complained to the FCC that radio station WTOP had refused to sell it time to broadcast a series of spot announcements expressing BEM views on Vietnam. WTOP's policy was to refuse to accept editorial advertising.[143] In *Democratic National Committee*, the Democratic Party sought a declaratory ruling that "[a] broadcaster may not, as a general policy, refuse to sell time to responsible entities . . . for the solicitation of funds and for comment on public issues."[144] Stressing that Congress had refused to treat broadcasters as common carriers, the Supreme Court majority[145] reversed the holding of the Court of Appeals for the District of Columbia that the first amendment and the Communications Act made WTOP's policy illegal:

> Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act.[146]

The majority found that the private journalistic interests of the broadcasters had not been outweighed by the interests of the public, in that the public's right to be informed was satisfied by the operation of the fairness doctrine, and that the licensee's refusal to carry editorial advertising constituted a proper exercise of licensee editorial responsibility. The complainants had challenged the broadcaster in his journalistic role, in which context he was justified in deciding that brief spot announcements were an ill-suited format for the intelligent treatment of issues of public importance. The Court took the position that the dispute centered on the question of which voice should carry a given message to the public. Since the message was being carried anyway, the licensee could retain control over the selection of the format and the speaker, lest the government become more deeply

---

141. 395 U.S. at 390.

142. 450 F.2d 642 (D.C. Cir. 1971), rev'd sub nom., CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

143. 450 F.2d at 647.

144. Id.

145. Chief Justice Burger wrote for the majority in parts I, II, and IV of his opinion. In part III, he was joined only by Justices Rehnquist and Stewart. Four justices wrote concurring opinions.

146. 412 U.S. at 110.

involved in the daily operation of broadcasters without any significant extra benefit to the public.

To Justice Brennan, the majority's emphasis on the broadcaster's journalistic role was misplaced, since the controversy concerned only the

> allocation of *advertising* time—air time that broadcasters regularly relinquish to others without the retention of significant editorial control. Thus, we are concerned here, not with the speech of broadcasters themselves, but, rather, with their "right" to decide which *other* individuals will be given an opportunity to speak in a forum that has already been opened to the public.[147]

Viewed this way, the weak journalistic interest of the broadcaster was offset by the strong need for the public to be exposed to as many different views as possible, an interest which, according to Justice Brennan, the fairness doctrine has not fully satisfied.[148] Thus, the broadcaster's right to impose a flat ban against all editorial advertising was outweighed by the need of some form of limited access, which, with the fairness doctrine, could better present issues of public importance to the citizenry whose need to be informed is paramount.

Although both the majority and the dissent viewed the case within the framework of the broadcaster's dual role as public trustee and journalist, they reached divergent conclusions because of their differing assessments of the distinction between political and commercial advertising. The majority's view can be roughly summarized as stating the following: since the broadcast audience is a "captive" one which must already endure an avalanche of commercial advertising, it is in the public interest to allow the licensee, in his editorial capacity, to draw the line at some point.[149] The dissent, on the other hand, maintained that once a broadcaster relinquishes control over advertising by making his facilities available for the commercial advertisers who pay him for access, he cannot refuse to sell time to advertisers with political messages solely because of the *content* of their messages.[150] For this reason the different treatment given "commercial" speech and "controversial" speech for purposes of access was constitutionally impermissible. The dissent accepted the view of the intermediate court that such different treatment is "favoritism toward the *status quo* and public apathy and, in these cases, a favoritism toward bland commercialism."[151] The Court of Appeals had viewed the term "controversial" as significantly ambiguous:

---

147. Id. at 199-200 (Brennan, J., dissenting) (footnote omitted).
148. Id. at 192 (Brennan, J., dissenting).
149. Id. at 127-28.
150. Id. at 200 (Brennan, J., dissenting).
151. 450 F.2d at 661.

Some advertisements may not be deemed "controversial" . . . but may still express ideas, the negative of which would surely be labeled "controversial." Ads for Radio Free Europe or Army recruiting, for example, may be allowed unanswered on the air, while ads calling the notion of the "free world" a sham or ads calling the Army a threat to democracy would be banned entirely. The line between ideological and non-ideological presentations is an almost impossible one to draw. All too often in our society one particular ideology—that of passivity, acceptance of things as they are, and exaltation of commercial values—is simply taken for granted, assumed to be a nonideology, and allowed to choke out all the rest.[152]

