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## Columbia Broadcasting: Public Access to the Media Denied

In *Columbia Broadcasting System v. Democratic National Committee*<sup>1</sup> the Supreme Court attempted to resolve the conflict between public access to the media and journalistic freedom in the field of electronic communication. This conflict emerged during the mid-1960's as groups of citizens sought to combat the presentation of views by an increasingly centralized press with a novel constitutional theory. In contrast to the traditional negative theory, based on the first amendment's prohibition of laws which abridge freedom of speech, the proponents of access urged a positive approach. Since the established media no longer provided an adequate outlet for dissonant minority views, the public needed *access*, a right of entry into the marketplace of ideas. Without this right, the argument concluded, effective speech was denied. Concededly, acceptance of this view would break hallowed constitutional traditions and restrict the independence of the media. Thus, the irony quickly materialized: if a constitutional right of access was to become a reality, some of the constitutional protections of the newspaper publisher and the broadcast licensee would have to yield to the public's demand for a more effective forum.

Those who proposed greater media access encountered various judicial responses to their constitutional claims. The theory gained acceptance in certain areas, but generally the courts failed to discern the requisite state action in the editorial decisions of electronic journalists to summon the demands of the first amendment.<sup>2</sup> In line with these lower court decisions, the majority in *Columbia Broadcasting* held that a broadcast licensee may refuse to accept editorial advertisements (advertorials)<sup>3</sup> without violating

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1. 412 U.S. 94 (1973).

2. Over two decades ago two lower court decisions refused to grant a right of access to the air waves because private broadcaster conduct did not adequately involve the government to require application of the first amendment. The opinions indicated that each court struggled with the problem of applying restraints to a segment of the press, and finally refused to do so on the grounds of insufficient governmental involvement. *McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945); *Massachusetts Universalist Convention v. Hildreth & Rodgers Co.*, 183 F.2d 497 (1st Cir. 1950); *accord*, *Post v. Payton*, 323 F. Supp. 799 (E.D.N.Y. 1971).

3. The term "advertorials" first appeared in 85 HARV. L. REV. 689, 692 (1972), in a casenote discussion of *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom.* *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), to describe non-commercial advertisements aimed at propagating a view on a controversial issue.

either his statutory duty to serve the public interest or the first amendment. The Court agreed with the appellants, the Federal Communications Commissions (FCC) and major representatives of the industry it regulates, and rejected the argument urging a constitutional right of access to the airwaves. It relied instead on the FCC's fairness doctrine as sufficient to protect first amendment values.

As an alternative to a constitutional right of access, the appellees in *Columbia Broadcasting* argued that a statutory foundation for access was implicit in the public interest standard of the Communications Act. This argument also faltered, however, as the Court again pointed to the fairness doctrine as the historical FCC approach to satisfaction of the public interest. Over the past two decades this doctrine has become an increasingly important broadcaster obligation, and now in the wake of the *Columbia Broadcasting* opinion, it is inextricably intertwined with access. Consequently, appreciation of the recent decision requires not only a background in the development of access, but also an overview of the fairness doctrine.

### 1. *The Fairness Doctrine*

The Communications Act of 1934,<sup>4</sup> the legislation controlling the federal government's regulation of the broadcasting industry, mandates that those who utilize the public airwaves provide full and fair coverage of public issues through the presentation of conflicting views on controversial issues. This obligation of fairness developed as the need for governmental management of the scarce electronic spectrum evolved into a statutory attempt to force the communications industry into serving the public interest.

Federal regulation was first imposed because the industry's lack of standards had resulted in a "cacophony of competing voices" clogging the public airways, "none of which could be clearly or predictably heard."<sup>5</sup> Through the FCC, and its predecessor, the Federal Radio Commission,<sup>6</sup> Congress sought to bring order to the electronic media by supervising the allocation of broadcast frequencies among qualified applicants.<sup>7</sup> In performing this function, the FCC requires that licenses would be granted only when the public interest, convenience, or necessity would be served. This rule has been broadly interpreted<sup>8</sup> to require each licensee to be responsive

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4. 47 U.S.C. §§ 7-744 (1971) [hereinafter cited as Communications Act].

5. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969). See also 60 GEO. L.J. 871, 1032 (1972).

6. The FRC was established by Congress in ch. 4 of the Radio Act of 1927, 44 Stat. 1162, and was transformed into the FCC by the Communications Act.

7. 47 U.S.C. §§ 307, 309 (1971).

8. Because, "[N]o clear expression on congressional intent regarding the fairness obligations of broadcast licensees exists in the legislative history associated with the

to the needs of the community it serves. In an early decision, the FCC defined the "public interest" obligation as "[giving] ample play for the free and fair competition of opposing views . . . [on] all discussions of issues of importance to the public."<sup>9</sup>

The FCC assumes wide discretionary authority under the public interest standard. It has denied licenses<sup>10</sup> and construction permits,<sup>11</sup> banned editorials<sup>12</sup> and promulgated chain broadcasting regulations.<sup>13</sup> The chain broadcasting orders were challenged by a broadcasting network in *National Broadcasting Company v. United States*.<sup>14</sup> In that case, the Supreme Court upheld the FCC's authority to use the "expansive"<sup>15</sup> power found in the Communications Act to devise remedies to insure that the public interest would be protected against the national networks' attempt to dominate local radio programming. This judicial declaration of the FCC's "comprehensive powers to promote and realize the vast potentialities of radio"<sup>16</sup> has become the touchstone for the development of rules which impose affirmative obligations on broadcasters to balance program content.<sup>17</sup>

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passage of the [Communications] Act," the FCC has had to interpret the public interest mandate. Note, *Fairness Doctrine: Television as a Marketplace of Ideas*, 45 N.Y.U.L. REV. 1222, 1224 (1970).

9. *Great Lakes Broadcasting Co.*, 3 FRC ANN. REP. 32, 39 (1929), quoted in *Red Lion*, 395 U.S. at 377.

10. *Trinity Methodist Church, South v. FRC*, 62 F.2d 850 (D.C. Cir. 1932).

11. *Young People's Association for the Propagation of the Gospel*, 6 F.C.C. 178 (1938).

12. *Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 340 (1940).

13. *Report on Chain Broadcasting*, FCC Order No. 37, Docket 5060 (May, 1941).

14. 319 U.S. 190 (1943).

15. *Id.* at 219.

16. *Id.* at 217.

17. The FCC has used the *National Broadcasting* holding to back up some of its most controversial rulings. See generally, Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701 (1964).

