voices and always itself presenting views in a bland, inoffensive manner. . . ." 25 F. C. C. 2d, at 222. A broadcaster neglects that obligation only at the risk of losing his license.

Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable. Indeed, the Commission noted in these proceedings that the advent of cable television will afford increased opportunities for the discussion of public issues. In its proposed rules on cable television the Commission has provided that cable systems in major television markets

> "shall maintain at least one specially designated, non-commercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programming for such channel." 37 Fed. Reg. 3289, § 76.251 (a)(4).

For the present, the Commission is conducting a wide-ranging study into the effectiveness of the Fairness Doctrine to see what needs to be done to improve the coverage and presentation of public issues on the broadcast media. Notice of Inquiry in Docket 19260, 30 F. C. C. 2d 26, 36 Fed. Reg. 11825. Among other things, the study will attempt to determine whether "there is any feasible method of providing access for discussion of public issues outside the requirements of the fairness doctrine." 30 F. C. C. 2d, at 33. The Commission made it clear, however, that it does not intend to discard the Fairness Doctrine or to require broadcasters to accept all private demands for air time.[28] The Commission's inquiry on

[28] Subsequent to the announcement of the Court of Appeals' decision, the Commission expanded the scope of the inquiry to comply with the Court of Appeals' mandate. Further Notice of Inquiry

this score was announced prior to the decision of the Court of Appeals in this case and hearings are underway.

The problems perceived by the Court of Appeals majority are by no means new; as we have seen, the history of the Communications Act and the activities of the Commission over a period of 40 years reflect a continuing search for means to achieve reasonable regulation compatible with the First Amendment rights of the public and the licensees. The Commission's pending hearings are but one step in this continuing process. At the very least, courts should not freeze this necessarily dynamic process into a constitutional holding. See *American Commercial Lines, Inc.* v. *Louisville R. Co.*, 392 U. S. 571, 590–593 (1968).

The judgment of the Court of Appeals is

Reversed.

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in Docket 19260, 33 F. C. C. 2d 554, 37 Fed. Reg. 3383. After we granted certiorari and stayed the mandate of the Court of Appeals, the Commission withdrew that notice of an expanded inquiry and continued its study as originally planned. Order and Further Notice of Inquiry in Docket 19260, 33 F. C. C. 2d 798, 37 Fed. Reg. 4980.

SUPREME COURT OF THE UNITED STATES

Nos. 71–863, 71–864, 71–865, AND 71–866

Columbia Broadcasting System, Inc., Petitioner,
71–863 *v.*
Democratic National Committee.

Federal Communications Commission et al., Petitioners,
71–864 *v.*
Business Executives' Move for Vietnam Peace et al.

Post-Newsweek Stations, Capital Area, Inc., Petitioner,
71–865 *v.*
Business Executives' Move for Vietnam Peace.

American Broadcasting Companies, Inc., Petitioner,
71–866 *v.*
Democratic National Committee.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE DOUGLAS.

While I join the Court in reversing the judgment below, I do so for quite different reasons.

My conclusion is that the TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines. The philosophy of the First Amendment requires that result, for the fear that

Madison and Jefferson had of government intrusion is perhaps even more relevant to TV and radio than it is to newspapers and other like publications. That fear was founded not only on the spectre of a lawless government but of government under the control of a faction that desired to foist its views of the common good on the people. In popular terms that view has been expressed as follows:

> "The ground rules of our democracy, as it has grown, require a free press, not necessarily a responsible or a temperate one. There aren't any halfway stages. As Aristophanes saw, democracy means that power is generally conferred on second-raters by third-raters, whereupon everyone else, from first-raters to fourth-raters, moves with great glee to try to dislodge them. It's messy but most politicians understand that it can't very well be otherwise and still be a democracy." Douglas J. Stewart, Brandeis University, reviewing Epstein, News From Nowhere: Television and the News (1972), Book World, Washington Post, March 25, 1973, pp. 4–5.

I

Public broadcasting, of course, raises quite different problems from those tendered by the TV outlets involved in this litigation.

Congress has authorized the creation of the Corporation for Public Broadcasting, whose Board of Directors is appointed by the President by and with the advice and consent of the Senate. 47 U. S. C. § 396. A total of 223 television and 560 radio stations made up this nationwide public broadcasting system as of June 30, 1972. See 1972 Corporation for Public Broadcasting, Annual Report. It is a nonprofit organization and by the terms of § 396 (b) is said not to be "an agency or establishment of the United States Government." Yet, since it is a creature of Con-

gress whose management is in the hands of a Board named by the President and approved by the Senate, it is difficult to see why it is not a federal agency engaged in operating a "press" as that word is used in the First Amendment. If these cases involved that Corporation, we would have a situation comparable to that in which the United States owns and manages a prestigious newspaper like the New York Times, Washington Post, and Sacramento Bee. The government as owner and manager would not, as I see it, be free to pick and choose such news items as it desired. For by the First Amendment it may not censor or enact or enforce any other "law" abridging freedom of the press. Politics, ideological slants, rightist or leftist tendencies could play no part in its design of programs. See Markel, Will It be Public or Private TV, World, March 13, 1973, p. 57; Shales, WGBH–TV, Washington Post, April 27, 1973, p. E2. More specifically, the programs tendered by the respondents in the present cases could not then be turned down.

Governmental action may be evidenced by various forms of supervision or control of private activities. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715. I have expressed the view that the activities of licensees of the government operating in the public domain are governmental actions, so far as constitutional duties and responsibilities are concerned. See *Garner* v. *Louisiana*, 368 U. S. 157, 183–185 (concurring); *Lombard* v. *Louisiana*, 373 U. S. 267, 281 (dissenting); *Moose Lodge* v. *Irvis*, 407 U. S. 163, 179 (dissenting). It is somewhat the same idea expressed by the first Mr. Justice Harlan in his dissent in *Plessy* v. *Ferguson*, 163 U. S. 537, 554. But that view has not been accepted. If a TV or radio licensee were a federal agency, the thesis of my Brother BRENNAN would inexorably follow. For a license of the Federal Government would be in precisely the situation of the Corporation for Public Broadcasting. A

licensee, like an agency of the government, would within limits of its time be bound to disseminate all views. For being an arm of the government it would be unable by reason of the First Amendment to "abridge" some sectors of thought in favor of others. The Court does not, however, decide whether a broadcast licensee is a federal agency within the context of this case.

II

If a broadcast license is not engaged in governmental action for purposes of the First Amendment, I fail to see how constitutionally we can treat TV and the radio differently than we treat newspapers. It would come as a surprise to the public as well as to publishers and editors of newspapers to be informed that a newly created federal bureau would hereafter provide "guidelines" for newspapers or promulgate rules that would give a federal agency power to ride herd on the publishing business to make sure that fair comment on all current issues was made. In 1970 Congressman Farbstein introduced a bill,[1] never reported out of the Committee, which provided that any newspaper of general circulation published in a city with a population greater than 25,000 and in which fewer than two separately owned newspapers of general circulation are published "shall provide a reasonable opportunity for a balanced presentation of conflicting views on issues of public importance" and giving the Federal Communications Commission power to enforce the requirement.

Thomas I. Emerson, our leading First Amendment scholar has stated that

> ". . . any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all 'newsworthy' events and print all viewpoints, under the watchful eyes of petty public officials, is

[1] H. R. 18927, 91st Cong., 2d Sess. (1970).

> likely to undermine such independence as the press now shows without achieving any real diversity." The System of Freedom of Expression (1970), p. 671.

The sturdy people who fashioned the First Amendment would be shocked at that intrusion of government into a field which in this Nation has been reserved for individuals, whatever part of the spectrum of opinion they represent. Benjamin Franklin, one of the Founders who was in the newspaper business, wrote in simple and graphic form what I had always assumed was the basic American newspaper tradition that became implicit in the First Amendment:

> "In our early history one view was that the publisher must open his columns 'to any and all controversialists, especially if paid for it.'" Mott, American Journalism, 55 (1962).
>
> "Franklin disagreed, declaring that his newspaper was not a stagecoach, with seats for everyone; he offered to print pamphlets for private distribution, but refused to fill his paper with private altercations."[2] *Ibid.*

It is said that TV and the radio have become so powerful and exert such an influence on the public mind that they must be controlled by government.[3] Some

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[2] Congress provided in 47 U. S. C. § 153 (h) that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

[3] "To say that the media have great decision-making powers without defined legal responsibilities or any formal duties of public accountability is both to overestimate their power and to put forth a meaningless formula for reform. How shall we make the *New York Times* 'accountable' for its anti-Vietnam policy? Require it to print letters to the editor in support of the war? If the situation is as grave as stated, the remedy is fantastically inadequate. But the situation is not that grave. The *New York Times*, the *Chicago Tribune*, NBC, ABC, and CBS play a role in policy formation, but clearly they were not alone responsible, for example,

newspapers in our history have exerted a powerful—and some have thought—a harmful interest on the public mind. But even Thomas Jefferson, who knew how base and obnoxious the press could be, never dreamed of interfering. For he thought that government control of newspapers would be the greater of two evils.[4]

> "I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. . . . These ordures are rapidly depraving the public taste.
>
> "It is however an evil for which there is no remedy, Our liberty depends on the freedom of the press, and that cannot be limited without being lost."

Of course there is private censorship in the newspaper field. But for one publisher who may suppress a fact, there are many who will print it. But if the government is the censor, administrative *fiat* not freedom of choice carries the day.

As stated recently by Harry Kalven, Jr.:

> "It is an insufficiently noticed aspect of the First Amendment that it contemplates the vigorous use of self-help by the opponents of given doctrines, ideas, and political positions. It is not the theory

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for Johnson's decision not to run for re-election, Nixon's refusal to withdraw the troops from Vietnam, the rejection of the two billion dollar New York bond issue, the defeat of Carswell and Haynsworth, or the Supreme Court's segregation, reapportionment and prayer decisions. The implication that the people of this country—except the proponents of the theory—are mere unthinking automatons manipulated by the media, without interests, conflicts, or prejudices is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American public." Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 786–787 (1972).

[4] Democracy by Thomas Jefferson (Padover ed. 1939), pp. 150–151.

that all ideas and positions are entitled to flourish under freedom of discussion. It is rather then that they must survive and endure against hostile criticism. There is perhaps a paradox in that the suppression of speech by speech is part and parcel of the principle of freedom of speech. Indeed, one big reason why policy dictates that government keep its hands off communication is that, in this area, self-help of criticism is singularly effective . . . .

"Free, robust criticism of government, its officers, and its policy is the essence of the democratic dialectic—of 'the belief,' again to quote Brandeis, 'in the power of reason as applied through public discussion.' The government cannot reciprocally criticize the performance of the press, its officers, and its policies without criticism carrying implications of power and coercion. The government simply cannot be another discussant of the press's performance. Whether it will it or not, it is a critic who carries the threat of the censor and more often than not it wills it. Nor is it all all clear that its voice will be needed; surely there will be others to champion its view of the performance of the press.

"The balance struck, then, is avowedly, and even enthusiastically, one-sided. The citizen may criticize the performance and motives of his government. The government may defend its performance and its policies, but it may not criticize the performance and motives of its critics." VI The Center Magazine, No. 3 (May/June 1973), pp. 36–37.

Red Lion Broadcasting Co. v. *FCC*, 395 U. S. 36, in a carefully written opinion that was built upon predecessor cases put the TV and the radio under a different regime. I did not participate in that decision and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime. It puts the head

of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends. In 1973—as in other years—there is clamoring to make the TV and radio emit the messages that console certain groups. There are charges that these mass media are too slanted, too partisan, too hostile in their approach to candidates and the issues.

The same cry of protest has gone up against the newspapers and magazines. When Senator Joseph McCarthy was at his prime, holding in his hand papers containing the names of 205 communists in the State Department (Feuerlicht, Joe McCarthy and McCarthyism (1972) p. 54), there were scarcely a dozen papers in this Nation that stood firm for the citizen's right to due process and to First Amendment protection. That, however, was no reason to put the saddle of the federal bureaucracy on the backs of publishers. Under our Bill of Rights people are entitled to have extreme ideas, silly ideas, partisan ideas.

The same is true, I believe, of the TV and radio. At times they have a nauseating mediocrity. At other times they show the dazzling brilliance of a Leonard Bernstein; and they very often bring humanistic influences of faraway people into every home.

Both TV and radio news broadcasts frequently tip the news one direction or another and even try to turn a public figure into a character of disrepute. Yet so do the newspapers and the magazines and other segments of the press. The standards of TV, radio, newspapers, or magazines—whether of excellence or mediocrity—are beyond the reach of government. Government—acting through courts—disciplines lawyers. Government makes crinimal some acts of doctors and of engineers. But the First Amendment puts beyond the reach of government federal regulation of news agencies save only business or financial practices which do not in-

volve First Amendment rights. Conspicuous is *Associated Press* v. *United States*, 326 U. S. 1, where enforcement of the antitrust laws against a news gathering agency was held to be not inconsistent with First Amendment rights.

Government has no business in collating, dispensing, and enforcing, subtly or otherwise, any set of ideas on the press. Beliefs, proposals for change, clamor for controls, protests against any governmental regime are protected by the First Amendment against governmental ban or control.

There has been debate over the meaning of the First Amendment as applied to the States by reason of the Fourteenth. Some have thought that at the state level the First Amendment was somewhat "watered down" and did not have the full vigor which it had as applied to the Federal Government. See *Roth* v. *United States*, 354 U. S. 476, 502–503 (Harlan, J., concurring). So far, that has been the minority view. See *Malloy* v. *Hogan*, 378 U. S. 1, 10. But it is quite irrelevant here, for the First Amendment, like other parts of the Bill of Rights, was at the outset applicable only to the Federal Government.[5] The First Amendment is written in terms that are absolute. Its command is that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

That guarantee, can, of course, be changed by a constitutional amendment which can make all the press or segments of the press organs of government and thus control the news and information which people receive. Such a restructuring of the First Amendment cannot be done by judicial fiat or by congressional action. The ban of "no" law that abridges freedom of the press is in my view total and complete.[6] The Alien and Sedition Acts,

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[5] *Barron* v. *Mayor of Baltimore*, 7 Pet. 243.

[6] The press in this country, like that of Britain, was at one time subject to contempt for its comments on pending litigation. *Toledo*

1 Stat. 566, 570, 596, passed early in our history were plainly unconstitutional, as Jefferson believed. Jefferson, indeed, said that by reason of the First Amendment

> "libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals. That therefore the act of the Congress of the United States, passed on the 14th of July, 1798, entitled 'An Act in Addition to the Act entitled "An Act for the Punishment of certain Crimes against the United States,"' which does abridge the freedom of the press, is not law, but is altogether void, and of no force." 4 Elliot's Debates on the Federal Constitution (1876), p. 541.

And see 15 Writings of Thomas Jefferson (mem. ed. 1904), p. 214; 14 *id.*, at 116; 11 *id.*, at 43–44).

Those Acts had but a short life, and we never returned to them. We have, however, witnessed a slow encroachment by government over that segment of the press that is represented by TV and radio licensees. Licensing is necessary for engineering reasons; the spectrum is limited and wavelengths must be assigned to avoid stations interfering[7] with each other. *Red Lion Broad-*

Newspaper Co. v. *United States*, 247 U. S. 402. But that position was changed. See *Bridges* v. *California*, 314 U. S. 252, 267. Federal habeas corpus, however, is available to give a man his freedom and the prosecution an opportunity for a new trial where the conduct of the press has resulted in an unfair trial. *Sheppard* v. *Maxwell*, 384 U. S. 33. And change of venue may be had where the local atmosphere has saturated the community with prejudice. See *Rideau* v. *Louisiana*, 373 U. S. 723.

[7] The Senate Report which accompanied the bill that became the Radio Act of 1927, 44 Stat. 1162 stated:

"If the channels of radio transmission were unlimited in number the importance of the regulatory body would be greatly lessened, but these channels are limited and restricted in number and the decision as to who shall be permitted to use them and on what terms and for what periods of time, together with the other questions connected

casting Co. v. *FCC, supra,* at 388. The Commission has a duty to encourage a multitude of voices but only in a limited way, *viz:* by preventing monopolistic practices and by promoting technological developments that will open up new channels.[8] But censorship[9] or editing or

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with the situation, requires the exercise of a high order of discretion and the most careful application of the principles of equitable treatment to all the classes and interests affected. For these and other reasons your committee decided that all power to regulate radio communication should be centered in one independent body, a radio commission, granting it full and complete authority over the entire subject of radio." S. Rep. 772, 69th Cong., 1st Sess., p. 3.

[8] Scarcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion.* It has been predicted that it may be possible within 10 years to provide television viewers 400 channels through the advances of cable television. Smith, The Wired Nation 7 (1972); see *Brandywine-Maine Line Radio, Inc.* v. *Federal Communications Commission,* 473 F. 2d 16, 73–76 (Bazelon, J., dissenting).

[9] Currently, press censorship covers most of the globe. In Brazil the present regime of censorship is pervasive. As reported in the New York Times for Feb. 17, 1973, p. 11:

"The censors' rules, issued a few months ago and constantly amended, cover a vast field and if strictly applied would leave the press little to discuss. In practice, however, much depends on the whims and suspicions of the local censors.

"General prohibitions include protests against censorship, and discussion of a successor to President Emilio Garrastazu Médici, whose term is up in 1974, campaigns against the Government's special powers by decree and sensational news that might hurt the image of Brazil.

"Others are campaigns to discredit the national housing program, the financial market or other matters of vital importance to the Government, the playing up of assaults on banks or credit establishments, tension between the Roman Catholic Church and the state, agitation in union and student circles, and publicity for Communist personalities and nations. Criticism of state governors and 'exaltation of immorality' through news of homosexuality, prostitution and drugs are also barred.

"The most controversial order, issued by the Minister of Justice last September, bans all news, comment or interviews on a political

the screening by government of what licensees may broadcast goes against the grain of the First Amendment.

The Court in *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 226, said, "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."

That uniqueness is due to engineering and technical problems. But the press in a realistic sense is likewise not available to all. Small or "underground" papers appear and disappear; and the weekly is an established institution. But the daily papers now established are unique in the sense that it would be virtually impossible for a competitor to enter the field due to the financial exigencies of this era. The result is that in practical terms the newspapers and magazines, like the TV and radio, are available only to a select few. Who at this time would have the folly to think he could combat the New York Times or Denver Post by building a new plant and becoming a competitor? That may argue for a redefinition of the responsibilities of the press in First Amendment terms.[10] But I do not think it gives us

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relaxation of the regime, on democracy for Brazil, and on the economic and financial situation in general."

[10] Indeed, it can be argued that the existence of newspapers, and thus their access to the public, is dependent upon the preferential mailing privileges newspapers receive through second-class postage rates. This is a privilege afforded by the government, and, as my Brother STEWART recognizes, a form of subsidy.

Under the Postal Reorganization Act, the new Postal Rate Commission is empowered to fix postage rates at levels high enough to make each class of mail pay its own way. John Fischer reports that the increase in second class mail rates for magazines and periodicals (127%) is "nothing less than a death sentence for an unpredictable number of publications." Fischer, The Easy Chair, The Atlantic Monthly (June 1973), p. 31. It is not the established giants

carte blanche to design systems of supervision and control nor empower Congress to read the mandate in the First Amendment that "Congress shall make no law . . . abridging the freedom . . . of the press" to mean that Congress may, acting directly or through any of its agencies such as FCC make "some" laws "abridging" freedom of the press.

Powerful arguments, summarized and appraised in Emerson, The System of Freedom of Expression (1970), cc. XVII and XVIII, can be made for revamping or reconditioning the system. The present one may be largely aligned on the side of the status quo. The problem implicates our educational efforts which are bland and conformist and the pressures on the press, from political and from financial sources, to foist boilerplate points of view on our people rather than to display the diversities of ideologies and culture in a world which, as Buckminster Fuller said, has been "communized" by the radio.

What kind of First Amendment would best serve our needs as we approach the 21st century may be an open

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of the publishing field that will suffer most, for it is estimated that some 10,000 magazines and small newspapers will be forced out of existence. *Id.*, at 30. Fischer mentions in specific the National Review, Human Events, The Nation, and The New Republic. These are the publications that offer us the rich diversity of opinion and reporting the First Amendment is designed to promote and protect. As Senator McGee, Chairman of the Post Office and Civil Service Committee, has said: "I believe that the American public generally has a vested interest in the survival of newspapers and magazines. Regardless of the economic, political, or social policies which they espouse, they contribute to the nation's thought process. I am personally convinced that the Congress should not permit magazines to go under because the cost of distributing them through the postal system is higher than their readers are willing to pay." *Id.*, at 32.

In addition to the benefits of reduced postage rates, newspapers have been afforded a limited antitrust exemption. Newspaper Preservation Act, 15 U. S. C. § 1801 *et seq.*

question. But the old fashioned First Amendment that we have is the Court's only guideline; and one hard and fast principle which it announces is that government shall keep its hands off the press. That principle has served us through days of calm and eras of strife and I would abide by it until a new First Amendment is adopted. That means, as I view it, that TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of "press" as used in the First Amendment and therefore are entitled to live under the laissez faire regime which the First Amendment sanctions.

The issues presented in this case are momentous ones. The TV and radio broadcasters have mined millions by selling merchandise, not in selling ideas across the broad spectrum of the First Amendment. But some newspapers have done precisely that, loading their pages with advertisements; they publish, not discussions of critical issues confronting our society, but stories about murders, scandal, and slanderous matter touching the lives of public servants who have no recourse due to *New York Times Co.* v. *Sullivan*, 376 U. S. 254. Commissioner Johnson of the FCC wrote in the present case a powerful dissent. He said:

> "Although the First Amendment would clearly ban governmental censorship of speech content, government must be concerned about the procedural rules that control the public forums for discussions. If someone—a moderator, or radio-television licensee—applies rules that give one speaker, or viewpoint, less time [or none at all] to present a position, then a censorship exists as invidious as outright thought control. There is little doubt in my mind that for any given forum of speech the First Amendment *demands* rules permitting as many to speak and be

heard as possible. And if this Commission does not enact them, then the courts must require them."

But the prospect of putting government in a position of control over publishers is to me an appalling one, even to the extent of the Fairness Doctrine. The struggle for liberty has been a struggle against government. The essential scheme of our Constitution and Bill of Rights was to take government off the backs of people. Separation of powers was one device. An independent judiciary was another device. The Bill of Rights was still another. And it is anathema to the First Amendment to allow government any role of censorship over newspapers, magazines, books, art, music, TV, radio or any other aspect of the press. There is unhappiness in some circles at the impotence of government. But if there is to be a change, let it come by constitutional amendment. The Commission has an important role to play in curbing monopolistic practices, in keeping channels free from interference, in opening up new channels as technology develops. But it has no power of censorship.

It is said, of course, that government can control the broadcasters because their channels are in the public domain in the sense that they use the airspace that is the common heritage of all the people. But parks are also in the public domain. Yet people who speak there do not come under government censorship. *Lovell* v. *Griffin*, 303 U. S. 444, 450–453; *Hague* v. *CIO*, 307 U. S. 496, 515–516. It is the tradition of Hyde Park, not the tradition of the censor, that is reflected in the First Amendment. TV and radio broadcasters are a vital part of the press; and since the First Amendment allows no government control over it, I would leave this segment of the press to its devices.

Licenses are, of course, restricted in time and while, in my view, Congress has the power to make each license limited to a fixed term and nonreviewable, there is no

power to deny renewals for editorial or ideological reasons. The reason is that the First Amendment gives no preference to one school of thought over the others.[11]

The Court in today's decision by endorsing the Fairness Doctrine sanctions a federal saddle on broadcast licensees that is agreeable to the traditions of nations that never have known freedom of press [12] and that is tolerable in countries that do not have a written constitution containing prohibitions as absolute as those in the First Amendment. Indeed after this case was argued the FCC instituted a "non-public" inquiry [13] to determine whether any broadcaster or cablecaster has

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[11] Judge Bazelon, dissenting in *Brandywine-Maine Line Radio, Inc. v. Federal Communications Commission*, 473 F. 2d 16, 69–70, said: "WXUR was no doubt devoted to a particular religious and political philosophy; but it was also a radio station devoted to speaking out and stirring debate on controversial issues. The station was purchased by Faith Theological Seminary to propagate a viewpoint which was not being heard in the greater Philadelphia area. The record is clear that through its interview and call-in shows it *did* offer a variety of opinions on a broad range of public issues; and that it never refused to lend its broadcast facilities to spokesmen of conflicting viewpoints.

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

[12] If Eastern European experience since World War II is any criterion, the newspapers are pretty much the company paper in the huge company (communist) nation. The easiest target, however, seems to be TV where the input can be carefully controlled and "prime time" filled with tapes of official meetings, political speeches, and the tedious accounts of achievement of the workers. See Morgan, Press Obedience in East Europe, Wash. Post, May 19, 1973, OPED.

[13] FCC Order No. 73–331, 39 Fed. Reg. 8301 (March 27, 1973).

broadcast "'obscene, indecent or profane material' in violation of" 18 U. S. C. § 1464.

In April 1973, FCC fined Sonderling Broadcasting Corp. that operates station WGLD in Oak Park, Illinois, for allowing "obscene" conversations on a telephone "talk show." It used *Roth* v. *United States*, 354 U. S. 476, *Memoirs* v. *Massachusetts*, 383 U. S. 413, and *Ginzburg* v. *United States*, 383 U. S. 463, as supplying the criteria for broadcasting. It fined the corporation $2,000 under 18 U. S. C. § 1464 which reads, "whoever utters any obscene indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." — F. C. C. —.

Commissioner Johnson dissented, saying that the FCC prefers "to sit as an omniscent programming review board, allegedly capable of deciding what is and is not good for the American public to see and hear"; and that when the FCC bars a particular program it casts "a pall over the entire broadcasting industry" for the reason that the licensees "fear the potential loss of their highly profitable broadcast licenses." That he concluded creates a "chilling effect" which has "enormous proportions" and reaches "all forms of broadcast expression." *Id.*, at —.

We ourselves have, of course, made great inroads on the First Amendment of which obscenity is only one of the many examples. So perhaps we are inching slowly toward a controlled press. But the regime of federal supervision under the Fairness Doctrine is contrary to our constitutional mandate and makes the broadcast licensees an easy victim of political pressures and reduces him to a timid and submissive segment of the press whose measure of the public interest will now be echoes of the dominant political voice that emerges after every election. The affair with freedom of which we have been

proud will now bear only a faint likeness of our former robust days.

III

I said that it would come as a surprise to the public as well as to publishers and editors of newspapers to learn that they were under a newly created federal bureau. Perhaps I should have said that such an event *should* come as a surprise. In fact it might not in view of the retrogressive steps we have witnessed.

We have allowed ominous inroads to be made on the historic freedom of the newspapers. The effort to suppress the publication of the Pentagon Papers failed only by a narrow margin and actually succeeded for a brief spell in imposing prior restraint on our press for the first time in our history. See *New York Times* v. *United States*, 403 U. S. 713.

In recent years the admonition of Mr. Justice Black that the First Amendment gave the press freedom so that it might "serve the governed, not the governors" (*id.*, at 717) has been disregarded.

"The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell." *Ibid.*

The right of the people to know has been greatly undermined by our decisions requiring under pain of contempt a reporter to disclose the sources of the information he comes across in investigative reporting. *Branzburg* v. *Hayes*, 408 U. S. 665.

The Boston Globe reports: [14]

> "In the last two years at least 20 Federal Grand Juries have been used to investigate radical or anti-war dissent. With the power of subpoena, the proceedings secret, and not bound by the rules of evidence required in open court, they have a lot more leverage than, for example, the old House Un-American Activities Committee." [15]

Many reporters have been put in jail, a powerful weapon against investigative reporting. As the Boston Globe states "in realizing what is being undermined here is press freedom itself." [15]

In the same direction is the easy use of the stamp "secret" or "top secret" which the Court recently approved in *Environmental Protection Agency* v. *Mink*, 409 U. S. —. That decision makes a shambles of the Freedom of Information Act. In tune with the other restraints on the press are provisions of the new proposed Rules of Evidence which the Court recently sent to Congress. Proposed Rule 509 (a)(2)(b) provides:

> "The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule."

Under the statute if Congress does not act,[16] this new regime of secrecy is imposed on the Nation and the right

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[14] The Peoples need to Know, an Editorial Series, Boston Globe, January 21-27, 1973.

[15] *Ibid.*

[16] By reason of an Act of Congress of March 30, 1973, the Rules of Evidence—and amendments to the Rules of Civil Procedure and to the Rule of Criminal Procedure (which we sent up Nov. 20, 1972 and Dec. 18, 1972) will have no force or effect except to the extent that Congress expressly approves. 87 Stat. 9.

of people to know is further curtailed. The proposed code sedulously protects the Government; it does not protect newsmen. It indeed pointedly omits any mention of the privilege of newsmen to protect their confidential sources.

These growing restraints on newspapers have the same ominous message that the overtones of the present opinion has on TV and radio licensees.

The growing spectre of governmental control and surveillance over all activities of people makes ominous the threat to liberty by those who hold the executive power. Over and again attempts have been made to use the Commission as a political weapon against the opposition, whether to the left or to the right.

Experience has shown that unrestrained power cannot be trusted to serve the public weal even though it be in governmental hands. The fate of the First Amendment should not be so jeopardized.[17] The constitutional mandate that the government shall make "no law" abridging freedom of speech and the press is clear; the orders and rulings of the Commission are covered by that ban; and it must be carefully confined lest broadcasting—now our most powerful media—be used to subdue the minorities or help produce a Nation of people who walk submissively to the executive's motions of the public good.

Mills v. *Alabama*, 384 U. S. 214, involved a prosecution of a newspaper editor for publishing, contrary to a state

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[17] Alexander Bickel has spurned the "total agnosticism" that allows the First Amendment to have its way because "who really knows, after all, what is true or false, evil or good, noxious or wholesome." Bickel, The Press and Government: Adversaries Without Absolutes, Freedom at Issue (May-June 1973), p. 5. He attributes this view to Justice Holmes. He would place at least partial responsibility with the government for determining the "good counsels and wholesome doctrine." *Ibid.* But, it was precisely the mistrust of the evanscent, narrow, factional views of those in power and the belief that no one has a patent on the "truth" that underly the First Amendment.

statute, an editorial on election day urging the voters to vote against the existing city commission and to replace it with a mayor-council government. This Court, speaking through Mr. Justice Black, reversed the judgment saying:

> ". . . the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." *Id.*, at 219.

I would apply the same test to TV or radio.[18]

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[18] The monetary and other burdens imposed on the press by the right of a criticized person to reply, like the traditional damage remedy for libel, lead of course to self-censorship respecting matters of importance to the public that the First Amendment denies the Government the power to impose. The burdens certainly are as onerous as the indirect restrictions on First Amendment rights which we have struck down: (1) the requirement that a bookseller examine the contents of his shop; *Smith* v. *California*, 361 U. S. 147 (1959); (2) the requirement that a magazine publisher investigate his advertisers, *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 492–493 (1962) (opinion of Harlan, J.); (3) the requirement that names and addresses of sponsors be printed on handbills, *Talley* v. *California*, 362 U. S. 60 (1960); (4) the requirement that organizations supply membership lists, *Gibson* v. *Florida Legislative Investigation*

What Walter Lippman wrote about Coolidge's criticism of the press has present relevancy. President Coolidge, he said, had

> "declared for peace, goodwill, understanding, moderation; disapproved of conquest, aggression, exploitation; pleaded for a patriotic press, for a free press; denounced a narrow and bigoted nationalism, and announced that he stood for law, order, protection of life, property, respect for sovereignty and principle of international law. Mr. Coolidge's catalog of the virtues was complete except for one virtue. . . .
>
> "That is the humble realization that God has not endowed Calvin Coolidge with an infallible power to determine in each concrete case exactly what is right, what is just, what is patriotic. . . . Did he recognize this possibility, he would not continue to lecture the press in such a way to make it appear that when newspapers oppose him they are unpatriotic, and that when they support him they do so not because they think his case is good but because they blindly support him. Mr. Coolidge's notion . . . would if it were accepted by the American press reduce it to utter triviality." Luskin, Lippman, Liberty, and the Press, p. 60 (1972).

The same political appetite for oversight of most segments of the press has markedly increased since the bland days of Calvin Coolidge.

Committee, 372 U. S. 539 (1963); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293 (1961); *Bates* v. *City of Little Rock*, 361 U. S. 516 (1960); *NAACP* v. *Alabama*, 357 U. S. 449 (1958); and (5) the requirement that individuals disclose organizational members, *Shelton* v. *Tucker*, 364 U. S. 479 (1960). In each instance we held the restriction unconstitutional on the ground that it discouraged or chilled constitutionally protected rights of speech, press or association.

SUPREME COURT OF THE UNITED STATES

Nos. 71–863, 71–864, 71–865 AND 71–866

Columbia Broadcasting System, Inc., Petitioner,
71–863 *v.*
Democratic National Committee.

Federal Communications Commission et al., Petitioners,
71–864 *v.*
Business Executives' Move for Vietnam Peace et al.

Post-Newsweek Stations, Capital Area, Inc., Petitioner,
71–865 *v.*
Business Executives' Move for Vietnam Peace.

American Broadcasting Companies, Inc., Petitioner,
71–866 *v.*
Democratic National Committee.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE STEWART, concurring.

While I join Parts I, II, and III of the Court's opinion, my views closely approach those expressed by MR. JUSTICE DOUGLAS in concurrence.

The First Amendment prohibits the Government from imposing controls upon the press.[1] Private broadcasters

[1] U. S. Const. Amend. I provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

are surely part of the press. *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166. Yet here the Court of Appeals held, and the dissenters today agree, that the First Amendment *requires* the Government to impose controls upon private broadcasters—in order to preserve First Amendment "values." The appellate court accomplished this strange convolution by the simple device of holding that private broadcasters *are* Government. This is a step along a path that could eventually lead to the proposition that private *newspapers* "are" Government. Freedom of the press would then be gone. In its place we would have such governmental controls upon the press as a majority of this Court at any particular moment might consider First Amendment "values" to require. It is a frightening specter.

I

There is some first blush appeal in seeking out analogies from areas of the law where governmental involvement on the part of otherwise private parties has led the Court to hold that certain activities of those parties were tantamount to governmental action.[2] The evolution of the "state action" concept under the Fourteenth Amendment is one available analogy.[3] Another is the decision of this

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[2] See *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U. S. 308; *Railway Employees' Department* v. *Hanson*, 351 U. S. 225; *Public Utilities Commission* v. *Pollak*, 343 U. S. 451; *Marsh* v. *Alabama*, 326 U. S. 501.

[3] "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton*, 382 U. S. 296. Earlier, in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, the Court held that a privately owned restaurant located within a public parking garage was sufficiently involved with state authority to bring its racially discriminatory actions within the proscription of the Fourteenth Amendment.

Court in *Public Utilities Commission* v. *Pollak*, 343 U. S. 451, where a policy of a privately owned but publicly regulated bus company that had been approved by the regulatory commission was held to activate First Amendment review. The First Amendment has also been held applicable where private parties control essentially public forums. *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308, *Marsh* v. *Alabama*, 326 U. S. 501; cf. *Lloyd Corp.* v. *Tanner*, 407 U. S. 551.

The problem before us, however, is too complex to admit of solution by simply analogizing to cases in very different areas. For we deal here with the electronic press, that is itself protected from Government by the First Amendment.[4] Before woodenly accepting analogies from cases dealing with quasi-public racial discrimination, regulated industries other than the press, or "company towns," we must look more closely at the structure of broadcasting and the limits of governmental regulation of licensees.

When Congress enacted the Radio Act of 1927, 44 Stat. 1162, and followed it with the Federal Communications Act of 1934, 47 U. S. C. § 151 *et seq.*, it was responding to a then evident need to regulate access to the public airwaves. Not every member of the public could broadcast over the air as he chose, since the scarcity of frequencies made this a sure road to chaos.[5] The system selected by the Congress was a hybrid. The Federal Radio Commission (succeeded by the Federal Communications Com-

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[4] See, *e. g.*, *United States* v. *Paramount Pictures, Inc.*, 344 U. S. 131, 166. The Federal Communications Act also prohibits the Commission from interfering with "the right of free speech by means of radio communication." 47 U. S. C. § 326.

[5] For a history of regulatory legislation regarding broadcasters, see *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 375–386; *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 210–214.

mission), was to license broadcasters for no more than three year periods. 47 U. S. C. § 307 (d). The licensees, though subject to some public regulation, were to be private companies.

Scarcity meant more than a need to limit access. Because access was to be limited, it was thought necessary for the regulatory apparatus to take into account the public interest in obtaining "the best practicable service to the community reached by his [the licensee's] broadcasts." *FCC* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 475. Public regulation has not, then, been merely a matter of electromagnetic engineering for the sake of keeping signals clear. It has also included some regulation of programming. Writing in defense of Commission regulations regarding chain broadcasting, Mr. Justice Frankfurter said: "These provisions, [of the Act] individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.'" *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 217.

Over time, federal regulation of broadcasting in the public interest has been extensive, and, *pro tanto*, has rightly or wrongly been held to be tolerable under the First Amendment. We now have the Fairness Doctrine, with its personal attack, editorial reply, and fair coverage of controversial issue requirements.[6] In *Red Lion Broad-*

[6] The personal attack and editorial reply rules appear at 47 CFR §§ 73.123, 73.300, 73.598, 73.679. The public issue aspect of the Fairness Doctrine requires the broadcaster to give adequate coverage to public issues, fairly reflecting divergent views. *United Broadcasting Co.*, 10 F. C. C. 515; *New Broadcasting Co.*, 6 P & F Radio Reg. 258; see generally Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415. This coverage must be provided at the broadcaster's

casting Co. v. *FCC*, 395 U. S. 367, this Doctrine was held to constitute permissible governmental regulation of broadcasters, despite the First Amendment. The Court said:

> "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. . . . Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." 395 U. S., at 388, 390.

The Fairness Doctrine has been held applicable to paid advertising as well as to other programming. *Banzhaf* v. *FCC*, 405 F. 2d 1082. And the public interest in broadcasting has been recognized as a rationale for liberalized standing on the part of listener groups in Commission licensing proceedings. *Office of Communication of United Church of Christ* v. *FCC*, 359 F. 2d 994.

Throughout this long history of regulation, however, it has been recognized that broadcasters retain important freedoms, and that the Commission's regulatory power has limits. Quite apart from what may be required by the First Amendment itself, the regulatory legislation

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own expense if necessary, *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895, and the duty must be met by providing programming obtained at the licensee's own initiative if it is available from no other source. *John J. Dempsey*, 6 P & F Radio Reg. 615.

makes clear what some of these freedoms are. Section 3 (h) of the Act, 47 U. S. C. § 153 (h), provides that broadcasters are not to be treated as common carriers. Were broadcasters common carriers within the meaning of the Act, they would be subject to 47 U. S. C. §§ 201, 202. Section 201 provides, in pertinent part, that:

> "(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor . . . ."

Section 202 provides that:

> "(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

The Act also specifically gives licensees "freedom of speech":

> "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U. S. C. § 326.

Thus, when examined as a whole, the Federal Communications Act establishes a system of privately owned

broadcast licensees. These licensees, though regulated by the Commission under a fairly broad "public interest" standard, have, quite apart from whatever additional protections the First Amendment may provide, important statutory freedoms in conducting their programming.

In *Red Lion, supra,* this Court held that, despite the First Amendment, the Commission may impose a so-called Fairness Doctrine upon broadcasters, requiring them to present balanced coverage of various and conflicting views on issues of public importance. I agreed with the Court in *Red Lion,* although with considerable doubt, because I thought that that much government regulation of program content was within the outer limits of First Amendment tolerability. Were the Commission to require broadcasters to accept some amount of editorial advertising as part of the public interest mandate upon which their licenses are conditional, the issue before us would be in the same posture as was the Fairness Doctrine itself in *Red Lion,* and we would have to determine whether this additional governmental control of broadcasters was consistent with the statute and tolerable under the First Amendment. Here, however, the Commission imposed no such requirement, but left private broadcasters free to accept or reject such advertising as they saw fit. The Court of Appeals held that the First Amendment *compels* the Commission to require broadcasters to accept such advertising, because it equated broadcaster action with governmental action. This holding not only raises a serious statutory question under § 3 (h) of the Act, which provides that broadcasters are not common carriers, but seems to me to reflect an extraordinarily odd view of the First Amendment.

The dissenting opinion today argues, in support of the decision of the Court of Appeals, that only a *limited* right of access is sought by the respondents and required by the First Amendment, and that such a limited right

would not turn broadcasters into common carriers. The respondents argue, somewhat differently, that the Constitution requires that only "responsible" individuals and groups be given the right to purchase advertising. These positions are said to be arrived at by somehow balancing "competing First Amendment values." But if private broadcasters *are* Government, how can the First Amendment give only a *limited* right to those who would speak? Since when has the First Amendment given Government the right to silence all speakers it does not consider "responsible?"

The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government.[7] To hold that broadcaster action is governmental action would thus simply strip broadcasters of their own First Amendment rights. They would be obligated to grant the demands of all citizens to be heard over the air, subject only to reasonable regulations as to "time and manner." Cf. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 98; *Cox* v. *Louisiana*, 379 U. S. 536, 554; *Poulos* v. *New Hampshire*, 345 U. S. 395; *Cox* v. *New Hampshire*, 312 U. S. 569. If, as the dissent today would have it, the proper analogy is to public forums[8]—that is, if broadcasters are Government for First Amendment purposes—then broadcasters are inevitably drawn to the position of common carriers. For

[7] Government is not restrained by the First Amendment from controlling its own expression, cf. *New York Times Co.* v. *United States*, 403 U. S. 713, 728–729 (STEWART, J., concurring). As Professor Emerson has written, "The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents." T. Emerson, The System of Freedom Expression 700 (1970).

[8] "[T]he right to speak can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency." *Post*, at —.

this is precisely the status of Government with respect to public forums—a status mandated by the First Amendment.[9]

To hold that broadcaster action is governmental action would thus produce a result wholly inimical to the broadcasters' own First Amendment rights, and wholly at odds with the broadcasting system established by Congress and with our many decisions [10] approving those legislative provisions.[11] As Judge McGowan wrote, dissenting from the judgment of the Court of Appeals in these cases,

> "This is the system which Congress has, wisely or not, provided as the alternative to public ownership

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[9] Professor Emerson has recognized the scope of the "access" argument: "The licensee therefore can only be considered as the agent of the government, or the trustee of the public, in a process of further allocation. Hence the licensee would have no direct First Amendment rights of his own, except as to his own expression." T. Emerson, The System of Freedom of Expression 663 (1970).

Though the licensee would be free to say what it wished during its *own* broadcasting, whatever that might mean, it seems clear that the licensee would have no special claim to broadcast time and would lose entirely the freedom to program and schedule according to its own judgment, values and priorities. Cf. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 98; *Cox* v. *Louisiana*, 379 U. S. 536, 554; *Poulos* v. *New Hampshire*, 345 U. S. 395; *Cox* v. *New Hampshire*, 312 U. S. 569. Licensees would be forced to develop a procedurally fair and substantively nondiscriminatory system for controlling access, and in my view this is precisely what Congress intended to avoid through § 3 (h) of the Act.

[10] *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367; *National Broadcasting Co.* v. *United States*, 319 U. S. 190; *FCC* v. *Sanders Brothers Radio Station*, 309 U. S. 470; *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134.

[11] None of this suggests any disagreement on my part with the evolution of "state action" under the Fourteenth Amendment. I recognize that if *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, were relevant, the fact that the Commission considered and rejected a challenge to broadcaster policy might be sufficient to constitute "state action." This, in fact, was the basis of the Court's decision in *Public Utilities Commission* v. *Pollak*, 343 U. S. 451.

and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice." 450 F. 2d 642, 666.

II

Part IV of the Court's opinion, as I understand it, seems primarily to deal with the respondents' statutory argument—that the obligation of broadcasters to operate in the "public interest" supports the judgment of the Court of Appeals. Yet two of my concurring Brethren understand Part IV as a discussion of the First Amendment issue that would exist in these cases were the action of broadcasters to be equated with governmental action. So, according to my Brother BLACKMUN, "the governmental action issue does not affect the outcome of this case." *Post*, at ——. The Court of Appeals also conflated the constitutional and statutory issues in these cases. It reasoned that whether its decision "is styled as a 'First Amendment decision' or as a decision interpreting the fairness and public interest requirements 'in light of the First Amendment' matters little." 450 F. 2d 642, at 649.

I find this reasoning quite wrong and wholly disagree with it, for the simple reason that the First Amendment and the public interest standard of the statute are not coextensive. The two are related in the sense that the Commission could not "in the public interest" place a requirement on broadcasters that constituted a violation of their First Amendment rights. The two are also related in the sense that both foster free speech. But we have held that the Commission can under the statute require broadcasters to do certain things "in the public interest" that the First Amendment would not require if the broadcasters *were* the Government. For example,

the Fairness Doctrine is an aspect of the "public interest" regulation of broadcasters that would not be compelled or even permitted by the First Amendment itself if broadcasters were the Government.[12]

If the "public interest" language of the statute were intended to enact the substance of the First Amendment, a discussion of whether broadcaster action is governmental action would indeed be superfluous. For anything that Government could not do because of the First Amendment, the broadcasters could not do under the statute. But this theory proves far too much, since it would make the statutory scheme, with its emphasis on broadcaster discretion and its proscription on interference with "the right of free speech by means of radio communication," a nullity. Were the Government really operating the electronic press, it would, as my Brother DOUGLAS points out, be *prevented* by the First Amendment from selection of broadcast content and the exercise of editorial judgment. It would not be permitted in the name of "fairness" to deny time to any person or group on the grounds that their views had been heard "enough." Yet broadcasters perform precisely these

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[12] The basis for a Fairness Doctrine is statutory, not constitutional. As the Court said in *Red Lion*:

"In light of the fact that the 'public interest' in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public; the fact that the FCC has rested upon that language from its very inception a doctrine that these issues must be discussed, and fairly; and the fact that Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts, we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority." 395 U. S., at 385.

functions and enjoy precisely these freedoms under the Act. The constitutional and statutory issues in these cases are thus quite different.

In evaluating the statutory claims, the starting point must be the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . ." *Red Lion, supra,* at 381.

Though I have no doubt that the respondents here were attempting to communicate what they considered to be important messages, it does not follow that the Commission erred when it refused to require every broadcaster to communicate those messages. Contrary to what is said in dissent today, it is not the case that a seller of goods is granted instant access to the media, while somone "seeking to discuss war, peace, pollution or the suffering of the poor is denied this right to speak." *Post,* at ——. There is no indication that the thousands of broadcasters regulated by the Commission have anything like a uniform policy of turning down "controversial" or "editorial" advertising. In the cases before us, the Business Executives' spot advertisements were rejected by a single radio station. Of the three television networks, only one turned down the Democratic National Committee's request for air time. We are told that many, if not most, broadcasters *do* accept advertising of the type at issue here. This variation in broadcaster policy reflects the very kind of diversity and competition that best protects the free flow of ideas under a system of broadcasting predicated on private management.[13]

Even though it would be in the public interest for the

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[13] The Democratic National Committee cited this very lack of uniformity as a reason for seeking a declaratory ruling from the Commission. There was too much diversity, it thought, for it to

respondents' advertisements to be heard, it does not follow that the public interest requires *every* broadcaster to broadcast them. And it certainly does not follow that the public interest would be served by *forcing* every broadcaster to accept any particular kind of advertising. In the light of these diverse broadcaster policies—and the serious First Amendment problem that a contrary ruling would have presented—there are surely no "compelling indications" that the Commission misunderstood its statutory responsibility.

