BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC., Intervenor

DEMOCRATIC NATIONAL COMMITTEE v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES

AMERICAN B/CASTING COS., INC. and COLUMBIA B/CASTING SYSTEM, INC., Intervenors

U.S. Court of Appeals, District of Columbia Circuit, August 3, 1971

Nos. 24,492; 24,537

[¶10:315(G)(1), ¶53:24(R), ¶53:24(Z)(10)] Sale of time to speak on controversial issues.

A broadcast licensee may not, as a general policy, refuse to sell any of its advertising time to groups or individuals wishing to speak out on controversial issues. The time has come for the Commission to cease abdicating responsibility over the uses of advertising time. The court leaves undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time; the court forbids an extreme form of control which totally excludes controversial public debate from broadcast advertising time. Business Executives Move For Vietnam Peace v. FCC, 22 RR 2d 2089 [US App DC, 1971].

[¶10:315(G)(1), ¶53:24(R), ¶53:24(Z)(10)] First Amendment.

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. Planned announcements of the Business Executives Move for Vietnam Peace and of the Democratic National Committee, or of any other particular applicant for air time, need not necessarily be accepted by broadcast licensees. The licensees and the Commission are to develop and administer reasonable procedures and regulations determining which and how many "educational advertisements" will be put on the air. Business Executives Move For Vietnam Peace v. FCC, 22 RR 2d 2089 [US App DC, 1971].

[¶10:315(G)(1), ¶53:24(R), ¶53:24(Z)(10)] First Amendment.

The public's First Amendment interests constrain broadcasters not only to provide the full spectrum

of viewpoints, but also to present them in an uninhibited, wide-open fashion and to provide opportunity for individual self-expression in advertising as well as non-advertising time. Even if broadcasters were to succeed in presenting a full spectrum of viewpoints and partisan spokesmen on non-advertising time, their retention of total initiative and editorial control is inimical to the First Amendment. Business Executives Move For Vietnam Peace v. FCC, 22 RR 2d 2089 [US App DC, 1971].

[¶10:315(G)(1), ¶53:24(R), ¶53:24(Z)(10)] "Spot" editorial announcements.

The onesidedness and private editing of particular "spot" editorial advertisements may in the end steer viewers and listeners away from the "truth" by distorting complex issues. Being brief, these "spot" messages – no less than normal broadcast news coverage – may not canvass all possible arguments or develop all possible implications of the position they espouse. But that does not mean that they are unprotected by the First Amendment. The Constitution protects many forms of misleading and overly simplified political expression in order to ensure robust, wide-open debate. Business Executives Move for Vietnam Peace v. FCC, 22 RR 2d 2089 [US App DC, 1971].

[¶10:315(G)(1), ¶53:24(R), ¶53:24(Z)(10)] Editorial advertising.

By opening up a forum for some paid presentations, independently edited and controlled by members of the public, the broadcasters have waived any argument that advertising is inherently disruptive of the proper functions of their stations. The exclusion of only one sort of advertising – which has great First Amendment value – is then highly suspect, a prima facie constitutional violation. To justify the exclusion, there must be a substantial factor distinguishing the disruptive effect of editorial advertising from that of commercial advertising. The content of the idea which the excluded speakers seek to promote is not permitted as a distinguishing factor in itself. The editorial advertising ban, particularly when licensees accept advertising generally, establishes an unmistakable infringing of First Amendment liberties. A modest reform – consideration and airing of some editorial advertisements – would not substantially undermine broadcasters' editorial control over their frequencies. Within the affected block of advertising

time, neither chaos nor anything approaching chaos would result. There may be regulations determining the time, place and manner of speech. A relegation of all editorial advertising to non-"prime time" or any other major discrimination in the placement of editorial advertisements would no doubt go too far. But there is still room for broad exercise of the broadcasters' discretion. "Reasonable regulations" may be adopted to prevent domination by a few groups or a few viewpoints. Business Executives Move For Vietnam Peace v. FCC, 22 RR 2d 2089 [US App DC, 1971].

Petitions for Review of Orders of the Federal Communications Commission [19 RR 2d 977, 1053]

Mr. Thomas R. Asher, with whom Messrs. Albert H. Kramer and Michael Schneiderman were on the brief, for petitioner in No. 24,492.

Mr. Joseph A. Califano, Jr., with whom Messrs. David H. Lloyd and Irvin B. Nathan were on the brief, for petitioner in No. 24,537.

Mr. Daniel R. Ohlbaum, Deputy General Counsel, Federal Communications Commission, for respondents.

Messrs. John H. Conlin, Associate General Counsel, and Stuart F. Feldstein, Counsel, Federal Communications Commission, were on the brief for respondents in No. 24,492. Mr. John H. Conlin and Miss Katrina Renouf, Counsel, Federal Communications Commission, were on the brief for respondents in No. 24,537.

Mr. Henry Geller, General Counsel, Federal Communications Commission, at the time the record was filed, also entered an appearance for respondent Federal Communications Commission in No. 24,492.

Mr. Howard E. Shapiro, Attorney, Department of Justice, entered an appearance for respondent United States of America.

Mr. Ernest W. Jennes, with whom Messrs. Charles A. Miller and Henry Goldberg were on the brief, for intervenor in No. 24,492.

Mr. J. Roger Wollenberg, with whom Messrs. Timothy B. Dyk and Daniel Marcus were on the brief, for intervenor Columbia Broadcasting System, Inc. in No. 24,537.

Messrs. James A. McKenna, Jr. and Vernon L. Wilkinson were on the brief for intervenor American Broadcasting Companies, Inc. in No. 24,537.

Before Wright, McGowan and Robinson, Circuit Judges.

Wright, Circuit Judge: In these cases we are asked to decide whether a broadcast licensee may, as a general policy refuse to sell any of its advertising

time to groups or individuals wishing to speak out on controversial public issues. The Federal Communications Commission concluded that such a policy is permissible. 1/ We reverse the Commission's decision. And we remand for further proceedings.

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

Under attack here is an allegedly common practice in the broadcast industry – airing only those paid presentations which advertise products or which deal with "non-controversial" matters, and confining the discussion of controversial public issues to formats such as the news or documentaries which are tightly controlled and edited by the broadcaster. In the Commission's view, an attack on the permissibility of this practice "goes to the heart of the system of broadcasting which has developed in this country." 2/ We disagree. The actual issue before us is relatively narrow and we decide it narrowly. We do not have to cut to the "heart" of our system of broadcasting; we leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an extreme form of control which totally excludes controversial public debate from broadcast advertising time.

We hold specifically 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. We do not hold, however, that the planned announcements of the petitioners – or, for that matter, of any other particular applicant for air time – must necessarily be accepted by broadcast licensees. Rather, we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many "editorial advertisements" will be put on the air.

I

Both petitioners in these cases are organizations whose primary modus operandi is public persuasion and communication. As a rule, they do not

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1/ Business Executives Move for Vietnam Peace, 25 FCC 2d 242 [19 RR 2d 1053] (1970); Democratic National Committee, 25 FCC 2d 216 [19 RR 2d 977] (1970).

2/ Democratic National Committee supra Note 1, 25 FCC 2d at 221.

attract attention to their views by performing newsworthy acts, such as engaging in civil disobedience or organizing mass demonstrations. They depend, instead, on their ability to get a hearing – as full as possible and as direct as possible – from the general public. Surely radio and television would seem to be the most effective media for their purposes. Yet they contend that their self-expression on those media – and, therefore, the public's access to their views – is significantly inhibited by broadcaster policies barring any and all paid editorial messages from the airwaves.

