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Broadcasting, the Reluctant Dragon: Will the First Amendment Right of Access end the Suppressing of Controversial Ideas?

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**BROADCASTING, THE RELUCTANT DRAGON:
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BROADCASTING, THE RELUCTANT DRAGON: WILL THE FIRST AMENDMENT RIGHT OF ACCESS END THE SUPPRESSING OF CONTROVERSIAL IDEAS?

*Donald M. Malone**

You see all the other fellows were so active and *earnest* and all that sort of thing – always rampaging, and skirmishing, and scouring the desert sands, and pacing the margin of the sea, and chasing knights all over the place, and devouring damsels, and going on generally – whereas I liked to get my meals regular and then to prop my back against a bit of rock and snooze a bit, and wake up and think of things going on and how they kept going on just the same, you know!

– K. Grahame, *The Reluctant Dragon* (1953)

I. INTRODUCTION

Like a reluctant dragon, the broadcast media¹ have for the most part been content to get their earnings regularly and to “think of things going on . . . just the same.” Television, the medium with the greatest potential for expressing a wide variety of ideas and social needs, has shown a marked reluctance to exercise that potential. Robert Montgomery has eloquently described the disparity between potential and performance in the television industry:

As we were all informed and believed when television was new, it has the greatest potential for good of any communications instrument ever invented. Most of us still feel that this is true. At the same time, I think there are now millions of people who, like me, believe that television lost its way and fell among evil companions who have not only prevented it from realizing its potential but have turned it in another direction. Ironically, the technological advance of television has been spectacular. More than ever today it offers a

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¹ In this article, the term “broadcast media” means commercial AM and FM radio and commercial VHF and UHF television. The term “broadcasters” means commercial broadcast licensees and commercial broadcast network management.

brilliant promise. But sadly, there is no relationship between technology and the quality of what is being transmitted.²

The scope of this article will be limited to one aspect of electronic media³ programming—the extent to which the public is and should be exposed to an accurate cross section of public opinion and a broad range of controversial ideas.⁴ Many people, including the Federal Communications Commission (FCC),⁵ have acknowledged that a desirable goal for the broadcast media, particularly television, is to provide a marketplace for controversial ideas.⁶ Part II of this article will identify the principal reasons why that goal has not been achieved. Part III will examine the fairness doctrine, the antecedents of which have been traced back to 1929.⁷ While generally requiring that a broadcast licensee's programming cover issues of public importance in a manner fairly presenting conflicting points of view,⁸ the broad discretion given

² R. MONTGOMERY, OPEN LETTER FROM A TELEVISION VIEWER 14 (1968).

³ The term "electronic media" includes the broadcast media and community antenna (or cable) television.

⁴ "Controversial ideas" are ideas, attitudes and viewpoints on matters of public concern that differ from those of the majority of citizens. Of course, there are many ideas, controversial by this definition, which may not seem controversial to many readers of this article; however, this definition probably corresponds to the definition of "controversial" that would be used by a network official or a sponsor in actual practice.

⁵ See FCC, Notice of Inquiry: The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 30 F.C.C.2d 26, 27 (1971) [hereinafter cited as Fairness Doctrine Inquiry], where the Federal Communications Commission (FCC) said that the "goal is clear: to foster 'uninhibited, robust, wide-open' debate on public issues. . . . That is the profound, unquestioned national commitment embodied in the First Amendment."

⁶ As Justice Holmes said over fifty years ago:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good derived is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion). This marketplace concept of the first amendment was elaborated by Justice Holmes in *Gitlow v. People of New York*, 268 U.S. 652, 672 (1925) (dissenting opinion), and by Justice Brandeis in *Whitney v. California*, 274 U.S. 357, 372 (1927) (concurring opinion).

⁷ *Great Lakes Broadcasting Co.*, 3 FRC Ann. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir. 1930), *petition for cert. dismissed*, 281 U.S. 706 (1930); and Fairness Doctrine Inquiry, *supra* note 5, at 27. *But cf.* Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes*, 23 FED. COM. B.J. 75, 79 (1969), stating that the fairness doctrine was not announced until 1949. The fairness doctrine is not set forth in any specific statutory provision, but is the product of FCC rulings applying the public interest standard of the Communications Act of 1934, 47 U.S.C. §§ 303, 307, 309, 316 (1970).

⁸ The FCC has recently explained the doctrine's basic rationale and requirements as follows:

The fairness doctrine is grounded in the recognition that the airwaves are inherently not available to all who would use them. It requires that those given the privilege of access hold their licenses and use their facilities as

to licensees in applying the doctrine has significantly lessened its impact.⁹ Moreover, a raging debate continues over whether the effect of the fairness doctrine has been more to suppress than to enhance the expression of controversial ideas.¹⁰ Part IV will describe a new legal doctrine—the first amendment right of access¹¹—which has recently been applied to the broadcast media,¹² and whose effect may be to thrust controversial programming upon *all* electronic media.¹³ Finally, part V will discuss additional ways to encourage the broadcasting of controversial ideas.

II. THE CAUSES OF THE DRAGON'S RELUCTANCE

The dragon's reluctance stems from a number of powerful constraints, both public and private, that discourage the broadcasting of controversial ideas. Of course, there are external pressures and constraints upon all media, but conformist pressures are significantly stronger on broadcasting than upon the print media.

trustees for the public at large, with a duty to present discussion of public issues and to do so fairly by affording reasonable opportunity for the presentation of conflicting views by appropriate spokesmen. The individual licensee has the discretion, and indeed the responsibility, to determine what issues should be covered, how much time should be allocated, which spokesmen should appear, and in what format.

Fairness Doctrine Inquiry, *supra* note 5, at 27-28.

⁹ The fairness doctrine does require broadcast news programs to maintain at least the appearance of objectivity, and may be in part responsible for the fact that television news ranks first in credibility in public opinion. H. MENDELSON & I. CRESPI, *TELEVISION, AND THE NEW POLITICS* 265 (1970). *But see* E. EFRON, *THE NEWS TWISTERS* (1971), arguing by word count from newscasts that network newscasting is far from objective.

¹⁰ Compare Barron, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CIN. L. REV. 447 (1968), with Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967).

¹¹ See generally Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) [hereinafter cited as Barron, *Access*]; Barron, *An Emerging First Amendment Right of Access to the Media*, 37 GEO. WASH. L. REV. 487 (1969) [hereinafter cited as Barron, *Emerging Access*].

¹² *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), *cert. granted*, 40 U.S.L.W. 3410 (Feb. 28, 1972) [BEM]; see also Johnson & Western, *A Twentieth-Century Soapbox: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574 (1971).

While the FCC has sought and obtained certiorari, note 12 *supra*, the Office of Telecommunications Policy, Executive Office of the President, [see Reorg. Plan no. 1 of 1970, Exec. Order 11556, 35 Fed. Reg. 14193 (1970)], appears to have accepted the circuit court's opinion as it stands. See Remarks of Clay T. Whitehead, Director, Office of Telecommunications Policy, at the International Radio and Television Society Newsmaker Luncheon, in New York City, October 6, 1971.

¹³ The cases before the BEM court involved only the broadcast media. The rationale for extending the court's holding to cable television as well is set forth in part IV E of this article.

A. The Reflexive Reaction to Burns from the Dragon's Fire

The broadcast media reach massive audiences;¹⁴ radio in the past, and television today, have demonstrated a tremendous capacity to influence these audiences.¹⁵ Moreover, whatever may

¹⁴ Tebbel, *Network Television's Uncertain Future*, 53 SATURDAY REV., NOV. 14, 1970, at 69.

¹⁵ As to radio, see H. MENDELSON & I. CRESPI, *supra* note 9, at 256; as to television, see *id.* at 264 and A. KROCK, *THE CONSENT OF THE GOVERNED* 66 (1971). See also N. JOHNSON, *HOW TO TALK BACK TO YOUR TELEVISION SET* 26-27 (1970), noting that television's salesmen cannot have it both ways. They cannot point with pride to the power of their medium to affect the attitudes and behavior associated with product selection and consumption, and then take the position that everything else on television has no impact whatsoever upon attitudes and behavior.

For examples of the power of television advertising, see *id.* at 25-26.

But see Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 768-71 (1972), concluding from writings in the field of communications theory that

legal doctrines should be developed and assessed free from any grandiose conceptions of the influence of television on political life. Broadcasting has at best an incremental and at worst a marginal effect on political consciousness. Too high a price in administrative and judicial inefficiencies, or in broadcast revenues, should not be paid for doctrines designed to increase the number of voices heard on the air.

Id. at 771. While a certain degree of debunking may be required in response to some popular assessments of the political impact of the electronic media, Professor Jaffe overstates the case. In the first place, he relies principally upon older articles representing the high water mark of scholarly scepticism on this issue, as can be seen from reviewing Schramm's latest compilation of materials on communications, W. SCHRAMM & D. ROBERTS, *THE PROCESS AND EFFECTS OF MASS COMMUNICATION* (rev. ed. 1971). See, e.g., Lang & Lang, *THE MASS MEDIA AND VOTING*, *id.* at 678 (studies of the effect of the media on voting behavior during political campaigns consider too narrow a period of time; the long run effect of the media *between* campaigns should be considered); Roberts, *The Nature of Communication Effects*, *id.* at 347 (noting, at 377, the importance of distinguishing between the effects of the mass media in the modification of *established* beliefs, and in the formulation of *new* opinions and beliefs; in the latter situation, the mass media have a more clearly perceptible influence); Krugman, *The Impact of Television Advertising: Learning without Involvement*, *id.* at 485 (suggesting that noncommercial persuasive use of television should be divided into attempts at influence not requiring viewer personal involvement, and attempts at influence characterized by a high degree of viewer personal involvement; over the long run, the former—like advertising—can be more influential because the public receives it less guardedly); Hovland, *Reconciling Conflicting Results Derived from Experimental and Survey Studies of Attitude Change*, *id.* at 495 (conclusions on communications effects vary with the methodology employed; methodological improvements required). See also NATIONAL INSTITUTE OF MENTAL HEALTH, *TELEVISION AND GROWING UP: THE IMPACT OF TELEVISED VIOLENCE* (1972). (Despite misleading newspaper headlines at the report's release, and the presence of five network representatives on the twelve member directing committee, Comment, 175 SCIENCE 608 (1972), several studies showed significant correlation between the viewing of violence on television and subsequent aggressive behavior).

Second, Professor Jaffe misperceives the appropriate response for the law. Rather than construe the first amendment in the light of the most sceptical scholarly views on the impact of television on behavior and attitudes, "a subject on which there is sharp controversy," Jaffe at 768, the law should strive to maintain the effectiveness of opportunity to express diverse viewpoints that existed prior to the concentration of communications power "wrought by the changing technology of the mass media," Barron, *Access, supra*

be the *actual* boundaries of broadcast media influence, that influence *appears* to many to be almost overwhelming.¹⁶ This appearance of power has not gone unnoticed by advertisers, government officials, and concerned citizens. It has often led to significant congressional attention, not only in the form of hearings,¹⁷ but also in the enactment of several pieces of legislation. The banning of cigarette advertising from the broadcast media¹⁸ is only a recent example of Congress's estimation of television's power to influence the public.

Since television, the most powerful of the broadcast media, is relatively youthful, broadcasters are still learning how to use its power responsibly.¹⁹ In the meantime, mistakes and misuses of television's powers increase its vulnerability to criticism. For example, while the intensity of the criticism of the CBS documentary *The Selling of the Pentagon* was disproportionate to the magnitude of the documentary's errors,²⁰ the mere existence of error was sufficient to cause a congressional committee to conduct an investigation²¹ that no doubt would never have been considered if the print media had been involved.²² Presumably because of their fear that the material presented by television reaches a

note 11, at 1644, at least until the social sciences can provide more definite answers than they can today. Professor Jaffe's formulation puts too little emphasis upon the historical importance of the communications media to our political process, and too much emphasis upon administrative and judicial convenience and the protection of broadcaster revenues. See note 282 *infra* and accompanying text.

¹⁶ Vice President Spiro Agnew spoke to the issue as follows:

One Federal Communications Commissioner considers the powers of the networks equal to that of local, state and Federal Governments all combined. Certainly it represents a concentration of power over American public opinion unknown in history.

....

Now, my friends, we'd never trust such power, as I've described, over public opinion in the hands of an elected Government. It's time we questioned it in the hands of a small unelected elite.

Excerpts from Television News Coverage, 36 VITAL SPEECHES 98, 99, 100 (1969). See also A. KROCK, *supra* note 15, at 23, 173-74; BROADCASTING, Dec. 27, 1971, at 21 (fairness doctrine complaints have increased from 409 in 1966 to over 60,000 in 1970).

¹⁷ See, e.g., *Hearings on Fairness Doctrine Before the Special Subcomm. on Investigations of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess., ser. 90-33 (1968).

¹⁸ Public Health Cigarette Smoking Act of 1969 § 6, 15 U.S.C. § 1335 (1970).

¹⁹ Fang, *It is Your Business, Mr. Cronkite*, 54 SATURDAY REV., Jan. 9, 1971, at 46, 54. See also, D. GILLMOR & J. BARRON, MASS COMMUNICATION LAW CASES AND COMMENT 706-710 (1969); Irvine, *The Selling of the Selling of the Pentagon*, 23 NAT'L REV. 855 (1971); *The Art of "Cut and Paste"*, 97 TIME, April 12, 1971, at 56.

²⁰ See text accompanying notes 86-88 *infra*.

²¹ See note 85 and accompanying text *infra*.

²² Actually, the same revelations in print media have *not* led to comparable controversy. See Sherrill, *The Happy Ending (Maybe) of "The Selling of the Pentagon"*, THE NEW YORK TIMES MAGAZINE, May 16, 1971, at 25, 26. Vice President Spiro Agnew distinguished newspapers from television journalism to justify differing degrees of first amendment freedom. *Supra* note 16, at 98.

very large audience and that the audience always believes the presentation, those affected by broadcast criticism and others sympathetic to their cause feel more seriously threatened by criticism from the broadcast media than by comparable criticism from the print media.

Thus, when the dragon gathers its power and actually does breath a little fire, the pain among those suffering burns is severe and their reaction is strong.²³ Paradoxically, the popular view of the power of the broadcast media, rather than causing respect or greater freedom of action, induces a strong reaction among those criticized to fend off the perceived threat. The appearance of power is a wellspring of constraint.

B. The Effect of the Federal Collar Around the Dragon's Throat

One popular view is that since the broadcast media are governmentally regulated, they are not entitled to the freedom of speech, particularly critical speech, accorded the print media.²⁴ However, the constraints upon programming actually imposed under federal law are not intended to suppress the broadcasting of criticism or controversial ideas,²⁵ whatever effect federal regulation may have in practice. The Supreme Court's opinion in *Red Lion Broadcasting Co. v. FCC*,²⁶ hardly pro-broadcasting industry in its approach and reasoning, reaffirms the idea that "refusal to permit the broadcaster to carry a particular program or to publish his own views . . . would raise . . . serious First Amendment issues."²⁷ Nonetheless, existence of the popular view no doubt enhances the strong response by viewers and others to critical or controversial programming.

²³ Broadcasters are beginning to learn that a heavy volume of adverse mail does not necessarily indicate widespread dissatisfaction. After a "major news program" led to such mail, a public opinion survey indicated that 86 percent of those who watched the program rated it good to excellent. Goodman, *U.S. Broadcasting Freedom*, 36 VITAL SPEECHES 658, 659 (1970).

²⁴ For a thoughtful analysis of this problem and of the freedom appropriate to licensed media, see Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15 (1967). See also B. Monroe, *The Captive Medium*, 37 VITAL SPEECHES 267 (1970).

²⁵ So long as the licensee is willing to give fair presentation to opposing views and to comply with the fairness doctrine, he is free to broadcast any idea:

The most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communications free from any governmental dictation as to what they can or cannot hear and free alike from similar restraints by private licensees.

FCC, *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1257 (1949) [hereinafter cited as *Editorializing*].

²⁶ 395 U.S. 367 (1969).

²⁷ *Id.* at 396.

Another effect of federal regulation is the increased pressure on broadcasters arising from informal threats by those situated in government or those having access to government officials that the regulatory process will be used as a means of reprisal.²⁸ A network executive could hardly be blamed for fearing that a Federal Communications Commission, sympathetic to a President who had recently been attacked by the network, might retaliate by awarding the license of one of the network's supporting stations to a citizen's group at renewal time.²⁹ Interestingly, the recent decision of *Citizens Communications Center v. FCC*,³⁰ which overturned the FCC's attempt to give existing licensees some preference for renewal over competing applicants, may weaken network ability to resist informal threats of government reprisal.

In summary, the presence of the federal collar supports the public myth that broadcasters are not supposed to transmit critical or controversial ideas and lends some air of credibility to informal threats of retaliation through the regulatory process. Some argue that the only solution to these problems is to remove the collar, freeing broadcasting from federal review of licensee programming.³¹ As will be shown below, so drastic a "solution" is not required.

C. *The Dragon's Anatomy and Appetite*

The men at the top, the network management and the individual broadcast licensees, are held responsible for the material broadcast on their stations.³² Despite federal regulation of pro-

²⁸ The observations of an aggressive journalist tend to make him sceptical toward the objectivity of regulatory officials, particularly if informal congressional pressures are applied. See D. PEARSON & J. ANDERSON, *THE CASE AGAINST CONGRESS* 161 (1968).

²⁹ See generally Sherrill, *supra* note 22, at 27 and 78; Statement of Walter Cronkite before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess., Sept. 30, 1971 (unpublished hearings) [hereinafter cited as Cronkite]. See also B. Monroe, *supra* note 24, at 268.

³⁰ 447 F.2d 1201 (D.C. Cir. 1971). The case is noted in 46 N.Y.U.L. REV. 1012 (1972).

³¹ Cronkite, *supra* note 29.

³² In denying renewal of an existing license, the FCC criticized one licensee's failure to maintain control over his programming as follows:

Complete supervision of and control over programs, including careful examination of their content, directly affects the rendition of a public service. The right to determine, select, supervise, and control programs is inherently incident to the privilege of holding a station license. In fact, the right becomes a responsibility of a licensee, as he must be held to strict accountability for the service rendered.

United States Broadcasting Corp., 2 F.C.C. 208 (1935). In addition, see *Banzhaf v. FCC*, 405 F.2d 1082, 1094 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). The FCC has reaffirmed this position by stating that "broadcasting licensees must assume responsibility for all material which is broadcast through their facilities," in FCC, *Network Programming Inquiry, Report and Statement of Policy*, 25 Fed. Reg. 7291 (1960) [hereinafter cited as

gram content, with only a few specific exceptions³³ the licensees and network management retain a great deal of discretion over the material they broadcast.³⁴ This discretion includes the choice of issues to be covered, the choice of spokesmen for any particular issue, and the power to censor any remarks of any speaker,³⁵ even on the very topic the speaker was invited to discuss.³⁶

This approach to programming, with its emphasis on total power and total responsibility at the very top, has helped foster a different attitude toward the broadcast media than exists toward the print media. Absent alleged defamation, the idea of expecting a newspaper publisher to justify printing a column by Walter Lippman seems preposterous; but such justification is routinely expected by the FCC from the managers of broadcast media.³⁷ Likewise, the print media experience a greater tendency on the part of the public to blame the author, rather than the publisher, for a columnist's offensive remarks. With freedom from direct governmental regulation, the print media have less to fear from

Policy Statement on Programming]. Broadcast licensees are expressly *prohibited*, however, from censoring material broadcast by a candidate for public office pursuant to 47 U.S.C. § 315(a) (1970).

The public at large appears to expect networks to exert strong control over the programming they supply. *See, e.g.*, Sherrill, *supra* note 22, at 25, 26.

³³ These exceptions include: the *Banzhaf*, personal attack, and political editorial aspects of the fairness doctrine [*see* text accompanying notes 120-130 *infra*]; the equal opportunities requirement [47 U.S.C. § 315(a) (1970)]; and various explicit prohibitions of particular kinds of programming or expression, including prohibitions of: cigarette advertising [15 U.S.C. § 1335 (1970)], lottery information or advertising [18 U.S.C. § 1304 (1970)], fraudulent communications [18 U.S.C. § 1343 (1970)], obscene or indecent or profane language [18 U.S.C. § 1464 (1970)], and "rigged" quiz shows [47 U.S.C. § 509 (1970)].

³⁴ The fairness doctrine allows great leeway in meeting its requirement that a reasonable percentage of broadcast time be devoted to information on, and consideration and discussion of, public issues of interest to the community being served. The FCC has stated:

It should be recognized that there can be no one all-embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request.

Editorializing, *supra* note 25, at 1251-54. *Accord*, Democratic National Committee, 25 F.C.C. 216 (1970), *rev'd on other grounds*, Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971).

³⁵ For the exception for certain broadcasts by political candidates, *see* note 32 *supra*.

³⁶ *See, e.g.*, letter to Hon. Richard L. Ottinger from Chairman Dean Burch, 31 F.C.C. 2d 852 (1970).

³⁷ *See* Kalven, *supra* note 24, at 22-23.

informal threats by government officials. And, ordinarily, advertisers do not seek to hold a newspaper publisher accountable for everything in his paper, particularly the views of syndicated columnists. On the other hand, in the broadcast media the tendency is reversed with top management blamed for all offensive programming. Thus, while it is fair to say that the public expects newspapers to assert their independence and to resist advertiser and informal governmental pressure, it is almost impossible to discern a similar expectation with respect to the broadcast media.³⁸

If those desiring to suppress controversial or critical programming were to apply their pressures directly against the producer or journalist who developed or expressed them, their efforts would probably prove fruitless. Therefore, the pressure is applied to top management. A consciousness of the need to sustain revenues³⁹ and to renew a federal license⁴⁰ makes top management much more vulnerable to external advertiser and informal governmental pressures than individuals at lower echelons of a broadcast organization.⁴¹ When top management submits to such pressures, it transmits them to working journalists and entertainers, with sanctions that are stronger than those which the original source of pressure could himself have imposed.⁴² While we might expect the fairness doctrine to provide station and network management with some insulation from external pressures, the broadcaster's wide discretion in implementing fairness doctrine requirements

³⁸ Differences in the natures of the two types of media may also be a factor. The public may link a controversial broadcast program with its sponsor, *see, e.g.*, F. FRIENDLY, *DUE TO CIRCUMSTANCES BEYOND OUR CONTROL* . . . 17, 20, 62, 75-76 (1967), but it is less likely that the public associates a newspaper columnist's views with those advertising in the same newspaper.

³⁹ *Id.* at xi-xii, 112, 182-84.

⁴⁰ Monroe, *supra* note 24, at 268.

⁴¹ The distinction between top management and those below has been described as follows:

Another distinction must be made, one between the network entrepreneurs of television, and those who work for it in the lower echelons. The medium is full of extremely able and talented men, fully capable of realizing everything television is capable of doing. They do what they are permitted to do, and many of them are miserable doing it, praying for the day when, if ever, it will be possible to accomplish better things.

Nor would it be fair to assert that television does nothing worth commendation. Sometimes, by virtue of the sheer expertise of the people who work for it, television shows real flashes of the exciting medium it can be; in the live transmission of public events, it cannot be excelled. By and large, however, what is done well on television is done in spite of network control, not because of it.

R. MONTGOMERY, *supra* note 2, at 14-15.

⁴² *See* notes 52-89 *infra passim*, particularly notes 70 and 81 and accompanying text *infra*.

and general public ignorance of the doctrine significantly reduce the doctrine's insulating value.

One final exacerbating aspect of the dragon's anatomy is the concentrated structure of the broadcast industry.⁴³ The obvious effect of this concentration is to provide fewer managers upon whom offended advertisers and government officials need apply their pressures. Presumably, the smaller the number of managers, the stronger and more concentrated those pressures can be. The concentration of economic power in the management of the three major commercial networks has enabled them to produce directly, or indirectly through so-called joint ventures with "nominally independent producers,"⁴⁴ almost all "prime time" television programming. In 1957 truly independent producers provided approximately one-third of the evening network schedules; by 1968 the independent share had declined to below 4 percent.⁴⁵ Thus the economic concentration within the broadcast media has led to concentration of control over individual program production. As a practical matter, if more programs were independently produced, criticism and pressures for conformity might be diffused enough to provide some protection for the controversial nature of a particular program. When substantially all programming is under the direct control of the network and its management, this potential insulating factor disappears. Recently the FCC has taken some steps to deal with the problem of economic concentration. These will be discussed in part V of this article.

D. Constraints Inherent in the Public's Response to the Dragon

One common broadcaster response to the criticism that the media fail to carry a sufficient diet of controversial ideas is to note that many private individuals and public officials have been allowed to appear on interview and panel discussion shows. This type of program, generally carried on Sunday afternoon (the time known within the industry as the "intellectual ghetto"),⁴⁶ does not reach an audience large enough to cause the strong reflexive reaction described in part II A. The fairness doctrine in this

⁴³ See, e.g., N. JOHNSON, *supra* note 15, at 45; FCC, Competition and Responsibility in Network Television Broadcasting, 23 F.C.C.2d 382 (1970) [hereinafter cited as Prime Time Access Rules].

⁴⁴ Prime Time Access Rules, *supra* note 43, at 389.

⁴⁵ *Id.* at 390.

⁴⁶ See F. FRIENDLY, *supra* note 38, at 104; G. STEINER, THE PEOPLE LOOK AT TELEVISION 164 (1963).

particular context provides some insulation to broadcast management by rather clearly requiring the presentation of a variety of opinions on interview and panel shows, thereby reducing management's personal responsibility for the appearance of controversial individuals. The format of these programs offers the further protection that views expressed are much more likely to be associated with the prominent guest who espouses them, rather than with the station or network management.

Since interview and panel discussion shows offer the broadcaster a relatively painless way to satisfy his fairness doctrine obligations, it is natural for him to utilize and call the critics' attention to such shows. However, this response fails to recognize that there are much more effective ways of transmitting information than by interview and panel discussion shows, and that when one of the more effective approaches is used to convey controversial ideas, suppression or very strong attempts at suppression have been common.

As common sense might tell us, people prefer to have information and ideas conveyed to them in a way that is entertaining—either amusing or dramatic. The truth of this observation, for television in particular, has been confirmed not only by the success of *Sesame Street*,⁴⁷ but by a detailed study of public opinion and viewing habits made a decade ago by Dr. Gary A. Steiner.⁴⁸

⁴⁷ See Trout, *Sesame Street*, 158 AM. SCHOOL BOARD J., April, 1971, at 19.