III

There is never a paucity of arguments in favor of limiting the freedom of the press. The Court of Appeals concluded that greater government control of press freedom is acceptable here because of the scarcity of frequencies for broadcasting. But there are many more broadcasting stations than there are daily newspapers.[14] And it would require no great ingenuity to argue that newspapers too *are* Government. After all, newspapers get Government mail subsidies and a limited antitrust immunity.[15] The reasoning of the Court of Appeals would

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plan effectively an advertising campaign. In the DNC's request for a declaratory ruling before the Commission, it stated:

"In addition to the three national commercial networks, as of April 1, 1970, there were, on the air, 509 commercial VHF television stations, 180 commercial UHF stations, 4,280 standard broadcast stations, and 2,111 commercial FM stations. While several of these stations have common owners, it does not necessarily follow that every station owned by an individual or group would follow the same policies."

[14] There are 1,792 daily newspapers in the United States. Ayer Directory of Publications (1973) VIII. Compare the number of broadcasters, n. 13, *supra*.

[15] Newspapers and other periodicals receive a government subsidy in the form of second-class postage rates, 39 CFR § 132. An antitrust immunity is established by the Newspaper Preservation Act, 15 U. S. C. § 1801 *et seq.*

then lead to the conclusion that the First Amendment requires that newspapers too be compelled to open their pages to all comers.

Perhaps I overstate the logic of the opinion of the Court of Appeals. Perhaps its "balancing" of First Amendment "values" would require no more than that newspapers be compelled to give "limited" access to dissident voices, and then only if those voices were "responsible." And perhaps it would require that such access be compelled only when there was a single newspaper in a particular community. But it would be a close question for me which of these various alternative results would be more grossly violative of the First Amendment's guarantee of a free press. For that guarantee gives *every* newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of Government.

I profoundly trust that no such reasoning as I have attributed to the Court of Appeals will ever be adopted by this Court. And if I have exaggerated, it is only to make clear the dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its "values."

Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that "fairness" was far too fragile to be left for a government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice.

This Court was persuaded in *Red Lion* to accept the Commission's view that a so-called Fairness Doctrine was required by the unique electronic limitations of broadcasting, at least in the then-existing state of the art. Rightly or wrongly, we there decided that broadcasters' First Amendment rights were "abridgeable." But surely this does not mean that those rights are nonexistent.

And even if all else were in equipoise, and the decision of the issue before us were finally to rest upon First Amendment "values" alone, I could not agree with the Court of Appeals. For if those "values" mean anything, they should mean at least this: If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom.

SUPREME COURT OF THE UNITED STATES

Nos. 71–863, 71–864, 71–865, AND 71–866

Columbia Broadcasting System, Inc., Petitioner, 71–863 *v.* Democratic National Committee. Federal Communications Commission et al., Petitioners, 71–864 *v.* Business Executives' Move for Vietnam Peace et al. Post-Newsweek Stations, Capital Area, Inc., Petitioner, 71–865 *v.* Business Executives' Move for Vietnam Peace. American Broadcasting Companies, Inc., Petitioner, 71–866 *v.* Democratic National Committee.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE WHITE, concurring.

I join Parts I, II and IV of the Court's opinion and its judgment. I do not, however, concur in Part III of the opinion.

I do not suggest that the conduct of broadcasters must always, or even often, be considered that of a government for the purposes of the First Amendment. But it is at

least arguable, and strongly so, that the Communications Act and the policies of the Commission, including the Fairness Doctrine, are here sufficiently implicated to require review of the Commission's orders under the First Amendment. For myself, the heart of the argument is simply stated. The claim in these cases was that the Communications Act and the First Amendment should be interpreted to confer a right of access on those who wished to buy time for editorial advertising and to raise political funds. The Commission rejected both the statutory and constitutional positions. To confer a right of access, it said, would be contrary to the Communications Act and to the policies adopted by the Commission to implement that Act. Congress intended that the Fairness Doctrine be complied with, but it also intended that broadcasters have wide discretion with respect to the method of compliance. There is no requirement that broadcasters accept editorial ads; they could, instead, provide their own programs, with their own format, opinion and opinion sources. Congress intended that there be no *right* of access such as claimed in these cases; and, in the Commission's view, to recognize that right would require major revisions in statutory and regulatory policy. The Commission also ruled, contrary to the views of its dissenting member, that rejection of the asserted right of access was wholly consistent with the First Amendment.

In this context I am not ready to conclude, as the Court does in Part III, that the First Amendment may be put aside for lack of official action necessary to invoke its proscriptions. But, assuming *arguendo*, as the Court does in Part IV of its opinion, that Congress or the Commission is sufficiently involved in the denial of access to the broadcasting media to require review under the First Amendment, I would reverse the judgment of

the Court of Appeals. Given the constitutionality of the Fairness Doctrine, and accepting Part IV of the Court's opinion, I have little difficulty in concluding that statutory and regulatory recognition of broadcaster freedom and discretion to make up their own programs and to choose their method of compliance with the Fairness Doctrine is consistent with the First Amendment.

SUPREME COURT OF THE UNITED STATES

Nos. 71–863, 71–864, 71–865, AND 71–866

Columbia Broadcasting System, Inc., Petitioner, 71–863 *v.* Democratic National Committee. Federal Communications Commission et al., Petitioners, 71–864 *v.* Business Executives' Move for Vietnam Peace et al. Post-Newsweek Stations, Capital Area, Inc., Petitioner, 71–865 *v.* Business Executives' Move for Vietnam Peace. American Broadcasting Companies, Inc., Petitioner, 71–866 *v.* Democratic National Committee.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE POWELL joins, concurring.

In Part IV the Court determines "whether, assuming governmental action, broadcasters are required" to accept editorial advertisements "by reason of the First Amendment." *Ante*, at p. 26. The Court concludes that the Court of Appeals erred when it froze the "continuing

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search for means to achieve reasonable regulation compatible with the First Amendment rights of the public and the licensees" into "a constitutional holding." *Ante*, at p. 37. The Court's conclusion that the First Amendment does not compel the result reached by the Court of Appeals demonstrates that the governmental action issue does not affect the outcome of this case. I therefore refrain from deciding it.

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[May 29, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

These cases require us to consider whether radio and television broadcast licensees may, with the approval of the Federal Communications Commission,[1] refuse *abso-*

[1] See *Business Executives Move for Vietnam Peace*, 25 F. C. C. 2d 242 (1970); *Democratic National Committee*, 25 F. C. C. 2d 216 (1970).

lutely to sell any part of their advertising time to groups or individuals wishing to speak out on controversial issues of public importance. In practical effect, the broadcaster policy here under attack permits airing of only those paid presentations which advertise products or deal with "non-controversial" matters, while relegating the discussion of controversial public issues to formats such as documentaries, the news, or panel shows, which are tightly controlled and edited by the broadcaster. The Court holds today that this policy—including the *absolute* ban on the sale of airtime for the discussion of controversial issues—is consistent with the "public interest" requirements of the Communications Act of 1934, 47 U. S. C. §§ 307 (d), 309 (a).[2] The Court also holds that the

[2] I do not *specifically* address the "statutory" question in this case because, in practical effect, the considerations underlying the "statutory" question are in many respects similar to those relevant to the "substance" of the "constitutional" claim. There is one aspect of the Court's "statutory" discussion, however, that merits at least brief attention. In upholding the absolute ban on the sale of editorial advertising, the Court relies heavily upon 47 U. S. C. § 153 (h), which declares that broadcasters shall not be deemed "common carriers." In my view, this reliance is misplaced. Even a cursory examination of the legislative history of this provision reveals that it was enacted in recognition of the fact that traditional doctrines governing true "common carriers," such as transportation companies, would not suit the particular problems of radio broadcasting. Specifically, it was feared that such "common carrier" status for broadcasters would mean that they "would have to give *all* their time to [public issues]." 67 Cong. Rec. 12504 (Sen. Dill) (emphasis added); see also *ibid.* (Sen. Broussard); *id.*, at 12356 (Sen. Fess). Section 153 (h) was intended solely to assure that broadcasters would not be required to surrender *all* of their airtime to willing purchasers; it does not bear upon the question whether they may be required to sell a *reasonable and limited* amount of airtime to members of the public for discussion of controversial issues. See 2 Z. Chafee, Government and Mass

challenged policy does not violate the First Amendment. It is noteworthy that, in reaching this result, the Court does *not* hold that there is insufficient "governmental involvement" in the promulgation and enforcement of the challenged ban to activate the commands of the First Amendment. On the contrary, only THE CHIEF JUSTICE, and my Brothers STEWART and REHNQUIST express the view that the First Amendment is inapplicable to this case. My Brothers WHITE, BLACKMUN, and POWELL quite properly do not decide that question, for they find that the broadcaster policy here under attack does not violate the "substance" of the First Amendment. Similarly, there is no Court for the *holding* that the challenged ban does not violate the "substance" of the First Amendment. For although THE CHIEF JUSTICE, and my Brother REHNQUIST purport to "decide" that question, their disposition of the "governmental involvement" issue necessarily renders their subsequent discussion of the "substantive" question mere *dictum*.

In my view, the principle at stake here is one of fundamental importance, for it concerns the people's right to engage in and to hear vigorous public debate on the broadcast media. And balancing what I perceive to be the competing interests of broadcasters, the listening and viewing public, and individuals seeking to express their views over the electronic media, I can only conclude that the exclusionary policy upheld today can

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Communications 635 n. 75 (1947). Indeed, the Commission has itself rejected the Court's interpretation of § 153 (h) when it declared, over 25 years ago, that "the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues . . . is inconsistent with the concept of public interest established by the Communications Act. . . ." *United Broadcasting Co.*, 10 F. C. C. 515, 518 (1945).

serve only to inhibit, rather than to further, our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964). I would therefore affirm the determination of the Court of Appeals that the challenged broadcaster policy is violative of the First Amendment.

I

The command of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press" is, on its face, directed at governmental rather than private action. Nevertheless, our prior decisions make clear that "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon [governmental] action." *Evans* v. *Newton*, 382 U. S. 296, 299 (1966). Thus, the reach of the First Amendment depends not upon any formalistic "private-public" dichotomy but, rather, upon more functional considerations concerning the extent of governmental involvement in, and public character of, a particular "private" enterprise. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the [Government] in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961); see *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 172 (1972). And because of the inherent complexity of this case-by-case inquiry, "[t]his Court has never attempted the 'impossible task' of formulating an infallible test" for determining in all instances whether particular conduct must be deemed private or governmental. *Reitman* v. *Mulkey*, 387 U. S. 369, 378 (1967); see *Kotch* v. *Pilot Comm'rs*, 330 U. S. 552, 556 (1947).

This does not mean, of course, that our prior experience in this area offers no guidance for the purposes of our present inquiry. On the contrary, our previous decisions have focused on myriad indicia of "governmental action," many of which are directly applicable to the operations of the broadcast industry.[3] As the Court of Appeals recognized, "the general characteristics of the broadcast industry reveal an extraordinary relationship between the broadcasters and the federal government—a relationship which puts that industry in a class with few others." 450 F. 2d, at 651. More specifically, the public nature of the airwaves, the governmentally created preferred status of broadcast licensees, the pervasive federal regulation of broadcast programming, and the Commission's specific approval of the challenged broadcaster policy combine in this case to bring the promulgation and enforcement of that policy within the orbit of constitutional imperatives.

At the outset, it should be noted that both radio and television broadcasting utilize a natural resource—the electromagnetic spectrum[4]—that is part of the public domain. And although broadcasters are granted the temporary use of this valuable resource for terminable three-year periods, "ownership" and ultimate control remain vested in the people of the United States. Thus, § 301 of the Communications Act of 1934, 47 U. S. C. § 301, specifically provides:

> "It is the purpose of this [Act] . . . to maintain the control of the United States over all channels of

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[3] See generally *Business Executives Move for Vietnam Peace*, 25 F. C. C. 2d 242, 253–264 (1970) (dissenting opinion), wherein Commissioner Johnson identified no less than eight separate indicia of "governmental action" involved in the promulgation and enforcement of the challenged broadcaster policy.

[4] For a discussion of the attributes of the electromagnetic spectrum, see generally W. Jones, Regulated Industries 1019 (1967); Levin, The Radio Spectrum Resource, 11 J. Law & Econ. 433 (1968).

> interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the licensee. . . ."

Such public "ownership" of an essential element in the operations of a private enterprise is, of course, an important and established indicium of "governmental involvement." In *Burton* v. *Wilmington Parking Authority, supra,* for example, we emphasized the fact of "public ownership" in holding the proscriptions of the Fourteenth Amendment applicable to a privately owned restaurant leasing space in a building owned by the State.[5] In reaching this result, we explained that, in part because of the "public ownership" of the building, the State "has elected to place its power, property and prestige behind the" actions of the privately owned restaurant. 365 U. S., at 725. And viewing the relationship in its entirety, we concluded that "[t]he State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recog-

[5] It is true, of course, that unlike the State in *Burton*, the Federal Government here does not receive substantial financial compensation for the use of the "public" property. See *Burton* v. *Wilmington Parking Authority, supra,* at 723–724; *Moose Lodge No. 107* v. *Irvis, supra,* at 174–175. Nevertheless, the absence of such a financial arrangement represents, in practical effect, government subsidization of broadcasters, thereby enhancing the degree of governmental involvement. Cf. Kalven, Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15, 31 (1967). Moreover, as in *Burton,* the publicly owned property is "not surplus state property" but, rather, constitutes an "integral and, indeed, indispensable part" of the governmental scheme. *Burton* v. *Wilmington Parking Authority, supra,* at 723. See also 47 U. S. C. § 303 (g).

nized as a joint participant in the challenged activity. . . ." *Ibid.*; see also *Moose Lodge No. 107* v. *Irvis*, *supra*, at 172–173, 175; *Turner* v. *City of Memphis*, 369 U. S. 350 (1962); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (SDNY 1967); *Farmer* v. *Moses*, 232 F. Supp. 154 (SDNY 1964).

A second indicium of "governmental involvement" derives from the direct dependence of broadcasters upon the Federal Government for their "right" to operate broadcast frequencies. There can be no doubt that, for the industry as a whole, governmental regulation alone makes "radio communication possible by . . . limiting the number of licenses so as not to overcrowd the spectrum." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 389 (1969).[6] Moreover, with respect to individual licensees, it is equally clear that "existing broadcasters have often attained their present position," not as a result of free market pressures[7] but, rather, "because of their initial government selection. . . ." *Id.*, at 400. Indeed, the "quasi-monopolistic" advantages enjoyed by broadcast licensees "are the fruit of a preferred position conferred by the Government." *Ibid.* Thus, as CHIEF JUSTICE (then Judge) BURGER has himself recognized, "[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 the United Church of Christ* v. *FCC*, 123 U. S. App. D. C. 328, 337, 359 F. 2d 994, 1003 (1966). And, along these same lines, we have consistently held

[6] For a discussion of the Fairness Doctrine and its relevance to this case, see text and notes, at nn. 15–34, *infra*.

[7] Indeed, the Communications Act of 1934 makes it a criminal offense to operate a broadcast transmitter without a license. See 47 U. S. C. § 501. Thus, the Federal Government specifically insulates the licensee from any real threat of economic competition.

that "when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 401 (1950); see, *e. g., Public Utilities Commission* v. *Pollak*, 343 U. S. 451, 462 n. 8 (1952).

A further indicium of "governmental involvement" in the promulgation and enforcement of the challenged broadcaster policy may be seen in the extensive governmental control over the broadcast industry. It is true, of course, that this "Court has never held" that actions of an otherwise private entity necessarily constitute governmental action if that entity "is subject to . . . regulation in any degree whatever." *Moose Lodge No. 107* v. *Irvis, supra*, at 173. Here, however, we are confronted not with some minimal degree of regulation but rather, with an elaborate statutory scheme governing virtually all aspects of the broadcast industry.[8] Indeed, federal agency review and guidance of broadcaster conduct is

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[8] Thus, the Communications Act of 1934 authorizes the Federal Communications Commission to assign frequency bands, 47 U. S. C. § 303 (c); allocate licenses by location, § 303 (d); regulate apparatus, § 303 (e); establish service areas, § 303 (h); regulate chain ownership, § 303 (i); require the keeping of detailed records, § 303 (j); establish qualifications of licensees, § 303 (l); suspend licenses, § 303 (m)(one); inspect station facilities, § 303 (n); require publication of call letters and other information, § 303 (p); make rules to effect regulation of radio and television, § 303 (r); require that television sets be capable of receiving all signals, § 303 (s); regulate the granting of licenses and the terms thereof, §§ 307, 309; prescribe information to be supplied by applicants for licenses, § 308 (b); regulate the transfer of licenses, § 310; impose sanctions on licensees, including revocation of license, § 312; require fair coverage of controversial issues, § 315; control the operation of transmitting apparatus, § 318; and prohibit the use of offensive language, § 326.

automatic, continuing and pervasive.[9] Thus, as the Court of Appeals noted, "[a]lmost no other private business—almost no other regulated private business—is so intimately bound to government. . . ." 450 F. 2d, at 652.

Even more important than this general regulatory scheme, however is the *specific* governmental involvement in the boradcaster policy presently under consideration. There is, for example, an obvious nexus between the Commission's Fairness Doctrine and the absolute refusal of broadcast licensees to sell any part of their airtime to groups or individuals wishing to speak out on controversial issues of public importance. Indeed, in defense of this policy, the broadcaster-petitioners argue vigorously that this exclusionary policy is authorized and even compelled by the Fairness Doctrine. And the Court itself recognizes repeatedly that the Fairness Doctrine and other Communications Act policies are inextricably linked to the challenged ban. Thus, at one point, the Court suggests that "[i]f the Fairness Doctrine were applied to editorial advertising, there is . . . the substantial danger that the effective operation of that doctrine would be jeopardized." *Ante*, at —. Similarly, the Court maintains that, in light of the Fairness

[9] Pursuant to statutory authority, see n. 8, *supra*, the Commission has promulgated myriad regulations governing all aspects of licensee conduct. See 47 CFR § 73.17 *et seq.* These regulations affect such matters as hours of operation, § 73.23; multiple ownership of licenses by a single individual, § 73.35; station location and program origination, § 73.30; maintenance of detailed logs of programming, operation, and maintenance, §§ 73.111–116; billing practices, § 73.124; the personal attack and political editorial fairness requirements, § 73–123; relationship of licensees to networks, §§ 73.131–139; permissible equipment, §§ 73.39–50. The above-cited regulations relate only to AM radio, but similar regulations exist for FM radio, § 73.201 *et seq.*, and television, § 73.601 *et seq.*

Doctrine, there simply is no reason to allow individuals to purchase advertising time for the expression of their own views on public issues. See *ante*, at ——.[10] Although I do not in any sense agree with the substance of these propositions, they serve at least to illustrate the extent to which the Commission's Fairness Doctrine has influenced the development of the policy here under review.

Moreover, the Commission's involvement in the challenged policy is not limited solely to the indirect effects of its Fairness Doctrine. On the contrary, in a decision which must inevitably provide guidance for future broadcaster action, the Commission has specifically considered and specifically authorized the flat ban. See *Business Executives Move for Vietnam Peace*, 25 F. C. C. 2d 242 (1970); *Democratic National Committee*, 25 F. C. C. 2d 216 (1970). In so doing, the Commission—and through it the Federal Government—has unequivocably given its imprimatur to the absolute ban on editorial advertising. And, of course, it is now well-settled that specific governmental approval of or acquiesence in challenged action by a private entity indicates "governmental action."

Thus, in *McCabe* v. *Atchison, Topeka & Santa Fe R. Co.*, 235 U. S. 151 (1914), for example, the Court dealt with a statute which, as construed by the Court, simply *authorized* rail carriers to provide certain types of cars for white passengers without offering equal facilities to blacks. Although dismissal of the complaint on procedural grounds was affirmed, we made clear that such a statute, even though purely permissive in nature, was invalid under the Fourteenth Amendment because a carrier refusing equal service to blacks would be "acting in

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[10] In addition, the Court contends that, because of the Fairness Doctrine, the challenged broadcaster policy does not discriminate against controversial speech. See *ante*, at ——.

the matter under the authority of a state law." *Id.*, at 162. And, some 50 years later, we explained this finding of "governmental action" in *McCabe* as "nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action to violate the Fourteenth Amendment. . . ." *Reitman* v. *Mulkey*, 387 U. S. 369. 379 (1967). Thus, "[o]ur prior decisions leave no doubt" that any action of the Government, through any of its agencies, approving, authorizing, encouraging or otherwise supporting conduct which if performed by the Government would violate the Constitution, "constitutes illegal [governmental] involvement in those pertinent private acts . . . that subsequently occur." *Adickes* v. *Kress & Co.*, 398 U. S. 144, 202 (1970) (separate opinion); see, *e. g.*, *Moose Lodge No. 107* v. *Irvis, supra; Hunter* v. *Erickson*, 393 U. S. 385 (1969); *Reitman* v. *Mulkey, supra; Evans* v. *Newton, supra, Robinson* v. *Florida*, 378 U. S. 153 (1964); *Lombard* v. *Louisiana*, 373 U. S. 267 (1963); *Peterson* v. *City of Greenville*, 373 U. S. 244 (1963); *Burton* v. *Wilmington Parking Authority, supra; McCabe* v. *Atchison, Topeka & Santa Fe R. Co., supra.*

Finally, and perhaps most important, in a case virtually identical to the one now before us, we held that a policy promulgated by a privately owned bus company, franchised by the Federal Government and regulated by the Public Utilities Commission of the District of Columbia, must be subjected to the constraints of the First Amendment. *Public Utilities Commission* v. *Pollak*, 343 U. S. 451 (1952). In reaching that result, we placed primary emphasis on the specific regulatory acquiescence in the challenged action of the bus company. Thus, after noting that the bus company "operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress," we explained that

our finding of "governmental action" was predicated specifically

> "upon the fact that that agency, pursuant to protests against the [challenged policy], ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby." 343 U. S., at 462.

See *Moose Lodge No. 107* v. *Irvis, supra,* at 175–176 n. 3.

Although THE CHIEF JUSTICE, joined by MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST, strains valiantly to distinguish *Pollak*, he offers nothing more than the proverbial "distinctions without a difference." Here, as in *Pollak*, the broadcast licensees operate "under the regulatory supervision of . . . an agency authorized by Congress." And, again as in *Pollak*, that agency received "protests" against the challenged policy and, after formal consideration, "dismissed" the complaints on the ground that the "public interest, convenience, and necessity" were not "impaired" by that policy. Indeed, the argument for finding "governmental action" here is even stronger than in *Pollak*, for this case concerns not an incidental activity of a bus company but, rather, the primary activity of the regulated entities—communication.

Thus, given the confluence of these various indicia of "governmental action"—including the public nature of the airwaves,[11] the governmentally created preferred

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[11] Moreover, the appropriateness of a particular forum, even if privately owned, for effective communication has in some instances been emphasized to establish the relevance of First Amendment protections. See, *e. g., Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968); *Marsh* v. *Alabama*, 326 U. S. 501 (1946). Here, as the Court of Appeals recognized,

status of broadcasters, the extensive Government regulation of broadcast programming, and the specific governmental approval of the challenged policy—I can only conclude that the Government "has so far insinuated itself into a position" of participation in this policy that the absolute refusal of broadcast licensees to sell airtime to groups or individuals wishing to speak out on controversial issues of public importance must be subjected to the restraints of the First Amendment.[12]

"the broadcast media are specifically dedicated to communication. They function as both our foremost forum for public speech and our most important educator of an informed people." 450 F. 2d, at 653. See also text and notes, at nn. 35–37, *infra*.

[12] In his separate concurring opinion, my Brother STEWART suggests that a finding of governmental action in this context necessarily means that "private broadcasters *are* Government." *Ante*, at — (emphasis in original). In my view, this assertion reflects a complete misunderstanding of the nature of the governmental involvement in this case. Here, the Government has selected the persons who will be permitted to operate a broadcast station, extensively regulates those broadcasters, and has specifically approved the challenged broadcaster policy. Thus, the commands of the First Amendment come into play, not because "private broadcasters *are* Government," but, rather, because the Government "has so far insinuated itself into a position" of participation in the challenged policy as to make the Government itself responsible for its effects. Similarly, I cannot agree with my Brother STEWART's suggestion that a finding of governmental involvement in this case "would simply strip broadcasters of their own First Amendment rights." *Ante*, at —. The actions of a purely private individual are, of course, not subject to the constraints of the First Amendment. But where, as here, the Government has implicated itself in the actions of an otherwise private individual, that individual must exercise his own rights with due regard for the First Amendment rights of others. In other words, an accommodation of competing rights is required, and "balancing," not the "absolutist" approach suggested by my Brother STEWART, is the result. Indeed, it is this misunderstanding of the significance of governmental involvement that apparently leads to my Brother STEWART's disagreement with my Brothers WHITE,

II

Radio and television have long been recognized as forms of communication "affected by a First Amendment interest" and, indeed, it can hardly be doubted that broadcast licensees are themselves protected by that Amendment. *Red Lion Broadcasting Co.* v. *FCC, supra,* at 386. See *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131, 166 (1948); Z. Chafee, Free Speech in the United States 545–546 (1941). Recognition of this fact does not end our inquiry, however, for it is equally clear that the protection of the First Amendment in this context is not limited solely to broadcasters. On the contrary, at least one set of competing claims to the protection of that Amendment derives from the fact that, because of the limited number of broadcast frequencies available and the potentially pervasive impact of the electronic media, "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends

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BLACKMUN, and POWELL as to the relationship between the "public interest" standard of the Act and First Amendment "values."

I might also note that, contrary to the suggestion of my Brother STEWART, a finding of governmental involvement in this case does not in any sense command a similar conclusion with respect to newspapers. Indeed, the factors that compel the conclusion that the Government is involved in the promulgation and enforcement of the challenged broadcaster policy have simply no relevance to newspapers. The decision as to who shall operate newspapers is made in the free market, not by Government fiat. The newspaper industry is not extensively regulated and, indeed, in light of the differences between the electronic and printed media, such regulation would violate the First Amendment with respect to newspapers. Finally, since such regulation of newspapers would be impossible, it would likewise be impossible for the Government to approve an exclusionary policy of newspapers in the sense that it has approved the challenged policy of the broadcasters.

and purposes of the First Amendment." *Red Lion Broadcasting Co.* v. *FCC, supra,* at 390.

Over 50 years ago, Mr. Justice Holmes sounded what has since become a dominant theme in applying the First Amendment to the changing problems of our Nation. "[T]he ultimate good," he declared, "is better reached by free trade in ideas," and "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." *Abrams* v. *United States,* 250 U. S. 616, 630 (1919) (dissenting opinion); see also *Whitney* v. *California,* 274 U. S. 357, 375–376 (1927) (Brandeis, J., concurring); *Gitlow* v. *New York,* 268 U. S. 652, 672–673 (1925) (Holmes, J., dissenting). Indeed, the First Amendment itself testifies to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," [13] and the Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." *Associated Press* v. *United States,* 326 U. S. 1, 20 (1945). For "it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected." *Terminiello* v. *Chicago,* 337 U. S. 1, 4 (1949); see also *Thornhill* v. *Alabama,* 310 U. S. 88, 102 (1940); *Palko* v. *Connecticut,* 302 U. S. 319, 326–327 (1937).

With considerations such as these in mind, we have specifically declared that, in the context of radio and television broadcasting, the First Amendment protects "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences. . . ." *Red Lion Broadcasting Co.* v. *FCC,*

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[13] *New York Times Co.* v. *Sullivan, supra,* at 270; see also *Pickering* v. *Board of Education,* 391 U. S. 563, 573 (1968); *Mills* v. *Alabama,* 384 U. S. 214, 218 (1966).

supra, at 390.[14] And, because "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee," "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Ibid.*

Thus, we have explicitly recognized that, in light of the unique nature of the electronic media, the public have strong First Amendment interests in the reception of a full spectrum of views—presented in a vigorous and uninhibited manner—on controversial issues of public importance. And, as we have seen, it has traditionally been thought that the most effective way to insure this "uninhibited, robust, and wide-open" debate is by fostering a "free trade in ideas" by making our forums of communication readily available to all persons wishing to express their views. Although apparently conceding the legitimacy of these principles, the Court nevertheless upholds the absolute ban on editorial advertising because, in its view, the Commission's Fairness Doctrine, in and of itself, is sufficient to satisfy the First Amendment interests of the public. I cannot agree.

The Fairness Doctrine originated early in the history of broadcast regulation and, rather than being set forth in any specific statutory provision,[15] developed gradually

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[14] This was not new doctrine, for we have long recognized in a variety of contexts that the First Amendment "necessarily protects the right to receive [information]." *Martin* v. *City of Struthers*, 319 U. S. 141, 143 (1943); see, *e. g.*, *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969); *Time, Inc.* v. *Hill*, 385 U. S. 374, 388 (1967); *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965); *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965).

[15] The Fairness Doctrine was recognized and implicitly approved by Congress in the 1959 amendments to § 315 of the Communications Act. Act of September 14, 1959, § 1, 73 Stat. 557, amending

in a long series of Commission rulings in particular cases.[16] In essence, the doctrine imposes a two-fold duty upon broadcast licensees: (1) coverage of issues of public importance must be adequate,[17] and (2) such coverage must fairly reflect opposing viewpoints.[18] See *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 377. In fulfilling their obligations under the Fairness Doctrine, however, broadcast licensees have virtually complete discretion, subject only to the Commission's general requirement that licensees act "reasonably and in good faith," [19]

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47 U. S. C. § 315 (a). As amended, § 315 (a) recognizes the obligation of broadcasters "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

[16] The Fairness Doctrine was first fully set forth in Report in the Matter of Editorializing by Broadcast Licensees, 13 F. C. C. 1246 (1949), and was elaborated upon in Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964). The statutory authority of the Commission to promulgate this doctrine and related regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires," to promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of [the Act]. . . ." 47 U. S. C. §§ 303, 303 (r).

[17] See *John J. Dempsey*, 6 P & F Radio Reg. 615 (1950); see also *Metropolitan Broadcasting Corp.*, 19 P & F Radio Reg. 602 (1960); *The Evening News Association*, 6 P & F Radio Reg. 283 (1950).

[18] If the broadcaster presents one side of a question, and does not wish to present the other side himself, he can fulfill his fairness obligation by announcing his willingness to broadcast opposing views by volunteers. See *Mid-Florida Television Corp.*, 40 F. C. C. 620 (1964). If the broadcaster rejects a volunteer spokesman as "inappropriate," he must seek out others. See *Richard G. Ruff*, 19 F. C. C. 2d 838 (1969). The broadcaster must provide free time for the presentation of opposing views if sponsorship is unavailable. See *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895 (1963).

[19] Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, *supra*, n. 16, at 10424.

"to determine what issues should be covered, how much time should be allocated, which spokesmen should appear, and in what format." [20] Thus, the Fairness Doctrine does not in any sense require broadcasters to allow "non-broadcaster" speakers to use the airwaves to express their own views on controversial issues of public importance.[21] On the contrary, broadcasters may meet their fairness responsibilities through presentation of carefully edited news programs, panel discussions, interviews, and documentaries. As a result, broadcasters retain almost exclusive control over the selection of issues and viewpoints to be covered, the manner of presentation and,

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[20] *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, 28 (1971); see also Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, *supra*, n. 16, at 10416; Report in the Matter of Editorializing by Broadcast Licensees, *supra*, n. 16.

[21] Thus, the Fairness Doctrine must be sharply distinguished from the "equal time" requirement, which provides that a broadcaster who affords airtime to one political candidate must make equal time available to other candidates for the same office. 47 U. S. C. § 315. See also *Nicholas Zapple*, 23 F. C. C. 2d 707 (1970) (extension of "equal time" rule to cover a candidate's supporters where spokesmen for other candidates are permitted to purchase airtime). Similarly, the Fairness Doctrine must not be confused with the Commission's "personal attack" and "political editorializing" rules which were upheld in *Red Lion Broadcasting Co.* v. *FCC*, *supra*. The "personal attack" rule provides that "when, during the presentation of views on a controversial issue of public importance, an attack is made on the honesty, character, integrity, or like personal qualities of an identified person," the licensee must notify the person attacked and offer him an opportunity to respond. 47 CFR § 73.123. The "political editorializing" rule provides that when a licensee endorses a candidate for political office it must give other candidates or their spokesmen an opportunity to respond. See, *e. g.*, 47 CFR § 73.123. Thus, unlike the Fairness Doctrine, the "equal time," "personal attack," and "political editorializing" rules grant a particular group or individual a limited "right of access" to the airways not subject to the "journalistic supervision" of the broadcaster.

perhaps most important, who shall speak. Given this doctrinal framework, I can only conclude that the Fairness Doctrine, standing alone, is insufficient—in theory as well as in practice—to provide the kind of "uninhibited, robust, and wide-open" exchange of views to which the public is constitutionally entitled.

As a practical matter, the Court's reliance on the Fairness Doctrine as an "adequate" alternative to editorial advertising seriously overestimates the ability—or willingness—of broadcasters to expose the public to the "widest possible dissemination of information from diverse and antagonistic sources." [22] As Professor Jaffe has noted, "there is considerable possibility that the broadcaster will exercise a large amount of self-censorship and try to avoid as much controversy as he safely can." [23] Indeed, in light of the strong interest of broadcasters in maximizing their audience, and therefore their profits, it seems almost naive to expect the majority of broadcasters to produce the variety and controversiality of material necessary to reflect a full spectrum of viewpoints. Stated simply, angry customers are not good customers and, in the commercial world of mass communications, it is simply "bad business" to espouse—or even to allow others to espouse—the heterodox or the controversial. As a result, even under the Fairness Doctrine, broadcasters generally tend to permit only established—or at least moderated—views to enter the broadcast world's "marketplace of ideas." [24]

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[22] *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945).

[23] Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 773 n. 26 (1972).

[24] See generally D. Lacy, Freedom and Communications 69 (1961); Mallamud, The Broadcast Licensee as Fiduciary: Toward the Enforcement of Discretion, 1973 Duke L. J. 89, 94–95, 98–99; Jaffe, *supra*, n. 23, at 773, 26; Canby, The First Amendment Right to Persuade: Access to Radio and Television, 19 U. C. L. A. L. Rev. 723, 727 (1972); Malone, Broadcasting, The Reluctant

Moreover, the Court's reliance on the Fairness Doctrine as the *sole* means of informing the public seriously misconceives and underestimates the public's interest in receiving ideas and information directly from the advocates of those ideas without the interposition of journalistic middlemen. Under the Fairness Doctrine, broadcasters decide what issues are "important," how "fully" to cover them, and what format, time and style of coverage are "appropriate." The retention of such *absolute* control in the hands of a few government licensees is inimical to the First Amendment, for vigorous,

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Dragon: Will the First Amendment Right of Access End the Suppressing of Controversial Ideas?, 5 U. Mich. J. L. Rev. 193, 205–211, 216 (1972); Johnson & Westen, A Twentieth Century Soapbox: The Right to Purchase Radio and Television Time, 57 Va. L. Rev. 547 (1971); Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967); Note, Free Speech and the Mass Media, 57 Va. L. Rev. 636 (1971); 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, Wasteland Revisited: A Modest Attack Upon the FCC's Category System, 17 U. C. L. A. L. Rev. 868, 870–875 (1970); Comment, Freedom of Speech and the Individual's Right of Access to the Airways, 1970 Law & Social Order 424, 428; Note, FCC's Fairness Regulations: A First Step Towards Creation of a Right of Access to the Mass Media, 54 Corn. L. Rev. 294, 296 (1969).

Although admitting that the Fairness Doctrine "has not always brought to the public perfect or indeed even consistently high quality treatment of all public events and issues," the Court nevertheless suggests that a broadcaster who fails to fulfill his fairness obligations does so "at the risk of losing his license." *Ante*, at —. The Court does not cite a single instance, however, in which this sanction has ever been invoked because of a broadcaster's failure to comply with the Fairness Doctrine. Indeed, this is not surprising, for the Commission has acted with great reluctance in this area, intervening in only the most extreme cases of broadcaster abuse. See Mallamud, *supra*, at 115–122; Canby, *supra*, at 725–727; Mallone, *supra*, at 215–216; see also Cox & Johnson, *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F. C. C. 2d 1 (1969).

free debate can be attained only when members of the public have at least *some* opportunity to take the initiative and editorial control into their own hands.

Our legal system reflects a belief that truth is best illuminated by a collision of genuine advocates. Under the Fairness Doctrine, however, accompanied by an absolute ban on editorial advertising, the public is compelled to rely *exclusively* on the "journalistic discretion" of broadcasters, who serve in theory as surrogate spokesmen for all sides of all issues. This separation of the advocate from the expression of his views can serve only to diminish the effectiveness of that expression. Indeed, we emphasized this fact in *Red Lion:* [25]

> "Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them."

Thus, if the public is to be honestly and forthrightly apprised of opposing views on controversial issues, it is imperative that citizens be permitted at least *some* opportunity to speak directly for themselves as genuine advocates on issues that concern them.

Moreover, to the extent that broadcasters actually permit citizens to appear on "their" airwaves under the Fairness Doctrine, such appearances are subject to extensive editorial control. Yet it is clear that the effectiveness of an individual's expression of his views is as dependent on the style and format of presentation as

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[25] *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 392 n. 18, quoting J. Mill, On Liberty 32 (R. McCallum ed. 1947).

it is on the content itself. And the relegation of an individual's views to such tightly controlled formats as the news, documentaries, edited interviews, or panel discussions may tend to minimize, rather than maximize the effectiveness of speech. Under a limited scheme of editorial advertising, however, the crucial editorial controls are in the speaker's own hands.

Nor is this case concerned solely with the adequacy of coverage of those views and issues which generally are recognized as "newsworthy." For also at stake is the right of the public to receive suitable access to new and generally unperceived ideas and opinions. Under the Fairness Doctrine, the broadcaster is required to present only "*representative* community views and voices on controversial issues" of public importance.[26] Thus, by definition, the Fairness Doctrine tends to perpetuate coverage of those "views and voices" that are already established, while failing to provide for exposure of the public to those "views and voices" that are novel, unorthodox or unrepresentative of prevailing opinion.[27]

Finally, it should be noted that the Fairness Doctrine permits, indeed *requires*, broadcasters to determine for themselves which views and issues are sufficienty "important" to warrant discussion. The briefs of the broadcaster-petitioners in this case illustrate the type of "jour-

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[26] *Democratic National Committee*, *supra*, n. 1, at 222.

[27] Indeed, the failure to provide adequate means for groups and individuals to bring new issues or ideas to the attention of the public explains, at least to some extent, "the development of new media to convey unorthodox, unpopular, and new ideas. Sit-ins and demonstrations testify to . . . the inability to secure access to the conventional means of reaching and changing public opinion. [For by] the bizarre and unsettling nature of his technique, the demonstrator hopes to arrest and divert attention long enough to compel the public to ponder his message." *Barron*, *supra*, n. 24, at 1647; cf. *Adderley* v. *Florida*, 385 U. S. 39, 50–51 (1966) (DOUGLAS, J., dissenting).

nalistic discretion" licensees now exercise in this regard. Thus, ABC suggests that it would refuse to air those views which *it* considers "scandalous" or "crackpot," [28] while CBS would exclude those issues or opinions that are "insignificant" [29] or "trivial." [30] Similarly, NBC would bar speech that strays "beyond the bounds of normally accepted taste," [31] and WTOP would protect the public from subjects that are "slight, parochial or inappropriate." [32]

The genius of the First Amendment, however, is that it has always defined what the public ought to hear by permitting speakers to say what they wish. As the Court of Appeals recognized, "[i]t has traditionally been thought that the best judge of the importance of a particular viewpoint or issue is the individual or group holding the viewpoint and wishing to communicate it to others." 450 F. 2d, at 656. Indeed, "supervised and ordained discussion" is directly contrary to the underlying purposes of the First Amendment,[33] for that Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." [34] Thus, in a related context, we have explicitly recognized that editorial advertisements constitute "an important outlet for the promulgation of information and ideas by persons who do not themselves have access to [media] facilities," and the unavailability of such editorial advertising can serve

[28] Brief for American Broadcasting Companies, Inc. 52.

[29] Brief for Columbia Broadcasting System, Inc. 34.

[30] *Id.*, at 40.

[31] Brief for National Broadcasting Company, Inc. 10.

[32] Brief for Post-Newsweek Stations, Capital Area, Inc. 31.

[33] *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969).

[34] *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (SDNY 1943), aff'd, 326 U. S. 1 (1945). See also *Thomas* v. *Collins*, 323 U. S. 516, 545 (1945) (Jackson, J., concurring).

only "to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'" *New York Times Co.* v. *Sullivan*, *supra*, at 266.

The Fairness Doctrine's requirement of full and fair coverage of controversial issues is, beyond doubt, a commendable and, indeed, essential tool for effective regulation of the broadcast industry. But, standing alone, it simply cannot eliminate the need for a further, complementary airing of controversial views through the limited availability of editorial advertising. Indeed, the availability of at least *some* opportunity for editorial advertising is imperative if we are ever to attain the "free and general discussion of public matters [that] seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936).

III

Moreover, a proper balancing of the competing First Amendment interests at stake in this controversy must consider, not only the interests of broadcasters and of the listening and viewing public, but also the independent First Amendment interest of groups and individuals in effective self-expression. See, *e. g.*, T. Emerson, Toward a General Theory of the First Amendment 4–7 (1967); Z. Chafee, Free Speech in the United States 33 (1941). "[S]peech concerning public affairs . . . is the essence of self-government," *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964), and the First Amendment must therefore safeguard not only the right of the public to *hear* debate, but also the right of individuals to *participate* in that debate and to attempt to persuade others to their points of view. See, *e. g.*, *Thomas* v. *Collins*, 323 U. S. 516, 537 (1945); cf. *NAACP* v. *Button*, 371 U. S. 415, 429–430 (1963). And, in a time of apparently growing

anonymity of the individual in our society, it is imperative that we take special care to preserve the vital First Amendment interest in assuring "self-fulfillment [of expression] for each individual." *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972). For our citizens may now find greater than ever the need to express their own views directly to the public, rather than through a governmentally appointed surrogate, if they are to feel that they can achieve at least some measure of control over their own destinies.

In light of these considerations, the Court would concede, I assume, that our citizens have at least an abstract right to express their views on controversial issues of public importance. But freedom of speech does not exist in the abstract. On the contrary, the right to speak can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency. For in the absence of an effective means of communication, the right to speak would ring hollow indeed. And, in recognition of these principles, we have consistently held that the First Amendment embodies not only the abstract right to be free from censorship, but also the right of an individual to utilize an appropriate and effective medium for the expression of his views. See, *e. g.*, *Lloyd Corp., Ltd.* v. *Tanner*, 407 U. S. 551, 559 (1972); *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969); *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968); *Brown* v. *Louisiana*, 383 U. S. 131 (1966); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Kunz* v. *New York*, 340 U. S. 290 (1951); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Jamison* v. *Texas*, 318 U. S. 413 (1943); *Schneider* v. *State*, 308 U. S. 147 (1939); *Hague* v. *CIO*, 307 U. S. 496 (1939).

Here, of course, there can be no doubt that the broadcast frequencies allotted to the various radio and television licensees constitute appropriate "forums" for the discussion of controversial issues of public importance.[35] Indeed, unlike the streets, parks, public libraries and other "forums" that we have held to be appropriate for the exercise of First Amendment rights, the broadcast media are dedicated *specifically* to communication. And, since the expression of ideas—whether political, commercial, musical or otherwise—is the exclusive purpose of the broadcast spectrum, it seems clear that the adop-

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[35] The Court does make the rather novel suggestion, however, that editorial advertising might indeed be "inappropriate" because "listeners and viewers constitute a 'captive audience.'" *Ante*, at —. In support of this proposition, the Court cites our decisions in *Public Utilities Commission* v. *Pollak*, *supra*, and *Kovacs* v. *Cooper*, 336 U. S. 77 (1949). In *Pollak*, however, we explicitly *rejected* a claim that the broadcasting of radio programs in streetcars violated the First and Fifth Amendment rights of passengers who did not wish to listen to those programs. And in *Kovacs*, although we upheld an ordinance forbidding the use on public streets of sound trucks which emit "loud or raucous noises," we did so because the ordinance was concerned, not with the *content* of speech, but rather with the offensiveness of the sounds themselves. Here, however, the Court seems perfectly willing to allow broadcasters to continue to invade the "privacy" of the home through commercial advertising and even controversial programming under the Fairness Doctrine. Thus, the Court draws its line solely on the basis of the content of the particular speech involved and, of course, we have consistently held that, where content is at issue, constitutionally protected speech may not be prohibited because of a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular idea." *Tinker* v. *Des Moines Independent Community School District*, *supra*, at 509; see, *e. g.*, *Grayned* v. *City of Rockford*, 408 U. S. 104, 117 (1972). The suggestion that constitutionally protected speech may be banned because some persons may find the ideas expressed offensive is, in itself, offensive to the very meaning of the First Amendment.

tion of a limited scheme of editorial advertising would in no sense divert that spectrum from its intended use. Cf. *Lloyd Corp., Ltd.* v. *Tanner*, *supra*, at 563; *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, *supra*, at 320.

Moreover, it is equally clear that, with the assistance of the Federal Government, the broadcast industry has become what is potentially the most efficient and effective "marketplace of ideas" ever devised.[36] Indeed, the electronic media are today "the public's primary source of information," [37] and we have ourselves recognized that broadcast "technology . . . supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news. . . ." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 386 n. 15. Thus, although "full and free discussion" of ideas may have been a reality in the heyday of political pamphleteering, modern technological developments in the field of communications have made the soapbox orator and the

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[36] Indeed, approximately 95% of American homes contain at least one television set, and that set is turned on for an average of more than five and one-half hours per day. See Hearings on H. R. 13721 before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess., 7 (1970) (statement of Dean Burch, Chairman of the Federal Communications Commission). As to the potential influence of the electronic media on American thought, see generally A. Krock, The Consent of the Governed 66 (1971); H. Mendelsohn & I. Crespi, Polls, Television, and the New Politics 256, 264 (1970); Malone, *supra*, n. 24, at 197.

[37] H. R. Rep. No. 91-257, 91st Cong., 1st Sess., 6 (1969). According to one study, 67% of Americans prefer the electronic media to other sources of information. See G. Wyckoff, The Image Candidates 13-14 (1968). See also *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules*, 22 F. C. C. 2d 339, 344 (1970) (59% of Americans depend on television as their principal source of news).

leafleteer virtually obsolete. And, in light of the current dominance of the electronic media as the most effective means of reaching the public, any policy that *absolutely* denies citizens access to the airwaves necessarily renders even the concept of "full and free discussion" practically meaningless.

Regrettably, it is precisely such a policy that the Court upholds today. And, since effectuation of the individual's right to speak through a limited scheme of editorial advertising can serve only to further, rather than to inhibit, the public's interest in receiving suitable exposure to "uninhibited, robust, and wide-open" debate on controversial issues, the challenged ban can be upheld only if it is determined that such editorial advertising would unjustifiably impair the broadcaster's assertedly overriding interest in exercising *absolute* control over "his" frequency.[38] Such an analysis, however, hardly reflects the delicate balancing of interests that this sensitive question demands. Indeed, this "absolutist" approach wholly disregards the competing First Amendment rights of all "non-broadcaster" citizens, ignores the teachings of our recent decision in *Red Lion Broadcasting Co.* v. *FCC*, *supra*, and is not supported by the historical purposes underlying broadcast regulation in this Nation.