The Business Executives Move for Vietnam Peace (BEM) is a national organization of over 2,700 business owners and executives, organized in opposition to the war. BEM apparently believes that it is in a position to offer the public a unique viewpoint on what is no doubt one of the great political and moral issues of our time. In order to communicate that viewpoint, it prepared several recorded one-minute radio announcements. The announcements urged "immediate withdrawal of American forces from Vietnam and from other overseas military installations" and featured statements by leading businessmen and retired military officers whose views may carry particular weight with the general public. BEM sought to buy time to air these announcements on the broadcast media, just as commercial advertisers do. It must have seemed an extraordinarily effective means of directly communicating its ideas and sense of urgency to the broad listening audience.

In June 1969 BEM sought to purchase time for its announcements on WTOP, an all-news radio station in the nation's capital. Like most broadcasters, WTOP sells substantial amounts of time for short advertisements. Yet over a period of eight months it repeatedly refused to sell any time to the business executives. WTOP cited no particular objection to the planned announcements. Rather, it relied solely upon an across-the-board policy barring all editorial advertisements – "its long established policy of refusing to sell spot announcement time to individuals or groups to set forth views on controversial issues." 3/ BEM then filed a complaint with the Federal Communications Commission alleging violations of both the fairness doctrine and the First Amendment.

The Democratic National Committee (DNC) came to the Commission with much the same sort of complaint. It stated that it was in the process of planning an extensive media campaign to communicate the Democratic Party's views on crucial issues and to solicit funds. In our political system, it is of obvious importance that the public have access – as direct and full as possible – to the views of the political parties. A party currently out of office

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3/ WTOP also stated "that 'subjects of this type require a more in-depth analysis than can be provided in a 10, 20, 30 or 60 second announcement.'" Business Executives Move for Vietnam Peace, supra Note 1, 25 FCC 2d at 242. There is no indication, however, that WTOP's "long established policy" of refusing to sell time for any controversial avertisement would have permitted it to sell BEM 5 minutes or 10 minutes for a more "in-depth" treatment of its antiwar views. For a discussion of the permissibility of a flat ban on "short" public issue advertisements, see text at pages 2107-2108 infra.

may well regard such communication as particularly vital. Yet DNC alleged that it confronted several obstacles to direct self-expression on the broadcast media, among them the refusal of some broadcasters to sell time for comment on controversial public issues. Unlike the business executives, DNC did not complain of any individual refusal to sell time for a particular editorial advertisement. Rather, it cast the issue in a somewhat different light by seeking a declaratory ruling from the Commission that "[a] broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues."

The Commission considered the two cases together and rejected the arguments of both BEM and DNC on the same day. The issues involved did not overlap completely. For example, the Commission found a defect in the vagueness and generality of BEM's fairness doctrine complaint, 4/ and it resolved DNC's contention concerning funds solicitation by noting that all three television networks had agreed to accept such solicitations and by stating that any broadcaster policy of confining solicitations to election periods alone "would appear arbitrary." 5/ On the matters central to these petitions for review, however, the Commission resolved both cases in the same fashion, and we, therefore, are also considering them as one.

The Commission held that it is permissible for a broadcast licensee to follow a general policy of rejecting all editorial advertisements. The essence of its

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4/ In its original complaint, BEM alleged generally that WTOP had failed to cover antiwar views fully and fairly. However, it offered no specific proof whatever of its allegations, and WTOP, on the other hand, offered a lengthy compilation of news and interview shows which aired the opinions of some antiwar groups and individuals. BEM has not pressed its fairness doctrine argument on appeal, but rather has relied solely upon the First Amendment right-of-access contention which it also made before the Commission. Therefore, we need not consider here the Commission's holding that BEM failed to shoulder its full burden of going forward under the fairness doctrine.

5/ All three television networks also commented on the sale of time for editorial advertising. CBS stated it would sell no time for such advertising, although an exception would be made for broadcasts on behalf of political candidates or ballot propositions. ABC said it would not sell time to most groups for public issue advertising since that would inspire a "flood" of requests, but it would "be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis." And NBC stated it "has no policy which would prevent the purchase of program time envisioned by DNC." We are constrained to note here that any discrimination in the sale of editorial advertising time in favor of political parties alone or the "major" political parties – and totally excluding other more issue-oriented groups or "minor" political parties – would be highly suspect under the First Amendment. See text at pages 2110-2112.

reasoning in the two cases was as follows: first, it interpreted the fairness doctrine to allow rejection of paid controversial announcements. The doctrine, evolved by the Commission and endorsed generally in the Communications Act, demands that all controversial issues of public importance be covered both fully and fairly by broadcasters. Yet the Commission held that it leaves the licensees broad leeway to exercise their professional judgment as to "the format for presentation of controversial issues 'and all others facets of such programming.'" Editorial advertising, the Commission said, is simply one of several possible formats for coverage of public issues. Under the permissive "reasonableness" standard of the fairness doctrine, acceptance of that particular format is by no means compulsory.

Second, the Commission interpreted the First Amendment to be equally permissive. Its reasoning on this point was rather sparse. It made no effort, for example, to identify the peculiar First Amendment interests attaching to paid editorial announcements as opposed to coverage of controversial issues on news, interview or discussion programs. Instead, it was content to raise the spectre of the "chaos" and other practical difficulties that, it said, would attend a right of access to the broadcast media. The Commission concluded that the fairness doctrine's requirement of full and fair coverage – tolerant as it is of a flat ban on the editorial advertisement format of expression – provides as much protection of public debate as the First Amendment demands.

Before this court, both petitioners make substantially the same attack on the Commission's decision. They do not ask for a ruling that all editorial advertisements submitted to broadcasters must be accepted. Nor do they seek to foreclose entirely the broadcasters' exercise of reasonable discretion. What they advocate is a limited right of access to radio and television for paid public issue announcements. They attack the Commission's ruling that a total exclusion of such announcements is permissible.

II

Petitioners have left no stone unturned in their attack on the exclusion of editorial advertising. They have invoked the Communications Act's "public interest" requirement 6/ and the statutory-regulatory fairness requirement 7/ – as well as First Amendment principles – to support their argument. In other contexts, we might attempt to avoid the constitutional issue by coming to a decision on non-constitutional grounds. But that course is neither fruitful nor possible here.

Speaking specifically of the Commission, the Supreme Court has stressed 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 Broadcasting Co. v. FCC, 395 US 367, 381

6/ 47 USC §§307(d), 309(a) (1964).

7/ 47 USC §315(a) (1964). For a discussion of the regulatory development of the fairness doctrine and its eventual adoption in the Communications Act, see Red Lion Broadcasting Co. v. FCC, 395 US 367, 375-381 [16 RR 2d 2029] (1969).

[16 RR 2d 2029] (1969). Thus the nonconstitutional question here is whether there are "compelling indications" that the public interest and fairness requirements compel some opening for public issue advertisements on radio and television. In matters of allocating burdens, reforming procedures and ensuring full attention to all relevant factors in agency decision making, we have not been reluctant to reverse the Commission in order to vindicate "the public interest." 8/ We have also intervened to see that broad policies developed by the Commission under the fairness doctrine are applied fully and consistently to all cases. 9/ However, when we are asked to reverse major substantive interpretations of the grand and open-ended statutory requirements, we tread somewhat more difficult terrain. Obviously, the requirements mean something and there must be a great range of actions which they foreclose to the Commission; but, in establishing the necessary guidelines, we must ourselves seek extrinsic guidance.

In these cases, that guidance comes from the Constitution. Petitioners have presented no "compelling" evidence from legislative history to indicate a congressional policy in favor of, or even a real congressional attention to, editorial advertising. Rather, their arguments on the nonconstitutional points closely parallel their constitutional arguments. The general policy considerations which they invoke encompass all of the interests that would have to be evaluated under the relevant First Amendment law. It would make no sense for us to blind ourselves to the constitutional status of those interests and to the doctrine that has been built up around them.

What then might be the "compelling indications" we are to consider? The ones which seem to us truly "compelling" involve First Amendment principles. Thus we conclude that the constitutional question must be faced and is, indeed, the essence of these cases. Whether our 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.