⁴⁸ G. STEINER, *supra* note 46. While criticised for its failure to show more than one would already know from common sense and common knowledge and its tendency to encourage television to cater to people's idle fancy, 68 NEW YORK TIMES BOOK REVIEW, April 14, 1963, at 38, Dr. Steiner's work was termed "statistically sound" and "a welcome step in the direction of an objective, scholarly assessment of [the television] medium" in a contemporary professional review. O'Hara, *Book Review*, 351 ANNALS 199 (1964). Among other things, Dr. Steiner asked his respondents to review a list of *kinds* of programs, and state whether television provided enough, not enough, or too much of each kind. Three kinds of programs listed were education, information, and food for thought. Approximately 60 percent of the respondents thought that television did not provide enough education; approximately 50 percent, not enough information; and approximately 40 percent, not enough food for thought. G. STEINER, *supra* note 46, at 134-39. Subsequently, Dr. Steiner studied viewing choices actually made by a portion of his earlier respondents, dividing the programming available for choice into three categories: light entertainment, heavy entertainment, and heavy information. During those time periods in which at least one program within each category was available for choice, heavy information was selected by 5 percent of all viewers and 9 percent of all viewers having a college education or beyond. *Id.* at 201. However, heavy entertainment was selected by 31 percent of all viewers, by 36 percent of viewers who said television did not provide enough food for thought, and by 53 percent of those having a college education or beyond. *Id.*

Another example of public awareness of learning from television entertainment—viewers learning of civil rights from television police dramas—is recounted in Gunther, "You Have the Right to Remain Silent. . .", 19 TV GUIDE, Dec. 18, 1971, at 6.

At least one production company has been sensitive to the public's interest in information and entertainment combined. In describing *The Electric Company*, a sequel to *Sesame Street* for second, third and fourth graders, Edith Efron notes that:

Irrespective of whether this observation comports with our romantic view of *Homo sapiens*, it appears that viewers would rather receive their education, information, and food for thought in an entertaining format,⁴⁹ rather than in the typically unentertaining discussion or interview show.⁵⁰

Thus, the fact that the dragon gives forth some smoke and fumes on Sunday afternoons does not reduce his apparent reluctance to raise more controversial issues on "popular" programs. Indeed, as the following examples indicate, the dragon ordinarily suppresses attempts to convey controversial ideas through entertaining or dramatic programming.⁵¹

See It Now. The birth, life, and ultimate demise of the first television news documentary program to cover controversial issues in a sometimes – by broadcast standards – controversial manner have been described in a book by one of the program's co-producers, Fred W. Friendly.⁵²

Edward R. Murrow and Friendly began producing the program in November 1951 under the sponsorship of the Aluminum Company of America, then strongly motivated to improve its public image.⁵³ After two years of making the transition from radio to television journalism, Murrow and Friendly decided during the height of the McCarthy investigations to cover a subject that would necessarily embroil the program in controversy.⁵⁴ An Air Force lieutenant, Milo J. Radulovich, was about to lose his commission on the ground that his father and sister were left-wing sympathizers. Murrow and Friendly invited the Pentagon to supply material for a program, but the Pentagon refused and sug-

If The Electric Company is a serious academic venture, there's no way to realize it from what appears on the screen. The letters and words and sentences are so brilliantly interwoven with entertainment that there is no classroom atmosphere to the proceedings at all. In fact, exactly like *Sesame Street*, the integration of entertainment and pedagogic goals is done with such supreme skill that an adult can watch the show with interest and often with extreme artistic delight.

And now – "The Electric Company," 19 TV GUIDE, Oct. 16, 1971, at 8, 10.

⁴⁹ "Entertaining format" should include drama, or a dramatic documentary or news presentation. Indeed, the dramatic effect of available film or tape is a significant factor in the selection of news items by network television journalists. *The Art of "Cut and Paste,"* *supra* note 19, at 56.

⁵⁰ The courts have understood the role of entertainment in the communication of ideas. In considering the issue of first amendment protection, they have consistently refused to distinguish between entertainment and expression of ideas. Kalven, *supra* note 24, at 28-30.

⁵¹ These examples will also provide support for the conclusions expressed in part III of this article concerning the effectiveness of the fairness doctrine, and for the recommendations contained in parts IV D and V.

⁵² *Supra* note 38. As to the program's primacy in controversial matters, see *id.* at 3, 16.

⁵³ *Id.* at xiii, xviii-xix.

⁵⁴ *Id.* at 3.

gested instead that the program not appear at all.⁵⁵ With an absence of material on the Pentagon viewpoint and a closing statement by Murrow that left little doubt as to his position, the program failed to fit within the traditional broadcast concept that “‘the audience should be left with no impression as to which side the analyst himself actually favors.’”⁵⁶

The program led to considerable public praise for Murrow and Friendly, while the CBS network reaped a harvest of bitter condemnation and criticisms from both ends of the political spectrum. CBS was caught in a cross-fire: liberals castigated CBS for not supporting Murrow and Friendly more fully; supporters of McCarthy condemned CBS for not stopping the program altogether. Although some animosity also arose toward the sponsor, Alcoa, including a few threats of order cancellations, letters from the public showed strong support for the program.⁵⁷ The power of television programming to stimulate public pressure became apparent five weeks later when the Secretary of the Air Force announced before an invited television film crew that Lieutenant Radulovich would be retained by the Air Force. The announcement was shown that night on *See It Now*.⁵⁸

See It Now devoted a half-hour to the work of Senator McCarthy on March 9, 1954, with occasional critical information and commentary interspersed by Murrow.⁵⁹ A second program was primarily devoted to a filmed McCarthy hearing.⁶⁰ Sub-

⁵⁵ *Id.* at 8–10.

⁵⁶ *Id.* at 10.

⁵⁷ *Id.* at 17.

⁵⁸ *Id.* at 19–20.

⁵⁹ For example, Murrow introduced a filmed excerpt of ‘Senator McCarthy questioning Reed Harris, for many years a civil servant in the State Department, about a book Harris had written in 1932. Harris was also questioned about his acceptance of legal services from the American Civil Liberties Union and asked whether he knew that the ACLU had “been listed as a front for and doing the work of the Communist party.” Following the excerpt, Murrow commented:

Senator McCarthy succeeded only in proving that Reed Harris had once written a bad book, which the American people had proved twenty-two years ago by not buying it, which is what they eventually do with all bad ideas. As for Reed Harris, his resignation was accepted a month later with a letter of commendation. McCarthy claimed it was a victory.

The Reed Harris hearing demonstrates one of the senator’s techniques. Twice he said the American Civil Liberties Union was listed as a subversive front. The Attorney General’s list does not and has never listed the ACLU as subversive, nor does the FBI or any other federal government agency. And the American Civil Liberties Union holds in its files letters of commendation from President Eisenhower, President Truman and General MacArthur.

Id. at 38. While carefully restrained, the program’s viewpoint was nonetheless obvious.

⁶⁰ McCarthy’s filmed hearing had fizzled. Because the camera could tell the story virtually unaided, there was less commentary from Murrow, and the program was better received by CBS management. *Id.* at 45, 47.

sequently, in response to an offer from Murrow, Senator McCarthy submitted a filmed reply which was aired on the April 6 program. The reply was of poor quality,⁶¹ but despite this and the film's technical inadequacies⁶² it did change viewer reaction to the program's treatment of the Senator. The ratio of mail received by CBS dropped from ten pieces to one in favor of Murrow to two to one.⁶³

Soon after the Radulovich affair, a program on the Bricker amendment to limit the treaty making powers of the President featured a live debate between Senators Bricker and Kefauver. In addition, three law professors debated the amendment. Feeling that the additional debate slanted the overall show against him, Senator Bricker issued two hostile reports on network practices. CBS management believed this incident to be one of the factors behind a subsequent congressional investigation "designed to punish the networks."⁶⁴ Regardless of the accuracy of that observation, this incident demonstrates the willingness of network man-

⁶¹ *Id.* at 54-55. One writer commented upon the program as follows:

I did not respond well to the Senator. He took half an hour to make a few accusations against Murrow, to give a rambling history of Communism and the Russian Revolution, and [to make one surprise accusation, soon refuted by President Eisenhower]. The techniques were stable; the handling of the medium incredibly dull.

Seldes, *Murrow, McCarthy and the Empty Formula*, 37 SATURDAY REV., April 24, 1954, at 26-27.

⁶² The significant difference between the technical quality of the Murrow-Friendly production and Senator McCarthy's response was the subject of a contemporary criticism of the practice of offering no more than "equal" time to amateurs. Seldes in his criticism wrote:

Unfortunately, it doesn't make sense, except mathematically, and Senator McCarthy's answer to Murrow was a brilliant demonstration of the fallacy involved. In the days of radio, when the formula was created, equal time meant time to make a speech in answer to a speech. To be sure, one speaker might have a better voice or a better ghost-writer than another, but there was a rough equality. In television it is possible to imagine a propagandist hiring a great dramatist to write a play in favor of (or against) public ownership of all electrical power, producing this play with great players, and then offering his opponents equal time for reply—time which for lack of talent or money they might be able to fill only with a series of dull speeches. In the case of Murrow and McCarthy, we had on the original broadcast the product of some three years of experience in the handling of film clips, an art in which Murrow and his co-worker Fred Friendly have no peers. Since (Mr. Murrow has told me) they looked at 15,000 feet of film beyond the amount they showed, I would guess they had spent many weeks and some \$15,000 on their program (counting salaries and incidentals). In reply Senator McCarthy came up with a feebly handled newsreel talk illustrated by two or three unanimated maps—about as weak a television program as you could devise. I am not impressed by the reiterated statement in the press that no one knows who will pay the \$6,000 this reply cost; I am impressed by the possibility that someone might be attacked who couldn't even borrow enough to make a film.

Seldes, *supra* note 61, at 26. CBS eventually paid the cost of preparing McCarthy's film, however. F. FRIENDLY, *supra* note 38, at 53.

⁶³ F. FRIENDLY, *supra* note 38, at 43, 58.

⁶⁴ *Id.* at 26-27.

agement to attribute their problems to the dissemination of controversial programming.

During 1954 and 1955, *See It Now* continued to air controversial programs.⁶⁵ Finally, a program describing how a small Texas weekly newspaper exposed a land scandal involving state officials brought strong pressure on Alcoa, just as Alcoa was enlarging its facilities in Texas. This pressure, combined with the history of customers angered by prior *See It Now* programs, led Alcoa to terminate its sponsorship of the program.⁶⁶ *See It Now* continued on an irregular schedule of hour long programs, not all of them sponsored, for three more years. However, the controversies brought on by the subjects of the programs and Murrow's injection of his own opinions eventually brought the series to a halt.⁶⁷

After the quiz show scandal, *CBS Reports* was created.⁶⁸ While the program's treatment of controversial subjects did receive continued support from CBS management, the practice instituted by CBS of allowing affiliates to review each show in advance did affect the tenor of the program. As Friendly explains:

I must admit that this system tempered our broadcasts. The stations didn't try to influence our choice of subjects any more than the management did, but I found myself subconsciously applying a new kind of conformity to our documentaries. Looking back now, I suppose that I was subtly influenced to do controversial subjects in a noncontroversial manner. We did handle tough subjects and we often did them well, but there were no strong endings such as in the McCarthy [or] Radulovich . . . programs. . . . Our techniques improved through the years, but in balancing arguments rather than objectively weighing them, we were sacrificing one ingredient of good journalism.⁶⁹

Thus the indirect pressure of affiliate review resulted in a diminution of controversial expression at the national level. Additionally, some affiliates have completely suppressed controversial programming at the local level, with advertiser pressure playing a key role.⁷⁰

⁶⁵ These included programs on race relations and one that brought considerable pressure on both Alcoa and CBS, an interview with J. Robert Oppenheimer. *Id.* at 68.

⁶⁶ *Id.* at 76.

⁶⁷ *Id.* at 76-92.

⁶⁸ *Id.* at 99.

⁶⁹ *Id.* at 135.

⁷⁰ *E.g.*, a journalist for a Jacksonville, Florida, television station turned out explicit and controversial documentaries on local pollution. While approving mail poured in from

The Smothers Brothers. The Smothers Brothers show on CBS was more than an entertainment program; it contained ample quantities of social commentary.⁷¹ Furthermore, the commentary was there for its own sake and not just as a vehicle for comedy, which distinguished the program from *Laugh-In* and humorists like Bob Hope.⁷² On the other hand, the humor was sometimes sophomoric, crass or so thickly laced with commentary as to be no longer perceptible.⁷³

Despite its problems, the program demonstrated the ability of satirical entertainment to communicate controversial ideas effectively.⁷⁴ Those who remember Officer Judy can hardly point to any discussion or interview show, or even any documentary, that could communicate as effectively social criticism of police officers.⁷⁵ The program was also successful in holding the interest of the young.⁷⁶ Perhaps the material needed to attract such an audience could hardly avoid being offensive, at times, to those on the other side of the generation gap.

Whatever other problems the Smothers Brothers may have had,⁷⁷ at least one factor in CBS's decision to cancel their program was the network's desire to suppress forceful social commentary on popular programs.⁷⁸ While the Smothers Brothers' approach to entertainment during their subsequent appearance on ABC may have been doomed to failure,⁷⁹ it appears that ABC's tight censorship kept them from maintaining the style that previously had been successful on CBS.⁸⁰ The history and demise of the Smothers Brothers' program demonstrates the broadcaster's

viewers, sponsor disapproval worked its corrosive effect, and the journalist began to worry when a station official sarcastically offered him a list of WJXT's customers "so [he] could hit them systematically instead of one by one." Eventually, he was fired, "for doing his job too well." *The Devil in Duval County*, 96 TIME, Aug. 17, 1970, at 42.

⁷¹ Dempsey, *Social Comment and TV Censorship*, 52 SATURDAY REV., July 12, 1969, at 53; Kloman, *The Transmogrification of the Smothers Brothers*, 72 ESQUIRE, Oct., 1969, at 148, 153; Simonds, *Smothering Dissent: A Pungent Social Comment*, 21 NAT'L REV. 345 (1969).

⁷² Dempsey, *supra* note 71, at 53.

⁷³ *Id.*; Simonds, *supra* note 71, at 345.

⁷⁴ See note 50 *supra*.

⁷⁵ If the role was ever overdone, so on some occasions are political cartoons, yet few would suggest that publishers should suppress such cartoons.

⁷⁶ Kloman, *supra* note 71, at 153.

⁷⁷ The sophomoric and tasteless character of some Smothers Brothers humor and the program's occasional banality muddy this analysis somewhat. See Simonds, *supra* note 71, at 346, criticising both the Smothers Brothers approach and television's inability to deal with "politics or sex or anything else remotely touchy."

⁷⁸ Dempsey, *supra* note 71. Affiliates also previewed each show before it was aired, no doubt exercising some chilling effect upon the Smothers Brothers. Kloman, *supra* note 71, at 148.

⁷⁹ Brudnoy, *Mom Always Loved Them Best*, 22 NAT'L REV. 1009 (1970).

⁸⁰ Shayon, *Painful Passing*, 53 SATURDAY REV., Oct. 3, 1970, at 48.

strong reluctance to present any meaningful and effective combination of social commentary and entertainment.⁸¹

The Selling of the Pentagon. The furor that arose in 1971 over this CBS documentary should reassure us that controversial ideas still appear, at least occasionally, on network television. Furthermore, the strong stand that CBS management took in supporting this documentary is also reassuring; but the fact that CBS was required to defend the documentary is illustrative of the great difference in public attitude toward broadcast and print journalism.⁸² The program has been characterized as hardly revolutionary, one that broke no new turf "except in television."⁸³ Indeed, the show's information had been reported earlier in the print media. Nevertheless, the reaction to the program was explosive. As one observer explained:

But inasmuch as not many people read, and a great many people watch television, some of Washington's most powerful pro-Pentagon politicians felt that their interests had for the first time been attacked in a truly significant and dangerous way. And it made them very angry.⁸⁴

A number of public figures, including Vice President Spiro Agnew, Congressman F. Edward Hébert, and Secretary of Defense Melvin Laird, denounced CBS for broadcasting the documentary, while Congressman Harley Staggers launched an investigation that was aborted only when the House of Representatives, in effect, sustained CBS's refusal to honor a subpoena to produce all film taken but not broadcast.⁸⁵

The reason for criticising a controversial documentary is to

⁸¹ Lest it be thought that suppressive practices are confined to one network, consider the following description of the demise of David Brinkley's half-hour program on NBC:

[Where "in depth" reporting gets too deep,] the story, and often the program, mysteriously disappears. Such was the case with David Brinkley when, on his own half-hour show, he exposed the shocking corruption of the Federal road-building program, with its broad highways leading into nowhere, in one instance, and accompanying evidences of money siphoned off into bottomless pockets to the tune of millions upon millions of dollars. His interview with the federal administrator of the highway program may have been one of the most embarrassing episodes involving a public figure ever seen on the tube. Apparently it was too embarrassing. The program was canceled soon afterward, with the usual bland excuse, and nothing more was ever heard again on the air about the corruption. It would be a naive observer indeed who would not conclude that the networks had retreated willingly before pressure from high places.

R. MONTGOMERY, *supra* note 2, at 110-11.

⁸² Sherrill, *supra* note 22, at 78. *See also TV v. the Pentagon*, 97 TIME, April 5, 1971, at 46.

⁸³ Sherrill, *supra* note 22, at 26.

⁸⁴ *Id.*

⁸⁵ *See* H.R.RES. 534, 92d Cong., 1st Sess., 117 CONG. REC. H6642, H6669-70 (daily ed. July 13, 1971); Irvine, *supra* note 19, at 855.

destroy its credibility with the public, or at least to distract the public from thinking about its basic message. In this case, CBS gave its potential critics a golden opportunity to accomplish the latter, if not both, objectives, by indulging in editorial practices that were likely to mislead the public in important ways,⁸⁶ merely for the sake of smoothing the overall appearance of the film.⁸⁷ "Seeing is believing" states the adage, and television journalists should realize that unless the average viewer is informed to the contrary he is going to believe, or think that he is expected to believe, that events occurred just as they appear on the screen.⁸⁸ To perform such severe editing without informing the viewer is to invite successful attacks upon the credibility of the documentary itself, allowing the main message to become obfuscated by the dispute over editorial methodology. The dragon must rid itself of the notion that news presentation should meet the standards of smoothness and continuity applicable to entertainment.

CBS News. A strong attack was conducted by members of the print media friendly to the administration against a portion of a November 3, 1970, CBS News telecast showing two South Vietnamese soldiers stabbing a prisoner to death in the presence of American military advisers.⁸⁹ In order to attack the credibility of the telecast, print media stories itemized various alleged discrepancies between the televised and printed accounts of the incident. As the print media campaign grew, apparently feeding upon leaks from the White House staff, CBS News finally decided to reply, consuming seven minutes of air time in responding to the discrepancies alleged by the print media. While seven minutes may not seem long, it is approximately one-third of the news time available in a half-hour broadcast, certainly a significant amount of time in its context. If this is the cost that a network must bear to present a controversial news item, the eventual result may be self-censorship.

⁸⁶ CBS recorded a long answer responding to a question basic to the theme of the documentary, used parts of it as responses to two other more specific questions, and deleted the balance altogether. It also selected small excerpts from a public speech by a Colonel of the Marines, and arranged them in a different order, failing to indicate that two of the excerpts were quotations from others and so identified by the speaker. Irvine, *supra* note 19. *But see The Art of "Cut and Paste," supra* note 19, at 56: "CBS maintains, with some support from a tape of the speech, that the colonel's own words and Souvanna Phouma's were so confusingly interwoven as to be almost indistinguishable."

⁸⁷ *The Art of "Cut and Paste," supra* note 19, at 56, 57.

⁸⁸ *Id.* at 56. The networks have perhaps forgotten how "hearing was believing" the evening before Halloween, 1938, when Orson Welles recreated H.G. Wells' *The War of the Worlds*. For a full description of the program and the panic it caused, see H. KOCH, *THE PANIC BROADCAST* (1970).

⁸⁹ Knoll, *Shaping Up CBS: A Case Study in Intimidation*, 34 *THE PROGRESSIVE*, July, 1970, at 18; Sherrill, *supra* note 22, at 93.

III. THE FAIRNESS DOCTRINE: A PROD OF LIMITED EFFECTIVENESS

The inherent nature of the broadcast technologies makes some degree of federal regulation essential in order to provide effective utilization of the airwaves without harmful interference.⁹⁰ Early attempts to use the radio broadcast medium without significant governmental regulation resulted in such extensive and chaotic interference that strong pressures grew for congressional enactment of regulatory legislation. This public pressure resulted in passage of the Radio Act of 1927.⁹¹ In addition to regulating the broadcast technology, the Act required consideration of the "public convenience or necessity" in the award of broadcast licenses.⁹² In 1934 the Act was rewritten, the regulatory body was renamed the Federal Communications Commission, and its authority extended.⁹³

While regulation of the technology of the broadcast industries is generally conceded to be both necessary and constitutional,⁹⁴ a battle rages over whether the FCC should be merely a technological traffic policeman, or whether it is also appropriate for the FCC to use its licensing and other authorities to regulate program content.⁹⁵ While the issue is still being debated, the FCC's general authority to regulate program content is now settled. *National Broadcasting Co. v. United States*⁹⁶ held such regulation to be consistent with the first amendment on the rationale that the unavoidable existence of technological limitations on the opportunity to broadcast is sufficient to justify further limiting this opportunity to those who can demonstrate that their operation will meet⁹⁷ or, in the case of competing applicants, will most advance,⁹⁸ the public interest, convenience or necessity.

In evaluating the reasonableness of the FCC's regulation of broadcasters, it must be recognized that the immutable laws of technology, coupled with the allocation of vast portions of the

⁹⁰ See W. JONES, REGULATED INDUSTRIES, CASES AND MATERIALS 1019-23 (1967).

⁹¹ *Id.* at 1023.

⁹² Radio Act of 1927 § 9, 44 Stat. 1162, 1166 (1927).

⁹³ W. JONES, *supra* note 90, at 74-76, 1028. The "public convenience or necessity" became the "public interest, convenience or necessity." Communications Act of 1934 §§ 303, 307, 309, 316; 47 U.S.C. §§ 303, 307, 309, 316 (1970).

⁹⁴ See, e.g., Robinson, *supra* note 10, at 86; Frank, *Broadcasting and the First Amendment*, 38 VITAL SPEECHES 125, 127 (1971).

⁹⁵ See generally the first six authorities cited in note 101 *infra*.

⁹⁶ 319 U.S. 190 (1943).

⁹⁷ *Henry v. FCC*, 302 F.2d 191 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 821 (1962); and *Lee Roy McCourry*, 2 P & F RADIO REG. 2d 895 (1964).

⁹⁸ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945); *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

electromagnetic spectrum to communications uses other than conventional broadcasting, have led to a situation in which the number of opportunities to broadcast is significantly less than the number of individuals financially able and willing to purchase or build the required facilities.⁹⁹ Unlike the situation in the print media, the number of persons able to enter the broadcast media is not related to consumer demand. Where the rationing of a technologically—as opposed to an economically—limited opportunity is required, it is not surprising that a regulatory commission has been substituted for the laws of the economic marketplace. However, since the opportunity in question is the opportunity to communicate ideas to the public, the first amendment subjects FCC powers to restrictions not applicable to other regulatory commissions. Nevertheless, as the courts have held, these first amendment values do not prohibit the limited intervention into content now practiced by the FCC.¹⁰⁰

One important aspect of federal regulation of the broadcast media is the fairness doctrine,¹⁰¹ which requires a broadcast li-

⁹⁹ W. JONES, *supra* note 90, at 1019–22, 1030–33. See also Levin, *The Radio Spectrum Resource*, 11 J. LAW & ECON. 433 (1968); and TELECOMMUNICATIONS SCIENCE PANEL OF THE COMMERCE TECHNICAL ADVISORY BOARD, ELECTROMAGNETIC SPECTRUM UTILIZATION—THE SILENT CRISIS (1966) [hereinafter cited as SILENT CRISIS]. Some authorities, e.g., Robinson, *supra* note 10, at 88, point to an excess of channels in the Ultra High Frequency (UHF) portion of the spectrum and assert that their availability demonstrates that only economic factors limit the number of television stations. However, technologically, UHF channels are so inferior as to have great difficulty competing with existing VHF stations (those assigned to channels 2 through 13). As the Supreme Court correctly noted in its *Red Lion* opinion, 395 U.S. 367, 398 (1969), UHF television channels are not going begging. The fact that more UHF stations cannot practically compete with VHF stations is hardly, by itself, a strong argument for loosening regulation of all broadcasting.

¹⁰⁰ The Supreme Court has not definitively established the limits of the FCC's power to intervene in the programming process, perhaps in part because the FCC has been so cautious in exercising of this authority. Kalven, *supra* note 24, at 18, 37. The FCC was bold in elaborating the fairness doctrine in the instances of personal attacks and political editorials (see text accompanying notes 109–127 *infra*), but the Supreme Court, in reviewing these elaborations in the *Red Lion* opinion, again set no express limits upon the FCC, although it did suggest limits in dictum, 395 U.S. at 396.

¹⁰¹ See note 7 *supra*. A partial selection of literature on the fairness doctrine includes: Barrow, *supra* note 10; Blake, *supra* note 7; Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation: Implications of Technological Change*, 37 U. CIN. L. REV. 550 (1968); Kalven, *supra* note 24; Marks, *Broadcasting & Censorship: First Amendment Theory After Red Lion*, 38 GEO. WASH. L. REV. 974 (1970); Robinson, *supra* note 10; Note, *A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access*, 39 GEO. WASH. L. REV. 532 (1971); Note, *Fairness Doctrine: Television as a Marketplace of Ideas*, 45 N.Y.U.L. REV. 1222 (1970).

Other major aspects of federal regulation are the statutory equal opportunities requirement, 47 U.S.C. § 315 (1970), and the FCC's program balance requirement. The FCC has explained the distinction between the fairness doctrine and the equal opportunities requirement as follows:

The "equal opportunities" requirement relates solely to use of broadcast facilities by candidates for public office. With certain exceptions involving specified news-type programs, the law provides that if a licensee permits a

censee¹⁰² to cover controversial issues of public importance¹⁰³ in a fair manner, giving reasonable opportunity for the presentation of contrasting viewpoints.¹⁰⁴ While the licensee has broad discretion to determine whether a particular matter constitutes a controversial issue of public importance, he is expected to exercise this discretion in a reasonable manner, and his determinations are subject to FCC review.¹⁰⁵ When the licensee intends to cover, or has already covered, one side of such an issue, he has an affirmative obligation to seek out appropriate spokesmen for any contrasting views; while he has considerable discretion in making

person who is a legally qualified candidate for public office to use a broadcast station, he shall afford equal opportunities to all other such candidates for that office in the use of the station. . . .

The fairness doctrine deals with the broader question of affording reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance. Generally speaking, it does not apply with the precision of the "equal opportunities" requirement. Rather, the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming. . . . In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. There is thus room for considerably more discretion on the part of the licensee under the fairness doctrine than under the "equal opportunities" requirement.

FCC, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C.2d 598 (1969) [hereinafter cited as *Fairness Primer*].