Prior to 1927, it must be remembered, it was clearly recognized that the broadcast spectrum was part of the public domain. As a result, the allocation of frequen-

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[38] It should be noted that, although the Fairness Doctrine is at least arguably relevant to the *public's* interest in receiving suitable exposure to "uninhibited, robust, and wide-open" debate on controversial issues, it is not in any sense relevant to the *individual's* interest in obtaining access to the airwaves for the purpose of effective self-expression. For the individual's interest in expressing his own views in a manner of his own choosing is an inherently personal one, and it can never be satisfied by the expression of "similar" views by a surrogate spokesman.

cies was left entirely to the private sector,[39] and groups and individuals therefore had the same right of access to radio facilities as they had, and still have, to the printed press—that is, "anyone who will may transmit." [40] Under this scheme, however, the number of broadcasters increased so dramatically that by 1927 every frequency was occupied by at least one station, and many were occupied by several. "The result was confusion and chaos. With everybody on the air, nobody could be heard." *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 212 (1943). It soon became "apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 376. Thus, in the Radio Act of 1927, 44 Stat. 1162 (1927), Congress placed the broadcast spectrum under federal regulation and sought to reconcile competing uses of the airwaves by setting aside a limited number of frequencies for each of the important uses of radio.[41] And, since the number of frequencies allocated to public broadcasting was necessarily limited, the Government was compelled to grant licenses to some applicants while denying them to others. See generally *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 375–377, 388; *National Broadcasting Co.* v. *United States*, *supra*, at 210–214.

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[39] Indeed, pre-1927 regulation of radio gave no discretion to the Federal Government to deny the right to operate a broadcast station. See 1 A. Socolow, The Law of Radio Broadcasting 38 (1939); H. Warner, Radio & Television Law 757 *et seq.* (1948); see generally *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 210–214 (1943).

[40] 67 Cong. Rec. 5479 (Rep. White).

[41] These include, of course, not only public broadcasting, but also "amateur operation, aircraft, police, defense, and navigation. . . ." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 388.

Although the overriding need to avoid overcrowding of the airwaves clearly justifies the imposition of a ceiling on the number of individuals who will be permitted to operate broadcast stations [42] and, indeed, renders it "idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish," [43] it does not in any sense dictate that the continuing First Amendment rights of all nonlicensees be brushed aside entirely. Under the existing system, broadcast licensees are granted a preferred status with respect to the airwaves, not because they have competed successfully in the free market but, rather, "because of their initial government selection. . . ." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 400. And, in return for that "preferred status," licensees must respect the competing First Amendment rights of others. Thus, although the broadcaster has a clear First Amendment right to be free from Government censorship in the expression of his own views [44] and, indeed, has a significant interest in exercising reasonable

[42] Although this licensing scheme necessarily restricts the First Amendment rights of those groups or individuals who are denied the "right" to operate a broadcast station, it does not, in and of itself, violate the First Amendment. For it has long been recognized that when "[c]onflicting demands on the same [forum] . . . compel the [Government] to make choices among potential users and uses," neutral rules of allocation to govern that scarce communications resource are not *per se* unconstitutional. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 98 (1972); cf. *Cox* v. *Louisiana*, 379 U. S. 536, 554 (1965); *Cox* v. *New Hampshire*, 312 U. S. 369, 374 (1940); *Schneider* v. *State*, 308 U. S. 147, 160 (1939). And, in the context of broadcasting, it would be ironic indeed "if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible . . . by limiting the number of licenses so as not to overcrowd the spectrum." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 389.

[43] *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 388.

[44] See, *e. g.*, 47 U. S. C. § 326.

journalistic control over the use of his facilities, "[*t*]*he right of free speech of a broadcaster . . . does not embrace a right to snuff out the free speech of others.*" *Id.*, at 387. Indeed, after careful consideration of the nature of broadcast regulation in this country, we have specifically declared that

> ". . . 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 . . . monopolize a radio frequency to the exclusion of his fellow citizens." *Id.*, at 389.

Because I believe this view is as sound today as when voiced only four years ago, I can only conclude that there is simply no overriding First Amendment interest of broadcasters that can justify the *absolute* exclusion of virtually all of our citizens from the most effective "marketplace of ideas" ever devised.

This is not to say, of course, that broadcasters have *no* First Amendment interest in exercising journalistic supervision over the use of their facilities. On the contrary, such an interest does indeed exist, and it is an interest that must be weighed heavily in any legitimate effort to balance the competing First Amendment interests involved in this case. In striking such a balance, however, it must be emphasized that this case deals *only* with the allocation of *advertising* time—airtime that broadcasters regularly relinquish to others without the retention of significant editorial control. Thus, we are concerned here not with the speech of broadcasters themselves [45] but, rather, with their "right" to decide which

[45] Thus, as the Court of Appeals recognized, "[i]n normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different." 450 F. 2d, at 654.

other individuals will be given an opportunity to speak in a forum that has already been opened to the public.

Viewed in this context, the *absolute* ban on editorial advertising seems particularly offensive because, although broadcasters refuse to sell any airtime whatever to groups or individuals wishing to speak out on controversial issues of public importance, they make such airtime readily available to those "commercial" advertisers who seek to peddle their goods and services to the public. Thus, as the system now operates, any person wishing to market a particular brand of beer, soap, toothpaste, or deodorant has direct, personal, and instantaneous access to the electronic media. He can present his own message, in his own words, in any format he selects and at a time of his own choosing. Yet a similar individual seeking to discuss war, peace, pollution, or the suffering of the poor is denied this right to speak. Instead, he is compelled to rely on the beneficence of a corporate "trustee" appointed by the Government to argue his case for him.

It has long been recognized, however, that although access to public forums may be subjected to reasonable "time, place, and manner" regulations.[40] "[s]elective exclusions from a public forum may not be based on *content* alone. . . ." *Police Dept. of Chicago* v. *Mosley*, *supra*, at 96 (emphasis added); see, *e. g.*, *Shuttlesworth* v. *City of Birmingham*, 394 U. S. 147 (1969); *Edwards* v. *South Carolina*, *supra*; *Fowler* v. *Rhode Island*, 354 U. S. 67 (1953); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Saia* v. *New York*, 334 U. S. 558 (1948). Here, of course, the differential treatment accorded "commer-

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[40] See, *e. g.*, *Police Dept. of Chicago* v. *Mosley*, *supra*, at 98; *Grayned* v. *City of Rockford*, *supra*, at 115; *Cox* v. *Louisiana*, *supra*, at 554; *Poulos* v. *New Hampshire*, 345 U. S. 395, 398 (1953); *Cox* v. *New Hampshire*, *supra*, at 575–576; *Schneider* v. *State*, *supra*, at 160.

cial" and "controversial" speech clearly violates that principle.[47] Moreover, and not without some irony, the favored treatment given "commercial" speech under the existing scheme clearly reverses traditional First Amendment priorities. For it has generally been understood that "commercial" speech enjoys *less* First Amendment protection than speech directed at the discussion of controversial issues of public importance. See, *e. g.*, *Breard* v. *City of Alexandria*, 341 U. S. 622 (1951); *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942).

The First Amendment values of individual self-fulfillment through expression and individual participation in public debate are central to our concept of liberty. If these values are to survive in the age of technology, it is essential that individuals be permitted at least *some* opportunity to express their views on public issues over the electronic media. Balancing those interests against the limited interest of broadcasters in exercising "journalistic supervision" over the mere allocation of *advertising* time that is already made available to some members of the public, I simply cannot conclude that the interest of broadcasters must prevail.

IV

Finally, the Court raises the spectre of administrative apocalypse as justification for its decision today. The Court's fears derive largely from the assumption, implicit in its analysis, that the Court of Appeals mandated an *absolute* right of access to the airwaves. In reality, however, the issue in this case is not whether there is an *absolute* right of access but, rather, whether there may

[47] Contrary to the Court's assertion, the existence of the Fairness Doctrine cannot in any sense rationalize this discrimination. Indeed, the Fairness Doctrine is wholly unresponsive to the need for individual access to the airwaves for the purpose of effective self-expression. See also n. 38, *supra*.

be an *absolute denial* of such access. The difference is, of course, crucial, and the Court's misconception of the issue seriously distorts its evaluation of the administrative difficulties that an invalidation of the absolute ban might conceivably entail.

Specifically, the Court hypothesizes three potential sources of difficulty: (1) the availability of editorial advertising might, in the absence of adjustments in the system, tend to favor the wealthy; (2) application of the Fairness Doctrine to editorial advertising might adversely affect the operation of that doctrine; and (3) regulation of editorial advertising might lead to an enlargement of Government control over the content of broadcast discussion. These are, of course, legitimate and, indeed, important concerns. But, at the present time, they are concerns—not realities. We simply have no sure way of knowing whether, and to what extent, if any, these potential difficulties will actually materialize. The Court's bare assumption that these hypothetical problems are both inevitable and insurmountable indicates an utter lack of confidence in the ability of the Commission and licensees to adjust to the changing conditions of a dynamic medium. This sudden lack of confidence is, of course, strikingly inconsistent with the general propositions underlying all other aspects of the Court's approach to this case.

Moreover, it is noteworthy that, some 25 years ago, the Commission itself declared that

> ". . . the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues . . . is inconsistent with the concept of public interest. . . . The Commission recognizes that good program balance may not permit the sale or donation of time

> to all who may seek it for such purposes and that difficult problems calling for careful judgment on the part of station management may be involved in deciding among applicants for time when all cannot be accommodated. However, competent management should be able to meet such problems in the public interest and with fairness to all concerned. The fact that it placed an arduous task on management should not be made a reason for evading the issue by a strict rule against the sale of time for any programs of the type mentioned." *United Broadcasting Co.*, 10 F. C. C. 515, 518 (1945).

I can see no reason why the Commission and licensees should be deemed any less competent today then they were in 1945. And even if intervening developments have increased the complexities involved in implementing a limited right of access, there is certainly no dearth of proposed solutions to the potential difficulties feared by the Court. See, *e. g.*, Canby, The First Amendment Right to Persuade: Access to Radio and Television, 19 U. C. L. A. L. Rev. 723, 754–757 (1972); Malone, Broadcasting, the Reluctant Dragon: Will the First Amendment Right of Access End Suppressing of Controversial Ideas?, 5 U. Mich. J. L. Ref. 193, 252–269 (1972); Johnson & Westen, A Twentieth-Century Soapbox: The Right to Purchase Radio and Television Time, 57 Va. L. Rev. 574 (1971); Note, 85 Harv. L. Rev. 689, 693–699 (1972).

With these considerations in mind, the Court of Appeals confined itself to invalidating the flat ban alone, leaving broad latitude [48] to the Commission and licensees

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[48] The Court of Appeals did, however, suggest certain possible contours of implementation. For example, the court noted that broadcasters should be permitted "to place an outside limit on the

to develop in the first instance reasonable regulations to govern the availability of editorial advertising. In the context of this case, this was surely the wisest course to follow, for "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing [First Amendment values], there will be time enough to reconsider the constitutional implications." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 393.

For the present, however, and until such time as these assertedly "overriding" administrative difficulties actually materialize, if ever, I must agree with the conclusion of the Court of Appeals that although "it may unsettle some of us to see an antiwar message or a political party message in the accustomed place of a soap or beer commercial . . . 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." [49]

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total amount of editorial advertising they will sell," and "reasonable regulation of the placement of advertisements is altogether proper," 450 F. 2d, at 663.

[49] 450 F. 2d, at 665–666.

NOTE: The synopsis prepared by the Reporter is printed herewith, preceding the opinion, as a convenience for readers, and is not part of the opinion.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2256

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

ACCURACY IN MEDIA, INC., INTERVENOR

Decided September 27, 1974

Petition by television network for review of a decision of the Federal Communications Commission that a television documentary entitled "Pensions: The Broken Promise" violated the Commission's "fairness doctrine". The Court of Appeals, Leventhal, Circuit Judge, held that the principle of deference to licensee judgments, unless the licensee has departed from underlying assumptions of good faith and reasonable discretion, is an integral part of the "fairness doctrine"; that the question

before the court was whether the network exceeded its "wide degree of discretion"; that the court would abstain from determining whether the "fairness doctrine" should be reserved for license renewals; that the Federal Communications Commission's function is limited to correction of the licensee for abuse of discretion; that the reviewing court has greater responsibility than normally when it reviews a fairness ruling that upsets the licensee's exercise of journalistic discretion but it does not have authority to interpolate its own discretion or judgment; that where a broadcaster has made a reasonable judgment that a news or investigative journalistic program relates to the "broken promise" abuses in various private pension plans, and there is no controversy as to existence of such abuses, the "fairness doctrine" does not permit the Federal Communications Commission to make its own determination of the subject matter and require that an opposing view be presented; that the network did not act in bad faith or unreasonableness in exercise of its editorial judgment; that the program achieved a reasonable balance; that the record did not support the Commission's findings on controversiality of issue of need for reform legislation; and that it would be an impermissible intrusion on broadcast journalism to insist that it adopt techniques congenial to newspaper journalism.

Reversed and remanded with directions.

Fahy, Senior Circuit Judge, joined in the opinion of the court, and also filed concurring opinion.

Leventhal, Circuit Judge, also filed supplemental concurring statement.

Tamm, Circuit Judge, dissented and filed opinion.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2256

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

ACCURACY IN MEDIA, INC., INTERVENOR

Petition for Review of an Order of the Federal Communications Commission

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Decided September 27, 1974

Floyd Abrams with whom *Dean I. Ringel* and *Howard Monderer*, were on the motion for petitioners.

John W. Pettit, General Counsel, with whom *Joseph A. Marino*, Associate General Counsel and *Lawrence W. Secrest, III*, were on the motions for respondent.

Timothy B. Dyk, with whom *J. Roger Wollenberg* were on the brief for Columbia Broadcasting System, Inc., as *amicus curiae*.

J. Laurent Scharff, was on the brief for Radio Television News Directors Association and the Society of Professional Journalists, Sigma Delta Chi, as *amicus curiae.*

Ellen S. Agress, with whom *Earle K. Moore* was on the brief for the Office of Communication, United Church of Christ, as *amicus curiae.*

Stanley H. Kamerow was on the motion for intervenor, Accuracy In Media, Inc. *Thomas F. Ragan* also entered an appearance for Intervenor, Accuracy In Media, Inc.

John B. Summers was on the brief of National Association of Broadcasters, as *amicus curiae.*

Douglas Caddy was on the brief for the Center for the Public Interest of the Robert M. Schuchman Memorial Foundation, Inc., as *amicus curiae.*

Ellen S. Agress was on the brief for National Citizens Committee for Broadcasting as *amicus curiae.*

Henry Geller was on the brief for the Rand Corporation, as *amicus curiae.*

Alexander Greenfield, was on the brief for New York Times Company as *amicus curiae.*

Carl D. Lawson, Attorney, Department of Justice, entered an appearance for Respondent, United States of America.

Before: FAHY, *Senior Circuit Judge*, TAMM and LEVENTHAL, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

Concurring opinion filed by *Senior Circuit Judge* FAHY.

Supplemental Concurring Statement filed by *Circuit Judge* LEVENTHAL.

Dissenting opinion filed by *Circuit Judge* TAMM.

LEVENTHAL, *Circuit Judge*: On September 12, 1972, the television network of the National Broadcasting Company broadcast its documentary entitled "Pensions: The Broken Promise," narrated by Edwin Newman. On November 27, 1972, Accuracy in Media (AIM) filed a complaint with the Federal Communications Commission charging NBC had presented a one-sided picture of private pension plans. The handling of this case by the Commission will be discussed in more detail subsequently (section II). For introductory purposes it suffices to say that on May 2, 1973—as it happens, the same day NBC received the George Foster Peabody Award [1] for its production—the Commission's Broadcast Bureau advised NBC that the program violated the Commission's fairness doctrine.[2] That decision was upheld by the Commission. We reverse.

I. THE PROGRAM

The "Pensions" program is the heart of the case, and for that reason it is set out in Appendix A to this opinion.

For convenience, we will summarize the main outlines of the program—with notation that certain aspects are dealt with more fully subsequently.

The "Pensions" program studied the condition under which a person who had worked in an employment situation that was covered by a private pension plan did not in fact realize on any pension rights. Its particular focus was the tragic cases of aging workers who were

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[1] In addition to the Peabody Award, the program was awarded a Christopher Award, a National Headliner Award, and a Merit Award of the American Bar Association. It was also an Emmy nominee. *See* Schmerler Affidavit ¶ 10, JA 121-22.

[2] *See* Letter of FCC to NBC, May 2, 1973, JA 55, 66-67.

left, at the end of a life of labor, without pensions, without time to develop new pension rights, and on occasion without viable income.

The program had no set format, but its most prominent feature was a presentation of tragic case histories, often through personal interviews with the persons affected.

One group of workers lost pension eligibility when their company decided to close the division in which they had worked. The first of these was Steven Duane, who after 17 years with a large supermarket chain, lost his job as foreman of a warehouse when the company closed the warehouse and discharged all its employees, leaving them with no job and no pension rights. Now in his fifties, starting again with another company, he felt ill-used and frightened of the future.

There were a number of other specific examples of employees terminated by closing of plants or divisions. The program also focused on the problems of vesting, the years of service with the company required for a worker to become eligible under its pension plan. NBC interviewed employees with many years of service who were suddenly discharged just prior to the date on which their pension rights were to have become vested. Thus Alan Sorensen asserted that he was the victim of a practice—a "very definite pattern"—under which his employer, a large department store chain, fired men just prior to vesting, assigning "shallow" reasons to men who had served with records beyond reproach.

A similar account was given by Earl Schroeder, an executive fired by Kelly Nut Company, after he more than met his 20 years of service requirement but was six months shy of the age 60 condition.

The program also set forth abuses in the literature given employees ostensibly explaining their plans—pic-

tures of contented retirees and words comprehensible only to the most sophisticated legal specialist. It took up examples where the company had gone bankrupt prior to their date of retirement, leaving the employees without pension funds.

The documentary gave instances of pensions lost for lack of portability, citing plans that required the employee be a member of the same local for the requisite period. NBC interviewed a number of teamsters who had worked for the same employer for over twenty years, but who later found that certain changes in work assignment entailed changes in union local representation and ultimately loss of pension.

Much of the program was a recount of human suffering, interviews in which aging workers described their plight without comment on cause or remedy. They told of long years of working in the expectation of comfortable retirements, finding out that no pension would come, having to work into old age, of having to survive on pittance incomes. Interspersed with these presentations by workers were comments by persons active in the pension field, public officials, and Mr. Newman.

None of those interviewed—and these included two United States Senators, a state official, a labor leader, a representative of the National Association of Manufacturers, a consumer advocate, a bank president, and a social worker—disputed that serious problems, those covered by the documentary, do indeed exist. Some of the comments related to the overall performance of the private pension system. We shall discuss these later (section VI B). In addition to comments on the private system generally, there were isolated expressions of views on the related but nonetheless quite distinct issue of the wisdom of reliance on private pensions, regardless of how well they function, to meet the financial needs of

retirees.[3] Finally, several speakers gave broad, general views as to what could be done.[4]

There were also comments on legislative reforms that might be taken to cope with problems. These will be discussed separately in part VI D of this opinion.

Concluding Remarks

It may be appropriate to quote in full the concluding remarks of narrator Edwin Newman, since the FCC considered them "indicative of the actual scope and substance of the viewpoints broadcast in the 'Pensions' program." He said:

> NEWMAN: This has been a depressing program to work on but we don't want to give the impression that there are no good private pension plans. There are many good ones, and there are many people for whom the promise has become reality. That should be said.
>
> There are certain technical questions that we've dealt with only glancingly, portability, which means, being able to take your pension rights with you when you go from one job to another, vesting, the point at which your rights in the pension plan become established and irrevocable.
>
> Then there's funding, the way the plan is financed so that it can meet its obligations. And insurance, making sure that if plans go under, their obligations can still be met.

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[3] *See* Dennenberg Statement, Tr. at 4; Kramer Statement, Tr. at 13-14.

[4] *See* Dennenberg Statement, Tr. at 5; Newman description of Nader position, Tr. at 18; Hubbard Statement at 18; Anderson Statement, Tr. at 18-19; Gotbaum Statement, Tr. at 18; Schweiker Statement, Tr. at 19.

Finally, there's what is called the fiduciary relationship, meaning, who can be a pension plan trustee? And requiring that those who run pension funds adhere to a code of conduct so that they cannot enrich themselves or make improper loans or engage in funny business with the company management or the union leadership.

These are matters for Congress to consider and, indeed, the Senate Labor Committee is considering them now. They are also matters for those who are in pension plans. If you're in one, you might find it useful to take a close look at it.

Our own conclusion about all of this, is that it is almost inconceivable that this enormous thing has been allowed to grow up with so little understanding of it and with so little protection and such uneven results for those involved.

The situation, as we've seen it, is deplorable.

Edwin Newman, NBC News.

Success of Program

Like many documentaries, "Pensions" was a critical success (*supra*, note 1) but not a commercial success. We shall consider the television reviews in more detail subsequently, but it may be observed here that they were generally enthusiastic. Critics called it, "A potent program about pitfalls and failures of some private pension plans . . . ," "a harrowing and moving inquiry . . . ," and "a public service."[5] Dissenting notes were also struck.

As to the viewing public, "Pensions" ran in competition with a popular medical drama and a crime movie, and ran a poor third, garnering only a 16% share of

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[5] See summary of reviews, Appendix B.

the viewing audience. In fact, NBC was able to sell only two-and-one-half minutes of advertising time out of an available six.[6]

II. Commission Proceeding

Watching the program with particular interest was Accuracy in Media ("AIM"), a "nonprofit, educational organization acting in the public interest" [7] that seeks to counter, in part by demanding aggressive enforcement of the fairness doctrine, what it deems to be biased presentations of news and public affairs. On November 27, 1972, the Executive Secretary of AIM wrote to the FCC complaining of the following:

> Our investigation reveals that the NBC report gave the viewers a grotesquely distorted picture of the private pension system of the United States. Nearly the entire program was devoted to criticism of private pension plans, giving the impression that failure and fraud are the rule. . . . The reporter, Mr. Newman, said that NBC did not want to give the impression that there were no good private pension plans, but he did not discuss any good plans or show any satisfied pensioners.[8]

In subsequent correspondence, AIM added the accusations that NBC was attempting "to brainwash the audience with some particular message that NBC is trying to convey" [9] and that the program was "a one-sided, uninformative, emotion-evoking propaganda pitch." [10] Thus AIM not only claimed that the program had presented one side of an issue of public importance, the perform-

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[6] Frank Affidavit, JA 125-26.

[7] Letter of AIM to FCC, July 2, 1973, JA 143.

[8] Letter of AIM to FCC, November 27, 1972, JA 1.

[9] Letter of AIM to FCC, February 20, 1973, JA 48.

[10] Letter of AIM to FCC, April 11, 1973, JA 54.

ance of private pension plans, it also charged that NBC had deliberately distorted its presentation to foist its ideological view of events on the viewing public.

In its reply, NBC rejected the allegations of distortion. It asserted that the "Pensions" broadcast had not concerned a controversial issue of public importance:

> The program constituted a broad over-view of some of the problems involved in some private pensions plans. It did not attempt to discuss all private pension plans, nor did it urge the adoption of any specific legislative or other remedies. Rather, it was designed to inform the public about some problems which have come to light in some pension plans and which deserve a closer look.[11]

Since, in the view of NBC, there was no attempt to comment on the overall performance of private pension plans, no controversial issue had been presented, for all agreed that the examples of suffering depicted were not themselves subject to controversy. Even so, NBC pointed out that it had presented the view that the system as a whole was functioning well; consequently, it asserted, even if it had inadvertently raised the issue of the overall performance of private pension plans, the side generally supportive of the system had been heard.[12]

In a letter to NBC,[13] the Broadcast Bureau of the Commission rejected AIM's allegations of distortion as being unsupported by any evidence but upheld the fairness doctrine complaint. The staff took issue with "the reasonableness of your [NBC's] judgment that the program did not present one side of a controversial issue of public importance" and concluded that the program's "overall thrust was general criticism of the entire pen-

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[11] Letter of NBC to FCC, February 14, 1973, JA 41.

[12] *Id.*, JA 45-46.

[13] *Accuracy in Media, Inc.*, 40 FCC 2d 958 (1973).

sion system, accompanied by proposals for its regulation." [14] The staff opinion included extensive quotation from the transcript of the documentary, but little explanation as to how the quoted portions sustained the staff's conclusion. Only four brief statements were singled out as containing "general views" on the overall performance of the private pension system. NBC appealed the Broadcast Bureau ruling to the entire Commission.[15]

On December 3, 1973, the Commission issued a "Memorandum Opinion and Order" affirming the decision of its staff.[16] Although it acknowledged that the broad issue upon review was "whether the Bureau erred in its ruling that NBC's judgment on these matters was unreasonable," it emphasized that:

> The specific question properly before us here is therefore not whether NBC may reasonably say that the broad, overall "subject" of the "Pensions" program was "some problems in some pension plans," but rather whether the program did in fact present viewpoints on one side of the issue of the overall performance and proposed regulation of the private pension system.[17]

The Commission found that "Pensions" had in fact presented views on the overall performance of the private pension system. It took note of the "pro-pensions" views expressed during the documentary, but concluded that

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[14] *Id.* at 963, 966.

[15] By letter of July 2, 1973, AIM replied to NBC's appeal and appended as an exhibit an article about pensions appearing in the Washington Post of November 26, 1972, written by Mr. Spencer Rich. AIM stated that this article "exemplifies good journalism." JA 155.

[16] 44 FCC 2d 1027 (1973), JA 201.

[17] 44 FCC 2d at 1034-35, JA 210.

the "overwhelming weight" of the "anti-pensions" statements required further presentation of opposing views. The Commission commended NBC for a laudable journalistic effort, but found that the network had not discharged its fairness obligations and ordered it to do so forthwith. This petition for review followed.

NBC petitioned the Commission for a stay, but was informed that the Commission "expects prompt compliance with its ruling." NBC filed a motion in this court for an expedited appeal, a stay, and expedited consideration. That motion was heard and granted on February 14, 1974, and the case was heard on the merits on February 21, 1974. AIM has intervened on the side of the Commission. The stay that has been in effect during the pendency of this appeal reflected, in part, an estimate of the likelihood of success by NBC as petitioner. We now set forth the reasons why we have decided that the case should be determined in favor of NBC.[18]

III. The Fairness Doctrine: General Considerations

Petitioners urge that the Commission's decision be set aside as a misapplication of the fairness doctrine and a violation of the First Amendment. Since we reverse on the former ground, we have no occasion to consider the latter.

Now twenty-five years old, the fairness doctrine imposes a double obligation on the broadcast licensee. First, he must devote a substantial portion of available time to the discussion of "controversial issues of public importance." [19] When he presents such an issue, the licensee

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[18] This opinion also serves to explain the continuation of the February 14, 1974, stay order during the preparation of the opinion on the merits. *See* note 88 *infra.*

[19] *In the Matter of Editorializing by Broadcast Licensees,* 13 FCC 1246, 1249 (1949).

has a further duty to present responsible conflicting views.[20] The doctrine, particularly as applied to newscasts and news documentaries, has been given statutory recognition in section 315 of the Communications Act,[21] and has been held to inhere in the "public interest" standard governing the grant of license applications and renewals.[22]

The essential task of the fairness doctrine is to harmonize the freedom of the broadcaster and the right of the public to be informed. Except for limited areas like libel and obscenity, the First Amendment generally forbids government regulation of the content of journalism. Not only is state censorship forbidden, so also is the government prohibited from compelling editors to include state approved material. Even a carefully limited statute giving political candidates attacked on a newspaper's editorial page the right to reply in kind was recently invalidated by the Supreme Court as an unconstitutional encroachment upon journalistic discretion. In *Miami Herald Publishing Company v. Tornillo*,[23] a "right to reply" law—analogous to the personal attack rule that

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[20] *Id.* This duty extends to making free time available if those holding responsible conflicting views are unable to purchase air time. *Cullman Broadcasting Co.*, 40 FCC 576, 577 (1963).

[21] 47 U.S.C. § 315(a) reads in part:

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

[22] *Red Lion v. FCC*, 395 U.S. 367, 379-86 (1969).

[23] 94 S. Ct. 2831 (1974).

is part of the fairness doctrine—was ruled unconstitutional. The "benign" purposes of the state statute were deemed irrelevant:

> [T]he Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental control of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

94 S. Ct. at 2839-40.

But almost from the beginning, the broadcasting press has been treated differently. Congress created the Federal Communications Commission and its predecessor, the Federal Radio Commission, because the available space on the electromagnetic spectrum was far exceeded by the number of those who would use it.[24] It was necessary to ration this scarce resource, for "[w]ithout government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard." [25]

Scarcity required licensing in order to bring order to chaos, but the dangers of control in the hands of a relative few were early recognized. The public interest did

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[24] *National Broadcasting Company v. United States*, 319 U.S. 190, 210-14 (1943).

[25] *Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S. at 376.

not countenance delegation to a few licensees to pursue their purely private interests at the expense of listeners and viewers, and instead the broadcaster was held to have an obligation to serve and inform the public.[26]

Under the fairness doctrine the public is not to be confined to hearing only the views approved by those licensees, but is entitled to be informed of the diversity of opinion in the land, to have that presented by appropriate spokesmen for its consideration and judgment.

The salutary intent of the fairness doctrine must be reconciled with the tradition against inhibition of the journalists' freedom. That tradition, which exerts a powerful countervailing force, is rooted in the constitutional guarantee of freedom of the press, a guarantee that has vitality for broadcast journalists, though not in exactly the same degree as for their brethren of the printed word.[27] And the same statute that provides authority for the FCC to implement the fairness doctrine for its licensees contains a clear provision (in section 326) disclaiming and prohibiting censorship as part of the legislative scheme. In construing the fairness doctrine, both the Commission and the courts have proceeded carefully, mindful of the need for harmonizing these often conflicting considerations.

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[26] Other responses to the dangers of placing control over the broadcast media into the hands of a relative few include: the obligation of the licensee to operate in the public interest, *see* 47 U.S.C. §§ 307(a), 309(a) and 312(a)(2), the chain broadcasting and multiple ownership rules, *see National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) and 47 C.F.R. §§ 73.131, 73.240, and the prime time access rule, 47 C.F.R. § 73.658(k) (1973). *See also Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 112 n.10 (1973).

[27] *See id.* at 117-18, 122.

In *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367 (1969), the Supreme Court approved the Commission's personal attack and political editorializing rules,[28]

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[28] *Red Lion v. FCC*, 395 U.S. at 373-75:

"Personal attacks; political editorials.

"(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

"(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).

"NOTE: The fairness doctrine is applicable to situations coming within [(3)], above, and, in a specific factual situation, may be applicable in the general area of political broadcasts [(2)], above. See, section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 F. R. 10415. The categories listed in [(3)] are the same as those specified in section 315 (a) of the Act.

"(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candi-

which are relatively narrow corollaries of the general fairness obligation. Under the personal attack rules a licensee must afford reply time to "an identified person or group" whose "honesty, character, integrity, or like personal qualities" are attacked in the course of presentation of views on a controversial issue of public importance. The political editorializing rule imposes a reply obligation where the licensee endorses or opposes a candidate for public office.

These rules were the target of sharp attack. The essence of the challenge was that no matter how slight, how narrow, or how precise, any limitation on the freedom of the licensee to broadcast what he chooses perforce violates the First Amendment. Rejecting this contention, a unanimous [29] Supreme Court reminded the broadcaster of the essential difference between the print and broadcast media: the physical limitations of the latter restrict the number of those who would broadcast whereas expression by publication is, at least in theory,

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dates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion." 47 CFR §§ 73.123, 73.300, 73.598, 73.679 (all identical).

[29] Justice Douglas did not participate, and said in *CBS*: "I did not participate in that decision and, with all respect, would not support it." 412 U.S. at 154.

available to all. To posit a First Amendment restriction on government action taken to enhance the variety of opinions available to the viewer is to protect those fortuitous enough to obtain broadcast licenses at the expense of those who were not. In now-famous language the Court stated:

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.[30]

This has become the guiding principle of the fairness doctrine: limitations on the freedom of the broadcaster —even those that would be unacceptable when imposed on other media—are lawful in order to enhance the public's right to be informed.[31] The Court's opinion, written by Justice White, reflects the circumspection of this principle of decision. While rejecting as unfounded claims that the personal attack and political editorializing rules would induce self-censorship by licensees in order to avoid the rigors of compliance with their requirements, the Court cautioned that its judgment might be different "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of

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[30] 395 U.S. at 390.

[31] "Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act." *CBS, supra,* 412 U.S. at 110.

coverage.[32] . . ." And the Court expressly stated that in approving the personal attack and political editorializing rules, it did not "approve every aspect of the fairness doctrine.[33] . . ."

Four years later, in *Columbia Broadcasting System v. Democratic National Committee*,[34] the Court again discussed the fairness doctrine. The Commission had held that licensees could impose a blanket ban on all editorial advertising. An intermediate court ruling that such a ban, even if consistent with the fairness doctrine, violated the First Amendment,[35] was reversed by the Supreme Court, in an opinion by Chief Justice Burger.

In *CBS* the Court reaffirmed the principle that scarcity requires that the broadcast media be treated differently than other forums of expression, but observed that this is not a principle without bounds, that not all regulation can be justified in the name of scarcity. Overzealous invocation of rules such as the fairness doctrine could cause an "erosion of the journalistic discretion of broadcasters in the coverage of public issues." [36]

Journalistic discretion, the Court emphasized, is the keynote to the legislative framework of the Communications Act.[37]

The limitations of broadcasting both spawned the fairness doctrine and establish that it is dependent primarily on licensee discretion. Perfect compliance is impossi-

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[32] 395 U.S. at 393.

[33] *Id.* at 396.

[34] 412 U.S. 94 (1973).

[35] *Business Executives' Move for Peace v. FCC*, 146 U.S. App.D.C. 181, 450 F.2d 642 (1971).

[36] 412 U.S. at 124.

[37] *Id.* at 110-11.

ble. No broadcaster can present all colorations of all available public issues. 412 U.S. at 111. Choices have to be made and, assuming that the area is one of protected expression, the choices must be made by those whose mission it is to inform, not by those who must rule. In the words of Chief Justice Burger:

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is not reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.[38]

There are no other decisions on the fairness doctrine from the Supreme Court, but this court has had occasion to consider the doctrine in several cases and it has endeavored to maintain the balance between broadcaster freedom and the public's right to know. Commercial advertising cases present different considerations than those before us and we need not reexamine the doctrine as there applied.[39] More related to the present issue is the public service announcement discussed in *Green v. FCC*,[40]

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[38] *Id.* at 124-25. This same thought appears in the *Tornillo* case, 94 S.Ct. at 2840 and is obviously an abiding constitutional consideration.

[39] *Neckritz v. FCC*, —— U.S.App.D.C. ——, —— F.2d —— (No. 71-1392, June 28, 1974); *Friends of the Earth v. FCC*, 146 U.S.App.D.C. 88, 449 F.2d 1164 (1971); *Banzhaf v. FCC*, 132 U.S.App.D.C. 14, 405 F.2d 1082 (1968), *cert. denied*, 396 U.S. 842 (1969).

[40] 144 U.S.App.D.C. 353, 447 F.2d 323 (1971).

where we refused petitioners' request to require a licensee to present a point of view on the Vietnam conflict that had already received extensive coverage. In *Green*, as in the instant case, there was some initial difficulty in defining the issue allegedly presented in the offending broadcast. We stated that this determination, as well as the decision as to the number of views to be presented and the manner in which they are portrayed, is one initially for the licensee, who has latitude to make all pertinent judgments and is not to be overturned unless he forsakes the standards of reasonableness and good faith.[41] Reliance on the reasonableness standard, "which is all that is required under the fairness doctrine" [42] preserves

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[41] The Commission has said:

> 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. See par. 9, *Editorializing Report.* 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.

In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 FCC 598, 599 (1964).

[42] 144 U.S.App.D.C. at 360, 447 F.2d at 330.

licensee discretion and serves the essential purposes of the fairness doctrine "that *the American public must not be left uninformed.*" [43]

In *Democratic National Committee v. FCC*,[44] we faced knotty problems in sorting out the fairness obligations generated by a radio and television address by the President and a reply by the opposition political party. In upholding the Commission decision that the licensees had not abused their discretion, Judge Tamm, writing for the court, stressed the importance of reliance on licensee judgment:

> By its very nature the fairness doctrine is one which cannot be applied with scientific and mathematical certainty. There is no formula which if followed will assure that the requirements of the doctrine have been met. Procedurally, *the doctrine can only succeed when the licensee exercises that discretion upon which he is instructed to call upon in dealing with coverage of controversial issues.*[45]

Finding no abuse of discretion, we affirmed.

In *Healey v. FCC*,[46] petitioner claimed to be within the ambit of the personal attack rule, which requires the licensee to afford opportunity to reply to an individual attacked in the course of a discussion of a controversial issue of public importance. As in the case now before us, the critical question was whether the broadcast involved a controversial issue of public importance. Petitioner, an American Communist, claimed that her role as a Communist within her community was such an issue. Judge Wilkey, the author of the *Green* opinion,

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[43] *Id.* at 359, 447 F.2d at 329 (emphasis in original).

[44] 148 U.S.App.D.C. 383, 460 F.2d 891, *cert. denied*, 409 U.S. 843 (1972).

[45] *Id.* at 392, 460 F.2d at 900 (emphasis added).

[46] 148 U.S.App.D.C. 409, 460 F.2d 917 (1972).

pointed out that there is a substantial difference between what is newsworthy, *i.e.*, that which is interesting to the public, and what is controversial:

> Merely because a story is newsworthy does not mean that it contains a controversial issue of public importance. Our daily papers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues.[47]

Converting every newsworthy matter into a controversial issue of public importance and requiring editors to "balance" every presentation creates a danger. Again in the words of Judge Wilkey:

> To characterize every dispute of this character as calling for rejoinder under the fairness doctrine would so inhibit television and radio as to destroy a good part of their public usefulness. It would make what has already been criticized as a bland product disseminated by an uncourageous media even more innocuous.[48]

The principle of deference to licensee judgments, unless the licensee has simply departed from the underlying assumptions of good faith and reasonable discretion, is an integral part of the fairness doctrine, and a fixture that has been reiterated and applied with fidelity by the courts.[49] It is the backdrop against which Judge Tamm's

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[47] *Id.* at 414, 460 F.2d at 922.

[48] *Id.* at 415, 460 F.2d at 923.

[49] *Brandywine-Main Line Radio, Inc. v. FCC*, 153 U.S.App. D.C. 305, 473 F.2d 16 (1972), *cert. denied*, 412 U.S. 922 (1973). Judge Tamm's opinion restated that "[t]he cornerstone of the doctrine is good faith and licensee discretion." That opinion sustained the denial of the application to renew the license only on the ground that the record of the licensee was "bleak in the area of good faith . . . [and] . . . shows an utter disdain for Commission rulings and ignores its own

opinion for the court in the *Democratic National Committee* case takes note, that

> in opinion after opinion, the Commission and the courts have stressed the wide degree of discretion available under the fairness doctrine. . . .[50]

The question is whether NBC has been shown to have exceeded its "wide degree of discretion" in its "Pensions" documentary.

IV. Abstention from Preliminary Issue—Whether Fairness Doctrine Should Be Reserved for License Renewals

A preliminary issue has been presented to us by amicus curiae Henry Geller, Esquire, formerly general counsel of the Commission, and a serious student of the fairness doctrine.[51] Mr. Geller's view is that under the law the FCC could not properly issue the ad hoc fairness ruling on this program, but was limited to consideration of the matter only in connection with NBC's application for renewal of license, and then only to determine if some flagrant pattern of violation of the fairness doctrine is indicated by NBC's overall operation, with a renewal standard, comparable to that voiced in *New York Times v. Sullivan*, 376 U.S. 254 (1964), requiring a showing of "malice"—either bad faith, or "reckless disregard" of fairness obligations.

Initially, it appears, it was the FCC's procedure to refer complaints to the station as received, obtain its

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responsibilities as a broadcaster and its representations to the Commission." 153 U.S.App.D.C. at 333, 335-36, 473 F.2d at 44, 46-47 (1972).

[50] 148 U.S.App.D.C. at 395, 460 F.2d at 903.

[51] *See* H. Geller, The Fairness Doctrine in Broadcasting: Problem and Suggested Courses of Action, (The Rand Corporation, R-1412-FF, Dec. 1973).

response, and then consider the matter definitively at renewal in connection with the overall showing of the station.[52] This practice was being followed in 1959, when the Communications Act was amended to codify the standard of fairness.[53] In 1962, the Commission changed its procedure to resolve all fairness matters as they arose and, if the station were found to have violated the doctrine, to direct it to advise the Commission within 20 days of the steps taken "to assure compliance with the fairness doctrine." [54]

Mr. Geller puts it that the resulting series of ad hoc fairness rulings "have led the Commission ever deeper

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[52] *See* Testimony of Mr. Joseph Nelson, Chief, FCC Renewal and Transfer Division, Hearings before the Senate Freedom of Communications Subcommittee, March 27, 1961, 87th Cong., 1st Sess., Report 994, Pt. 5, p. 21; *see, e.g., Dominican Republic Information Center,* 40 FCC 457, 457-588 (1957).

[53] *See* Section 315(a), 47 U.S.C. § 315(a); *Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. at pp. 380-385.

[54] *See Tri-State Broadcasting Co., Inc.,* 40 FCC 508, 509 (1962). This change apparently occurred in connection with personal attack cases, and was extended without discussion to all fairness cases. The only FCC treatment is in *Honorable Oren Harris,* 40 FCC 582 (1963). Chairman Harris of the House Interstate and Foreign Commerce Committee criticized this new approach, and urged that fairness ". . . be applied periodically (i.e., at the time of renewal) and upon an overall basis." *Id.* at p. 583. In its response, the Commission gave three reasons for its policy of resolving fairness questions at time of complaint rather than awaiting renewal: (1) It is not fair to the licensee to wait; he should have a chance to contest the fairness ruling by appealing to the courts; (2) awaiting renewal is unfair to the public, which then does not have the opportunity to hear contrasting views, such as in programs dealing with ballot issues; and (3) similarly, it would be unfair to candidates in political campaigns.

into the journalistic process, and have raised most serious problems." [55] The effect, particularly on the small broadcaster, has been to inhibit the promotion of robust, wide-open debate. Thus, in a case where the FCC found that a licensee had afforded reasonable opportunity for opposing viewpoints,[56] the FCC process was long (decision 21 months after broadcast) and arduous. The licensee's burden included not only substantial legal (about $25,000) and other expenses (*e.g.*, travel), but also required top-level station personnel to devote substantial

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[55] Amicus Brief at 3-5. These problems, which are under FCC consideration, may be grouped as follows:

(a) Defining balance or reasonable opportunity to afford contrasting viewpoints on an issue.

(b) The stopwatch problem. Apparently, the FCC has on occasion literally used a stop-watch to time the presentations made on the various sides on an issue. *See* Concurring Statement of Chairman Burch in *Complaint of the Wilderness Society against NBC (ESSO)*, 31 FCC 2d 729, 735-739 (1971). *See also Sunbeam TV Corp.*, 27 FCC 2d 350, 351 (1971).

Even an apparently mechanical stop-watch approach involves sensitive judgments in determining whether particular segments of a program tilt for or against, or are neutral on a particular issue.

(c) The "stop-time" program. During the period of FCC consideration, the licensee may offer additional broadcasts (perhaps, to cover new developments). And these may affect the FCC's judgment on whether reasonable opportunity has been presented. *Complaint of Wilderness Society against NBC (ESSO), supra.*

[56] *Sherwyn M. Heckt*, 40 FCC 2d 1150 (1973). Licensee KREM-TV editorialized in favor of an Expo 74 for Spokane, and a supporting bond issue. There was a disparity in the time offered for anti-bond viewpoints. The station rejected an anti-bond spokesman, and was held to have a reasonable explanation (the spokesman did not appear to represent groups for which he claimed to speak). The station showed it had actively sought to obtain the views of leading spokesmen for the opposition, and did present them.

time and attention, with attendant dislocation of regular operational functions. In sum, Mr. Geller says that a substantial inhibiting effect derives not merely from any rulings adverse to the broadcaster, but the strain, time and resources involved in coping with particular challenges even if they are unsuccessful.

Amicus cites expressions in *Columbia Broadcasting System v. Democratic National Committee*, *supra*, rejecting a contention (right of access for editorial advertisements) that would involve the government too much in the "day-to-day operations of broadcasters' conduct," and stating the fairness doctrine, in terms of the legislative scheme and purpose, in these terms, 412 U.S. at 127:

> Under the Fairness Doctrine the Commission's responsibility is to judge whether a licensee's overall performance indicates a sustained good-faith effort to meet the public interest in being fully and fairly informed. The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who should be heard and when.

We have stated the amicus position at some length because we do not wish our opinion to be misunderstood as inadvertent on the point. The position is a serious one, and it deserves serious consideration.[57] The fact that *Red Lion* reviewed a particular ruling is no bar, for this point was not raised. Indeed, even as to points that were raised, the Court was careful to say that it

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[57] The specter of renewal jeopardy for failure to comply fully with the fairness doctrine can have a serious inhibiting effect, as the Commission recognized in saying that it would consider refusing renewal only when a most substantial and fundamental issue is presented. *See Hunger in America*, 20 FCC 2d 143, 150 (1969).

would be alert to reexamine its assumptions upon an appropriate showing.

We do not think, however, that the present case is an appropriate vehicle for determination of the contention presented by amicus. It is resisted by petitioners, who seek reversal but not on this basis, which might enhance their risk. Moreover, it was not expressly considered by the Commission. While amicus states that a copy of the underlying study, see footnote 51, *supra*, was distributed to each Commissioner prior to the Commission's consideration of this case, that is not the same thing as putting the matter in issue in the proceeding. The proposal is one that merits consideration by the Commission before it can be discussed by this court as a legal imperative.[58] We abstain, then, from any determination in this case concerning the merits of the proposition put by amicus curiae.

V. Application of the Fairness Doctrine to News Documentaries

Our assumption of the propriety of the FCC's current practice that it may make rulings whether particular programs violate the fairness doctrine does not lessen our concern as to those rulings; it rather enhances the need for careful scrutiny, particularly where, as here, a ruling is challenged on the ground that it displaces the judgment entrusted to the broadcast journalist.

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[58] Amicus himself recognizes the desirability of particular rulings for the personal attack and political editorializing rules. *See* Amicus Brief at 14 n.28: "[T]hese are specific rule situations which do not involve any 'stop-time' or 'stop-watch' considerations. There is also a need for prompt rulings as to political broadcasts."

A. *The Function of the FCC*

The principal controversial issue the Commission identified for the "Pensions" program is "the overall performance of the private pension plan system." In NBC's submission, the focus of the program was the existence of abuses, of "some problems in some pension plans." While one understands NBC's point as made, it might be refined as a statement that NBC was engaged in a study in abuses and did not separately examine how pervasive those abuses were. On what basis did the Commission reject NBC's position, and accept AIM's view that the point of the program was the performance of the common run of pension plans?

The staff ruling of May 2, 1973, said this (p. 11): 11):

> The Pensions program thus did in fact present views which were broadly critical of the performance of the entire private pension system and explicitly advocated and supported proposals to regulate the operation of all pension plans. Your judgments to the contrary, therefore, cannot be accepted as reasonable.

One is struck by the palpable flaw in the staff's reasoning. The staff actually put it that because the staff found as a fact that the program was broadly critical of the entire private pension plan system, NBC's contrary judgment "therefore" cannot be accepted as reasonable. The flaw looms the larger, in that it appears in the ruling of the staff of an agency operating under the Rule of Administrative Law. Under that Rule, agencies daily proclaim that their findings of fact must be upheld if reasonable and if supported by substantial evidence, even though there is equal and even preponderant evidence to the contrary, and even though the courts would have found the facts the other way if they had approached the issue independently.