Less than four months after the Supreme Court handed down that decision, the FCC cited its chain broadcasting regulation to support a broad ruling that a licensee may not, as a general policy, deny all paid time for discussions of controversial issues. *Radio Corporation of America*, 10 F.C.C. 212, 213 (1943). It required applicants for licenses to "refrain from adopting any restrictions which will automatically rule out certain types of programs." According to some, this proceeding was significant because "it recognized for the first time an affirmative obligation on the part of the licensee to broadcast controversial issues." 60 GEO. L.J. 1032, 1035 (1972). Three years later, in a lengthy 1946 memorandum, familiarly known as the Blue Book, the FCC promulgated guidelines for adequate programming, *Public Service Responsibility of Broadcast Licensees*, reprinted in DOCUMENTS OF AMERICAN BROADCASTING (Kahn ed. 1968). These guidelines have given way to a formal FCC ruling that broadcasters must devote certain percentages of their time to specified categories of programs. 20 P & F RADIO REG. 1901 (1960). Most recently, the FCC "prime time access rule" has limited network-provided programs to three hours a weekday night. 23 F.C.C.2d 382 (1970).

The courts have also used the *National Broadcasting* holding to justify FCC rules and regulations. See, e.g., *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953);

A 1949 FCC report, *Editorializing by Broadcast Licensees*,<sup>18</sup> marked the beginning of an official statutory framework, known as the fairness doctrine, which imposes the obligation of comprehensive coverage of public issues on the broadcaster as an integral part of the public interest standard. The report enumerated the twofold duty of the licensee to devote a reasonable percentage of time to public issue broadcasting, and to insure that during such programming the public had a reasonable opportunity to hear conflicting positions on the issues. These limitations on the freedom of the licensee are accepted as the price necessary to "make possible the maintenance of radio as a medium of free speech."<sup>19</sup> The report gave the licensee the right to express its own opinions on the air as long as it made "reasonable effort(s) to provide a balanced presentation of comment and opinion on such issues."<sup>20</sup> Ten years later, Congress accepted the validity of the *Editorializing Report* balancing requirements by specifically applying the fairness doctrine to the broadcast of editorials for political candidates through an amendment to Section 315(a) of the Communications Act.<sup>21</sup> Congress provided, however, that this action did not narrow the licensee's duty to fulfill public interest requirements as interpreted by the FCC.<sup>22</sup> The FCC has ruled that the presentation of conflicting views on issues of public importance must be done at the broadcaster's expense if sponsorship were unavailable<sup>23</sup> or must be produced by the broadcaster itself if necessary.<sup>24</sup> In addition to an overall evaluation of the balance of a licensee's general new programming at license renewal time, the FCC, in a public notice reviewing the scope of the fairness doctrine, listed three areas in which it would apply the doctrine:<sup>25</sup> (1) personal attacks,<sup>26</sup> (2) ex-

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Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 (1969); *Banzhaf v. FCC*, 405 F.2d 1082, 1093-94 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

18. 13 F.C.C. 1246 (1949).

19. *Id.* at 1250.

20. *Id.* at 1255.

21. Act of Sept. 14, 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557, *amending* 47 U.S.C. § 315(a) (1958) (codified at 47 U.S.C. § 315(a) (1971)).

22. 47 U.S.C. 315(a) (1971) reads in part,

Nothing in the foregoing sentence 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 obligations 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.

23. *Cullman Broadcasting Co.*, 25 P & F RADIO REG. 895 (1963).

24. *John J. Dempsey*, 6 P & F RADIO REG. 615 (1950).

25. 29 Fed. Reg. 10415 (1964).

26. When the controversial view expressed consists of a personal attack on the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall offer a reasonable opportunity to respond over the licensee's facilities. 29 Fed. Reg. 10420 (1964) (codified at 47 C.F.R. §§ 73.123(a), .300(a), .598(a), .679(a) (1970)).

pression of a partisan positions by non-candidates,<sup>27</sup> and (3) presentation of views on current issues in the context of entertainment programming.<sup>28</sup>

Broadcaster dissatisfaction with the fairness doctrine limitations on their freedom of speech culminated in *Red Lion Broadcasting Company v. FCC*.<sup>29</sup> In *Red Lion*, a licensee challenged the constitutionality of the fairness doctrine and its corollary personal attack rules.<sup>30</sup> The FCC had required a licensee to make reply time available to an author insulted by a fundamentalist minister during a radio program. A unanimous Supreme Court<sup>31</sup> held that the regulations comprising the fairness doctrine were within the scope of statutory authority given to the FCC to regulate broadcasting in the public interest,<sup>32</sup> and enhanced, rather than abridged, freedom of speech.<sup>33</sup> The Court reasoned that federal control of the airwaves by licensees necessitated treating them as public trustees.<sup>34</sup> Such a status allowed the government to require a licensee to share its allotted frequency with others whose opinions of importance to the community might go unnoticed if the licensee had absolute control over the broadcast of all opinions.<sup>35</sup> While the Court could have rested on this statutory justification of the fairness doctrine, the Justices went on to hold that the public's first amendment right to free and open debate on public issues is paramount to the licensee's right to broadcast its own views.<sup>36</sup> Significantly, the Court found the fairness doctrine, an imposition of public obligations on the electronic press, consistent with the intent of the first amendment. According to those who proposed increased public access, *Red Lion* laid the foundation for a constitutional right of public entry to the media.

## II. Access And The First Amendment

The constitutional theory that claimed a first amendment right of access to the media was first proposed by Professor Jerome Barron in 1967.<sup>37</sup> Grad-

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27. 29 Fed. Reg. at 10419.

28. *Id.* at 10418.

29. 395 U.S. 367 (1969).

30. 29 Fed. Reg. at 240 (1964).

31. Mr. Justice White wrote the 8-0 opinion in which Justice Douglas did not participate.

32. As part of the FCC's powers and duties the Communications Act provides that the FCC may, "from time to time, as public convenience, interest, or necessity requires . . . [m]ake such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of [the Act]." 47 U.S.C. §§ 303, 303(r) (1970).

33. 395 U.S. at 379-86.

34. *Id.* at 394.

35. *Id.* at 389.

36. The Court stated that "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." 395 U.S. at 390.

37. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L.

ually, the theory gained relatively wide acceptance by courts and commentators.<sup>38</sup> According to Barron, an anomaly exists in our constitutional law which protects the expression of the established media, but is indifferent to creating opportunities for individual expression. This anomaly allows the press to use its first amendment rights as a rationale for the repression of competing ideas.<sup>39</sup> He blames the situation on the Supreme Court's "romantic view" that truth will win out only if the free marketplace of ideas is unhampered by governmental intrusion.<sup>40</sup> Believing that the romantic view is an anachronism in the modern world, Barron would replace it with an approach that views the problem of access to media in the context of a technology which can defeat<sup>41</sup> or dampen<sup>42</sup> the free competition of ideas. This "contextual" approach would focus on access as an enhancement of free expression,<sup>43</sup> and not simply whether or not such a right would restrain

REV. 1641 (1967) [hereinafter cited as Barron].