A second issue on which the majority and the dissent differed was the efficacy of the fairness doctrine. To the dissent, the licensee's freedom under the fairness doctrine to separate the advocate from his views diminished the effectiveness of the concept that the "expression of his views is as dependent on the style and format of presentation as it is on the content itself."[153] Also, to the dissent, the fairness doctrine requirement that " '*representative* community views and voices on controversial issues' " be presented served

to perpetuate coverage of those "views and voices" that are already established, while failing to provide for exposure of the public to those "views and voices" that are novel, unorthodox, or unrepresentative of prevailing opinion.[154]

In this view, fairness cannot by itself transcend the blandness which is sought by the broadcaster, who fears to alienate any significant segment of the audience lest he thereby fail to maximize profits. So long as the broadcaster remains entirely in control of the issues and voices heard over his station, there is little chance that the public will become exposed to the " 'widest possible dissemination of information from diverse and antagonistic sources.' "[155] Professor Jaffe has pointed out the "considerable possibility the broadcaster will exercise a large amount of self-censorship and try to avoid as much controversy as he safely can."[156]

If the fairness doctrine is by itself insufficient to assure that an adequate flow of information will reach the public, and a limited right of access will promote expansion of public debate over the airwaves, then it might seem appropriate to grant access programming in areas where the broadcaster substantially has voluntarily relinquished his

152. Id. (footnote omitted).

153. 412 U.S. at 190 (Brennan, J., dissenting).

154. Id. (Brennan, J., dissenting).

155. Id. at 192 (Brennan, J., dissenting), quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

156. Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 773 n.26 (1972). ABC was on record that it would refuse to air those views which it considers "scandalous" or "crackpot," and CBS stated it excluded opinions that are "insignificant" or "trivial." NBC would not permit speech that "strays 'beyond the bounds of normally accepted taste.' " 412 U.S. at 191 (Brennan J., dissenting).

journalistic control. Regulation of private licensees and the fairness doctrine both were conceived to establish a middle ground between complete government control and free access.[157]

However, a licensee's refusal of paid access, constitutionally protected by *CBS, Inc. v. DNC,* may not serve the public interest, if it results in a grant to the broadcaster of more freedom than he needs to assure the effective use of the airwaves. Where the broadcaster has failed to exercise substantial editorial control over what is being advertised on his station, it might be desirable for him to be bound by this programming decision at least to the extent of not being allowed to carve out an exception for advertising that does not suit his views. Just as the broadcaster who grants access to editorial advertising that raises one side of a controversial issue of public importance[158] is required to show reasonable presentation of opposing views,[159] he should not be able to exclude a member of this class solely on grounds that he disapproves of the *content* of that member's message.

This logic applies not only in the area of advertising, but also in other areas which traditionally come under greater editorial control by the broadcaster. Thus, in *Student Association of the State University,*[160] it was alleged that ABC had engaged in improper broadcast censorship of political expression by failing to telecast a football half-time show which expressed opposition to the Vietnam war, racism and industrial pollution. The network had a policy of declining to broadcast material that it deemed a "political demonstration."[161] The Student Association contended that since ABC had previously broadcast "patriotic" half-time shows supportive of the war in Vietnam, including a presentation where the Chairman of the Joint Chiefs of Staff praised four war heroes and asked 4,300 cadets and midshipmen to join in prayer for the armed forces, the network had no right to deny access. ABC's sports producer allegedly had expressed ABC's concern that potential customers of its commercial sponsors might be alienated.[162]

---

157. See note 43 supra and accompanying text.

158. Fairness Report, 48 F.C.C.2d 1 (1974).

159. E.g., Wilderness Society, 30 F.C.C.2d 643 (1971), in which Esso commercials concerning Alaskan oil were held to raise implicitly the question of the need for rapid development of an Alaskan pipeline, clearly a controversial issue of public importance. The Commission found that the network had failed to present opposing views to the commercials. See Wilderness Society, 31 F.C.C.2d 729, 733 (1971). But see note 91 supra and accompanying text.

160. 40 F.C.C.2d 510 (1973).