For discussions of federal regulation of programming, see Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 704 (1964); and Policy Statement on Programming, *supra* note 32.

¹⁰² While FCC rules extend the fairness doctrine to CATV-originated programming, 47 C.F.R. § 74.1115 (1971), the scarcity rationale does not apply to a CATV system since its operator must lease available channels, or channel-time, to anyone willing to pay, and increase channel capacity in response to increased demands. See part IV E of this article *infra*. The FCC's public access channel requirement, discussed in part IV E *infra*, further reduces any need for control of the cable operator's programming to protect the public's right to receive all viewpoints on controversial ideas of public importance.

On the other hand, the FCC argues that the absence of scarcity is immaterial, FCC, *Amendment of the Commission's Rules Relative to Community Antenna Television Systems*, 34 Fed. Reg. 17651, 17658-59 (1969), because the fairness doctrine is in the public interest. But in the absence of scarcity, the first amendment itself is the controlling expression of the public interest. The FCC's argument that CATV's carriage of broadcast signals subjects CATV-originated programming to regulation is too broad. This argument supports FCC regulation of what CATV does with broadcast signals, *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958), but does not properly extend beyond the necessities of regulating and protecting broadcast technology.

If it is constitutional for the FCC to apply the fairness doctrine to a medium in which technological scarcity does not prevail, what would prevent Congress from applying the fairness doctrine to any newspaper subscribing to an interstate wire service?

¹⁰³ This requirement applies even when state law is contrary. *State v. Univ. of Maine*, 266 A.2d 863 (Me. 1970).

¹⁰⁴ Notes 8 and 101 *supra*.

¹⁰⁵ *Fairness Primer*, *supra* note 101, at 601-02.

such a choice, his action is again subject to FCC review.¹⁰⁶ The licensee is not required to give equal time to contrasting viewpoints, nor need they be expressed on the same program, so long as the licensee's overall performance in presenting the contrasting viewpoints is reasonable and fair.¹⁰⁷

A more extensive analysis of the fairness doctrine requires the consideration of two regulatory themes that thread their way through the economic regulation of traditional "natural monopoly" industries.¹⁰⁸ One can be characterized as regulation in an "absolute" sense; a typical example would be a public utility commission determining the "just and reasonable" rate to be charged by a particular regulatee. The other theme can be characterized as regulation in a "relative" sense; an example would be a commission's comparison of the regulatee's practices as between different customers to determine whether they constitute unjust discrimination against a particular customer or provide that customer with an unreasonable preference or advantage.¹⁰⁹ The fairness doctrine is a curious amalgam of these two regulatory themes, adapted, of course, for application to the flow of information through the broadcast media.¹¹⁰ The "absolute component" of the general fairness doctrine is its requirement that licensees present a reasonable amount of programming treating controversial issues of public importance,¹¹¹ while its "relative component" is the requirement that, in treating controversial issues of public importance, the licensee must ensure a balanced presentation of opposing viewpoints.¹¹²

¹⁰⁶ *Id.* at 607-608. See also FCC, Notice of Rulemaking: Obligations of Broadcast Licensees Under the Fairness Doctrine, 23 F.C.C.2d 27 (1970).

¹⁰⁷ Fairness Primer, *supra* note 101, 607-08.

¹⁰⁸ *E.g.*, public utilities. In transportation, competition is limited by legislative policy, rather than technological conditions. C. PHILLIPS, JR., *THE ECONOMICS OF REGULATION* 21 (Rev. ed. 1969). See also W. JONES, *supra* note 90, at 1-25.

¹⁰⁹ For an illustration of statutory recognition of the distinction between "absolute" and "relative" regulation, compare subsections (a) and (b) of the Natural Gas Act § 4, 15 U.S.C. § 717c (1970).

¹¹⁰ Presumably the themes cannot be applied to broadcasters without such adaptation, because broadcasters are not to be subjected to common carrier regulation. 47 U.S.C. § 153(h) (1970).

It is not uncommon to divide the fairness doctrine into these particular components. See, *e.g.*, Robinson, *supra* note 10, at 134.

¹¹¹ Editorializing, *supra* note 25, at 1249. But see Blake, *supra* note 7, at 78. Blake's relegation of the absolute component to a footnote illustrates its practical importance to the communications bar and supports the conclusion in the text accompanying note 114 *infra*.

¹¹² Editorializing, *supra* note 25, at 1251. One should not infer from the parallels between themes of economic regulation and the fairness doctrine that economic regulatory concepts may simply be lifted bodily from that field and applied to the regulation of broadcast programming. On the other hand, the presence of some parallels should not seem surprising when one considers that federal regulation of broadcasting is a form of government regulation over the utilization of a limited opportunity, the opportunity to

The absolute component of the general fairness doctrine has been relatively ineffective in promoting the broadcasting of controversial ideas. Undoubtedly, if given the opportunity, a number of licensees would prefer to broadcast no ideas of controversial import whatsoever.¹¹³ To the extent that the operation of the fairness doctrine causes such licensees to carry some ideas of a controversial nature, the doctrine has had some success. However, the level of controversiality in broadcasting has not been comparable to that in the print media,¹¹⁴ for the fairness doctrine seldom spurs a broadcaster to carry a program with ideas so controversial as to provoke significant advertiser or informal governmental pressure; broadcasters are usually quite ready to suppress a program when they believe that the economic interests of the network or station so require.

The relative, or non-discriminatory component of the fairness doctrine has had more obvious effects, although opinions differ as to whether all of them have been beneficial.¹¹⁵ Probably the most clearly beneficial effect of the relative component has been on the choice of participants for panel discussions.¹¹⁶ While there are occasional exceptions, particularly at the local level, for the most part the relative component of the fairness doctrine has brought about a balanced selection of persons with differing viewpoints. Unfortunately, the extent of the societal benefit is mitigated by the limited effectiveness of most panel discussion shows as a means of conveying controversial ideas.¹¹⁷ Additionally, the relative aspect of the fairness doctrine might have a detrimental impact upon television journalism by encouraging "on the one hand," "on the other hand" reporting and editing.¹¹⁸ However, the internal pressures to avoid controversial programming prob-

convey information over the broadcast media, just as traditional economic regulation of natural monopoly industries is a governmental system for regulating the utilization of limited economic resources, the products or services of a public utility or transportation industry.

¹¹³ See Sherrill, *supra* note 22, at 90-92.

¹¹⁴ Certainly *The Selling of the Pentagon* is an exception that proves the rule. Sherrill, *supra* note 22, at 26. ABC's openly being referred to as "the silent majority's network," Knoll, *supra* note 89, at 22, is hardly a testimonial to the effectiveness of the fairness doctrine's absolute component.

¹¹⁵ Compare Robinson, *supra* note 10, at 136-44, with Barrow, *supra* note 10, at 485-95. See also Frank, *supra* note 94, at 127.

¹¹⁶ Jaffe, *supra* note 101, at 554.

¹¹⁷ Note 48 *supra* demonstrates the low interest expressed by the public in "heavy information" programs.

¹¹⁸ See Edward R. Murrow, quoted in F. FRIENDLY, *supra* note 38, at 10: "[S]ome issues aren't equally balanced. We can't sit there every Tuesday night and give the impression that for every argument on one side there is an equal one on the other side."

For a journalist's view that such an approach to broadcast news journalism is required by the fairness doctrine, see E. EFRON, *supra* note 9, at 19.

ably contribute more strongly to such journalism than does the fairness doctrine.¹¹⁹

The application of the relative component of the fairness doctrine to three recurring types of situations has been elaborated and particularized through the establishment of three specific principles within the relative component. These principles may be referred to as the personal attack principle, the political editorial principle, and the *Banzhaf* principle.

Formulated by the FCC, first by decision and subsequently in the form of regulations,¹²⁰ the personal attack and political editorial principles of the fairness doctrine were expressly approved in *Red Lion Broadcasting Co. v. FCC*.¹²¹ These principles require a licensee who has broadcast either a personal attack on an identified person or group¹²² or a political editorial endorsing or opposing any legally qualified candidate for public office to notify the person, group or affected candidates and offer a reasonable opportunity to respond. Generally, attacks by one political candidate upon another and bona fide news programs are excepted from these principles.¹²³ While these principles can provide a specific individual or group a reasonable opportunity to be heard, the FCC does not regard them as forms of the first amendment right of access.¹²⁴

It is difficult to determine whether the personal attack and political editorial principles of the fairness doctrine increase the presentation of controversial ideas over the broadcast media. Obviously, on those occasions when either principle is invoked, controversial ideas are likely to be broadcast. However, because each such occasion probably costs the network or licensee a significant amount of money, network and individual broadcast managers are apt to attempt to minimize the number of such occasions.¹²⁵ Even if the personal attack principle does have a

¹¹⁹ Comment, *From the FCC's Fairness Doctrine to Red Lion's Fiduciary Principle*, 5 HARV. CIV. LIB., CIV. RIGHTS L. REV. 89, 96-97 (1970). See also Barrow, *supra* note 10, at 486-87; F. FRIENDLY, *supra* note 38, at e.g., 10, 122.

¹²⁰ See, e.g., 47 C.F.R. § 73.679 (1971).

¹²¹ 395 U.S. 367 (1969). The decision was welcomed in a student comment, *supra* note 119, but received critically elsewhere, not only for approving the subject principles, but also for deciding more than the narrow issue actually before it. Blake, *supra* note 7; Marks, *supra* note 101.

¹²² Except, e.g., foreign groups or foreign public figures, 47 C.F.R. § 73.679(b)(1).

¹²³ See e.g., 47 C.F.R. § 73.679(b)(2) and (3) (1971), and the Commission's note following the section.

¹²⁴ The FCC has stated that the principles rest not upon an individual's right to be heard, but, rather, upon the proposition that the public's right to be informed will be best served if the person attacked or the candidate opposed presents the contrasting viewpoint.

Fairness Doctrine Inquiry, *supra* note 5, at 28.

¹²⁵ See *Red Lion Broadcasting v. FCC*, 395 U.S. 372, 392-93 (1969). A similar

stultifying effect in a few specific situations, however, it generally implements the public policy underlying the law of defamation¹²⁶ and should not be abandoned. Similarly, the political editorial principle is, in effect, a reasonable extension of the statutory equal opportunities philosophy to political editorials.¹²⁷ Yet, except during the short life of political campaigns, the political editorial principle is not likely to increase the broadcasting of controversial ideas.

The *Banzhaf* principle is embodied in cases finding that the broadcasting of certain product commercials amounts to the presentation of one side of a controversial issue of public importance.¹²⁸ When such a finding is made, broadcasters are required to provide a reasonable amount of programming presenting the contrary view. To the extent that other programming does not fulfill such a requirement, broadcasters must accept public interest messages presenting the contrary view. The doctrine began with cigarette advertisements and has recently been extended to advertisements for high octane gasoline and high powered cars.¹²⁹

The *Banzhaf* principle has brought about an increase in the broadcasting of controversial ideas. Since it requires the presentation of the view opposite to the view embodied in a commercial message, and since most commercial messages reflect majoritarian viewpoints, practically every application of the *Banzhaf* principle will result in the broadcast of a controversial idea. Moreover, the *Banzhaf* principle is unlikely to encourage any suppression of controversial ideas, because the broadcasters still have a strong

argument was rejected by the Supreme Court in *Red Lion* partially because it was speculative, and partly because the FCC "is not powerless to insist that [licensees] give adequate and fair attention to public issues." 395 U.S. at 392-93. A favorable student comment on *Red Lion* nevertheless found this treatment "unconvincing." Comment, *supra* note 119, at 96. Whatever the merits of the Court's former ground of rejection, the latter ground appears valid only to the extent that the present level of effectiveness of the absolute component of the fairness doctrine is satisfactory or capable of improvement without threatening first amendment rights of broadcasters. See text accompanying notes 292-94 *infra*.

¹²⁶ It is in this respect, *Red Lion* may mark a step back from the direction in which the Supreme Court has been moving in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. Since there is an obvious need to develop alternate methods of implementing the policy of defamation law which are more compatible with the first amendment, the over-all effect of the personal attack principle may be highly constructive, even though it seems unlikely that the principle will have a significantly favorable impact upon the narrower problem considered in this article. See also text accompanying notes 345-56 *infra*.

¹²⁷ See note 101 *supra* and *Red Lion Broadcasting Co. v. FCC* 395 U.S. 367, 382-83, 385 (1969).

¹²⁸ *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971).

¹²⁹ *Id.* For a more extensive treatment of the doctrine, see Jaffe, *supra* note 15, at 775-79.

economic incentive to carry the "triggering" commercial with a relatively low risk of having to broadcast unsponsored opposing messages. The principal weakness of the *Banzhaf* principle is that its benefits are limited to the broadcast of *only* those ideas that oppose the views of a "triggering" commercial, presently a rather limited category.¹³⁰

IV. THE RIGHT OF ACCESS: A NEW PROD FOR THE RELUCTANT DRAGON

"It's all up, dragon!" he shouted as soon as he was within sight of the beast. "He's coming! He's here now! You'll have to pull yourself together and *do* something at last!"

—The Boy to the Reluctant Dragon, in K. Grahame, *The Reluctant Dragon* (1953)

A. *The Genesis of the Right of Access*

The first amendment right of access has evolved over a number of years;¹³¹ its origin lies in decisions which were no doubt intended by their authors to do little more than prohibit government from imposing a prior restraint upon expression.¹³² For example, in *Lovell v. City of Griffin*,¹³³ the Supreme Court held unconstitutional a city ordinance that prohibited the distribution of any kind of publication without prior permission from the city manager, on the ground that the ordinance "would restore the system of license and censorship in its baldest form."¹³⁴

In *Hague v. CIO*¹³⁵ the Supreme Court held unconstitutional an ordinance requiring a permit before a public assembly or parade could be held on a public street, in a public park or near a

¹³⁰ *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 n. 34 (D.C. Cir. 1971).

¹³¹ The earliest case to recognize an affirmative right of access to a medium of mass communication, *Uhlman v. Sherman*, 22 Ohio N.P. (n.s.) 225, 31 Ohio Dec. 54 (C.P. 1919), appears to have been an anachronism. This 1919 decision, finding the only community newspaper so clothed with the public interest that it had to allow all members of the public to purchase advertising space, subject to any reasonable rules and classifications the newspaper might impose, was so far ahead of its time that the law has not yet caught up.

¹³² For a recent case denying a right of access see *Chicago Joint Bd. v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), where the court held that the first amendment did not require a newspaper to serve as a public forum so as to force newspaper publishers to publish a labor union's editorial advertisement. The Seventh Circuit said that the union's right to free speech did not give it the right to make use of the publishers' printing presses and distribution systems without their consent.

¹³³ 303 U.S. 444 (1938).

¹³⁴ *Id.* at 451-52.

¹³⁵ 307 U.S. 496 (1939).

public building. Mr. Justice Roberts' opinion¹³⁶ contained an access-oriented description of the rights secured by the first amendment:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places, has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.¹³⁷

The right to engage in protected expression at recognized public gathering places without local intervention was extended to private property, under certain limited circumstances, in the well-known case of *Marsh v. Alabama*.¹³⁸ This case held that the proprietors of a private town could not invoke the power of the state to deny an individual the right to distribute religious literature on the sidewalk of the town's "business block."

Less well-known is the companion case, *Tucker v. Texas*.¹³⁹ Here, defendant had been presenting religious views and distributing religious literature at a federally owned housing project built for workers engaged in national defense activities. Although the village was not a restricted area for security purposes, its federally employed manager ordered the defendant to cease his activities and had him arrested by state authorities when he refused. The Supreme Court reversed defendant's conviction. Of the eight justices considering the case, four accepted for the purpose of appeal the holding of the Texas courts that the manager had been given authority by a federal agency to issue such an

¹³⁶ There was no majority opinion in the case. An opinion by Mr. Justice Stone deemed first amendment principles to be secured against state infringement by the due process clause of the fourteenth amendment, rather than the privileges and immunities clause upon which Mr. Justice Roberts' opinion rested. *Id.* at 519, 512-13, respectively.

¹³⁷ *Id.* at 515-16. The first sentence of the quotation was quoted with approval by the Court in *Kunz v. New York*, 340 U.S. 290, 293 (1951). The balance of the quotation is an early example of the right of access concept's being accompanied by assurances of the opportunity to engage in reasonable regulation thereof.

¹³⁸ 326 U.S. 501 (1946).

¹³⁹ 326 U.S. 517 (1946).

order, and then went on to find that this authorization violated the freedoms of press and religion safeguarded by the first amendment. The Justices added that while such restrictions might be required for security reasons in certain circumstances, the government had shown "no such necessity and no such intention on the part of Congress or the Public Housing Authority."¹⁴⁰ Despite the lack of a majority opinion,¹⁴¹ the case appears to support the proposition that the federal government may not arbitrarily deny access to federally owned property to persons wishing to engage in protected first amendment expression.¹⁴²

While the United States Supreme Court was deciding *Marsh* and *Tucker*, the Supreme Court of California in *Danskin v. San Diego Unified School District*¹⁴³ was taking another step in the evolution of the right of access. The California legislature had required that school districts grant the free use of school auditoriums for meetings by citizen groups to "discuss, from time to time, as they may desire, any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the citizens."¹⁴⁴ In short, the legislature expressly established a public forum. *Danskin* placed before the California court a subsequent amendment to the statute by which the legislature sought to deny the use of such school facilities to "subversive elements."

Justice Traynor, speaking for the court, found that the subversive element exclusion was so broad as to exclude expression that did not in any way constitute a clear and present danger:

The state is under no duty to make school buildings available for public meetings. . . . If it elects to do so, however, it

¹⁴⁰ *Id.* at 520.

¹⁴¹ Mr. Justice Frankfurter, in a separate concurring opinion, refused to assume that Congress had authorized the manager to prohibit defendant's activities. However, he did state that:

In the case of communities established under the sponsorship of the United States by virtue of its spending power, it would, I should think, be even less desirable than in the case of company towns to make the constitutional freedoms of religion and speech turn on gossamer distinctions about the extent to which land has been "dedicated" to public uses.

Id. at 521. For explanation of the concept of land "dedicated" to public uses, see text accompanying notes 224-33 *supra*.

¹⁴² See also *Lamont v. Postmaster General*, 381 U.S. 301 (1965), holding a postal statute requiring an addressee of an item of "Communist political propaganda" to take affirmative action within twenty days after notice to obtain delivery of the item, an unconstitutional "limitation upon the unfettered exercise of the addressee's First Amendment rights." *Id.* at 305. In addition, *United States v. Robel*, 389 U.S. 258 (1967), held unconstitutional a federal statute barring all employment in any defense facility of members of certain organizations, because it interfered too broadly with the freedom of association protected by the first amendment.

¹⁴³ 28 Cal.2d 536, 171 P.2d 885 (1946).

¹⁴⁴ *Id.* at 540, 171 P.2d at 888.

cannot arbitrarily prevent any members of the public from holding such meetings. . . . Nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property. . . .

Since the state cannot compel "subversive elements" directly to renounce their convictions and affiliations, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building.¹⁴⁵

While the statement that the state has no affirmative duty to provide a public forum is now being questioned,¹⁴⁶ *Danskin* provides a firm foundation for the right of access not only to publicly owned forums, but also to publicly owned media.¹⁴⁷

Although Professor Chafee wrote about the need for affirmative action to facilitate the presentation and discussion of unpopular ideas over thirty years ago,¹⁴⁸ Professor Barron presented the first exposition of a right of access for individuals to today's oligopolistic mass media in 1967.¹⁴⁹ In his article, Barron argued for abandonment of the "romantic view of the first amendment" (essentially a *laissez faire* approach to the operation of the "marketplace of ideas"), in which the first amendment's role is limited to the prohibition of laws and governmental actions that restrain expression. Unfortunately, this "romantic view" of the first amendment's operation has the predictable effect of permitting those private persons who control mass communications media to suppress and over-simplify ideas they consider undesirable. If the marketplace is to function effectively, providing us with "the widest possible dissemination of information from diverse and antagonistic sources,"¹⁵⁰ the first amendment must be understood to include an affirmative right of individual expression over the mass media.¹⁵¹

¹⁴⁵ *Id.* at 545-46, 171 P.2d at 891.

¹⁴⁶ T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 646 (1970).

¹⁴⁷ For a good review of the development of first amendment public forum law, see Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931.

¹⁴⁸ Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 559 (1941). His later work, *GOVERNMENT AND MASS COMMUNICATIONS* (1947), treats the issue of affirmative governmental action in much greater detail, from postal subsidies to the antitrust laws. He discusses, and rejects, the idea of applying the fairness doctrine, or at least the relative component thereof, to the press. *Id.* (1965 ed.) at 624-50. However, he does not appear to have considered the more specific proposal of access for individuals for the expression of their own ideas.

¹⁴⁹ Barron, *Access*, *supra* note 11.

¹⁵⁰ *Id.* at 1654, quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

¹⁵¹ Barron, *Access*, *supra* note 11, at 1641-56. The balance of the article analyzes and

Since the appearance of Barron's article, those courts considering allegations of an individual right of access to publicly owned media have almost uniformly recognized its existence. The cases of *Kissinger v. New York City Transit Authority*,¹⁵² *Wirta v. Alameda-Contra Costa Transit District*,¹⁵³ and *Hillside Community Church, Inc. v. City of Tacoma*¹⁵⁴ all acknowledge an individual's first amendment right of access to publicly owned transit system advertising. Of these three cases, the California Supreme Court opinion in *Wirta* provides the most useful analysis of the right of access. In *Wirta* plaintiff officers of Women for Peace had offered to pay standard rates to place anti-Vietnam war posters inside transit district buses, but their offer was refused. The court relied heavily upon the determination by the defendant transit district that placing advertising in its motor coaches would not interfere with its primary function of providing transportation:

[D]efendants, having opened a forum for the expression of ideas by providing facilities for advertisements on its buses, cannot for reasons of administrative convenience decline to accept advertisements expressing opinions and beliefs within the ambit of First Amendment protection.¹⁵⁵

The court noted that the defendants' form of censorship gave total freedom to mercantile messages, which are not protected by the first amendment, but prohibited a form of expression which is protected by the first amendment. Furthermore, the court stated that many of the commercial messages implicitly took positions on public issues, while the contrary positions were banned.¹⁵⁶

criticizes pertinent cases and considers several approaches to implementation of the right of access.

¹⁵² 274 F.Supp. 438 (S.D.N.Y. 1967).

¹⁵³ 68 Cal.2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).

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

¹⁵⁵ 68 Cal.2d at 55, 434 P.2d at 985, 64 Cal. Rptr. at 433. *Danskin* is naturally cited as being directly on point. 68 Cal.2d at 55, 434 P.2d at 985, 64 Cal. Rptr. at 433.

¹⁵⁶ The court gave several examples:

A minimum of imagination is required to illustrate the paradoxical scope of the district's policy. A cigarette company is permitted to advertise the desirability of smoking its brand, but a cancer society is not entitled to caution by advertisement that cigarette smoking is injurious to health. A theater may advertise a motion picture that portrays sex and violence, but the Legion for Decency has no right to post a message calling for clean films. A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes. An insurance company may announce its available policies, but a senior citizens' club cannot plead for legislation to improve our social security program. The district would accept an advertisement from a television station that is commercially inspired, but would refuse a paid nonsolicitation message from a strictly educational television station. Advertisements for travel,

Thus, *Wirta* is in effect a precursor of the *Banzhaf* principle.¹⁵⁷

The defendant transit district also argued that riders might believe that it endorsed the views of political advertisers. The court rejected this contention, stating that defendants could continue their practice of requiring a disclaimer on political advertisements posted in the buses.¹⁵⁸ While the court commended the transit district for its equal opportunity program for political advertising during election campaigns, it said that the affirmative efforts which had been made to inform opposing candidates of their opportunity to advertise on the buses were not required in all circumstances, so long as those wishing to state their protected beliefs and opinions were permitted to do so on an equal basis:

[D]efendants may regulate the time and place and manner of advertising to the extent necessary to accommodate those who wish to purchase advertising space, and such regulations are valid if they are applied without discrimination and without restriction as to lawful and protected content.¹⁵⁹

The cases of *Zucker v. Panitz*,¹⁶⁰ *Lee v. Board of Regents of State Colleges*,¹⁶¹ and *Avins v. Rutgers, State University of New Jersey*,¹⁶² involve publicly owned print media. *Zucker* and *Lee* apply the *Wirta* rationale to public high school and state university student newspapers, respectively.¹⁶³ The *Zucker* court echoed Professor Barron's concern¹⁶⁴ with the harm that follows from suppression of dissident ideas:

This lawsuit arises at a time when many in the education community oppose the tactics of the young in securing a

foods, clothing, toiletries, automobiles, legal drugs—all these are acceptable, but the American Legion would not have the right to place a paid advertisement reading, "Support Our Boys in Viet Nam. Send Holiday Packages."

68 Cal.2d at 57-58, 434 P.2d at 986-87, 64 Cal. Rptr. at 434-35.

¹⁵⁷ The *Banzhaf* principle is described in text accompanying notes 128-29 *supra*.

¹⁵⁸ 68 Cal.2d at 61, 434 P.2d at 989, 64 Cal. Rptr. at 437.

¹⁵⁹ *Id.* at 62, 434 P.2d at 990, 64 Cal. Rptr. at 438.

¹⁶⁰ 299 F.Supp. 102 (S.D. N.Y. 1969).

¹⁶¹ 306 F.Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971).

¹⁶² 385 F.2d 151 (3rd Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

¹⁶³ Since the cases arose in publicly owned educational institutions, the courts also relied upon *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), where the Supreme Court stated that a public school student

may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. . . . But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Id. at 513.

¹⁶⁴ Barron, *Access*, *supra* note 11, at 1647.

political voice. It would be both incongruous and dangerous for this court to hold that students who wish to express their views on matters intimately related to them, through traditionally accepted nondisruptive modes of communication, may be precluded from doing so by that same adult community.¹⁶⁵

In *Lee*, the defendant state university argued that the "Letters to the Editor" column of the student newspaper was a sufficient alternative to a paid advertisement. The district court rejected that argument, because "a paid advertisement can be cast in such a form as to command much greater attention than a letter to the editor." The court held that to deprive the plaintiffs of the opportunity to command that attention infringed their freedom of expression.

In *Avins* the plaintiff alleged that his freedom of expression had been violated by the editors of a state university law review because they had refused to publish his article reviewing the legislative history of the Civil Rights Act of 1875. From this legislative history he had concluded that the Supreme Court had erred in *Brown v. Board of Education*.¹⁶⁶ The article's editor of the review rejected the article on the ground that approaching the problem from the point of view of legislative history alone was insufficient. The trial judge had expressly found that that was a valid reason for rejecting the article.¹⁶⁷ Furthermore, the plaintiff conceded that he would be able to publish the article in some other law review. Affirming the trial court, the Third Circuit held that the plaintiff's first amendment rights had not been violated.