The Commission's opinion of December 3, 1973, corrected the staff's error of logic, but it made a mistake of law. It stated (see para. 17, JA 210):

> The specific question properly before us here is therefore *not whether NBC may reasonably say* that the broad, overall "subject" of the "Pensions" program was "some problems in some pension plans," but rather whether the program did *in fact* present viewpoints on one side of the issue of the overall performance and proposed regulation of the private pension system. [emphasis added.]

Thus the Commission ruled that even though NBC was reasonable in saying that the subject of "Pensions" program was "some problems in some pension plans," in determining that this was the essential subject of the program, its dominant force and thrust, nevertheless NBC had violated its obligation as a licensee, because the Commission reached a different conclusion, that the program had the effect "in fact" of presenting only one side of a *different* subject.

The Commission's error of law is that it failed adequately to apply the message of applicable decisions that the editorial judgments of the licensee must not be disturbed if reasonable and in good faith. The licensee has both initial responsibility and primary responsibility. It has wide discretion and latitude that must be respected even though, under the same facts, the agency would reach a contrary conclusion.

The pertinent principle that the Commission will not disturb the editorial judgment of the licensee, if reasonable and in good faith, is applicable broadly in fairness doctrine matters. It has distinctive force and vitality when the crucial question is the kind raised in this case, *i.e.*, in defining the scope of the issue raised by the program, for this inquiry typically turns on the kind of

communications judgments that are the stuff of the daily decisions of the licensee. There may be mistakes in the licensee's determination. But the review power of the agency is limited to licensee determinations that are not only different from those the agency would have reached in the first instance but are unreasonable.[58a]

[58a] Subsequent to the preparation of this opinion, a recent notice setting forth the FCC's present views on the fairness doctrine came to our attention. Fairness Doctrine and Public Interest Standards: Fairness Report Regarding Handling of Public Issues, 39 Fed. Reg. 26372 (1974). That order is presently being challenged on appeal in *National Citizens Committee v. FCC,* No. 74-1700 (D.C. Cir., filed July 3, 1974). In paragraphs 32-35, the Commission considers the problems in "the determination of the specific issue or issues raised by a particular program." The Commission states: "This would seem to be a simple task, but in many cases it is not. Frequently, resolution of this problem can be of decisional importance. . . . [A] broadcast may avoid explicit mention of the ultimate matter in controversy and focus instead on assertions or arguments which support one side or the other on that ultimate issue. [The Commission offers a hypothetical instance of a heated community debate over a proposed school bond, with the broadcast referring to conditions stressed by advocates of the bond although the spokesman does not explicitly mention or advocate passage of the bond.] [We] would expect a licensee to exercise his good faith judgment as to whether the spokesman had in an obvious and meaningful fashion presented a position on the ultimate controversial issue [approval of a bond]. . . . If a licensee's determination is reasonable and arrived at in good faith, however, we will not disturb it." *Id.* at 26376.

We find this exposition congruent with—and indeed supportive of—the approach taken in this opinion. The Commission also states, in a preceding section, that on the question whether an issue is "controversial" and of "public importance" it has not been able to develop detailed criteria, and continues (par. 29): "For this very practical reason, and for the reason that our role must and should be limited to one of review, we will continue to rely heavily on the reasonable,

In *Columbia Broadcasting System v. Democratic National Committee, supra,* the Court stressed the wide latitude entrusted to the broadcaster. See 412 U.S. at 110-111:

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> Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations.
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> * * * *
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> The broadcaster, therefore, is allowed significant journalistic discretion in deciding how best to fulfill the Fairness Doctrine obligations, although that discretion is bounded by rules designed to assure that the public interest in fairness is furthered.

While the government agency has the responsibility of deciding whether the broadcaster has exceeded the bounds of discretion, the Court makes clear that any approach whereby a government agency would undertake to govern "day-to-day editorial decisions of broadcast licenses" endangers the loss of journalistic discretion and First Amendment values. (412 U.S. at 120-21)

What is perhaps most striking and apt for present purposes is the figure used by Chief Justice Burger wherein the licensee is identified as a "free agent" who has "*initial and primary* responsibility for fairness, balance, and objectivity," with the Commission serving as

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good faith judgments of our licensees in this area." *Id.* at 26376.

While the Supreme Court's recent opinions in non-broadcast areas do not undercut a role for the Commission in the fairness doctrine, the underlying principles underscore the appropriateness of confining that role. In addition to *Tornillo,* quoted above, see e.g., *Gertz v. Robert Welch, Inc.,* 94 S.Ct. 2997, 3010 (1974), referring to the "difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not."

an "overseer" and "ultimate arbiter and guardian of the public interest." [59] [Emphasis added.]

Our own decisions [60] amplify these basic propositions. Judge Tamm's opinion for the court in *Democratic National Committee v. FCC*, 148 U.S.App.D.C. 383, 460 F.2d 891 (1972) serves as a compendium and a wrap-up. That opinion refers to:

(1) *Mid-Florida Television Corp.*, 40 FCC 2d 620, 621 (1964), that the mechanics of achieving fairness "is within the discretion of each licensee, acting in good faith."

(2) *Applicability of the Fairness Doctrine*, 29 Fed. Reg. 10416, 40 FCC 598, 599 (1964):

> [T]he 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

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[59] *See* 412 U.S. at 117:

> The regulatory scheme evolved solely, but very early the licensee's role developed in terms of a "public trustee" charged with the duty of fairly and impartially informing the listening and viewing public. In this structure the Commission acts in essence as an "overseer," but the initial and primary responsibility for fairness, balance, and objectivity rests with the licensee. This role of the Government as an "overseer" and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic "free agent" call for a delicate balancing of competing interests. The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a "tightrope" to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act.

While this part (III) of the opinion of Chief Justice Burger was written for himself and Justices Stewart and Rehnquist, this particular paragraph is not contrary to the views of the other justices.

[60] See Part III, *supra*.

> 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 such viewpoints, and all the other facets of such programming.

(3) The concept that the Commission will "exercise substantial restraint in this area." *Id.*:

> [T]he 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.

(4) This court's other opinions [61] and such references therein as "the permissive 'reasonableness' standard of the fairness doctrine." The court therefore concluded (460 F.2d at 903):

> Thus, in opinion after opinion, the Commission and the courts have stressed the wide degree of discretion available under the fairness doctrine. . . .

The range of journalistic discretion is not limited to the issue of how to comply with the fairness doctrine in the details of presenting both (or more) sides of an issue when the issue has been subsequently defined by the Commission. This would be narrow and artificial. In *CBS*, the Court, in discussing the broadcaster's "significant journalistic discretion" under the fairness doctrine pointed out that the licensee must consider "such questions as whether the subject is worth considering" (412 U.S. at 111 & n.9).[62] And the Court cited with

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[61] *E.g.*, in *Green v. FCC*, 144 U.S.App.D.C. 353, 447 F.2d 323, and in *BEM for Vietnam Peace v. FCC*, 146 U.S.App. D.C. at 187, 450 F.2d at 648.

[62] Quoting *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, 1251-2 (1949). *See also* L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 772 (1972). "[T]he broad-

approval a passage, as old as the fairness doctrine itself, wherein the Commission stated that the licensee "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." [63]

Where the Commission has relatively specific rules under the fairness doctrine, as in the personal attack and political editorializing rules, it has a more ample role in determining whether the licensee was in compliance with his obligations. But when the claim is put in terms of the general obligation concerning controversial issues of public importance, there is primary reliance on the journalistic discretion of the licensee, subject to supervision by the government agency only in case he exceeds the bounds of his discretion. This yields as a corollary that if the broadcast licensee was reasonable in his premise, and his projection of the subject-matter of the program, he cannot be said by the supervising agency to have abused or exceeded his sound discretion.

The FCC's function becomes that of correcting the licensee for *abuse* of discretion, as our function on judicial review is that of correcting the agency for *abuse* of discretion.

The Commission in this case agreed that there was wide latitude of journalistic discretion in regard to news and news documentary programs. It said (par. 25), that it "cannot uphold a patently unreasonable exercise of that discretion which would deny the right of the public to be informed as to both sides of a controversial issue which in fact has been presented by such programming."

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caster has considerable discretion in operating the doctrine. He is to decide whether a question raises an issue of public importance."

[63] *Applicability of the Fairness Doctrine, supra,* 40 FCC at 599, approved by the courts in *e.g., DNC v. FCC, supra,* 148 U.S.App.D.C. at 392, 460 F.2d at 900.

The Commission's reference to "patently unreasonable exercise of discretion" by the licensee, as the standard that warrants agency intervention, captures the spirit of the scope of discretion entrusted to the licensee. We need not dwell on abstract issues such as whether a licensee whose exercise of discretion is unreasonable may validly claim it was not "patently" unreasonable; this is more a matter of mood than rule. In this case, we think it plain that the licensee has not been guilty of an unreasonable exercise of discretion. Where the Commission may have started on the wrong path in its approach is the place where the Commission undertook to determine for itself as a fact whether "the program did in fact present viewpoints on one side of the issue of the overall performance and proposed regulation of the private pension system." This is not a sufficient basis for overturning the licensee. It is not clear from the Commission's opinion that it also appreciated the need for a finding of abuse of discretion by the licensee in concluding that no controversial issue had been presented. In any event, we are clear that the licensee's discretion was not abused in this respect.

On this issue, whether there was an abuse of discretion in NBC's determination concerning the subject matter of the "Pensions" documentary, the staff—which did see that this was the real issue—proceeded to resolve it adversely to the licenseee by concluding that NBC was unreasonable in determining that the subject of the program was some problems of private pension plans. The Commission backed away from that staff conclusion.

A substantial burden must be overcome before the FCC can say there has been an unreasonable exercise of journalistic discretion in a licensee's determination as to the scope of issues presented in the program. Where, as here, the underlying problem is the thrust of the program and the nature of its message, whether a controversial issue of public importance is involved presents not a question of simple physical fact, like temperature,

but rather a composite editorial and communications judgment concerning the nature of the program and its perception by viewers. In the absence of extrinsic evidence that the licensee's characterization to the Commission was not made in good faith, the burden of demonstrating that the licensee's judgment was unreasonable to the point of abuse of discretion requires a determination that reasonable men viewing the program would not have concluded that its subject was as described by the licensee.[64]

Here the Commission concluded that the program involved a controversial issue, namely the overall performance of the private pension plan system. If the agency had free rein to make the critical finding we might well support this conclusion as a reasonable exercise of agency discretion. But here the primary discretion was not vested in the government agency but in the licensee. And the agency could not premise any order on a conclusion contrary to that of the licensee unless it was willing and able to take the additional step—which it deliberately avoided—of finding the licensee's conclusion to be unreasonable. "A conclusion may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view." [65]

The situation here is unlike the case of an agency's review of a fact finding proposed by its hearing officer. In that situation, it is the agency that has the primary discretion, and it may differ with its hearing officer even though his finding is supported by substantial evidence.[66] Even there, where the agency has primary discretion, its

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[64] In this regard, see the discussion of the conclusions of professional reviewers, part VI. A, *infra*.

[65] *Western Airlines v. CAB*, —— U.S.App.D.C. ——, 495 F.2d 145, 152 (1974).

[66] *Id.* at ——; 495 F.2d at 153. *Lorain Journal Co. v. FCC*, 122 U.S.App.D.C. 127, 351 F.2d 824 (1965), *cert. denied*, 383 U.S. 967 (1966).

"departures from the Examiner's findings are vulnerable if they fail to reflect attentive consideration to the Examiner's decision." [67] Certainly in a situation where it is the licensee that has primary discretion, and his judgment as to dominant impact is substantially supported by responsible persons skilled in judging these matters, this must be given attentive consideration before determining the licensee's judgment was unreasonable.

B. *The Function of the Reviewing Court*

When an agency purports to exercise regulatory discretion conferred by Congress, a court reviewing its order generally accords wide latitude to the agency. The court has responsibilities and restraints. Its reponsibility is to assure that the agency has not abused or exceeded its authority, that every essential element of the order is supported by substantial evidence, and that the agency has given reasoned consideration to the pertinent factors.[68] The restraint arises out of the consideration that industry regulation has been entrusted by Congress "to the informed judgment of the Commission, and not to the preferences of reviewing courts." [69] If an agency has "genuinely engaged in reasoned decision-making . . . the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards." [70]

In the case of the fairness doctrine, a reviewing court is under the same injunction against injecting its own preferences as the rule of decision. And so when the

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[67] *Greater Boston Television Corp. v. FCC*, 143 U.S.App. D.C. 383, 395, 444 F.2d 841, 853 (1970), *cert. denied*, 403 U.S. 923 (1971), and case cited.

[68] *Mobil Oil Co. v. FPC*, 94 S.Ct. 2328 (1974); *see also Permian Basin Area Rate Cases*, 390 U.S. 747, 791-2 (1968).

[69] 390 U.S. at 767.

[70] *Greater Boston TV Corp. v. FCC, supra*, 143 U.S.App.D.C. at 393, 444 F.2d at 851.

Commission, in the exercise of its discretion, affirms the licensee's exercise of its discretion, the role of the court is most restricted.[71] But the court has a greater responsibility than is normally the case, when it reviews an agency's fairness rulings that upset the licensee's exercise of journalistic discretion, both because the area is suffused with First Amendment freedoms [72] and because Congress has determined that the interest of the public, and its right to know, is furthered by giving primary discretion not to the government agency but instead to the regulated licensee. Congress has sharply narrowed the scope of agency discretion—which the court must see is not exceeded—to a government intervention permissible only for abuse of the licensee's journalistic judgment. If the Commission can claim wide latitude in and deference for its exercise of prerogative to overrule and discard the journalistic judgments of the broadcast licensees, the very premise of the legislative structure is undermined.

In Judge Tamm's phrase, in another case involving a Commission determination that the licensee violated the fairness doctrine, and aspects of intrusion on the licensee's journalistic freedoms: "Not only must the Commission take a hard look at the case in this light but so must this court." [73]

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[71] *E.g., DNC v. FCC, supra,* 148 U.S.App.D.C. at 404, 460 F.2d at 912; *Neckritz v. FCC,* 446 F.2d 501 (9th Cir. 1971), citing *American Tel. & Tel. v. United States,* 299 U.S. 232 (1936).

[72] *Compare WAIT Radio v. FCC,* 135 U.S.App.D.C. 317, 418 F.2d 1153 (1969).

[73] *Brandywine-Main Line Radio, Inc. v. FCC, supra,* 153 U.S.App.D.C. at 341, 473 F.2d at 52 (1972). Judge Wright did not consider the fairness doctrine ruling. Chief Judge Bazelon, dissenting, stated that the Commission's application of the fairness doctrine violated constitutional safeguards.

The general "hard look" doctrine of the Rule of Administrative Law originated in a case reviewing an FCC action,

To restate, even in a fairness doctrine case the court is not given carte blanche or an authority to interpolate its own discretion or judgment as to what should be done by the agency or what should have been done by the licensee. But a court is properly exercising the high judicial function of assuring that agencies respect legislative mandates [74] when it studies the record to make certain that the Commission has not interpolated its own judgment and wrested the primary discretion Congress placed in the licensee, without making the requisite showing of abuse of the licensee's journalistic discretion.

C. *The Need for Selection Latitude of Broadcast and Investigative Journalism*

The doctrine that respects licensee determination, if not unreasonable, concerning the issues tendered in a news broadcast, is a matter of concern for the vitality of broadcast journalism generally, and for investigative journalism in particular.

The Commission's opinion in this case reaffirmed—

> our recognition of the value of investigative reporting and our steadfast intention to do nothing to interfere with or inhibit it. See *WBBM-TV*, 18 FCC 2d 124, 134 (1969); *Hunger in America*, 20 FCC 2d 143, 150 (1969).

In *Hunger in America*, *supra*, it not only commended CBS "for undertaking this documentary on one of the tragic problems of today" but it undertook to clarify its policy as to a claim that a licensee deliberately distorted the news, to avoid concern lest its inquiry in that case

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see WAIT Radio v. FCC, *supra*, though it has been extended to other areas, *see e.g.*, *Natural Resources Defense Council v. Morton*, 148 U.S.App.D.C. 5, 458 F.2d 827 (1972).

[74] *National Automatic Laundry & Cleaning Council v. Shultz*, 143 U.S.App.D.C. 274, 281, 443 F.2d 689, 696 (1971).

"may tend to inhibit licensees' freedom or willingness to present programming dealing with the difficult issues facing our society." 20 FCC 2d at 150. It reiterated the ruling of *ABC*, 16 FCC 2d 650 (1969), that it would require extrinsic evidence of *e.g.*, a charge that a licensee staged news events. "Otherwise, the matter would again come down to a judgment as to what was presented, as against what should have been presented—a judgmental area for broadcast journalism which this Commission must eschew." 16 FCC 2d at 657-58.

In the world of news documentaries, there is inherently an area of "judgment as to what was presented." And if its judgment is not unreasonable, the licensee cannot fairly be held faithless to fairness doctrine responsibilities.

Investigative reporting has a distinctive role of uncovering and exposing abuses. It would be undermined if a government agency were free to review the editorial judgments involved in selection of theme and materials, to overrule the licensee's editorial "judgment as to what was presented," though not unreasonable, to conclude that in the agency's view the expose had a broader message in fact than that discerned by the licensee and therefore, under the balancing obligation, required an additional and offsetting program.

The field of investigative exposures, as the Commission has noted, is one in which "[p]rint journalism has long engaged [and] been commended," [78] and to which broadcast journalism, also part of the press is "no less entitled." Even for print journalism, not subject to the extreme time coverage limitations of broadcasters, a requirement like the Commission's would be considered a "millstone" burdening investigative reporting. We refer to the affidavit supplied to the Commission by J. Edward

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[78] *WBBM-TV*, 18 FCC 2d 124, 134 (1969).

Murray, associate editor of the Detroit Free Press and immediate past president of the American Society of Newspaper Editors. These are representative excerpts:

> The whole process of investigative reporting is a complex and sensitive equation involving editors with high purpose and intuition, reporters with skill and courage, and publishers willing to incur heavy expense and the risk of offending both public opinion and advertisers. This equation, as I said, is powered by the drive to correct evils in the society.
>
> If we weight the equation with the requirement that the press look for, and report, good wherever it finds and reports evil, we might as well forget investigative reporting. We will have overwhelmed it with the deadly commonplace of things as they are.
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> * * * *
>
> [I]t would be commonplace newspaper procedure that if an editor decided that some private pensions are flawed or useless, and published a typical expose to this effect, the expose would simply assume that the majority of private pension plans were more or less in acceptable shape. Otherwise, the forces of both law and business would have corrected so obvious a deficiency.
>
> * * * *
>
> The investigative reporter's thrust is against presumed evils in society. If he must always give an equivalent weight to the good (which is now presumed) in the situation he is investigating, his thrust would become so dulled as to be boring—and unread. Newspapers, including the Detroit Free Press, investigate and expose policemen who are on the "take" in the dope rackets. If an equivalent weight or time must be given to policemen who are not on the "take", the whole campaign becomes so unwieldy and pointless as to be useless.
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> * * * *

> The suggestion of a positive non-expose, in the wake of an original negative expose, falls of its own weight. No one would read it. It would thus be a waste of space. And it would add one more millstone to the already considerable burden of legitimate investigative reporting. (JA 140-42.)

To like effect are affidavits in the record from broadcast journalists.[76]

The basic point merits emphasis: A report that evils exist within a group is just not the same thing as a report on the entire group, or even on the majority of the group. An expose that establishes that certain policemen have taken bribes, or smoked pot, or participated in a burglary ring, is not a report on policemen in general. It may be that the depiction of particular abuses will lead to broader inferences. Certainly severe deficiencies within an industry may reflect on the industry as a whole. When one bank fails, others may suffer a run. But the possible inferences and speculations that may be drawn from a factual presentation, are too diverse and manifold—ranging, as they inevitably must, over the entire span of viewer predilections, characteristics and reactions—to serve as a vehicle for overriding the journalistic judgment.

There is residual latitude in the Commission to condemn the journalist's vision as an unreasonable exercise of discretion. But if the Commission is to condemn a journalist's vision as excessively narrow, it must show that its own vision is broadgauged. Yet here we are reviewing a Commission opinion that says: "It is difficult

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[76] An apt example appears in Mr. David Brinkley's affidavit concerning a program he narrated on highway construction: "I did not think at that time that I was obliged to recite (or find someone to recite) that not all highway construction involves corruption, that many highways are built by honorable men, or the like." JA 132-33.

to see why a network would devote its time and effort to a program with no broad impact or value." (Par. 20). But abuses in an industry are of interest to the public, and merit a documentary, if they exist in any significant amount, even though they are not the general rule. Failures on automobiles are an example. Yet this obvious underpinning for an editorial judgment to run a limited expose was not referred to by the Commission.

The Commission simply neglected our caution in *Healey v. FCC*, *supra*, 460 F.2d at 922:

> Petitioner's basic misapprehension here is a confusion of an issue over newsworthiness with a "controversial issue of public importance." Merely because a story is newsworthy does not mean that it contains a controversial issue of public importance.

The point is fundamental. In a case where NBC has made a reasonable judgment that a program relates to, and the public has an interest in knowing about, the "broken promise" abuses that its reporters have identified in various private pension plans, and there is no controversy concerning the existence in fact of such abuses, then the balancing of the fairness doctrine cannot permit the intrusion of a government agency to make its own determination of the subject and thrust of the program as a report that such abuses feature private pensions generally, and with such enlargement to a controversial status to burden the reporting with the obligation of providing an opposing view of the escalated controversy.

VI. The Present Record Sustains the Licensee's Editorial Judgment Against a Charge of Requisite Bad Faith or Unreasonableness

This is the first case in which a broadcaster has been held in violation of the fairness doctrine for the broad-

casting of an investigative news documentary that presented a serious social problem. We have already stated that the Commission used an unsound legal standard in reviewing the licensee's exercise of discretion. What result ensues—on the record before us—from application of the sound legal standard?

A. *The Issue As to the Issue*

In law, as in philosophy, the task of ascertaining the sound rule or precept often turns significantly on rigor in the statement of the problem. Nowhere is this more the case than in the application of the fairness doctrine, for in regard to the determination that a program raised a "controversial issue of public importance," the first and often most difficult step is "to define the issue." [77]

In holding that "Pensions" presented views advocating only one side of a controversial issue of public importance, the Commission defined that issue in these terms: "that issue being the overall performance of the private pension system and the need for governmental regulation of all private pension plans." (Par. 19).

In so defining the issue, the Commission overruled NBC's judgment. NBC was called to answer AIM's complaint that NBC had given a one-sided view of a controversial issue of public importance—in its "picture of the private pension system of the United States." [78] NBC responded that "Pensions" was primarily designed to expose failures found in some private plans rather than to evaluate the overall performance of the private

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[77] *Green v. FCC*, 144 U.S.App.D.C. 353, 359, 447 F.2d 323, 329 (1971); *Healey v. FCC*, 148 U.S.App.D.C. 409, 412, 460 F.2d 917, 920 (1972).

[78] AIM also said this was a "distorted" picture, but the FCC dropped the "distortion" charge out of the case. *See* text accompanying notes 10-13, *supra*.

pension system and that the program did not urge any specific legislative or other remedies.[79]

The controversial "issue" identified by the Commission reflects a compound of issues—one, whether problems exist in private pension plans generally, and two, whether overall legislation should be enacted to remedy those problems. In aid of analysis, these issues will be discussed separately.

In our view, the present record sustains NBC as having exercised discretion, and not abused discretion, in making the editorial judgment that what was presented, in the dominant thrust of the program, was an expose of abuses that appeared in the private pension industry, and not a general report on the state of the industry. If this judgment of NBC may stand, there is no showing of a controversial issue. The staff's ruling that NBC was unreasonable in this judgment was not sustained by the Commission. And in our view, the present record does not establish a basis for the conclusion that the licensee's judgmental conclusion may be set aside as unreasonable and as constituting an abuse rather than a permissible exercise of discretion.

1. *The description of the program in TV columnist reviews.*

NBC offered the Commission an exhibit showing the appraisal of some 25 television critics who reviewed the program, appraisals made contemporaneously, in September, 1972, immediately or shortly after the broadcast.

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[79] Letter of February 14, 1973 to FCC (JA 40), recording NBC's judgment that the program "constituted a broad overview of some of the problems involved in some private pension plans" and "did not attempt to discuss all private pension plans, nor . . . urge the adoption of any specific legislative or other remedies." JA 41.

Typically, the critical comments were favorable, reporting that the program was an important and worthwhile public news service, "superlative investigative reporting." Many noted that most viewers were likely glued elsewhere, as was apparently the case, though perhaps one may take heart from Clarence Peterson's observations in the Chicago Tribune: "Most viewers will have watched Marcus Welby instead but it takes only a few hard-nosed skeptics to rattle the cage."

More important for present purposes are the reviewers' descriptions of the program. These appear in Appendix B to this opinion. In general, the reviewers' appraisals of the nature of the program are consistent with NBC's editorial judgment. Examples include the Philadelphia Daily News: "A potent program about pitfalls and failures of some private pension plans of business and unions . . . it was an angry, incisive study that focused on some people who felt cheated by their blind faith in Pensions." More succinct was UPI: "Tough study of the failure of some private pension systems."

The note that the program undercut a "blind faith" in pensions program was struck in a constructive way in reviews like that in the Chicago Tribune: "Pension administrators may face some hard questions from employees when they get to work this morning. If so, NBC Reports will have done its job."

Other comments cut from a different angle. Thus, the review in Business Insurance put it: "The program was by no means objective; it could not have been . . . there was just not enough time to do it thoroughly. [Newman did] point out that there were many good pension plans." The Denver Post said the documentary had "a disorganized approach" and added: "Likewise nothing was said about what makes good pension systems work . . . but

NBC should be commended for publicizing a condition of social anarchy." And intervenor AIM brings to our attention that John J. O'Connor in the New York Times has written: "The NBC program strongly implied that 90 per cent were failures. The title was, 'Pensions: The Broken Promise,' not 'Pensions: Broken Promises.'" AIM stresses that reviews in the Boston Globe, Chicago Today and Hollywood Reporter, reflected reactions to the program as commenting on the private pension system as a whole.

The Commission's opinion dismissed the newspaper reviews. It stated its determination of the question must rest with the program itself, and added (fn. 4): "Such brief and general one-line summaries provide no information as to what particular views on the subject of pensions may have been presented in the one-hour documentary, and hence are of little value in determining the applicability of the fairness doctrine. . . ."

Obviously, television reviews cannot be conclusive, for the obligation of licensees and the Commission to determine fairness doctrine questions is not delegable. The opinion of this court does not depend in any critical measure on television reviews. Yet we are here concerned, not with some broad question of fairness doctrine responsibility, but with something that is not only closer to a question of fact—the description of the program—but is a matter on which the reviewer is expected to make an accurate report to the public as his primary task. Even if the Commission believed the reviewer to be wrong, it should have considered whether the review did not have more than minimal value on the issue of the NBC's reasonableness in saying that the subject of the program was that of abuses discovered, of some problems in some pension plans. If this was the

primary thrust of the program, as discerned by persons trained to view such programs attentively and report their description to the public, it is a substantial factor —though, we repeat, not a conclusive one—to an agency exercising its surveillance role under correct standards of review. As for the Commission's comment that the brief format itself undercuts any significance for these newspaper reviews, this is belied by the quite different reactions recorded in the different newspaper reviews. paper reviews.

2. *Application of the correct standard.*

Had the Commission applied the correct standard of review, the consequence clearly would have been an acceptance of NBC's position as a reasonable statement of the subject of the "Pensions" broadcast. There were a few explicit statements of views on the overall performance of private pension plans that are of no consequence in terms of fairness doctrine, as will be presently seen.* Otherwise, the plain heft of the program was the recitation of case histories that identified shortcomings of private pensions, and various interviews that identified the abuses in more general terms. But effective presentation of problems in a system does not necessarily generate either comment on the performance of the system as a whole, or a duty to engage in a full study. This is plain from our discussion of investigative journalism.

The licensee does not incur a balancing obligation solely because the facts he presents jar the viewer and cause him to think and ask questions as to how widespread the abuses may be.

The licensee's judgment on an issue of investigative journalism is not to be overturned unless the agency

* In Part V-B.

sustains a heavy burden and makes a clear showing that the licensee has been unreasonable, that there has been an abuse of journalistic discretion rather than an exercise of that discretion. We have been presented no basis for sustaining the view that there is such unreasonableness on the part of a licensee who presents undisputed facts—and no party has contended that the abuses identified by NBC do not exist—because it has failed to treat them as a general indictment of a system.

B. *Comments on the "Overall" Performance of the Private Pension Plan*

In previous sections of this opinion we have identified the dangers to broadcast journalism, and investigative reporting in particular, if descriptions of abuses in a system are converted inferentially into a broadside commenting adversely on the overall system.

A separate question is presented, however, by the comments in the program that differs from the description of particular evils.

1. *Adverse comments on overall performance.*

We examine, seriatim, those passages of the "Pensions" program that may be taken as adverse comments on overall performance. We need not refine whether a fairness doctrine obligation is generated by this kind of comment, either alone or with some kind of FCC determination. For in this case, as we shall see, NBC provided offsetting material on the overall performance of pension plans. But this discussion will at least identify our concern with some of the problems. As we shall see, some statements are unquestionably to be given a different reading.

(1) The short passage spoken by a MAN (Tr. 1), who begins that the pension system is essentially a consumer

fraud, and ends by saying it is "an insurance contract that can't be trusted." *Overall-Adverse.*

(2) Edwin Newman's statement (p. 2) that the availability of annual reports filed in the Labor Department "is a meager protection for the twenty-five million Americans who are in private pension plans."

Neither this nor the next sentence, that "very many of the hopes will prove to be empty" says that all, or even most, of the 25 million Americans will be unprotected. The statement that the mere filing of the reports is meager protection hardly seems controversial, as to the "very many" whose pension hopes will be lost by e.g., inability to meet stringent vesting provisions.

(3) Herbert Dennenberg, at Tr. 4: Paragraph ending "most pension funds are inadequate." This is *Overall-Adverse—Arguable.*

(a) Mr. Dennenberg says that those who retire under the plans typically receive only a thousand dollars a year, which is inadequate even with social security. This is a general comment, but we do not see what has been identified as a controversial issue. AIM's complaint of November 27, 1972, stresses:

> More than 5 million retired employees are receiving benefits from them [the plans] to the tune of about $7 billion a year.

This datum in AIM's complaint palpably confirms rather than contradicts $1,000 as a typical figure.[80] But if there is a controversial issue here which requires reference to AIM's datum, then it should be noted that this very fact was brought out on the "Pensions" program

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[80] And AIM later cited with approval a Washington Post article that quoted Mr. Donald Landay of the Bureau of Labor statistics as saying: "The median benefit being paid is slightly over $100 a month."

by Mr. Russell Hubbard of the National Association of Manufacturers (see Tr. 18).

(b) Whether a $1,000 annual amount is "adequate even with social security, is a value question.

The complaint of inadequacy of pensions is also, perhaps, one meaning that might be given to the caption of "broken promise"—if one posits that there was a promise of an "adequate" retirement income. There is plainly no unreasonable abuse of discretion for the licensee to determine that the complaint of "inadequacy," though surfacing in the program, is simply not the main thrust of the program, which basically turns on whether pension plans do pay out the amounts that were held out to the employees when their work was done, and if not, why not. The FCC, disagreeing with its staff, has held the fairness doctrine would be both unworkable, and an intolerably deep involvement in broadcast journalism, if every single statement, inference, or sub-issue, could be built up into a requirement of countering presentation.[81]

(c) Mr. Dennenberg also says that over half the people will have nothing at all from pension plans. See also Tr. 5: "There have been studies that indicate that most people won't collect." Under current plans, pension rights depend on a combination of longevity, endurance in specified employment for a minimum vesting period, and lack of termination of the plan, and Mr. Dennenberg describes this as "an obstacle course."

Again AIM does not contradict the basic fact asserted by Mr. Dennenberg. Its complaint compares 5 million receiving pensions with 30 million workers now covered. But it does not assert that the number who worked under

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[81] *In re NBC* (Fairness ruling re Aircraft Owners and Pilots Assn.), 25 FCC 2d 735, 736 (1970).

pension plans but have failed to qualify for pensions stands below 5 million. And Mr. Dennenberg's statement is not too different in impact from one in a Washington Post article that AIM lauds as balanced journalism.[82] Obviously a greater burden would have to be met by the FCC in identifying the existence and nature of a controversial issue of importance.

(4) Senator Harrison Williams (Tr. 4-5). Following a statement by Mr. Newman that many plans have restrictions and exclusions buried in fine print, comes Senator Williams' comment that the plans "suggest the certainty of an assured benefit upon retirement" which gives "a sense of false security."

> Newman: Senator, the way private pension plans are set up now, are the premises real?
> Williams: The answer is, they are not.

Senator Williams enlarges that he wants descriptions of the realties of plans that are clear and that do not require a lawyer.

Here again we have a general comment on the plans, that the eligibility requirements are not clearly identified. But we do not see wherein this comment has been identified by AIM, the Commission or its staff, as inaccurate, or as presenting a controversial issue.

(5) Victor Gotbaum (Tr. 12).

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[82] After referring to instances of pensions lost by Mr. Duane, and by an employee whose company went out of business, the Post article states:

> These are not simply isolated horror stories. Experts say up to half the 30 to 35 million people now in jobs with pension plans may never receive a cent, because of shifts to another job, company shutdowns or employer bankruptcy—a prospect that threatens millions of Americans with economic insecurity in old age.

The Post article is discussed further in fn. 86 and text thereto.

In these four lines appears: "Pensions in the private area are a mockery." *Overall-Adverse.*

(6) Edward Kramer (Tr. 12-13): Mr. Kramer and Mr. Gotbaum identify the feelings of people who have retired only to find they are living in squalor. These people, says Mr. Kramer, feel "cheated by the pension system, cheated by social security." This is essentially a complaint of the inadequacy of amounts of payments, rather than denial of pensions. See comment as to Mr. Dennenberg under (3).

(7) Mr. Ralph Nader (at Tr. 18): "I think time is running out. On the private pension systems. And it [sic] its abuses continue to pile up, and if its enormous popular disappointments begin to be more and more revealed, it might collapse of its own weight, and social security will have to take up the slack." *Overall-Adverse.*

2. *Favorable comments on overall performance.*

Toward the conclusion of the program, comments were made, by Messrs. Hubbard, of the National Association of Manufacturers, and Anderson of the Bank of America, which the Commission recognized as generally favorable to the performance of the private pension plan system:

> HUBBARD: Over a good number of years, the track record is excellent. It's unfortunate that every now and then some of the tragic cases make the newspapers and the headlines. But it's a question of perspective and balance. When you consider that there are thirty million people covered by the plans, that there are five million people receiving about seven billion dollars in benefits. I think that's a pretty good record. That's not to say that there aren't a few remaining loopholes that need closing

but we ought to make sure that we don't throw out the baby with the wash water. (Tr. at 18.)

ANDERSON: You must remember that the corporation has set this plan up voluntarily. They have not been required by law to set it up. (Tr. at 18.)

ANDERSON: These pension plans are a part of a fringe benefit package. Like hospitalization insurance and so forth, but it's still a voluntary thing on the part of the corporation. (Tr. at 19.)

NEWMAN: This has been a depressing program to work on but we don't want to give the impression that there are no good private pension plans. There are many good ones, and there are many people for whom the promise has become reality. That should be said. (Tr. at 19.)

Moreover, Mr. Newman, earlier in the program, made specific reference to some generally good pension programs operated by Teamsters Unions:

NEWMAN: . . . [I]n most respects, the pension programs run by the Chicago teamsters union locals are among the best. Benefits are generous and a teamster can retire as early as age fifty-seven. (Tr. at 9-10.)

C. *Reasonable Balance*

As the foregoing shows, there were a handful of comments on "overall performance" of the private pension plan system. Some were favorable, more were adverse, but there was adequate balance of both sides of that issue and a reasonable opportunity for presentation of both sides of that issue. The fairness doctrine "nowhere requires equality but only reasonableness." *Democratic National Committee v. FCC, supra*, 148 U.S.App.D.C. at 397, 460 F.2d at 905. On this aspect of the program, the FCC did not say, and in our scrutinizing review we do not consider it could rightfully say, that the

licensee had failed to provide a reasonable opportunity for the presentation of contrasting approaches.

We repeat that Mr. Hubbard of N.A.M. brought out the fact given primary stress in AIM's complaint—that 5 million retirees were receiving $7 billion under private pension plans. As for AIM's notation that only 1 percent of pension plans have been terminated, while this precise statistic was not mentioned by Mr. Hubbard, he made the basic point that the overall track record is excellent, and the question is one of perspective and balance.

D. *The Non-Controversial Nature of the Issue Whether Some Reform Legislation Should Be Enacted.*

The FCC concluded that the "Pensions" program "supported proposals to regulate the operation of all private pension plans." NBC does not deny, and it would be patently unreasonable for NBC to deny, that it broadcast its view that there was a need for legislative reform. We refer to Edwin Newman's concluding paragraph, in which he capped his notation that the situation involved various technical problems (portability, funding, insurance, fiduciary relations) by saying (Tr. 20):

> These are matters for Congress to consider and, indeed, the Senate Labor Committee is considering them now. They are also matters for those who are in pension plans. If you're in one, you might find it useful to take a close look at it.
>
> Our own conclusion about all of this, is that it is almost inconceivable that this enormous thing has been allowed to grow up with so little understanding of it and with so little protection and such uneven results for those involved.
>
> The situation, as we've seen it, is deplorable.

An entirely different problem is presented by the Commission's conclusion that there was a controversial issue in "the need for governmental regulation of all private

pension plans." The Commission stressed (para. 19) that at the time of the program "Congress was engaged in a study of private pension plans and considering proposed legislation for their regulation—legislation which was opposed in whole or in part by various private and public groups and spokesmen."

The fairness doctrine would require that when a controversial bill is pending, if advocates of its passage have access to a licensee's facilities, so must opponents.[83] But the Commission wholly failed to document its premise that there is a controversial issue in the assertion that there is a need for some remedial legislation applicable generally to pension plans. The record does not support the Commission's statements in its opinion (at para. 16, 23):

> . . . NBC does not dispute the Bureau's finding that at the time the "Pensions" program was broadcast the overall performance and proposed regulations of the private pension system constituted a controversial issue of public importance within the meaning of the fairness doctrine.[3]
>
> * * * *
>
> NBC does not dispute that there are many private and public groups and spokesmen who oppose the view that the overall performance of the private pension system is so "deplorable" as to require remedial legislation.

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[3] The Bureau based this finding on AIM's uncontradicted submissions that proposals for the regulation of all private pension plans were pending before the Congress and that such proposals were opposed in whole or in part by "various groups and spokesmen including the National Association of Manufacturers, several labor unions, the Chamber of Commerce of the United States, and the Nixon administration." 40 F.C.C.2d 958, at 967.

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[83] *In the Matter of Editorializing by Broadcast Licensees*, 1-3 F.C.C. 1246, 1250-51 (1949).

There was no occasion for NBC to reply to a claim that was never made. AIM's complaint to the FCC dated November 27, 1972, made no reference whatever to a stand on legislation as a controversial issue; it said criticism of pension plans was such an issue. AIM's letter to NBC dated December 6, 1972, stated that it was struck by a reference in NBC's letter to the FCC that it had concluded that a program on pensions would be timely in view of Senate Reports 92-1150 and 92-1224. AIM added that this bill was opposed by some labor unions, the Chamber of Commerce and the NAM. AIM added: "While your program did not endorse any specific legislative proposal, it did emphasize the need for new regulatory legislation and it pointed out that the Senate Labor Committee had the matter under consideration." From this circumstance, and the fact that Senator Schweiker had inserted the transcript of the Pensions program in the Congressional Record for October 3, 1972, as dramatically showing the need for pension reform,[84] AIM evolved a contention this was a program "inspired by a contested legislative proposal" and presenting one side of that contest. Neither the staff nor the Commission supported AIM's efforts at such extrapolation or extreme conjecture.[85]

This case does not involve any controversial issue derived from favoring certain specific proposals under con-

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[84] 118 CONG. REC., S 16,599 (daily ed. Oct. 3, 1972). Senator Schweiker stated: "This outstanding television special portrayed vividly the plight of the individual worker who is faced with the loss of expected pensions because of situations totally beyond the worker's control."

[85] AIM's pleading in this court goes so far as to say: "AIM has suggested that NBC produced the documentary in collaboration with the promoters of this legislation with the intention of arousing public opinion in favor of the legislation in question." AIM's Opposition to Motion for Expedited Appeal at 3.

sideration by Congress.[86] And AIM did not contend before the FCC that at the time of the broadcast there were any significant groups opposed in principle to the idea of remedial legislation. Since NBC was not called on to dispute what was not asserted, the staff's statement is lacking in support and too lifeless to be a basis for a key Commission premise.

AIM transmitted a Washington Post article on pensions as one "exemplifying good journalism." In certain respects, the Post article, which recites the case of Stephen Duane (A&P) and others, and states these are not simply isolated horror stories (see fn. 82, *supra*) resembles the NBC program. In other respects it is different, for the Post article does undertake to examine and analyze the different specific legislative proposals made, and the arguments for and against, including "strong business and Nixon administration opposition to some of the more stringent reform proposals." But the fact that the Post ran an article on specific legislative proposals, their pros and cons, does not mean NBC was obligated to do so. In NBC's program Edwin Newman said that the question of particular approaches was difficult, beyond the scope of the program and "matters for Congress to consider."

We know as judges, as we knew as lawyers, that there is a profound difference between the kind of materials that can be presented effectively in oral form (on argument) and in written form (in briefs).

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[86] What the Post article indicated were controversial issues in regard to legislative matters related to items as to which no sides were taken in The "Pensions" broadcast—such as issues as whether regulation should be by the Labor Department, a new agency, or through the Internal Revenue Code; details of eligibility, vesting formulae, funding, portability, fiduciary duties and disclosure standards.

NBC specifically pointed out to the Commission on appeal that the Post article esteemed by AIM had stated: "The problem, then, is not whether there will eventually be pension reform legislation, but what kind." [86]

NBC's letter of July 13, 1973, called the Commission's attention to the wide span of sources supporting some form of remedial legislation.[87] And NBC specifically emphasized that there was no indication of any meaningful view opposing the concept of some reform legislation (JA 163, 171-172):

> In the 786 page transcript of the most recently published Congressional hearings with respect to pensions, in which 35 witnesses testified on all sides with respect to pensions, *not one* took the position that some kind of meaningful reform (usually mandated by legislation) of the pension system was unwarranted or should not be instituted. (*Hearings of Subcommittee on Labor of the Senate Comm. on Labor and Public Welfare*, US Senate, 93rd Cong., 1st Sess., 1973.) Nor is that view attributed to anyone in the *Washington Post* article on pensions annexed to Mr. Kalish's letter, the article that has apparently been awarded the AIM *imprimatur* for "good" journalism (p. 13). (Emphasis in original.)

In the light of this record, it is plain that while the "Pensions" program recommended that legislation regulating pension plans be passed, it did not address controversial issues, and there is no reasonable basis for invoking the fairness doctrine on this ground.

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[87] The letter noted, *inter alia*: "Support for some form of remedial legislation has come, for example, from the American Bankers Association, American Life Insurance Association, American Society for Personnel Administration Members, American Society of Pension Actuaries, Chamber of Commerce of the United States, Investment Counsel Association of America and the National Association of Manufacturers.

VII. Conclusion

The First Amendment is broadly staked on the view that our country and our people—rich in diversity of strains and viewpoint—is best served by widest latitude to the press, as broadening input and outlook, through a robust and uninhibited debate that is subject only to minimum controls necessary for the vitality of our democratic society.

The Court has sustained the fairness doctrine in broadcasting as an instance of a necessary control in the public interest. The broadcaster cannot assert a right of freedom of press that transcends the public's right to know. But application of the doctrine must still recognize the enduring values of wide latitude of journalistic discretion in the licensee. And when a court is called on to take a "hard look" whether the Commission has gone too far and encroached on journalistic discretion, it must take a hard look to avoid enforcing judicial predilections.

And so it is that a natural judicial tendency to respond to such conditions as conciliation, and recognition of the other's viewpoint in the broad interest of fairness, must yield to a vigilant concern that a government agency is not to intervene or burden or second-guess the journalist given primary discretion and responsibility, unless there is documentation of unreasonableness on the part of the licensee.

The foregoing observations are supported by, and indeed are a distillate of, pertinent decisions—including notably the opinions of the Supreme Court in *CBS v. DNC*, *Tornillo*, and *Red Lion*—all of which have been carefully studied and discussed.

Their application to this case convinces us that the Commission did not guide itself by the appropriate re-

strictive standards. The Commission has not acted in a rigidly bureaucratic manner, and it has in good faith sought to meet its responsibilities under the Act. There are areas where the Commission's duty of surveillance is considerable, and where there have been abuses on the part of licensees. But we are here concerned with the area of investigative journalism, there there is greatest need for self-restraint on the part of the Commission, and for keen awareness of the inhibitory dimension of impermissible intrusion of a government agency. Investigative journalism is a portrayal of evils, and there may be a natural tendency to suspect that the evils shown are the rule rather than the exception. But the question is not the Commission's view of what was broadcast, and what would have been reasonable if it were the Commission's role to determine what should be broadcast, but whether the licensee, who had this role, had been demonstrated to have maintained an approach that was an abuse rather than an exercise of its discretion.

We find no basis for the Commission's conclusion that the need for reform legislation in the pensions field was a controversial issue. There are controversies as to specific proposals, but they were not the subject of the Pensions broadcast.

The complaint is made that a more balanced presentation was made in a newspaper article that did consider specific proposals and their various pro's and con's. But there are different strengths and weaknesses in printed and oral presentation, as lawyers and judges well know, and it would be an impermissible intrusion on broadcast journalism to insist that it adopt techniques congenial to newspaper journalism. This approach might well undercut the particular values, of intensity of communication through interviews, that make broadcast journalism so effective in enhancing public awareness. The fairness doctrine—which rests, says *Red Lion*, on

the distinctive characteristic of broadcasting—cannot be applied by the government to alter broadcasting's distinctive quality.

We have analyzed the various segments of the "Pensions" broadcast, and have not found them to justify the Commission's invocation of the fairness doctrine. We also take account of the Commission's statement that its decision was based upon the "overall impact" of the program. In some fields, the whole may be greater than the sum of its parts—according to the precepts of Gestalt Psychology. In general, however, the evils of communications controlled by a nerve center of Government loom larger than the evils of editorial abuse by multiple licensees who are not only governed by the standards of their profession but aware that their interest lies in long-term confidence. The fairness doctrine requires a demonstrated analysis of imbalance on controversial issues. This cannot be avoided by recourse to a subjective and impressionistic recording of overall impact.

This has not been an easy case to decide. But after sorting out all the strands of decision, we conclude that the Commission has not presented a justification sufficient to sustain its order under review.[88] The case will

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[88] We conclude our opinion on the merits with a brief comment explaining that it has not been mooted by the passage of the Employment Retirement Income Security Act of 1974 (Public Law 93-406) signed by the President on Labor Day, September 2, 1974, while this opinion was being distributed to our colleagues for information, and readied for publication. First, the passage of the act does not technically moot any aspect of this case because legislation is always subject to reconsideration and modification. Second, we think the principle of *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515-16 (1911) on recurring controversies is properly invoked.

Third, this opinion sets forth the reasons for maintenance of the stay pending appeal (*see* note 18 and text thereto). The case was expedited because the pensions bill was on a cur-

be remanded to the Commission with instructions to vacate its order adopted November 26, 1973.

So ordered.