38. Within four months of the article's publication Barron was cited approvingly in *Kissinger v. New York City Transit Authority*, 274 F. Supp. 438, 442 (S.D.N.Y. 1967), and *Wolin v. Port of New York Authority*, 392 F.2d 83, 93 (2d Cir. 1968), cert. denied, 393 U.S. 940 (1968); see notes 55-58 *infra*, and accompanying text. To date more than 15 courts have cited his thesis in problems of individual access to the electronic media.

Some commentators have criticized his article for taking the unprecedented position that newspapers may be subjected to far-ranging controls; see, e.g., Robinson, *The FCC and the First Amendment, Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 159 (1967). Most, however, have accepted the basic validity of his argument when applied to the electronic press. See e.g., Johnson and Western, *A 20th Century Soapbox: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574 (1971); Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931; Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863 (1970).

39. Barron 1641-42.

40. *Id.* at 1642. Barron believes this "romantic view" was articulated best in *Denis v. United States*, 341 U.S. 494, 584 (1951) where Justice Douglas stated that,

When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

41. *Id.* at 1644. Barron cites statistics showing that the number of American cities with competing daily newspapers declined from 689 to 87 between 1910 and 1954. This trend, due in part to the rising costs of producing and distributing a metropolitan newspaper, has caused papers to either collapse or combine with rivals. He quotes a commentator who feels the one-paper town allows the monopoly to suppress facts at its discretion.

42. Marshall McLuhan has observed that the very nature of modern media is at war with a point of view orientation. The electronic media, he contends, has mesmerized our society into believing the form the message is delivered is its most important quality and thus television is particularly ill-suited to the problem of making public issues meaningful. See generally H.M. McLuhan, *UNDERSTANDING MEDIA* (1964).

43. Barron argues that citizen expression has always been given more protection than the press' right to freedom of expression which "is not an absolute right, as is illustrated by *Associated Press v. United States*, 326 U.S. 1 (1945), holding that anti-trust laws are applicable to newspapers despite possible affect on speech], and

the press. The following judicial decisions, legislative history, and FCC proceedings represent the foundation from which Barron and later commentators developed the theory of a constitutional right of access.

#### A. Access to Appropriate Forums

The Supreme Court took up the problem of ensuring suitable access to appropriate forums for the communication of ideas more than thirty years ago. In *Hague v. CIO*,<sup>44</sup> the Court struck down ordinances which restricted speech in public parks. When applied, these laws abridged the union's right to effectively communicate with a relevant audience in an appropriate forum. More recently, this right to use public forums was expanded<sup>45</sup> to include such areas as privately owned streets and sidewalks,<sup>46</sup> shopping malls,<sup>47</sup> public schools,<sup>48</sup> and bus terminals.<sup>49</sup> Generally, the Court's decisions of the past decade emphasized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open . . . ."<sup>50</sup> Gradually, the constitutional emphasis shifted from the right to *speak*, to the right to both *speak effectively* and to *hear* the voices of public debate.<sup>51</sup> This theme was directed to broadcasting by Justice White in *Red Lion*: "It is the right of the viewers and listeners, not the

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to guarantee access to divergent, otherwise unexpressed ideas would so promote the societal interests underlying the first amendment as perhaps to outweigh the medium's claim." Barron 1655.

44. 307 U.S. 496 (1939).

45. The expansion of this "appropriate forum" concept progressed in *Local 590, Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) [hereinafter cited as *Logan Valley*], where the Court declared that, having opened his property for general commercial use by the public, the shopping mall owner could not ban protest activity related to the policies of one of his tenants. Four years later *Logan Valley* was severely limited by *Lloyd Corporation v. Tanner*, 407 U.S. 551 (1972) [hereinafter cited as *Lloyd*]. In *Lloyd* the majority affirmed a private property owner's right to prohibit first amendment activity on his property, but they expressly refused to overturn the *Logan Valley* holding that speech closely related to the primary purpose of the property itself may not be abridged by the owner or the government. 407 U.S. at 563-64. Applying this rationale to the "forum" of the electronic media it could be strongly argued that the very nature of the media is the business of communicating information to the public. First amendment activity seeking access to the airwaves could not, therefore, be denied under the *Lloyd* principle that such speech was not related to the primary purpose of the property.

46. *Marsh v. Alabama*, 326 U.S. 501 (1946).

47. *Logan Valley*.

48. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

49. *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1968); see n. 57 *infra* and accompanying text.

50. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

51. In *Time v. Hill*, 385 U.S. 374, 389 (1967) the court proclaimed, "Those guarantees [of freedom of the press] are not for the benefit of the press so much as for the benefit of all of us."



right of the broadcasters, which is paramount . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here."<sup>52</sup>

During the turbulent 1960's, several federal and state courts utilized the implications of the Supreme Court's "forum" decisions as a springboard to grant access to protestors seeking to publicize their dissent. In the first three cases, *Wirta v. Alameda-Contra Costa Transit District*,<sup>53</sup> *Kissinger v. New York City Transit Authority*,<sup>54</sup> and *Hillside Community Church v. City of Tacoma*,<sup>55</sup> demonstrators tried to purchase bus and subway advertising space that was readily available to commercial advertisers. They were refused access to the billboard of the vehicles by the municipalities because of an advertising policy that allowed only commercial advertising for the sale of goods and services. In each case the court found that the refusal sufficiently involved the government, and concluded that once the forum had been opened, discrimination based on speech content was constitutionally invalid.<sup>56</sup>

Two other cases, *Wolin v. Port of New York Authority*<sup>57</sup> and *In Re Hoffman*,<sup>58</sup> dealt with the right of protestors to have access to bus and railway terminals to communicate their opposition to the Vietnam war. Both the California Supreme Court and the circuit court found that the crowds, confusion and various commercial activities made transportation terminals appropriate public forums. The courts rejected the private owner's contention that they had simply opened their premises to the public for a "limited and specific purpose only, namely, for the use of the transportation facilities offered . . . ."<sup>59</sup>

### B. Access and Federal Regulation

Despite pronouncements on the right of access to public forums, these cases cannot be directly analogized to create a similar right of access to the broadcaster's microphone. Electronic communication is unique, presenting an inherent paradox in that although the press has been traditionally free from government interference, the electronic press must be regulated to make maximum use of the publically owned airwaves. The paradox is nowhere more apparent than in the statutory and regulatory attempts to deal with the question of access.