III

It has always been clear that the broadcast media – so vital to communication in our society – are affected by strong First Amendment interests. 10/ Yet the nature of those interests has not been so clear; an evolution of constitutional principles in this area is still very much in progress. Until quite recently, the only interest raised to constitutional status was that of the broadcast licensees themselves. In a leading case, the Commission's powers over

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8/ See, e.g., Office of Communication of United Church of Christ v. FCC, 123 US App DC 328, 359 F2d 994 [7 RR 2d 2021] (1966); 138 US App DC 112, 425 F2d 543 [16 RR 2d 2095] (1969).

9/ See, e.g., Retail Store Employees Union, Local 880 v. FCC, ____ US App DC ____, 436 F2d 248 [20 RR 2d 2005] (1970).

10/ See, e.g., United States v. Paramount Pictures, Inc., 334 US 131, 166 [4 RR 2022] (1948). Congress itself has prohibited any interference by the Commission with "the right of free speech by means of radio communication." 47 USC §326 (1964).

program content were attacked and upheld with reference solely to the licensees' right of immunity from governmental interference with their "speech." The scarcity of broadcast frequencies was said to justify some regulation trenching on the broadcasters' First Amendment interests. National Broadcasting Co. v. United States, 319 US 190 (1943). These cases mark a new effort by members of the public to assert their First Amendment interests in the operations of radio and television.

There is scant precedent for such an effort. Indeed, the few previous attempts by individuals or groups to enforce their First Amendment interests in court have failed. In each case, the litigants have run up against not only an unreceptiveness to their constitutional theory, but also a crabbed judicial view of "state action" – a view that the "[First] Amendment limits only the action of Congress or of agencies of the federal government and not private corporations such as [broadcast licensees]." Massachusetts Universalist Convention v. Hildreth & Rogers Co., 1 Cir., 183 F2d 497, 501 (1950); McIntire v. Wm. Penn Broadcasting Co. of Philadelphia, 3 Cir., 151 F2d 597, 601 (1945). See also Post v. Payton, ED NY, 323 F Supp 799 (1971).

We believe the path is now clear of such doctrinal impedimenta. Perhaps the most important recent development is the Supreme Court's seminal decision in Red Lion Broadcasting Co., supra. There the Court upheld another aspect of the Commission's regulation of program content – the fairness doctrine's personal attack and campaign editorial rules. However, the Court's opinion went well beyond the scarcity rationale of the National Broadcasting Co. case. It justified the Commission's interference with broadcasters' free speech by invoking specifically constitutional rights of the general public which, it said, underlie and support the fairness doctrine rules at issue. Issuing what must become a clarion call for a new public concern and activism regarding the broadcast media, the Court stated that "the people as a whole retain their . . . collective right to have the medium function consistently with the ends and purposes of the First Amendment." 11/ It went on to say:

> ". . . The right of free speech of a broadcaster. . . does not embrace a right to snuff out the free speech of others. . . .
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> ". . .[A] licensee has no constitutional right. . . to monopolize a radio frequency to the exclusion of his fellow citizens. . . .
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> ". . .It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . ." 12/

11/ 395 US at 390.

12/ Id. at 387, 389, 390.

Of course, the Red Lion Court had to invoke the public's First Amendment interests for a narrow purpose only – to uphold legislative and administrative action already taken. It did not have to reach the issue, presented in these cases, of invoking those interests for a direct attack on broadcasters' policies approved by the Commission. However, the language used by the Court is significantly expansive. It spoke of a First Amendment "right" held by "the people as a whole." A constitutional "right" is hardly deserving of the name if it can function only to permit legislative and administrative action and if its content depends entirely upon the current policies of the legislative and executive branches. The First Amendment, after all, contains nothing analogous to the fifth section of the Fourteenth Amendment, authorizing Congress to enforce constitutional interests unenforceable by the courts. 13/

For many purposes, it is proper to consider broadcast licensees as "private" businesses. Yet, for purposes of the First Amendment, "[o]wnership does not always mean absolute dominion." Marsh v. Alabama, 326 US 501, 506 (1946). "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 US 296, 299 (1966). The Red Lion Court itself commented on the impermissibility of "private censorship" and cited old doctrine that "'[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.'" 14/ The reach of the First Amendment, therefore, depends not upon "public" – "private" technicalities, but upon more functional considerations. They are (1) the governmental involvement in or public character of a particular enterprise, and (2) the importance or suitability of that enterprise for the communication of ideas. 15/

13/ On the effect of the specific language in the fifth section of the Fourteenth Amendment, see Oregon v. Mitchell, 400 US 112 (1970); Katzenbach v. Morgan, 384 US 641 (1966). Of course, the Fourteenth Amendment does not apply to federal regulation of the broadcast industry, since no interference with the states is involved.

14/ 395 US at 392, quoting Associated Press v. United States, 326 US 1, 20 (1945).

15/ Most "state action" cases, of course, have been concerned with equal protection rights under the Fourteenth Amendment rather than with free speech rights under the First Amendment. However, the principle of governmental involvement developed therein has been applied equally well in the First Amendment context. See, e.g., Public Utilities Comm'n v. Pollak, 343 US 451 (1952); Farmer v. Moses, SD NY, 232 F Supp 154 (1964). The principle of "public character" may be found in decisions dealing directly with application of First Amendment rights to "private" entities. See, e.g., Marsh v. Alabama, 326 US 501 (1946); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 US 308 (1968); Tanner v. Lloyd Corp., D Ore, 308 F Supp 128 (1970); Diamond v. Bland, 91 Cal Rptr 501, 477 P2d 733 (1970). The importance and suitability of a particular place for the communication of ideas has been stressed in all of the cases cited above, as well as in all of the access-to-public-forum cases, see Notes 40-43 infra.

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The last few decades of court decisions expanding the concept of "state action" have focused on myriad indicia of governmental involvement and public character. Many of them are apparently applicable to the operations of the broadcast industry. 16/ But we need stress only two more basic factors which, taken together, bring broadcast licensees well within the ambit of the First Amendment for the purposes of these cases. First, 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. 17/ It is one of "interdependence" and "joint participa[tion]." See Burton v. Wilmington Parking Authority, 365 US 715, 725 (1961). "[T]he [federal] regulatory system," it has been said, "is as much responsible for the existence of a broadcasting medium as the Bureau of Engraving is responsible for the existence of United States currency." 18/ It has long been recognized that the airwaves are "a limited and valuable part of the public domain," 19/ leased out temporarily by the federal government which retains ultimate control over them. 20/ Federal

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16/ Dissenting in the BEM case now under review, Commissioner Johnson dealt exhaustively with the Supreme Court's state action doctrine, isolating eight separate indicia of "state action." He argued very strongly that all eight indicia apply to broadcast licensees. Business Executives Move for Vietnam Peace, supra Note 1, 25 FCC 2d at 253-264. Because this highly analytical – one might say mechanical – approach runs the risk of reading Supreme Court opinions for more than they mean, we have chosen to paint with a broader brush. Ours is the approach which the Supreme Court seems in fact to have used in the past.

17/ In particular, broadcasting may be easily distinguished from the newspaper industry in terms of "state action." In two recent decisions, courts have held that newspapers are not subject to the First Amendment. Associates & Aldrich Co., Inc. v. Times Mirror Co., 9 Cir., 440 F2d 133 (1971); Chicago Joint Board v. Chicago Tribune Co., 7 Cir., ___ F2d ___, 39 US L WEEK 2360 (December 17, 1970). While the governmental involvement in and public character of newspapers in surely less than that of broadcasting, we of course need express neither agreement nor disagreement with the cited decisions here.

18/ Pemberton, The Right of Access to Mass Media, in N. Dorsen (ed.), The Rights of Americans 277, 290 (1971). The Government is also directly responsible for the very existence of particular broadcasters. "[E]xisting broadcasters have often attained their present position because of their initial government selection in competition with others. . . . . . .[Their present] advantages are the fruit of a preferred position conferred by the Government." Red Lion Broadcasting Co. v. FCC, supra Note 7, 395 US at 400.