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rent legislative time table. Following oral argument on the merits the panel voted, with one dissent, that it would vacate the Commission's order, and continue the stay pending preparation of the opinion. All votes are subject to reconsideration, and if in the course of preparation of the opinion it had become evident that an opinion for reversal "would not write," the court would have reversed course. But the court continued to adhere to its vote, and this opinion on the merits is also, therefore, an opinion explaining why the court continued its stay in effect.

APPENDIX A

NBC REPORTS

PENSIONS: THE BROKEN PROMISE

September 12, 1972

N B C

ANNOUNCER: Tonight NBC reports on Pensions: The Broken Promise.

MAN: I figure I had twenty-three years seniority filled up, possibly last up until I was in my forty year sometime at least before I retired and then to look back and see it all fallen away. Everything that you planned on. Just seems like a waste of time.

WOMAN: There must be thousands maybe millions of them that's getting the same song and dance that my husband got. When they reach their time for retirement there is no funds to pay them.

MAN: This man, Hoffa, on there, retired with a one point seven million dollar lump sum pension. And I can't get three hundred dollars a month out of them on there for my retirement.

MAN: Where does all this money go that's been paid into these pensions.

MAN: The pension system is essentially a consumer fraud, a shell game and a hoax. As a matter of fact, when you say it's a consumer fraud, you pay it an undue compliment, because typically you think of consumer frauds in terms of short transactions, the purchase of an automobile, the purchase of a pair of pants, but with the pension system you really have a long term contract that may run fifty or a hundred years that's designed

to guarantee the security of our population. Essentially, you have an insurance contract that doesn't perform. You have an insurance contract that can't be relied on. You have an insurance contract that can't be trusted.

[Tr. 2]

MAN: And I think it's a terrible thing in this country where men who work forty-five years have to eat yesterday's bread. And I don't want to compete on my old age against other old men on old age running down a supermarket aisle to get dented cans and stale breads. I don't want to look forward to it. So I really have nothing to look forward to at sixty-five.

(DANCE MUSIC)

EDWIN NEWMAN: This is a story about ordinary people with the modest hope to finish their working careers with enough money to live in dignity. That is a modest hope but it's one that is all too often not realized.

* * * *

NEWMAN: There is a widely held belief in this country that public disclosure is a good thing that it inhibits misconduct and helps to keep people honest. That's why these files are full of pension plans, private pension plans. Under the law, all such plans must submit annual reports on their activities to the Department of Labor. And these annual reports wind up here, roughly thirty-four thousand of them in a building in Silver Spring, Maryland, just outside Washington.

The Labor Department has the right to audit them and to a limited extent, where wrongdoing is discovered, the government may prosecute. Also, the reports are available to anybody who asks to see them, but as it works out that is a meager protection for the twenty-five million Americans who are in private pension plans.

There are millions of hopes and dreams in these files. If experience is any guide, very many of the hopes will

prove to be empty and dreams will be shattered and the rosy promises of happy and secure retirement and a vine covered cottage will prove to be false.

Understandably, there's a good deal of bewilderment about this and bitterness among those who find nothing where they thought that pension plan payments were going to be. The Labor Department therefore receives in addition to the annual reports of pension plans complaints about them and appeals for help. A lot of these are passed along by members of Congress.

For example:

WOMAN: I understood that I was covered under a very good pension plan to which I did not contribute. It was a hundred [Tr. 3] percent paid by the company. But it did mean a lot to me and I had several other job offers which I refused or didn't even consider because I knew I had security to build up for the future.

MAN: I started when I was nineteen years old.

NEWMAN: Steven Duane (?) used to be a warehouse foreman for the A&P supermarket people in New Jersey. Eighteen months ago the A&P closed the warehouse and discharged the men who worked there. Duane lost all his years of pension credits.

DUANE: . . . in my old age I would be happy and secure in the pension and the benefits that I thought I had with the A&P.

WOMAN: At the end of these fifteen years, the company was bought out and the new owners decided to close down the air (?) division so I had less that a week's notice and I was let go as well as everybody else in the air division with no severance pay, nothing, absolutely out in the street, after fifteen years with nothing.

DUANE: When the time came to talk about the pension, we were (UNCLEAR) . . . we did have books but

nobody took bother in looking at the book, so you feel you're going to be pensioned and that's it. So when they finally told us that the men had to be fifty-five years and over to collect a pension, I was the big loser. I had a brother the same time as me down there. We were the big losers. Thirty-two years of our life was given up and we had nothing, absolutely nothing to show for it.

NEWMAN: Duane discovered what a lot of other people have, that it's not easy for a man in his fifties to find a new job. He wound up as a laborer in another warehouse, where he has to compete with much younger men. But no matter how hard Duane works, it's almost certainly too late for him to start building pension credits again.

DUANE: It's a terrible experience, an experience I would never like to see anybody else go through. That is why I feel so deep about this pension so that future men won't feel like I do. You wake up in the middle of the night, in a cold sweat, knowing all your work, all your life has gone down the drain. I was just number, number seventy-two was my number. No Steven Duane or a worker. I worked, I remember, I had seventeen years with only four days out. But what does that mean to them? That means nothing. They just turn you out in the street because it's an economy move. [Tr. 4] I personally wrote a letter to the president of the A&P, not yelling at him, I want to discuss some kind of moral obligation. Just me and him, how does he feel, how does he put his head on the teller(?) knowing that you have men walking the streets. I don't know. It's very—It's a deep emotional thing with me. Sometimes I'm ahead of it. Sometimes I'm not. That's my feelings on the thing.

RALPH NADER: We've come across in our questionaires and other surveys, some of the most tragic cases imaginable. Where people who worked for twenty-

five thirty years and just because of a tiny quirk in the pension plan's fine print, they don't get anything.

HERBERT DENNENBERG: When you get to be sixty-five, you're out of work and you need a source of money and that's what a pension plan is supposed to do. Unfortunately, it's woefully inadequate. Over half the people have nothing at all from pension plans and those that do typically have only a thousand dollars a year so even if you have social security, most pension funds are inadequate.

SAM ZAGORIA: And there are a lot of people who just believe because something is printed and because they've heard some glowing words about it, that that means it's a lead pipe thing, that they're actually going to have it when they need it. It may not be so.

NEWMAN: Many employees form their ideas about pensions by reading the slick brochures that their company or union gives them. Most of these booklets do make a pension seem a sure thing. The many restrictions and exclusions are buried in fine print or concealed by obscure language.

The Senate Labor Committee has been looking at these brochures as part of its general study of the pension problem. Senator Harrison Williams is chairman of the committee.

SENATOR WILLIAMS: I have all kinds of descriptions of plans here and all of them just suggest the certainty of an assured benefit upon retirement. Here's a man—this was from a brewery, sitting relaxed with a glass of beer and checks coming out of the air; well, you see, this gives a false hope, a sense of false security.

NEWMAN: Senator, the way private pension plans are set up now, are the promises real?

WILLIAMS: The answer is, they are not.

[Tr. 5]

NEWMAN: So you want to get some reality behind the premise, Senator?

WILLIAMS: Exactly. We don't want just these golden general descriptions of what can be expected under the plan; we want clear and precise and understandable descriptions of the reality. The worst example that I've seen is this description that is wholly unintelligible to anybody but an advanced lawyer.

NEWMAN: If an employee makes the election provided for, is that the one?

WILLIAMS: Yes.

NEWMAN: If an employee makes the election provided for in Subparagraph Two of Paragraph B of this Section Six, his monthly pension is determined under either Section Three or Subparagraph One of Paragraph A of Section Four whichever applies, shall be reduced by the percentage set forth in Paragraph C of this Section Six as if the employee has made the election provided for in Subparagraph One of Paragraph B of this Section Six and shall be further reduced actuarily on the basis of the age of the employee and his spouse at the time such election shall become effective. The sex of the employee and the spouse and the level of benefits in the election provided in Subparagraph One of Paragraph B of this Section Six.

Maybe I didn't read it very well.

WILLIAMS: Well, of course, you understood it though.

DENNENBERG: It's almost an obstacle course and the miracle is when someone actually collects with the plan. There have been studies that indicate that most people won't collect. I think we need controls of the same type we apply to insurance companies, your money should be funded so it's going to be there at age sixty-

five. Today, it's almost a miracle if it's there at age sixty-five.

You have to go to work for an employer, you have to stay with him, you have to stay in good health, you have to avoid layoffs, you have to take your money, turn it over to the employer, hope that he invests it safely and soundly, you have to hope that when you're age sixty-five the employer is still around and he's likely to be in terms of the high mortality of business, so there's almost a sequence of miracles which you're counting on.

[Tr. 6]

SENATOR RICHARD SCHWEIKER: In one study made by our subcommittee of fifty-one pension plans, covering six point nine million workers since 1950, ninety-two percent of the workers in these plans left without any benefits whatsoever.

Workers are losing their pension rights when their companies go bankrupt, merge with other companies or simply go out of business. Workers are losing their pension rights when they are forced to leave one job to find another. We will hear testimony from five retired employees at Horn and Hardart, men and women in their sixties and seventies who have worked an average of forty years or more for the company. Today they are retired and forced to keep working because the company has hit financial difficulty and has had to give up its pension plan.

MAN: They called me into the office, they say, Grimes you almost about time for you to go ahead. I say, is that so, well, I said, go out for what. I heard of people retiring, I mean, but they say, well, you know, everybody got to retire. And I say, I didn't know that. I say, I'm not ready to retire. I have no money. I say, I owe everybody in Philadelphia which I did. I said,— I told them, I'm not ready to retire.

WOMAN: They made me retire on account of the age. They call me in and Mr. Downey(?) was the man

over the place at the time. And he said, (UNCLEAR) . . . what I would get and after taking out other compensations, I got fifty dollars and forty-eight cents a month.

MAN: They claim that this plan would make us financially independent along with our social security and whatever income we might have saved. They said that this plan, you will not have to worry about anything. Then all of a sudden, they said, we can't pay you anymore, cause the funds has run out. And we have to sell some properties in order to recuperate and get some more funds into this . . .

SCHWEIKER: And then that was cut off in October of '71 when they went into bankruptcy.

WOMAN: That's right. As Mr. Grimes said, we stop and then we started it again. And they finished it in November 1971 and that was it. I don't get anything at all. Nothing at all. For all those years.

MAN: When I retired in '56, I was getting fifty-five dollars in pension money. I could make it with my social security.

SCHWEIKER: Had you expected to get a full pension for the rest of your life?

MAN: Yes, sir. At the time the pension plan was established, [Tr. 7] we got literature stating what we were going to get and I was satisfied with my share at that time I was satisfied with social security. I suppose I knew I could sort of make it like that. But when it collapsed, I collapsed with it.

SCHWEIKER: I have here a booklet called Horn & Hardart Retirement Pension Plan. I assume this was something that was passed out to the employee. No doubt you all have one. I'm sure that it spells out what you expected to get in terms of your benefits. I think

significant on the inside back cover, it says: Happy Retirement to you when your turn comes.

(LAUGHTER AND APPLAUSE)

ANNOUNCER: Pension: The Broken Promise will continue after this message.

* * * *

NEWMAN: This was the Baldwin-Lima-Hamilton Heavy Equipment plant near Philadelphia where thirteen hundred men used to work. They were the sort of people who thought security was important and they had passed up bigger wage increases in favor of a better pension plan.

When the plant closed in April, many of the men discovered their pension rights had disappeared.

MAN: I heard a lot of guys say, the only reason I stayed with it, for my pension. Now there is no pension. So in order to have all this go down the drain, let's face it, it affected every one of us in one way or another.

MAN: What's going to happen to me? Here I am. I'm now fifty-nine years old. When people get up in age and the bottom drops out, like what happened to us. It's a crime. After thirty years and I've got nothing. I mean, it's gone down the drain, thirty years of service. Now I can make up—I can get up into another place and I'll get fifteen years, but that's not going to amount to anything.

MAN: So there goes my future plans. I mean, I figure, well, I'd like to put the boys through college, but what can I do now? I'm afraid to.

MAN: A younger person does have some chance to do it but at my age, you've made that round, there's no more. In other words, I missed the pension here by about four months.

MAN: Everybody was just relying on a pension and if they knew today all the stuff, they would have never stayed there.

MAN: Yeah, but George, you realize that there's so many [Tr. 8] people, working people under the impression that they've got a pension coming they don't even realize it they could be in the same fix . . .

MAN: . . . complacency. They don't realize that this can happen. They think, oh, I'm doing all right, I've got my paycheck and I've got a pension but he didn't read the fine print.

MAN: Well, we felt that way ourselves two years ago.

MAN: This is where I thought I had it. I thought when I reached the age of sixty-five or even sixty-two, I'd have approximately forty-five to forty-seven years with the company. And I could turn around and retire at six dollars a month (sic) for every year of service.

(CROSS TALK)

MAN: As the years went on, that figure would have increased.

MAN: I lose faith in a government that allows things like this. Not long ago I was in New York and I saw that inscription on the Statue of Liberty. And it sounded wonderful, you know. Give us your tired and so on. But what it actually said was, give us your labor; get these honkies here where we can put them to work for nothing. That's what it amounted to.

NEWMAN: An employee becomes much more expensive to a company once he has been vested, that is guaranteed a pension. This man, Alan Sorenson says he helped to prove that point in a study he did for a large department store chain. After the study was made, so

Sorensen says, the company got rid of many long service employees before they could achieve vested pension rights.

Sorenson himself was transferred out of company headquarters winding up in Salt Lake City as a store manager, that is Sorenson was a store manager until he was fired last year after twenty-two years of service. He now works as a check-out clerk in this Salt Lake City store.

Sorenson told us he had been only a few months away from his vested pension rights.

ALAN SORENSON: I definitely feel that I was terminated because I was approaching an age when I would have vesting and they had terminated so many long service employees just prior to terminating me that it all seemed to fall into a very definite pattern.

[Tr. 9]

INTERVIEWER: And the reasons you were given for being let go? How did they seem to you?

SORENSON: They seemed very shallow. Because my past record was such that it was above reproach. I had never had a serious shrinkage in the total time that I had been a store manager. Within the last two or three years before I was terminated they terminated a great many store managers with long service with the company.

INTERVIEWER: People who would be approaching the . . .

SORENSON: Approaching the age of vesting and retirement. See, by terminating these people before they reached age sixty-five, this cuts their pension benefits back drastically.

EARL SHROEDER: Out in Chicago, I worked for twenty-four years for the Kelly Nut Company. And . . .

NEWMAN: Earl Schroeder was a corporate executive in a company that had been taken over by a large

conglomerate. Several other executives had been fired and Schroeder was worried about what promised to be a substantial pension.

He was only six months away from his vested pension rights.

SCHROEDER: . . . a retirement plan at age sixty by having put twenty years service with the company. I had put in my twenty years, in fact twenty-four years with the company, but I did not have the age requirement of sixty. I was called from my office to a lunch with one of the executives of Kelly Nut Company, Corn Products Company, our vice president for finance. And informed that henceforth I would no longer be with the company.

And I said, Walter, what do you mean? He says, well, Earl, I hired you twenty-four years ago, today I'm firing you. Why? Well, we decided you're too good for the company. And we have no other spot for you.

I was at the time assistant secretary of the company, the secretary of the company he was lopped off at thirty years' service. I had a warehouse manager in Albany, George, Howell Free, who was lopped off two months before he would be vested in the plan; he had his time, he had his age, this poor individual became so ill and upset over it that he shot himself, took his own life.

NEWMAN: Driving a truck in Chicago wears a man down fast, so the truckdrivers have always been concerned about pensions. And in most respects, the pension programs run by the Chicago teamsters union locals are among the best. Benefits are generous [Tr. 10] and a teamster can retire as early as age fifty-seven. Many feel that after twenty or thirty years behind the wheel, retirement can't come soon enough.

MAN: When I was young, I was like a bull, I thought I was big and tough. When I started in the taxicab.

Driving a cab. You sit. Your kidneys, your back, everything just goes. When you get older, same thing, only worse.

MAN: Every truck driver I think thinks forward to the day that they're going to retire. And if you got the seniority you think you're well established. You're not thinking about somebody cutting, shooting you down or something. About cutting your pension off.

NEWMAN: The trouble is, every teamster local in the Chicago area runs its own pension plan. And it's common practice for a man to be forced to transfer from one local to another, every time he changes his job. From driving to the loading dock, for example. Or from loading to checking weight (?) bills. Or from an outside to an inside job.

Sometimes, different groups of teamster members working for the same company or even in the same garage will be in different teamster locals.

A teamster must have twenty years of membership in one local to draw a pension. His pension rights are not portable. He cannot take them with him from one local to another.

A lot of drivers don't know that until it's time for them to retire. And when they do find out, they can't understand why it should be so.

MAN: When they started up this pension plan, I don't think they were strictly honest with the people. I mean, with the people, I mean the truck drivers. They didn't come out in detail and say, you got to have twenty years in this local only that you can get a pension.

MAN: As far as I'm concerned, with the amount of years that I have with the company, I should get a full pension. I've got my twenty years with the company,

but you got ten years over here, I got eleven years over here.

MAN: It's the same thing on there as you would put money in one bank and then go on the west side and put another part of your money into another bank on there and when it comes time to draw it out down there, they tell you, we're sorry out there. You put your money in two banks. We refuse to give it to you. This is the same principle. I have money in two different locals.

MAN: Almost twenty-one years with one outfit and I can't [Tr. 11] see why one local can't get together with the other local which I'm in and there's nothing to it, this one has to give me half, the other one gives me half and they make a whole out of it. We'll take care of it. They don't.

MAN: The union was to me a brother. And that they wouldn't sell me down the river. They wouldn't deprive me of something on there that was paid for that I was looking forward to by a little technicality on there.

MAN: They're taking away by lying to the men, they're taking away by pulling out the fine print in their pension programs. They're taking away by keeping the man ignorant of these pension programs. Of these pension rules.

MAN: You cannot change unions. So what do you do then? If you can't change unions, if you have to get another job and you have to go in another union, what are you going to do then? Do you start all over again? Are you going to go ahead and build up time time time? You can't do it . . .

INTERVIEWER: What are your plans for the future?

MAN: I have no plans. What can I do? I'm just going to have to live out my time and do the best I possibly can with (CROSS TALK) . . . from social security.

WOMAN: And what we have in the bank.

MAN: That's all I can look forward to. Nothing else.

MAN: You've got people driving those trucks that are as high as sixty-eight years old. Sixty-eight years old driving a seventy-two or seventy-three thousand pound unit. With such commodities as explosives, jet fuels, gasolines, oils, plastics, sixty-eight year old man driving this truck. They're not going to last. Somebody's going to get killed. They should have been pensioned about ten or twelve years ago.

MAN: That's the way I figured it was going to be. And that's the way we all figured. All the old timers, we figured that if we put in twenty or twenty-five years, when we retired, we would get a pension. But no, because they got cheated they still have to work. But can you imagine a sixty-eight year old man on an interstate with anywhere from seventy-two to seventy-three thousand pounds coming at you?

ANNOUNCER: Pensions: The Broken Promise will continue after this message.

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NEWMAN: The flaws in the private pension system have hurt [Tr. 12] middle class and working class people most. Rich people don't need pensions and the very poor never build up any pension rights they can lose.

People don't get the pensions they expect for many reasons. One is that most plans require you to work in the same place for twenty-five or thirty years or more. A lot of people lose their pensions because the plan runs out of money. At this moment the Coal Miners Fund is operating in the red and the Railway Retirement System is running an annual deficit.

It's also common for workers to get smaller pensions than they expect, partly because many plans treat highly

paid executives much better than lower and middle level employees.

Women get the worst treatment. They seldom work in one place long enough to qualify. And the wife of a pensioner usually gets nothing after her husband dies.

What's wrong with the system is most evident to the social worker helping the aged and to a few labor leaders who take an interest in retirement problems.

VICTOR GOTBAUM: In the United States we have a magnificent ability to cover up our own diseases especially the disease of big business. Pensions in the private area are a mockery. They're a national disgrace. We know this.

MAN: The place where it gets very difficult is with your fairly average middle income class person. Who arrives somewhere between sixty-two and sixty-five at retirement, finds their income cut sometimes as much as seventy percent. These are the folk that I think have the most difficult time. They're sometimes our most difficult client because they're bitter. They're resentful. Our society being what it is, they postpone thinking about old age and its problems. And all of a sudden, they find themselves old and poor.

EDWARD KRAMER: These people feel who worked all their lives and let's say they worked thirty-five, forty years, and many of them have worked for one employer for all these years, are, they feel that now that they've retired, they're going to live a better life. They won't have to get up early in the morning. They won't have to work and they'll be able to do all the things that they couldn't do when they were working. And then they find themselves in the position that they have no money, they have no friends. And they live in squalor and they can't do these things. So what—they've really been cheated, cheated by the pension system, cheated by social security,

cheated by their employer and they feel very angry at themselves because I think in the back of their mind, they knew this was going to happen. They knew that when the day came that they would retire, they would be [Tr. 13] worse off than when they were working. But they're afraid to admit it.

GOTBAUM: They don't eat meat. It's soup. It's lower economy. When they go into the supermarket, something of a thing you discover is that they're special hunters. Their housing situation is an atrocity. We know this. We've now discovered them so we're trying to build housing for the aged. And there's a thrust in this direction. The aged poor. Well, there's not enough housing, there's not enough housing for the aged poor. So that, you'll find that the ghettos, interestingly enough, fascinating areas, the ghettos are composed mainly of the black and Puerto Rican poor and then you'll find spotted throughout aged whites as well as the black and Puerto Rican. This is integration of the poor, integration based on lower economic status.

KRAMER: They're kind of waiting around. See, what we've done in our country is create God's waiting rooms all over the country. In Miami, New York and Boston, and Los Angeles, and Philadelphia, where old people kind of wait around for the day to come when they're going to die.

MAN: We're living too long. In some area if we could just disappear, it would be very nice to the community at large. But we are not disappearing, we're still here. And we're growing older and older. The age now are ninety and ninety-five is not too uncommon. Even a hundred is not too uncommon. And the result is this, that we have made no plans to retire.

MAN: You can't make it on social security, maybe after that twenty percent increase we can. Far as I'm

concerned, if you had just say a hundred and half more a month, we could make it pretty good. But now when a bill comes up, you gotta figure how you're gonna meet it. See, if the car breaks down for a hundred dollars, you gotta start skimping or go to the bank—you got two, three hundred left in there and draw one of them out. And that's like pulling teeth.

WOMAN: We'll get by, we'll just have to get by, we'll have to eat less. If we had any indebtedness at all, we'd never make it. Makes you feel bad and a lot of times you just sit there and think, at my age, what am I going to do, where am I going to go? (UNCLEAR) . . .

MAN: The average person—elderly person who lives on social security, old age assistance and perhaps some money they've been able to save, income runs about a hundred and eighty dollars a month. They've literally got to watch every nickel and penny.

KRAMER: Going to a movie is a big expense, taking a bus to a clinic to visit a doctor is a big expense, buying a new pair of shoes is a big expense, getting ill and having to get medicine [Tr. 14] is a big expense. This is where, if there was an adequate pension system in the United States along with social security, some of these problems could be avoided.

NEWMAN: Retired people like to live in places that are warm and cheap. There are towns in California and Florida where more than half the adult population is retired. Years ago, older people lived with their working age children. Now, in our mobile society, the elderly have taken to living in trailer parks filled with other retired people.

That means retirement is a lot more expensive than it used to be. And the elderly are complaining much more about needing money.

The average retired person depends on society security for most of his income, so the big day is the third of the month, the day the social security checks arrive.

MAN: Everybody's out, they're standing at the door for the mailman, they grab this little check and they haul off to the bank with it. And we get in line up there to get your check. And we try to let it go till the next day because it takes too much of your time standing there. And then you run off to the grocery store. And the grocery stores all run big sales. On the day they're going to have this—you can get yourself a steak, if you're lucky, for a dollar and a half. But retirement's not, unless you can adapt yourself, it's not for the lively person, somebody that's sickly, he can't enjoy it, there's nothing to enjoy about it. But if you can prepare yourself to accept a quiet life and you and your wife figure what you want to do with yourself during the day, then you can make it.

We have fishing and take an umbrella and a couple of chairs and go down to the beach and sit there for the early part of the day before it gets too hot and then we come back and turn the air conditioner on, spend the afternoon in the house. We have a couple of friends around here we visit with, but it's nothing exciting. And you don't have the money to get exciting, I mean, the wife likes to go and I would love to go too but you can't afford to drop ten or twenty dollars. You go down to these restaurants, none of them have a meal less than three dollars. But they got some beautiful malls and one thing and another, you can loaf around in air conditioning. We went in one yesterday, Ha's I think it was, and . . . pull about four bolts of material there . . . how do you like this and I go through the routine, it's a little loud, or a little conservative and she throws them back in the pile and walks on. And the girls follow around (UNCLEAR)

But that keeps them busy, you know, they got something to do. I imagine all these old people do that, I don't know.

[Tr. 15]

NEWMAN: The crux of the matter now is that increasing numbers of Americans are reaching retirement age, they should not be expected to live in poverty or near poverty or a cut or two higher, lead a drab, penny-pinching sort of existance. Nor, obviously, is that anything the rest of us would want to look forward to. The refrain that runs through what we've been hearing is a kind of incomprehension. What emerges over and over again is that these people played the game. They did what Americans are expected to do; they worked and met their obligations. But at the end of their working lives, they found that they were in trouble. Put simply, they did not have enough money. The pension plans that they thought were going to take care of them didn't. How, it may be that some of them did not save as much money as they might have. The urge to consume in American life is very strong. Also inflation played its part and maybe they were careless about what the pension plans they were in actually could do.

In any case, at the end of their working lives, they feel cheated and cast aside.

ANNOUNCER: Pensions: The Broken Promise wil continue after this message.

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FRANKLIN D. ROOSEVELT: This social security measure gives at least protection to fifty millions of our citizens who will . . .

NEWMAN: Most people didn't have any sort of steady retirement income until the first social security law was passed. Social security was to take care of working people when they got old. At least that was the impression given by this government publicity film but

no one who ever had to live on social security alone has ever considered the monthly benefit to be enough. It was enough perhaps where people also saved money for their old age, or got help from their children.

The private pension system really got started when wage controls were put into effect during World War II. Fringe benefits were exempt from controls and since labor and management couldn't talk about much else, they began to negotiate pension plans. Companies also started using pension plans as a way to keep skilled employees. The idea was that a man would not be tempted to look for another job if he had a paid retirement to look forward to.

Today labor unions consider pension benefits to be part of the wage package, higher income workers now want more insurance that they'll actually get their pensions. Lower income workers think they have a right to better pensions than they get [Tr. 16] now.

For that matter, major league baseball players struck last spring for improved pensions.

In New York, not long ago, angry municipal workers paralyzed the city by opening drawbridges and blocking highways. They wanted their pensions improved to match the gains made by policemen and firemen. And by some workers in private industry.

If there is a pension crisis, it is, at least, in part, a crisis of rising expectations.

Another crisis of sorts involves the vast amounts of pension fund investments. James Hoffa was convicted of criminally mishandling pension fund investments. So was the leader of a Chicago barber union.

Pension funds have outgrown the laws regulating them. No government agency has enough staff or authority to control them. The Justice Department's labor section

believes it's common for the pension money to be incompetently or dishonestly invested.

RICHARD BENVINISTI: Well, we've prosecuted cases involving embezzlement of pension funds, misuse of pension funds, for the personal benefit of the labor union officials who are charged with administering these funds. We've also prosecuted cases involving the receipt of kickbacks by pension fund employees and trustees for the granting of loans and for the use of this pension fund money.

BENJAMIN SCHENCK: It could be something as simple as using the money to buy a new vacation home for one of them, it could be the more complex, more subtle situations where the money in the trust fund is for example, loaned to the employer, to build him a new factory or loaned to the union to finance a new recruitment campaign.

CHARLES RUFF: We have no real idea of how much fraud there may be in the pension plan area. But you're talking about institutions, the pension plan area, generally, that deals in hundreds of billions of dollars. And when you have that much money involved, the federal government ought to take a more active role than it does.

DENENBERG: We regulate insurance completely. We regulate the agent, the contract, reserve, the policies, the sales technique, the investment, we regulate insurance companies from birth to death. And yet we have a gigantic pension system, almost the size of the insurance industry, a hundred and fifty billion dollar business that's essentially unregulated.

Can you imagine what would happen if we would let insurance [Tr. 17] companies do whatever they wanted to? We can't even protect the public with full regulation in insurance, but essentially we have a pension system

which is precisely an insurance plan and which is almost unregulated.

NEWMAN: This is where most of the pension money now goes. To Wall Street. To be invested.

It's estimated that private pension fund assets now amount to something like a hundred fifty-three billion dollars. The way they're growing, they very likely will amount to two hundred fifty billion dollars by the end of this decade.

Pension funds are now the largest institutional investors in the country; they've passed the mutual funds and there is no end in sight.

Typically, the management of pension fund money is handed over to banks, mostly very big banks. Banks for the piling up of pension fund money. A few banks may administer significant and even controlling amounts of the common stock of very big corporations.

An example:

More than ten percent of such companies as IBM, Ford, IT&T, J.C. Penney, Westinghouse, and Boise-Cascade is held by three banks. Fifteen percent of Trans-World Airlines is held by two banks. Morgan Guaranty Trust and Chase Manhattan.

MAN: We remain confident beyond 1973 on a . . .

NEWMAN: There is so much pension fund money to invest, that just finding productive uses for it can be a problem.

This is something few outsiders see, an investment meeting at Bankers Trust Company in New York.

MAN: One of our major concerns is to protect our accounts against risk, risk being defined as underperforming the market in a down market which it is true

we do not forecast. My question is, how do you think the chemical stocks would fare in the event we do have a weak market over the next six months?

MAN: Jerry, I was just talking this morning . . .

NEWMAN: Critics of the big banks claim that they stick too much to safe investments in a big corporation. The bankers insist that their industry is competitive and that all banks seek the highest return with the least risk.

Bankers and critics agree that the trust fund investing industry has grown tremendously. The institutions managing trust [Tr. 18] funds have become so big that they often prefer to trade large blocks of stocks among themselves by computer, rather than using the stock exchange.

Pension fund money has become so important to the economy that nobody knows what would happen if the system were to be drastically changed. Incorporated in social security, for example.

Ralph Nader opposes that. Nader wants to take pension funds away from the banks and have the government set up a new set of institutions, responsible only to the pensioners.

Other critics would concentrate on insuring pension benefits and making it possible to take pension rights from one job to another. But almost everybody agrees that some changes are needed.

RALPH NADER: I think time is running out. On the private pension systems. And it its abuses continue to pile up, and if its enormous popular disappointments begin to be more and more revealed, it might collapse of its own weight, and social security will have to take up the slack.

RUSSELL HUBBARD: Over a good number of years, the track record is excellent. It's unfortunate that every

now and then some of the tragic cases make the newspapers and the headlines. But it's a question of perspective and balance. When you consider that there are thirty million people covered by the plans, that there are five million people receiving about seven billion dollars in benefits. I think that's a pretty good record. That's not to say that there aren't a few remaining loopholes that need closing but we ought to make sure that we don't throw out the baby with the wash water.

VICTOR GOTBAUM: The solutions in the wealthiest country in the world is not do what they've been doing in terms of pensions. You fund a pension. You fund it on the basis of man's ability to live. You tie it into cost of living. The wealthiest country in the world ought to be able to do it.

KENNETH ANDERSON: You must remember that the corportaion has set this plan up voluntarily. They have not been required by law to set it up.

INTERVIEWER: So that it gets from the employer to the employee?

ANDERSON: That's what it amounts to.

DENENBERG: I say it's the employee's money and I think that is the economic fact of life and I think in terms of the morals [Tr. 19] of the problem and in terms of the economics of the problem, that anyone would conclude that it does belong to the employee and yet it's not being used for his benefit.

ANDERSON: These pension plans are a part of a fringe benefit package. Like hospitalization insurance and so forth, but it's still a voluntary thing on the part of the corporation.

GOTBAUM: So, all I can say is my God how can you hold to that view? Do you mean, people are supposed to starve, that people are supposed to live on a subsistence

money because they are not unique, and that, by the way, is the same attitude. That gives top management stock options, gives them retirement after a small serving period whereas the middle worker, the lower economic worker takes a terrible beating.

SENATOR SCHWEIKER: What we're proposing to do a little bit what was done with the bank failure problem. We didn't go in and take over the banks but we did, by means of insurance and federal deposit insurance corporation come in and guarantee that no depositor would lose his savings under a certain point. And I think that's what we're saying here, that once a worker has put in eight years time, once he's reached a certain age, once his company's reached a certain point, then he doesn't lose it, regardless of what happens to his company or the country.

MAN: What are they waiting for? What the hell are they waiting for? Do they have to give us a certain quota, a certain number of people that have to be victims? Do they have to give us a certain amount of money? How many billions must it take before they do something about this? How many people have to starve? How many people have to lay on the sidelines and just hope and pray. How much misery do they want before they actually act upon it?

NEWMAN: This has been a depressing program to work on but we don't want to give the impression that there are no good private pension plans. There are many good ones, and there are many people for whom the promise has become reality. That should be said.

There are certain technical questions that we've dealt with only glancingly, portability, which means, being able to take your pension rights with you when you go from one job to another, vesting, the point at which your

rights in the pension plan become established and irrevocable.

Then there's funding, the way the plan is financed so that it can meet its obligations. And insurance, making sure that if plans go under, their obligations can still be met.

Finally, there's what is called the fiduciary relationship, [Tr. 20] meaning, who can be a pension plan trustee? And requiring that those who run pension funds adhere to a code of conduct so that they cannot enrich themselves or make improper loans or engage in funny business with the company management or the union leadership.

These are matters for Congress to consider and, indeed, the Senate Labor Committee is considering them now. They are also matters for those who are in pension plans. If you're in one, you might find it useful to take a close look at it.

Our own conclusion about all of this, is that it is almost inconceivable that this enormous thing has been allowed to grow up with so little understanding of it and with so little protection and such uneven results for those involved.

The situation, as we've seen it, is deplorable.

Edwin Newman, NBC News.

APPENDIX B

Summary of Description of "Pensions" Program Appearing in Reviews in Newspaper TV Columns Shortly After Broadcast

Name of Newspaper	Date of Article	Description of Program
The Boston Globe	9/18/72	"[T]he private pension industry . . . is an unholy mess and last week some of the details were bared in a television documentary. . . . It was about time."
Business Insurance Chicago (by Patrick Thomas)	9/25/72	". . . was by necessity, sketchy but revealed nothing new to anyone who spends any of his [time] in the pension area. . . . The program was by no means objective; it could not have been . . . there was just not enough time to do it thoroughly. [Newman did] point out that there were many good pension plans."
Chicago Sun-Times (by Ron Powers)	9/13/72	". . . a hard look at failures in the pension system in the United States."
Chicago Today (by Bruce Vilanch)	9/13/72	". . . dealt with the terrifying pension plan racket . . . As with all news documentaries, the accent was on hardship and sadness."
Chicago Tribune (by Clarence Peterson)	9/13/72	"Pension administrators may face some hard questions from employees when they get to work this morning. If so, NBC Reports will have done its job."

Name of Newspaper	Date of Article	Description of Program
The Christian Science Monitor (by Richard L. Strout)	9/22/72	". . . concentration of funds provides a pension system that is often imperfect, sometimes tragic, and almost wholly uncoordinated. . . . An hour long documentary . . . presented this situation vividly."
Daily News (by Kay Gardella)	Undated but prob. 9/20/72	". . . it did a hard-hitting job of examining a system that doesn't always pay back long-time workers."
Daily Variety Television Review	9/14/72	"was a penetrating, albeit depressing probe of pension plans, or, to be more specific, the victims of such plans. . . . It was a superior bit of investigative reporting."
		"No one was knocking pension plans; the knock was over the fact that supposed recipients were often deprived of them."
The Denver Post On the Air (by Barbara Haddan Ryan)	9/14/72	"The presenting of tragic case histories, experts' opinions and Newman's clarifications seemed a disorganized approach to a critical issue that's widely misunderstood or ignored. Likewise nothing was said about what makes good pension systems work . . . but NBC should be commended for publicizing a condition of social anarchy. . . ."

Name of Newspaper	Date of Article	Description of Program
The Evening Sun Baltimore	9/13/72	"NBC Reports opened its season . . . with a long needed look at the many faults of private pension plans. . . . It heard a brief defense of the way private pension systems are run and examined possible remedies and alterations to correct the more glaring flaws in the system."
Hollywood Reporter Television Review (by Glenn Lovell)	9/14/72	"NBC reports into the world of old-age security was, as commentator Edwin Newman summed up 'a depressing program' which revealed a shockingly fraudulent American pension program. The report deals with its subject completely and sounds out many startling revelations." "But . . . the investigation is most effective when it is least objective. While this makes for touching and sincere glimpses into the shattered dream of the retired without benefits, it makes one wonder if we are seeing the entire truth."
Houston Chronicle	9/13/72	"Edwin Newman said in summation and in all fairness he should have said it sooner —'I don't want to leave the impression that there are no good pension plans. Indeed there are many.'" ". . . an informative and provocative show."

Name of Newspaper	Date of Article	Description of Program
The Indianapolis Star	9/12/72	"What [NBC Reports] attempts to do is pinpoint the existing problems in our private pension systems. . . ."
Kansas City Star	9/12/72	"Victims of the private pension systems will describe its failures through their own bitter experiences in an investigative report that will initiate NBC Reports. . . ."
Morgantown, N.C. News-Herald (Ed. F. Reading)	9/19/72	". . . there was a blockbuster of a documentary on NBC Reports last week treating with the abuse of pension funds."
The Newark Star Ledger	9/13/72	"The program pulled no punches . . . ."
N.Y. Post (by Bob Williams)	9/13/72	"NBC Reports lived up to its promise last night in warning all contributors to pension plans to check the fine print in the contracts."
Philadelphia Daily News The New Season . . . in review (By Rick DuBrow)	9/13/72	"A potent program about pitfalls and failures of some private pension plans of business and unions . . . it was an angry, incisive study that focused on some people who felt cheated by their blind faith in Pensions."
The Pittsburgh Press	9/13/72	". . . premiered with a probing look at retirement pensions."
Portland Oregonian (by Francis Murphy)	Undated	". . . Edwin Newman examined how millions of Americans are cheated out of pensions which they expected to receive upon retirement."

Name of Newspaper	Date of Article	Description of Program
The Star-Ledger	9/12/72	"What it attempts to do is pinpoint the existing problems in our private pension systems by talking to middle class and working people . . . and then offering explanations about such flaws in those pension plans by . . . experts. . . ."
Toledo Blade	9/13/72	" 'NBC Reports' made an auspicious debut with a harrowing and moving inquiry into 'Pensions: The Broken Promise.' "
Variety	9/20/72	"No one can fault NBC News for exposing the national scandal of private pension frauds and the inhuman practices of big business and reckless practices of unions as regards pensions but even reporter Ed Newman, summing it up said this had been a depressing show to work on and one wonders why the network chose it to premiere the new telementary series when it is a sure bet that sales will be screaming about those nothing numbers soon enough."
Rick DuBrow—UPI Correspondent	9/13/72	"Tough study of the failures of some private pension systems."

FAHY, *Senior Circuit Judge*: I concur in the well reasoned and comprehensive opinion of Judge Leventhal for the court. The opinion upholds the wide latitude to be accorded the press as essential to the mandate of the First Amendment, notwithstanding the limitation upon complete freedom imposed by the Fairness Doctrine which is applicable to broadcasting licensed under the standards of the Communications Act. One may hope that this latitude will not encourage in a different context abuses which, even though protected by the First Amendment, should be discouraged,[1] or lead to claims of such protection which could not be sustained.

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[1] An example of abuses in an important area of national concern is documented in the well-balanced treatment of the relation of television broadcasting to the violence afflicting the nation contained in the *Report of the President's National Commission on the Causes and Prevention of Violence* (1969). This Commission was composed of an exceptional group of men and women under the Chairmanship of Dr. Milton Eisenhower, distinguished brother of the late President. The Report states in part:

> We do not suggest that television is a principal cause of violence in society. We do suggest that it is a contributing factor. Television, of course, operates in a complex social setting and its effects are undoubtedly mitigated by other social influences. But it is a matter for grave concern that at a time when the values and the influence of traditional institutions such as family, church, and school are in question, television is emphasizing violent, anti-social styles of life.
>
> * * * *
>
> The television industry has consistently argued that its standards for the portrayal of violence and its machinery for enforcement of these standards are adequate to protect the public interest. We do not agree. . . .
>
> * * * *
>
> We believe that the television networks, network affiliates, independent stations, and other members of the broadcasting industry should recognize the strong prob-

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ability that a high incidence of violence in entertainment programs is contributing to undesirable attitudes and even to violence in American society. It is time for them to stop asserting "not proved" to charges of adverse effects from pervasive violence in television programming when they should instead be accepting the burden of proof that such programs are not harmful to the public interest. Much remains to be learned about media violence and its effects, but enough is known to require that constructive action be taken at once to reduce the amount and alter the kind of violent programs which have pervaded television.

pp. 199-202.

The matter of course is aggravated by the lack of adequate control of firearms.

LEVENTHAL, *Circuit Judge, supplemental concurring statement*:

I append a concurring statement in which I speak for myself, even though I have authored the opinion for the court, because I find that this device, which I have used in other cases,[1] gives reasonable latitude to offer comments that occurred to me in the course of my researches and reflections on the subject under consideration, but which for one reason or another are not appropriate for the opinion of the court.

* * * *

A judge confronted with a problem like this one has a natural tendency, born of his years of lawyering and judging, to try to strike a middle ground between the antagonists—here, between NBC and AIM.

The Commission's recognition of latitude to NBC as to how to give access to an opposing viewpoint tempts a judge to be swayed by the submission of Commission counsel that the "cost of presenting an opposition spokesman should be minimal."[2]

It is doubtless tempting not only to the judge but to counsel for a licensee—particularly if the problem should arise not for a network but as to a station owner—to say: "See if you can't run something that will satisfy the government officials."

What is overlooked is the stultifying burden on journalism. Even the monetary burden is not inconsequential, as the record indicates, and it is no answer to say that the license is profitable, because the problem is that the incremental burden will lead a licensee to acquiesce in the Government's instruction as to what he should broadcast. More important, however, is the unquantified

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[1] *United States v. Poole*, 495 F.2d 115 (1974); *United States v. Ammidown*, 497 F.2d 615 (1973); *Bellei v. Rusk*, 296 F. Supp. 1247 (D.D.C. 1969) (3-judge court), *reversed*, 401 U.S. 815 (1971).

[2] Opposition to Motion for Stay, at 16.

burden, the bureaucrat peeking over the journalist's shoulder.

In the context of the fairness doctrine, the twin principles of latitude for the licensee and narrow review for the Federal Communications Commission merit special vigilance when the question is whether the "issue" in a program of investigative reporting is one of evils described or a broad subject canvassed, because government latitude to redefine the issue enfleshes the specter of a subtle and self-serving government censorship impeding the ventilation of abuses.

While journalists on the public airwaves are subject to fairness doctrine responsibilities, the risks of government interference are so oppressive as to require a plain showing of journalistic abuse before a government official can issue a direction that the journalist's report must be supplemented with a codicil. The danger of intrusion on journalistic discretion is no less real and profound because it rests, at base, in the spirit, in the way men carry on their functions. Journalism in America has had its evils and abuses, but in the large they are outweighed by its achievements in liberating the questioning mind and spirit. The public interest pulses in the investigative reporting that depicts whatever evils are seen wherever they are seen, and asks provocative questions.

Journalists may be stifled if they are steered from the way in which their profession looks at things, and channeled to another way, which however congenial to men of the law, dampens the investigative spirit.

> The major item in the diet of the press is controversy and confrontation. Lawyers are usually working to compose and accommodate differences. The press must try to make simple that which in fact is complex and to suppress factual detail in

favor of the emotional jugular. The lawyers pull exactly the other way.[3]

The First Amendment freedoms established in the interest of an informed citizenry "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. Little Rock*, 361 U.S. 516, 523 (1960).

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[3] B. Manning, *If Lawyers Were Angels: A Sermon in One Canon*, 60 ABAJ 821, 822 (July, 1974). Mr. Manning is focusing on the lawyer advising the client as distinguished from the litigating lawyer.

TAMM, *Circuit Judge* dissenting: This case presents us squarely with questions arising from the head on collision of First Amendment rights of freedom of the media and the right of the people to know. It requires again "an expression of the pervasive precept of fairness between government and governed that runs thru American jurisprudence. . . ." *Trailways of New England, Inc. v. C.A.B.*, 412 F.2d 926, 931 (1st Cir. 1969). Involved is not the so called "on the spot reporting" which makes up a substantial portion of television newscasts but a documentary type of presentation referred to in these proceedings as investigative reporting. The editorial supervision and selectivity frequently approved in judicial decisions was not herein discharged under the pressure of time considerations essential to the preservation of news values, but permitted, according to representations made to us, the digesting of eighty thousand feet of film into a two thousand foot final product. Most importantly we are not dealing with a printed publication utilizing its private property to disseminate its news and views in the exercise of that freedom of the press which is the central freedom of the whole democratic process. Our petitioner, the National Broadcasting Company, Inc. is the temporary licensee of a right to utilize the public's airways in the public interest and for the public welfare. To me this is the dominant element in distinguishing the rights and obligations of a telecaster from those of the press, which under controlling Supreme Court opinions has an unlimited freedom to report events in the public domain.

No right is absolute. It is elementary that each right carries with it an obligation. In accepting the right to use the public airways our petitioner, willingly or reluctantly, assumed the obligation of utilizing those airways in the public interest. The public interest in television programming expressed in fundamentals is to know the facts.

Petitioner argues that investigative reporting is somehow a special specie to which the application of a fairness requirement is constitutionally repugnant. The majority opinion supports in substance this position and capsulized into its basic and ultimate holding concludes that fairness, meaning a presentation of both sides of a question of public interest, is not a practically enforceable obligation of a licensee of the public airways. This position means that a telecaster's presentation under the label of investigative reporting of a few factual bones covered with the corpulent flesh of opinion and comment fulfills the obligation of the network to give a fair picture to the public and to assist the public in knowing the facts essential to a determination of basic policies. The majority opinion fails to recognize that as a practical matter there is no real distinction between this type of so called investigative reporting and propaganda. The investigative reporter, regardless of his initial motivation, too often reaches a point where objectivity disappears and he becomes an ardent advocate for a particular position or viewpoint. Developing a feeling for what might or should be, rather than awareness of what is, he produces a manipulated and selective presentation which ignores all viewpoints and positions other than his own. There is no doubt but that embellishment, color and opinion often prove to be more interesting than objective presentation of both sides of an issue of public interest but is such a production a discharge of the responsibility of the telecaster to give a fair picture and a presentation of all points of view?

The history of democracy is a record of the fear and distrust by the people of unrestrained power. This is the womb in which was gestated the constitutional amendments which we identify as the Bill of Rights. First Amendment guarantees were and are designed to afford the people an effective weapon against the existence or

use of destructive and abusive power. Does anyone doubt that a tremendous reservoir of power exists today in the radio and television industry? Are not television and radio newscasters and commentators dominant in the shaping of the public's viewpoints and opinions? Does not their ability to capture the public attention arm them with a weapon of such magnitude that public officials are too often completely subject to their influence? Is it an exaggeration to say that the telecasting industry constitutes a power system comparable if not superior to government itself but basically free of the restraints imposed on government power? We proudly proclaim that in our democracy all power is in the people, but is this power impartially exercised today upon a full knowledge of all facts which affect the public order? The answer is obviously dependent upon the public's ability to learn the facts and again we are face to face with the use which is made of the public airways by the licensees.