161. Id.

162. Id. at 510-11. None would dispute that "advertising is the lifeblood of broadcasting." R. Summers & H. Summers, Broadcasting and the Public 100 (1966). The extent to which advertisers themselves control the media directly is a subject of dispute. See Simmons, Commer-

ABC argued that given its concededly fair news coverage of the war, all it had done was to determine that the half-time show was not an appropriate format to carry the anti-war message. ABC defended its decision as a reasonable one, stating that even though the material presented in the half-time show was "perfectly appropriate for other ABC programming, [it] was inappropriate for inclusion in the telecast of a sporting event."[163] ABC sought to characterize the war hero half-time show as mere military pagentry that at most made an implicit reference to a public issue during a statement that was ancillary to the program. The Commission upheld ABC's position, stressing that because the point of view expressed by the Student Association had been given ample coverage on other ABC programming, the Student Association's claim for a personal right of access could be denied.[164] Although the content of what the Student Association decided to express in its half-time show might have been given extensive coverage in other formats, what was important in the students' statement was the expression of the message in the context of a football game, rather than the content of the message itself. It was, by ABC's admission, the association of football with an anti-war position that caused the network to be fearful of alienating its sponsors' customers. In other words, there may be a strong resistance against associating football, often projected as "manly," "brave," "violent" and "patriotic," with the anti-war position which is projected as being "unmanly," "unbrave," and "unpatriotic." Yet, this very type of resistance may be the source from which "robust, wide open debate" springs, as the dissonant marriage of football and anti-war symbolism was more likely to shake many out of their apathy than any series of well-reasoned speeches. This, as the Commission's holding for the network illustrates, cannot be achieved by the fairness doctrine alone.

It must be emphasized that the decision in *Student Association* is unfortunate not because it sanctioned ABC's censorship of the students' half-time presentation, but rather because it deprived the viewing audience of exposure to vigorous expression from an antagonistic source. Although a student association can have no general right to be granted access to disseminate its views, a viewing audience was here shielded from the anti-war view's most strident manifestation. If the network shows non-controversial half-time shows while refusing to carry those it deems to be potentially offensive, a distorted image is

---

cial Advertising and the Fairness Doctrine: The New F.C.C. Policy in Perspective, 75 Colum L Rev. 1083, 1085-86 & n.30 (1975).

163. 40 F.C.C.2d at 512.

164. Id. at 516-17.

conveyed, and a disservice is done to the viewing audience for which the fairness doctrine affords no remedy.

Ultimately, whenever a licensee chooses to broadcast a football game, a live theatrical performance, or a community group meeting, it has voluntarily relinquished part of its control over the content of its presentation, and should not be allowed to take back what it has yielded solely because it objects to what is being expressed on a particular occasion. If this practice were established, the licensee would continue to be free to decide which football game or which play to show on any given week, and this decision would not be subject to any challenge, even if it could be clearly shown that it was taken for the sole purpose of denying access to unpopular ideas.

What of the question of public access in areas of programming where the licensee has not voluntarily relinquished any of its control? Here again, the primary concern of the Communications Act is to serve the public interest, not to provide a public forum for any given individual to present personal views. Although too much access would undermine effective use of the airwaves by promoting the very chaos which the Act was designed to avoid, no access at all can deprive the public of exposure to "those 'views and voices' that are novel, unorthodox, or unrepresentative of prevailing opinion."[165] The fairness doctrine itself is not triggered before a viewpoint on a given issue has been expressed, so that it cannot insure presentation of all opposing viewpoints. Therefore, some form of limited access might appear to be in furtherance of the public interest.

The enactment of a plan of limited access, however, would present thorny practical problems. It is doubtful that broadcasters would voluntarily grant access to proponents of unorthodox or novel viewpoints, since to do so would not contribute to broadcaster profits, and might alienate significant segments of the viewing audience. Moreover, since not every viewpoint could be given broadcast time, a process of selection would still have to be devised. Finally, if access were granted to unorthodox groups, it is entirely possible that interest among the public audience would be so low that the entire project might become a costly waste of time.

IV. The Philosophical Appraisal of Fairness

A. *An Appraisal of the Present Scheme of Regulation*

At the very least, we have seen that the establishment and maintenance of a positive freedom of expression—the freedom for all ideas of

165. 412 U.S. at 190 (Brennan, J., dissenting).

public importance to be expressed over the airwaves—entails difficult problems, unknown and unforeseen by proponents of a marketplace of ideas grounded solely upon a negative freedom of expression. Indeed, a regulated balance of interests cannot be achieved with the smoothness and economy of means exhibited by the model of a self-regulating marketplace, where the public or common interest is presumed to be served by an unobstructed clash of divergent private interests.

In the self-regulating marketplace model each individual is free to express his views in pursuit of his own interests, because truth—those views useful in promoting the progress which leads to the greatest happiness for the greatest number—is thought to emerge from the uninhibited debate among all points of view. Thus, under the self-regulating model, the expression of an individual view serves both the private interests of the speaker and the public interest, regardless of whether society's adoption of the view expressed would itself be in the public interest. Even if the adoption of a given individual view would harm the public interest, the public debate of the view in question would nevertheless benefit the public interest, for example, by sharpening the import of an opposed view. The individual interest services the public interest even if the two interests do not coincide, and whether or not the individual interest sought to be advanced is ultimately frustrated. Therefore, if the public interest is best served by each individual's pursuit of his private interests, the marketplace of ideas that provides negative freedom of expression is a most efficient mechanism.