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52. 395 U.S. at 390.

53. 68 Cal. 2d 51, 434 P.2d 982, (1967).

54. 274 F. Supp. 438 (S.D.N.Y. 1967).

55. 76 Wash. 2d 63, 455 P.2d 350 (1969).

56. 274 F. Supp. at 443; 434 P.2d at 990; 455 P.2d at 354.

57. 392 F.2d 83 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1968).

58. 67 Cal. 2d 845, 434 P.2d 353 (1967).

59. *Id.* at 846, 434 P.2d at 354.

During the congressional debates on both the Radio Act of 1927 and the Communications Act of 1934, the legislators repeatedly refused to "put the broadcaster under the hampering control of being a common carrier and compelled to accept anything and everything that was offered him so long as the price was paid."<sup>60</sup> Although Congress sought to preserve the rights of private journalism for the electronic press,<sup>61</sup> it did create a limited right of access for political candidates.<sup>62</sup>

It was not Congress, however, that provided the most important impetus for the statutory right of access in *Columbia Broadcasting*. In 1945, the FCC promulgated a broad rule in a license renewal proceeding, *United Broadcasting Company (WHKC)*,<sup>63</sup> which intimated that at least limited access was a fundamental tenet of the public interest requirement of the Communications Act. When a union objected to a station's refusal to sell time, the FCC declared: "[T]he operation of any station under the extreme principles that no time shall be sold for discussion of controversial

60. 67 CONG. REC. 12504 (1926), quoted in *Columbia Broadcasting*, 412 U.S. at 106.

The public utility status imposed by 47 U.S.C. §§ 201-23 on telegraph and radio communications was proposed for broadcasting by Congressman Davis. See 67 CONG. REC. 5483 (1926), and 412 U.S. 94, 105 n.2.

The Committee on Interstate and Foreign Commerce in reporting out the bill that was to become the Radio Act of 1927 refused to include a provision making broadcast facilities open on a non-selective basis to everyone seeking to discuss public issues. See H.R. REP. NO. 404, 69th Cong., 1st Sess. 18 (1926) (minority report).

The House-Senate Conference deleted a portion of the Senate's proposed 1934 Communications Act that would have allowed a limited number of individuals to have personal access to the licensee facility to oppose any view broadcast concerning a public issue. See H.R. REP. NO. 1918 and S. REP. NO. 3285, 73 Cong., 2d Sess. 49 (1934) quoted at 412 U.S. 94, 108 n.4. Congress finally adopted Section 3(h) of the Communications Act. Section 3(h) provided as follows:

'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio or in interstate or foreign radio transmission of energy, except when reference is made to common carriers not subject to this chapter: but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

48 Stat. 1065, as amended 47 U.S.C. § 153(h) (1971).

61. See, e.g., § 326 of the Communications Act of 1934, as amended 47 U.S.C. § 326 (1971), where the intent is displayed by insuring that radio and television will not be subjected to government censorship.

62. 47 U.S.C. § 315(a) provides in part that "If any licensee shall permit any person who is a legally qualified candidate for public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."

Recently, Congress has broadened the scope of a candidate's right to air time by commanding that stations "allow reasonable access to or permit purchase of reasonable amounts of time . . . by a legally qualified candidate for federal, elective office." See Campaign Communications Reform Act of 1972, Pub. L. No. 92-225, amending 47 U.S.C. § 312(a).

63. 10 F.C.C. 515 (1945).

public issues . . . is inconsistent with the concept of the public interest."<sup>64</sup> This new FCC policy was seemingly understood and accepted<sup>65</sup> by the broadcasters. It was enforced by the FCC and, prompted by formal petitions for the denial of license renewals, three warnings<sup>66</sup> were issued to licensees based on the *United Broadcasting* principle. Four years later, with the *Editorializing Report*<sup>67</sup> which outlined the fairness doctrine, the FCC gave broadcasters on the one hand the explicit responsibility of fully and fairly informing the public, and on the other the absolute discretion to decide when, who, and what would be transmitted. Although not specifically mentioned, direct public access had been subjugated to private journalistic judgment until 1971, when the Court of Appeals of the District of Columbia promoted access to a constitutional prerogative in *Columbia Broadcasting*.

### III. *Columbia Broadcasting: A Right of Access Denied*

In 1970, the Democratic National Committee (DNC) sought a declaratory ruling from the FCC which would forbid a broadcaster from rejecting paid announcements on public issues as a general policy, or, in the alternative, that such policy would constitute an adverse consideration for the broadcaster's license renewal. The Business Executives' Move for Vietnam Peace (BEM) had also raised the same issue with the FCC in a complaint against a radio station which had refused to air BEM's advertising spots opposing the Vietnam war. Announcing both decisions on the same day,<sup>68</sup> the FCC ruled that the stations had complied with the fairness doctrine<sup>69</sup> and thereby satisfied both the public interest requirement of the Communications Act and the first amendment. Thus, it would not compel the licensees to accept the offered "advertorials." The Court of Appeals for the District of Col-

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64. *United Broadcasting Co. (WHKC)*, 10 F.C.C. 515, 518 (1945). Lewis White, a historian of American radio, described the *United Broadcasting* decision in his book *THE AMERICAN RADIO* (1942) as "a memorable order which, in effect, threw the door open to the sale of time for discussion of public issues."

65. Within two months the National Association of Broadcasters had amended its Code to delete the ban on the sale of time for discussion of controversial issues. See "NAB Revises Code, Expands Labor Relations," *BROADCASTING*, Aug. 13, 1945, at 20 quoted in Brief for Respondent DNC at 21 n.23, *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

66. Sam Morris, 11 F.C.C. 197 (1946); Robert Harold Scott, 11 F.C.C. 372 (1946); and Homer P. Rainey, 11 F.C.C. 898 (1947).

67. 13 F.C.C. 1246 (1949). See notes 18-23 *supra* and accompanying text.

68. *Democratic National Comm.*, 25 F.C.C.2d 216; *Business Executives for Vietnam Peace*, 25 F.C.C.2d 242 (1970).