I recognize and will readily defend the constitutionally mandated right of the licensed media to exercise its choice of what to report and what not to report. Beyond this the right to editorialize with properly descriptive identification is judicially recognized, but confining my position to the record before us, in the presentation of a so called investigative or documentary report I believe that there is a legally enforceable obligation on broadcasters to present a report in which all conflicting positions and viewpoints are fairly portrayed. To require less in my view is to permit an abuse of the public's right to know, and a desecration of the license to use the public airways in the public interest.

"Freedom of the Press" as a generic term has long been prominent in the lexicon of judicial opinions. It will never be fully defined because it is not a static phrase with final and permanent meaning. It defines a continuously evolving phenomenon with changing, dis-

appearing, materializing and sometimes almost mystifying significance. Rapid development of the utilization of the public airways as a means of informing the public has placed tremendous power in these media. The fairness doctrine, as the Federal Communications Commission has exercised it in this case, is not a censorship, is not a prior (or subsequent) restraint, is not a usurpation of what the majority describes as "Journalistic Discretion" but is merely a policy that requires in the public interest all viewpoints be presented in factual matters of public interest. The doctrine, as it has been utilized here, is the yeast of fairness in the dough of the telecaster's right to exercise his journalistic freedom. The resulting problem of the Commission is then the securing of responsibility in the exercise of the freedom which the broadcasting industry enjoys. We are asked to rule that on the traditional scales of justice the right of the people to know is outweighed by the claimed right of the telecasters to exercise a constitutional infallibility in determining what the public is entitled to know. I cannot so hold. I would affirm the Commission's action.

throwing their weight around in this administration."

Mr. Rumsfeld, in both oral and written communications with all workers in the executive branch, is saying quite clearly: "Everyone must fully understand and abide by the President's message: there shall not only be no wrongdoing in this administration—there shall not be even the appearance of wrongdoing."

That's the President's standard. And Mr. Rumsfeld is seeing to it that everyone in this administration lives up to it.

THE FEDERAL RESERVE'S CURRENT TIGHT-MONEY POLICIES

Mr. TUNNEY. Mr. President, I would like to bring to the attention of my colleagues a two-part editorial by television station KGTV in San Diego, Calif. Mr. Gordon McKinley, senior vice president of McGraw-Hill Inc. and the company's chief economist spoke for the station on the Federal Reserve's current tight-money policies.

I ask unanimous consent that the editorials be printed in the RECORD.

There being no objection, the editorials were ordered to be printed in the RECORD, as follows:

WHY OUR GOVERNMENT'S REMEDY FOR INFLATION IS DEAD WRONG

(NOTE.—Why does the government's awesome fiscal power seem unable to cope with the inflation that's eating us all alive? Because the Federal Reserve Board is fighting the wrong kind of inflation. The following two-part editorial commentary was broadcast this week for the McGraw-Hill Broadcasting Company by Gordon W. McKinley, Senior Vice President-Economics and Financial Planning, McGraw-Hill, Inc.)

PART I. THE BASIC CAUSE OF TODAY'S INFLATION

Each and every one of you has felt the impact of inflation in one way or another. It is the most serious economic problem we face today. Yet—tragically—our Government has no effective program to solve the problem. The Federal Reserve Board's solution is to restrict the supply of money and force interest rates to the highest levels in this century. McGraw-Hill Broadcasting Company believes that this tight-money, high-interest rate policy is mistaken. The policy has failed miserably thus far, and will only make inflation worse if it is continued. We call for a prompt move to easier money and lower interest rates.

We do not doubt the sincerity of the Federal Reserve Board. We are convinced, however, that the Board has badly misjudged the true nature of the inflation virus that now grips the American economy. The Board apparently believes that we are in a classic kind of "demand-pull" inflation. They picture the economy as fully employed, with consumer demand very strong and with prices rising simply because we are unable to turn out goods fast enough. Under these conditions, the solution is clear: restrict the money supply so that we do not have too much money chasing too few goods.

Unfortunately, a close look at the real economy of our country does not look at all like the classic case envisioned by the Federal Reserve Board. For one thing, the economy today is not fully employed in any meaningful sense of that term. For another, Government statistics show that our manufacturing industries taken as a group are operating at just 80 per cent of capacity, a rate of utilization which in the past twenty-five years has occurred only during periods of recession. And, in the first quarter of this year, our real gross national product fell by a larger amount than in any other quarter in the past sixteen years. Unemployment is rising, and business failures are multiplying. Industrial production today is actually below that of a year ago. These are not the signs of a fully employed economy.

The fact of the matter is that today's inflation is not at all the demand-pull situation I mentioned earlier. Instead, it is a new cost-push inflation, stemming from a worldwide shortage of basic commodities. Look at the record. The first symptom showed up in a sharp rise in the price of grains and other foods, followed by a staggering jump in petroleum prices. Then, in dramatic succession, price increases developed in other raw materials and foods, from bauxite to bananas. Steel, paper, cement, chemicals and many others joined the list—all booming at the same time that broad areas of the economy are declining. The distinguishing characteristic of today's inflation is that prices are being forced up by rising costs despite a complete absence of vigorous consumer demand.

Now the question: what happens when a Federal Reserve policy of tight money and high interest rates is used in an attempt to halt this new type of cost-push inflation? The answer is all too clear: the whole economy is dragged down in a futile effort to reduce the prices of raw materials and basic commodities. The home construction industry is crippled and vital plant and equipment expenditures are discouraged. The loss of 600,000 homes and apartments this year will unquestionably mean higher home prices in the future. And curbing plant expenditures now will directly affect our ability to raise productivity and lower costs in the future. To the extent that tight money is curbing the output of housing and new plant and equipment in 1974, it is depriving us of our most effective means of combating inflation in the future.

The net effect of the current high interest rate, tight money policy has been to reduce output, not prices. And, even if tight money is pushed to the point of a severe recession, it will not be successful in curing today's inflation. Deliberately provoked recessions are not the cure for inflation. Following the 1970 recession, inflation accelerated so rapidly that an Administration committed to the free market was forced to accept direct wage and price controls.

PART II. A WORKABLE PROGRAM TO COMBAT INFLATION

What, then, can be done about inflation? We suggest the following six-point, anti-inflation program.

The first step, and one which should be put into effect immediately, is easier money and lower interest rates. Tight money has reduced output and raised costs. An easing in monetary policy will increase output, restore order to the financial markets, halt the rising tide of business failures, and put people to work again. Higher production is the best way to beat inflation.

The second step is a cut in government spending. There is fat and waste in the Federal budget and this unnecessary spending can and must be eliminated. Federal officials smugly advise the American public to pull in their belts and suffer patiently while the economy stagnates. I suggest that it is the bureaucrats who should pull in their belts so that the private sector can have the resources necessary to expand production and jobs.

The third step is to increase incentives to the business community to encourage expansion of factories and modernization of machinery. This can be done with a more liberal investment tax credit; depreciation allowances adjusted to reflect inflation; and other forms of tax relief necessary to spur plant and equipment expenditures. Modern plants mean larger, more efficient output which is the way to bring down prices.

The fourth step is the establishment of a National Commodity Reserve. Substantial stocks of raw materials and basic commodities would be accumulated in this Reservoir through government purchase when supply is ample and prices weak. These reserves would be released on the market only when prices rose more than, for example, 10 per cent. This would effectively stabilize prices, and equally important, would make this country less dependent on foreign sources.

Fifth, Congress establish, immediately, an Agricultural Production Bonus Program. Government bonuses would be paid for production above the base period. The increased farm production would bring food prices down, and the bonus payments would keep farm income high. No greater blow could be leveled against inflation than a drop in food prices.

Finally, Congress should establish a National Commission on Free Market Prices. The Commission would be charged with carefully reviewing the many existing laws and regulations which inhibit price competition. The Commission would then recommend to Congress solutions designed to repeal these laws.

All the steps in this program follow one central theme—what this country needs to bring down prices is more production, more employment, more plant capacity. Inflation can be beaten if we discard restrictive monetary policies and concentrate our efforts on increasing output.

President Ford right now is searching for new solutions. Let him know how you feel.

The President's summit conference on economic affairs starts today. If you agree with our solution, or if you disagree with it, or if you have a solution, of your own, by all means communicate it to him. Write to us. We'll forward your comments to President Ford.

If you would like reprints of this editorial commentary, write to: KGTV-10, McGraw-Hill Broadcasting Company, Inc., P.O. Box 81047, San Diego, California 92138.

MR. JUSTICE STEWART INTERPRETS A FREE PRESS

Mr. PROXMIRE. Mr. President, the title, "Or of the Press," hints at the force of the address by Mr. Justice Potter Stewart to the Yale Law School Sesquicentennial Convocation on Nov. 2. Just as the words of the first amendment to the Constitution granting a free press in the United States are simple and forthright, so were the words of the Supreme Court Justice.

Mr. Justice Stewart makes it clear that a free press goes beyond free speech. The free press guarantee, he says, is a "structural provision of the Constitution." Most of the other provisions in the Bill of Rights, he says, are to protect "specific liberties or specific rights of individuals."

Mr. Justice Stewart goes on to say that:

The Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.

His point becomes clear when he notes that the founders of our system "deliberately created an internally competitive system," meaning a distribution of powers between the legislative, executive, and judicial branches.

So what does that have to do with the free press?

Stewart first quotes Mr. Justice Brandeis in a 1926 dissenting opinion:

The [Founders'] purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the Government as an additional check on the three official branches. Consider the opening words of the Free Press Clause of the Massachusetts Constitution, drafted by John Adams:

"The liberty of the press is essential to the security of the state."

Stewart is saying that a free press is the citizen's guarantee against Government domination.

An old radio program, "Steve Wilson of the Illustrated Press"—remember?—had a standard introduction that included these words: freedom of the press is a flaming sword—hold it high, use it well.

Stewart is saying about the same thing.

Think not?

Early in his address to the Yale convocation, he said that polls have shown that some Americans believe that the former Vice President and former President were "hounded out of office by an arrogant and irresponsible press," and that many more Americans consider the press to have "illegitimate power" in our political structure. Not true, says Stewart. He says:

On the contrary, the established American press in the past ten years, and particularly in the past two years, has performed precisely the function it was intended to perform by those who wrote the First Amendment of our Constitution.

In his distinction between free speech and a free press, Stewart points to the Supreme Court's decisions on libel and slander. He notes that for all practical purposes officials of all three branches of Government are immune from libel and slander suits, for otherwise we as citizens could not be assured of "bold and vigorous prosecution of the public's business."

And, he says—

By contrast, the Court has never suggested that the constitutional right of free speech gives an *individual* any immunity from liability for either libel or slander. (The emphases are his.)

In this context, he explains the close vote of the Court in a decision that has led to a debate over whether reporters should be able to shield the identity of their sources. As an individual, the reporter obviously cannot use free speech as an argument to frustrate a grand jury. Stewart says:

Only if a reporter is a representative of a protected institution does the question become a different one. The members of the Court disagreed in answering the question, but the question did not answer itself.

The implication in his speech on this point is that a free press must be about the public's business, and it can do that business only if it cannot be intimidated by the officials who are supposed to run it correctly. And that, of course, is why we use the phrase free press rather than just the word press.

Stewart covers CBS versus the Democratic National Committee, which raised the question of "whether political groups have a first amendment or statutory right of access to the federally regulated broadcast channels of radio and television. The Court held there was no such right of access."

Also in his list is the Miami Herald versus Tornillo, in which the Court unanimously held unconstitutional the Florida statute requiring newspapers to grant a right of reply to political candidates who had been criticized in print.

In getting back to the principle on those cases, he says:

The cases involving the so-called "right of access" to the press raised the issue whether the first amendment allows government, or indeed requires government, to regulate the press so as to make it a genuinely fair and open "market place for ideas." The Court's answer was "no" to both questions. If a newspaper wants to serve as a neutral market place for debate, that is an objective which it is free to choose. And, within limits, that choice is probably necessary to commercially successful journalism. But it is a choice that government cannot constitutionally impose.

But for the Government to force newspapers to be fair is impossible under our system, not only because that force is unconstitutional, but because there is no assurance whatsoever that the Government could establish standards for fairness.

My thesis is that the Federal Communications Commission's fairness doctrine is unconstitutional. Stewart did not say that to his Yale audience.

Can that be read into his speech?

Probably not, because a Justice of the Supreme Court of the United States will not speak in particular about cases that might come before the Court. Also, only a majority of the Court can speak with authority, and it will do that only when a specific question is before the Court.

Yet, I believe it is important that Stewart in his Yale address did not exclude the electronic media from his definition of the press. Indeed, in two instances he specifically listed them along with the print press. In another instance, he alluded to the electronic media.

Here are those three instances:

Specifically, I shall discuss the role of the organized press—of the daily newspapers and other established news media—in the system of government created by our Constitution.

* * * * *

Newspapers, television networks, and magazines have sometimes been outrageously abusive, untruthful, arrogant, and hypocritical. But it hardly follows that elimination of a strong and independent press is the way to eliminate abusiveness, untruth, arrogance, or hypocrisy from government itself.

* * * * *

The press could be relegated to the status of a public utility. The guarantee of free speech would presumably put some limitation on the regulation to which the press could be subjected. But if there were no guarantee of a free press, government could convert the communications media into a neutral 'market place of ideas.' Newspapers and television networks could then be required to promote contemporary government policy or current notions of social justice.

Mr. President, there is no doubt in my mind that radio and television broadcasters could be, and should be, the same watchdogs of government that publishers are structurally under our Constitution. It is significant that Stewart in his specific mention of the electronic media warned of government abuse.

Let me repeat my last quotation from his speech:

Newspapers and television networks could then be required to promote contemporary government policy or current notions of social justice.

Stewart sees the danger in government control of the news media that the authors of the Bill of Rights were seeking to avoid.

We have an adversary system in this country. We have it because it was designed that way. The press is part of that system, and it is part of it constitutionally. It may not be an official or integral part; but it is distinct part of the system outside the Government.

And the beneficiaries of that system are not the legislative, executive, and judicial branches nor the watchdog press. No; the beneficiaries are the citizens of our country.

The citizens, the people of the United States, delegate powers to the Government. Someone has to watch that Government to make sure abuses are exposed. The press—electronic and print—has that duty. It can carry out that duty because it is not official.

Other countries have official publications. That is, they have authorized organs or tools of information. We should not under our Constitution.

But how then can the FCC—an integral part of government—be explained away in its function of controlling that part of the press which happens to use the airwaves to deliver its information?

It cannot be explained away. It cannot be fitted into our constitutional system.

The FCC is a chain on the watchdog.

Some argue that it is not a chain. Others argue that the chain is necessary because the airwaves are public property.

But it is legal fantasy to say that the airwaves are public property. Suppose for a moment that the airwaves are publicly owned; the chain still cannot be rationalized.

The Constitution is an instrument of the People of the United States.

It is the Constitution that establishes the government.

The Constitution vests powers to the legislative branch, to the executive branch and to the judicial branch. It vests only the powers enumerated.

The first amendment to the Constitution specifically prohibits the legislative branch from passing a law abridging, that is, diminishing, the freedom of the press.

The President is sworn to uphold the Constitution.

The FCC was established by the legislative branch and is part of the executive branch. It is a part of the Government.

The Government may not interfere with the press. Therefore the FCC may not interfere with the press, which includes radio and television broadcasters.

It makes no difference who owns the airwaves.

The law that established the FCC says that the Government controls the channels of radio communication and may provide for their use but not their owner-

ship. It does not say who owns the channels or airwaves.

That law also says that the FCC shall not interfere with the right of free speech by means of radio communication.

If the FCC may not interfere with free speech, which according to Justice Stewart can be limited because it is not a structural provision of the Constitution, it follows that the FCC in no way can interfere with a free press.

Radio and television are part of the free press, so the Government through the FCC may not interfere with the free press aspects of broadcasters.

But it does interfere.

So it is time to right the situation. It is time to start following the Constitution again.

I believe that job should be done by the legislative branch. It is too much to hope that the executive will change its ways. The judicial, correctly, is reluctant to make law.

That is why after the next Congress convenes I shall introduce legislation making clear that the people of this country should have the protection of a completely free press.

Why is it too much to hope that the executive branch will help accomplish this?

In the Pentagon Papers case, Mr. Justice Stewart said that the line was drawn between secrecy and openness in the affairs of Government. But was the line drawn in the Constitution?

He said:

The Justice Department asked the Court to find in the Constitution a basis for prohibiting the publication of allegedly stolen government documents. The Court could find no such prohibition. So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can.

Then comes the heart of the matter. The Justice goes on:

But this autonomy cuts both ways. The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.

The Constitution, in other words, establishes the contest, not its resolution.

Mr. President, it seems clear to me from that position that the real push for a free press—a complete free press including television—should come from the people of this country. They are the ones with the real stake in knowing.

The Congress, being closest to the people, is the place to start.

And what if the free press, including radio and television, gets out of hand.

Justice Stewart, as I have already quoted, has the answer. The press must be responsive to the needs of the people.

He put it this way:

If a newspaper (and from his context, I believe he includes radio and television) wants to serve as a neutral market place for debate, that is an objective which it is free to choose. And, within limits, that choice is probably necessary to commercially successful journalism. But it is a choice that government cannot constitutionally impose.

Mr. President, I ask unanimous consent that Mr. Justice Stewart's address be printed in the RECORD. It is, I think, an eloquent argument for a fully free press.

There being no objection, the address was ordered to be printed in the RECORD, as follows:

OR OF THE PRESS

(Address of Potter Stewart, Associate Justice, Supreme Court of the United States)

Mr. Justice White, President Brewster, Dean Goldstein, Mr. Ruebhausen, Ladies and Gentlemen:

It is a pleasure to be here today with my colleague Byron White, and I am very grateful to him for his generous words of introduction. And it is, of course, a pleasure to participate with him and with all of you in this convocation marking the commencement of the sesquicentennial year of the Yale Law School.

Just how it is that this is the Law School's 150th Anniversary is a subject that I am happy to leave for others to explain. All I know is that it is supposed to have something to do with a couple of young men who, in the year 1824, persuaded a friendly printer to give their proprietary law school a little free advertising space in the Yale College catalogue.

But many great institutions have had humble beginnings. Even the Roman Empire, you will remember, traced its history back to no more than two hungry little boys and a friendly wolf.

Yet, however obscure the origins of this law school may have been, all of us know that by the early years of this century it was emerging as an important center for legal study. And by the time my classmates and I showed up here as first year students in 1938, the Yale Law School had long since been universally recognized as one of a very few great national law schools in the western world.

Just to speak the names of those, now gone, in whose classrooms I sat during my three years as a student here is to call the roll of some of the most notable legal scholars and law teachers in our country's history: Charles Clark, Arthur Corbin, Edwin Borchard, George Dession, Ashbel Gulliver, Walton Hamilton, Underhill Moore, Harry Shulman, Roscoe Steffens, Wesley Sturges.

And, although we hardly realized it then, the law school's student body during those three years was quite a remarkable collection of people as well. The membership of a single student eating club during that three year period included, as it turned out, the two members of the Supreme Court who are here today, a United States Senator, three members of the House of Representatives, two Governors of Pennsylvania, two Secretaries of the Army, an Undersecretary of Defense, a nominee for the Vice Presidency of the United States, and the incumbent President of the United States.

The Yale Law School of that era had already acquired a distinctive reputation for its leadership in the so-called "realist movement." Yet it was a place then, as it is a place now, where, in the words of Dean Goldstein, "widely divergent theories of law and society were taught and debated, a school which cannot be described as representing an orthodoxy of left, center, or right." It was then, as it is now, an exciting place and a challenging place, where a teacher's reach sometimes exceeded a student's grasp and where, as a result, every student was invited to stretch himself, in intellect and understanding, to heights and breadths well beyond his previous experience. There was a tradition here then, as there is now, of free inquiry, of independent thought, and of skeptical examination of the very foundations of existing law.

It is in that tradition that I turn this morning to an inquiry into an aspect of constitutional law that has only recently begun to engage the attention of the Supreme Court. Specifically, I shall discuss the role of the organized press—of the daily newspapers and other established news media—in the system of government created by our Constitution.

It was less than a decade ago—during the Vietnam years—that the people of our country began to become aware of the twin phenomena on a national scale of so-called investigative reporting and an adversary press—that is, a press adversary to the Executive Branch of the Federal Government. And only in the two short years that culminated last summer in the resignation of a President did we fully realize the enormous power that an investigative and adversary press can exert.

The public opinion polls that I have seen indicate that some Americans firmly believe that the former Vice President and former President of the United States were hounded out of office by an arrogant and irresponsible press that had outrageously usurped dictatorial power. And it seems clear that many more Americans, while appreciating and even applauding the service performed by the press in exposing official wrongdoing at the highest levels of our national government, are nonetheless deeply disturbed by what they consider to be the illegitimate power of the organized press in the political structure of our society. It is my thesis this morning that, on the contrary, the established American press in the past ten years, and particularly in the past two years, has performed precisely the function it was intended to perform by those who wrote the First Amendment of our Constitution. I further submit that this thesis is supported by the relevant decisions of the Supreme Court.

Surprisingly, despite the importance of newspapers in the political and social life of our country, the Supreme Court has not until very recently been called upon to delineate their constitutional role in our structure of government.

Our history is filled with struggles over the rights and prerogatives of the press, but these disputes rarely found their way to the Supreme Court. The early years of the Republic witnessed controversy over the constitutional validity of the short-lived Alien and Sedition Act, but the controversy never reached the Court. In the next half century there was nationwide turmoil over the right of the organized press to advocate the then subversive view that slavery should be abolished. In Illinois a publisher was killed for publishing abolitionist views. But none of this history made First Amendment law because the Court had earlier held that the Bill of Rights applied only against the Federal Government, not against the individual states.

With the passage of the Fourteenth Amendment, the constitutional framework was modified, and by the 1920's the Court had established that the protections of the First Amendment extend against all government—federal, state, and local.

The next fifty years witnessed a great outpouring of First Amendment litigation, all of which inspired books and articles beyond number. But, with few exceptions, neither these First Amendment cases nor their commentators squarely considered the Constitution's guarantee of a Free Press. Instead, the focus was on its guarantee of free speech. The Court's decisions dealt with the rights of isolated individuals, or of unpopular minority groups, to stand up against governmental power representing an angry or frightened majority. The cases that came to the Court during those years involved the rights of the soapbox orator, the nonconformist pamph-

letter, the religious evangelist. The Court was seldom asked to define the right and privileges, or the responsibilities, of the organized press.

In very recent years cases involving the established press finally have begun to reach the Supreme Court, and they have presented a variety of problems, sometimes arising in complicated factual settings.

In a series of cases, the Court has been called upon to consider the limits imposed by the free press guarantee upon a state's common or statutory law of libel. As a result of those cases, a public figure cannot successfully sue a publisher for libel unless he can show that the publisher maliciously printed a damaging untruth.[1]

The Court has also been called upon to decide whether a newspaper reporter has a First Amendment privilige to refuse to disclose his confidential sources to a grand jury. By a divided vote, the Court found no such privilege to exist in the circumstances of the cases before it.[2]

In another noteworthy case, the Court was asked by the Justice Department to restrain publication by the *New York Times* and other newspapers of the so-called Pentagon Papers. The Court declined to do so.[3]

In yet another case, the question to be decided was whether political groups have a First Amendment or statutory right of access to the federally regulated broadcast channels of radio and television. The Court held there was no such right of access.[4]

Last term the Court confronted a Florida statute that required newspapers to grant a "right of reply" to political candidates they had criticized. The Court unanimously held this statute to be inconsistent with the guarantees of a free press.[5]

It seems to me that the Court's approach to all these cases has uniformly reflected its understanding that the Free Press guarantee is, in essence, a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.

This basic understanding is essential, I think, to avoid an elementary error of constitutional law. It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy. Between 1776 and the drafting of our Constitution, many of the state constitutions contained clauses protecting freedom of the press while at the same time recognizing no general freedom of speech. By including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two.

It is also a mistake to suppose that the only purpose of the constitutional guarantee of a free press is to insure that a newspaper will serve as a neutral forum for debate, a "market place for ideas," a kind of Hyde Park corner for the community. A related theory sees the press as a neutral conduit of information between the people and their elected leaders. These theories, in my view, again give insufficient weight to the institutional autonomy of the press that it was the purpose of the Constitution to guarantee.

In setting up the three branches of the Federal Government, the Founders deliberately created an internally competitive system. As Mr. Justice Brandeis once wrote: [6]

"The [Founders'] purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the Government as an additional check on the three official branches. Consider the opening words of the Free Press Clause of the Massachusetts Constitution, drafted by John Adams:

"The liberty of the press is essential to the security of the state."

The relevant metaphor, I think, is the metaphor of the Fourth Estate. What Thomas Carlyle wrote about the British Government a century ago has a curiously contemporary ring:

"Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech or witty saying; it is a literal fact—very momentous to us in these times."

For centuries before our Revolution, the press in England had been licensed, censored, are bedevilled by prosecutions for seditious libel. The British Crown knew that a free press was not just a neutral vehicle for the balanced discussion of diverse ideas. Instead, the free press meant organized, expert scrutiny of government. The press was a conspiracy of the intellect, with the courage of numbers. This formidable check on official power was what the British Crown had feared—and what the American Founders decided to risk.

It is this constitutional understanding, I think, that provides the unifying principle underlying the Supreme Court's recent decisions dealing with the organized press.

Consider first the libel cases. Officials within the three governmental branches are, for all practical purposes, immune from libel and slander suits for statements that they make in the line of duty.[7] This immunity, which has both constitutional and common law origins, aims to insure bold and vigorous prosecution of the public's business. The same basic reasoning applies to the press. By contrast, the Court has never suggested that the constitutional right of free speech gives an *individual* any immunity from liability for either libel or slander.

In the cases involving the newspaper reporters' claims that they had a constitutional privilege not to disclose their confidential news sources to a ground jury, the Court rejected the claims by a vote of five to four, or, considering Mr. Justice Powell's concurring opinion, perhaps by a vote of four and a half to four and a half. But if freedom of the press means simply freedom of speech for reporters, this question of a reporter's asserted right to withhold information would have answered itself. None of us—as individuals—has a "free speech" right to refuse to tell a grand jury the identity of someone who has given us information relevant to the grand jury's legitimate inquiry. Only if a reporter is a representative of a protected *institution* does the question become a different one. The members of the Court disagreed in answering the question, but the question did not answer itself.

The cases involving the so-called "right of access" to the press raised the issue whether the First Amendment allows government, or indeed *requires* government, to regulate the press so as to make it a genuinely fair and open "market place for ideas." The Court's answer was "no" to both questions. If a newspaper wants to serve as a neutral market place for debate, that is an objective which it is free to choose. And, within limits, that choice is probably necessary to commercially successful journalism. But it is a choice that government cannot constitutionally impose.

Finally the Pentagon Papers case involved the line between secrecy and openness in the affairs of Government. The question, or at least one question, was whether that line is drawn by the Constitution itself. The Justice Department asked the Court to find in the Constitution a basis for prohibiting the publication of allegedly stolen government documents. The Court could find no such prohibition. So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can.

But this autonomy cuts both ways. The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy.[8] The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.

The Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolution, at least in some instances, through carefully drawn legislation. For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society.

Newspapers, television networks, and magazines have sometimes been outrageously abusive, untruthful, arrogant, and hypocritical. But it hardly follows that elimination of a strong and independent press is the way to eliminate abusiveness, untruth, arrogance, or hypocrisy from government itself.

It is quite possible to conceive of the survival of our Republic without an autonomous press. For openness and honesty in government, for an adequate flow of information between the people and their representatives, for a sufficient check on autocracy and despotism, the traditional competition between the three branches of government, supplemented by vigorous political activity, might be enough.

The press could be relegated to the status of a public utility. The guarantee of free speech would presumably put some limitation on the regulation to which the press could be subjected. But if there were no guarantee of a free press, government could convert the communications media into a neutral "market place of ideas." Newspapers and television networks could then be required to promote contemporary government policy or current notions of social justice.[9]

Such a constitution is possible; it might work reasonably well. But it is not the Constitution the Founders wrote. It is not the Constitution that has carried us through nearly two centuries of national life. Perhaps our liberties might survive without an independent established press. But the Founders doubted it, and, in the year 1974, I think we can all be thankful for their doubts.

Let me emphasize again what I tried to indicate at the beginning of this discussion. The First Amendment views that I have expressed are my own. I have not spoken for the Court, and particularly I have not spoken for Mr. Justice White. While he and I are in agreement about many things, we have also sometimes disagreed—from as long ago as 1939 to as recently as last Tuesday. And, whatever else we may have learned at this Law School, I think each of us learned somewhere along the way that the person who disagrees with you is not necessarily wrong.

In my opening remarks I spoke of the Law School that I knew as a student. But I am not here today in the role of an aging alumnus with wistful memories of the way things used to be. All of us are here not so much

Footnotes at end of article.

to commemorate a golden past as to celebrate the present, and to express our faith in a bright and solid future.

I spoke earlier of the distinguished members of the faculty who are gone. The fact is that many of the finest teachers of my day are still here, or only recently retired: Fleming James, Myres McDougal, J. W. Moore, Fred Rodell, Eugene Rostow. And the more important fact is that the Law School through the years has been remarkably successful in its continuing program of faculty self-renewal—drawing here teachers and scholars of proven achievement or extraordinary promise. Of them all, I mention only the name of Alexander Bickel, not just because of his nationally recognized distinction, but because I am so sorry he cannot be with us today.

Among the students now here there are undoubtedly future judges and justices, perhaps future senators and congressmen and governors and cabinet officers, and maybe even a future President. But that is not what was really important about the Yale Law School of a generation ago, nor what is important now, nor what will be important in future years. The number of our graduates who have gone into government service is exceedingly high. But public service is surely not limited to government service. The real impact of the Yale Law School will always be most broadly felt through the leadership of its sons and daughters in countless other areas of professional and business activity.

Whatever place any of us may now occupy, all of us share one priceless experience in common. All of us have spent three of the most formative years of our lives in *this* place—challenged by the ideal of excellence, and prepared by that challenge to go forth from here with the will and the confidence to do our best with any task that life may bring.

The opportunity for that priceless experience at this great Law School, for generations of young men and women yet to come, is surely worth preserving for *at least* another 150 years.

FOOTNOTES

[1] See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

[2] *Branzburg v. Hayes*, 408 U.S. 665 (1972).

[3] *New York Times Co. v. United States*, 403 U.S. 713 (1971).

[4] *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

[5] *Miami Herald Publishing Co. v. Tornillo*, 94 S. Ct. 2831 (1974).

[6] *Myers v. United States*, 272 U.S. 52, 293 (1926) (dissenting opinion).

[7] *See Barr v. Matteo*, 360 U.S. 564 (1959).

[8] Cf. *Pell v. Procunier*, 94 S. Ct. 2800 (1974); *Saxbe v. Washington Post Co.*, 94 S. Ct. 2811 (1974).

[9] Cf. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

BUSINESS EXECUTIVES VIEW CONSUMERISM AS POSITIVE MARKET FORCE

Mr. PERCY. Mr. President, one of the most encouraging signs during these times of two-digit inflation and an unstable economy is the widely held view by businessmen that consumerism is a positive force in the marketplace. A recent article by Stephen A. Greyser and Steven L. Diamond in the Harvard Business Review dramatically reports that 84 percent of the more than 3,400 businessmen surveyed believe that consumerism is "here to stay." Consumer concern over rising prices is seen to be the most important factor in the growth of consumer interest.

Advertising is cited as a major cause of consumer dissatifaction, and the businessmen strongly support more truthfulness; 87 percent agree that "advertising should include adequate information for 'logical' buying decisions, whether or not consumers choose to use it." Hopefully, the views of these executives will be reflected in the mainstream of marketing practices. Consumers need such improvements in advertising both to assist them in their purchases and to restore confidence in American business.

The blame and responsibility for consumer problems was also addressed in this excellent study. The executives assigned to business "the dominant share of responsibility" for both causing, 48 percent, and remedying, 52 percent, consumer problems. In contrast, Government was considered more of a cause, 27 percent of, than a force for remedying, consumer problems. Most significantly, the majority of businessmen, 53 percent thought "consumers should have a lot more protection than they are getting."

These attitudes are encouraging. The Washington-based trade associations that bitterly fought the creation of an Agency for Consumer Advocacy would do better to listen to the enlightened views of these business executives who make up their membership. Fifty-eight percent believe that it is the responsibility of Government to protect consumers from abuse.

The article reports further that 70 percent of the executives agree that "consumerism's pressures overall have had a positive effect on business," and that 74 percent agree that "consumerism's pressures overall have had a positive result for the consumer." This is, as the article indicates, "an interesting twin faceted overall endorsement of consumerism."

Because of the importance of these current research findings for businessmen, consumers, and Members of Congress, I ask unanimous consent that the full text of this article be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From Harvard Business Review, September–October 1974]

BUSINESS IS ADAPTING TO CONSUMERISM

(By Stephen A. Greyser and Steven L. Diamond)

(AUTHORS' NOTE: We gratefully acknowledge the support of the Marketing Science Institute and especially thank Jane Ross for her assistance in data tabulation and analysis.)

Broad recognition and growing acceptance characterize management's attitude toward consumerism, the "buyers' rights" movement that has sometimes frustrated, sometimes dismayed, the business community. Generally considered as here to stay, consumerism is now seen by a surprisingly large number of executives as an opportunity rather than a threat. This comprehensive report interprets the opinions of HBR subscribers on the causes and growth of consumerism, its impact on marketing and other business practices, present and prospective business reactions to it, and its regulatory ramifications.

Mr. Greyser is professor of business administration at the Harvard Business School, where he teaches advertising, and executive director of the Marketing Science Institute (a nonprofit research center associated with HBS). Among other books, he has authored Cases in Advertising and Communications Management (Prentice-Hall, 1972) and co-authored with Raymond A. Bauer Advertising in America: The Consumer View (Division of Research, Harvard Business School, 1968). A frequent contributor to this and other journals on issues of businessmen's attitudes, marketing, advertising, and public policy, he also serves as secretary of HBR's Editorial Board. Mr. Diamond is a doctoral candidate at HBS and a research assistant at MSI. Also research director of The Child, Inc., Mr. Diamond has published a number of articles in the areas of consumer behavior and market research.

Threat . . . or opportunity? Legitimate rights . . . or radical take-over? Substantive . . . or strictly political? Redressing imbalances in the marketplace . . . or creating them?

Consumerism—a movement generally defined as seeking to increase the rights and powers of buyers in relation to sellers—is a phenomenon that has been characterized as each of the above by some observers. As the principal targets of consumerists' activities and demands, businessmen, especially marketers, are often perplexed and distressed by consumerism. Yet whatever their attitude—accepting, cautious, or rejecting—most businessmen regard consumerism with growing interest and concern.

This survey of HBR subscribers is the first wide-scale study of the attitudes and reactions of the executive community regarding consumerism. The respondents come from a variety of industries, company sizes, functional areas, and levels of management, as shown in *Exhibit I* (see page 40). Not unexpectedly, a healthy proportion—about half—are in industries and companies where marketing is considered particularly important. The respondents include many who have direct experience with consumerism as well as many who have been relatively unaffected by it. (For details on the study methodology, see the accompanying ruled insert.)

From the responses to the comprehensive HBR questionnaire, we see a picture of broad recognition and acceptance of consumerism by managers as a permanent part of the business landscape. Although some of this acceptance is grudging, a strong majority of executives consider consumerism a positive force in the marketplace. Moreover, by far the most dominant management view of consumerism is that it represents an opportunity for marketers rather than a threat to them.

SURVEY HIGHLIGHTS

Here are the major findings of the study, which are given more extensive treatment in the indicated sections that follow:

Consumerism is here to stay is the overwhelming executive consensus. The combination of consumer concern over rising prices and over the problems of product performance and quality are viewed as the chief reasons for consumerism's growth. (See the section entitled *Here to stay.*)

The traditional "buyer beware" philosophy of the marketplace is seen as fast eroding. Executives think the balance between buyer beware and seller beware is still tilted toward the former, but the pendulum is swinging swiftly toward seller beware. (See *Caveat emptor eroding.*)

Despite their problems, consumers are seen

as still able to make sensible buying decisions. Although many respondents think that marketers sometimes manipulate consumers into unwanted purchases, executives strongly contend that consumers still hold the ultimate weapon of not buying products. (See *Marketing practices and the consumer.*)

Businessmen support propositions to make advertising more factual and informative. They see consumerism as leading to major modifications in advertising's content that will make it more truthful. (See *Focus on advertising.*)

Business is considered primarily responsible for both causing consumer problems and resolving them. Business self-regulation is still the most favored route (See *Blame and responsibility.*)

Improving product quality and performance is viewed as the most constructive consumer-oriented program that companies can undertake. The auto industry, and American Motors specifically, are cited as doing particularly effective work in responding to consumer pressures. (See *Constructive consumer programs.*)

While much progress has been made in the past decade on key consumer-related issues, even further progress is foreseen in the decade ahead. Increased sensitivity to consumer complaints has shown the most progress; quality of repair and maintenance services has the furthest to go. (See *Pace of progress.*)

Consumerism can be a positive competitive marketing tool—an opportunity for business. Executives also generally think consumerism is both good for business and good for the consumer. (See *Overall appraisal.*)

HERE TO STAY

Businessmen strongly agree that consumerism can no longer be ignored or denied. It is "here to stay" say 84% of our responding executives, and only 8% think it is "a passing fad." A financial manager of a pet-food products company said of consumerism, "It is a factor which will not disappear in the near term, one which will ever more strongly influence our decision making, and one which we need not fear."

In order to probe the "why" behind this strongly held attitude, we asked respondents to appraise the relative importance of a variety of claimed causes of consumerism's growth, including general economic and social factors as well as specific business and marketing practices.

Looking first at the former, we see that consumer concern over rising prices is regarded as the leading cause of consumerism's growth (see *Exhibit II*). A cluster of product performance and quality problems—both real and as perceived by consumers—are the next most frequently mentioned causes; these include consumers feeling a growing gap between product performance and marketing claims. Warranting comment (although not shown in the exhibit) is the feeling that certain factors have been relatively unimportant in causing consumerism's growth. These include consumerist concern over inadequate consumer protection legislation, inadequate enforcement of the legislation that does exist, and reliance on voluntary control of marketing practices.

EXHIBIT I—*Profile of HBR subscribers responding*

Management position	*Percent*
Top management	21
Chairman of the board; owner; partner; president; division manager; executive vice president; general manager; publisher; editor; administrative director; dean; executive director; member of board of directors; managing director.	
Upper-middle management	16
Vice president; treasurer; controller; corporate secretary; general counsel; assistant to top manager; principal (consulting firm).	
Middle management	22
Assistant vice president, treasurer, etc; functional department head (advertising, sales, brand manager, production, purchasing, personnel, etc.); assistant to upper-middle manager.	
Lower-middle management	13
Assistant manager; regional sales manager; section head; supervisor; associate head of department.	
Other executives	10
Salesman; representative; advertising personnel; engineer; research personnel; actuary; nonsupervisory personnel.	
Professional	6
Doctor; lawyer; CPA; consultant.	
Miscellaneous	3
Librarian; retired executive.	
Job function:	
Accounting	6
Engineering; R&D	8
Finance	8
General management	40
Marketing	18
Personnel; labor relations	5
Production	4
Other	11
Education:	
High school	2
Some college	10
Bachelor's degree	32
Graduate school	56
Age:	
Under 30	16
30–39	34
40–49	29
50–59	17
60–64	3
65 or over	1
Industry	
Manufacturing consumer durable products	9
Manufacturing consumer nondurable products	9
Manufacturing industrial products	18
Advertising; media; publishing	3
Banking; investments; insurance	13
Construction; mining; oil	5
Defense industry	2
Education; social services	7
Government	5
Management consulting	5
Personal consumer services	2
Retail or wholesale trade	7
Transportation; public utility	6
Other	10
Importance of marketing to company	
Vitally important	51
Very important	26
Rather important	13
Not particularly important	6
Not important at all	4
Relative size of company in industry	
Very large	30
Larger than most	31
About average	20
Smaller than most	14
Very small	5
Company's annual sales	
Under $1 million	10
$1 million–$10 million	19
$10 million–$25 million	10
$25 million–$100 million	15
$100 million–$500 million	17
Over $500 million	29
Impact of consumerism on company	
Tremendous influence	11
Large influence	27
Some influence	32
Little influence	13
Not much influence at all	17

Regarding executives' opinions about specific business and marketing practices that cause consumer dissatisfaction, *Exhibit II* shows that product problems are considered the most important. Specifically, defective products, hazardous or unsafe products, and defective repair work or service are the three most frequently mentioned causes of consumer problems and dissatisfaction—each cited as important by over 80% of responding executives.

A final all-encompassing comment from our respondents is their 3-2 agreement that "the problems of consumers are more serious now than in the past."

Dip in consumer confidence: Another major component of today's consumer picture is the state of consumer confidence in both the marketplace and marketers.

Businessmen draw a gloomy picture here: 76% take the view that "consumer disillusionment today is higher than in the past." Also, executives see today's consumers as far more critical of business generally and far more cynical about what marketers say and do, compared with consumers ten years ago. An executive vice president of a chemicals manufacturing company said: "Consumerism is only a small part of the public's overall disillusionment with business—a symptom. We'd better listen and act—and soon."

EXHIBIT II—*Causes of consumerism's growth*

Economic and social factors	
Consumer concern over rising prices	4.2
Consumers feeling a growing gap between product performance and marketing claims	4.1
Increased consumer expectations for product quality	3.8
Deterioration in product quality	3.6
Political appeal of consumer protection	3.6
Failure of normal marketplace operations to satisfy consumers	3.6
A feeling that business should assume greater social responsibilities	3.6
Impersonal nature of the marketplace	3.5
Greater public concern over social problems generally	3.2
Consumers demanding more product information	3.6
Business and marketing practices	
Defective products	4.5
Hazardous or unsafe products	4.3
Defective repair work or service	4.1
Misleading advertising	3.9
Poor complaint-handling procedures by retailers	3.9
Advertising which claims too much	3.9
Deceptive packaging and labeling	3.8
Poor complaint-handling procedures by manufacturers	3.8
Failure to deliver merchandise which has been paid for	3.6
Inadequate guarantees and warranties	3.5

*The importance rating is based on a 5-point scale, ranging from "very important" (5) to "very unimportant" (1).

At the same time, as exhibit III shows, management views today's shopper as much more sophisticated than yesterday's and expects still greater sophistication in the years ahead.

"CAVEAT EMPTOR" RECOING

Perhaps the most enduring general characterization of the marketplace is caveat emptor—"let the buyer beware." This characterization has been modified somewhat—some would say altered—in recent years by changes in the "rules of the marketplace" made by Government and by changes in the marketing approach of many businesses. Indeed, some observers have suggested that the current marketplace should be characterized

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D 1973

PAT L. TORNILLO, JR.,

Appellant,

vs.

CASE NO. 43,009

THE MIAMI HERALD PUBLISHING COMPANY, a Division of Knight Newspapers, Inc.,

Appellee.

Opinion filed July 18, 1973

An Appeal from the Circuit Court in and for Dade County, Francis J. Christie, Judge

Jerome A. Barron, Tobias Simon and Elizabeth du Fresne, for Appellant

Dan Paul and James W. Beasley of Paul & Thomson, for Appellee

Robert L. Shevin, Attorney General, as Amicus Curiae

Jonathan L. Alpert, Richard Yale Feder, Irma Robbins Feder and Warren S. Schwartz, for Amicus Curiae, American Civil Liberties Union of Fla., Inc.

C. Ballard of Bayard, McLeod, Lang, Eckert & Ballard, for Amicus Curiae, Times Publishing Company

Donald U. Sessions, as Amicus Curiae

PER CURIAM

This cause is before us upon direct appeal from Circuit Court of Dade County, holding Florida Statute 104.38[1] unconstitutional thereby vesting jurisdiction in this Court under Article V, Section 3(b)(1), Florida Constitution, as amended 1973.

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(1) F.S. §104.38 - Newspaper assailing candidate in an election; space for reply. -- If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

Appellant Tornillo, plaintiff below, who was a candidate for the State Legislature demanded that appellee print verbatim his replies to two editorials printed therein attacking appellant's personal character. The appellee refused and Tornillo filed complaint for declaratory and injunctive relief and punitive damages. Pursuant to Florida Statute 86.091, the Attorney General of this State was advised that appellant intended to contest the constitutionality vel non of Florida Statute 104.38. In view of the circumstances, the trial court granted the request for an emergency hearing.

Preliminarily, the trial court determined that the statutory provision in question is a criminal statute and that absent special circumstances, equity will not ordinarily enjoin commission of a crime. Pompano Horse Club Co. v. State, 93 Fla. 415, 111 So. 801 (1927). Notwithstanding this infirmity in appellant's complaint, the trial court further concluded that F.S. §104.38 is violative of Article I, Sections 4 and 9 of the Constitution of Florida and the Fourteenth Amendment to the Constitution of the United States as a restraint upon freedom of speech and press and because it is impermissibly vague and indefinite.

Believing that the promulgation of this statute is authorized by Article IV, Section 4,[2] and the First[3] and Fourteenth Amendments to the Constitution of the United States, and Article VI, Section 1,[4] and Article I, Section 4[5] of the

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(2) Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and On Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

(3) Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abriding the freedom of speech, or of the press; ....

(4) Section 1. Regulation of elections. -- All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. Registration and elections shall, and political party functions may, be regulated by law.

(5) Section 4. Freedom of speech and press. -- Every person may speak, write and publish his sentiments on all subjectsbut shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

Florida Constitution, and believing that this statute enhances rather than abridges freedom of speech and press protected by the First Amendment, we hold that it does not constitute a violation of the First and Fourteenth Amendments to the Constitution of the United States or Article I, Section 4, Florida Constitution.

The election of leaders of our government by a majority of the qualified electors is the fundamental precept upon which our system of government is based, and is an integral part of our nation's history. Recognizing that there is a right to publish without prior governmental restraint,(6) we also emphasize that there is a correlative responsibility that the public be fully informed.

The entire concept of freedom of expression as seen by our founding fathers rests upon the necessity for a fully informed electorate. James Madison wrote that, "A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy; or, perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors, must arm themselves with the power which knowledge gives (to W. T. Barry, August 4, 1822)."(7)

The public "need to know" is most critical during an election campaign. The enactment of the first comprehensive corrupt practices act relating to primary elections in 1909 our legislature responded to the need for insuring free and fair elections. Article III, Section 26, and Article VI, Section 9, Constitution of Florida 1885, commanded the Legislature to pass laws "regulating elections and prohibiting under adequate penalties, all undue influence thereof from power, bribery, tumult or other improper practices" and to "enact such laws as will preserve the purity of the ballot given under this Constitution." This act of 1909 did not deal with the subject of the wrongful use of newspapers or other printed or written matter, with the exception of a provision which declared it to be a misdemeanor for any candidate or other person to have or distribute on day of primary

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(6) Near v. Minnesota, 283 U.S. 697, New York Times v. United States, 403 U.S. 713, Martin v. City of Struthers, 319 U.S. 141, Lamonet v. Postmaster General, 381 U.S. 301.