Barron does not view *Avins* as a refutation or unreasonable restriction of the first amendment right of access. Rather, he thinks it supports the proposition that the courts are capable of fashioning reasonable rules governing the operation of the right of access that will avoid undue infringement on the editorial discretion of the managers of any particular medium.¹⁶⁸ However, it is difficult to derive specific guidelines for those rules from *Avins*,¹⁶⁹ perhaps because the opinion was written in advance of

¹⁶⁵ 299 F.Supp. at 105.

¹⁶⁶ 347 U.S. 483 (1954).

¹⁶⁷ 385 F.2d at 153.

¹⁶⁸ Barron, *Emerging Access*, *supra* note 11, at 496-97.

¹⁶⁹ Reliance upon the plaintiff's admitted opportunity to publish his article elsewhere appears to ignore a theme, running through a number of first amendment cases since *Schneider v. State*, 308 U.S. 147 (1939), to the effect that the availability of some other place for a person to express his views is no justification for restricting his first amendment right to express them at the place under consideration. It can be argued that, as to national law issues, law reviews appear to have substantially the same circulation; thus, the plaintiff still had an opportunity to express his opinion to the same audience, albeit through the

most of the other access to state media opinions noted above and apparently did not explicitly consider the principles that Barron and earlier cases had developed.¹⁷⁰

B. Extension of the Right of Access to the Broadcast Media

Against this background, two cases arose before the FCC in 1970, *Democratic National Committee (DNC)*¹⁷¹ and *Business Executives Move for Vietnam Peace (BEM)*¹⁷² which extended the basic principles of the right of access to the broadcast media. In *DNC* the Democratic National Committee requested that the FCC issue a declaratory ruling that a broadcaster "may not, as a general policy, refuse to sell time to responsible entities, such as *DNC*, for the solicitation of funds and for comment on public issues."¹⁷³ The FCC held that the Democratic National Com-

medium of a law review other than the Rutgers Law Review. However, such an analysis of *Avins* might allow a network to reject a proffered editorial advertisement that had recently been carried by another network, a result that makes the analysis appear questionable unless narrowly limited.

Barron regards need for access as a critical factor in analysis of *Avins*, stating: "Since the law review audience is a national one, unlike, for example, that of a monopoly newspaper in a single city, the showing of a need for access in such a context ought to be far more demanding." Barron, *Emerging Access*, *supra* note 11, at 497. No doubt, network executives would welcome the opportunity to rely upon such a rationale significantly to reduce access.

Another analysis would seize upon the difference between paid editorial advertising and the material that is selected by the editors of a particular medium to be published at no charge, or with payment to the author. The *Avins* court stated that the plaintiff could not "commandeer the press and columns of the Rutgers Law Review for the publication of his article, at the expense of the subscribers to the Review and the New Jersey taxpayers, to the exclusion of other articles deemed by the editors to be more suitable for publication." 385 F.2d at 153.

The court's finding that there was a "reasonable basis" for rejection of the article by the law review editors may amount to approval of their selecting from among competing applicants those submissions most worthy of publication through this necessarily limited medium. Such an analysis would be consistent with the position taken in part IV D 2 of this article on broadcasters' power to apportion a limited opportunity to purchase editorial advertising time among a large number of applicants.

Some journalists are disturbed by the idea of judges reviewing editorial decisions. See, e.g., Bagdikian, *Right of Access: A Modest Proposal*, 8 COLUM. JOURNALISM REV. 10 (Spring 1969).

¹⁷⁰ The *Kissinger* case, *supra* note 152, was decided less than a month prior to argument before the *Avins* court. The Barron article, *Emerging Access*, *supra* note 11, appeared in June of 1967, three months before argument, but was not cited in *Avins*. Nor did the court cite *Farmer v. Moses*, 232 F.Supp. 154 (S.D. N.Y. 1964), in which managers of the New York World's Fair had prohibited plaintiffs from handbilling and picketing two state pavilions. Because of the congestion and arrangement of the fairgrounds, and the fact that the expression did not relate to the fair or its management, the court did not order the management to allow picketing, although the court did order the management to recognize plaintiffs' right to distribute their leaflets.

¹⁷¹ 25 F.C.C. 2d 216 (1970), *rev'd*, *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971).

¹⁷² 25 F.C.C. 2d at 242.

¹⁷³ *Id.* at 216.

mittee's request, so far as it posited a right to purchase air time for comment on public issues, was inconsistent with the discretion accorded to a licensee in meeting the requirements of the fairness doctrine and with section 3(h) of the Communications Act of 1934¹⁷⁴ which provides that broadcasting shall not be considered common carriage.

The FCC briefly considered the argument that the first amendment required the requested ruling,¹⁷⁵ saying that cases concerning public parks or transit systems were inapposite because they did not involve a medium already subject to a constitutionally valid fairness doctrine protecting the public's right to be informed. The FCC argued further that no practical way existed for implementation of a right of access to the broadcast media.¹⁷⁶ The FCC did, however, approve the decisions of the major networks to sell time to the Democratic National Committee to solicit funds for the party.

In *BEM*, AM station WTOP of Washington, D.C., had denied the complainant the opportunity to purchase time to air spot announcements urging immediate withdrawal of American forces from Vietnam and other overseas military installations. The complainant argued before the FCC that WTOP's refusal to sell time violated the fairness doctrine. The FCC found that WTOP appeared to have given adequate time to contrasting views on this controversial issue, since its coverage of the Vietnam war under the fairness doctrine had included the ideas which the complainant wished to express. Finally, the FCC rejected on the basis of the *DNC* opinion complainant's allegation of a violation of a first amendment right of access.¹⁷⁷

Both *DNC* and *BEM* were appealed to the United States Court of Appeals for the District of Columbia Circuit. The court of appeals combined them for argument and on August 3, 1971,

¹⁷⁴ 47 U.S.C. § 153(h) (1970).

¹⁷⁵ The FCC said initially that it was beyond the power of an administrative agency to declare its governing statute to be unconstitutional, but that even if the FCC could declare the statute unconstitutional, it would not do so in this case. 25 F.C.C. 2d at 227, citing *Central Nebraska Pub. P. & I. Dist. v. FPC*, 160 F.2d 782, 783 (8th Cir. 1947).

¹⁷⁶ The Commission stated:

In short, we think the present system of regarding licensees as trustees [citation omitted] with a duty to present contrasting viewpoints through representative spokesmen, is constitutionally sound and of greater public benefit than the concept of an individual right of access, which we have shown has great drawbacks in the broadcast field.

25 F.C.C.2d at 228.

¹⁷⁷ Commissioner Nicholas Johnson dissented to both of these opinions. His dissent to *DNC*, 25 F.C.C.2d at 230, included a discussion of *Wirta* and a description of his views on broadcaster implementation of the right of access. His dissent to *BEM*, 25 F.C.C.2d at 249, included an extensive analysis of state action arguments and the right of access cases discussed in part IV A of this article.

issued a combined opinion, *Business Executives' Move for Vietnam Peace v. FCC*.¹⁷⁸ Judge J. Skelly Wright succinctly described the principle involved:

The principle at stake here is one of fundamental importance: it concerns the people's right to engage in and to hear vigorous public debate on the broadcast media. More specifically, it concerns the application of that right to the substantial portion of the broadcast day which is sold for advertising. For too long advertising has been considered a virtual free fire zone, largely ungoverned by regulatory guidelines. As a result, a cloying blandness and commercialism—sometimes said to be characteristic of radio and television as a whole—have found an especially effective outlet. We are convinced that the time has come for the Commission to cease abdicating responsibility over the uses of advertising time. Indeed, we are convinced that broadcast advertising has great potential for enlivening and enriching debate on public issues, rather than drugging it with an overdose of non-ideas and non-issues as is now the case.

Under attack here is an allegedly common practice in the broadcast industry—airing only those paid presentations which advertise products or which deal with “non-controversial” matters, and confining the discussion of controversial public issues to formats such as the news or documentaries which are tightly controlled and edited by the broadcaster.¹⁷⁹

The FCC unsuccessfully argued before the court that a licensee may maintain a flat ban on editorial advertisements, first, because the licensee discretion built into the fairness doctrine permits him to discharge his responsibility to cover controversial issues through means other than the acceptance of editorial advertisements and, second, because the fairness doctrine requirement of full and fair coverage of issues of public importance—even though carried out exclusively by means other than the broadcasting of editorial advertisements—“provides as much protection of public debate as the first amendment demands.”¹⁸⁰

The D.C. Circuit's opinion raises the fundamental issue of the first amendment interests of members of the public in the operation of radio and television. The D.C. Circuit noted only a few prior efforts to assert such a right, all having failed because of the courts' narrower view of the first amendment and a narrower view

¹⁷⁸ 450 F.2d 642 (D.C. Cir. 1971). The case is noted in 85 HARV. L. REV. 689 (1972).

¹⁷⁹ 450 F.2d at 645-46.

¹⁸⁰ *Id.* at 648.

of "state action"—a view limiting the ambit of the first amendment to the actions of Congress or agencies of the federal government and excluding action of private corporations such as broadcast licensees. The court determined that recent developments in the concept of state action and the Supreme Court's decisions in *Red Lion*¹⁸¹ had cleared the path of "such doctrinal impedimenta."¹⁸² Even if broadcast licensees are "private" businesses, under the first amendment ownership does not always mean absolute dominion, as *Marsh*¹⁸³ illustrated. The court relied on the extraordinary relationship of "interdependence" and "joint participation" reminiscent of the situation in *Burton v. Wilmington Parking Authority*¹⁸⁴ which, it asserted, now existed between broadcasters and the federal government. Furthermore, while prior cases had been direct suits against broadcast licensees, *BEM* involved review of a decision by the FCC expressly approving a flat ban on editorial advertising.¹⁸⁵ In short, the court was reviewing not simply a private decision, but a decision by a federal agency "which must inevitably provide guidance for future broadcaster action."¹⁸⁶

Having decided that broadcast licensees administer their facilities subject to first amendment constraints, the court analyzed the public's first amendment interests in the operation of radio and television and the application of those interests to the issue of editorial advertising. It began by emphasizing that these cases dealt only with the public's first amendment interests in the broadcaster's allocation of advertising time—time already relinquished by broadcasters to others—and not normal programming time.¹⁸⁷ After noting the broadcasters' limited interests in the allocation of advertising time, the court went on to emphasize not only the public interest in receiving a broad range of ideas and experiences (an interest already protected by the fairness doctrine), but also the public interest in the *manner* in which views are presented, as opposed to their content,¹⁸⁸ and the interest of individuals and

¹⁸¹ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

¹⁸² 450 F.2d at 650.

¹⁸³ See text accompanying note 138 *supra*.

¹⁸⁴ 365 U.S. 715, 725 (1961). This case held that a restaurant operating in space leased within a publicly owned parking garage building was sufficiently engaged in state action to subject it to fourteenth amendment prohibitions against refusing to serve Blacks.

¹⁸⁵ Similar regulatory acquiescence was important in *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952), in which a governmentally regulated, privately owned city transit system was found to be engaged in state action.

¹⁸⁶ 450 F.2d at 653.

¹⁸⁷ 450 F.2d at 654. See also note 299 and accompanying text *infra*.

¹⁸⁸ In *Lee v. Board of Regents of State Colleges*, 306 F.Supp. 1097 (W.D. Wis. 1969), *aff'd.*, 441 F.2d 1257 (7th Cir. 1971), discussed in text accompanying notes 161-166 *supra*, defendant newspaper's willingness to print plaintiffs' views in its letters to the

groups in effective self-expression.¹⁸⁹ Allowing others to speak in their own way—instead of relying solely on bureaucrats and licensees to decide what issues are important and how they should be covered—is the essence of the first amendment concept of a free market of ideas. Broadcaster retention of total initiative and editorial control, no matter how wisely executed, may be inimical to the first amendment idea that truth must be discovered out of a multitude of tongues, rather than authoritative selection or supervised discussion.¹⁹⁰ Even though a licensee had broadcast anti-war views, an anti-war editorial advertisement would not necessarily duplicate the licensee's regular coverage of that issue; the court predicted differences in style and intensity of feeling and expression that would enliven and enrich the public's overall information.¹⁹¹ And while agreeing that spot editorial advertisements might distort or oversimplify complex issues, the court noted that the first amendment protects many forms of misleading and oversimplified political expression in order to assure robust, wide-open debate. If factual error or defamatory content is constitutionally protected,¹⁹² so is brevity of expression.

The court did not have to decide whether the broadcast medium is a public forum in the sense in which public streets, parks, meeting halls, or even bus terminals are.¹⁹³ The petitioners had

editors column did not undermine plaintiffs' right to purchase advertising space for such expression. The court recognized plaintiffs' interest in the manner of expression of their views, stating:

[A] paid advertisement can be cast in such a form as to command much greater attention than a letter to the editor. Large type, photographs, repeated publication and full pages of space are some of the modes of expression available in an editorial advertisement that might not be available in a letter to the editor.

306 F.Supp. at 1101.

¹⁸⁹ While the *Red Lion* court did say that "it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish," 395 U.S. at 388, because broadcast time is necessarily limited, the court in *BEM* observed that this limitation did not entirely do away with the interest of the individual or group in effective self-expression. Instead, that interest must be limited to a "reasonably regulated, 'abridgeable' right to speak." 450 F.2d at 655. As the court viewed the history of the first amendment and its interpretation outside broadcasting, it could hardly be argued that "the First Amendment protects ideas but not an individual's interest in expressing them and doing so in his own way." *Id.*

¹⁹⁰ 450 F.2d at 656, citing *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967), and *Tinker v. Des Moines School District*, 393 U.S. 503 (1969). The court also noted that even the constitutional interest relied upon by the FCC—the viewer's interest in access to a full spectrum of viewpoints—will be better attained if others are also allowed to supplement the licensee's assessment of importance, controversy and full coverage. 450 F.2d at 657.

¹⁹¹ 450 F.2d at 657.

¹⁹² *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁹³ See text accompanying notes 131–170 *supra*. *Wolin v. Port of New York Auth.*, 392 F.2d 83 (2d Cir. 1968) and *In re Hoffman*, 67 Cal.2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967), held respectively that bus terminals and railroad stations were public forums.

confined their attacks to commercial broadcasters, allowing the court to deal solely with a forum that already had been opened to members of the public by the licensees themselves, albeit discriminatorily.¹⁹⁴ When so viewed, the court readily found that these cases fell within an area of law already well developed, the law of access to state media described above.¹⁹⁵ By opening their forum to paid commercial speech, while excluding paid editorial advertisements, the broadcasters had indulged in a *prima facie* constitutional violation which could be justified only by showing "a substantial factor distinguishing the disruptive effect of editorial advertising from that of commercial advertising."¹⁹⁶ To point solely to the *content* of the excluded speech as the "substantial factor" would present an even clearer constitutional violation. Discrimination against all controversial speech is censorship favoring the status quo.¹⁹⁷

The FCC and intervenors had alleged that a holding for petitioners would give editorial advertisers a right to air time that commercial advertisers would not have¹⁹⁸ and would allow petitioners to "grab the mike" from broadcasters' hands. They further alleged that a holding for petitioners would result in: (1) returning to the chaos of radio's early days; (2) allowing a few rich individuals or groups to buy so much time and so nearly to monopolize the medium, as to upset the station's balanced treatment of the issue; and (3) threatening broadcasters' economic self-sufficiency by requiring them to offer free advertising time, if necessary, to maintain the balance required by the fairness doctrine. The court also rejected these arguments, noting that the FCC and intervenors misunderstood the narrowness of the issue:

¹⁹⁴ The court described broadcasters' discriminatory policies:

[T]he political nature of editorial advertising places it near the core of the First Amendment. However, the very characteristic which affords it strict constitutional protection is also the characteristic causing the broadcasters' challenged policy to single it out and exclude it from the airwaves. That, we believe, is the crucial aspect of these cases.

450 F.2d at 659.

¹⁹⁵ See text accompanying notes 131-170 *supra*. The court stated:

Six courts have confronted discriminations among types of speech like the one challenged here. Every one of them—four federal courts and two state supreme courts—has held that once a forum, subject to First Amendment constraints, has been opened up for commercial and "noncontroversial" advertising, a ban on "controversial" editorial advertising is unconstitutional unless clearly justified by a "clear and present danger."

450 F.2d 659, citing the *Lee*, *Zucker*, *Kissinger*, *Hillside Church*, and *Wirta* cases.

¹⁹⁶ 450 F.2d at 660.

¹⁹⁷ *Id.* at 661, citing the examples from *Wirta*, quoted in note 156 *supra*.

¹⁹⁸ A preference for editorial advertisers over commercial advertisers would appear consistent with *Valentine v. Chrestensen*, 316 U.S. 52 (1942), which held that "purely commercial advertising" is not protected by the first amendment against government prohibition. *Id.* at 54

All petitioners ask is that broadcasters be required to accept *some* advertising. They do not advocate an absolute right to air their advertisements. . . . What petitioners do argue is that editorial advertisements should at least be considered and that some should be aired.

Such a modest reform would not substantially undermine broadcasters' editorial control over their frequencies. For broadcasters would retain full latitude to control the content of their programming. Their editorial control over nonadvertising time would not be disturbed whatever. All that would be affected is their allocation of advertising time—an area in which *editorial* control over content has never been of major importance. The interest in deciding which advertisements to accept is not as great as in deciding what public issues to cover and how to cover them on news presentations, for example. . . . [Nor is a] broadcaster traditionally . . . as involved in the preparation and editing of advertisements as a law review staff is in the preparation and editing of articles.¹⁹⁹

In addition, the court pointed out that traditional first amendment theory provides that access to forums may be made subject to reasonable regulations. Broadcasters would, therefore, be able to control time, place and manner of speech, not to stifle speech but to prevent competing groups from drowning out one another. Broadcasters could also place a limit on the total time sold for editorial advertising and regulate placement in the broadcast day, so long as they did not engage in a “major” discrimination in such placement. The court stated that the FCC, on remand, was to develop reasonable regulations specifying the control which broadcasters might exercise over editorial advertising. Since broadcasters had successfully handled scheduling problems associated with commercial advertising, the court felt that they should be able to handle editorial advertisements in the same evenhanded manner.²⁰⁰

Similarly the possibility that wealthy individuals or groups might be able to dominate editorial advertising time was held not to justify a total ban on editorial advertising. The right of the wealthy to operate their own magazines, newspapers or broadcast stations is still protected by the first amendment despite the advantages of wealth. To prevent the potential problem of a “one-sided flood of editorial advertisements,” the court stated that the

¹⁹⁹ 450 F.2d at 662–63. The last clause is a reference to *Avins v. Rutgers, State University of New Jersey*, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968), discussed in text accompanying notes 166–170.

²⁰⁰ Particularly since those broadcasters already allowing editorial advertising had not been shown to have experienced chaos. 450 F.2d at 664.

FCC and licensees could set "outside limits on the amount of advertising time that will be sold to one group or to representatives of one particular narrow viewpoint."²⁰¹

As to the effect of fairness doctrine obligations, the court said that if editorial advertisements are accepted on one side of an issue, the FCC might require broadcasters to accept at least some advertisements on the other side of the issue, free of charge if necessary. But the court was quick to state that the FCC had the power to make necessary adjustments upon a proper showing of a threat of actual financial harm to a particular broadcaster.²⁰²

In short, the court concluded that none of the problems raised were sufficient to justify an absolute ban on editorial advertising. The court looked to the past and demonstrated that the FCC had not always considered the task of reasonably regulating access to the broadcast media so difficult. Quoting from an FCC decision twenty-five years earlier, which held that a broadcaster had violated free speech rights by refusing to sell program time for the airing of controversial views,²⁰³ the court said that the FCC and broadcast licensees were no less competent to deal with this problem in 1971 than they had been in 1945:

In the end, it may unsettle some of us to see an anti-war message or a political party message in the accustomed place of a soap or beer commercial. But we must not equate what is habitual with what is right—or what is constitutional. A society already so saturated with commercialism can well afford another outlet for speech on public issues. All that we may lose is some of our apathy. That is a small price to pay.²⁰⁴

In dissenting, Judge McGowan stated that the task of drawing up the required regulations would not be as easy as the majority suggested. He also noted that in the past the fairness doctrine had been considered an adequate means of informing the public, and questioned whether the substitution of a system in which money alone determines what is to be broadcast would be a wise course.²⁰⁵ The dissent would have left this matter to the discretion of the FCC; it could, on its own initiative, adopt such regulations

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ United Broadcasting Co., 10 F.C.C. 515, 517-18 (1945).

²⁰⁴ 450 F.2d at 665-66.

²⁰⁵ *Id.* at 666. This characterization of the effect of the right of access appears to rely more upon Commissioner Johnson's view that sale of editorial advertising time should be on a first-come, first-served basis, 25 F.C.C.2d at 234-35, than it does upon the view of the majority that Commission regulations could be written to "prevent domination by a few groups or a few viewpoints," 450 F.2d at 664.

but should not be required to review this question "in a constitutional strait jacket which dictates the result in advance."²⁰⁶

C. Applying First Amendment Constraints to Private Licensees

In the state media cases described in part IV A of this article, the first and fourteenth amendments were held to constrain state agencies and instrumentalities of government from arbitrarily denying an individual access to the media. The denial of access was "state action" unreasonably restricting an individual's freedom of expression. The courts have regarded municipally-owned bus systems and public high school or state college newspapers as public forums to which the first and fourteenth amendments apply.

On the other hand, where only private action restrains an individual's ability to express his views to the public at large, the absence of state action is said to prevent the courts from even considering whether the private restraint in question impairs expression in violation of constitutional norms, unless valid implementing legislation protects those norms.²⁰⁷ When the private restraint is imposed by the press, this restricted view is reinforced by the traditional view of the first amendment as solely a restraint upon governmental bodies (including courts).²⁰⁸ The traditional analysis is not applicable, however, to government action enforcing an individual's right of access, because such action is not implementing an area of law that conflicts with the first amendment as a whole. Instead, such action requires the balancing of conflicting first amendment interests, neither of which can be "preferred."²⁰⁹ In fact, the courts are already performing the kind of balancing process in the state media cases that extension of the

²⁰⁶ *Id.* at 667.

²⁰⁷ *Chicago Joint Board v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

²⁰⁸ For example, Justice Black said: "The basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition." *Kovacs v. Cooper*, 336 U.S. 77, 102 (1949) (dissenting opinion) (allowing municipal regulation of sound trucks). *See also* *Barron, Access*, *supra* note 11, at 1641-43. First amendment prohibitions of court actions impairing expression, whether or not at the request of other individuals, are set forth in *Bridges v. California*, 314 U.S. 252 (1941) (contempt); *Pennakamp v. Florida*, 328 U.S. 331 (1946) (contempt); *New York Times Co. v. Sullivan*, 376 U.S. 245 (1964) (defamation); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (right of privacy); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (defamation).

²⁰⁹ Areas of the law that conflict with the first amendment as a whole include national security, *Roehel*, *supra* note 270; criminal syndicalism, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); obscenity, *Bantam Books v. Sullivan*, 372 U.S. 58 (1963) and *Freedman v. Maryland*, 380 U.S. 51 (1965); and defamation and invasion of privacy, note 208 *supra*. *See also* Linde, "Clear and Present Danger" Reexamined: Dissonance in the *Brandenburg Concerto*, 22 *STAN. L. REV.* 1163 (1970).

right of access to privately owned media would require, that is, a balancing of the first amendment interests of a publisher or a broadcast licensee against the first amendment interests of the individual seeking access.

Nevertheless, there is a strong precedential basis for the distinction between private and state action;²¹⁰ therefore, this section will consider state action and the electronic media. The analyses will extend beyond the classification of electronic media action as state action to examine the extent to which such a classification permits federal limitation of expression over the electronic media.

1. Rationales for Applying First Amendment Constraints to Private Individuals—The concept of “state action” encompasses a multitude of rationales.²¹¹ Although these categories are not mutually exclusive, and a single fact situation may involve more than one rationale,²¹² the following analysis will separate these rationales into three categories: agent action, government action, and public action.

“Agent action” means that the actions of some private individuals are, in effect, the actions of an identifiable unit of government or are so bound up with such a unit as to necessitate their being treated as an extension of that unit.²¹³ Examples are a privately owned restaurant in a government owned parking garage²¹⁴ and a pre-primary election of a county political organization.²¹⁵ An important incident of agent action is that it subjects a private individual to forms or degrees of state or local government regulation beyond those applicable to private citizens in

Government action requiring the balancing of competing first amendment interests is seen in *Lee v. Bd. of Regents of State Colléges*, 306 F.Supp. 1097 (W.D. Wisc. 1969), *aff'd*, 441 F.2d 1257 (7th Cir., 1971). *Lee's* holding that the editor of a state college newspaper may be required to publish an editorial advertisement cannot be explained by saying that the editor has no first amendment rights to assert in defense against such an action. State college newspapers may not be subjected to prior restraints. *Antonelli v. Hammond*, 308 F.Supp. 1329 (D. Mass. 1970); *Korn v. Elkins*, 317 F.Supp. 138 (D. Md. 1970); *Trujillo v. Love*, 322 F.Supp. 1266 (D. Colo. 1971).

²¹⁰ Civil Rights Cases, 109 U.S. 3 (1883). For a recent demonstration of the continued vitality of the distinction, compare *Evans v. Newton*, 382 U.S. 296 (1966), with *Evans v. Abney*, 396 U.S. 435 (1970). *But, cf.* *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (Congress, pursuant to section 5 of the fourteenth amendment, may “enforce the rights guaranteed by the Amendment against private conspiracies.”).

²¹¹ See *e.g.*, *Business Executives' Move for Vietnam Peace*, 25 F.C.C.2d 242, 253-64 (1970), *rev'd*, *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971).

²¹² See, *e.g.*, the discussion of *Marsh v. Alabama* in text accompanying notes 227-235 *infra*, showing that that case might fall under an agent action or public action rationale.

²¹³ The relationship between private individual and unit of government is thus a broader one than that implied by the word “agent.” The word “instrumentality” is probably more accurate.

²¹⁴ *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

²¹⁵ *Terry v. Adams*, 345 U.S. 461 (1953).

general.²¹⁶ If a broadcast licensee's actions constitute state action under the agent action concept, the licensee may be subject to extensive governmental regulation beyond that necessitated by present technological limitations upon entry into broadcasting.²¹⁷

In *Chicago Joint Board v. Chicago Tribune Co.*,²¹⁸ the Seventh Circuit affirmed a rejection of the argument that there was sufficient "state involvement" in the operation of the defendant newspapers to make their conduct subject to the restrictions applicable where there is state action:

Rather than regarded as an extension of the state exercising delegated powers of a governmental nature, the press has long and consistently been recognized as an independent check on governmental power. . . .