69. The fairness doctrine was first fully promulgated in *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949). It requires that the broadcaster furnish full and fair coverage of important public issues, and was implicitly approved by Congress in the 1959 amendments to § 315 of the Communications Act. 73 Stat. 557, *amending* 47 U.S.C. § 315(a). See notes 18-23 *supra* and accompanying text.

lumbia Circuit reversed,<sup>70</sup> holding, first, that sufficient state action existed and, second, that an absolute ban on public issue advertisements violated the public's first amendment right to be informed, at least when other types of advertisements are accepted.<sup>71</sup> The majority did not direct the broadcasters to sell commercial time to the BEM or DNC, but remanded the cases to the FCC for the determination of "reasonable procedures and regulations" to implement this limited right of access to the media. Thereafter, the FCC began to investigate how to implement this new policy,<sup>72</sup> but the Supreme Court accepted the joint appeal of the FCC, CBS, ABC, and Post-Newsweek stations and reversed the court of appeals.

In a 7-2 vote with six separate opinions, the Court concluded that neither the first amendment nor the Communications Act mandated that broadcasters accept advertorials. The *Columbia Broadcasting* holding went "to the heart of our system of broadcasting,"<sup>73</sup> and the complexity of the subject matter was exemplified in the divergent rationales expressed by the individual Justices. Although the central theme of the majority was clearly that a licensee had substantial "journalistic discretion," a close examination of this denial of universal access reveals major disagreements within the Court. The two large areas of disparity were: first, was the government sufficiently involved in this action by private broadcasters to invoke the requirements of the first amendment; and, secondly, is a complete denial of access to paying members of the public within the broadcaster's discretion?

#### A. State Action

The state action question remains unanswered<sup>74</sup>—only Justices Stewart and

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70. 450 F.2d 642, 646 (D.C. Cir. 1971). Under 47 U.S.C. § 402(a) (1971) and 28 U.S.C. § 23432(1) (1971) the United States Court of Appeals may review F.C.C. regulations and decisions.

71. *Id.* at 665.

72. Further Notice of Inquiry in Docket 19260, 33 F.C.C.2d 554, 37 Fed. Reg. 3383 (1972).

73. Democratic National Committee, 25 F.C.C.2d 216, 221 (1970), *quoted in Columbia Broadcasting*, 412 U.S. at 99.

74. The court of appeals decision that action by a licensed broadcaster, with the approval of the FCC, represented governmental action for purposes of the first amendment presented "a novel question, and one with far-reaching implications," to the Supreme Court. 412 U.S. at 115. Analyzing this particular area of the diverse opinions is made difficult, however, by the apparent confusion among the Justices concerning exactly what the Chief Justice is discussing in the third section of his opinion. 412 U.S. at 181 n.12. It is clear that only three Justices concluded that insufficient governmental action existed. The two dissenters, of course, strongly disagreed. Of the remaining Court, Justice Douglas reasoned that if state action was found, the dissent's logic would "inexorably follow;" and significantly, Justice Stewart's arguments "closely approached" those of Justice Douglas. 412 U.S. at 150, 132. Justice White

Rehnquist agreed with the Chief Justice that the broadcasting industry is neither a government "proxy" nor engaged in a "symbiotic relationship" with the government.<sup>75</sup> In his opinion for the Court, Chief Justice Burger asserted that no general formula could be utilized to delineate private conduct from state action, and analogies to other contexts were inadequate. Stressing the difficulty of balancing the competing interests involved in access cases, the Chief Justice surveyed the legislative history of the Communications Act and concluded that Congress sought to grant a traditional journalistic role to broadcasters, with the FCC simply overseeing their performance within the general regulatory standards. Also, the opinion indicated that the complex problems involved in regulating the dynamic broadcasting industry required that the FCC be allowed great flexibility in its rulings. In his view, the congressional objective of providing wide operational latitude for both the FCC and the broadcasters would be frustrated by a holding that equated independent licensee conduct with government conduct, which would subject them to the rigid restraints of the first amendment.<sup>76</sup>

The Chief Justice attempted to distinguish an analogous case urged by the respondents, *Public Utilities Commission v. Pollak*.<sup>77</sup> There the Court had invoked first amendment restraints when a federal agency approved the playing of radio music within a public transit bus. Chief Justice Burger reasoned that the two cases were clearly dissimilar because the regulation of broadcasting is not as pervasive as the regulation of public transportation in *Pollak*. Furthermore, Congress has particularly indicated in the Com-

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also hinted that he found the state action argument appealing. It is obvious, then, under slightly different circumstances, such as the FCC actually promulgating or enforcing a regulation rather than merely permitting a pre-existing private policy of the broadcasters themselves, radio and television licensees may be held to be agencies of the government.

75. 412 U.S. at 119.

76. Similarly, Justice Stewart found the state action issue too complex for simple analogies to other situations where governmental action had been ascertained. While admitting in his concurrence that the FCC does comprehensively regulate broadcasting, and even programming content to some extent, he contended that the industry still retains first amendment protection. This protection includes the right to select who will have access to an assigned frequency, as long as the statutory obligations to the public are fulfilled. Justice Douglas, however, contrasted the instant case with a similar situation in which a broadcaster's action would assuredly be state action. Under his theory, if the BEM and the DNC had appealed to the Corporation for Public Broadcasting, an agency established by Congress, when they sought to air their advertorials, the CPB could not have refused. This is consistent with his contention that "activities of licensees of the government operating in the public domain are governmental actions," but his has never been a majority viewpoint. If it were, however, Justice Douglas postulated that all broadcasters would be obligated to accept any advertorials offered, basically the same thesis expressed by Justice Brennan in his dissent.

77. 343 U.S. 451 (1952).

munications Act that editorial decisions are reserved for the licensee and "a more basic distinction, perhaps . . . is that *Pollak* was concerned with a transportation utility that itself derived no protection from the first amendment."<sup>78</sup> Also, according to the Court, finding state action in *Columbia Broadcasting* would necessarily entangle the government increasingly in the daily affairs of the electronic press. Every time a broadcaster refused to grant access to someone, for whatever reason, a constitutional conflict would arise—a conflict subject to review by the FCC and the courts.