By contrast, although the regulatory model of the broadcast spectrum is predicated on the same belief that truth will emerge from robust and uninhibited debate on issues of public importance, it cannot function without curtailing at least to some degree the opportunity of all who wish to participate. If members of the public cannot be given unrestricted access to the airwaves, broadcasters cannot be allowed to operate without any constraints, lest their views monopolize the air. Government cannot select the views to be presented over the air, even in a disinterested and impartial way, without violating the first amendment. Under these circumstances, the regulatory scheme which underlies positive freedom in broadcasting must encounter substantial difficulties, since it often operates in opposition to the individual's inclination to promote his own private interests. Moreover, not only does the regulatory scheme curtail the broadcaster's freedom to pursue his own interests, but it also charges him with the responsibility of determining the interest of the public and to act in accordance with it. This responsibility, in turn, often presents the broadcaster with a conflict of interest, aggravated by the imprecise boundary between his

role as a journalist and his role as a trustee. Whenever the government is motivated to conceal embarrassing information, it will face a conflict with its duty to protect the public's right to know through proper regulation. Broadcasters have asserted that the fairness doctrine is a means used by the government to pursue a course of supervision by the "raised eyebrow,"[166] thwarting the broadcast journalist's inclination to engage in the vigorous and often controversial reporting of his newspaper counterpart. Finally, at least in the opinion of Newton Minow, former chairman of the FCC, the public interest in broadcasting is not what interests the public—not what the public wants—but presumably what will enlighten the public and enable it to choose among competing alternatives.[167]

Despite the conceptual difficulty of defining the boundaries of the conflicting interests to be served, and the practical difficulties of finding an efficient scheme of regulation, the regulatory scheme that arises from implementation of a "positive freedom" can be defended if the benefits it brings to the marketplace of ideas outweigh the restraints it imposes on those it affects. Indeed, all positive freedoms must require some sacrifice of freedom, which is justified if the sacrifices are clearly outweighed by the newly gained freedom. Hence, if the fairness doctrine preserves free flow of ideas over the airwaves, the interests adversely affected by its application will not tip the balance in favor of its repeal.[168] This is particularly true since even under the alternative laissez-faire model, no effort is to be made to promote the realization of individual interests once the ideas offered in their support have been freely introduced into the marketplace of ideas.

The analysis of the fairness doctrine seems to imply that the regulatory scheme has failed in its attempt to establish a free marketplace of ideas over the airwaves. This failure is perhaps most sharply brought into focus in *Brandywine* and *San Francisco Women For Peace.* These cases demonstrate that the requirement of "balance" actually promotes conformity and non-controversy, and that any application of a "reasonableness" standard to determine whether a given issue is controversial almost inevitably will make it impossible for administrators to avoid an inquiry into the content of broadcast material.

Since the requirement of balance does not come into play until one

166. See Mickelson, "The First Amendment and Broadcast Journalism," in The First Amendment and The News Media, Final Report of the Annual Chief Justice Earl Warren Conference on Advocacy in the United States, June 8-9, 1973, at 54. Cf. Robinson, supra note 42, at 137.

167. N. Minow, Speech Before the National Association of Broadcasters, quoted in A. Gewirth, Political Justice, in Social Justice 164 n.50 (R. Brandt ed. 1962).

168. See T. Emerson, The System of Freedom of Expression 663 (1970).

side of a controversial issue has been presented,[169] broadcasters can to a large extent avoid the trouble of seeking out spokesmen for controversial viewpoints, and thus minimize the risk of alienating any significant segment of their audience, by refraining from presenting any side of a controversial issue. As long as the broadcaster endeavors to present a certain minimum of controversial subject matter, lest he risk losing his license at renewal time, he remains free to pursue his economic goal of maximizing profits by appealing to the widest possible audience through bland and inoffensive programming.[170] On the other hand, a broadcaster who decides to flood his frequency with controversial programming assumes a heavy burden to meet the balance requirement, and may lose substantial advertising revenue as well. Moreover, if a broadcaster's own views are unpopular and offensive to the majority, he may find it particularly difficult to achieve balance.[171] In sum, the requirement of balance blends well with the broadcaster's economic interest in promoting blandness and conformity over the air. Thus, the regulative scheme fails to provide adequate protection for unpopular ideas, while enabling non-controversial and generally accepted views to flow unhindered. Accepted views go unchallenged, while disputed ones can be stated only if adequate provision is made for their subsequent negation. Needless to say, this is hardly what Mill envisaged for a free marketplace of ideas.[172]