In sum, the function of the press from the days the Constitution was written to the present time has never been conceived as anything but a private enterprise, free and independent of government control and supervision. Rather than state power and participation pervading the operation of the press, the news media and the government have had a history of disassociation.²¹⁹

If agent action rationales were the only state action rationales available, the concern expressed above would justify shrinking from direct application of constitutional restraints upon broadcast licensees. Fortunately, they are *not* the only state action rationales available; there are additional rationales that apply constitutional restraints to actions of private individuals without otherwise bringing them under the almost proprietary or managerial control of some unit of government associated with agent action.

Some private actions are subject to constitutional constraint because they can be carried out only with the aid of the power²²⁰

²¹⁶ In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), for example, we can assume that the city by virtue of owning the property on which the restaurant was located had a more pervasive ability to exercise control over the restaurant than it would have had if the restaurant had been across the street from the parking garage on privately owned land. Undoubtedly, it could have, and indeed should have, placed a condition in its lease with the restaurant requiring the lessee to offer restaurant services without discrimination on the basis of race, regardless of whether it had the power under state law to enact civil rights ordinances governing privately owned businesses in general.

The advertising agency in *Kissinger v. New York City Transit Authority*, 274 F.Supp. 438 (S.D. N.Y. 1967), which managed advertising in the Transit Authority subway system was engaged in state action with respect to such advertising. See *Barron, Emerging Access*, *supra* note 11, at 489. Presumably, the terms of the contract between the Authority and the advertising agency gave the Authority ultimate managerial control over advertising in the subway system, making the agency's state action a form of agent action.

²¹⁷ See text accompanying notes 94-100 *supra*, and part IV C 2 of this article.

²¹⁸ 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

²¹⁹ 435 F.2d at 474, quoting from 307 F.Supp. 422, 427 (N.D. Ill. 1969).

²²⁰ *Shelley v. Kraemer*, 334 U.S. 1 (1948). After defendant homeowner had contracted to sell his home to a Black in violation of a racially restrictive covenant, the plaintiff

or the encouragement²²¹ of the state. In both cases, the action of a private individual is deemed state action because of the parallel action of some unit of government itself; hence these rationales are termed government action rationales. The classic example is state court enforcement of a racially restrictive covenant.²²² Another example is a municipality's transfer of a public park to private trustees to escape the obligations of the fourteenth amendment.²²³ In the government action rationales, government control over the private party is limited to government's ordinary police powers over citizens in general. But this element of government assistance, encouragement or authorization of private discrimination has made such discrimination unlawful under the fourteenth amendment.

The third rationale, "public action," is more difficult to describe. Under long established property law, a private owner's acquiescence in public use of his land may operate as a formal dedication of the land to the public use.²²⁴ When such formal dedication has occurred, the state or municipality can, for many purposes, treat the land as state or municipally owned land or land subject to a state or municipal easement. Thus, management of land formally dedicated to a public use is state action,²²⁵ either agent action or government action depending on the circumstances.

However, state action is not limited to those situations in which complete formal dedication has occurred.²²⁶ For example, in *Marsh v. Alabama*²²⁷ the Supreme Court held that a state could not consistently with the first and fourteenth amendments impose

neighbor could seek to halt the action only through the aid of a court. Any attempt at forceful "self-help" such as assault, arson, or the like, would have been a crime or a tort or both.

²²¹ *Robinson v. Florida*, 378 U.S. 153 (1964); *Peterson v. City of Greenville*, 373 U.S. 244 (1963).

Irrespective of whether private discriminations so "encouraged" amount to state action, judicial intervention may limit or prevent further discrimination. *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Hunter v. Erickson*, 393 U.S. 385 (1969).

²²² *Shelley v. Kraemer*, 334 U.S. 1 (1948).

²²³ *Evans v. Newton*, 382 U.S. 296 (1966).

²²⁴ See, e.g., *Velasco v. Goldman Builders, Inc.*, 93 N.J. Super. 123, 225 A.2d 148 (1966); *Allen v. Village of Savage*, 261 Minn. 334, 112 N.W. 2d 807 (1961).

²²⁵ *Evans v. Newton*, 382 U.S. 296 (1966).

²²⁶ See Mr. Justice Frankfurter's concurring opinion in *Marsh v. Alabama*, 326 U.S. 501, 510 (1946):

Constitutional privileges having such a reach [as to accord purveyors of ideas, religious or otherwise, "a preferred position"] ought not to depend upon a State court's notion of the extent of "dedication" of private property to public purposes. Local determinations of such technical matters govern controversies affecting property. But when decisions by State courts involving local matters are so interwoven with the decision of the question of Constitutional rights that one necessarily involves the other, state determination of local questions cannot control the Federal Constitutional right.

²²⁷ 326 U.S. 501 (1946).

criminal punishment on a person who distributes religious literature on the premises of a company-owned town contrary to the wishes of the town's management, even though the proprietors of the private town apparently had not dedicated the sidewalks in their business block to the public use.²²⁸ Of course, since the proprietors were performing a full range of municipal services, they could, alternatively, have been said to have engaged in agent action.²²⁹ But the privately owned shopping center in *Amalgamated Food Employees Union v. Logan Valley Plaza*²³⁰ was not providing municipal services and yet was held subject to the first amendment rights of labor union pickets.²³¹ The actions of the shopping center were short of formal dedication, as the following quotation from Justice Marshall's opinion demonstrates:

This Court has also held . . . that under some circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held.

. . . .

[I]t may well be that respondents' ownership of the property here in question gives them various rights, under the laws of Pennsylvania, to limit the use of that property by members of the public in a manner that would not be permissible were the property owned by a municipality. All we decide here is that because the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through" [citing *Marsh*], the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the

²²⁸ The proprietors had posted a sign saying "This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted." 326 U.S. at 503.

²²⁹ See, e.g., *Business Executives' Move for Vietnam Peace*, 25 F.C.C.2d 242, 258-59 (1970), *rev'd*, *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971); Spriggs, *Access of Visitors to Labor Camps on Privately Owned Property*, 21 U. FLA. L. REV. 295, 302-03 (1969); Mr. Justice Black's dissent in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 330-33 (1968).

²³⁰ 391 U.S. 308 (1968).

²³¹ Mr. Justice White's dissent stressed that:

[I]n *Marsh*, the company ran an entire town and the State was deemed to have devolved upon the company the task of carrying out municipal functions. But here the "streets" of Logan Valley Plaza are not like public streets; they are not used as thoroughfares for general travel from point to point, for general parking, for meetings, or for Easter parades.

391 U.S. at 340.

The state courts, relying upon state trespass law, had enjoined the labor union from picketing on the parking lot and sidewalks of the shopping center, thus restricting picketing activities to narrow areas adjacent public thoroughfares and well away from the situs of the dispute. The Supreme Court reversed and remanded.

premises in a manner and for a purpose generally consonant with the use to which the property is actually put.²³²

The *Logan Valley Plaza* opinion did not indicate that formal dedication had occurred or that the local government had exercised any powers over the shopping center greater than its ordinary police powers. One might postulate state action from the use of state trespass laws, a government action rationale, but to do so would presuppose that a shopping center could avoid *Logan Valley Plaza* by erecting a fence or by building an enclosed mall and refusing entry to persons carrying picket signs, handbills or the like, while admitting everyone else.²³³

Since neither agent action, nor government action, is fully consistent with *Logan Valley Plaza*, an additional rationale, public action, is required to account for the court's finding of state action. In granting the general public unrestricted access to the plaza, the private corporate owner of the shopping center engaged in public action that, in effect, waived its private citizen status and its immunity from the constraints of the fourteenth amendment.²³⁴ The private corporation had established a direct interrelationship with the public at large which made it subject to the public's free speech rights. As Mr. Justice Black said in *Marsh*: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."²³⁵

A private individual engaged in public action becomes subject to some governmental controls not applicable to ordinary private

²³² 391 U.S. at 316, 319-20.

Presumably, respondents could routinely bar all persons from the shopping center's parking lots and sidewalks throughout the hours during which the center is closed. Short of an emergency justifying a curfew (an exercise of general police power, rather than municipal ownership authority), it seems unlikely, however, that a municipality could similarly bar use of its ordinary sidewalks during hours when adjacent businesses are closed.

²³³ In *Diamond v. Bland*, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), the Supreme Court of California extended *Logan Valley Plaza* to all peaceful and reasonably exercised first amendment expression, outside or within a shopping center's enclosed mall. At trial upon plaintiffs' complaint for declaratory and injunctive relief, the parties agreed that defendant shopping center would have used a state trespass statute to enforce its uniformly applied prohibition against noncommercial expression on its premises; no mention was made of using self-help. Nonetheless, the court held plaintiffs entitled to a judgment "declaring that defendants may not constitutionally impose a prohibition on all First Amendment activity on the premises of their shopping center." This language hardly appears to contemplate the use of self-help (blocking the doors of the enclosed mall to those bearing leaflets or signs) as a lawful means of avoiding its requirements.

²³⁴ A private individual may also, in effect, waive other fourteenth amendment due process rights by allowing the public to use his property. See *City of Clayton v. Nemours*, 353 Mo. 61, 192 S.W.2d 57 (1944). The author acknowledges the assistance of James A. Lake, Professor of Law, University of Nebraska, in broadening his insights into this area of law.

²³⁵ 326 U.S. at 506. Also quoted in *Logan Valley Plaza*, 391 U.S. at 325.

citizens. Since his public action has given the public certain rights or opportunities that they could not otherwise assert against him, governmental controls may be established as necessary to enforce those rights or to ensure those opportunities.²³⁶ Thus, the owner of a shopping mall in *Diamond v. Bland*²³⁷ was held to be subject to such control—in that case, a court injunction—to protect the right of access of members of the public wishing to exercise free speech rights inside the mall.

One of the most extreme examples of additional governmental control of private persons engaged in public action is governmental control of public utilities. The privately-owned public utility or common carrier company has not formally dedicated the company's equipment and property to the public; it is still privately owned unless the company performs additional actions or otherwise acquiesces in formal dedication of a portion of its property.²³⁸ Thus, as to the bulk of its property which has not been formally dedicated to public use, the mere management thereof is not agent or government action. Nevertheless, the actions of a public utility or common carrier in serving the public have been held state action,²³⁹ and public action rationales readily support these holdings.²⁴⁰

When the government regulates a privately-owned utility or

²³⁶ In *City of Clayton v. Nemours*, 353 Mo. 61, 182 S.W.2d 57 (1944), the city had prohibited parking on a portion of a privately owned street, even though it claimed no right in the street "arising from dedication, condemnation, or prescription." *Id.* at 64, 182 S.W.2d at 59. In appealing a parking ticket, the defendant, the owner of property adjacent to the no parking zone, contended that the ordinance establishing that zone had deprived defendant of vested property rights in that portion of the private street without due process of law and without just compensation. The decision rejected those arguments:

Defendant's basic premise is wrong. Instead of the municipality appropriating private property to a public use, there was evidence that *Glen Ridge avenue was devoted to a public use by the owners thereof and the municipality thereafter*, exercising its governmental function referable to the police power, *regulated in a reasonable manner such public user* for the protection and in the interest of the public safety, health, and welfare.

.....
 In the instant case, sufficient for the purpose of this review, *Glen Ridge avenue was devoted, although not dedicated, to the public use by acts of the owners*. It was not taken over by the municipality. In so devoting the use of their property, the owners constituted Glen Ridge avenue a de facto although not a de jure public street within the meaning of statutory and ordinance provisions, the word public, when applied to highways, not being restricted to connote ownership alone but in proper instances being employed to describe the use. (Emphasis added.)

Id. at 65-66, 182 S.W.2d at 59-60.

²³⁷ 3 Cal.3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970).

²³⁸ *Louisville & N.R. Co. v. Muncey*, 229 Ky. 538, 544, 17 S.W.2d 422, 425 (1929); *Crane v. Delaware, L. & W.R. Co.*, 1 F.2d 865 (3d Cir. 1924).

²³⁹ *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952). *In re Hoffman*, 67 Cal.2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

²⁴⁰ So also do traditional definitions of the obligations associated with public utility status:

carrier, it does so to protect the public's right to reasonable and non-discriminatory rates, practices and service; however, actions by the utility or carrier outside their areas of obligation to the public are no more subject to government regulation than similar actions by other businesses.²⁴¹ Thus, even the public action of public utilities and common carriers does not subject them to governmental regulation beyond the bounds of their dedication to the public service. Public action is not subject to the more extreme forms of governmental intervention applicable to agent action.

2. *The First Amendment and Broadcaster Use of the Electromagnetic Spectrum*—Broadcasting uses a natural resource, the electromagnetic spectrum,²⁴² in a manner analogous to farming, in that both activities require occupancy of a defined portion of a resource to the exclusion of most other uses.²⁴³ A farm occupies a tract of land with ascertainable boundaries. Likewise a particular broadcaster's transmission of electromagnetic radiation occupies a portion of the electromagnetic spectrum having definable boundaries, although the overall system of boundary definition and measurement is more complex than the system used to set the boundaries for land.²⁴⁴ Moreover, barring some disaster, most

It is the duty which the purveyor or producer has undertaken to perform on behalf of and so owes to the public generally, or to any defined portion of it, as the purveyor of a commodity, or as an agency in the performance of a service, which stamps the purveyor or the agency as being a public service utility.

Pinney & Boyle Co. v. Los Angeles Gas & Electric Co., 168 Cal. 12, 14, 141 P. 620, 621 (1914). "Public use, then, means the use by the public and by every individual member of it, as a legal right." Allen v. Railroad Comm'n of Calif., 179 Cal. 68, 88, 175 P. 466, 474 (1918).

[T]he principal determinative characteristic of a public utility is that of service to, or readiness to serve an indefinite public (or portion of the public as such), which has a legal right to demand and receive its services or commodities.

Motor Cargo v. Bd. of Township Trustees, 52 Ohio Op. 257, 258, 117 N.E.2d 224, 226 (Summit Co. C.P. 1953).

²⁴¹ I A. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION 12-13 (1969), quoting from Northern Pacific Ry. v. North Dakota ex rel McCue, 236 U.S. 585, 595 (1915):

Utilities may act in a private, as distinguished from a public, capacity. They may enter into agreements between themselves and with others free from state control . . . so long as those contracts are not oppressive and do not impair the utility obligation. Public utility status should not be imposed on such "private" activities by either regulatory or legislative action, for certainly "the state does not enjoy the freedom of an owner."

²⁴² Electromagnetic radiation can be seen within a limited range of frequencies in a rainbow or the display of a prism. Electronic equipment is used to produce, emit, receive and interpret electromagnetic radiations of lower frequencies than the frequencies of light. The full range of frequencies which can be occupied by such electromagnetic radiations constitute the electromagnetic spectrum. See generally, W. JONES, *supra* note 90, at 1019; Levin, *supra* note 99; SILENT CRISIS, *supra* note 99, at 2.

²⁴³ W. JONES, *supra* note 90, at 1020.

²⁴⁴ Furthermore, throughout much of the spectrum electromagnetic radiation tapers off

occupancies of a farm cannot be terminated on a moment's notice; occupancy of the electromagnetic spectrum can be terminated virtually instantaneously by shutting off the pertinent transmitter.

The limits of an occupation of land can be described in terms of the length of time involved and the necessary physical dimensions: length, width, and, if some structure is tall enough to affect aviation, a fourth variable, height. The limits of an occupation of the electromagnetic spectrum are at least five: the three dimensions necessary to describe the volume of space occupied, plus time and a characteristic of electromagnetic radiation known as frequency.²⁴⁵ The same volume of space may at the same time be usefully occupied by many electromagnetic radiations if their frequencies are sufficiently different from one another, as our own experiences in selecting a particular radio or television signal demonstrate. On the other hand, as one notices at night on AM standard radio, if two or more electromagnetic radiations of identical, or insufficiently dissimilar, frequencies occupy the same volume of space at the same time, interference results rendering part of our electromagnetic spectrum resource useless, until such time as all but one of the radiations are no longer present in sufficient strength to cause interference. Each broadcast occupancy of the electromagnetic spectrum occupies a band of frequencies of a width (usually called bandwidth) that varies from one broadcast service to another.²⁴⁶ The frequency of electromagnetic radiation is important because many of a radiation's characteristics vary with its frequency. For example, the signals of AM radio stations travel greater distances, particularly at night, than do higher frequency FM radio and television signals.²⁴⁷

A farm is occupied by the actions of plowing, planting, and cultivating over a particular period of time. A portion of the electromagnetic frequency spectrum—a specific bandwidth of frequencies within a particular volume of space—is occupied by constructing a transmitter and operating it for a period of time. Several farmers cannot simultaneously perform their actions on

gradually, rather than terminating abruptly along a particular boundary line. For this reason, "[i]n radio transmission . . . the area of interference is generally broader than the area of beneficial use," W. JONES, *supra* note 90 at 1020–1021, because a particular signal may be too weak to be received reliably and usefully, but still strong enough to interfere with another signal of useful strength at the same frequency.

²⁴⁵ W. JONES, *supra* note 90, at 1019.

²⁴⁶ For AM standard broadcast radio, channels are 10 kilocycles per second in bandwidth, W. JONES, *supra* note 90, at 1034, 47 C.F.R. § 73.3 (1971); FM broadcast radio channels are 200 kilocycles in bandwidth, W. JONES, *supra* note 90, at 1040, 47 C.F.R. § 73.201 (1971); broadcast television channels are 6 megacycles (6000 kilocycles) in bandwidth, W. JONES, *supra* note 90, at 1042, 47 C.F.R. § 73.601 (1971).

²⁴⁷ W. JONES, *supra* note 90, at 1034, 1039.

the same piece of land unless they deliberately coordinate their efforts. Likewise, several persons may not usefully occupy the same portion of the electromagnetic frequency spectrum unless they coordinate their efforts; however, in most cases, such coordination will be by using a portion of the frequency spectrum at different times. With a few exceptions, simultaneous use of the same portion of the spectrum is impractical.

If farmer *A* is the lawful occupant of a defined tract of land, the state will aid him if farmer *B* attempts to occupy or use that tract without lawful permission. Likewise, if the natural resource of the electromagnetic spectrum is to be utilized gainfully, it is necessary that government institute a system for determining lawful occupancy of portions thereof and enforce such determinations against would-be interlopers. While the techniques involved are more elaborate and complex, the reasons for government intervention are the same as those involved in state protection of the occupancy of land.

Congress could have apportioned occupancy of the electromagnetic spectrum in a number of ways, including: appropriation by the first occupant as in western water law or homesteading; definition and sale of property rights as economists have proposed;²⁴⁸ or some variant of the present licensing system. Congress decided to deny the opportunity to purchase private property rights in the electromagnetic spectrum.²⁴⁹ Whatever the economic merits of that decision, it appears somewhat more consistent with the degree and flexibility of control required over individual transmitters to utilize the spectrum most effectively.²⁵⁰

²⁴⁸ Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1 (1959); De Vany, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 STAN. L. REV. 1499 (1969). *But see* Kalven, *supra* note 24, at 30-32; *also cf.* PRESIDENT'S TASK FORCE ON COMMUNICATIONS POLICY, FINAL REPORT, ch. 8 at 34-38 (recommending greater consideration of economic factors but not a property system).

²⁴⁹ 47 U.S.C. §§ 301, 304 (1970). *See also* *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 331 (1945) ("No licensee obtains any vested interest in any frequency.") *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 394 (1969) ("Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them."); Coase, *supra* note 248.

²⁵⁰ If your next door neighbor does not maintain his house properly, his peeling paint may be an eyesore and may even lower the market value of your house; however, his poor maintenance does not keep you from using your house as you please, and it is unlikely that an economist would recommend that your neighbor's house be forfeited as a remedy for your loss. On the other hand, if your "neighbor" on a frequency band adjacent to the one you occupy does not properly maintain his transmitter, he may make it impossible for you to utilize your frequency band fully or even at all. For reasons perhaps more psychological than legal, a "licensee" of a portion of the electromagnetic spectrum is more likely to respond promptly to a complaint of interference than one who feels secure in the knowledge that he "owns" his portion of the spectrum and will at most suffer some minor penalty for causing interference, rather than the loss of opportunity to utilize his portion of the spectrum. Even today, the threat of forfeiture of an ownership interest in the spectrum

Additionally, the demand on the electromagnetic spectrum, at least in more populous locations, far exceeds the supply, and wealthy individuals' acquisition of additional portions of the spectrum for reasons of self-aggrandizement or personal convenience might waste a significant portion of the spectrum, unless there were stringent regulation of use after purchase.

To enable greater economic efficiency in the manufacture and use of the equipment needed to utilize the electromagnetic spectrum resource and to facilitate international cooperation in its use, various bands of frequencies are limited or allocated to particular types of uses.²⁵¹ To some extent, the allocation of frequency bands to various uses is done on the basis of determining which band of frequencies is best adapted to the use in question, but historical and other factors also influence the allocation process. Most of the spectrum is allocated to communication rather than broadcast uses or to other uses incompatible with broadcasting. The federal government may so allocate portions of this resource to non-broadcast uses without infringing the first amendment.²⁵²

Likewise, the allocation of certain frequencies to broadcast usage has set aside a portion of nature's unique communications resource, the electromagnetic spectrum, to serve as a public forum.²⁵³ However, federal law also limits individual access to the public forum portion of the electromagnetic spectrum; these limitations will be analyzed in stages.

The first stage of federal limitation of access to this public forum is the requirement that any individual who wishes to occupy a portion of the spectrum must first secure a transmitter license; implicitly, through specification of factors such as location, power, antenna height, frequency, time and general type of operation, the license will fix the limits of his occupancy and utilization. Knowingly and willfully to operate a transmitter without first having secured such a license is a federal criminal offense subject to a maximum penalty of a \$10,000 fine and one year's

for failure to properly maintain equipment might raise due process problems not accompanying the licensing approach.

²⁵¹ See 47 C.F.R. §§ 2.100-2.106 (1971).

²⁵² 47 C.F.R. § 2.106 (1971) shows that most of the spectrum is allocated to communication or to other uses incompatible with broadcasting. Noncommunications uses include radar and microwave ovens. See, e.g., *id.*, 13.25-13.4 GHz band; and FCC Future Use of the Frequency Band 806-960 MHz, 35 Fed. Reg. 8644, 8647 (1970).

The power of the federal government to allocate portions of the spectrum to non-broadcast uses without infringing the first amendment was recognized in *Lafayette Radio Electronics Corp. v. United States*, 345 F.2d 278 (2d Cir. 1965); *Citizens Band Ass'n v. United States*, 375 F.2d 43, 55 (9th Cir. 1967), *cert. denied*, 389 U.S. 844 (1967).

²⁵³ The existence of a relevant audience makes this portion of the spectrum a public forum. See *Wolin v. Port of New York Authority*, 392 F.2d 83, 90 (2d Cir. 1968).

imprisonment for the first offense.²⁵⁴ Clearly, this first stage of restriction is no more extreme than the system used to determine and enforce lawful occupancy of land, and the criminal sanction for unlicensed spectrum occupancy is the functional equivalent of the criminal trespass action.

Theoretically, at least, had Congress or the FCC so desired, it could have allowed anyone technically qualified,²⁵⁵ or able to hire someone technically qualified, to operate a broadcast transmitter, and then apportioned time to the extent necessary to accommodate all persons desiring such an opportunity.²⁵⁶ Such an arrangement would meet all the technical requirements and limitations of the electromagnetic spectrum. If electromagnetic spectrum technology does not so require, why then has it been deemed constitutional for Congress and the FCC to limit access to the public forum portion of the electromagnetic spectrum still further by denying licenses to some and granting most licensees²⁵⁷ unlimited time in which to occupy the forum? No doubt, because of economic considerations. Broadcast transmitters are expensive,²⁵⁸ and if the amount of time available for broadcasting were divided among all persons desirous of broadcasting, none would receive enough to support the costs of station operation and programming. Under these circumstances the weakest would fall by the wayside, releasing some time to be divided among those remaining, until the time available to each remaining licensee would be just enough to allow him to continue operation. With such marginal revenue, the quality of programming might be significantly poorer than it is today. It is better to divide the available time in such a way as to have a smaller number of stations, each with a greater opportunity to derive revenue and provide better programming, than to have licensees receive the minimum revenue needed

²⁵⁴ 47 U.S.C. §§ 301, 501 (1970); *United States v. Betteridge*, 43 F. Supp. 53 (N.D. Ohio 1942).

Certain low-powered transmitting devices need not be licensed if their operation does not produce signals exceeding specified limits. *See* 47 C.F.R. part 15 (1971).

²⁵⁵ The Commission does assure technical competence in the operation of transmitters by maintaining a system of operator licensing, *see* 47 C.F.R. part 13 (1971). For this system's relation to broadcasting, *see, e.g.*, 47 C.F.R. §§ 73.93, 73.661 (1971).

²⁵⁶ At one time the FCC did require several stations to share one portion of the spectrum. *See, e.g.*, *United States Broadcasting Corp.*, 2 F.C.C. 208 (1935) (reducing the number of stations sharing the frequency of 1400 kc. at Brooklyn, N. Y., from four to two).

²⁵⁷ Because radiations in the standard (AM) broadcast band travel much farther at night than during the daytime (*see* note 247 *supra*), certain standard (AM) broadcast stations may operate only during daylight hours, with a few of those allowed limited pre-sunrise operation. *See, e.g.*, *Cornell Univ. v. United States*, 427 F.2d 680 (2d Cir. 1970); 47 C.F.R. §§ 73.21, 73.99 (1971).

²⁵⁸ However, the economic return from the utilization thereof can be quite great, with television broadcasters averaging a 90 to 100 percent return on tangible investment annually. N. JOHNSON, *supra* note 15, at 65.

to survive.²⁵⁹ Whether it was necessary for the FCC to go to the extreme of unlimited time licenses,²⁶⁰ as opposed to time-sharing, is another question; however, at least some limitations, above and beyond those minimum limitations technically required for effective use of the electromagnetic spectrum, are necessary for economic reasons. Even Commissioner Nicholas Johnson appears to have accepted this second stage of federal government constraint upon access to the public forum portion of the electromagnetic spectrum.²⁶¹

Two of the stages of federal action narrowing individual access to the public forum portion of the spectrum have been described. First, by act of Congress, only licensed transmitters may utilize any appreciable portion of this public forum. Second, by determination of the FCC pursuant to its delegated authority, only one person may operate a transmitter within a particular portion of the spectrum.²⁶² Both are severe restrictions upon individual access to the forum, but the first is necessary for practical policing of the utilization of the electromagnetic spectrum, and the second is grounded in practical economic considerations and appears to be within the area of discretion of a legislature in determining how a public resource may be utilized most efficaciously.