The dissent began in agreement with the Court that any attempt to discover sufficient state action could not depend on a "formalistic 'private-public' dichotomy but, rather [must depend] upon more functional considerations."<sup>79</sup> There the agreement ended, however, for the dissenting Justices Brennan and Marshall found indications of governmental involvement which led them to an opposite result.<sup>80</sup> In broadcasting, Congress has established a complicated regulatory scheme governing all aspects of the industry, and most importantly, the FCC had specifically authorized the ban on advertorials which instigated the instant litigation. In a related matter, the dissent disagreed substantially with the Court's discernment of the analogous *Pollak* holding. *Pollak* involved federal agency approval of the activities of an autonomous, privately owned bus company; thus it represented precedent for finding state action in *Columbia Broadcasting*, at least from the dissent's standpoint. Quoting from the earlier decision, Justice Brennan concluded that in *Columbia Broadcasting*, as in *Pollak*, the requisite governmental action was present based "upon the fact that [the] agency, pursuant to protests against the [challenged policy], ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby."<sup>81</sup>

#### B. *The Public Interest and The First Amendment*

Although the governmental action question remains largely unresolved, a substantial majority of the Justices held that no universal right of access springs from either the public interest requirement of the Communications Act or from the substance of the first amendment.<sup>82</sup> The only clear precedent is *Red Lion* in which Justice White reasoned that the interests of the broadcasters were secondary to the interests of the public. The Court did

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78. 412 U.S. at 120.

79. *Id.* at 172.

80. *Id.* at 172-181.

81. 343 U.S. at 462 *quoted in* *Columbia Broadcasting*, 412 U.S. at 180.

82. 412 U.S. at 121-132.

not quarrel with this fundamental principle in *Columbia Broadcasting*, but deduced that any balancing must be done "within the framework of the regulatory scheme" enacted and periodically modified by Congress, with due deference to the decisions of the FCC and the courts. In its analysis of the legislative history of the Communications Act, the Court emphasized that Congress had consistently rejected all efforts to impose common carrier status on broadcasters. Such a requirement would have compelled each broadcast station to provide access to its facilities on a nonselective basis, similar to a telephone or telegraph. This refusal by Congress to make broadcasting a common carrier, plus the prohibition on governmental censorship included in the Communications Act itself,<sup>83</sup> evidenced to the Court a congressional intent to permit private journalistic decisions on program content.<sup>84</sup>

Moreover, the Court reasoned that the FCC had evolved the fairness doctrine as a method of keeping the public informed, thus it had become essentially a substitute for universal access. The restricted electronic spectrum made some selection technique imperative, and the Court held that the FCC did not err in allowing that selection to be made by the licensee, as long as the public interest was satisfied. Dismissing in a footnote the FCC ruling in *United Broadcasting*, the Court found the language relied upon by the court of appeals, respondents, and the dissent to be mere dictum expressed before the fairness doctrine had fully developed.<sup>85</sup> The Chief Justice speculated that forced access would be "heavily weighted in favor of the financially affluent,"<sup>86</sup> and would remove the responsibility for programming from the broadcaster who is held accountable at license renewal time. Also, in an argument that paralleled his conclusion in the state action section of his opinion, he declared that even a statutory right of access<sup>87</sup> would necessitate increasing FCC involvement in broadcast programming to assure equitable distribution of access among the public.

Justice Douglas' opinion, concurring in the result but for "quite different reasons," reflected his belief that during recent years the press had had its duties and privileges clarified, if not circumscribed, by the government

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83. 47 U.S.C. § 326 (1971).

84. 412 U.S. at 109-110.

85. *Id.* at 113 n.11. Intervenor Post-Newsweek Stations distinguished *United Broadcasting* as "an eccentric departure from an otherwise uniform line of Commission pronouncements." Brief for Petitioner at 37 n.36, *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

86. 412 U.S. at 123.

87. *See* 450 F.2d at 649, where the lower federal court stated that, "whether our decision is styled as a 'First Amendment decision' or as a decision interpreting fairness and public interest requirements 'in light of the First Amendment' matters little."

generally and the courts in particular.<sup>88</sup> Lamenting these inroads into the freedom of the press, he postulated that the federal action sought by the respondents would be yet another abridgement of the first amendment. Forced access would represent one more bureaucratic burden on the broadcasters, a burden inconsistent with radio and television's right to the same freedom from governmental hindrance as the print media. Espousing the "romantic"<sup>89</sup> view of the first amendment, the Justice agreed that private censorship exists, but responded that for every censor there is someone else who will publish.<sup>90</sup> Like Justice Stewart, he would "leave the press to its devices" whenever editorial decisions are necessary.<sup>91</sup>

Conversely, the dissent stressed the absolute nature of the ban on advertisements approved by the FCC, and the limited right of access requested by the DNC and BEM.<sup>92</sup> Applying a balancing test, the dissenting Justices determined that the public's right to be informed outweighed the electronic journalist's "absolute" privilege to reject all controversial commercials. The fairness doctrine, relied upon by the majority to provide full presentation of public issues, actually fails to provide any access at all, according to the dissent, because the broadcaster selects the issues, the mode of expression and who shall speak. Rejecting the analogy to the print media, Justice Brennan asserted that broadcasting, unlike newspapers, will deliberately avoid as much controversy as possible, fearing that such controversy may inhibit the profits gained from standard product advertising.<sup>93</sup> In addition, declared the dissent, although a long line of cases has emphasized that effective self expression sometimes demands a certain forum,<sup>94</sup> this exclusionary policy virtually closes to the vast majority of the public the most pervasive marketplace of ideas ever devised. In conclusion, the dissent labeled the Court's specter of administrative apocalypse, being an inevitable result of access, as "mere speculation" and offered some possible solutions to the problem.<sup>95</sup>

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88. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Branzburg v. Hays*, 408 U.S. 665 (1972); *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973).

89. See note 40 *supra* and accompanying text.

90. 412 U.S. at 153.

91. *Id.*

92. *Id.* at 170.

93. "Stated simply, angry customers are not good customers and, in the commercial world of mass communications, it is simply 'bad business' to espouse—or even to allow others to espouse—the heterodox or the controversial." 412 U.S. at 187. See also Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 773 n.26 (1972).

94. Cf. *Logan Valley*, 391 U.S. 308 (1968).

95. Specifically, Justice Brennan offered four articles which include proposed solutions to the problems of access implementation. See e.g., Canby, *The First Amend-*



#### IV. Implications For The Press And Public

##### A. The Impact on the Fairness Doctrine

*Columbia Broadcasting's* effect of frustrating the quest for access through the purchase of time will be felt most directly by the FCC in its enforcement of the fairness doctrine. As access seekers will probably now utilize the fairness doctrine as an opening to the media, it would be useful to discover whether the regulatory history of the fairness doctrine or the *Columbia Broadcasting* decision itself supports an extension of the doctrine into ads which raise controversial questions.