19/ Office of Communication of United Church of Christ v. FCC, supra Note 8, 123 US App DC at 337, 359 F2d at 1003.

20/ The licensing-out or delegation of governmental authority has been a element in some of the Supreme Court's most expansive state action

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agency review and guidance of broadcasters' conduct is automatic, continuing and pervasive. 21/ For broadcast licensees are considered the "proxies" or "fiduciaries" of the people. 22/ Almost no other private business - almost no other regulated private business - is so intimately bound to government and to service to the commonweal.

A second and even more important factor is the specific governmental involvement in the broadcasters' action now under review here. All of the cases in which previous courts have characterized broadcasters as mere "private corporations" immune from First Amendment constraints, see text at page 2097 supra, have involved direct suits against broadcast licensees. In the cases before us now, however, the Commission has given its imprimatur to the flat ban on editorial advertising. It specifically considered and specifically authorized the flat ban. Thus we are called upon to review not simply a private decision, but a decision by a government agency, a decision which must inevitably provide guidance for future broadcaster action.

There is ample authority for the principle that specific governmental approval of or acquiescence in challenged action by a private organization indicates "state action". 23/ Indeed, in a case similar to ours the Supreme Court held

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20/ [Footnote continued from preceding page]

decisions. See Evans v. Newton, 382 US 296 (1966); Burton v. Wilmington Parking Authority, 365 US 715 (1961); Smith v. Allwright, 321 US 649 (1944). The mere existence of a licensing or delegation relationship is not, of course, enough by itself to establish state action; licensed pharmacists cannot be equated with licensed broadcasters. The actual extent of governmental involvement and the public character of the enterprise in question remain the final tests of state action.

21/ The activities of a governmental regulatory agency have also been emphasized in at least one of the Supreme Court's expansive state action decisions. See Public Utilities Comm'n v. Pollak, supra Note 15, 343 US at 462, citing American Communications Ass'n v. Douds, 339 US 382, 401 (1950) ("[W]hen 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.")

22/ See Red Lion Broadcasting Co. v. FCC, supra Note 7, 395 US at 394, 396; Office of Communication of United Church of Christ v. FCC, supra Note 8, 123 US App DC at 337, 359 F2d at 1003.

23/ The Supreme Court has said that "action of state courts and judicial officers in their official capacities is to be regarded as action of the State. . . ." Shelley v. Kraemer, 334 US 1, 14 (1948). See New York Times Co. v. Sullivan, 376 US 254 (1964); Van Alstyne, Mr. Justice Black, Constitutional Review, and the Talisman of State Action, 1965 Duke L. J. 219, 227-230. See also this court's discussion of the Shelley principle - which surely must apply to actions of a federal administrative

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that a private bus company franchised by the federal government and regulated by the District of Columbia Public Utilities Commission could be subject to First Amendment constraints. It emphasized the specific regulatory acquiescence in the challenged action of the bus company:

> ". . . In finding [state action] we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit 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 rely particularly upon the fact that that agency, pursuant to protests against the [challenged action], 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. . . ."

Public Utilities Commission v. Pollak, 343 US 451, 462 (1952). (Footnote omitted.)

Broadcasting's importance and suitability for communication of ideas need not be labored. Mere presence of large and appropriate audiences (and thus opportunities for effective communication) has sometimes been emphasized by the courts to show the relevance of First Amendment protections. 24/ In Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza Inc., 391 US 308 (1968), for example, the Supreme Court held that a privately owned shopping center was an appropriate place for the "speech" of labor union picketers. It stressed "[t]he large-scale movement of the country's population from the cities to the suburbs [that] has been accompanied by the advent of the suburban shopping center. . . ." Id. at 324. With this demographic change, the "speech" that once took place on the public streets around

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23/ [Footnote continued from preceding page]

agency specifically approving private action – in Edwards v. Habib, 130 US App DC 126, 397 F2d 687 (1968). Specific governmental acquiescence, as well as specific approval, has also been a focus of Supreme Court state action decisions. See Marsh v. Alabama, supra Note 15, 326 US at 507 & n. 4, 509; Burton v. Wilmington Parking Authority, supra Note 20, 365 US at 725.

24/ See, e.g., Wolin v. Port of New York Authority, 2 Cir., 392 F2d 83, 90-91 (1968) ("The propriety of a place for use as a public forum. . . [may be established if] the place is where the relevant audience may be found.") Of course, the cases before us involve the right to speak on a medium of communication, not in a particular place. Thus many of the considerations are different, but the basic concern with the ability to reach the relevant audience applies in both situations.

downtown shopping areas must be allowed to move to privately owned parking areas in the suburbs, for that is where the relevant audiences now are. The technological and cultural changes connected to the current preeminence of the broadcast media as our primary means of communication are no less striking. The soap box orator and the leafleter are becoming almost obsolescent; their Saturday afternoon audiences have increasingly moved indoors – in front of their television sets. 25/

Moreover, unlike most of the private entities held to be subject to First Amendment constraints, 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. In a populous democracy, the only means of truly mass communication must play an absolutely crucial role in the processes of self-government and free expression, so central to the First Amendment. That can be said of almost no other "private" enterprise.

IV

Broadcast licensees, then, serve not only as "speakers" but also as administrators of a highly valuable communications resource, subject to First Amendment constraints. Their dual role demands that their own constitutional interests in free speech coexist with those of the general public. But what are the dimensions of the public's First Amendment interests in the operation of radio and television? And how do they apply to the issue of editorial advertising?

It is particularly important that these cases deal only with the public's First Amendment interests in broadcasters' allocation of advertising time. They deal only with time relinquished by broadcasters to others; petitioners argue only that, in relinquishing that time, broadcasters must not discriminate against protected expression. In normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different. In news and documentary presentations, for example, the broadcasters' own interests in free speech are very, very strong. 26/ The Commission's fairness doctrine properly leaves licensees broad leeway for professional judgment in that area. But in the allocation of advertising time, the broadcasters have no such strong First Amendment interests. Their speech is not at issue; rather, all that is at issue is their decision as to which other parties will be given an opportunity to speak.

Though the broadcasters themselves have no substantial First Amendment interest in the allocation of advertising time, we might expect that the interest of members of the public – potential advertisers – would be quite strong.

25/ The Supreme Court has noted 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 Note 7, 395 US at 386 n. 15.

26/ See id. at 396.

However, the Commission and the broadcaster-intervenors have argued just the opposite. They contend that the public's constitutional concerns do not extend to advertising time. Thus we must decide whether the substantial block of the broadcast day devoted to advertising is but a vacuum, devoid of First Amendment constraints, in the midst of a medium powerfully affected by those constraints – a desert in the midst of an oasis.

The Commission and intervenors work from the following premise. They define the public's overall constitutional interests in the operations of radio and television quite narrowly. The public's only interest, they suggest, is as viewers and listeners – not as speakers. They cite to us the Red Lion Court's mention of "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences" over the broadcast media. 27/ And they read that statement to set forth not only an interest of the public, but the only interest of the public.

Working from that premise, the Commission and intervenors contend that the public already receives "suitable access" to controversial views on normal programming time. Application of the fairness doctrine's requirement of full and fair coverage of public issues in non-advertising time, they suggest, ensures that all views on these issues will in fact be presented. They assume that editorial advertising adds nothing new to the debate. The fairness guarantee alone, they say, is enough to eliminate petitioners' claim on advertising time – and enough to satisfy the First Amendment. We disagree.

Surely the public's interest in free access to the full spectrum of ideas and controversial views on radio and television is highly important. The right to receive ideas and information is deeply rooted in First Amendment la v. 28/ The Red Lion Court stressed that right, since it was the one primarily relevant to the fairness doctrine rules at issue in the case. But we do not believe that the Red Lion decision makes the goal of an informed public the exclusive First Amendment interest constraining broadcasters. Certainly the Supreme Court has done so in no other context.