There is, however, a third stage of governmental action narrowing individual access to the public forum portion of the electromagnetic spectrum that is more difficult to justify. While the FCC affords some opportunities for non-licensee access under the equal opportunities, personal attack, political editorial and *Banzhaf* requirements of the Communications Act of 1934 and the FCC's fairness doctrine,²⁶³ it otherwise authorizes licensees to deny access to members of the public and to subject constitutionally protected expression to arbitrary censorship.²⁶⁴ Whether one characterizes broadcasters' unreasonable restrictions upon individuals' access to the media as actions of regulated private individuals taken pursuant to express federal regulatory authorization²⁶⁵ or as private suppressions of individual rights upon the encouragement of the federal government,²⁶⁶ these re-

²⁵⁹ Marks, *supra* note 101, at 980-82. For the appropriateness of avoiding the minimum revenue situation resulting from an excess of licensees in a particular area, see *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958).

²⁶⁰ Note the exception mentioned at note 257 *supra*.

²⁶¹ Johnson & Westen, *supra* note 12, at 583-84.

²⁶² Note the exception mentioned at note 257 *supra*.

²⁶³ See note 101 *supra* and the text accompanying notes 120-130 *supra*.

²⁶⁴ See Ottinger, *supra* note 36.

²⁶⁵ As in *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952).

²⁶⁶ See note 221 *supra*; *Lombard v. Louisiana*, 373 U.S. 267 (1963).

strictions amount to state action under a government action rationale, in violation of the individual's right of access protected by the first amendment.²⁶⁷

An additional state action rationale arises out of the nature of, and conditions upon a licensee's interest in the portion of the electromagnetic spectrum licensed to him. Congress has specified clearly that this is not an ownership interest.²⁶⁸ Taken alone, this factor might support an agent action rationale for holding broadcast licensee action to be state action. However, it is abundantly clear that Congress, in denying ownership interests to licensees, did not intend to make licensees agents of the state.²⁶⁹ Rather, the Radio Act of 1927, the predecessor of the Communications Act of 1934, was enacted to facilitate management of the spectrum and operation of broadcasting in the public interest²⁷⁰ and not to

²⁶⁷ See cases cited in part IV A of this article, and text accompanying notes 131-170 *supra*.

Concurring in *Lamont v. Postmaster General*, 381 U.S. 301, 310 (1965), Mr. Justice Brennan said: "In the area of First Amendment freedoms, government has a duty to confine itself to the least intrusive regulations which are adequate for the purpose." Since technology does not require the third stage of limitation by the FCC, and since the reasonable regulation to which the right of access is subject can protect those economic interests justifying limitation of access (see *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958)), the FCC's decision in *BEM* exceeds the bounds of those "least intrusive regulations."

²⁶⁸ 47 U.S.C. §§ 301, 304 (1970). See also 67 CONG. REC. 12351 (1926) (remarks of Sen. Dill). Apparently floor manager of the legislation that eventually became the Radio Act of 1927, Senator Dill's views on communications law have been quoted with favor by the Supreme Court. See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 379 n. 7 (1969).

The refusal of Congress to authorize ownership interests in the electromagnetic spectrum was a political decision, see 67 CONG. REC. 12351, 12352, 12355 (remarks of Sen. Dill), rather than an affirmation of Professor Jaffe's assertion that "[t]o speak of owning such resources is a solecism." Jaffe, *supra* note 15, at 783. While the first two articles cited *supra*, note 248, may have blundered in arguing that authorization of ownership of portions of the electromagnetic spectrum would be preferable to the licensing system we have today, they have left little doubt as to the technical feasibility of such a system.

²⁶⁹ Section 326 of the Communications Act of 1934, 47 U.S.C. § 326 (1970), provides:

Nothing in this Act 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.

This provision was apparently introduced in the Senate by Senator Dill. H.R. Rep. No. 1886, 69th Cong., 2d Sess. 19 (reference to § 29); *Hearings on S.1 and S.1754 [Radio Control] Before the Senate Comm. on Interstate Commerce*, 69th Cong., 1st Sess., part 1 at 5 (§ 14) and part 2 at 121 (1926). His initiation of this provision may have been motivated by reports of licensee fear of the possible consequences of their broadcasting statement critical of the national administration. 67 CONG. REC. 12356 (1926) (remarks of Sen. Dill). In any event, concern over the possibility of censorship motivated the Senate committee to propose control by a bipartisan independent commission, rather than continued sole administration by the Secretary of Commerce. *Id.*

²⁷⁰ In his statement explaining the bill that eventually became the Radio Act of 1927, Sen. Dill said:

The other condition regarding radio in the United States that is different from conditions in foreign countries relates to broadcasting. In practically all other countries the government either owns or directly controls all broad-

make a licensee's actions agent action. Congress expressly declined to assert full common carrier economic regulation over broadcast licensees,²⁷¹ but it did require licensees to operate consistently with the public interest, convenience and necessity.²⁷² Such obligations are functionally equivalent to the public service obligations undertaken by a public utility²⁷³ and appear to mean that broadcasting is public action.²⁷⁴ Commercial broadcasters themselves make their actions public action by giving commercial advertisers ready access to the medium. In voluntarily allowing a variety of citizens access to the broadcasters' portions of the electromagnetic spectrum public forum, broadcast licensees bring themselves within the principle of public action set forth in *Marsh* and *Logan Valley Plaza*.²⁷⁵ Whether licensee action is public or government action, it is subject to other persons' first amendment rights, including the right of access.

Broadcasters are also subject to fairly extensive federal regu-

casting stations. In this country there has been practically no control exercised by the Government, except as to the assignment of wave lengths and regulations as to the amount of power to be used.

.....
 Let me add that not only are radio reception and radio broadcasting free from Government restraint in the United States, but it is our desire and purpose to keep them free so far as it is possible to do so in conformity with the general public interest and the social welfare of the great masses of our people. It is this combination of conditions and purpose that complicates the problem of legislation on this subject and compels Congress to pioneer the way in the passage of a radio bill. We must steer the legislative ship between the Scylla of too much regulation and the Charybdis of the grasping selfishness of private monopoly.

67 CONG. REC. 12335 (1926).

²⁷¹ 47 U.S.C. § 153(h) (1970).

²⁷² 47 U.S.C. §§ 307, 309 (1970). In particular, broadcast licenses are not to be renewed unless the Commission finds that to do so would serve the "public interest, convenience, and necessity." *Id.* § 307(d).

²⁷³ At an earlier part of his judicial career, Justice Burger said:

The argument that a broadcaster is not a public utility is beside the point. True, it is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or an automobile agency. . . . A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.

Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966) (by then Circuit Judge, now Chief Justice, Burger).

In attacking Judge Wright's determination that broadcasting is state action, Professor Jaffe ignoes this functional equivalence between the broadcaster's obligation to manage the use of a portion of a limited communications medium in the public interest and the public utility's obligation to manage large investments of capital in the public interest. Jaffe, note 15 *supra*, at 783. Judge Wright's reliance on *Pollak*, discussed in note 185 *supra* and accompanying text, is entirely correct, because it is the operation of a public service under regulatory supervision that is significant, not whether the regulation is of economic matters. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 462 (1952).

²⁷⁴ Text accompanying notes 237-242 *supra*.

²⁷⁵ Text accompanying notes 224-235 *supra*.

lation, leading some to the conclusion that broadcasters themselves have no first amendment rights.²⁷⁶ To the extent that newspaper publishers have the power to be arbitrary and to regard their newspapers as extensions of their own personalities, publishers of the print media enjoy greater rights than do broadcasters.²⁷⁷ Because of its limited nature and dedication to the public interest, the public forum portion of the electromagnetic spectrum cannot be used so arbitrarily or abusively.²⁷⁸ However, the degree of dedication to the general public interest required by the Communications Act of 1934 is not so great as to establish a form of state action bringing the private licensee under the managerial control of the federal government.²⁷⁹ The federal control exercised over broadcast licensees is an intermingling of the police power, the economic power over commerce, and so much of the judicial power as is delegated in the establishment of the administrative process. None of these powers threatens the broadcaster's right to express his own opinion on political issues, and the FCC has expressly affirmed its right in its *Report on Editorializing*.²⁸⁰

Why, then, such strong assertions that federal regulation threatens broadcasters' rights? There may be a few legitimate concerns underlying such assertions,²⁸¹ but, primarily, such arguments seek to use the first amendment as a screen behind which many broadcasters may engage in the activity most important to them—earning money from deliberately non-controversial programming designed to appeal to large, profitable audiences.²⁸²

²⁷⁶ See, e.g., Kalven, *supra* note 24, at 15-18.

²⁷⁷ This "romantic" notion of the meaning of the first amendment as applied to newspapers has been criticized. Barron, *Access*, *supra* note 11.

²⁷⁸ In *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966), the court said:

A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.

²⁷⁹ There is a significant difference between the status of Voice of America, operated by the executive branch of the United States government, and the relationship of a broadcast licensee's station to the federal government. Furthermore, since the first amendment protects the expression of student editors of newspapers sponsored and financed by state colleges and universities, it can hardly be said not to protect expression by broadcasters who are not funded or (with a limited exception, *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958)) even protected against financial loss by the federal government.

²⁸⁰ Note 25 *supra*.

²⁸¹ See part V of this article.

²⁸² F. FRIENDLY, *supra* note 38, at xi ("Because television can make so much money

Of course, commercial broadcasters are expected to make money; the opportunity to do so is an incentive for investing the necessary capital and for maintaining "the costly temples of communication that house the elaborate radio and television equipment, the technical prerequisite to any speech at all" over the broadcast media.²⁸³ Investment is required to produce the programming that entertains and occasionally enlightens us.²⁸⁴ But it is Orwellian Newspeak to invoke the first amendment as if it existed to protect the opportunity, not merely to earn, but to pander continuously to the lowest common denominator. Indeed, so to exploit this unique public resource without a thought to the social consequences or to the interest of others in using it for public expression is antithetical to first amendment values.

Significant light has been shed on this issue by the Supreme Court's decision in *Red Lion* despite the FCC's misconstruction of the Court's opinion. In particular, the FCC has cited the following quotation from *Red Lion* to support its position that for practical and technical reasons there can be no right of access to the broadcast media:

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.²⁸⁵

When the preceding quotation is viewed in context, it becomes clear that the Court was referring to the opportunity to transmit electromagnetic radiation into a particular portion of the spectrum—the opportunity to be a full broadcast licensee.²⁸⁶ Further-

doing its worst, it often cannot afford to do its best."); N. JOHNSON, *supra* note 15, at 20–23; R. MONTGOMERY, *supra* note 2, *passim*.

Edward R. Murrow once commented:

[W]e have in this country a free enterprise system of radio and television which is superior to any other . . . There is no suggestion here that networks or individual stations should operate as philanthropies. But I can find nothing in the Bill of Rights or the Communications Act which says that they must increase their net profits each year lest the republic collapse. . . .

Quoted in F. FRIENDLY, *supra* note 38, at 112–13.

²⁸³ Johnson & Westen, *supra* note 12, at 583–84.

²⁸⁴ For example, the production cost of *The Selling of the Pentagon* was approximately \$100,000. Sherrill, *supra* note 22, at 26.

²⁸⁵ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 388 (1969), cited by the FCC in *Democratic National Committee*, 25 F.C.C.2d 216 (1970), *rev'd*, *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971).

²⁸⁶ The balance of the paragraph states:

If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few must be licensed and the rest must be barred from the airwaves. It would be strange if the First

more, *Red Lion* does not support the third stage of federal regulatory action authorizing licensees arbitrarily to exclude others from access to their equipment. Instead, it emphasized the distinction between the limited opportunity to be a licensee and the broader opportunity to use a licensee's facilities:

By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others. . . .

. . . .

. . . As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.²⁸⁷

Thus, an individual's first amendment access rights are not subordinate to the desire of broadcast licensees to maximize profits by shunning controversiality.

While *Red Lion* guarantees continued first amendment protection of a licensee's basic rights of expression, a licensee's first amendment rights do not include an absolute power to exclude others from access to his facilities and designated portion of the electromagnetic spectrum. Rather, the application of any of the state action rationales described above is sufficient to require the FCC and its reviewing courts to enforce individuals' first amendment right of access when reasonably asserted against a broadcaster, just as it must now be enforced when asserted against media owned by a state.²⁸⁸ The issues remaining for consideration

Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

395 U.S. at 388. This description corresponds to the first and second stages of federal limitation of access to the spectrum described in the text accompanying notes 254-261 *supra*.

²⁸⁷ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 389, 391 (1969).

²⁸⁸ The great breadth of the first amendment's protection of individual rights related to the exchange of ideas is illustrated in *Lamont v. Postmaster General*, 381 U.S. 301 (1965). A 1962 postal statute required affirmative action within twenty days after receipt of a notice if an addressee wished to receive an item of "Communist political propaganda." The court held the statute to be an unconstitutional limitation on the exercise of the addressee's first amendment rights. In a concurring opinion, Mr. Justice Brennan stated:

It is true that the First Amendment contains no specific guarantee of [ad-

are the manner and extent of enforcement appropriate to the context of broadcasting.

D. Reform Through Access to Conventional Broadcast Media

As shown above,²⁸⁹ the first amendment right of access extends to the public forum portion of the electromagnetic spectrum and facilities of broadcast licensees. However, implementing access to conventional broadcast facilities will be significantly more complicated than arranging access to the advertisement display area of a transit system or the pages of a state college newspaper. The purpose of this section is to explore the more significant issues which will have to be considered and resolved by the FCC or by broadcasters themselves if the right of access is to be effectively implemented.²⁹⁰ Four major issues will be considered: (1) alloca-

dressees] access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful . . . I think the right to receive publications is such a fundamental right.

381 U.S. at 308.

²⁸⁹ See part IV C of this article.

²⁹⁰ The question of how best to secure individual freedom of expression over a broadcaster's forum is not a new one. In 1926, the Senate Committee on Interstate Commerce proposed legislation providing, among other things, that,

[i]f any licensee shall permit a broadcasting station to be used as aforesaid, or by a candidate or candidates for any public office, or for the discussion of any question affecting the public he shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce.

67 CONG. REC. 12503 (1926) (remarks of Senator Howell). The preceding paragraph of the committee bill, like 47 U.S.C. § 317 (1970), required identification of persons paying valuable consideration for the broadcast of any matter. *Id.* at 12501-02.

In defending the quoted provision against an amendment that would have deleted it and instead would have required only equal opportunities for candidates for public office, Senator Howell of Nebraska pointed out that broadcasters were then censoring the remarks of persons whom they had invited to their stations. *Id.* at 12503. However, the broadcasters appeared to be strongly opposed to being referred to as "common carriers" in any respect. 67 CONG. REC. 12503 (1926) (remarks of Senator Dill) (the committee's reversal of position after recommending the quoted language to the Senate is also an indication of the intensity of broadcasters' feelings on the provision. See *id.* at 12502). After several pages of debate, the amendment was approved. *Id.* at 12501-05.

In Democratic National Committee, 25 F.C.C.2d 216 (1970), *rev'd*, Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), the FCC sought to link this history with section 3(h) of the Communications Act of 1934, which in defining the term "common carrier" for part II of the Act (*see* note 93 *supra*) also provides: "but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. 153(h) (1970). However, no other link besides the words "common carrier" exists. For all that appears, section 3(h) was merely inserted to ensure that no provisions of part II of the Act would be applied to licensees *qua* licensees. Furthermore, if the FCC construes section 3(h) as a statutory implementation of the Senate's vote against the first provision quoted above, it is in effect asserting that its fairness doctrine violated section 3(h) until section 315 was amended in 1959. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 n. 11 (1969).

tion of a minimum amount of conventional broadcast time for access; (2) apportionment of that time between various applicants for access; (3) power of a broadcaster to review and control programming tendered by those entitled to access; and (4) assistance from the broadcaster to those desiring access who are unable to prepare their own programming effectively.

The preceding analysis of the broadcast media and the fairness doctrine²⁹¹ will be relied upon in approaching the four areas. For example, part II of this article shows the importance of trying to absolve the broadcaster, in the public mind, from responsibility for the content of controversial messages he broadcasts for those exercising their right of access. Important lessons from that material will be used below to formulate recommendations. In part III, the fairness doctrine was analyzed in terms of its absolute and relative components. That analysis will be carried over into this section to assist in comparing the fairness doctrine with the right of access. To simplify the discussion, the term "access time" will mean the broadcast time available to private individuals or groups for the exercise of their right of access; those receiving and utilizing such time will be called "accesseses."

The absolute component of the fairness doctrine appears to be in large part a failure.²⁹² Because of broadcasters' strong interest in seeking the largest possible audience in order to maximize their earnings, it is undoubtedly naïve to expect that more than a few broadcasters will be willing to produce the variety and controversiality of material needed to reflect a full spectrum of viewpoints and thus fulfill effectively the mandate of the absolute component of the fairness doctrine. Stronger attempts to require broadcasters themselves to produce such programming can lead only to significantly increased federal regulation over programming with the threat of federal dominance of the marketplace of ideas and stultification of first amendment values.²⁹³ One of the great advantages of a fully implemented right of access is that it

Rather than attempt to link the vote of the Senate rejecting the first provision with either the right of access or the fairness doctrine, it would be more realistic to note Senator Dill's several references to broadcaster opposition to being branded with the term "common carrier," and construe that vote as a rejection of that term and status for broadcasting. While the first amendment prohibits broadcasters from denying others reasonable access to the public forum portion of the electromagnetic spectrum through the use of broadcasters' facilities, it hardly imposes the full obligations of common carrier status upon broadcasters, as the circuit court most carefully explained in *BEM*. 450 F.2d at 662-63.

²⁹¹ Parts II and III of this article.

²⁹² Text accompanying notes 113-114 *supra*. See also *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 656-57 (D.C. Cir. 1971), particularly notes 34 and 35.

²⁹³ *Id.* at 656. See also Blake, *supra* note 7, at 82-86; Frank, *Freedom of the Broadcast Press*, 36 VITAL SPEECHES 332 (1970); Frank, *supra* note 94.

can effectively serve as a powerful substitute for the absolute component of the fairness doctrine.²⁹⁴

The principal criticism of the relative component of the fairness doctrine is its lack of realism in expecting one person to accept the responsibility for presenting, fairly and evenly, both sides of a controversial issue.²⁹⁵ Again, attempts at significantly more detailed federal regulation to achieve this objective would, in all likelihood, do more harm than good.²⁹⁶ However, if the fairness doctrine's relative component is applied at the correct level of decision making, the objective of balanced programming can be achieved more naturally without expecting broadcasters themselves to prepare all the programming required. The relative component of the fairness doctrine should *not* be applied at all to the programming of individual accesses. Rather, as will be developed in greater detail below, this component should be applied in the *apportionment* of access time among accesses of differing viewpoints.²⁹⁷

1. Broadcast Time for Access—How long a time period must an accesssee be allowed to purchase for the presentation of his message? Is it only a minute or must an hour be sold from time to time for an accesssee's documentary? The D.C. Circuit in *Business Executives' Move for Vietnam Peace v. FCC*²⁹⁸ sought to reassure broadcasters that the programming which they normally produce would not suddenly be taken over by private individuals exercising their right of access.²⁹⁹ The court carefully dis-

²⁹⁴ As the D.C. Circuit said in the *BEM* opinion:

Assuming that broadcasters are sometimes fallible, the goal of a fully informed public is best attained by opening of outlets for members of the public to supplement the licensees' assessments of "importance," "controversiality" and "full" coverage.

450 F.2d at 657.

²⁹⁵ Problems of both motivation and definition of fairness contribute to the artificiality. See, e.g., Robinson, *supra* note 10, at 143; Blake, *supra* note 7, at 82-86.

²⁹⁶ See note 293 *supra*. Reportedly, renewal of a CBS television license (see text accompanying notes 402-405 *supra*) was deferred pending the answering of complaints on another controversial CBS documentary, *Hunger in America*. Sherrill, *supra* note 22, at 87.

²⁹⁷ See text accompanying notes 317-330 *infra*.

²⁹⁸ 450 F.2d 642 (D.C. Cir. 1971).

²⁹⁹ The circuit court said:

It is particularly important that these cases deal only with the public's First Amendment interests in broadcasters' allocation of advertising time. They deal only with time relinquished by broadcasters to others; petitioners argue only that, in relinquishing that time, broadcasters must not discriminate against protected expression. In normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different. In news and documentary presentations, for example, the broadcasters' own interests in free speech are very, very strong. The Commission's fairness doctrine properly leaves licensees broad leeway for professional judgment in that area. But in the allocation of advertising time, the broadcasters have no such strong First Amendment interests. Their

tinguished between broadcasters' advertising time and normal programming time without defining either term, emphasizing that its opinion would apply only to the former.³⁰⁰ When a complainant recently sought enforcement of its right of access so that it could broadcast an hour long documentary opposing the admission of the Peoples Republic of China to the United Nations, the FCC denied its complaint stating that it read the D.C. Circuit's opinion as "focusing upon the right of access for paid public issue announcements" only,³⁰¹ and that it "would not construe the court's mandate as specifically applicable to the situation now before us."³⁰²

The problem here is definitional. The FCC uses the term "programming time" to refer to all programs of some length, whether produced by the licensee, his network, or some independent producer buying time from the licensee or network, such as a political party during an election, or a private corporation.³⁰³ On the other hand, the FCC views the term "advertising time" as referring to the rather short spot announcements commonly called "commercials" by the public. While the D.C. Circuit used the terms "advertising time" and "programming time," it probably did not intend the terms to have the meanings ascribed to them by the FCC. Certainly, the court did not explicitly limit itself to the FCC's definitions; rather, at one point the court implicitly endorsed a more expansive view of the time an editorial advertisement may consume, by quoting from the early FCC decision in *United Broadcasting Co.*³⁰⁴ In that 1945 case, a broadcaster had refused to sell a period of time long enough to meet the current FCC definition of programming time, as opposed to spot announcement time. Yet, the FCC saw no obstacle to ordering the sale. The D.C. Circuit court's approval of *United Broadcasting Co.* and its statement that there was "no reason why the Commission and broadcast licensees should be any less competent in

speech is not at issue; rather, all that is at issue is their decision as to which other parties will be given an opportunity to speak.

450 F.2d at 654.

³⁰⁰ *Id.*

³⁰¹ Committee of One Million, 23 P & F RADIO REG. 2d 148, 152.

³⁰² *Id.*

³⁰³ Networks do sell program-length blocs of time to corporations and political parties. H. MENDELSON & I. CRESPI, *supra* note 9, at 286-92; Johnson & Westen, *supra* note 12, at 627. The reasons given by broadcasters for refusing to air the Committee's documentary (summarized in Commissioner Johnson's dissent) included little mention of scheduling problems. The predominant themes were broadcaster insistence on total control of programming on controversial public issues, and avoidance of scheduling changes that might adversely affect ratings. Committee of One Million, 23 P & F RADIO REG. 2d 148, 155-56 (1971).

³⁰⁴ 10 F.C.C. 515 (1945), quoted in 450 F.2d at 665.

1971 than they were in 1945," are inconsistent with the FCC's view of the scope of the *BEM* decision.³⁰⁵ The first amendment right of access should extend, not merely to the sale of short announcement time, but also to the sale of time for longer announcements and documentaries.

Time is, of course, limited on the conventional broadcast media; in particular, there is great competition for prime time and the opportunity to earn money therefrom. It is simply not practical to expect broadcasters to establish "reasonable" standards for the amounts of access time that they will offer. The FCC would do both the broadcasters and the public a great service by facing up to the necessity of establishing minimum standards for availability of access time. Of course, minimum standards would not stop any broadcaster from offering a greater amount of access time if he wished.³⁰⁶

In setting its minimums, the FCC should consider at least three major categories of access time, with subcategories in each for prime time and non-prime time programming. The three major categories would be announcement access time, regular program access time, and entertainment program access time.³⁰⁷

Commissioner Nicholas Johnson has proposed a significant difference in treatment of announcement access time and regular program access time, suggesting that broadcasters should make 50 percent of their total announcement time available for use as access time, while recommending a figure of 5 percent of available regular program time during prime time hours as appropriate for access time.³⁰⁸ This distinction seems quite reasonable. Although

³⁰⁵ The FCC did note that "one of the petitioners in the *BEM* case [the Democratic National Committee], requested a broad ruling on its rights to purchase time, including program length material." But, apparently regarding the sale of program length time as an invasion of *editorial* control of broadcaster programming, the Commission concluded that the circuit court had focused upon access for paid public issue announcements, even though the court had remanded the FCC's ruling on DNC's request simultaneously with its remand of *BEM*. The FCC is objecting to an inherent feature of the right of access—its requirement that others be given reasonable access to a broadcaster's facilities, even though the broadcaster will lose most editorial control over the material broadcast while such access is occurring.

³⁰⁶ To the extent that such a minimum standard approach would appear to be regulatory action that discriminates against ordinary commercial advertising, it would not violate the first amendment which offers commercial advertising little protection against restrictive regulation. *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

³⁰⁷ Announcement access time would, of course, be available only for messages of relatively short duration. The maximum length of time that a broadcaster should be required to sell for one announcement should be fixed by referring to the maximum time now consumed by a set of adjacent commercials. Longer "announcements" could be treated as regular program access time material.

³⁰⁸ *Business Executives' Move for Vietnam Peace*, 25 F.C.C.2d 242, 273 (1970) (dissenting opinion) and *Democratic National Committee*, 25 F.C.C.2d 216, 235 (1970) (dissenting opinion). See also Johnson & Westen, *supra* note 12, at 627-28.

some critics, of television in particular, would like to restructure broadcast programming radically, there appears to be no reasonable way to avoid having the bulk continue to be typical entertainment programming. While the right of access may mean that the majority of the public cannot demand a total diet of entertainment cleansed of all controversial ideas, it would be stretching the right too far to hold that the right of access enables those desiring access to deny the majority its favored programming during a major part of the broadcast day.³⁰⁹ Because of the intense competition for prime time, any percentage of time set aside for access programming within the entire broadcast day should also be specifically applied to prime time. Thus, if the 50 percent figure proposed by Commissioner Johnson is accepted for announcement access time during the entire broadcast day, the FCC should also specify that 50 percent of announcement time within prime time hours should be available as access time. The same principle should also be applied to regular program access time and entertainment program access time.

Most persons desiring program access time will be seeking an opportunity to broadcast a single documentary, interview, panel discussion, or the like. But some potential accessees may believe that they can express themselves in a way that will appeal to the public sufficiently to justify repeated exposure. Yet the history of the Smothers Brothers' program shows that good ratings will not protect a controversial combination of entertainment programming and social commentary against suppression.³¹⁰ Therefore, in addition to the 5 percent suggested for regular program access time, an additional 5 percent should be set aside for accessees who, in addition to expressing their views on public issues, could maintain a specified minimum viewer rating.³¹¹ If a person desiring access is to have repeated appearances, as opposed to spot announcements or an occasional documentary, it seems appro-

³⁰⁹ Another reason for the differing treatment is that accessee's spot announcements displace only commercial messages, while accessees' program length materials will displace entertainment or public issue programming, and thus should be more limited. Johnson & Westen, *supra* note 12, at 627-28.