Our examination of the definition of "controversy" revealed that administrative decisions in the area could not be entirely divorced from a subjective assessment of the issue under consideration. Where the Commission finds that the licensee was unreasonable in asserting that a given statement was not controversial, it must be shown that a balancing view was presented. If the Commission holds that the licensee's determination was "reasonable," no counter-statement need enter into the marketplace of ideas. Whichever result the Commission reaches, it exerts control over the flow of ideas, thereby affecting the nature and scope of the marketplace of ideas. The regulatory scheme meant to provide positive freedom of expression restrains not only freedoms other than expression, but operates to restrict freedom of expression itself. The regulative scheme gives government a role in the selection of those viewpoints which are granted access to the marketplace of ideas, though it does not operate to the systematic exclusion of any particular view. However, if Mill is right, and government

169. Geller, supra note 126, at 66.

170. This is especially true in the context of television, where a few network-dominated channels compete for the attention of the general public.

171. See notes 97-101 supra and accompanying text.

172. See notes 26-29 supra and accompanying text.

represents the public opinion of the mass which supports it, then the government's affirmative input is much more likely to err on the side of conformity than on the side of increased debate.

Mill's belief that independent thought is desirable[173] was predicated on the assumption that novel and unorthodox ideas often have the force necessary to awaken slumbering individuals from the tyranny of custom, forcing them to use their mental faculties. Eccentricity itself is as much a matter of form as a matter of substance, since an old idea may find new vigor when presented in an unorthodox context.[174] Thus, although a free marketplace of ideas could undoubtedly be enriched by the introduction of novel and unorthodox expression of old ideas as well as by expression of new ideas, the operation of the fairness doctrine does little to encourage either. The regulatory scheme makes broadcast of novel and unorthodox views of any sort quite unlikely.

The exclusion of eccentricity of form was best illustrated by *Student Association,* where the fairness doctrine requirements of balance failed to temper the broadcaster's self-interest in keeping potentially offensive and shocking material off the air. In general, the broadcaster can satisfy his obligation to provide balance after one side of a controversial issue has been stated by airing the views of some representative spokesman for the "other side," thereby reducing complex and multifaceted issues into "two sides." The broadcaster, in selecting the format and the speaker for the "other side," can avoid the most forceful expression of an unpopular view when he disagrees with it, or when he fears that giving it airtime may run counter to his pecuniary interests. Since dissonant notes are more likely to offend the collective ears of the audience, the broadcaster has a strong incentive to keep the debate low-keyed and dull.

The exclusion of novel and unorthodox ideas is the result of several factors, among which can be counted the requirement of balance, and the fact that the fairness doctrine comes into operation only after "one side" of a controversial issue has been put over the air. However, we should not overlook the fact that the fairness doctrine is limited in application to controversial issues of *public importance.* At first sight, this requirement might seem appropriate, since it would seem ill-advised to glut the scarce airwaves with controversial matter of mere private importance. On closer analysis, however, this requirement contributes significantly to the exclusion of novel and unorthodox ideas be-

173. On Liberty, supra note 3, at 196.

174. See text accompanying notes 163-64 supra.

cause under the fairness doctrine, a controversial issue that addresses matters of a public nature is not deemed one of public importance if it fails to seem important to the public. Thus, if a view overwhelmingly accepted by a great majority of the public is stated over the air, and this view stands in opposition to the view held by an insignificant minority, the view of the latter need not be given time over the air, since the controversy is not one of public importance. Atheist[175] and Communist[176] views have been kept off the air on this ground because the Commission estimated that what their advocates had to say was not important to the public, even though the public had heard attacks on the positions held by those advocates. From this, it would seem to follow that novel and unorthodox views of public importance which do not appear important to the public must almost inevitably fall victim to the tyranny of public opinion, and be suppressed.

Certainly, the marketplace of ideas over the airwaves bears little resemblance to the original model it was supposed to emulate. The fairness doctrine emerges less as a guarantor of full and uninhibited debate than as an often unaware protector of public opinion, carving an unobstructed path for the middle ground of mediocrity while obstructing the path of the unconventional and the novel. The purported positive freedom it creates is at best but half a freedom, imposing sacrifice upon the interests of many, yet failing to open the medium to all views of public importance.