The public has a First Amendment interest in the mode or manner – as well as the content – of public debate aired on the broadcast media. The Red Lion Court itself stated specifically that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas [in the broadcast media]." 29/ This court, similarly, has said that the Commission is obliged to administer the airwaves "in such a manner that. . .debate on public issues is 'uninhibited, robust and wide-open.'" National Ass'n of Theatre Owners v. FCC, 136 US

27/ Id. at 390.

28/ See Stanley v. Georgia, 394 US 557, 564 (1969); Lamont v. Postmaster General, 381 US 301, 307-308 (1965) (Mr. Justice Brennan, concurring); Martin v. City of Struthers, 319 US 141, 143 (1943). The "right to receive," however, has not been considered the central First Amendment interest, and never the only First Amendment interest.

29/ 395 US at 390. (Emphasis added.)

App DC 352, 365, 420 F2d 194, 207 [16 RR 2d 2010] (1969). The reference to "uninhibited" debate is, of course, borrowed from the Supreme Court's decision in New York Times Co. v. Sullivan, 376 US 254, 270 (1964). The Court there extended First Amendment protection to some forms of libel on public officials. It made clear that the Amendment's concern extends beyond the mere fostering of speech whose content will properly inform the public. The New York Times decision establishes a strong First Amendment interest in vigorous, "wide-open" public debate.

Furthermore, we must take note of a third – but, perhaps, most important – First Amendment interest. That is the interest of individuals and groups in effective self-expression. The Red Lion Court did say that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." 30/ For, as it pointed out, broadcast time is necessarily limited. But the limited nature of broadcast time does not dictate that the individual and group interest in self-expression be brushed aside entirely; it allows for a reasonably regulated, "abridgeable" right to speak. The First Amendment values of individual self-fulfillment through expression and individual participation in public debate have long been recognized. 31/ We all have an interest in speaking up ourselves as well as in hearing others. It is too late to argue that the First Amendment protects ideas but not an individual's interest in expressing them and doing so in his own way.

We conclude, then, that the public's First Amendment interests constrain broadcasters not only to provide the full spectrum of viewpoints, but also to present them in an uninhibited, wide-open fashion and to provide opportunity for individual self-expression. 32/ How do these three First Amendment interests relate to a more specific interest in the airing of editorial advertisements? The answer emerges when we understand the special importance of advertising time to our system of free expression. First, the initial decision to produce an editorial advertisement is in the hands of members of the public. The initiative to present a particular view does not have to come from a member of the broadcaster's staff. Second, a paid advertisement is basically controlled and edited by the advertiser. He is allowed to present his views in a fashion chosen by himself. If an individual is interviewed for a news program, he may expect his comments to be abbreviated and edited;

30/ Id. at 388.

31/ See, e.g., T. Emerson, Toward a General Theory of the First Amendment 4-7 (Vintage ed. 1967).

32/ Of course, all three of these interests apply to non-advertising time as well as to advertising time. The Commission, in fact, has encouraged broadcasters to present conflicting views through partisan voices as well as through predigested commentary. See Democratic National Committee, supra Note 1, 25 FCC 2d at 222-223. However, as we make clear in text, the selective, edited presentation by the Government's licensee of partisan voices on news shows, for example, does not erase the special advantages of allowing self-selected partisan voices on advertising time.

reporters' commentary will qualify what he has to say. For it is the broadcasters' responsibility to be objective, to condense issues into available time for presentation, and to play up or play down views according to the broadcaster's opinion of what is important and interesting. But when an individual or group buys time to say its piece, the crucial controls are in its own hands. Editorial advertising is thus a special and separate mode of expression, not simply a duplication of other expression on the same medium. 33/

The importance of initiative and control to the First Amendment interests in wide-open debate and individual self-expression should be obvious. Vigorous, free expression is promoted when members of the public have some opportunity to take the initiative and editorial control into their own hands on the broadcast media. It 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. In the First Amendment area, our best guarantee has always been a "free market" in which partisans who feel strongly on particular issues may decide on their own to speak out and to speak out in their own way. The present system, allowing a flat ban on editorial advertising, conforms instead to a paternalistic structure in which licensees and bureaucrats decide what issues are "important," how "fully" to cover them, and the format, time and style of the coverage.

Even if broadcasters were to succeed in presenting a full spectrum of viewpoints and partisan spokesmen on non-advertising time, their retention of total initiative and editorial control is inimical to the First Amendment. The importance of fair, objective and full treatment of controversial issues on normal programming cannot be doubted. But, as the Supreme Court has said in the context of classroom debate, "supervised and ordained discussion" is not enough. Tinker v. Des Moines School District, 393 US 503 (1969). "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" Keyishian v. Board of Regents, 385 US 589, 603 (1967). In other words, there is always a strong First Amendment interest in opening up channels for more spontaneous, self-initiated, self-controlled expression. 34/

33/ See text at pages 2107-2108 & Note 37 infra. See also Note, A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access, 39 Geo. Wash. L. Rev. 532, 557-560 (1971).

34/ We are cognizant of current proposals to reform the Commission's fairness doctrine and invigorate its enforcement so lackluster in the past. We commend the Commission's consideration of new rules to "encourage and implement" presentation of opposing viewpoints by reemphasizing the obligation to "seek out" controversial issues. Obligations of Broadcast Licensee Under the Fairness Doctrine, 35 Fed Reg 7820 (1970). But, as the Commission says, the proposed rules would be but a "modest. . . step in promoting access to the media." Id. at 7821. They go little

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Even in terms of the public's First Amendment interest emphasized by the Commission and intervenors - the interest of "viewers and listeners" in passive access to the full spectrum of viewpoints on radio and television - editorial advertising plays an important role. The concept of "full" coverage of "controversial" issues "of public importance" is vague to say the least, and leaves much to the broadcasters' discretion (and possible oversight). 35/

34/ [Footnote continued from preceding page]

beyond the present obligation to give "full" coverage to controversial issues. Such an obligation is inherently difficult to define and enforce. At best, the Commission can evaluate only the general willingness of a licensee to "seek out" issues and glaring examples of noncoverage of obviously important issues. The Commission cannot be expected to engage licensees in fine debates over coverage of less obviously life-or-death issues. But the fundamental point - the point we emphasize - is that no matter how "fully" controversial issues might be covered in a perfect broadcasting world, the basic initiative and control remains with the licensee. Because there is not even a partial "free market" opening to the public at large, the crucial First Amendment interests in decentralized initiative and control go unsatisfied.

We realize that there is another possible, but purely speculative, reformation of the fairness doctrine now under consideration which might be supposed to obviate the need for a measure of "free market" access to advertising time. It has been proposed that licensees be required to provide self-edited advertising time to groups or individuals under the fairness doctrine only when a commercial advertiser has already taken a controversial position in his broadcast messages. Such an approach has been taken regarding cigarette advertisements, though that case was said to be extraordinary and not to establish a general precedent. Banzhaf v. FCC, 132 US App DC 14, 405 F2d 1082 [14 RR 2d 2061] (1968). But even if that principle were made to apply generally, it would leave the initiative solely in the hands of commercial advertisers: the only issues on which noncommercial groups and individuals could speak through editorial advertisements would be those issues which commercial advertisers had already chosen to raise themselves. Allowing such a narrow group, motivated largely by business profit, to set the agenda for editorial advertising is unconscionable and contrary to First Amendment precepts. It is crucial that noncommercial groups and individuals have the same rights of initiative as commercial advertisers.

35/ The guarantees of full and fair coverage have proved particularly difficult to define and enforce in the past. They have taken on effective meaning only in the most extreme cases of broadcaster irresponsibility. For a depressing critique of the Commission's apparent inability to enforce its own standards, see Cox & Johnson, Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study, 14 FCC 2d 1 (1968).