(7) 6 Writings of James Madison 398 (Hunt Ed. 1906), The Complete Madison 337 (1953).

at or near any polling place any writing against any candidate in the primary. Florida Statute 104.38 was originally enacted in 1913 as Chapter 6470, Section 12, Laws of Florida, 1913.[8] This second act adopted in 1913 known as the corrupt practices act was enacted to supplement the act of 1909. The statutory provision, the constitutionality vel non which is being questioned in the instant cause, was enacted not to punish, coerce or censor the press but rather as a part of a centuries old legislative task of maintaining conditions conducive to free and fair elections. The Legislature in 1913 decided that owners of the printing press had already achieved such political clout that when they engaged in character assailings, the victim's electoral chances were unduly and improperly diminished. To assure fairness in campaigns, the assailed candidate had to be provided an equivalent opportunity to respond; otherwise not only the candidate would be hurt but also the people would be deprived of both sides of the controversy.[9]

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(8) Chapter 6470, Section 12 (Laws of Florida, 1913), provided, "That if any newspaper in its columns assails the personal character of any candidate for nomination in a primary election, or charges such candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall, upon request of such candidate, immediately publish free of cost any reply he may make thereto, in as conspicuous a place and in the same kind of type as the matter that calls for such reply; provided, such reply does not take up more space than the matter replied to. A person who fails to comply with the provisions of this Section, shall upon conviction be punished by fine not exceeding five hundred dollars, or by imprisonment." See subsequent history of statute, Section 5927, Revised General Statutes of Florida, 1920, entitled newspaper assailing candidate must give free space for reply. This provision was re-enacted as Section 875.40, Florida Statutes, which varies only slightly from the present law. Section 875.40, Florida Statutes, was identical to Chapter 6470, Section 12 (Laws of Florida, 1913). In 1951, the Legislature renumbered and slightly revised this provision to cover any elections (not just primaries) and to provide that, "Any one failing to comply with the provisions of the section shall, upon conviction, be guilty of a misdemeanor." Chapter 268.70, Laws of Florida, 1951. Section 104.38 was entitled, "Newspaper assailing candidate in election; space for reply." See also Chapter 28151, General Laws, 1953, which adds the words "or for election" so that the preliminary portion of the statute reads: "If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election ...." In 1972, HB 2801 attempting to repeal F.S. 104.38 died in committee.

(9) Ex Parte Hawthorne, 116 Fla. 608, 156 So. 619 (1934). 9 Florida L.J. 297 (1935), "Brief History of the Corrupt Practices Act of Florida," J.V. Keen.

What some segments of the press seem to lose sight of is that the First Amendment guarantee is "not for the benefit of the press so much as for the benefit of us all."(10) Speech concerning public affairs is more than self expression. It is the essence of self government.(11)

Mr. Justice Learned Hand expressed the role of the press well when he emphasized,

> "However neither exclusively, nor even primarily are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: The dissemination of news from as many different sources and with as many different facets and colors as possible." (12)

In Pennekamp v. Florida, 328 U.S. 331 (1946), the Supreme Court of the United States emphasized that the power of the press must be tempered with responsibility when it explained,

> "Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the consitutional protection of freedom of speech must be viewed in that light and in that light applied. * * *
>
> "A free press is vital to a democratic society because its freedom gives it power. Power in a demoncracy implies responsibility in its exercise. No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. . . . In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. Most State constitutions expressly provide for liability for abuse of the press's freedom. That there was such legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out. Responsibility for its abuse was embedded in the law. The First Amendment safeguarded that right.
>
> "The press does have the right, which is its professional function, to criticize and to advocate. The whole gamut of public affairs is the domain for fearless and critical comment, and not the least the administration of justice. But the public function which belongs to the press makes it an obligation of honor to exercise this function only with the fullest sense of responsibility. Without such a lively sense of responsibility a free press may readily become a powerful instrument of injustice." [Emphasis Supplied]

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(10) Time, Inc. v. Hill, 385 U.S. 374, 389.

(11) Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

(12) United States v. Associated Press, 52 F. Supp. 362, 372.

The concept which appears throughout the decisions underlying First Amendment guarantees that there is a broad societal interest in the free flow of information to the public by the Supreme Court of the United States was explicitly stated in New York Times v. Sullivan, 376 U.S. 254 (1964), as well as other Supreme Court decisions, as follows:

> "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth vs. United States, 354 U.S. 476, 484, 1 L.Ed.2d 1498, 1506, 77 S.Ct. 1304. The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the republic, is a fundamental principle of the constitutional system."

The statute here under consideration is designed to add to the flow of information and ideas and does not constitute an incursion upon First Amendment rights or a prior restraint, since no specified newspaper content is excluded. There is nothing prohibited but rather it requires, in the interest of full and fair discussion, additional information.

The right of the public to know all sides of a controversy and from such information to be able to make an enlightened choice is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship. Through consolidation, syndication, acquisition of radio and television stations and the demise of vast numbers of newspapers, competition is rapidly vanishing and news corporations are acquiring monopolistic influence over huge areas of the country. We take note of a recent article in Florida Trend magazine, March 1973, explicating that the Miami Herald is the largest newspaper published in Florida, that it is larger in size than the next two largest newspapers; and that it is not only a large city daily newspaper but also is a regional and international newspaper.

Freedom of expression was retained by the people through the First Amendment for all the people and not merely for a select few. The First Amendment did not create a privileged class which through a monopoly of instruments of the newspaper industry would be able to deny to the people the freedom of expression which

the First Amendment guarantees. The Supreme Court of the United States in Associated Press v. United States, 326 U.S. 1, 20, clearly expounded,

> "It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."

More recently in Red Lion Broadcasting Co. v. F.C.C., 381 F.2d 908, affirmed 395 U.S. 367 (1969), the Supreme Court opined,

> "Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. 'Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.' Associated Press v. United States, 326 U.S. 1, 20 (1945)."

By this tendency toward monopolization, the voice of the press tends to become exclusive in its observation and its wisdom which in turn deprives the public of their right to know both sides of controversial matters.

Appellant urges that if a newspaper may attack a candidate with impunity and he is provided no right to reply, the public interest in free expression suffers, because they can only hear the publisher's side of the controversy and are denied the dissenting view.

Although we have carefully considered appellee's argument that Red Lion Broadcasting Co. v. F.C.C., supra, is inapplicable to the present cause, we cannot discount certain excerpts therefrom which are applicable to First Amendment guarantees in general. Therein, the Supreme Court explained that,

> "Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication." 395 U.S. at 401, n. 28.

That Court further stated in Red Lion Broadcasting v. F.C.C., supra, at 390, in Associated Press v. U.S., supra, at 20, and New York Times v. Sullivan, supra, at 270, that it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas wherein truth will prevail rather than to countenance a monopolization of that market whether by government or private enterprise.

Florida's right of reply statute is consistent with the First Amendment as applied to this State through the Fourteenth Amendment. In Rosenbloom v. Metromedia, 403 U.S. 29, 47, we find that the Supreme Court of the United States is inclined to this position by the following quote from the majority opinion:

> "Furthermore, in First Amendment terms, the cure seems far worse than the disease. 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."

To this comment, the Court appended the following note:

> "Some States have adopted retraction statutes or right-of-reply statutes. See Donnelly, The Right of Reply: An Alternative to an Action for Libel, 34 Va. L. Rev. 867 (1948); Note, Vindication of the Reputation of a Public Official, 80 Harv. L. Rev. 1730 (1967). Cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).
>
> "One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion. Barron, Access to the Press - A New First Amendment Right, 80 Har. L. Rev. 1641, 1666-1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access

> to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly."

Although appellee attempts to minimize the import of the aforestated quotation, we feel compelled to note that such remarks regarding right to reply legislation is entirely consistent with past precedent establishing the fundamental purpose of the First Amendment to inform the people.

Neither appellant nor appellee takes issue with the holding of the trial court that it lacked jurisdiction to enjoin an alleged violation of Florida Statute 104.38. This provision is criminal in nature and absent special circumstances equity will usually not enjoin commission of a crime.(13)

Appellant urges that the Right of Reply Statute in question is neither impermissibly vague nor unnecessarily broad. We must agree and therefore uphold the constitutionality of this statutory provision. It is a fundamental principle that this Court has the duty, if reasonably possible, consistent with protection of constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and if reasonably possible a statute should be construed so as not to conflict with the constitution.(14) Courts are inclined to adopt that reasonable interpretation of a statute which removes it farthest from constitutional infirmity. In Gitlow v. People of New York, 268 U.S. 652, the Supreme Court of the United States stated every presumption is to be indulged in favor of the validity of a statute, and the case is to be considered in the light of the principle that the State is primarily the judge of regulations in the interest of public safety and welfare.

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(13) Pompano Horse Club Co. v. State, supra, 17 Fla. Jur. Injunctions, §46.

(14) Buck v. Gibbs, 34 F. Supp. 510, Mod. 313 U.S. 387 (1940); Hunter v. Owens, 80 Fla. 812, 86 So. 839 (1920); Cragin v. Ocean 4 Lake Realty Co., 133 So. 569, 135 So. 795 (1931), appeal dism. 286 U.S. 523; Haworth v. Chapman, 113 Fla. 591, 152 So. 663 (1933); Hanson v. State, 56 So.2d 129 (1952); Overstreet v. Blum, 227 So.2d 197 (Fla. 1969); Hancock v. Sapp, 225 So.2d 411 (Fla. 1969); Rich v. Ryals, 212 So.2d 641 (Fla. 1968).

We do not believe that Florida's statutory right of reply is lacking in any of the required standards of preciseness. The statute is sufficiently explicit to inform those who are subject to it as to what conduct on their part will render them liable to its penalties.

We recognize that certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press and association for fear of violating an unclear law. Scull v. Virginia, 359 U.S. 344 (1959), Ashton v. Kentucky, 384 U.S. 195 (1965).

In Brock v. Hardie, 154 So. 690, 694 (1934), relative to the issue of vagueness, this Court said,

> "Whether the words of the Florida statute are sufficiently explicit to inform those who are subject to its provisions what conduct on their part will render them liable to its penalties is the test by which the statute must stand or fall, because, as was stated in the opinion above mentioned, 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'
>
> "Such seems to be the test approved by the Supreme Court of the United States. Citation of authorities as to what may be considered the exact meaning of the phrase 'so vague that men of common intelligence must necessarily guess at its meaning,' so that certain conduct may be considered within or outside the true meaning of that phrase, or what language of a statute may lie within or without it, would be of little aid to us.
>
> "We must apply our own knowledge with which observation and experience have supplied us in determining whether words employed by the statute are reasonably clear or nor in indicating the legislative purpose, so that a person who may be liable to the penalties of the act may know that he is within its provisions or not."

Inter alia, appellee attacks the constitutionality of the statute on grounds of vagueness and overbreadth because of the use of the term "any" - referring to the type of reply allowable. This statute provides in part,

> "if any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply .... " [Emphasis Supplied]

Because of the longstanding policy of this Court to give a statute, if reasonably possible, a construction supporting its constitutionality, we hold that the mandate of the statute refers to "any reply" which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane.

We conclude that the statute in question is as certain and definite as others heretofore upheld as constitutionally permissible. The following statement made by Judge Tamm in Red Lion Broadcasting Co. v. F.C.C., supra, 381 F.2d at 921, is clearly applicable to the instant cause: "Here there is no broad-reaching, all-embracive statutory provision penalizing knowing as well as unknowing conduct."

Although apparently not raised before the trial court, the brief of Amicus Times Publishing Co. has raised the issue that Florida Statute 104.38 is a deprivation of property right without due process. With this contention, we can not agree. Florida Statute 104.38 is a valid exercise of the state police power enacted to assure the integrity of the electoral process. In Miller v. Schoene, 276 U.S. 272 (1928), the Supreme Court stated,

> "And where the public interest is involved preferment of that interest over the property interest of the individual, to extent even of its destruction, is one of the distinguishing characteristics of every exercise of police power which affects property." Id. at 279, 280.

We find this argument of deprivation of property rights by being required to furnish free space to be without merit. See Miller v. Schoene, supra; Marsh v. Alabama, 326 U.S. 501, at 506; Red Lion Broadcasting v. F.C.C., supra; Rosenbloom v. Metromedia, supra; Chronicle Publishing Co. v. Attorney General, 94 N.H. 148, 48 A.2d 478 (1946); Amalgamated Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

In conclusion, we do not find that the operation of the statute would interfere with freedom of the press as guaranteed by the Florida Constitution and the Constitution of the United States. Indeed it strengthens the concept in that it presents both views leaving the reader the freedom to reach his own conclusion. This

decision will encourage rather than impede the wide open and robust dissemination of ideas and counterthought which the concept of free press both fosters and protects and which is essential to intelligent self government.

Newspapers are not wholly dependent on electronic media as were the broadcasters in Red Lion Broadcasting Co. v. F. C. C., supra. However, we have no difficulty in taking judicial notice that the publishers of newspapers in this contemporary era would perish without this vital source of communications. The dissemination of news other than purely local is transmitted over telegraph wires or over air waves. This not only includes dissemination of news but also in chain newspaper operations so prevalent today, the Miami Herald being one; even editorials are prepared in one place and transmitted electronically to another. Therefore, the principles of law enunciated in Red Lion Broadcasting Co. v. F. C. C., supra, have been taken into consideration in reaching our opinion.

A half free press would be deceptive to the public. Florida Statute 104.38, in the interest of all the people, provides that candidates for public office under certain prescribed circumstances shall have a right of reply, a right of expression. It does not deny to the owner of the instruments of the newspaper industry any right of expression. The statute assures, and does not abridge, the right of expression which the First Amendment guarantees. The statute supports the freedom of the press in its true meaning - that is, the right of the reader to the whole story, rather than half of it - and without which the reader would be "blacked out" as to the other side of the controversy.

For the foregoing reasons, we find Florida Statute 104.38 to be constitutional and reverse the holding of the trial court that it is unconstitutional.

Accordingly, the judgment of the trial court is reversed and this cause is remanded to the trial court for further proceedings not inconsistent herewith.

It is so ordered.

CARLTON, C.J., ADKINS, McCAIN and DEKLE, JJ., and RAWLS, District Court Judge, Concur
ROBERTS, J., Concurs Specially with Opinion
BOYD, J., Dissents with Opinion

ROBERTS, J., Specially Concurring:

I concur in the opinion and judgment of the majority. We are fully cognizant of the recent decision rendered by the Supreme Court of the United States in Columbia Broadcasting System, Inc. v. Democratic National Committee, ___ U.S. ___, 41 U.S.L.W. 4688, decided May 29, 1973, which holds that neither the Federal Communications Act nor the First Amendment require broadcasters to accept paid editorial advertisements. But this opinion in no way derogated the earlier opinion of that court in Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969), validating the fairness doctrine of the Federal Communications Commission which imposes two affirmative responsibilities on the broadcaster - coverage of issues must be adequate and must fairly [illegible] In the Supreme Court stated in [illegible] of fulfilling its fairness doctrine [illegible] presentation of opposing views in a paid sponsor is unavailable, . . . and must initiate programming on public issues if no one else seeks to do so. See John J. Dempsey, 6 P & F Radio Reg. 615 (1950); Red Lion, supra, 395 U.S., at 378."

The complaints filed in Columbia Broadcasting, supra, by the Democratic National Committee and the Business Executives Move for Vietnam Peace, alleged that a broadcaster had violated the First Amendment by refusing to sell it time to broadcast spot announcements expressing political views of the different groups. The Supreme Court turned its decision primarily on the limited nature of the broadcasting airwaves and the existence of the Fairness Doctrine which requires broadcasters to provide free time for presentation of opposing political views when a paid sponsor is not available. The decision in Columbia Broadcasting is directed

solely to the peculiar and limited nature of broadcasting frequencies, and that decision is not applicable to the instant facts presently before this Court in the case sub judice. Chief Justice Burger commences the body of his opinion with the following remarks:

> "Mr. Justice White's opinion for the Court in Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969), makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated. The Court spoke to this reality when, in Red Lion, we said 'it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.' Red Lion, supra, 395 U.S., at 388.
>
> "Because the broadcast media utilize a valuable and limited public resource, there is also present an unusual order of First Amendment values. Red Lion discussed at length the application of the First Amendment to the broadcast media. In analyzing the broadcasters' claim that the Fairness Doctrine and two of its component rules violated their freedom of expression, we held that '[n]o one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.'' Red Lion, supra, 395 U.S., at 389. Although the broadcaster is not without protection under the First Amendment, United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948), '[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.' Red Lion, supra, 395 U.S., at 390."

After recounting the history of broadcast regulations, the court in Columbia Broadcasting, supra, opined that broadcasters are charged with the duty of providing the listening and viewing public with access to a balanced presentation of information on issues of public importance. The Supreme Court was particularly concerned with forcing broadcasters to accept paid political advertisements when broadcasting frequencies are so limited because of a substantial

risk that such a system would be monopolized by those who could and would pay the costs, and that a system so heavily weighted in favor of the financially affluent or those with access to wealth would in effect undermine the effective operation of the Fairness Doctrine. The views of the affluent would prevail since they would have it within their power to purchase time more frequently, and editorial advertising could then be monopolized by those of one political persuasion. Those were the concerns of the Supreme Court in Columbia Broadcasting, supra, when it rendered its decision that broadcasters are not required to accept paid editorial advertisements regardless of the content thereof.

Our opinion in the instant cause in no way conflicts with the recent decision of the Supreme Court in Columbia Broadcasting, supra.

CARLTON, C.J., ADKINS, McCAIN and DEKLE, JJ., and RAWLS, District Court Judge, Concur

BOYD, J., Dissenting:

I respectfully dissent.

This statute carries a penalty provision for violations thereof, and it therefore must be most strictly construed in favor of any person accused thereunder. The statute is so vague on its face as to raise doubts in the minds of those reading it as to the exact underlying legislative intent.

There are no standards as to when a publisher must carry a reply. For example, the following are just some of the important questions left unanswered by this statute. Does the law include both news stories and editorial comment? If a story mentions a "situation", but does not mention the candidate by name, may he reply? When the publisher knows his statements are true, must he publish a statement from the candidate which he knows to be false? If the reply of the candidate libels other persons, must the publisher print it, and, if so, is the publisher subject to liability for any resulting libel suit? If the candidate's reply were to contain obscene language, would the publisher still have to print it--and thereby invite prosecution under our obscenity laws?

The First Amendment to the Constitution of the United States provides that, "Congress shall make no law...abridging the freedom of speech, or of the press...." Article I, Section 4 of the Constitution of the State of Florida similarly provides: "No law shall be passed to restrain or abridge the liberty of speech or of the press." Since these constitutional provisions prohibit the government from limiting the right of the publishing press to publish news and comment editorially, it would be equally unconstitutional for the government to compel a publisher to print a statement of any other person, or persons, against that publisher's will.

The majority opinion correctly observes that freedom of speech and freedom of the press carry the duty to speak the truth.

And, of course, the constitutional rights of freedom of speech and freedom of the press must be exercised with appropriate regard to the provisions of our libel and obscenity statutes. As in all other areas of public and private service, some errors will, from time to time, surely occur. Yet, recognizing that the survival of a free press is contingent upon the press fulfilling its duty to the general public, the overwhelming majority of those in the publishing press comply with the highest of ethical standards.

We are taught in the Bible that, "the truth will make you free".[1]

Free people can make proper decisions for their own self-government only when they are adequately informed by a free press. To the extent that government limits or adds to that which a publisher must distribute, freedom of speech and freedom of the press are thereby diminished.

Almost everyone whose name has been carried frequently in the news media has been offended, at one time or another, by stories or comments with which he disagrees. This is part of the price one pays for success and notoriety. If there exists a problem in this state of affairs, the muzzling of a free press is not the solution to such problem.

I therefore dissent.

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[1] John 8:32

fication upon these general principles but was fashioned solely as a determinant of standing of plaintiffs alleging only injury as taxpayers who challenge alleged violations of the Establishment and Free Exercise Clauses of the First Amendment. See *Barlow* v. *Collins*, *supra*, at 170–172. The extension of that test to the very different challenges here only produces the confusion evidenced by the differing views of the *Flast* test expressed in the several opinions filed today in these cases. Outside its proper sphere, as my Brother POWELL soundly observes, that test is not "a reliable indicator of when a federal taxpayer has standing." *Ante*, at p. —. We avoid that confusion if, as I said in *Barlow*, *supra*, at 176, we recognize that

> ". . . alleged injury in fact, reviewability, and the merits pose questions that are largely distinct from one another, each governed by its own considerations. To fail to isolate and treat each inquiry independently of the other two, so far as possible, is to risk obscuring what it at issue in a given case, and thus to risk uninformed, poorly reasoned decisions that may result in injustice. . . .
>
> "The risk of ambiguity and injustice can be minimized by cleanly severing, so far as possible, the inquiries into reviewability and the merits from the determination of standing."

No. 72-1188

MR. JUSTICE MARSHALL, dissenting.

I agree with my Brother DOUGLAS that respondents have standing as citizens to bring this action. I cannot accept the majority's characterization of respondents' complaint as alleging only "injury in the abstract" and "'generalized grievances' about the conduct of government." *Ante*, at 8–9. According to their complaint, respondents are present and former members of the various armed forces reserves

> "organized for the purpose of opposing the military involvement of the United States in Vietnam and of using all lawful means to end that involvement, including efforts by its members individually to persuade the Congress of the United States and all members of the Congress to take all steps necessary and appropriate to end that involvement."

The specific interest which they thus asserted, and which they alleged had been infringed by violations of the Incompatibility Clause, though doubtless widely shared, is certainly not a "general interest common to all members of the public." *Ex parte Levitt*, 302 U. S. 633, 634 (1937). Not all citizens desired to have the Congress take all steps necessary to terminate American involvement in Vietnam, and not all citizens who so desired sought to persuade members of Congress to that end.

Respondents nevertheless had a right under the First Amendment to attempt to persuade Congressmen to end the war in Vietnam. And respondents have alleged a right, under the Incompatibility Clause, to have their arguments considered by Congressmen not subject to a conflict of interest by virtue of their positions in the armed forces reserves. Respondents' complaint therefore states, in my view, a claim of direct and concrete injury to a judicially cognizable interest. It is a sad commentary on our priorities that a litigant who contends that a violation of a federal statute has interfered with his aesthetic appreciation of natural resources can have that claim heard by a federal court, see *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973), while one who contends that a violation of a specific provision of the United States Constitution has interfered with the effectiveness of expression protected by the First Amendment is turned away without a hearing on the merits of his claim.

I respectfully dissent.

ROBERT H. BORK, Solicitor General (IRVING JAFFE, Acting Assistant Attorney General, DANIEL M. FRIEDMAN, Deputy Solicitor General, LEONARD SCHAITMAN and WILLIAM D. APPLER, Justice Dept. attorneys, with him on the brief) for petitioners; WILLIAM A. DOBROVIR, Washington, D.C. (ANDRA N. OAKES, with him on the brief) for respondents; THOMAS H. KING, MAURICE F. BIDDLE, and HAROLD SHAPIRO filed brief for Reserve Officers Assn. of the U.S., as amicus curiae, seeking reversal.

No. 73-797

The Miami Herald Publishing Company, A Division of Knight Newspapers, Inc., Appellant, v. Pat L. Tornillo, Jr. | On Appeal from the Supreme Court of Florida.

[June 25, 1974]

Syllabus

After appellant newspaper had refused to print appellee's replies to editorials critical of appellee's candidacy for state office, appellee brought suit in Florida Circuit Court seeking injunctive and declaratory relief and damages, based on Florida's "right of reply" statute that grants a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper, and making it a misdemeanor for the newspaper to fail to comply. The Circuit Court held the statute unconstitutional as infringing on the freedom of the press and dismissed the action. The Florida Supreme Court reversed, holding that the statute did not violate constitutional guarantees, and that civil remedies, including damages, were available, and remanded to the trial court for further proceedings. *Held*:

1 The Florida Supreme Court's judgment is "final" under 28 U. S. C. § 1257, and thus is ripe for review by this Court. *North Dakota Pharmacy Bd.* v. *Snyder's Stores*, 414 U. S. 156.

2 The statute violates the First Amendment's guarantee of a free press.

(a) Governmental compulsion on a newspaper to publish that which "reason" tells it should not be published is unconstitutional.

(b) The statute operates as a command by a State in the same sense as a statute or regulation forbidding appellant from publishing specified matter

(c) The statute exacts a penalty on the basis of the content of a newspaper by imposing additional printing, composing, and materials costs and by taking up space that could be devoted to other material the newspaper may have preferred to print.

(d) Even if a newspaper would face no additional costs to comply with the statute and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the statute still fails to clear the First Amendment's barriers because of its intrusion into the function of editors in choosing what material goes into a newspaper and in deciding on the size and content of the paper and the treatment of public issues and officials.

287 So. 2d 78, reversed.

BURGER, C. J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring statement, in which REHNQUIST, J., joined. WHITE, J., filed a concurring opinion.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper, violates the guarantees of a free press.

I

In the fall of 1972, appellee, Executive Director of the Classroom Teachers Association, apparently a teachers' collective-bargaining agent, was a candidate for the Florida House of Representatives. On September 20, 1972, and again on September 29, 1972, appellant printed editorials critical of appellee's candidacy.[1] In response to these editorials appellee demanded that appellant print verbatim his replies, defending the role of the Classroom Teachers Association and the organization's accomplishments for the citizens of Dade County. Appellant declined to print the appellee's replies, and appellee brought suit in Circuit Court, Dade County, seeking declaratory and injunctive relief and actual and punitive damages in excess of $5,000. The action was premised on Florida Statute § 104.38, a "right of reply" statute which provides that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute constitutes a first-degree misdemeanor.[2]

Appellant sought a declaration that § 104.38 was unconstitutional. After an emergency hearing requested by appellee, the Circuit Court denied injunctive relief because, absent special circumstances, no injunction could properly issue against the commission of a crime, and held that § 104.38 was unconstitutional as an infringement on the freedom of the press under the First and Fourteenth Amendments to the Constitution. *Tornillo* v. *Miami Herald Publishing Co.*, 38 Fla. Supp. 80 (1972). The Circuit Court concluded that dictating what a newspaper must print was no different from dictating what it must not print. The Circuit Judge viewed the statute's vagueness as serving "to restrict and stifle protected expression." 38 Fla. Supp., at 83. Appellee's cause was dismissed with prejudice.

On direct appeal, the Florida Supreme Court reversed, holding that § 104.38 did not violate constitutional guarantees. *Tornillo* v. *Miami Herald Publishing Co.*, 287 So. 2d 78 (1973).[3] It held that free speech was enhanced

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[1] The text of the September 20, 1972, editorial is as follows:

"The State's Laws And Pat Tornillo

"'LOOK who's upholding the law!'

"Pat Tornillo, boss of the Classroom Teachers Association and candidate for the State Legislature in the Oct. 3 runoff election, has denounced his opponent as lacking 'the knowledge to be a legislator, as evidenced by his failure to file a list of contributions to and expenditures of his campaign as required by law.'

"Can Tornillo calls 'violation of this law inexcusable.'

"This is the same Pat Tornillo who led the CTA strike from February 19 to March 11, 1968, against the school children and taxpayers of Dade County. Call it whatever you will, it was an illegal act against the public interest and clearly prohibited by the statutes.

"We cannot say it would be illegal but certainly it would be inexcusable of the voters if they sent Pat Tornillo to Tallahassee to occupy the seat for District 103 in the House of Representatives."

The text of the September 29, 1972, editorial is as follows:

"FROM the people who brought you this—the teacher strike of '68—come now instructions on how to vote for responsible government, i.e., against Crutcher Harrison and Ethel Beckham, for Pat Tornillo. The tracts and blurbs and bumper stickers pile up daily in teachers' school mailboxes amidst continuing pouts that the School Board should be delivering all this at your expense. The screeds say the strike is not an issue. We say maybe it wouldn't be were it not a part of a continuation of disregard of any and all laws the CTA might find aggravating. Whether in defiance of zoning laws at CTA Towers, contracts and laws during the strike, or more recently state prohibitions against soliciting campaign funds amongst teachers, CTA says fie and try and sue us—what's good for CTA is good for CTA and that is natural law. Tornillo's law, maybe. For years now he has been kicking the public shin to call attention to his shakedown state-manship. He and whichever acerbic press is on alleged office have always felt their private ventures so chock full of public weal that we should leap at the chance to nab the tab, be it half the Glorious Leader's salary or the dues checkoff or anything else except perhaps mileage on the staff hydrofoil. Give him public office, says Pat, and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule.

[2] "104.38 *Newspaper assailing candidate in an election, space for reply.*—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083."

[3] The Supreme Court did not disturb the Circuit Court's holding that injunctive relief was not proper in this case even if the statute were constitutional. According to the Supreme Court neither side

and not abridged by the Florida right of reply statute, which in that court's view, furthered the "broad societal interest in the free flow of information to the public." 287 So. 2d, at 82. It also held that the statute was not impermissably vague; the statute informs "those who are subject to it as to what conduct on their part will render them liable to its penalties." 287 So. 2d, at 85.[4] Civil remedies, including damages, were held to be available under this statute; the case was remanded to the trial court for further proceedings not inconsistent with the Florida Supreme Court's opinion.

We postponed consideration of the question of jurisdiction to the hearing of the case on the merits. 414 U. S. 1142 (1974).

II

Although both parties contend that this Court has jurisdiction to review the judgment of the Florida Supreme Court, a suggestion was initially made that the judgment of the Florida Supreme Court might not be "final" under 28 U. S. C. § 1257.[5] In *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U. S. 156 (1973), we reviewed a judgment of the North Dakota Supreme Court, under which the case had been remanded so that further state proceedings could be conducted respecting Snyder's application for a permit to operate a drug store. We held that to be a final judgment for purposes of our jurisdiction. Under the principles of finality enunciated in *Snyder's Drug Stores*, the judgment of the Florida Supreme Court in this case is ripe for review by this Court.[6]

III

A

The challenged statute creates a right to reply to press criticism of a candidate for nomination or election. The statute was enacted in 1913 and this is only the second recorded case decided under its provisions.[7]

Appellant contends the statute is void on its face because it purports to regulate the content of a newspaper in violation of the First Amendment. Alternatively it is urged that the statute is void for vagueness since no editor could know exactly what words would call the statute into operation. It is also contended that the statute fails to distinguish between critical comment which is and is not defamatory.

B

The appellee and supporting advocates of an enforceable right of access to the press vigorously argue that Government has an obligation to ensure that a wide variety of views reach the public.[8] The contentions of access proponents will be set out in some detail.[9] It is urged that at the time the First Amendment to the Constitution[10] was enacted in 1791 as part of our Bill of Rights the press was broadly representative of the people it was serving. While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers.[11] A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.

Access advocates submit that although newspapers of the present are superficially similar to those of 1791 the press of today is in reality very different from that known in the early years of our national existence. In the past half century a communications revolution has seen the introduction of radio and television into our lives, the promise of a global community through the use of communications satellites, and the spectre of a "wired" nation by means of an expanding cable television network with two-way capabilities. The printed press, it is said, has not escaped the effects of this revolu-

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took issue with that part of the Circuit Court's decision. 287 So. 2d, at 85.

[4] The Supreme Court placed the following limiting construction on the statute:

"[W]e hold that the mandate of the statute refers to 'any reply' which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane."

287 So. 2d, at 86.

[5] Appellee's Response to Appellant's Jurisdictional Statement and Motion to Affirm the Judgment Below or, in the Alternative, to Dismiss the Appeal, at 4–7.

[6] Both appellant and appellee claim that the uncertainty of the constitutional validity of § 104.38 restricts the present exercise of First Amendment rights. Brief for Appellant, at 41. Brief for Appellee, at 79. Appellant finds urgency for the present consideration of the constitutionality of the statute in the upcoming 1974 elections. Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment an uneasy and unsettled constitutional posture of § 104.38 could only further harm the operation of a free press. *Mills* v. *Alabama*, 384 U. S. 214, 221–222 (1966) (DOUGLAS, J., concurring). See also *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 418 n. (1971).

[7] In its first court test the statute was declared unconstitutional. *State* v. *News-Journal Corp.*, 30 Fla. Supp. 164 (Volusia County Ct., Fla. 1972). In neither of the two suits, the instant action and the 1972 action, has the Florida Attorney General defended the statute's constitutionality.

[8] See generally Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967).

[9] For a good overview of the position of access advocates see Lange, The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment, 52 N. Car. L. Rev. 1, 8–9 (1973) (hereinafter "Lange").

[10] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[11] See Commission on Freedom of the Press, A Free and Responsible Press 14 (1947) (hereinafter "Commission").

fact. Newspapers have become big business and there are far fewer of them to serve a larger literate population.[12] Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns,[13] are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. Major metropolitan newspapers have collaborated to establish news services national in scope.[14] Such national news organizations provide syndicated "interpretative reporting" as well as syndicated features and commentary, all of which can serve as part of the new school of "advocacy journalism."

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion.[15] Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretative analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership.

> "This concentration of nationwide news organizations—like other large institutions—has grown increasingly remote from and unresponsive to the popular constituencies on which they depend and which depend on them." Report of the Task Force, The Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press 4 (1973).

Appellees cite the report of the Commission on Freedom of the Press, chaired by Robert M. Hutchins, in which it was stated, as long ago as 1947, that "The right of free public expression has . . . lost its earlier reality." Commission on Freedom of the Press, A Free and Responsible Press 15.

The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers,[16] have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be "surrogates for the public" carries with it a concomitant fiduciary obligation to account for that stewardship.[17] From this premise it is reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the "marketplace of ideas" is today a monopoly controlled by the owners of the market.

Proponents of enforced access to the press take comfort from language in several of this Court's decisions which suggests that the First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press from government regulation. In *Associated Press* v *United States*, 326 U. S. 1, 20 (1945), the Court, in rejecting the argument that the press is immune from the antitrust laws by virtue of the First Amendment, stated:

> "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitu-

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[12] Commission 15. Even in the last 20 years there has been a significant increase in the number of people likely to read newspapers. Bagdikian, Fat Newspapers and Slim Coverage, Columbia Journalism Review, Sept./Oct. 1973, at 16.

[13] "Nearly half of U. S. daily newspapers, representing some three-fifths of daily and Sunday circulation, are owned by newspaper groups and chains, including diversified business conglomerates. One newspaper towns have become the rule, with effective competition operating in only 4 percent of our large cities." Balk, Background Paper, Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press 18 (1973).

[14] Report of the Task Force, Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press 4 (1973).

[15] "Local monopoly in printed news raises serious questions of diversity of information and opinion. What a local newspaper does not print about local affairs does not see general print at all. And, having the power to take initiative in reporting and enumeration of opinions, it has extraordinary power to set the atmosphere and determine the terms of local consideration of public issues." B. Bagdikian, The Information Machines 127 (1971).

[16] The newspapers have persuaded Congress to grant them immunity from the antitrust laws in the case of "failing" newspapers for joint operations. 15 U.S.C. § 1801 *et seq.*

[17] "Freedom of the press is a right belonging, like all rights in a democracy, to all the people. As a practical matter, however, it can be exercised only by those who have effective access to the press. Where the financial, economic, and technological conditions limit such access to a small minority, the exercise of that right by that minority takes on fiduciary or quasi-fiduciary characteristics." A. MacLeish in W. Hocking, Freedom of the Press, 99 n. 4 (1947).

tionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." (Footnote omitted.)

In *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964), the Court spoke of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." It is argued that the "uninhibited, robust" debate is not "wide-open" but open only to a monopoly in control of the press. Appellee cites the plurality opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 47 & n. 15 (1971), which he suggests seemed to invite experimentation by the States in right to access regulation of the press.[18]

Access advocates note that MR. JUSTICE DOUGLAS a decade ago expressed his deep concern regarding the effects of newspaper monopolies:

> "Where one paper has a monopoly in an area, it seldom presents two sides of an issue. It too often hammers away on one ideological or political line using its monopoly position not to educate people, not to promote debate, but to inculcate its readers with one philosophy, one attitude—and to make money . . . . The newspapers that give a variety of views and news that is not slanted or contrived are few indeed. And the problem promises to get worse . . . ." The Great Right (Ed. by E. Cahn) 124-125, 127 (1963).

They also claim the qualified support of Professor Thomas I. Emerson, who has written that "[a] limited right of access to the press can be safely enforced," although he believes that "[g]overnment measures to encourage a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a preferable course of action." T. Emerson, The System of Freedom of Expression 671 (1970).

IV

However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual.[19] If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that amendment developed over the years.[20]

The Court foresaw the problems relating to government enforced access as early as its decision in *Associated Press* v. *United States*, *supra*. There it carefully contrasted the private "compulsion to print" called for by the Association's Bylaws with the provisions of the District Court decree against appellants which "does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published." 326 U. S., at 20 n. 18. In *Branzburg* v. *Hayes*, 408 U. S. 665, 681 (1972), we emphasized that the cases then before us "involve no intrusions upon speech and assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 117 (1973), the plurality opinion noted:

> "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers."

An attitude strongly adverse to any attempt to extend a right of access to newspapers was echoed by several Members of this Court in their separate opinions in that case. 412 U. S., at 145 (STEWART, J., concurring); 412 U. S., at 182 n. 12 (BRENNAN, J., dissenting). Recently, while approving a bar against employment advertising specifying "male" or "female" preference, the Court's opinion in *Pittsburg Press Co.* v. *Human Relations Commission*, 413 U. S. 376, 391 (1973), took pains to limit its holding within narrow bounds:

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[18] "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. . . .

"[19] Some states have adopted retraction statutes or right-of-reply statutes . . . .

"One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamation, [illegible] Barron, Access to the Press—A New First Amendment right, 80 Harv. L. Rev. 1641, 1666-1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly."

[19] The National News Council, an independent and voluntary body concerned with press fairness, was created in 1973 to provide a means for neutral examination of claims of press inaccuracy. The Council was created following the publication of the Twentieth Century Fund's Task Force Report for a National News Council, A Free and Responsive Press. The Background Paper attached to the Report dealt in some detail with the British Press Council, seen by the author of the paper as having the most interest to the United States of the European press councils.

[20] Because we hold that § 10438 violates the First Amendment's guarantee of a free press we have no occasion to consider appellant's further argument that the statute is unconstitutionally vague.

> "Nor, *a fortiori*, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial."

Dissenting in *Pittsburgh Press*, MR. JUSTICE STEWART joined by MR. JUSTICE DOUGLAS expressed the view that no "government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot." *Id.*, at 400. See *Associates & Aldrich Company* v. *Times Mirror Company*, 440 F. 2d 133, 135 (CA9 1971).

We see that beginning with *Associated Press, supra*, the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which "'reason' tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the *Miami Herald* from saying anything it wished"[21] begs the core question. Compelling editors or publishers to publish that which "'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant from publishing specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244-245 (1936). The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.[22]

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right of access statute, editors might well conclude that the safe course is to avoid controversy and that, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.[23] Government enforced right of access inescapably "dampens the vigor and limits the variety of public debate," *New York Times Co.* v. *Sullivan, supra*, 376 U. S., at 279. The Court, in *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966), stated that

> "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, . . ."

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.[24] The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE REHNQUIST joins, concurring.

I join the Court's opinion which, as I understand it, addresses only "right of reply" statutes and implies no

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[21] Brief for Appellee, at 5.

[22] "However, since the amount of space a newspaper can devote to 'free news' is finite,[25] if a newspaper is forced to publish a particular item, it must as a practical matter, omit something else

[23] "The number of column inches available for news is predetermined by a number of financial and physical factors, including circulation, the amount of advertising, and, increasingly, the availability of newsprint . . ."

Note, 48 Tulane L. Rev. 433, 438 (1974) (footnote omitted)

Another factor operating against the "solution" of adding more pages to accommodate the access matter is that "increasingly subscribers complain of bulky, unwieldly papers." Bagdikian, Fat Newspapers and Slim Coverage, Columbia Journalism Review, Sept./Oct. 1973, at 19.

[24] See the description of the likely effect of the Florida statute on publishers, in Lange, 52 N. C. L. Rev., at 70–71

[25] "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper. A journal does not merely print observed facts the way a row is photographed through a plate-glass window. As soon as the facts are set in their context, you have interpretation and you have selection, and editorial selection opens the way to editorial suppression. Then how can the state force abstention from discrimination in the news without dictating selection?" 2 Z. Chafee, Government and Mass Communications 633 (1947)

view upon the constitutionality of "retraction" statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction. See generally Note, Vindication of the Reputation of a Public Official, 80 Harv. L. Rev. 1730, 1739–1747 (1967).

MR. JUSTICE WHITE, concurring.

The Court today holds that the First Amendment bars a State from requiring a newspaper to print the reply of a candidate for public office whose personal character has been criticized by that newspaper's editorials. According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. *New York Times Co.* v. *United States*, 403 U. S. 713 (1971). A newspaper or magazine is not a public utility subject to "reasonable" governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. Cf. *Mills* v. *Alabama*, 384 U. S. 214, 220 (1966). We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficient-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" [1] and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

> "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials selected by the people responsible to all the people whom they were elected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor or contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." *Mills* v. *Alabama*, *supra*, at 218–219.

Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed. The press would be unlicensed because, in Jefferson's words, "[w]here the press is free, and every man able to read, all is safe." [2] Any other accommodation—any other system that would supplant private control of the press with the heavy hand of government intrusion—would make the government the censor of what the people may read and know.

To justify this statute, Florida advances a concededly important interest of ensuring free and fair elections by means of an electorate informed about the issues. But prior compulsion by government in matters going to the very nerve center of a newspaper—the decision as to what copy will or will not be included in any given edition—collides with the First Amendment. Woven into the fabric of the First Amendment is the unexceptionable, but nonetheless timeless, sentiment that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." 2 Z. Chafee, Jr., Government and Mass Communications 633 (1947).

The constitutionally obnoxious feature of § 104.38 is not that the Florida legislature may also have placed a high premium on the protection of individual reputational interests; for, government certainly has "a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt* v. *Baer*, 383 U. S. 75, 86 (1966). Quite the contrary, this law runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor. Whatever power may reside in government to influence the publishing of certain narrowly circumscribed categories of material, see, *e. g.*, *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U. S. 376 (1973); *New York Times Co.* v. *United States*, *supra*, at 730 (concurring opinion), we have never thought that the First Amendment permitted public officials to dictate to the press the contents of its news columns or the slant of its editorials.

But though a newspaper may publish without government censorship, it has never been entirely free from liability for what it chooses to print. See *New York Times Co.* v. *United States*, *supra*, at 730 (concurring opinion). Among other things, the press has not been wholly at liberty to publish falsehoods damaging to individual reputation. At least until today, we have cherished the average citizen's reputation interest enough to afford him a fair chance to vindicate himself in an action for libel characteristically provided by state law. He has

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[1] *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring).

[2] Letter to Col. Charles Yancey, in XIV The Writings of Thomas Jefferson 384 (Lipscomb ed. 1904).

been unable to force the press to tell his side of the story or to print a retraction, but he has had at least the opportunity to win a judgment if he can prove the falsity of the damaging publication, as well as a fair chance to recover reasonable damages for his injury.

Reaffirming the rule that the press cannot be forced to print an answer to a personal attack made by it, however, throws into stark relief the consequences of the new balance forged by the Court in the companion case also announced today. *Gertz* v. *Robert Welch, Inc.*, *ante*, goes far towards eviscerating the effectiveness of the ordinary libel action, which has long been the only potent response available to the private citizen libeled by the press. Under *Gertz*, the burden of proving liability is immeasurably increased, proving damages is made exceedingly more difficult, and vindicating reputation by merely proving falsehood and winning a judgment to that effect are wholly foreclosed. Needlessly, in my view, the Court trivializes and denigrates the interest in reputation by removing virtually all the protection the law has always afforded.

Of course, these two decisions do not mean that because government may not dictate what the press is to print, neither can it afford a remedy for libel in any form. *Gertz* itself leaves a putative remedy for libel intact, albeit in severely emaciated form; and the press certainly remains liable for knowing or reckless falsehoods under *New York Times* and its progeny, however improper an injunction against publication might be.

One need not think less of the First Amendment to sustain reasonable methods for allowing the average citizen to redeem a falsely tarnished reputation. Nor does one have to doubt the genuine decency, integrity and good sense of the vast majority of professional journalists to support the right of any individual to have his day in court when he has been falsely maligned in the public press. The press is the servant, not the master, of the citizenry, and its freedom does not carry with it an unrestricted hunting license to prey on the ordinary citizen.

> "In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. . . .
>
> ". . . Without . . . a lively sense of responsibility a free press may readily become a powerful instrument of injustice." *Pennekamp* v. *Florida*, 328 U. S. 331, 356, 365 (1946) (Frankfurter, J., concurring) (footnote omitted).

To me it is a near absurdity to so deprecate individual dignity, as the Court does in *Gertz*, and to leave the people at the complete mercy of the press, at least in this stage of our history when the press, as the majority in this case so well documents, is steadily becoming more powerful and much less likely to be deterred by threats of libel suits.

DANIEL P. S. PAUL, Miami, Fla. (JAMES W. BEASLEY, JR., PAUL & THOMSON, RICHARD M. SCHMIDT, JR., MARTIN J. GAYNES, IAN D. VOLNER and COHN & MARKS, with him on the brief) for appellant; JEROME A. BARRON, Washington, D.C. (TOBIAS SIMON and ELIZABETH duFRESNE with him on the brief) for appellee; DONALD U. SESSIONS filed brief as amicus curiae, pro se, seeking affirmance; ALBERT H. KRAMER, THOMAS R. ASHER, FRANK W. LLOYD, III, MATTHEW B. BOGIN, MARIA E. MALDONADO and SHELLEY HIGGINS filed brief for National Citizens Committee for Broadcasting, as amicus curiae, seeking affirmance; WILLIAM G. MULLEN filed brief for National Newspaper Assn., as amicus curiae, seeking reversal; LEONARD H. MARKS and COHN & MARKS filed brief for American Society of Newspaper Editors and the Society of Professional Journalists, Sigma Delta Chi, as amici curiae, seeking reversal; JOSEPH A. CALIFANO, JR., RICHARD M. COOPER and TERRY M. ROSE filed brief for Washington Post Co., as amicus curiae, seeking reversal; J. LAURENT SCHARFF and PIERSON, BALL & DOWD filed brief for Radio Television News Directors Assn., as amicus curiae, seeking reversal; JAMES W. RODGERS and TOWNLEY, UPDIKE, CARTER & RODGERS filed brief for New York News INC., as amicus curiae, seeking reversal; LAWRENCE E. WALSH and GUY MILLER STRUVE filed brief for Reporters Committee for Freedom of the Press Legal Defense and Research Fund and nine individual news reporters, editorial writers, and commentators, as amici curiae, seeking reversal; FLOYD ABRAMS, DEAN RINGEL, CAHILL, GORDON & REINDEL, CORYDON B. DUNHAM, HOWARD MONDERER and BARBARA HERING filed brief for National Broadcasting Co., Inc., as amicus curiae, seeking reversal; HARRY A. INMAN, JAMES C. GOODALE, ALEXANDER GREENFELD, D. ROBERT OWEN, ROBERT S. POTTER and PATTERSON, BELKNAP & WEBB filed brief for Dow Jones & Co., Inc. and New York Times Co., as amici curiae, seeking reversal; ARTHUR B. HANSON, W. FRANK STICKLE, JR., RALPH N. ALBRIGHT, JR., and HANSON, O'BRIEN, BIRNEY, STICKLE and BUTLER filed brief for American Newspaper Publishers Assn., as amicus curiae, seeking reversal; SPESSARD LINDSEY HOLLAND, JR. and CROFTON, HOLLAND, STARLING, HARRIS & SEVERS filed brief on behalf of the publishers of the following Florida newspapers, Today, Star Advocate, Evening Times, News-Press and News Journal, as amici curiae, seeking reversal; WILLIAM C. BALLARD and BAYNARD, McLEOD, LAND, ECKERT and BALLARD filed brief for Times Publishing Co., as amicus curiae, seeking reversal; ROBERT C. LOBDELL, ROBERT S. WARREN and GIBSON, DUNN & CRUTCHER filed brief for Times Mirror Co., as amicus curiae, seeking reversal; JOHN B. SUMMERS and BRENDA L. FOX filed brief for National Assn. of Broadcasters, as amicus curiae; JONATHAN L. ALPERT, IRMA ROBBINS FEDER, RICHARD YALE FEDER and WARREN S. SCHWARTZ filed brief for American Civil Liberties Union of Florida, as amicus curiae; HAROLD B. WAHL and LOFTIN and WAHL filed brief for Florida Publishing Co., as amicus curiae.