B. *Evaluation of Possible Alternatives*

Having concluded that the present scheme of regulation fails to preserve a genuine free marketplace of ideas over the airwaves, it becomes necessary to determine which possible alternative will best serve to approximate the ends sought by Mill. Once it is assumed that Mill's model cannot work in the electronic media, we can attempt to determine whether a "positive" or "negative" model for freedom is best suited to serve the public interest while straying least from the ultimate objective of a full and vigorous debate of ideas.

Although current practice falls far short of the explicit purposes which the administrative scheme was designed to serve, this fact does not by itself mean that no "positive" scheme whatsoever can accomplish the task of preserving the free flow of ideas over the airwaves. The failure of a practical scheme to secure a "positive" freedom need

175. Robinson, supra note 42, at 133.
176. Healey v. FCC, 460 F.2d 917 (D.C. Cir. 1972).

not affect the ultimate possibility of attaining such a freedom through better suited means.[177]

Unfortunately, no practical solutions can be envisaged in the case of broadcasting. Indeed, even if one were to assume that the ends are clearly defined (*e.g.*, presentation over the air of all viewpoints on issues of public importance), and that the means are readily available (*e.g.*, all individuals who hold views on matters of public importance are within the broadcaster's reach, and are willing to cooperate), it would still be impossible to devise an adequate scheme for the adoption of the means to the ends, or to find an objective criterion whereby the success of the program could be satisfactorily measured. Indeed, since the process of adapting the means to the end must necessarily involve the selection of some views to the exclusion of others, someone (or some group of individuals) will have to decide which view is, and which is not, deserving of access into the medium. And no matter who this someone turns out to be, he will not be able to discharge his responsibility without making a value judgment for which no objective criteria are available.[178] Moreover, even if it is assumed that the medium can accommodate all viewpoints and that the process of adaptation of the means to the end is to be limited to the selection of one among all spokesmen for the same viewpoint, there would still be a need for subjective evaluation, and the role played by such infusion of a subjective element into the administrative process could be important (*e.g.*, the different impact which the statement, "The President should be impeached," could have depending upon whether it were

---

177. Thus, for example, if a current scheme devised to provide welfare assistance to the needy is inefficient either because it is structured in such a way that funds are wasted, not readily available for the intended beneficiaries of the program, or because it is corruptly or ineffectually administered, it is plain that these problems could be solved (e.g., by restructuring the administrative process along lines more suitable for the eventual distribution of all available funds to those for whom they were intended). Where the ends of the program are clearly defined (e.g., to give a certain amount of monetary help to people falling within certain precisely circumscribed categories), where the means are available (e.g., the money set aside for the program), where the adoption of the means to the ends poses no theoretical problems (e.g., it is simply a matter of putting the available funds into the hands of intended recipients), and where there exists a simple objective criterion to determine whether the ends of the program are being reasonably fulfilled (e.g., statistics showing how much of the available money is being distributed, and to whom it is being given), problems of administration are reduced to practical considerations of efficiency which eventually lend themselves to practical solutions.

178. In fact, if such objective criteria did exist, there would be no need for a free marketplace of ideas, and the broadcasting medium could fulfill its obligation to the public by simply presenting those views which had objectively been determined to be worthy of presentation for the common good.

uttered by a known communist or a nationally respected clergyman). Ultimately then, no positive freedom can create a genuinely free marketplace of ideas over the airwaves, since no administrative procedure can conceivably adapt the available means so as to generate a free flow of ideas, without by the same token altering the end result which it seeks to attain. In other words, no free flow of ideas can be obtained by means of a procedure that is incapable of operating without altering the flow of ideas. Even if the element of subjective evaluation were removed, as where a lottery of ideas were held to determine entry into the airwaves, this new flow of ideas would not be equivalent to that which emerges from the exchange of views in the society at large.

That the lifting of all governmental regulations pertaining to broadcast content would restore a free flow of ideas over the airwaves is a proposition that might be advanced by one who feels that the scarcity of available broadcasting outlets—which gave rise to regulation in the first place—is a thing of the past. Proponents of negative freedom for broadcasters cannot claim that simply because there are now more broadcast outlets than daily newspapers in the United States, vigorous debate would increase significantly if the inhibitions brought about by government intervention were removed. Without presently deciding whether continued regulation or repeal of all regulation would better serve the public interest, it should be pointed out that in spite of the proliferation of broadcasting outlets, negative freedom cannot realistically be presently expected to fulfill the promise of a free flow of ideas over the air. In the first place, the end to scarcity of channels promised by the development of cable television is still in the future,[179] and hence is not a significant factor for present consideration. Moreover, the comparison of television outlets with daily newspapers does not, under more careful scrutiny, lead to the conclusion which a proponent of negative freedom might wish to draw. Quite to the contrary, the concentration of ownership of the broadcasting industry[180] shows that negative freedom is no more capable than positive freedom of bringing about the realization of a genuinely free marketplace of ideas over the airwaves.