Assuming that broadcasters are sometimes fallible, the goal of a fully informed public is best attained by opening of outlets for members of the public to supplement the licensees' assessments of "importance," "controversiality" and "full" coverage. The Commission's and intervenors' argument might be somewhat stronger if it were designed to support a partial ban on editorial advertising concerning issues and views which have in fact been substantially aired on normal programming time. 36/ The argument is unconvincing, however, in support of a flat, per se ban on any and all editorial advertisements.

Moreover, even if "antiwar views," for example, have in fact been presented on news and interview shows, it is not necessarily clear that a particular antiwar editorial advertisement would add nothing to the public's information and understanding. "Viewpoints" cannot be so neatly and infallibly catalogued as the Commission would have us believe. Self-expression and public debate are much more subtle phenomena; matters of style and intensity of feeling are important components. 37/ Again, an across-the-board ban on editorial advertisements – leaving the quality of public debate in the control of one licensee, supplemented by no other autonomous inputs – may well ignore opportunities to enliven and enrich the public's overall information.

We recognize, of course, that the onesidedness and private editing of particular "spot" editorial advertisements may in the end steer viewers and listeners away from the "truth" by distorting complex issues. Being brief, these "spot" messages – no less than normal broadcast news coverage – may not canvass all possible arguments or develop all possible implications of the position they espouse. But that does not mean that they are unprotected by the First Amendment. Our Constitution protects many forms of misleading and overly simplified political expression in order to ensure robust, wide-open debate. "[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct. . . ." New York

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36/ Even then, however, the special attributes of editorial advertising would not be eliminated by the broadcaster's own coverage. See text at pages 2104-2105 supra & pages 2107-2108 infra.

37/ In Lee v. Board of Regents of State Colleges, W.D. Wis., 306 F Supp 1097 (1969), affirmed, 7 Cir., 441 F2d 1257 (1971), the court held that a school newspaper was obliged under the First Amendment to print antiwar editorial advertising, even though antiwar views could be printed in the newspaper's news and letters-to-the-editor columns. The court stressed the qualitative – and valuable – difference in expression of views through an editorial advertisement. "It is readily apparent," it said, "that a paid advertisement can be cast in such a form as to command much greater attention than a letter to the editor. Large type, photographs, repeated publication and full pages of space are some of the modes of expression available in an editorial advertisement that might not be available in a letter to the editor." Id. at 1101. Another court has come to the same result in a newspaper editorial advertising case. Zucker v. Panitz, SD NY, 299 F Supp 102 (1969). See text at page 2109 infra.

Times Co. v. Sullivan, supra, 376 US at 273. Nor does the brevity of the criticism. We must, then, be very, very slow to judge any sort of speech on public issues worthless. The marketplace of ideas protected by the First Amendment, after all, is not governed by the tastes and intellectual standards of the universities or the broadcast newsroom – or even if judicial chambers.

We conclude, therefore, that the fairness doctrine's goal of full and fair coverage of issues on normal programming time does not eliminate the public's interest in a further, complementary airing of controversial views during advertising time. We must concur in the Supreme Court's only recorded comments on constitutional protection for editorial advertising – comments made in the context of newspapers, like broadcasting a medium which may be expected, if not required, to present the various sides of public issues in its non-advertising space. The Court said that editorial advertisements, unlike commercial advertisements, 38/ are of fundamental First Amendment concern, since they deal with political questions. And it protected them from libel law attack to the same extent as the newspapers' own editorial columns, for

> "[a]ny other conclusion. . .might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities – who wish to exercise their freedom of speech even though they are not members of the press. . . . The effect would be 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, 376 US at 266.

V

We come now to the aspect of the broadcasters' policy which, petitioners say, trenches on the First Amendment interest in editorial advertising. The constitutional defect of that policy is somewhat ironic. The New York Times Court made clear that the fact distinguishing fully protected editorial advertising from less fully protected commercial advertising is that the former deals with controversial public issues. Indeed, the political nature of editorial advertising places it near the core of the First Amendment. However, the very characteristic which affords it strict constitutional protection is also the characteristic causing the broadcasters' challenged policy to single it out and exclude it from the airwaves. That, we believe, is the crucial aspect of these cases.

38/ Commercial advertising – indeed, any sort of commercial speech – is less fully protected than other speech, because it generally does not communicate ideas and thus is not directly related to the central purpose of the First Amendment. See Breard v. City of Alexandria, 341 US 622 (1951); Valentine v. Chrestensen, 316 US 52 (1942).

It is important to note that petitioners do not attack the exclusion of editorial advertising by broadcasters who accept no advertisements whatever. 39/ We do not have to decide whether the broadcast medium inherently amounts to a "public forum" on the order of public streets or parks or meeting halls or even bus terminals. 40/ We leave open the possibility that broadcasters may constutitionally relinquish no time at all for advertising of any sort. For the issue in these cases is the permissibility of discrimination, within a given block of advertising time, against "controversial" speech and in favor of commercial and "noncontroversial" speech. We deal here with a forum that already has been opened up by the licensees themselves, opened up for direct broadcast presentations by members of the public.

Fortunately, we do not write on a clean slate in this area. Six courts have confronted discriminations among types of speech like the one challenged here. Every one of them – four federal courts and two state supreme courts – has held that once a forum, subject to First Amendment constraints, has been opened up for commercial and "noncontroversial" advertising, a ban on "controversial" editorial advertising is unconstitutional unless clearly justified by a "clear and present danger." Lee v. Board of Regents of State Colleges, WD Wis, 306 F Supp 1097 (1969), affirmed, 7 Cir., 441 F2d 1257 (1971); Zucker v. Panitz, SD NY, 299 F Supp 102 (1969); Kissinger v. New York City Transit Authority, SD NY, 274 F Supp 438 (1967); Hillside Community Church, Inc. v. City of Tacoma, Wash., 455 P2d 350 (1969); Wirta v. Alameda-Contra Costa Transit District, 64 Cal Rptr 430, 434 P2d 982 (1967). We join this unbroken line of authority.

First Amendment doctrine governing access to forums for communication has been elaborated often in recent years. The essential test is an exercise in balancing, though weighted in favor of First Amendment values. 41/ On one

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39/ DNC's position is somewhat ambiguous. The ruling which it requested from the Commission would, by its terms, apply to all broadcasters, whether or not they accept any advertising. See text at page 6 supra. However, on appeal DNC's arguments have been focused entirely on broadcasters who do already accept noncontroversial advertising. The interests of particular licensees in keeping all advertising off the air were not explored before the Commission or before this court – for example, an all music station may have a very substantial interest in broadcasting no paid announcements. Because the special issues relating to such licensees were not presented here, we do not decide them.

40/ See, e.g., Schneider v. State, 308 US 147 (1939); Hague v. CIO, 307 US 496 (1939); Wolin v. Port of New York Authority, supra Note 24. See generally Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup Ct Rev 1.

41/ Most of the cases, other than those cited above in text, have involved access to particular places in order to perform expressive activities such as speaking, leafleting, or demonstrating in some fashion. For general discussions of the cases and the principles applied, see H. Kalven,

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hand, the court must assess the constitutionally protected interest in the particular expressive activity in the particular forum. On the other hand, it must assess the importance of other uses of the forum which may be threatened and the extent to which they actually will be disrupted. Access may be denied only if the disruption caused by a particular type of expression (e.g., public speaking, marching, picketing) clearly overrides the "preferred" interest in free speech. Thus there is some right of access by demonstrators to state capitol grounds 42/ but not to a jailyard. 43/

Ordinarily, courts have to make the basic balancing judgment on their own. However, when the administrator of a forum has determined to grant access to some speakers or some picketers, he has implicitly made that basic judgment himself. When some public speaking is allowed in a park, the park's administrator has determined that the normal and proper functions of the park will not be excessively harmed by public speaking. If he then attempts to deny access to other public speakers, he cannot be heard to claim the opposite. The burden is on him to show some very substantial factor distinguishing the disruption they would cause from that caused by the speaking or picketing already allowed.