The latter type of displacement involves a balancing between conflicting first amendment interests, Kalven, *supra* note 24, at 28-30, while the former does not. See note 306 *supra*. Thus, the first amendment itself reinforces the distinction, though not to the extent asserted by the FCC in *Committee of One Million*. See note 305 *supra* and text accompanying notes 298-305 *supra*.

³¹⁰ Text accompanying notes 71-81 *supra*.

³¹¹ This additional 5 percent would not constitute a financial burden on the broadcaster, because the rating requirement would protect revenues. A reasonable minimum rating is a feasible requirement; for instance, the Smothers Brothers were having no problems with ratings while at CBS. Kroman, *supra* note 71, at 153.

priate to expect him to prove that, among other things, he is, in fact, entertaining.³¹²

The relationship between networks and affiliates in the marketing of access time must be carefully considered and defined. Affiliates do not always elect to carry network program material;³¹³ furthermore, it is against current FCC regulations for them to bargain away their power to reject network programming.³¹⁴ However, it would seem that first amendment expression will be chilled if a person seeking access to a nationwide audience for his protected expression must deal with each individual affiliate. Therefore, the FCC standards should delegate to networks the power to market a certain proportion of access time without affiliates having the discretion to refuse to broadcast the access time's program or announcement.³¹⁵ Perhaps the best approach would be to allow networks to market the proportion of access time, for each category, equal to the average proportion of broadcast time that they ordinarily provide affiliates in the corresponding non-access category.³¹⁶

2. *Broadcaster Apportionment of Access Time*—While broadcasters and the FCC purport to fear inundation from persons desiring access time, there are reasons to be skeptical of this contention. It cannot be assumed that local level broadcasters will experience an overwhelmingly large number of requests for access.³¹⁷ At the network level, while many people may desire the opportunity to address a national audience, the higher advertising rates may serve as a significant deterrent. However, skeptical

³¹² The FCC may wish to set different minimum access time standards for broadcast stations that have been permitted to adopt specialized formats. For example, a station with an "all news" format could reasonably be required to carry a higher percentage of program access time than an ordinary broadcast station, because its format is more clearly analogous to an ordinary forum than the "balanced programming" required of most stations. See note 101 *supra*. A station that has been permitted to devote the bulk of its programming to music might be allowed to make a lower percentage of program access time available.

³¹³ For example, out of 204 CBS affiliated television stations, 39 elected not to carry the first broadcast of the CBS documentary, *The Selling of the Pentagon*. Sherrill, *supra* note 22, at 26.

³¹⁴ See 47 C.F.R. § 73.658(e) (1971).

³¹⁵ The FCC might authorize exceptions for reasonable local needs, such as emergencies, fast breaking news events, local sports or civic events traditionally covered, etc., on the condition that the access time be given a priority opportunity to purchase access time from that portion of time sold by the excepted licensee.

³¹⁶ Thus, if a network provides an average of 75 percent of programming during the prime time hours, it would market 75 percent of each category of prime time program access time, while each affiliate would control the balance of time in each category broadcast over his station.

³¹⁷ Two New York city cable television companies have made two channels available for public access and are not yet experiencing chaos. Demand averages 40 cable hours per week out of an available 336 hours. Furthermore, cost to users apparently is significantly lower than cost of conventional broadcast time. See Editorial, 19 TV GUIDE, Dec. 11, 1971, at 4.

speculation can be as erroneous as fearful speculation; therefore, the following discussion is predicated on the broadcasters' assumption that the demand for editorial advertising time will exceed any reasonable amount of time that might be made available. It will also be assumed that requests for time will not necessarily be balanced, either as between viewpoints on specific issues or as to the issues sought to be covered.

In the *BEM* decision, the court strongly emphasized the power of the FCC and broadcasters to establish reasonable regulation concerning the time, place, and manner of speech.³¹⁸ In establishing reasonable regulation, the FCC could define the limits of the control which broadcasters might exercise over editorial advertising.³¹⁹ In addition, the court made it clear that the FCC, or licensees under FCC regulation, could set some outside limits on the amount of advertising time to be sold to one group or representatives of one particular viewpoint.³²⁰ Finally, the court noted that the FCC would retain its power to apply the fairness doctrine so as to require broadcasters, upon granting access to viewpoints on one side of an issue, to accept advertisements on the other side, free of charge if necessary.³²¹ While setting forth the general principle that broadcasters could no longer apply a flat ban to editorial advertising, the court did not provide detailed guidance. It did not need to because the fairness doctrine³²² stands ready to steer the FCC and broadcasters away from the chaos they fear.

Of course, some elements of the fairness doctrine are simply not applicable to the apportionment of access time. For example, the broadcaster's discretion under the general fairness doctrine to determine whether an issue is a controversial issue of public

³¹⁸ 450 F.2d 642, 663-64 (D.C. Cir. 1971).

³¹⁹ *Id.*

³²⁰ Specifically, the court said at 450 F.2d at 664:

[I]nvalidation of a flat ban on editorial advertising does not close the door to "reasonable regulations" designed to prevent domination by a few groups or a few viewpoints. Within a general regime of accepting *some* editorial advertisements, there is room for the Commission and licensees to develop such guidelines. For example, there could be some outside limits on the amount of advertising time that will be sold to one group or to representatives of one particular narrow viewpoint.

³²¹ *Id.* However, the court thought it "incredible that the Commission would enforce a rule so rigid that licensees would be driven out of business," and stated further that upon a showing of threat of actual harm to particular broadcasters, the FCC "could make necessary adjustments." *Id.*

³²² The court spoke of fairness doctrine obligations as being something the FCC has "the power" to apply. *id.* at 664, perhaps implying that it has the power to decline to apply the doctrine insofar as editorial advertising is concerned. However, the 1959 amendment of section 315(a) of the Communications Act of 1934, a Congressional ratification of the fairness doctrine, *see the Red Lion* opinion, 395 U.S. at 380, while affording the FCC considerable latitude in interpreting the extent of its application, may nonetheless prevent the FCC from simply excusing broadcasters generally from compliance with its terms.

importance is clearly inapplicable to the apportionment of access time; under the first amendment right of access, that determination is placed in the hands of individual accessees.³²³ However, other elements of the fairness doctrine can, and indeed should, be applied. The most important of these elements is the relative component of the fairness doctrine requiring a broadcaster who has broadcast one view on a controversial public issue to provide a reasonable opportunity for the broadcasting of opposing points of view. As the fairness doctrine is ordinarily applied, the broadcaster has great discretion to determine exactly how the opposing points of view should be presented. On the other hand, under the right of access, the manner of presenting views is for the accessee to determine,³²⁴ subject to reasonable overall regulation discussed below.³²⁵ Nevertheless, if a number of persons are simultaneously requesting the opportunity to express their views on various controversial issues, the relative component of the fairness doctrine can serve as a familiar guide to the broadcaster, if he will use it not as a basis for attempting to edit an accessee's program, but as an aid to apportioning limited broadcast time among potential accessees. If potential accessees do not among themselves sufficiently cover the various viewpoints on any particular issue, then the broadcaster would have an obligation to seek out persons representing the "missing" viewpoint and to offer them a priority opportunity to purchase editorial advertising time. If such a purchase cannot be arranged, the relative component of the fairness doctrine would require that the broadcaster, through his own programming, present the missing viewpoint with his customary discretion in the selection of spokesmen.³²⁶

The balancing principle of the relative component can be applied not only to balancing the opportunity for access between opposing viewpoints on a particular issue, but also to allocating available time between issues. While a broadcaster should not have the power to prohibit altogether editorial advertising on a particular issue, it might be appropriate for the broadcaster to apportion limited access time³²⁷ so as to increase the variety of issues covered, rather than to present issues on a "first-come,

³²³ As the *BEM* court said, "[W]hen an individual or group buys time to say its piece, the crucial controls are in its own hands." 450 F.2d at 656.

³²⁴ *Id.*

³²⁵ See text accompanying notes 331-359 *infra*.

³²⁶ *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963). See generally *Editorializing*, *supra* note 25.

³²⁷ Balancing issues should be performed *only* to the extent necessary to match demand for access time to available supply, after that demand has been "reduced" by the limitation of amount of time to be sold to representatives of one particular viewpoint.

first-served" basis. Furthermore, the broadcaster should be free to apportion less time to persons wanting to comment on issues already substantially covered during the broadcaster's normal programming.³²⁸ Such an approach to apportionment would tend to give more coverage to editorial advertising on matters not covered in depth by the broadcaster, and thereby increase the total diversity of issues and views appearing over the broadcast media.

The three more specific principles of the relative component of the fairness doctrine³²⁹ would also have the effect of giving certain accessees priority over others in obtaining limited access opportunities. Thus, an individual who has been personally attacked by a prior accessee would have an earlier opportunity to respond than he might otherwise have on a first-come, first-served basis. If an accessee's editorial advertising amounts to comment on a specific issue or person in a current political campaign, application of the political editorial concept to such situations would give accessees favoring other sides of the issue or other candidates an earlier opportunity to respond. The *Banzhaf* principle would similarly give priority to accessees seeking to respond to viewpoints expressed in those commercial advertisements to which the principle applies.

In his apportionment of access time, a broadcaster might find good reason in some cases to restrict an accessee's advertisement to certain specified periods of the day. For example, he might reasonably restrict the appearance of an editorial advertisement setting forth a viewpoint on our sexual mores to a period of time in the late evening when younger children presumably are asleep.

These suggestions demonstrate that the relative component of the fairness doctrine can serve as a reasonable and familiar basis for apportionment of access time.³³⁰ Of course, if it should turn out that the demand for editorial advertising time is not as great as the FCC and broadcasters have predicted, then most of the special considerations for apportionment described above would not be required, and a first-come, first-served basis, augmented by licensee programming, might be sufficient to satisfy the first amendment and the public interest standard of the Communications Act of 1934.

³²⁸ The court in *BEM*, 450 F.2d at 657, states:

The Commission's and intervenors' argument might be somewhat stronger if it were designed to support a partial ban on editorial advertising concerning issues and views which have *in fact* been substantially aired on normal programming time.

The court's footnote to this sentence says, however, that even then, "the special attributes of editorial advertising would not be eliminated by the broadcaster's own coverage."

³²⁹ These principles are discussed in text accompanying notes 120-130 *supra*.

³³⁰ *Cf.* Johnson & Westen, *supra* note 12, at 628 n. 234.

3. *Broadcaster Review and Control of Accessee Programming*—The very concept of access rests on the assumption that each accessee will be entitled to determine the substance of the material he will present. However, the “reasonable regulation” to which the right of access is subject will give broadcasters and the FCC an opportunity to review and to exercise carefully defined control over the content of accessee programming.³³¹ Of course, such control would not extend so far as to enable a broadcaster or the FCC to require that the content of an individual accessee’s program or announcement comply with the relative component of the fairness doctrine. Rather, the requirements of the relative component should be met by balanced selection from *among* potential accessees, plus necessary supplementary broadcaster programming.

Where programming is submitted in advance in the form of a script or on tape or film, the logistics of review and control will be relatively simple. Live presentation will present greater problems, which broadcasters might solve by taping in advance. Within his capabilities, the broadcaster has an obvious duty to prevent accessees from broadcasting material that violates valid criminal statutes. Thus, broadcasters must abide by the federal statutory prohibitions against profanity and obscenity,³³² lotteries, fraud,

³³¹ While the circuit court’s discussion in *BEM* is concerned primarily with scheduling of editorial advertising, it admits of some broadcaster involvement in the preparation and editing of advertisements and specifies that reasonable regulations may determine manner of speech, in addition to time and place. 450 F.2d at 663.

³³² Federal law prohibits the utterance of “any obscene, indecent, or profane language by means of radio communication. . . .” 18 U.S.C. § 1464 (1970).

Relying upon the recent decision of the Supreme Court in *Cohen v. California*, 403 U.S. 15 (1971), the FCC has suggested that recognition of the right of access to the broadcast media would require that all constitutionally protected speech be allowed such access, thus negating current federal prohibitions against the broadcasting of profanity and obscenity. Petition for Rehearing and Suggestion for Rehearing en banc at 7, *Business Executives’ Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971). This fear is not justified. A principal element of the *Cohen* case was the lack of specificity of the California statute under which the defendant was convicted. The Court intimated that a more particularized statute, supported by more compelling reasons, would pass constitutional muster. 403 U.S. at 26.

The federal statutes in question are much more specific than the California statute at issue in *Cohen*. They apply to a narrower set of circumstances and rely upon terms with readily ascertainable meanings. See, e.g., H. WENTWORTH & S. FLEXNER, *DICTIONARY OF AMERICAN SLANG* (1960), identifying offensive words with the euphemism “taboo,” explained *id.* at xvi. Surely, if circulation of particular photographs can be banned as obscene. *United States v. Thirty-seven (37) Photographs*, 402 U.S. 363 (1971), *United States v. Reidel*, 402 U.S. 351, 357 (1971), without threatening the expression of popular ideas, it is hardly reasonable to castigate more limited attempts to protect members of the public against offensive words on the ground that “government might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views,” *Cohen v. California*, 403 U.S. 15, 26 (1971), particularly when independently compiled scholarly compendia exist against which any such government action can be measured.

Furthermore, the federal statutes are supported by the compelling need to protect

and so forth.³³³ The standards they enforce should be consistent with their own practices. For example, if a broadcaster has customarily relaxed prohibitions against certain profane words during those portions of the late evening when younger children are not expected to be watching, presumably an accesser would be entitled to the same relaxation for editorial advertising scheduled to appear only during those times.³³⁴

When reviewing accesser material, broadcasters will no doubt look upon defamation as the most serious problem. In *Farmers Educational and Cooperative Union of America v. WDAY, Inc.*,³³⁵ the Supreme Court held a broadcaster not liable for a political candidate's broadcast containing defamatory statements because section 315 of the Communications Act of 1934 prohibited the broadcasters from censoring the broadcast. Unless this ruling is extended to protect broadcasters against liability for the broadcast of defamatory material prepared by accessers, the broadcaster may be held liable for his accesser's defamation because he published the defamation and gave it wide currency throughout a local broadcast area or the entire nation.³³⁶ How-

privacy in the home. *Rowan v. Post Office Dep't.*, 397 U.S. 728, 736-37 (1970). Admittedly, total prohibition of obscene and profane language denies willing adults the opportunity to receive "adult" programming. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 598 (1963). However, there is a significant difference between the sale of books in bookstores and the ordinary use of the radio or television receiver in the home. While adults can protect their own privacy by "flipping the dial," they cannot be expected to hover around the receiver to do the same while their children are viewing or listening. In view of the relatively unrestricted use of radio and television by children in the home, the interest of Congress in protecting the individual right of privacy against offensive broadcast programming is very strong. Even the United States Commission on Obscenity and Pornography recommended that legislation should "aid parents in controlling the access of their children to [explicit sexual] materials during their formative years." THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 57 (1970), and the Supreme Court has ruled such legislation to be constitutional. *Ginsberg v. New York*, 390 U.S. 629 (1968).

³³³ See note 33 *supra*.

³³⁴ Cable television may someday provide "adult" programming through a locked channel technology that would enable more effective protection against unwanted programming than present broadcast receiver technology permits. Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008, 1034 (1971). See also note 363 *infra*.

³³⁵ 360 U.S. 525 (1959).

³³⁶ The unsettled state of the relationship between defamation law and the first amendment makes it difficult to predict whether *WDAY* will be so extended. While broadcasters are expressly prohibited from censoring the material broadcast by a candidate for political office during the exercise of his equal opportunity [47 U.S.C. § 315(a) (1970)], no such express prohibition exists with respect to one who is exercising his right of access. The right of access itself is subject to "reasonable regulation"; therefore, it is not clear at this time that the first amendment itself prohibits the licensee from "reasonably censoring" an accesser's materials to prevent defamation, or at least the types of defamation which are still actionable under *New York Times Co. v. Sullivan*, 376 U.S. 354 (1964), and its progeny. For a recent review of these cases, see *Rosenbloom v. Metromedia*, 403 U.S. 29, 30 (1971).

The FCC has prohibited cable television operators from censoring material presented by accessers to public access channels or lessees of leased channels, except to a minimal extent not including the prevention of defamation. See text accompanying notes 375-376

ever, if broadcasters attempt to exercise a power of review so conservatively as to prevent any possibility of liability for defamation, there would be little opportunity to satisfy the mandate that "debate on public issues . . . be uninhibited, robust, and wide-open."³³⁷

The FCC could help broadcasters solve this dilemma. First, the FCC should attempt to provide guidance to licensees on the current limits of constitutionally actionable defamation. Such guidance written expressly for broadcasters would facilitate intelligent broadcaster screening of accessee material and selection of those items that reasonably merit the attention and advice of counsel.

Second, the FCC should promulgate regulations on broadcaster procedures for review of accessee material. With its expert knowledge and understanding of the practical problems of operating a broadcast station or network, the FCC can indicate the standard of care to be practiced by broadcasters in their review of material for possible defamation. In particular, the FCC should determine how far in advance filmed or taped materials must be submitted for review. Without such standards, some broadcasters may require so long an advance that protected expression would be chilled and a court tempted to hold an advance review requirement unconstitutional.³³⁸ Where advance review is not possible, a broadcaster should not be expected to anticipate the occurrence of defamation, particularly on a live program during which accessees spontaneously present their views.³³⁹

Third, the FCC should establish regulations governing broadcaster response to complaints that broadcast accessee material was defamatory. These regulations might expressly apply the

infra. In its accompanying report, the FCC stated that "state law imposing liability on a system that has no control over these channels may unconstitutionally frustrate Federal purposes," but admits that "the matter is of course one for resolution by the courts." 37 Fed. Reg. 3271 (1972). Presumably the damages that will be involved, if the FCC is wrong, will be relatively small, because each cable television system reaches a relatively small audience; therefore, cable television is an appropriate vehicle for experimentation. But the audiences reached by network television are much larger, and the FCC may wish to wait before applying the same approach to access to the conventional broadcast media, until either a successful court test of the insulating value of the no-censoring regulation or enactment of clarifying federal (or uniform state) legislation occurs.

³³⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Court elimination of, or limitation upon, review of accessee material for defamatory content would not necessarily result in a simultaneous elimination or limitation of licensee liability. In *WDAY*, four members of the Court felt that such a limitation of liability was not constitutionally required, but was merely a question for state courts and legislatures to decide. 360 U.S. 535.

³³⁸ *Cf. Robinson v. Coopwood*, 292 F.Supp. 926 (N.D. Miss. 1968), *aff'd per curiam*, 415 F.2d 1377 (5th Cir. 1969).

³³⁹ While the FCC has held that a broadcaster may, in good faith, terminate a live interview because it was appearing to become libelous, *The NBC "Today" Program etc.*, 31 F.C.C.2d 847 (1971), the transcript accompanying the holding, 31 F.C.C.2d at 850-852, shows how difficult an on-the-spot decision may be.

personal attack rules and require priority in the availability of access time for the defamed person's exercise of a right of reply.³⁴⁰ In those more serious situations requiring after-the-broadcast investigation of an accessee's material, FCC regulations might encourage the broadcaster to make the inquiry and to issue a public statement of its findings. This procedure might reduce the damage caused by an accessee's broadcast of factual error.

Fourth, the FCC should develop a proposed uniform state law limiting, or eliminating, the liability of a broadcaster who has complied with the FCC's regulations. Limitation to actual economic damages³⁴¹ might be the most socially desirable policy. With damages so limited, broadcasters should be able to afford the necessary insurance premiums—a burden broadcasters are better able to bear than most persons who are defamed. Indeed, implementation of the first three recommendations above, when coupled with the present scope of the first amendment privilege may be sufficient to keep premiums low.

The FCC has found that prompt action is necessary to handle the equal opportunities complaints of candidates for public office under section 315(a) of the Communications Act of 1934,³⁴² and an analogous complaint procedure could undoubtedly be set up for complaints following broadcaster refusals of access, particularly when time has been sold but accessee material rejected. If a particular broadcaster appeared to be the cause of an excessive number of complaints, the FCC should adopt the policy of investigating the basis for the complaints when the broadcaster's license is up for renewal. Announcement of such a policy would tend to keep the FCC's Complaints and Compliance Division from receiving a complaint every time an accessee's material causes a broadcaster the slightest concern.

Broadcasters may find it necessary to offer free time for response to a personal attack made by an accessee.³⁴³ Rather than

³⁴⁰ Mr. Justice Brennan's plurality opinion in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971) said that: "If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern." *Id.* at 47.

To the extent that FCC regulations ensure the ability of an allegedly defamed person to respond, presumably they will tend to forestall the states from substituting a more drastic and expensive remedy against broadcasters.

³⁴¹ See Mr. Justice Marshall's dissenting opinion in *Rosenbloom*, 403 U.S. at 78.

³⁴² 47 U.S.C. § 315(a) (1970); FCC, Use of Broadcast Facilities by Candidates for Public Office, 19 P&F RADIO REG.2d 1913, 1916-17 (1970) [hereinafter cited as FCC Public Notice].

³⁴³ Such a requirement now applies if a candidate for public office, exercising his uncensorable right to equal opportunity, makes a personal attack on a person other than another candidate, his authorized spokesman or one otherwise associated with his campaign. *Id.* at 1954-55.

have a dispute each time a broadcaster fears that an accessee's material contains a personal attack on someone else, it might be much simpler to allow the broadcaster to protect himself by inserting a clause in his contract with the accessee that would require the accessee to pay for such free time as the broadcaster may have to offer in response to any personal attack made by the accessee.³⁴⁴

The sensitivity of broadcasters to criticism, threats, or other negative reactions from persons who object to their broadcasting of controversial material has been explained above.³⁴⁵ The FCC should develop a standard form disclaimer to be used by broadcasters in editorial advertisements.³⁴⁶ For television, the FCC might wish to designate a standard symbol to appear on the screen from time to time to indicate that the material being broadcast is accessee material for which the broadcaster is not responsible. An occasional tone might convey the same message on radio. The broadcasters could also prepare and broadcast programs explaining the right of access and the broadcaster's limited role in its exercise as a means of educating the public. The public attitudes that tend to reinforce the dragon's reluctance might then be mitigated.

³⁴⁴ It may be argued that such a provision would chill expression by accessees. However, the financial threat involved is quite distinguishable from that associated with general damages in an action for defamation, *see* note 341 *supra*, and FCC Public Notice, 19 P&F RADIO REG.2d at 1954-56, and is ordinarily not particularly serious. To the extent that the presence of such a clause would tend to inhibit expression, even though not seriously jeopardizing the finances of the accessee, it would nevertheless be protecting an important interest: the interest of the government in protecting the reputation of its citizens against unwarranted attack. *Rosenbloom v. Metromedia*, 403 U.S. 29, 48-49, 78 (1971).

Such a contract would also contain an arbitration clause to settle differences between the broadcaster and the accessee; if the arbitrators so determined, the licensee would make reply time immediately available at the original accessee's expense. If the arbitrators ruled against the person demanding reply time, he, as a third party, would still have the opportunity to file a complaint with the FCC. The contract could also provide that if the FCC ruled in favor of the complainant, the original accessee would still be required to pay the costs involved. In handling such a complaint, the FCC should of course permit intervention by the accessee, the real party in interest.

In *Metromedia, Inc.*, 23 P&F RADIO REG.2d 610, 614-15 (Jan. 12, 1972), the FCC indicated its disapproval of a condition in a licensee offer to give reply time prohibiting the offeree's program from containing "any 'personal attack' as defined by the FCC." The clause suggested herein would, of course, *not* require an accessee to promise that he would make no personal attack. Furthermore, the reply in *Metromedia* was to be to licensee-originated programming, not to programming originated by some person independent of the licensee.

³⁴⁵ Text accompanying notes 32-42, 281-289 *supra*.

³⁴⁶ In *Wirta v. Alameda-Contra Costa Transit District*, 68 Cal.2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967), the defendant transit district had contended that riders might be led to believe it endorsed the views expressed in its buses by editorial advertisers. In rejecting that contention, the court said the transit district could require that editorial advertisements include a disclaimer, in accordance with its existing practice for those political advertisements which it had been carrying.

Note that a disclaimer of accessee material may protect a broadcaster against adverse public reaction arising from the accessee's controversial message, while broadcasting of that message can count toward fulfillment of his fairness doctrine obligations.

4. *Broadcaster Assistance to Accessees Unable to Prepare Programming to Professional Standards*—A number of organizations and wealthy individuals will be able to prepare programming that will effectively express their views over the broadcast media. Others will nervously appear during time allocated by the broadcaster on a local channel or on the public access channel of their local cable television system and express their opinions to whomever may be watching. Clearly, the average private citizen will not be able to use the medium as effectively as will those who can afford professionally prepared spot announcements of programs.³⁴⁷ Broadcasters and the FCC should explore a variety of alternatives to minimize the effect of any monetary disparities.

A first alternative would be to enforce the relative component of the fairness doctrine.³⁴⁸ If a controversial issue of public importance is the subject of editorial advertising, but one or more viewpoints are not being presented, under the relative component of the fairness doctrine the responsible broadcasters would have to seek out an appropriate spokesman for each viewpoint and give him reasonable air time to express his view. This approach is better than a totally one-sided presentation, but the format for expression may be little more effective than an appearance on a public access channel or a letter to the editor in a newspaper. An additional problem is that if the broadcaster himself produces the program, he may have difficulty disassociating himself from the views expressed.

One resolution of the problem of the spokesman who cannot afford professionally prepared programming is for the licensee to give him a partial or total grant from a fund accumulated from broadcaster revenues or some other source prescribed by the FCC. The accessee with little or no funds would be able to have his own announcement or program produced professionally, and the broadcaster, since he did not personally produce the material, could disassociate himself from it. To avoid any connection of the broadcaster in the public mind with the program, the broadcaster could insulate himself further by establishing a committee of prominent citizens to disburse the funds set aside for this purpose. The broadcaster might prefer to establish such a committee and then allow the committee to use the broadcaster's facilities for producing programs presenting the view of those accessees who cannot themselves afford to engage in professional production. This practice would be analogous to the "Common Carrier," a

³⁴⁷ Cf. Seldes, *supra* note 61; note 62 and accompanying text *supra*.

³⁴⁸ Discussion of the relative component appears in text accompanying notes 323-326 *supra*.

feature recently established by the *Salt Lake Tribune* as a forum for public expression of opinion.³⁴⁹ In addition to providing space for statements longer than those ordinarily appearing in the letters to the editor column, the feature operates under the supervision of a lay board of editors acting independently of the *Tribune* staff, and provides professional journalistic assistance to those whose ideas are selected by the lay board for publication.³⁵⁰ Since broadcast production costs are no doubt higher than the costs of employing a journalist to prepare a feature column in a newspaper, it might be appropriate for the committee to expect partial payment of production expenses by accessees who can afford it.