---

179. Baxter, Regulation and Diversity in Communications Media, 64 Am Econ Rev 392, 396 (1974).

180. The potential for diversity and competition among broadcast channels is greatly limited by concentration of ownership. See Howard, Multiple Broadcast Ownership: Regulatory History, 27 Fed. Com. B.J. 1 (1974); Johnson, Freedom to Create: The Implications of Antitrust Policy for Television Programming Content, 1970 L. & Soc. Order 337, Johnson & Hoak, Media Concentration: Some Observations on the United States' Experience, 56 Iowa L. Rev 267 (1970), Lago, The Price Effects of Joint Mass Communication Media Ownership, 16 Antitrust Bull. 789 (1971)

Having seen that Mill's model cannot succeed in the electronic media, and keeping in mind the first amendment assumption that the widest possible dissemination of information is essential to the public's welfare, one can decide which of the available alternative courses of action would best serve the interests of the broadcasting public, while ensuring as full and as vigorous a debate of ideas as possible. The range of possible alternatives covers a spectrum ranging from the abolition of all regulation to the reduction of the broadcaster to little more than a common carrier. Some possibilities are to grant broadcasters the same freedom that is enjoyed by the printed press; to preserve the present scheme of regulation; or to supplement or replace the fairness doctrine with a right of public access to the airwaves which, if substantial, could significantly reduce the broadcaster's control over the operation of his station.

Even though concentration of ownership in the broadcasting industry promises less than full debate over the airwaves, the abolition of all program regulation would perhaps be the best course to adopt if it were proven more conducive to uninhibited debate than the present regulatory scheme. To be sure, government regulation poses some risks of censorship, and can at times inhibit broadcast journalism's capacity to investigate controversial issues.

On the other hand, if broadcasters were left free to pursue their own interests, they would most likely avoid controversy. There is little doubt that for commercial broadcasters, broadcasting is above all a means of making money. "Broadcasters are essentially people who sell time to advertisers,"[181] and therefore their principal concern must be to line up the biggest possible audience to which the advertiser can deliver his message. The broadcaster's true role may be to operate for profit while maintaining the appearance of operating in the "public interest," even though this conflicts with what can be considered the public interest.

Replacing the fairness doctrine with a right of public access would ensure the over-the-air appearance of voices whose self-interest would not necessarily lie in the avoidance of controversy. This approach could result in an increase in diversity, by permitting new voices, not presently heard, to make their appearance over the airwaves. Moreover, such a course of action would measurably decrease the government's role in broadcasting by relegating its responsibility to that of assuring that broadcasters make their facilities available when

181. Barron, supra note 20, at 311.

appropriate. One major difficulty, however, is to determine how much public access should be allowed in the best interests of the viewing public. If only a token of public access is required, over-the-air debate of controversial issues could become insignificant. If too much access were imposed, other uses of the medium might be crowded out. Even if it is assumed that a proper balance can be struck so that the maximum public debate compatible with the effective use of the airwaves can be achieved, the problem of finding a procedure guaranteeing a fair selection from among groups competing for access would still be unresolved.

Notwithstanding the serious problems which each leaves unresolved, the choice between "fairness" and "access" can be narrowed, in the last analysis, to the determination of whether the predominant function of broadcasting should be to promote *inter-group* communication. If "access" is chosen over "fairness," it is likely that an increasing number of views will find their way over the airwaves, and as new outlets become available, new voices will be heard. But as this takes place fewer listeners will be available for each new entry into the marketplace of ideas. Eventually, with a modern society's tendency to overspecialize, and the increasing trend of isolation of specialist groups, members of a group will almost exclusively speak to other members of the same group, severely limiting if not practically eliminating communication between persons of different professions, different beliefs, or different political convictions. Hence, carried to its logical conclusion, the choice of "access" over "fairness" might well lead to the use of broadcasting as a means of communication between scientist and scientist, radical and radical, lawyer and lawyer; leaving the remaining issues of common interest in the hands of profit-oriented networks dedicated to the presentation of mindless banalities.