The same principle applies to broadcasters who have opened their forum to commercial speech but would close it to controversial political speech. By opening up a forum for some paid presentations, independently edited and controlled by members of the public, the broadcasters have waived any argument that advertising is inherently disruptive of the proper function of their stations. The exclusion of only one sort of advertising - which we have shown to have great First Amendment value - is then highly suspect, a prima facie constitutional violation. To justify the exclusion, there must be a substantial factor distinguishing the disruptive effect of editorial advertising from that of commercial advertising.

The content of the idea which the excluded speakers seek to promote is - emphatically - not permitted as a distinguishing factor in itself. Indeed, the existence of an exclusionary discrimination apparently based on the content of ideas presents an additional, or greatly heightened, prima facie constitutional violation. Both free speech and equal protection principles condemn any discrimination among speakers which is based on what they intend

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The Negro and the First Amendment (paper ed. 1965); Note, Regulation of Demonstrations, 80 Harv L Rev 1773 (1967). There is no reason why the general principles applied in cases involving access to places should not apply to our cases involving access to a particular medium of expression. See Note 24 supra.

42/ Cox v. Louisiana, 379 US 536 (1965).

43/ Adderley v. Florida, 385 US 39 (1966).

to say. 44/ If the First Amendment prohibits anything at all, it must be a censorial discrimination among ideas. And since First Amendment rights have been held to be "fundamental rights" triggering the strict standard of review under equal protection principles, Williams v. Rhodes, 393 US 23, 30-31 (1968), it is doubly clear that the burden of justifying any apparent discrimination is very great indeed.

At least 20 years ago, the Supreme Court began condemning discriminations among different exercises of the same type of expression. Fowler v. Rhode Island, 354 US 67 (1953); Niemotko v. Maryland, 340 US 268, 272-273 (1951). Both cases involved access to a forum already opened to others. More recently, the Court in Cox v. Louisiana, 379 US 536 (1965), invalidated a state regulation that permitted labor picketing but not civil rights picketing. In his concurrence, Mr. Justice Black stated that this sort of discrimination is "censorship in a most odious form" and violates both the First Amendment and the equal protection clause. Id. at 581. Similarly, in Adderley v. Florida, 385 US 39 (1966), the Court upheld a ban on demonstrations in a jail-yard, but was careful to note that "[t]here is not a shred of evidence in this record. . .[the demonstrators were excluded] because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest." Id. at 47.

No doubt a discrimination against all controversial speech - such as we face in these cases - is somewhat less "odious" than a discrimination among different controversial viewpoints on particular issues. But it is a form of censorship just the same. 45/ It is a favoritism toward the status quo and

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44/ For discussions of the First Amendment-equal protection intersection, see Blasi, Prior Restraints on Demonstrations, 68 Mich L Rev 1482, 1492-1497 (1970); Kalven, supra Note 40, 1965 Sup Ct Rev at 29-30; Van Alstyne, Political Speakers at Universities; Some Constitutional Considerations, 111 U Pa L Rev 328, 337-339 (1963).

45/ In Wirta v. Alameda-Contra Costa Transit District, 64 Cal Rptr 430, 434 P2d 982, 986 (1967), the California Supreme Court came to the same conclusion as we do on this issue, saying:

> ". . .The vice is not that the district has preferred one point of view over another, but that it chooses between classes of ideas entitled to constitutional protection, sanctioning the expression of only those selected, and banning others. Thus the district's regulation exercises a most pervasive form of censorship.
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> ". . .[T]he district's policy. . .affords total freedom of the forum to mercantile messages while banning the vast majority of opinions and beliefs extant which enjoy First Amendment protection because of their noncommercialism. No statistical data is required to demonstrate that in the totality of man's communicable knowledge, that which bears no relationship to material value preponderates."

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public apathy and, in these cases, a favoritism toward bland commercialism. 46/ Such favoritism flies in the face of the First Amendment, whose central purpose is to protect and promote controversy, "uninhibited, robust and wide-open," on public issues.

Moreover, it is by no means clear that a broadcasters' ban on "controversial" advertising does not impermissibly open the door to a sub rosa discrimination among controversial ideas. The term "controversial" is extraordinarily vague. Some advertisements may not be deemed "controversial" – and may not even be "controversial" for purposes of the fairness doctrine 47/ – but may still express ideas, the negative of which would surely be labeled "controversial." 48/ Ads for Radio Free Europe or Army recruiting, for example, may be allowed unanswered on the air, while ads calling the notion of the "free world" a sham or ads calling the Army a threat to democracy would be banned entirely. The line between ideological and nonideological presentations is an almost impossible one to draw. All too often in our society one particular ideology – that of passivity, acceptance of things as they are, and exaltation of commercial values – is simply taken for granted, assumed to be a nonideology, and allowed to choke out all the rest. 49/

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45/ The Supreme Court of Washington specifically adopted this view in Hillside Community Church, Inc. v. City of Tacoma, Wash., 455 P2d 350, 353 (1969).

46/ Commissioner Johnson commented in his dissent that broadcasters "have created a system in which immediate access is granted to one, privileged class of applicants: the commercial peddler of goods and services. . . . We have an individual right of access, all right, but only for hucksters of industrial garbage." Democratic National Committee, supra Note 1, 25 FCC 2d at 233.

47/ See Banzhaf v. FCC, 132 US App DC 14, 405 F2d 1082 (1968); Green v. FCC, ____ US App DC ____, ____ F2d ____ (Nos. 24470 & 24516, decided June 18, 1971).

48/ In Wirta v. Alameda-Contra Costa Transit District, supra Note 45, 434 P2d at 987, the California Supreme Court made the same point very forcefully, and provided several telling examples:

". . .A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes. An insurance company may announce its available policies, but a senior citizens' club cannot plead for legislation to improve our social security program."

49/ See generally C. Waxman (ed.), The End of Ideology Debate (1969).

Thus the editorial advertising ban, particularly when licensees accept advertising generally, establishes an unmistakable infringing of First Amendment liberties. The Commission and the broadcasters, then, bear a very heavy burden of justification. Whether we require a "compelling" justification, an "overriding" justification, or a "clear and present danger" is relatively unimportant.

VI

It being established that there is strong and specific First Amendment interest in editorial advertising and that the policies discriminatorily barring such expression work a prima facie violation of constitutional principles, we must consider the countervailing considerations raised by the Commission and the broadcaster-intervenors. In order to justify the policy at issue, they must show some very substantial harm that would be caused by acceptance of editorial advertising - a sort of harm great enough to override the First Amendment interests at stake and a sort of harm not already involved in the acceptance of commercial and "noncontroversial" advertising. Only such a showing could convince us that the ban on editorial advertisements is supported by sufficient countervailing values and is not based solely on the content of the ideas conveyed.

The Commission and intervenors have begun from the assumption that our holding for petitioners would deprive broadcast licensees of their highly prized editorial independence and control over their frequencies, giving editorial advertisers a right to air time which commercial advertisers do not presently have. They have argued that petitioners seek the right to "grab the mike" from broadcasters' hands. 50/ The result, they say, would be a three-fold disaster. First, they foresee "'a return to the chaotic situation of radio's early days'" 51/ when too many hands grabbing for too few mikes made successful broadcasting impossible. Second, they argue that compulsory acceptance of editorial advertising would allow a few rich individuals or groups to buy up great blocks of time to purvey views on only one side of important issues, thus grossly unbalancing the broadcast station's treatment of those issues. And third, they point out that broadcasters compelled to accept editorial advertisements on one side of an issue would then be required by the fairness doctrine to accept at least some advertisements on the other side - free of charge if necessary. Provision of such free advertising time, they say, would cut into the broadcasters' revenues and might bring financial collapse.