When a commercial message advocates one side of an important and generally recognized public issue, then the acceptance by the licensee of such an advertisement activates the fairness doctrine. Thus, the FCC has been willing to impose the obligation of letting the opposition be heard, when, for instance, Humble Oil's "institutional" advertisements extolled the virtues of the controversial Alaska oil pipeline.<sup>96</sup> When advertisers advocate social values in their routine product advertisements<sup>97</sup> the fairness problem becomes more subtle. Before the FCC grants a right to reply, it must decide whether an issue of public importance has been raised implicitly by the message and whether the other side of such an issue has been fairly presented in the station's overall programming.

The first case in which courts applied the fairness doctrine to commercial advertising was *Banzhaf v. FCC*.<sup>98</sup> The petitioner contended that because cigarette commercials "deliberately seek to create the impression and present the point of view that smoking is socially acceptable and desirable, manly, and a necessary part of a rich full life,"<sup>99</sup> the advertisers had raised a controversial issue with respect to the health hazards of smoking. The FCC<sup>100</sup> and the court of appeals agreed with this contention, and required licensees to produce at their own cost anti-smoking commercials to be broadcast at regular intervals.<sup>101</sup> The FCC stated that cigarette ad-

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*ment Right to Persuade: Access to Radio and Television*, 19 U.C.L.A.L. REV. 723, 754-57 (1972).

96. *Wilderness Society and Friends of the Earth*, 30 F.C.C.2d 643 (1971). Other situations where the Commission saw a clear need to apply the fairness doctrine to particular advertisements were when a local community chest made an appeal for funds during an organizational controversy, *United People*, 32 F.C.C.2d 124 (1971); and when a department store's ad explained its view of an employee strike, *Retail Store Employees Local 880 v. FCC*, 436 F.2d 248 (D.C. Cir. 1970).

97. See 60 GEO. L.J. at 966-68 for discussion of "social messages through commercial speech—cultural spillover."

98. 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

99. *Id.* at 1086.

100. *WCBS*, 8 F.C.C.2d 381, *aff'd on reh'g*, *Applicability of the Fairness Doctrine to Cigarette Advertising*, 9 F.C.C.2d 921 (1967).

101. 450 F.2d at 1097

vertising was a unique situation, and that an extension of the ruling to other products would be rare, if ever.<sup>102</sup>

Abiding by that previous declaration, the FCC refused to apply the fairness doctrine to counter advertisements against high-powered automobiles and high octane gasoline in a later case, *Friends of the Earth v. FCC*.<sup>103</sup> The Court of Appeals for District of Columbia reversed the FCC, finding the case "indistinguishable from *Banzhaf* in the reach of the fairness doctrine,"<sup>104</sup> but affirmed the FCC's determination in *Green v. FCC*<sup>105</sup> that the extensive television advertising campaign aimed at bolstering enlistment in the country's armed forces did not raise a sufficiently controversial issue.

The majority opinion in *Columbia Broadcasting* certainly supports the prior FCC determination that the fairness doctrine is directly applicable to product advertising. Interestingly, the Court is willing to follow the lead of Congress<sup>106</sup> in adopting the fairness doctrine as a substitute for an open access system of broadcasting, thus placing a great burden on this statutory method of access. It could be argued, then, that this emphasis on the doctrine to protect the constitutional rights of the public will encourage the FCC to examine more closely the licensee's performance under the fairness mandate. Of course, the impact of this inclination is diminished by the Court's statement that increased governmental involvement in the private actions of broadcasters should be avoided where possible. Considering this opposing rationale, perhaps the content control practiced by the FCC in commanding licensees to air counter-commercials will not be extended past the *Banzhaf* holding. Realistically, although the *Columbia Broadcasting* Court's endorsement of a licensee's obligation to provide a forum for partisan voices under the aegis of the fairness doctrine<sup>107</sup> could become a basis for license renewal challenges, little likelihood exists that the FCC

102. It is significant that in this case neither the FCC nor the court of appeals left the manner in which the health hazards of cigarette smoking were communicated to the broadcaster's "journalistic discretion." The Commission stated, "We believe that the frequency of the presentation of the one side and the nature of the potential hazard to the public here necessitates presentation of the opposing viewpoint on a regular basis. . . ." 9 F.C.C.2d at 941.

103. *Friends of the Earth*, 24 F.C.C.2d 743 (1970), *rev'd* 449 F.2d 1164 (D.C. Cir. 1971).

105. *Green v. FCC*, 447 F.2d 323 (D.C. Cir. 1971), *aff'g* 24 F.C.C.2d 171 (1970). *Cf.* Alan F. Neckritz, 24 F.C.C.2d 175 (1070), *aff'd* 446 F.2d 501 (9th Cir. 1971); *San Francisco Women for Peace*, 24 F.C.C.2d 156 (1970).

106. 412 U.S. at 122-23.

107. *See* 412 U.S. at 130 where Chief Justice Burger asserted "We reject the suggestion the Fairness Doctrine permits broadcasters to preside over a 'paternalistic' regime." He also approved the Commission's holding that a licensee is forbidden from "excluding partisan voices and always itself presenting views in a bland inoffensive manner . . ." at the risk of losing his license. *Id.*

will feel compelled to deny licenses or to force broadcasters to give advertising reply time. The FCC has never denied renewal of a license solely on the basis of a fairness complaint,<sup>108</sup> and only in the cigarette ruling has it recommended that controversial product commercials be balanced by counter-commercials.

The extension of the fairness doctrine to cigarette advertising has been praised by even the harshest critics of access.<sup>109</sup> But on grounds on policy,<sup>110</sup> they are content to have the trend stop there. The commentators lament the time consuming case-by-case review, while the broadcasting representatives claim that an expansion of the doctrine would cause severe economic hardships within the industry. These economic and administrative arguments parallel the FCC's approach, but are not persuasive. First, economic collapse of the communications industry appears unlikely in light of the health of the television advertising market,<sup>111</sup> even after experiencing the annual loss of \$300 million<sup>112</sup> when cigarette advertising was banned from the air.<sup>113</sup> Secondly, although case-by-case review is time consuming, the FCC has already rejected the argument that administrative review should be abandoned.<sup>114</sup> The difficulty, then, is not in the review itself, but in the standard to be applied.

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108. A 1969 case, however, *WHDH, Inc.*, 16 F.C.C.2d 1 (1969), indicates that in the renewal of licenses the FCC may examine fairness doctrine complaints concerning program content and controversial issues. Essentially, the issue in *WHDH* was cross-media ownership, but the denial was also based on failure to present issues of public importance—a factor which may again prove significant in future renewal applications. In New York, for example, an independent group, Forum Communications, challenged the renewal of *WPIX's* license on the grounds that the station had not fulfilled its obligation to fully and fairly report news events. After renewing *WPIX's* license, the FCC reversed itself and ordered a full scale investigation. *N.Y. Times*, June 19, 1969, at 1, col. 1.

109. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections On Fairness and Access*, 85 *HARV. L. REV.* 768 (1972) [hereinafter cited as Jaffe].

110. Jaffe admits that, "The Commission refused to follow the cigarette decision on grounds not of logic but of general policy." *Id.* at 777.

111. "The television industry, bouncing back strong after the loss of cigarette advertising in 1971, showed a 41.9 percent increase in profits last year (1972). . . .

Advertising expenditures for all television came to \$3.63 billion [in 1972], up 14.3 percent from 1971." *The Washington Post*, Aug. 22, 1973 § c, at 10.

112. This figure constituted almost 7% of all major TV network advertising revenue in 1967.

113. *Public Health Cigarette Smoking Act of 1969*, 15 U.S.C. § 1335 (1970), upheld in *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971).

114. *See* 9 F.C.C. at 942-43 where the Commission rejects the broadcaster's contention that giving fairness remedies to cigarette commercials will produce complaints concerning the "public issue" inherent in the advertisement of the following products: automobiles, food with high cholesterol count, alcoholic beverages, flouride in toothpaste, pesticide residue in food, aspirin, detergents, candy, gum, soft drinks, girdles and even table salt.

One noted author has suggested this criteria: "[I]f a reading of the advertisement reveals an intent to address, even though implicitly, a current controversy, then the broadcaster can forecast the applicability of the fairness doctrine."<sup>115</sup> This will affect no real change because the problem of defining "intent," "current controversy," and "address . . . implicitly" will continue to require review by the FCC and possibly the courts. An admittedly less precise but more equitable approach is simply the general standard of reasonableness under the circumstances.<sup>116</sup> This standard would at least mute the claim that every advertisement raises some controversial issue, such as the merit of consumerism or capitalism. The vagueness of the standard is its merit, for perhaps the flexibility allowed the FCC and the industry would ameliorate the economic and administrative burden entailed in extending the fairness doctrine to controversial product information.

#### B. *The Prerogatives of Journalistic Discretion.*

The *Columbia Broadcasting* decision has uplifted "journalistic discretion," a repeated phrase in the opinion of the Court,<sup>117</sup> from its obscurity as a limitation on the government's method of enforcing prescribed public regulations<sup>118</sup> to the prominent level of a broadcaster's constitutional right. This power to make editorial judgments represents a seldom challenged prerogative, but the Court's ratification of such activity without specific limits on the exercise of such power leaves several disturbing implications. First, in *Columbia Broadcasting*, a system of "private broadcast journalism held only broadly accountable to public interest standards"<sup>119</sup> was held to be consistent with public ownership of the airwaves<sup>120</sup> even when "journalistic judgment of priorities and newsworthiness"<sup>121</sup> effectively denied members of the public the opportunity to use the media. Certainly the limited nature of the medium justifies the basic principle that "no private individual or group has a right to command the use of broadcast facilities."<sup>122</sup> Accord-

115. Jaffe 778 n.128.

116. Suggested in Note, *Fairness Doctrine: Television as a Marketplace of Ideas*, 45 N.Y.U.L. Rev. 1222 (1970).

117. Chief Justice Burger uses different terms to express the concept 16 times in his opinion, using such phrases as; "broad journalistic discretion"; "editorial judgment"; "journalistic freedom"; and "journalistic judgment of priorities."

118. See Editorializing Report, notes 18-23 *supra* and accompanying text, where this discretionary power was given to the broadcasters, seemingly as a concession, to reduce the impact of the new obligations imposed on them to cover public issues fully and fairly.

119. 412 U.S. at 120.

120. 47 U.S.C. § 301 (1971).

121. 412 U.S. at 117.

122. *Id.* at 113, citing recent FCC rejections of individual claims for access. See Dowie A. Crettender, 18 F.C.C.2d 499 (1969); Mrs. Margaret L. Scherbina, 21 F.C.C.2d

ingly, this rationale would allow reasonable journalistic judgments as to the time, manner, and total amount of citizen access allowed, but the flat ban on any personal access approved by the Court seems inimical to meaningful public ownership of the airwaves.

Secondly, although three Justices claimed that a licensee's "journalistic freedom [is not] as large as that exercised by a newspaper,"<sup>123</sup> the remaining Court implicitly agreed that journalistic discretion is as much a right of the broadcaster as it is of the newspaper editor.<sup>124</sup> How much this discretion is to be tempered by the statutory public interest requirements is unclear, but the decision seems to provide the broadcast licensee with a strong defense for any particular programming decision.<sup>125</sup> The Court recognized the potential for abuse by the broadcasters, but accepted the danger "in order to preserve higher values."<sup>126</sup>

The immediate impact of *Columbia Broadcasting* on the constitutional right of access is clear, but the future of the concept is not. Seven members of the Supreme Court, espousing what the proponents of access label a narrow, romantic view of the first amendment, have firmly rejected any right of entry to the media. For those seeking public exposure of their ideas, the only avenues presently open are actions of sufficient magnitude to attract the coverage of the news media. On the other hand, the Court has assuredly granted wide discretionary power to the electronic press. This journalistic discretion, the power to edit, is now clearly a constitutionally protected element of the extremely valuable broadcasting license.

Roy L. Mason

Robert E. Ganz

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141 (1969); *Boalt Hall Student Ass'n.*, 20 F.C.C.2d 612 (1969); *Mrs. Madalyn Murray*, 40 F.C.C. 647 (1965); *Democratic State Central Committee of California*, 19 F.C.C.2d 833 (1968). *But see United Broadcasting Co.*, 10 F.C.C. 515 (1945).

123. 412 U.S. at 117-18.

124. The Chief Justice readily accepted the network's proposition that the BEM "advertisements" were rejected because the broadcasters felt 10- to 60-second spot announcements were "ill-suited to intelligible and intelligent treatment of public issues." 412 U.S. at 118. However, he failed to notice CBS's admission in their brief that the 1970 CBS network news program devoted less than four minutes an evening to coverage of the Vietnam war and the related domestic protests. Brief for Petitioner at 7, n.10, and App. 81-343, *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

125. A recent example of an incident in which a commercial broadcaster might cite *Columbia Broadcasting* as support for his journalistic judgment concerned the CBS network television program, *The Selling of the Pentagon*. The program became the subject of considerable controversy when certain editing practices were thought to reflect a journalistic bias. The network was requested by investigating United States Senators to submit the edited portions of the program for examination. The network producers refused, contending that such acts were within their rights as journalists.

126. 412 U.S. at 125.