No. 72-1180

Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, et al., Appellants, v. Henry M. Austin et al. — On Appeal from the Supreme Court of Virginia.

[June 25, 1974]

Syllabus

As part of its ongoing efforts to organize the remainder of letter carriers, appellant union, the carriers' collective-bargaining representative in Richmond, Virginia, published a "List of Scabs" in its newsletter including the names of appellees, together with a pejorative definition of "scab" using words like "traitor." Appellees brought libel actions. Though recognizing that the case involved the publications of a labor union that were relevant to the union's organizational campaign, the trial court overruled appellants' motions to dismiss based on the ground that the publication had First Amendment and federal labor law protection. The court interpreted *Linn* v. *Plant Guard Workers*, 383 U. S. 53, to permit application of state libel laws as long as

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COLUMBIA BROADCASTING SYSTEM, INC. *v.* DEMOCRATIC NATIONAL COMMITTEE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71–863. Argued October 16, 1972—Decided May 29, 1973*

The Democratic National Committee requested a declaratory ruling from the Federal Communications Commission (FCC) that the Communications Act or the First Amendment precluded a licensee from having a general policy of refusing to sell time to "responsible entities" to present their views on public issues. The Business Executives' Move for Vietnam Peace filed a complaint with the FCC, alleging that a broadcaster had violated the First Amendment by refusing to sell it time to broadcast spot announcements expressing the group's views on the Vietnam conflict and that the station's coverage of antiwar views did not meet the requirements of the Fairness Doctrine. The FCC rejected the Fairness Doctrine challenge and ruled that a broadcaster was not prohibited from having a policy of refusing to accept paid editorial advertisements by individuals and organizations like respondents. The Court of Appeals reversed, holding that "a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted," and remanded the causes to the FCC to develop regulations governing which, and how many, editorial announcements would be aired. *Held:* Neither the Communications Act nor the First Amendment requires broadcasters to accept paid editorial advertisements. Pp. ———.

450 F. 2d 642, reversed.

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*Together with Nos. 71–864, *Federal Communications Commission et al.* v. *Business Executives' Move for Vietnam Peace et al.*; 71–865, *Post-Newsweek Stations, Capital Area, Inc.* v. *Business Executives' Move for Vietnam Peace*; and 71–866, *American Broadcasting Companies, Inc.* v. *Democratic National Committee*, also on certiorari to the same court.

Syllabus

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court with respect to Parts I, II, and IV, finding that:

1. The basic criterion governing use of broadcast frequencies is the right of the public to be informed: the manner by which this interest is best served is dispositive of the respondents' statutory and First Amendment contentions. Pp. 5–19.

(a) In evaluating respondents' claims, great weight must be afforded the decisions of Congress and the experience of the FCC. Pp. 5–8.

(b) Congress has consistently rejected efforts to impose on broadcasters a "common carrier" right of access for all persons wishing to speak out on public issues. Instead, it reposed in the FCC regulatory authority by which the Fairness Doctrine was evolved to require that the broadcaster's coverage of important public issues must be adequate and must fairly reflect differing viewpoints; thus, no private individual or group has a right to command the use of broadcast facilities. Pp. 8–19.

2. The "public interest" standard of the Communications Act, which incorporates First Amendment principles, does not require broadcasters to accept editorial advertisements. Pp. 26–34.

(a) The FCC was justified in concluding that the public interest in having access to the marketplace of "ideas and experiences" would not be served by ordering a right of access to advertising time. There is substantial risk that such a system would be monopolized by those who could and would pay the costs, that the effective operation of the Fairness Doctrine itself would be undermined, and that the public accountability which now rests with the broadcaster would be diluted. Pp. 26–30.

(b) The difficult problems involved in implementing an absolute right of access would inevitably implicate the FCC in a case-by-case determination of who should be heard and when, thus enlarging the involvement of the Government in broadcasting operations. The FCC could properly take into account the fact that listeners and viewers constitute a kind of "captive audience" and that the public interest requires that a substantial degree of journalistic discretion must remain with broadcasters. Pp. 30–34.

THE CHIEF JUSTICE, joined by MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST, concluded, in Part III, that a broadcast licensee's refusal to accept a paid editorial advertisement does not constitute "governmental action" for First Amendment purposes. The Government is neither a "partner" to the action complained

Syllabus

of nor engaged in a "symbiotic relationship" with the licensee. Pp. 19–26.

(a) Under the Communications Act a broadcast licensee is vested with substantial journalistic discretion in deciding how to meet its statutory obligations as a "public trustee." Pp. 19–22.

(b) The licensee's policy against accepting editorial advertising is compatible with the Communications Act and with the broadcaster's obligation to provide a balanced treatment of controversial questions. Pp. 22–26.

(c) The FCC has not fostered the licensee policy against accepting editorial advertisements; it has merely declined to command acceptance because the subject was a matter within the area of journalistic discretion. P. 23.

BURGER, C. J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I, II, and IV, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and in which as to Parts I, II, and III STEWART and REHNQUIST, JJ., joined. STEWART, J., filed an opinion concurring in parts I, II, and III. WHITE, J., filed an opinion concurring in Parts I, II, and IV. BLACKMUN, J., filed an opinion concurring in Parts I, II, and IV, in which POWELL, J., joined. DOUGLAS, J., filed a separate opinion concurring in the judgment. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined.

SUPREME COURT OF THE UNITED STATES

Nos. 71–863, 71–864, 71–865, AND 71–866

Columbia Broadcasting System, Inc., Petitioner,
71–863 *v.*
Democratic National Committee.

Federal Communications Commission et al., Petitioners,
71–864 *v.*
Business Executives' Move for Vietnam Peace et al.

Post-Newsweek Stations, Capital Area, Inc., Petitioner,
71–865 *v.*
Business Executives' Move for Vietnam Peace.

American Broadcasting Companies, Inc., Petitioner,
71–866 *v.*
Democratic National Committee.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court (Parts I, II, and IV) together with an opinion (Part III) in which MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST joined.

We granted the writ in these cases to consider whether a broadacst licensee's general policy of not selling adver-

tising time to individuals or groups wishing to speak out on issues they consider important violates the Federal Communications Act of 1934, 47 U. S. C. §151 *et seq.*, or the First Amendment.

In two orders announced the same day, the Federal Communications Commission ruled that a broadcaster who meets his public obligation to provide full and fair coverage of public issues is not required to accept editorial advertisements. *In re Democratic National Committee*, 25 F. C. C. 216; *In re Business Executives Move for Vietnam Peace*, 25 F. C. C. 2d 242. A divided Court of Appeals reversed the Commission, holding that a broadcaster's fixed policy of refusing editorial advertisements violates the First Amendment; the court remanded the cases to the Commission to develop procedures and guidelines for administering a First Amendment right of access. *Business Executives' Move For Vietnam Peace* v. *FCC*, 146 U. S. App. D. C. 181, 450 F. 2d 642 (1971).

The complainants in these actions are the Democratic National Committee (DNC) and the Business Executives' Move for Vietnam Peace (BEM), a national organization of businessmen opposed to United States involvement in the Vietnam conflict. In January 1970, BEM filed a complaint with the Commission charging that radio station WTOP in Washington, D. C., had refused to sell it time to broadcast a series of one-minute spot announcements expressing BEM views on Vietnam. WTOP, in common with many but not all broadcasters, followed a policy of refusing to sell time for spot announcements to individuals and groups who wished to expound their views on controversial issues. WTOP took the position that since it presented full and fair coverage of important public questions, including the Vietnam conflict, it was justified in refusing to accept editorial advertisements. WTOP also submitted evidence showing that the station had aired the views of

critics of our Vietnam policy on numerous occasions. BEM challenged the fairness of WTOP's coverage of criticism of that policy, but it presented no evidence in support of that claim.

Four months later, in May 1970, the DNC filed with the Commission a request for a declaratory ruling:

> "That under the First Amendment to the Constitution and the Communications Act, 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."

DNC claimed that it intended to purchase time from radio and television stations and from the national networks in order to present the views of the Democratic Party and to solicit funds. Unlike BEM, DNC did not object to the policies of any particular broadcaster but claimed that its prior "experiences in this area make it clear that it will encounter considerable difficulty—if not total frustration of its efforts—in carrying out its plans in the event the Commission should decline to issue a ruling as requested." DNC cited *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969), as establishing a limited constitutional right of access to the airwaves.

In two separate opinions, the Commission rejected respondents' claim that "responsible" individuals and groups have a right to purchase advertising time to comment on public issues without regard to whether the broadcaster has complied with the Fairness Doctrine. The Commission viewed the issue as one of major significance in the administration of the electronic media, one going "to the heart of the system of broadcasting which has developed in this country. . . ." 25 F. C. C. 2d, at 221. After reviewing the legislative history of the Communications Act, the provisions of the Act itself, the Commission's decisions under the Act and

the difficult problems inherent in administering a right of access, the Commission rejected the demands of BEM and DNC.

The Commission also rejected BEM's claim that WTOP had violated the Fairness Doctrine by failing to air views such as those held by members of BEM; the Commission pointed out that BEM had made only a "general allegation" of unfairness in WTOP's coverage of the Vietnam conflict and that the station had adequately rebutted the charge by affidavit. The Commission did, however, uphold DNC's position that the statute recognized a right of political parties to purchase broadcast time for the purpose of soliciting funds. The Commission noted that Congress has accorded special consideration for access by political parties, see 47 U. S. C. § 315 (a), and that solicitation of funds by political parties is both feasible and appropriate in the short space of time generally allotted to spot advertisements.[1]

A majority of the Court of Appeals reversed the Commission, holding that "a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted." 450 F. 2d, at 646. Recognizing that the broadcast frequencies are a scarce resource inherently unavailable to all, the court nevertheless concluded that the First Amendment mandated an "abridgeable" right to present editorial advertisements. The court reasoned that a broadcaster's policy of airing commercial advertisements but not editorial advertisements constitutes unconstitutional discrimination. The court did not, how-

[1] The Commission's rulings against BEM's Fairness Doctrine complaint and in favor of DNC's claim that political parties should be permitted to purchase airtime for solicitation of funds were not appealed to the Court of Appeals and are not before us here.

ever, order that either BEM's or DNC's proposed announcements must be accepted by the broadcasters; rather, it remanded the cases to the Commission to develop "reasonable procedures and regulations determining which and how many 'editorial announcements' will be put on the air." *Ibid.*

Judge McGowan dissented, in his view, the First Amendment did not compel the Commission to undertake the task assigned to it by the majority:

> "It is presently the obligation of a licensee to advance the public's right to know by devoting a substantial amount of time to the presentation of controversial views on issues of public importance, striking a balance which is always subject to redress by reference to the fairness doctrine. Failure to do so puts continuation of the license at risk—a sanction of tremendous potency, and one which the Commission is under increasing pressure to employ.
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> "This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice." 450 F. 2d, at 666.

Judge McGowan concluded that the court's decision to overrule the Commission and to remand for development and implementation of a constitutional right of access put the Commission in a "constitutional strait jacket" on a highly complex and far-reaching issue.

I

MR. JUSTICE WHITE'S opinion for the Court in *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969), makes clear that the broadcast media pose unique and

special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated. The Court spoke to this reality when, in *Red Lion*, we said "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion, supra*, 395 U. S., at 388.

Because the broadcast media utilize a valuable and limited public resource, there is also present an unusual order of First Amendment values. *Red Lion* discussed at length the application of the First Amendment to the broadcast media. In analyzing the broadcasters' claim that the Fairness Doctrine and two of its component rules violated their freedom of expression, we held that "[n]o one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.'" *Red Lion, supra*, 395 U. S., at 389. Although the broadcaster is not without protection under the First Amendment, *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166 (1948), "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." *Red Lion, supra*, 395 U. S., at 390.

Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. The process must necessarily be

undertaken within the framework of the regulatory scheme that has evolved over the course of the past half-century. For during that time, Congress and its chosen administrative agency have established a delicately balanced system of regulation intended to serve the interests of all concerned. The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.

Thus, in evaluating the First Amendment claims of respondents, we must afford great weight to the decisions of Congress and the experience of the Commission. Professor Chafee aptly observed:

> "Once we get away from the bare words of the [First] Amendment, we must construe it as part of a Constitution which creates a government for the purpose of performing several very important tasks. The [First] Amendment should be interpreted so as not to cripple the regular work of the government. A part of this work is the regulation of interstate and foreign commerce, and this has come in our modern age to include the job of parceling out the air among broadcasters, which Congress has entrusted to the FCC. Therefore, every free-speech problem in the radio has to be considered with reference to the satisfactory performance of this job as well as to the value of open discussion. Although free speech should weigh heavily in the scale in the event of conflict, still the Commission should be given ample scope to do its job." II Chafee, Government and Mass Communications 640–641 (1947).

The judgment of the legislative branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella

of the First Amendment. That is not to say we "defer" to the judgment of the Congress and the Commission on a constitutional question, nor that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of government have addressed the same problem. Thus, before confronting the specific legal issues in these cases, we turn to an examination of the legislative and administrative development of our broadcast system over the last half century.

II

This Court has on numerous occasions recounted the origins of our modern system of broadcast regulation. See, *e. g., Red Lion, supra,* 395 U. S., at 375–386; *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 210–217 (1943); *FCC* v. *Sanders Brothers Radio Station,* 309 U. S. 470, 474 (1940); *FCC* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 137–138 (1940). We have noted that prior to the passage of the Radio Act of 1927, 44 Stat. 1162, broadcasting was marked by chaos. The unregulated and burgeoning private use of the new media in the 1920's had resulted in an intolerable situation demanding congressional action:

> "It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard." *Red Lion, supra,* 395 U. S., at 376.

But, once it was accepted that broadcasting was subject to regulation, Congress was confronted with a major dilemma: how to strike a proper balance between priviate and public control. Cf. *Farmers Educational & Cooperative Union of America* v. *WDAY, Inc.*, 360 U. S. 525, 528 (1959).

One of the earliest and most frequently quoted statements of this dilemma is that of Herbert Hoover, when he was Secretary of Commerce. While his Department was making exploratory attempts to deal with the infant broadcasting industry in the early 1920's, he testified before a House Committee:

> "We cannot allow any single person or group to place themselves in [a] position where they can censor the material which shall be broadcasted to the public, nor do I believe that the government should ever be placed in the position of censoring this material." Hearings before the House Committee on the Merchant Marine and Fisheries, 68th Cong., 1st Sess. (1924).

That statement foreshadowed the "tightrope" aspects of government regulation of the broadcast media, a problem the Congress, the Commission and the courts have struggled with ever since. Congress appears to have concluded, however, that of these two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided.

The legislative history of the Radio Act of 1927, the model for our present statutory scheme, see *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137 (1940), reveals that in the area of discussion of public issues Congress chose to leave broad journalistic discretion with the licensee. Congress specifically dealt with—and firmly rejected—the argument that the broadcast facilities

should be open on a nonselective basis to all persons wishing to talk about public issues. Some members of Congress—those whose views were ultimately rejected—strenuously objected to the unregulated power of broadcasters to reject applications for service. See, *e. g.*, H. R. Rep. No. 404, 69th Cong., 1st Sess., at 18 (minority report). They regarded the exercise of such power to be "private censorship," which should be controlled by treating broadcasters as public utilities.[2] The provision that came closest to imposing an unlimited right of access to broadcast time was part of the bill reported to the Senate by the Committee on Interstate Commerce. The bill that emerged from the Committee contained the following provision:

> "[I]f any licensee shall permit a broadcasting station to be used . . . 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 such matters the licensee shall be deemed a common carrier in interstate commerce:* Provided, that such licensee shall have no power to censor the material broadcast." 67 Cong. Rec. (1926) (emphasis added).

When the bill came to the Senate floor, the principal architect of the Radio Act of 1927 and the Chairman of the Commerce Committee, Senator Dill, offered an amendment to the provision to eliminate the common

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[2] Congressman Davis, for example, stated on the floor of the House the view that Congress found unacceptable:

"I do not think any member of the committee will deny that it is absolutely inevitable that we are going to have to regulate the radio public utilities just as we regulate other public utilities. We are going to have to regulate the rates and the service, and to force them to give equal service and equal treatment to all." 67 Cong. Rec. 5483. See also 67 Cong. Rec. 5484.

carrier obligation and to restrict the right of access to candidates for public office. Senator Dill explained the need for the amendment:

> "When we recall that broadcasting today is purely voluntary, and the listener-in pays nothing for it, that the broadcaster gives it for the purpose of building up his reputation, it seemed unwise to put the broadcaster under the hampering control of being a common carrier and compelled to accept anything and everything that was offered him so long as the price was paid." *Ibid.*

The Senators were also sensitive to the problems involved in legislating "equal opportunities" with respect to the discussion of public issues. Senator Dill stated:

> "["Public questions"] is such a general term that there is probably no question of any interest whatsoever that be discussed but that the other side of it could demand time; and thus a radio station would be placed in the position that the Senator from Iowa mentions about candidates, namely, that they would have to give all their time to that kind of discussion, or no public question could be discussed." 67 Cong. Rec. 12504.

The Senate adopted Senator Dill's amendment. The provision finally enacted, § 18 of the Radio Act of 1927, 44 Stat. 1170, was later re-enacted as § 315 (a) of the Communications Act of 1934,[3] but only after Congress

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[3] Section 315 (a) now reads:

"If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station; *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station

rejected another proposal that would have imposed a limited obligation on broadcasters to turn over their microphones to persons wishing to speak out on certain public issues.[4] Instead, Congress after prolonged con-

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by any such candidate. Appearance by a legally qualified candidate on any—

"(1) bona fide newscast,

"(2) bona fide news interview,

"(3) bona fide news documentary [if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary], or

"(4) on-the-spot coverage of bona fide news events [including but not limited to political conventions and activities incidental thereto],

"shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcaster, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news event, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U. S. C. § 315 (a).

[4] The Senate passed a provision providing that:

". . . if any licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office, *or in the presentation of views on a public question to be voted upon at an election, he shall afford equal opportunity to an equal number of other persons to use such station* in support of an opposing candidate for such public office, or to reply to a person who has used such broadcasting station in support of or in opposition to a candidate, *or for the presentation of opposite views on such public questions.*"

See Hearings before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., on S. 2910, at 19 (1934) (emphasis added). The provision for discussion of public issues was deleted by the House-Senate Conference. See H. R. Rep. No. 1918 on S. 3285, 73d Cong., 2d Sess., at 49.

Also noteworthy are two bills offered in 1934 that would have restricted the control of broadcasters over the discussion of certain

sideration adopted § 3 (h), which specifically provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." [5]

Other provisions of the 1934 Act also evince a legislative desire to preserve values of private journalism

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issues. Congressman McFadden proposed a bill that would have forbidden broadcasters from discriminating against programs sponsored by religious, charitable, or educational associations. H. R. 7986, 73d Cong., 2d Sess. (1934). The bill was not reported out of committee. And, during the debates on the 1934 Act, Senators Wagner and Hatfield offered an amendment that would have ordered the Commission to "reserve and allocate only to educational, religious, agricultural, labor, cooperative, and similar non-profit-making associations one-fourth of all the radio broadcasting facilities within its jurisdiction." 78 Cong. Rec. 8828. Senator Dill explained why the Committee had rejected the proposed amendment, indicating that the practical difficulties and the dangers of censorship were crucial:

"MR. DILL. . . . If we should provide that 25 percent of time shall be allocated to nonprofit organizations, someone would have to determine—Congress or somebody else—how much of the 25 percent should go to education, how much of it to labor, how much of it to fraternal organizations, and so forth. When we enter this field we must determine how much to give to the Catholics probably and how much to the Protestants and how much to the Jews." 78 Cong. Rec. 8843.

Senator Dill went on to say that the problem of determining the proper allocation of time for discussion of these subjects should be worked out by the Commission. 78 Cong. Rec. 8844. The Senate rejected the amendment. 78 Cong. Rec. 8846.

[5] Section 3 (h) provides as follows:

"'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 48 Stat. 1065, as amended, 47 U. S. C. § 153 (h).

under a regulatory scheme which would insure fulfillment of certain public obligations. Although the Commission was given the authority to issue renewable three-year licenses to broadcasters[6] and to promulgate rules and regulations governing the use of those licenses,[7] both consistent with the "public interest, convenience and necessity," § 326 of the Act specifically provides that:

> "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U. S. C. § 326.

From these provisions it seems clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the legitimate journalistic interests of the broadcasters will government power be asserted within the framework of the Act. License renewal pro-

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[6] 48 Stat. 1083, as amended, 47 U. S. C. § 307.

[7] Section 303 of the Communications Act of 1934, 48 Stat. 1082, as amended, 47 U. S. C. § 303, provides in relevant part:

"Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest or necessity requires, shall—

. . . . . .

"(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

. . . . . .

"(4) make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter. . . ."

ceedings, in which the listening public can be heard, are a principal means of such regulation. *Office of Communications of the United Church of Christ* v. *FCC*, 123 U. S. App. D. C. 328, 359 F. 2d 994 (1966).

Subsequent developments in broadcast regulation illustrate how this regulatory scheme has evolved. Of particular importance, in light of Congress' flat refusal to impose a "common carrier" right of access for all persons wishing to speak out on public issues, is the Commission's "Fairness Doctrine," which evolved gradually over the years spanning federal regulation of the broadcast media.[8] Formulated under the Commission's power to issue regulations consistent with the "public interest," the doctrine imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints. See *Red Lion, supra*, 395 U. S., at 377. In fulfilling its Fairness Doctrine obligations, the broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable, *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895 (1963), and it must initiate programming on public issues if no one else seeks to do so. See *John J. Dempsey*, 6 P & F Radio Reg. 615 (1950); *Red Lion, supra*, 395 U. S., at 378.

Since it is physically impossible to provide time for all viewpoints, however, the right to exercise editorial judgment was granted to the broadcaster. The broadcaster, therefore, is allowed significant journalistic discretion in deciding how best to fulfill its Fairness Doctrine

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[8] In 1959, Congress amended § 315 of the Act to give statutory approval to the Fairness Doctrine. Act of September 14, 1959, § 1, 73 Stat. 557, as amended, 47 U. S. C. § 315 (a).

For a summary of the development and nature of the Fairness Doctrine, see *Red Lion, supra*, 395 U. S., at 375–386.

obligations,[9] although that discretion is bounded by rules designed to assure that the public interest in fairness is furthered. In its decision in the instant cases, the Commission described the boundaries as follows:

> "The most important consideration in this respect is that the licensee cannot rule off the air coverage of important issues or views because of his private ends or beliefs. As a public trustee, he must present representative community views and voices on controversial issues which are of importance to his listeners. . . . This means also that some of the voices must be partisan. A licensee policy of excluding partisan voices and always itself presenting views in a bland, unoffensive manner would run counter to the 'profound national commitment that debate on public issues should be uninhibited, robust, and wide open.' *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964); see also *Red Lion Broadcasting Co., Inc.* v. *F. C. C.*, 395 U. S. 367, 392 (n. 18) (1969). . . ." 25 F. C. C. 2d, at 222–223.

Thus, under the Fairness Doctrine broadcasters are responsible for providing the listening and viewing public with access to a balanced presentation of information

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[9] See *Madalyn Murray*, 5 P & F Radio Reg. 2d 263 (1965). Factors that the broadcaster must take into account in exercising his discretion include the following:

"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 [or group] making the request." Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246 (1949).

on issues of public importance.[10] The basic principle underlying that responsibility is "the right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter. . . ." *Report on Editorializing*, 13 F. C. C. 1246, 1249 (1949). Consistent with that philosophy, the Commission on several occasions has ruled that no private individual or group has a right to command the use of broadcast facilities.[11] See, *e. g.*, *Dowie A.*

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[10] The Commission has also adopted various component regulations under the Fairness Doctrine, the most notable of which are the "personal attack" and "political editorializing" rules which we upheld in *Red Lion*. The "personal attack" rule provides that "when, during the presentation of views on a controversial issue of public importance, an attack is made on the honesty, character, integrity, or like personal qualities of an identified person," the licensee must notify the person attacked and give him an opportunity to respond. *E. g.*, 47 CFR § 73.123. Similarly, the "political editorializing" rule provides that, when a licensee endorses a political candidate in an editorial, he must give other candidates or their spokesmen an opportunity to respond. *E. g.*, 47 CFR § 73.123.

The Commission, of course, has taken other steps beyond the Fairness Doctrine to expand the diversity of expression on radio and television. The chain broadcasting and multiple ownership rules are established examples. *E. g.*, 47 CFR §§ 73.131, 73.240. More recently, the Commission promulgated rules limiting television network syndication practices and reserving 25% of prime time for non-network programs. 47 CFR §§ 73.658 (j), (k).

[11] The Court of Appeals, respondents, and the dissent in this case have relied on *dictum* in *United Broadcasting Co.*, 10 F. C. C. 515 (1945), as illustrating Commission approval of a private right to purchase air time for the discussion of controversial issues. In that case the complaint alleged not only that the station had a policy of refusing to sell time for the discussion of public issues, but also that the station had applied its policy in a discriminatory manner, a factor not shown in the cases presently before us. Furthermore, the decision was handed down four years before the Commission had fully de-

Crettenden, 18 F. C. C. 2d 499 (1969); *Mrs. Margaret Z. Scherbina*, 21 F. C. C. 2d 141 (1969); *Boalt Hall Student Assn.*, 20 F. C. C. 2d 612 (1969); *Mrs. Madalyn Murray*, 40 F. C. C. 647 (1965); *Democratic State Central Committee of California*, 19 F. C. C. 2d 833 (1968); *U. S. Broadcasting Co.*, 2 F. C. C. 208 (1935). Congress has not yet seen fit to alter that policy, although since 1934 it has amended the Act on several occasions [12] and considered various proposals that would have vested private individuals with a right of access.[13]

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veloped and articulated the Fairness Doctrine. See Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246 (1949). Thus, even if the decision is read without reference to the allegation of discrimination, it stands as merely an isolated statement, made during the period in which the Commission was still working out the problems associated with the discussion of public issues; the *dictum* has not been followed since and has been modified by the Fairness Doctrine.

[12] In 1959, for example, Congress amended § 315 (a) of the Act to give statutory approval to the Commission's Fairness Doctrine. Act of September 14, 1959, § 1, 73 Stat. 557, amending 47 U. S. C. § 315 (a). Very recently, Congress amended § 312 (a) of the 1934 Act to authorize the Commission to revoke a station license "for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy." Campaign Communications Reform Act of 1972, Pub. L. No. 92-225. This amendment essentially codified the Commission's prior interpretation of § 315 (a) as requiring broadcasters to make time available to political candidates. *Farmers Union* v. *WDAY*, 360 U. S. 525, 534 (1959). See FCC Memorandum on Second Sentence of Section 315 (a), in Political Broadcasts—Equal Time, Hearings before Subcommittee of the House Interstate and Foreign Commerce Commission, 88th Cong., 1st Sess., on H. J. Res. 247, pp. 84-90.

[13] See, *e. g.*, H. R. 3595, 80th Cong., 1st Sess. (1947). A more recent proposal was offered by Senator Fulbright. His bill would have amended § 315 of the Act to provide:

"(d) Licensees shall provide a reasonable amount of public service time to authorized representatives of the Senate of the United States,

With this background in mind, we next proceed to consider whether a broadcaster's refusal to accept editorial advertisements is governmental action violative of the First Amendment.

III

That "Congress shall make no law . . . abridging the freedom of speech, or of the press" is a restraint on government action, not that of private persons. *Public Utility Commission* v. *Pollak*, 343 U. S. 451, 461 (1952). The Court has not previously considered whether the action of a broadcast licensee such as that challenged here is "governmental action" for purposes of the First Amendment. The holding under review thus presents a novel question, and one with far-reaching implications. See L. Jaffe, The Editorial Responsibility of the Broadcaster, 85 Harv. L. Rev. 768, 782–787 (1972).

The Court of Appeals held that broadcasters are instrumentalities of the government for First Amendment purposes, relying on the thesis, familiar in other contexts, that broadcast licensees are granted use of part of the public domain and are regulated as "proxies" or "fiduciaries of the people." 450 F. 2d, at 652. These characterizations are not without validity for some purposes, but they do not resolve the sensitive constitutional issues inherent in deciding whether a particular licensee action is subject to First Amendment restraints.[14]

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and the House of Representatives of the United States, to present the views of the Senate and the House of Representatives on issues of public importance. The public service time required to be provided under this subsection shall be made available to each such authorized representative at least, but not limited to, four times during each calendar year." S. J. Res. 209, 91st Cong., 2d Sess. (1970).

[14] The dissent offers the same analysis as the Court of Appeals. As one distinguished commentator has recognized, this line of reasoning "stretch[es] the concept of state action very far." Jaffe,

In dealing with the broadcast media, as in other contexts, the line between private conduct and governmental action cannot be defined by reference to any general formula unrelated to particular exercises of governmental authority. When governmental action is alleged there must be cautious analysis of the quality and degree of government relationship to the particular acts in question. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961).

In deciding whether the First Amendment encompasses the conduct challenged here, it must be kept in mind that we are dealing with a vital part of our system of communication. The electronic media have swiftly become a major factor in the dissemination of ideas and information. More than 7,000 licensed broadcast stations undertake to perform this important function. To a large extent they share with the printed media the role of keeping people informed.

As we have seen, with the advent of radio a half century ago Congress was faced with a fundamental choice between total government ownership and control of the new medium—the choice of most other countries—or some other alternative. Long before the impact and potential of the medium was realized, Congress opted for a system of private broadcasters licensed and regulated by Government. The legislative history suggests that this choice was influenced not only by traditional attitudes toward private enterprise, but by a desire to main-

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The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 784 (1972). The notion that broadcasters are engaged in "governmental action" because they are licensed to utilize the "public" frequencies and because they are regulated is superficially appealing but, as Professor Jaffe observes, "not entirely satisfactory." *Id.*, at 783.

tain for licensees, so far as consistent with necessary regulation, a traditional journalistic role. The historic aversion to censorship led Congress to enact § 326 of the Act, which explicitly prohibits the Commission from interfering with the exercise of free speech over the broadcast frequencies. Congress pointedly refrained from divesting broadcasters of their control over the selection of voices; § 3 (h) of the Act stands as firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public. Both these provisions clearly manifest the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee.[15]

The regulatory scheme evolved slowly, but very early the licensee's role developed in terms of a "public trustee" charged with the duty of fairly and impartially informing the listening and viewing public. In this structure the Commission acts in essence as an "overseer," but the initial and primary responsibility for fairness, balance and objectivity rests with the licensee. This role of the Government as an "overseer" and ultimate arbiter and guardian of the public interest and the role

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[15] The dissenting view would appear to "want to have it both ways" on the question of government control of the broadcast media. In finding governmental action, the dissent stresses what is perceived as an "elaborate statutory scheme governing virtually all aspects of the broadcast industry." "Indeed," the dissent suggests, "federal agency review and guidance of broadcaster conduct is automatic, continuing and pervasive." *Infra*, at —. Yet later in the dissent, when discussing the constitutional need for a right of access, the dissent objects to the substantial independence afforded broadcasters in covering issues of public importance. Thus, it is said that "broadcasters retain almost exclusive control over the selection of issues and viewpoints to be covered, the manner of presentation and, perhaps most important, who shall speak." *Infra*, at —.

of the licensee as a journalistic "free agent" call for a delicate balancing of competing interests. The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a "tightrope" to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act.

The tensions inherent in such a regulatory structure emerge more clearly when we compare a private newspaper with a broadcast licensee. The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers. A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper. A licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a "public trustee." To perform its statutory duties, the Commission must oversee without censoring. This suggests something of the difficulty and delicacy of administering the Communications Act—a function calling for flexibility and the capacity to adjust and readjust the regulatory mechanism to meet changing problems and needs.

The licensee policy challenged in this case is intimately related to the journalistic role of a licensee for which it has been given initial and primary responsibility by Congress. The licensee's policy against accepting editorial advertising cannot be examined as an abstract proposition, but must be viewed in the context of its journalistic role. It does not help to press on us the idea that editorial ads are "like" commercial ads for the licensee's policy against editorial spot ads is expressly

based on a journalistic judgment that 10 to 60 second spot announcements are ill suited to intelligible and intelligent treatment of public issues; the broadcaster has chosen to provide a balanced treatment of controversial questions in a more comprehensive form. Obviously the licensee's evaluation is based on its own journalistic judgment of priorities and newsworthiness.

Moreover, the Commission has not fostered the licensee policy challenged here; it has simply declined to command particular action because it fell within the area of journalistic discretion. The Commission explicitly emphasized that "there is of course no Commission policy thwarting the sale of time to comment on public issues." 25 F. C. C. 2d, at 226. The Commission's reasoning, consistent with nearly 40 years of precedent, is that so long as a licensee meets its "public trustee" obligation to provide balanced coverage of issues and events, it has broad discretion to decide how that obligation will be met. We do not reach the question whether the First Amendment or the Act can be read to preclude the Commission from determining that in some situations the public interest requires licensees to re-examine their policies with respect to editorial advertisements. The Commission has not yet made such a determination; it has, for the present at least, found the policy to be within the sphere of journalistic discretion which Congress has left with the licensee.

Thus, it cannot be said that the government is a "partner" to the action of broadcast licensee complained of here, nor is it engaged in a "symbiotic relationship" with the licensee, profiting from the invidious discrimination of its proxy. Compare *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 174–177 (1972), with *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 723–724 (1961). The First Amendment does not reach acts of

private parties in every instance where the Congress or the Commission has merely permitted or failed to prohibit such acts.

Our conclusion is not altered merely because the Commission rejected the claims of BEM and DNC and concluded that the challenged licensee policy is not inconsistent with the public interest. It is true that in *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451 (1952), we found governmental action sufficient to trigger First Amendment protections on a record involving agency approval of the conduct of a public utility. Though we held that the decision of a District of Columbia bus company to install radio receivers in its public buses was within the reach of the First Amendment, there Congress had expressly authorized the agency to undertake plenary intervention into the affairs of the carrier and it was pursuant to that authorization that the agency investigated the challenged policy and approved it on public interest standards. *Id.*, at 462.

Here, Congress has not established a regulatory scheme for broadcast licensees as pervasive as the regulation of public transportation in *Pollak*. More important, as we have noted, Congress has affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard. In *Pollak* there was no suggestion that Congress had considered worthy of protection the carrier's interest in exercising discretion over the content of communications forced on passengers. A more basic distinction, perhaps, between *Pollak* and this case is that *Pollak* was concerned with a transportation utility that itself derives no protection from the First Amendment. See *United States* v. *Paramount Pictures, Inc.*, 344 U. S. 131, 166 (1948).

Were we to read the First Amendment to spell out governmental action in the circumstances presented here,

few licensee decisions on the content of broadcasts or the processes of editorial evaluation would escape constitutional scrutiny. In this sensitive area so sweeping a concept of governmental action would go far in practical effect to undermine nearly a half century of unmistakable congressional purpose to maintain—no matter how difficult the task—essentially private broadcast journalism held only broadly accountable to public interest standards. To do this Congress, and the Commission as its agent, must remain in a posture of flexibility to chart a workable "middle course" in its quest to preserve a balance between the essential public accountability and the desired private control of the media.

More profoundly, it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on government. Application of such standards to broadcast licensees would be antithetical to the very ideal of vigorous, challenging debate on issues of public interest. Every licensee is already held accountable for the totality of its performance of public interest obligations.

The concept of private, independent broadcast journalism, regulated by government to assure protection of the public interest, has evolved slowly and cautiously over more than 40 years and has been nurtured by processes of adjudication. That concept of journalistic independence could not co-exist with a reading of the challenged conduct of the licensee as governmental action. Nor could it exist without administrative flexibility to meet changing needs and the swift technological developments. We therefore conclude that the policies com-

plained of do not constitute governmental action violative of the First Amendment. See *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597, 601 (CA3 1945), cert. denied, 327 U. S. 779 (1946); *Massachusetts Universalist Convention* v. *Heldreth & Rogers Co.*, 183 F. 2d 497 (CA1 1950); *Post* v. *Payton*, 323 F. Supp. 799, 803 (EDNY 1971).

IV

There remains for consideration the question whether the "public interest" standard of the Communications Act requires broadcasters to accept editorial advertisements or, whether, assuming governmental action, broadcasters are required to do so by reason of the First Amendment. In resolving those issues, we are guided by the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." *Red Lion, supra*, 395 U. S., at 381. Whether there are "compelling indications" of error in this case must be answered by a careful evaluation of the Commission's reasoning in light of the policies embodied by Congress in the "public interest" standard of the Act. Many of those policies, as the legislative history makes clear, were drawn from the First Amendment itself; the "public interest" standard necessarily invites reference to First Amendment principles. Thus, the question before us is whether the various interests in free expression of the public, the broadcaster and the individual require broadcasters to sell commerical time to persons wishing to discuss controversial issues. In resolving that issue it must constantly be kept in mind that the interest of the public is our foremost concern. With broadcasting, where the available means of communication are limited in both space and time, the

admonition of Professor Meiklejohn that "What is essential is not that everyone shall speak, but that everything worth saying shall be said" is peculiarly appropriate. A. Meiklejohn, Political Freedom 26 (1948).

At the outset we reiterate what was made clear earlier that nothing in the language of the Communications Act or its legislative history compels a conclusion different from that reached by the Commission. As we have seen, Congress has time and again rejected various legislative attempts that would have mandated a variety of forms of individual access. That is not to say that Congress' rejection of such proposals must be taken to mean that Congress is opposed to private rights of access under all circumstances. Rather, the point is that Congress has chosen to leave such questions with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require. In this case, the Commission has decided that on balance the undesirable effects of the right of access urged by respondents would outweigh the asserted benefits. The Court of Appeals failed to give due weight to the Commission's judgment on these matters.

The Commission was justified in concluding that the public interest in providing access to the marketplace of "ideas and experiences" would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth. Cf. *Red Lion, supra,* 395 U. S., at 392. Even under a first-come-first-served system, proposed by the dissenting Commissioner in these cases,[16] the views of the affluent could well prevail over those of others, since they would have it within their power to purchase time more frequently. Moreover, there is the substantial danger, as the Court of Appeals

[16] See 25 F. C. C. 2d 230, 234–235 (Johnson, dissenting).

acknowledged, 450 F. 2d, at 664, that the time allotted for editorial advertising could be monopolized by those of one political persuasion.

These problems would not necessarily be solved by applying the Fairness Doctrine, including the *Cullman* doctrine, to editorial advertising. If broadcasters were required to provide time, free when necessary, for the discussion of the various shades of opinion on the issue discussed in the advertisement, the affluent could still determine in large part the issues to be discussed. Thus, the very premise of the Court of Appeals' holding—that a right of access is necessary to allow individuals and groups the opportunity for self-initiated speech—would have little meaning to those who could not afford to purchase time in the first instance.[17]

If the Fairness Doctrine were applied to editorial advertising, there is also the substantial danger that the effective operation of that doctrine would be jeopardized. To minimize financial hardship and to comply fully with its public responsibilities a broadcaster might well be forced to make regular programming time available to those holding a view different from that expressed in an editorial advertisement; indeed, BEM has suggested as much in its brief. The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable to private individuals who are not. The pub-

[17] To overcome this inconsistency it has been suggested that a "submarket rate system" be established for those unable to afford the normal cost for airtime. See 85 Harv. L. Rev. 689, 695–696 (1972). That proposal has been criticized, we think justifiably, as raising "incredible administrative problems." L. Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 789 (1972).

lic interest would no longer be "paramount" but rather subordinate to private whim especially since, under the Court of Appeals' decision, a broadcaster would be largely precluded from rejecting editorial advertisments that dealt with matters trivial or insignificant or already fairly covered by the broadcaster. 450 F. 2d, at 657, n. 36, 658. If the Fairness Doctrine and the *Cullman* doctrine were suspended to alleviate these problems, as respondents suggest might be appropriate, the question arises whether we would have abandoned more than we have gained. Under such a regime the congressional objective of balanced coverage of public issues would be seriously threatened.

Nor can we accept the Court of Appeals' view that every potential speaker is "the best judge" of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is not reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.

It was reasonable for Congress to conclude that the public interest in being informed requires periodic accountability on the part of those who are entrusted with the use of broadcast frequencies, scarce as they

are. In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet their legitimate needs. No such accountability attaches to the private individual, whose only qualifications for using the broadcast facility may be abundant funds and a point of view. To agree that debate on public issues should be "robust, and wide-open" does not mean that we should exchange "public trustee" broadcasting, with all its limitations, for a system of self-appointed editorial commentators.

The Court of Appeals discounted those difficulties by stressing that it was merely mandating a "modest reform," requiring only that broadcasters be required to accept some editorial advertising. 450 F. 2d, at 663. The court suggested that broadcasters could place an "outside limit on the total amount of editorial advertising they will sell" and that the Commission and the broadcasters could develop " 'reasonable regulations' designed to prevent domination by a few groups or a few viewpoints." 450 F. 2d, at 663, 664. If the Commission decided to apply the Fairness Doctrine to editorial advertisements and as a result broadcasters suffered financial harm, the court thought the "Commission could make necessary adjustments." 450 F. 2d, at 664. Thus, without providing any specific answers to the substantial objections raised by the Commission and the broadcasters, other than to express repeatedly its "confidence" in the Commission's ability to overcome any difficulties, the court remanded the cases to the Commission for the development of regulations to implement a constitutional right of access.

By minimizing the difficult problems involved in implementing such a right of access, the Court of Appeals failed to come to grips with another problem of critical importance to broadcast regulation and the First Amendment—the risk of an enlargement of government control over the content of broadcast discussion of public issues. See, *e. g.*, *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951). This risk is inherent in the Court of Appeals remand requiring regulations and procedures to sort out requests to be heard—a process involving the very editing that licensees now perform as to regular programming. Although the use of a public resource by the broadcast media permits a limited degree of Government surveillance, as is not true with respect to private media, see *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 216–219 (1943), the Government's power over licensees, as we have noted, is by no means absolute and is carefully circumscribed by the Act itself.[18]

Under a constitutionally commanded and government supervised right-of-access system urged by respondents and mandated by the Court of Appeals, the Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy for the ailment respondent's complain of.

Under the Fairness Doctrine the Commission's responsibility is to judge whether a licensee's overall performance indicates a sustained good faith effort to meet the public interest in being fully and fairly informed.[19]

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[18] See n. 8, *supra*.

[19] See Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246, 1251–1252 (1949).

The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who should be heard and when. Indeed, the likelihood of Government involvement is so great that it has been suggested that the accepted constitutional principles against control of speech content would need to be relaxed with respect to editorial advertisements.[20] To sacrifice First Amendment protections for a speculative gain is not warranted, and it was well within the Commission's discretion to construe the Act so as to avoid such a result.[21]

The Commission is also entitled to take into account the reality that in a very real sense listeners and viewers constitute a "captive audience." Cf. *Public Utilities Commission* v. *Pollak*, 343 U. S. 451, 463 (1952); *Kovacs* v. *Cooper*, 336 U. S. 77 (1949). The "captive" nature of the broadcast audience was recognized as early as 1924, when Commerce Secretary Hoover remarked at the Fourth National Radio Conference that "the radio listener does not have the same option that the reader of publications has—to ignore advertising in which he is not interested—and he may resent its invasion on his set." [24] As the broadcast media became more prevasive in our society, the problem has become more acute. In a recent decision upholding the Commission's power to promulgate rules regarding cigarette advertising, Judge Bazelon,

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[20] See 85 Harv. L. Rev. 689, 697 (1973)

[21] DNC has urged in this Court that we at least recognize a right of our national parties to purchase airtime for the purpose of discussing public issues. We see no principled means under the First Amendment of favoring access by organized political parties over other groups and individuals.

[24] Reprinted in Hearings before the Senate Committee on Interstate Commerce on Radio Control, 69th Cong., 1st Sess., at 54 (1926).

writing for a unanimous Court of Appeals, noted some of the effects of the ubiquitous commercial:

> "Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are 'in the air.' In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word." *Banzhaff* v. *FCC*, 132 U. S. App. D. C. 14, 405 F. 2d 1082, 1100–1101 (1968), cert. denied, 396 U. S. 842 (1969).

It is no answer to say that because we tolerate pervasive commercial advertisement we can also live with its political counterparts.

The rationale for the Court of Appeals' decision imposing a constitutional right of access on the broadcast media was that the licensee impermissibly discriminates by accepting commercial advertisements while refusing editorial advertisements. The court relied on decisions holding that state supported school newspapers and public transit companies were forbidden by the First Amendment from excluding controversial editorial advertisements in favor of commercial advertisements.[22] The

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[22] *Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (WD Wis. 1969), aff'd, 441 F 2d 1257 (CA7 1971); *Zucker* v. *Panitz*, 229 F. Supp. 102 (SDNY 1969); *Kissinger* v. *New York*

court also attempted to analogize this case to some of our decisions holding that States may not constitutionally ban certain protected speech while at the same time permitting other speech in public areas. *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Fowler* v. *Rhode Island*, 354 U. S. 67 (1953); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951). This theme of "invidious discrimination" against protected speech is echoed in the briefs of BEM and DNC to this Court. Respondents also rely on our recent decisions in *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972), and *Police Dept. of City of Chicago* v. *Mosley*, 408 U. S. 92 (1972), where we held unconstitutional city ordinances that permitted "peaceful picketing of any school involved in a labor dispute," but prohibited demonstrations for any other purposes on the streets and sidewalks within 150 feet of the school.

These decisions provide little guidance, however, in resolving the question whether the First Amendment required the Commission to mandate a private right of access to the broadcast media. In none of those cases did the forum sought for expression have an affirmative and independent statutory obligation to provide full and fair coverage of public issues, such as Congress has imposed on all broadcast licensees. In short, there is no "discrimination" against controversial speech present in this case. The question here is not whether there is to be discussion of controversial issues of public importance on the broadcast media, but rather who shall determine what issues are to be discussed by whom, and when.

The opinion of the Court of Appeals asserts that the Fairness Doctrine, insofar as it allows broadcasters to

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City Transit Authority, 274 F. Supp. 438 (SDNY 1967); *Hillside Community Church, Inc.* v. *City of Tacoma, Wash.*, 76 Wash. 2d 63, 455 P. 2d 350 (1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr. 430, 434 P. 2d 982 (1967).

exercise certain journalistic judgment over the discussion of public issues, is inadequate to meet the public's interest in being informed. The present system, the court held, "conforms . . . to a paternalistic structure in which licensees and bureaucrats decide what issues are 'important,' and how 'fully' to cover them, and the format, time and style of the coverage." 450 F. 2d, at 656. The forced sale of advertising time for editorial spot announcements would, according to the Court of Appeals majority, remedy this deficiency. That conclusion was premised on the notion that advertising time, as opposed to programming time, involves a "special and separate mode of expression" because advertising content, unlike programming content, is generally prepared and edited by the advertiser. Thus, that court concluded, a broadcaster's policy against using advertising time for editorial messages "may well ignore opportunities to enliven and enrich the public's overall information." 450 F. 2d, at 658. The Court of Appeals' holding would serve to transfer a large share of responsibility for balanced broadcasting from an identifiable, regulated entity—the licensee—to the unregulated speakers who could afford the cost.

We reject the suggestion the Fairness Doctrine permits broadcasters to preside over a "paternalistic" regime. See *Red Lion, supra*, 395 U. S., at 390. That doctrine admittedly has not always brought to the public perfect or indeed even consistently high quality treatment of all public events and issues; but the remedy does not lie in diluting licensee responsibility. The Commission stressed that, while the licensee has discretion in fulfilling his obligations under the Fairness Doctrine, he is required to "present representative community views and voices on controversial issues which are of importance to his listeners." and he is forbidden from "excluding partisan