In the long run, "fairness" emerges, in spite of all its shortcomings, as the best available means of insuring public debate over the airwaves. To be sure, its limitations are manifold, and its potential use for the suppression of new and unorthodox views is a continuing threat. It is unfortunate that the FCC has rejected suggestions that fairness be supplemented by a limited right of access, especially in counteradvertising and other areas where broadcasters' journalistic interests are weak. As a further measure, it might be useful to require broadcasters to adhere strictly to their affirmative obligation to offer programming dealing with controversial issues. To eliminate the inherent arbitrariness built into the FCC's operating procedures, and to reduce the government's role in the day-to-day affairs of its licensees, it

would be advisable for the FCC to return to its pre-1962 practice of reviewing the overall performance of the licensee at renewal time.[182] With these modifications, the fairness doctrine could be the best alternative for preserving the public's interest in the exchange of divergent ideas.

An essential philosophical point remains to be considered. Throughout this Article, I have attempted to discover some of the aspects of freedom by drawing a comparison between present reality as shaped by the fairness doctrine and Mill's model for freedom. I have concluded that his model cannot be duplicated in modern times, and that our best hope for freedom in the marketplace of ideas is only a half freedom by Mill's criteria.

What of the argument that access can eventually duplicate the model for freedom envisioned by Mill? Surely, as the number of broadcasting outlets increases, all voices wanting to be heard should be able to find an available outlet for their message. It must be remembered that freedom becomes a meaningful descriptive concept only when applied to precisely delimited socio-political and philosophical contexts.[183] Throughout this inquiry, I have sought to appraise freedom within the context of present-day American society, approaching modern reality from the standpoint of Mill's theory. This procedure seemed justified because of the striking affinities which underlie both present-day demand for a free marketplace of ideas and Mill's plea for freedom of expression. Indeed, both Mill and American constitutional interpretation share the view that it is the individual who must be the *subject* of freedom, that he must be *free from* the imposition of restraints which could curtail his ability to express his ideas, and that he must be *free to* exchange his ideas with others in order to enrich his mental capacities and thereby contribute to the formulation of the common good. Underlying this view of freedom is the implicit assumption that the individual is possessed of the means necessary to engage in a fruitful exchange of ideas. In other words, for freedom to be more than a hollow illusion in this context, it is both necessary that individuals have access to information, and that they be capable of absorbing information made available to them. Mill underscored the importance of individual access to information by proposing "the greatest possible centralisation of information, and diffusion of it from the centre,"[184] and warned that concentration of power combined with

182. As suggested by Geller, supra note 126, at 48.

183. See notes 11-15 supra and accompanying text.

184. On Liberty, supra note 3, at 248.

too little information would isolate the individual while allowing the state to "dwarf its men."[185] Paradoxically, today's individual runs perhaps a greater risk of being dwarfed by too much information which he cannot hope to absorb, than by a lack of access to available information. Indeed, while it is true that concentration of power in government and the private sector can lead to concerted efforts to conceal information from the public, it is nevertheless also true that the average citizen has never before had such an opportunity to become exposed to the multiple sources of information that are available today. If the average individual remains isolated and dwarfed it is primarily due to the increased specialization required by the ever more complex organization of modern society, which demands that its members devote most of their efforts to learning more and more about smaller component parts of the whole structure. As areas of specialization become more remote from one another, inter-group communication tends to decrease, while intra-group communication tends to establish jargons which are incomprehensible to the outsider. In sum, as increasing specialization eliminates the remnants of Renaissance man, individuals can have all the available information at their disposal, and yet remain in utter isolation from one another because they cannot understand each other.

As the dangers of too much incomprehensible information, coupled with concentration of power in the hands of experts, become increasingly threatening to individual freedom, it can be easily understood why fairness is, in the last analysis, more suited than "access" to serve the ends suggested by the spirit of Mill's doctrine. Indeed, fairness alone guarantees some measure of inter-group communication, and provides some incentive for experts to translate their jargon into plainer language so that they can be understood by the large audience which they can reach. Moreover, by requiring that opposite views be balanced, fairness reduces the risk of brainwashing by one-sided presentations which the public might not otherwise suspect. Although pro and con presentations of highly complex issues carry with them an inherent risk of oversimplification and distortion, this need not operate against the public interest if the distortions are neither substantial nor misleading. Actually, oversimplification may often serve as a means of conveying the main issues which emerge from complex and seemingly puzzling problems, allowing the public to be a party to important debate much as a jury is involved in the adversary confrontation of a trial. Thus, in the long run, the public interest in broadcasting appears

185. Id. at 250.

better served by a half freedom which disseminates debate of the crucial issues which affect the whole society, than a full freedom which brings all ideas to all individuals, but which by the same token fails to provide a common forum for mutual debate and mutual comprehension.