Finally, the FCC might wish to allow broadcasters to experiment with the employment of several professional broadcast journalists to act as conduits for expression of public opinion during access time. If several journalists with differing viewpoints were employed, each member of the public could communicate with the one who appeared closest to his views.³⁵¹ Some mem-

³⁴⁹ The feature was announced in the *Salt Lake Tribune* of Aug. 1, 1970. A typical editor's note accompanying the feature, after further identifying the author and the article's purpose, states:

Views expressed in "Common Carrier" do not necessarily reflect those of the "Common Carrier" board of editors or *The Tribune*.

The public is urged to submit articles to "Common Carrier." Articles should be short, promote dialogue and should pertain to the political, social or economic well-being of the Intermountain Area. Articles need not be expertly written.

A lay board of editors reviews the statements and either recommends them for publication in *The Tribune* or rejects them. This board works independently of *Tribune* reportorial and editorial policies.

Mail your articles, along with a return address and phone number, to "Common Carrier," *The Salt Lake Tribune*, Box 867, Salt Lake City, Utah 84110.

The Salt Lake Tribune, Nov. 28, 1971, at 10B.

The origins of the feature have been explained as follows:

[T]he idea suggested itself during the fight over the Newspaper Preservation Act, which brought forth much criticism of the monopoly that is the average ownership situation of newspapers in the United States. Despite the fact that economic pressures have brought this situation to all but 39 towns in America, certain segments of the public are inclined to blame surviving publishers for being alone in the field.

Howsoever a monopoly situation [arises] it is our feeling that today's newspaper must respect the fact that it is probably the only newspaper going into most homes it serves and it, therefore, should be truly a common carrier of ideas for all of its readers and all groups and schools of thought within the area it serves.

Letter from J. W. Gallivan, Publisher, *Salt Lake Tribune*, to Donald B. Holbrook, Esq., Dec. 22, 1971, in the author's files.

³⁵⁰ *Salt Lake Tribune*, Aug. 16, 1970 (request for nominations); *id.*, Oct. 25, 1970 (board of editors announced).

³⁵¹ Since these journalists would be using access time repeatedly, they would have an opportunity not available to the average accessee. Each should be allowed to retain his opportunity only if he is effectively expressing the views of some portion of the public; his performance could be measured by public opinion survey.

See also F. FRIENDLY, *supra* note 38, at 96; E. EFRON, *supra* note 9, at 210-14.

bers of the public might prefer to entrust expression of their viewpoints to professionals rather than face the camera themselves. If none of the regular staff feels capable of expressing a particular viewpoint, and its source cannot afford competently produced editorial advertising, a guest, a professional, or a prominent person might be invited to speak for that viewpoint.

Such a panel of journalists should have a defined opportunity to employ the resources of the news-gathering department. While a broadcaster may properly wish to deny a congressional investigating committee access to the films it has not broadcast, it should be willing to make such films available to professional journalists as aids to their presentations. It also should allow such professionals to have a specified amount of a film crew's time to cover events omitted by the regular news department. If a regular news department, because of time restrictions or for other reasons, edits out a fact that is important to the support of a particular viewpoint, the journalist called upon to express that viewpoint should have the opportunity to show the omitted materials demonstrating that fact or have the fact recorded by a film crew.³⁵²

These proposals are not suggested as substitutes for accessee-originated editorial advertising; rather, they should augment accessee-produced programming to reflect the full spectrum of viewpoints on public issues.

E. New Promise for the Dragon: Cable Television

The subject of cable television has been thoroughly covered in recent literature,³⁵³ often accompanied by access-oriented recommendations for regulatory action. Recent FCC regulations now

³⁵² See generally STAFF OF THE SPECIAL SUBCOMM. ON INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, REPORT ON TELEVISION COVERAGE OF THE DEMOCRATIC NATIONAL CONVENTION, CHICAGO, ILLINOIS, 1968 (1969). The report is critical of the networks' selection and editing of material to be broadcast. Whether or not one agrees with the report's conclusion that "the significant outtakes [material gathered but not broadcast] contained a predominant amount of material which would have been unfavorable to the demonstrators," *id.* at 14, the existence of differing views on what should have been broadcast supports the need for pluralistic review and selection from films and tapes made in the field. Surely, it would be better to allow the public to judge events for itself with the aid of materials selected from differing perspectives, than to have the public rely upon government to ensure "objective" network journalism.

See also, Roberts, *supra* note 15, at 379-83, emphasizing the importance of the news media's selection process upon the typical citizen's view of reality. For example, it is argued that the first riots in urban ghettos in the late 1960's took the public by surprise because the media did not cover ghetto conditions prior to the riots.

³⁵³ See, e.g., Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008 (1971); Note, *Common Carrier CATV: Problems and Proposals*, 37 BROOK. L. REV. 533 (1971), and other materials cited herein.

provide for access to many cable television systems.³⁵⁴ Before describing these regulations, however, the applicability of the first amendment right of access to cable television will be briefly considered.

Cable television systems are sufficiently engaged in serving the public interest to be regulated by the states as public utilities,³⁵⁵ as well as by the FCC.³⁵⁶ While the FCC has shunned direct control of rates,³⁵⁷ it has now required local control of them.³⁵⁸ Furthermore, it will exercise limited control over entry³⁵⁹ and will continue to exercise rather extensive control over many cable television practices.³⁶⁰ Therefore, it seems clear that the actions of cable television system operators in providing cable television service under governmental regulation is as much "state action"—either public or governmental action—as the action of a privately owned transit system operating under the regulation of a public utilities commission.³⁶¹ Since it is not agent action, the problem of managerial control over cable television programming does not arise,³⁶² and the cable television operator should have at least the same personal freedom of expression that broadcasters enjoy. If the FCC adopts a "locked channel" regulation, permitting the installation of tuning devices that would enable parents to prevent their children from tuning to selected channels, the operator will have *greater* freedom of expression than a broadcast licensee.³⁶³

³⁵⁴ 37 Fed. Reg. 3252, 3269–72 (1972); 37 Fed. Reg. 3289 (1972) (to be codified as 47 C.F.R. § 76.251). *See also* FCC, Commission Proposals for Regulation of Cable Television, 31 F.C.C.2d 115, 128–133 (1971) [hereinafter cited as Cable TV Proposals]. These new rules are subject to modification in response to petitions for rehearing. 47 C.F.R. § 1.106 (1971); 37 Fed. Reg. 3277, para. 190 (1972).

³⁵⁵ *TV Pix. Inc. v. Taylor*, 304 F.Supp. 459 (1968), *aff'd mem.*, 396 U.S. 556 (1970); Ill. Commerce Comm. Investigation of Cable Television and Other Forms of Broadband Cable Communications in the State of Illinois, 22 P&F RADIO REG.2d 2192 (1971), and other authorities cited therein.

However, it appears that states are now prohibited from regulating cable television rates at more than one level of state government, although implementation of the prohibition will be gradual for existing systems. Specifically, the new regulations require new systems immediately, and existing systems gradually, to obtain certificates of compliance from the FCC, after showing *inter alia* that rates have been approved or specified by the franchising authority. 37 Fed. Reg. 3281 (1972) (to be codified in 47 C.F.R. § 76.31). *See also* 37 Fed. Reg. 3275 (1972), noting cable operator opposition to three-tiered government regulation, particularly the state tier.

³⁵⁶ *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

³⁵⁷ 37 Fed. Reg. 3276 (1972). *See also* Cable TV Proposals, 31 F.C.C.2d 138 (1971).

³⁵⁸ 37 Fed. Reg. 3281 (1972) (to be codified in 47 C.F.R. § 76.31).

³⁵⁹ 37 Fed. Reg. 3268 (1972), Fed. Reg. 3280 (1972) to be codified in 47 C.F.R. § 76.11). *See Also* Cable TV Proposals, 31 F.C.C.2d at 125–26.

³⁶⁰ *Id. passim*.

³⁶¹ *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952).

³⁶² Agent action is discussed in text accompanying notes 213–219 *supra*.

³⁶³ 37 Fed. Reg. 3271 (1972). Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008, 1034–35 (1971). *See also* Cable TV Proposals, 31 F.C.C.2d at

Since the action of a cable television operator is state action, he is constitutionally required to honor a person's first amendment right of access. Whether in response to the right of access cases or in response to many suggestions that cable television should be treated as a common carrier,³⁶⁴ the FCC's regulations now provide for access to many cable television systems.³⁶⁵ Affected systems must "maintain at least one specially designated, non-commercial public access channel available on a first-come, non-discriminatory basis."³⁶⁶ To avoid unreasonable economic burden on cable systems, cable operators will be allowed to charge accesses for production costs for live studio presentations exceeding five minutes; however, except for production costs, access to the public access channel is to be free.³⁶⁷ Since accesses may cablecast films and videotapes produced elsewhere, the public access channel should fully satisfy the right of access of individuals and groups who can afford professional production expenses; the proposal may not be sufficient for those who are less well endowed.³⁶⁸

In addition to the public access channel, cable system operators will be required to lease their nonbroadcast channels on a

131. The equipment for locking certain channels would be furnished by the CATV system operator. Ideally, a subscriber should have at least three options: 1) a device with no lock through which any channel might be tuned; 2) a device with a lock that, when locked, would prevent the signals of certain channels from reaching the receiver; 3) a device that would always prevent the signals of certain channels from reaching the receiver.

While the FCC proposes to study a device that would lock off all public access and leased channels, it should allow channel lessees who wish to appeal to larger audiences to accept the burdens of full compliance with the standards applicable to broadcasters and avoid being lumped together with those channels subject to being locked off.

³⁶⁴ See, e.g., Note, *Common Carrier CATV: Problems and Proposals*, 37 BROOK. L. REV. 533 (1971), and proposals cited therein, *id.* 533 n. 5.

³⁶⁵ Note 354 *supra*. The access regulation will apply to all cable television systems commencing operations within the top 100 market areas. See 37 Fed. Reg. 3278, 3281 (1972) (to be codified in 47 C.F.R. §§ 76.5, 76.51). Every existing cable system within the top 100 market areas must comply on or before March 31, 1977, or at such earlier time as it adds another broadcast television signal to its system. 37 Fed. Reg. 3289-90 (1972) (to be codified in 47 C.F.R. § 76.251(c)). Cable television systems outside the top 100 market areas may be required by local government to provide access, and minimum standards are made applicable to any access programming offered voluntarily or by local requirement. 37 Fed. Reg. 3289 (1972) (to be codified in 47 C.F.R. § 76.251(b)).

Cable system operators are to implement, and elaborate, the FCC's access rules through establishment of operating rules. 37 Fed. Reg. 3289 (1972) (to be codified in 47 C.F.R. § 76.251(a)(11)); 37 Fed. Reg. 3271 (1972).

³⁶⁶ 37 Fed. Reg. 3289 (1972) (to be codified in 47 C.F.R. § 76.251(a)(4)); 37 Fed. Reg. 3270 (1972). See also Cable TV Proposals, 31 F.C.C.2d at 130.

³⁶⁷ 37 Fed. Reg. 3289 (1972) (to be codified in 47 C.F.R. § 76.251(a)(4) and (10)(ii)); 37 Fed. Reg. 3270 (1972). See also Cable TV Proposals, 31 F.C.C.2d at 130.

³⁶⁸ The FCC has endeavored to assist those less well endowed by exempting non-broadcast channels, including access channels, from its technical standards, thereby allowing accesses use of less expensive production technology. 37 Fed. Reg. 3271-72 (1972). The question remains, however, whether the conditioning acquired from watching professionally produced broadcast programming will unconsciously bias viewers against ideas presented with poor quality production techniques.

first-come, nondiscriminatory basis.³⁶⁹ As leasing or other non-broadcast uses take up most of the available channel capacity, operators will be required to make additional channels operational.³⁷⁰ The length or repetitiveness of programming that will require a person to lease channel space, rather than use the access channel, is not specified in the FCC's regulations; rather, cable operators will be able to define eligibility for use of the public access channel in their operating rules.³⁷¹

The FCC's regulations do not allow a cable system operator to exercise the degree of control over apportionment of time between applicants or over access program content suggested above for conventional broadcasting access time.³⁷² Of course, much more access time will be available on the cable operator's public access channel alone than any individual broadcast licensee can provide. Additional cable time may be leased, and channel capacity is to be increased as demand increases.³⁷³ Consequently, there should be no concern that demand for access will significantly exceed the supply of cable television time³⁷⁴ and there is no need for an elaborate time apportionment system guided by the relative component of the fairness doctrine.

The FCC has restricted the authority of a cable system operator to exclude or prevent material from being cablecast over a public access or leased channel.³⁷⁵ In particular, he may not exclude material on the ground that it is defamatory.³⁷⁶ The courts may extend *WDAY*³⁷⁷ to protect cable operators from liability for actionable defamation committed by an accesser or lessee, because the FCC regulations prohibit the operators from

³⁶⁹ 37 Fed. Reg. 3289 (1972) (to be codified in 47 C.F.R. § 76.251(a)(7) and (11)(iii)); 37 Fed. Reg. 3270 (1972).

³⁷⁰ 37 Fed. Reg. 3289 (1972) (to be codified in 47 C.F.R. § 76.251 (a)(8)); 37 Fed. Reg. 3270 (1972).

³⁷¹ 37 Fed. Reg. 3271 (1972); 37 Fed. Reg. 3289 (1972) (to be codified in 47 C.F.R. § 76.251(11)(i) and (iii)).

³⁷² See text accompanying notes 298-346 *supra*.

³⁷³ Note 370 *supra*.

³⁷⁴ In New York City, supply of cable television public access time currently exceeds demand by a considerable margin. See note 317 *supra*.

³⁷⁵ The cable operator must establish rules for leased and public access channels prohibiting the presentation of lottery information and obscene or indecent matter. In addition, his rules must prohibit presentation of any advertising material designed to promote the sale of commercial products or services (including advertising by or on behalf of candidates for public office) over any public access channel, and require identification of sponsored programming appearing on a leased channel. 37 Fed. Reg. 3289 (1972) (to be codified in 47 C.F.R. § 76.251(a)(11)(i) and (iii)); 37 Fed. Reg. 3271 (1972). However, the cable system operator may exercise no additional control over program content beyond that which he is required to exercise. 37 Fed. Reg. 3289 (1972) (to be codified in 47 C.F.R. § 76.251(a)(9)); 37 Fed. Reg. 3271 (1972). See also Cable TV Proposals, 31 F.C.C.2d at 131, 132.

³⁷⁶ 37 Fed. Reg. 3271 (1972). See also Cable TV Proposals, 31 F.C.C.2d at 130-33.

³⁷⁷ See note 335 and accompanying text. See also 37 Fed. Reg. 3271 (1972).

screening out defamatory material. In that event, the victim of such defamation will be in a worse position than one who has been defamed over the conventional broadcast media. The FCC has wisely distinguished between the cable system operator's origination channel on the one hand and public access and leased channels on the other in applying the fairness doctrine and the equal opportunities requirement. However, the distinction is extensive—the fairness doctrine and equal opportunities requirements are not imposed upon public access and leased channels at all.³⁷⁸ The victim of such defamation or personal attack will have to pay for the opportunity to respond unless a five minute live presentation over the public access channel will suffice. Such a result does not seem consistent with the most recent Supreme Court opinion on the subject.³⁷⁹ Potential victims might better be protected by a contract provision between the cable operator and lessees and those accessees presenting more than a five minute live presentation, providing for the latter to pay the cost of reply time,³⁸⁰ and a regulation applying the personal attack principle of the fairness doctrine to their presentations. A lessee appearing at regularly scheduled times should also be required to announce the time and channel of the reply to his prior personal attack.

The FCC has emphasized the experimental nature of its proposals for cable television.³⁸¹ It might wish to add to the experiment a system of insurance, perhaps modeled after workman's compensation, to reimburse the actual damages sustained by a victim of a defamatory cablecast. In the process of protecting the media against the potentially crippling effect of large awards of general or exemplary damages, the courts have apparently lost sight of the victim of defamation who suffers actual economic damages.³⁸² Presumably, the media are in the best position to support a system of insurance to cover these costs. The FCC is in a unique position to seek an alternative to the present failure of the judicial system to protect the unavoidable few who are financially harmed by the "uninhibited, robust, and wide-open" debate that is necessary to fuel and sustain the marketplace of ideas.

³⁷⁸ 37 Fed. Reg. 3272 (1972). For their application to origination programming, see 37 Fed. Reg. 3287-88 (1972) (to be codified in 47 C.F.R. §§ 76.205, 76.209).

³⁷⁹ *Rosenbloom v. Metromedia*, 403 U.S. 29, 47 n. 15 (1971) and the dissenting opinions thereto. See also note 126 *supra*.

³⁸⁰ This is analogous to the agreement suggested in note 344 *supra*.

³⁸¹ 37 Fed. Reg. 3271 (1972).

³⁸² See *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), particularly Mr. Justice Marshall's dissent at 78; Note, *The End of the Line: Rosenbloom v. Metromedia*, 31 U. PITT. L. REV. 734 (1970).

V. PARTING SHOTS AT THE DRAGON'S RELUCTANCE

The more a network controls through direct production or participation in production the material it provides its affiliates, the greater the opportunity for advertiser and informal governmental pressures to reduce the flow of controversial ideas over the broadcast media.³⁸³ In 1957 roughly two-thirds of television network evening prime time programming was controlled by the networks; by 1968, the proportion of network controlled production had risen to almost 97 percent.³⁸⁴ The FCC, quite reasonably disturbed by this trend, has adopted rules requiring that in addition to the half-hour of local news programming during or just before prime time hours, another half-hour of each licensee's evening programming shall be obtained from some source other than network origination.³⁸⁵ The network norm during the four hours of evening prime time was three and one-half hours; under the new rules, the networks are limited to three hours per evening, with exceptions for network coverage of fast-breaking news events and political broadcasts.³⁸⁶ Time will be required to determine how beneficial the new rules will be, but anything that encourages the growth of independent production companies has the potential for decreasing the dragon's reluctance. The FCC has also prohibited the issuance of a new license that would result in one person or entity owning both a VHF television station and a radio station, AM or FM.³⁸⁷ Simultaneously with the issuance of this regulation, the FCC proposed a rule that would require divestiture to reduce common holdings in one market to one or more daily newspapers or one television broadcast station, or one AM-FM combination.³⁸⁸ The competition that would result from reduction of media concentration within individual markets could stimulate the dragon.

The FCC receives complaints from the public concerning programs originated locally or nationally. It selects some of these letters and forwards them to the concerned licensee, demanding that a letter of explanation be prepared within twenty or sometimes ten days.³⁸⁹ No doubt, some of the letters describe practices for which some explanation is needed, but it is hard to believe that

³⁸³ See text accompanying notes 43-45 *supra*.

³⁸⁴ Prime Time Access Rules, 23 F.C.C.2d at 389.

³⁸⁵ *Id.* at 384. The rule is limited to licensees in the top fifty markets, but the effect applies to all if the networks simply decide, as they apparently have, not to originate material at all for that half-hour.

³⁸⁶ *Id.*; 47 C.F.R. § 73.658(k) (1971).

³⁸⁷ FCC, Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C.2d 306 (1970), *modified*, 28 F.C.C.2d 662 (1971).

³⁸⁸ *Id.* 22 F.C.C.2d 339, 346 (1970).

³⁸⁹ Kalven, *supra* note 24, at 21-23; Cronkite, *supra* note 29.

some of the letters of complaint are prompted by anything more than the viewer's ire over the controversiality of a program in which a broadcaster is attempting to adhere to the marketplace of ideas concept. Under these circumstances, a federal demand that a broadcaster "explain" his action carries with it a certain aura of intimidation that is inconsistent with the spirit of the first amendment.³⁹⁰

It is unlikely that such intimidation is actually intended; more likely, it is the result of public and financial pressures upon the FCC. Federal agencies, themselves servants of the people, ordinarily attempt to respond to letters from the public. Naturally, it is less expensive for the FCC to pass complaints on to licensees than it is to explain the first amendment to each correspondent individually. Nonetheless, when the FCC passes on letters that complain about nothing more than the fact that the broadcaster has engaged in lawful protected expression,³⁹¹ it is passing on expenses of reply that should be funded out of the FCC's budget. The act of forwarding such complaints amounts to a tax on broadcasters that increases with the controversiality of the broadcaster's programming. Thus viewed, the practice is analogous to a tax on content of speech and appears to violate broadcasters' first amendment rights.³⁹²

The FCC should also reform its complaint handling procedures. With the aid of thoughtful comments from broadcasters,³⁹³ the FCC should establish procedures for distinguishing between complaints concerning activities within the FCC's purview and complaints directed solely at a broadcaster's free speech.³⁹⁴ The FCC should devise some other means for answering the latter type of complaint, perhaps a form letter and accompanying brochure explaining the FCC's limited authority over programming

³⁹⁰ Cronkite, *supra* note 29. Monroe, *supra* note 24, at 268.

³⁹¹ See the list of explicit prohibitions given in note 33 *supra*. To the extent that the fairness doctrine or program balance requirements are relied upon as justification for forwarding such letters of complaint, *quaere* whether the FCC has adopted an enforcement procedure having an undue chilling effect upon broadcaster protected expression?

³⁹² *Grosjean v. American Press*, 297 U.S. 233 (1936).

³⁹³ Broadcasters have brought some of their problems upon themselves by failing to isolate and complain about those FCC practices threatening their freedom to engage in controversial expression. Kalven, *supra* note 24, at 24. Instead, they concentrate their complaints upon regulatory actions threatening to decrease revenues while increasing the expression of ideas over their media, e.g., *Radio Television News Directors Ass'n v. United States*, 400 F.2d 1002 (7th Cir. 1968), *rev'd sub nom*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), or call for a total end to regulation, Cronkite, *supra* note 29, at 20. From this set of priorities, one might infer that broadcasters would rather protect profits than expression. See text accompanying notes 281-284 *supra*.

³⁹⁴ If the present approach toward enforcing the relative component of the fairness doctrine in effect renders the making of such a distinction impossible, the FCC should modify its procedures to require significantly more particularized fairness doctrine complaints, based upon a viewing of the broadcaster's programming over a specified period of

and the philosophy behind the first amendment. The FCC might then forward such letters to broadcasters who wanted to volunteer further comment. But such letters should not be put into licensee files (except as evidence that a licensee is attempting to meet the affirmative mandate of the first amendment) or be forwarded with demands for "explanation." The FCC cannot, of course, shield licensees from public pressure, but it should not use its procedures to formalize or amplify pressures for conformity or orthodoxy, except as they have been embodied in statutory law prohibiting obscene and profane programming.

Networks themselves own licensed stations "which contribute substantially to their profits and provide key support for their news operations. . . ." ³⁹⁵ The *Citizens Communication Center* ³⁹⁶ case, prohibiting favoritism to existing licensees at renewal time, while commendable as applied to renewal of affiliates' or independents' licenses, may increase the vulnerability of networks to informal threats by government officials. ³⁹⁷ Of course, such pressures could not be applied if networks did not own licensed stations. Thus, it is imperative that the FCC investigate the relationship between networks and their licensed stations. If the stations are not necessary to the economic health of the network or to successful news or other program production, divestiture might be a sound course for increasing network independence from informal governmental pressure. If, on the other hand, the networks need their licensee stations to perform their services to the public effectively, ³⁹⁸ the FCC should consider treating network-owned stations somewhat differently from all others. One approach would be to consider all licenses owned by a particular licensee at the same time and require competing applicants to compare their alternates with the entire range of operations of the network. If a protestant showed that a network-owned station is not sufficiently concerned with local issues, the FCC might first issue a warning, then a suggestion that the license be sold, before considering non-renewal. Finally, the FCC might require partial

time, and simply refuse to process complaints based upon the content of one show unless some other more specific programming abuse is alleged. Of course, some of the complaints about *The Selling of the Pentagon* were more specific, see note 150 *supra*, but those types of complaints can readily be avoided by the adoption of editing practices that tell the viewer what the editor is doing. See text accompanying notes 152-154 *supra*.

³⁹⁵ Cronkite, *supra* note 29.

³⁹⁶ *Citizens Communication Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

³⁹⁷ Cronkite, *supra* note 29. For one ripple from his "stone in the pond," see Knoll, *supra* note 89, at 18 (quoting Tricia Nixon).

Reportedly, the FCC delayed renewal of a CBS television station license pending investigation of the CBS documentary *Hunger in America*. Sherrill, *supra* note 22, at 87.

See also text accompanying notes 28-30 *supra*.

³⁹⁸ See Cronkite, *supra* note 29.

divestiture, accompanied by acquisitions elsewhere to ensure that each city is served by no more than one network-owned station, and that local ownership in each market increases.

The suggestions in this part may do a little to help broadcasters overcome their own reluctance to broadcast controversial material. Like the absolute component of the fairness doctrine, any success resulting from their implementation may be only partial. The most significant restraint upon the dragon is not the government, but the various informal manifestations of majoritarian opinion that slow the circulation of all new or strange ideas. The dragon's appetite for revenue makes it highly sensitive to these informal pressures, and there is little reason to expect that its reluctance would decrease measurably if government regulation were lifted.

Thus, the principal hope of those who do wish to see the broadcast media provide a marketplace for the full spectrum of ideas must be the first amendment right of access. The right of access must survive further court review before that hope can be realized.³⁹⁹ The Supreme Court has considered a number of cases closely related to the issue of access to the mass media, but has not yet decided a case requiring it to strike the balance between the first amendment rights of the broadcast media, and the individual's right of expression in the context of our technological age, in which the keys to the principal means of expression are in so few hands.⁴⁰⁰ The Court has been adapting constitutional imperatives to the demands of our modern society on many fronts, and this general sensitivity, coupled with the access-oriented reasoning of *Red Lion*, give strong reason to believe that the Court will not deny the public a right to reasonable access to the electronic media.⁴⁰¹ Assuming such a response by the Supreme Court, the proponents of the right to access will still have to urge the FCC to implement the right.

Some day after the dust of litigation has settled dedicated accesses may be causing the dragon to belch forth great drafts of fire and smoke. As technological advance brings us from national village to global village,⁴⁰² we may have mutual experiences, other than beer and detergent commercials, to discuss, to share, and, as seems appropriate, to act upon.

³⁹⁹ See note 13 *supra*.

⁴⁰⁰ However, in *Red Lion* the Court ruled on a case involving an individual's opportunity to appear on a broadcast station to reply to a personal attack. But the FCC grounds the personal attack principle in the public's right to be fully informed. Fairness Doctrine Inquiry, 30 F.C.C.2d at 28.

⁴⁰¹ The Supreme Court has granted certiorari in the *BEM* case. See note 12 *supra*.

⁴⁰² M. McLuhan & Q. Fiore, *The Medium is the Massage* 63 (Paperback ed. 1967).