The arguments of the Commission and intervenors fall well short of the mark. The reason is that they have apparently misunderstood the narrowness of the issue here. All that we are considering is the permissibility of a total, flat ban on editorial advertising. All petitioners ask is that broadcasters be required to accept some editorial advertising. They do not advocate an absolute right to air their advertisements. As the Red Lion Court made clear, there

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50/ Statement of attorney for intervenor Columbia Broadcasting System at oral argument before this court.

51/ Brief for the Commission in Case No. 24,537 at p. 12.

Clearly, for example, broadcasters are entitled to place an outside limit on the total amount of editorial advertising they will sell. To fail to impose some such limit would be to deny the public the other sorts of programming which it legitimately expects on radio and television. Similarly, "reasonable regulation" of the placement of advertisements is altogether proper. No advertiser has a right to air his presentation at any particular point in an evening's programming. Nor does he have a right to clog a particular time segment with this messages. A relegation of all editorial advertising to non-"prime time" or any other major discrimination in the placement of editorial advertisements would no doubt go too far. But there is still room for broad exercise of the broadcasters' discretion.

We need not define the precise control which broadcasters may exercise over editorial advertising. Rather, the point is that by requiring that some such advertising be accepted, we leave the Commission and licensees broad latitude to develop "reasonable regulations" which will avoid any possibility of chaos and confusion. The spectre of chaos and "mike grabbing" raised by the Commission and intervenors here is, as petitioners say, a "bogus issue." Broadcasters, after all, have dealt quite successfully with the scheduling problems involved with commercial advertising. We require only that noncommerical advertisers be treated in the same evenhanded way. Although many broadcasters already do allow editorial advertisements on the air, we have not been shown one reason, drawn from their experience, to suggest that chaos has resulted.

Beyond the mistaken suggestion of administrative apocalypse, the Commission and intervenors have raised a more plausible and important claim, involving the danger that a few individuals or groups might come to dominate editorial advertising time. Of course, the mere fact that wealthy people may use their opportunities to speak more effectively than other people is not enough to justify eliminating those opportunities entirely. It takes more money to operate a magazine or newspaper – or, for that matter, a broadcast station – than to buy a segment of time for an editorial advertisement. Yet we are not reluctant to provide strict First Amendment protection for the operators of magazines, newspapers and broadcast stations. The real problem, then, is not that editorial advertising will cost money, but that it may be dominated by only one group from one part of the political spectrum. A onesided flood of editorial advertisements could hardly be called the "robust, wide-open" debate which the people have a right to expect on radio and television.

Again, however, invalidation of a flat ban on editorial advertising does not close the door to "reasonable regulations" designed to prevent domination by a few groups or a few viewpoints. Within a general regime of accepting some editorial advertisements, there is room for the Commission and licensees to develop such guidelines. 54/ For example, there could be some outside

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54/ In the context of regulating demonstrations or picketing, guidelines which limit access because the same or similar groups had already had substantial access would be unusual and perhaps impermissible. However, the interest in maintaining some degree of balance on the broadcast media

[Footnote continued on following page]

limits on the amount of advertising time that will be sold to one group or to representatives of one particular narrow viewpoint. The licensee should not begin to exercise the same "authoritative selection" in editorial advertising which he exercises in normal programming. See text at pages 2105-2107 supra. However, we are confident of the Commission's ability to set down guidelines which avoid that danger.

We are no less confident of its ability to deal reasonably with the final problem it has raised – that relating to licensees' fairness obligations. Invalidation of a flat ban on editorial advertising, of course, leaves the Commission the power to require that if editorial advertisements are accepted on one side of an issue, then broadcasters must also accept at least some advertisements on the other side of the issue, free of charge if necessary. See Cullman Broadcasting Co., 40 FCC 576 [25 RR 895] (1963). The result of such a reasonable regulation, however, need not be financial disaster. Indeed, it is incredible that the Commission would enforce a rule so rigid that licensees would be driven out of business. 55/ If the obligation to provide some free time for answering editorial advertisements were shown to threaten actual financial harm to particular broadcasters, the Commission could make necessary adjustments. 56/

We conclude that none of the spectres raised by the Commission and intervenors – spectres of chaos, grossly unbalanced programming and financial disaster – is enough to justify a flat ban on editorial advertising. What real problems there are may be dealt with while the acceptance of some editorial advertisements is required. The keynote must be a scheme of reasonable regulation, administered by the licensee and guided by the Commission. At least in the past, the Commission has not considered this task so impossible. Twenty-five years ago it decided a case in which a union charged that a broadcaster was violating free speech rights by refusing to sell program time for the airing of controversial views. The Commission stated:

54/ [Footnote continued from preceding page]

is particularly great. And "the characteristics of news media justify differences in the First Amendment standards applied to them" Red Lion Broadcasting Co. v. FCC, supra Note 7, 395 US at 386.

55/ We note that the Commission's requirement of free time for antismoking was administered generously toward the financial concerns of licensees and, indeed, few broadcasters seem to have been deterred from accepting cigarette commercials as a result. See National Broadcasting Co., Inc., 16 FCC 2d 947 [15 RR 2d 1048] (1969).

56/ See Note, Fairness Doctrine: Television as a Marketplace of Ideas, 45 NYUL Rev 1222, 1249 (1970). We must be somewhat skeptical of the talk about financial disaster. For, according to Commissioner Johnson, television broadcasters at least "average a 90 to 100 percent return on tangible investment annually." N. Johnson, How to Talk Back to Your Television Set 65 (1969). (Emphasis in original.)

". . . The spirit of the Communications Act of 1934 requires radio to be an instrument of free speech, subject only to general statutory provisions imposing upon the licensee the responsibility of operating its station in the public interest. . . .

". . . No single or exact rule of thumb for providing time, on a non-discriminatory basis, can be stated for application to all situations which may arise in the operation of all stations. The Commission, however, is of the opinion that the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues and that only charitable organizations and certain commercial interests may solicit memberships 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 FCC 515, 517-518 (1945).

We agree with those views, and see no reason why the Commission and broadcast licensees should be any less competent in 1971 than they were in 1945. Given a scheme of reasonable regulation, there is no reason why acceptance of editorial advertising should cause any substantial harm or disruption not already involved in the acceptance of other advertising. Therefore, to single out and exclude editorial advertising is to violate the First Amendment of the Constitution.

VII

On the basis of the foregoing, we reverse the Commission's decision that a flat ban on all editorial advertising is permissible. However, we remand these cases to the Commission for further consideration. On remand, the Commission should develop reasonable regulatory guidelines to deal with editorial advertisements. Petitioners should be allowed to reapply for advertising time; and, unless their presentations are found to be excludable under the Commission's guidelines, their applications should be accepted. Since the issues on which BEM and DNC seek to speak are current and changing, it is essential that regulations be developed speedily and that the affected broadcasters pass promptly upon petitioners' applications to buy time.

In the end, 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. But we must not equate what is habitual with what is right – or what is constitutional. A society already so saturated with commercialism can well afford another outlet for speech on public issues. All that we may lose is some of

our apathy. That is a small price to pay. For, as the Supreme Court has said, "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Terminiello v. Chicago, 337 US 1, 4 (1949).

Reversed and remanded.

McGowan, Circuit Judge, dissenting: The majority do not hold that petitioner in No. 24,492 is entitled to have its proposed spot announcements carried by the intervenor-licensee there involved, or that the petitioner in No. 24,537 is assured of being able to buy time for its programs on public issues. What is held is that the Constitution commands that "some", but not all, editorial advertising be accepted; and the Commission is directed to embark upon rule-making to determine how a licensee is to differentiate the "some" from the all.

The majority appear to believe that this assignment will not prove difficult. I am not so sure, particularly when I note that the only Commissioner who has perceived the same constitutional requirement as the majority responds to the practical problems by suggesting that sales of a significant proportion of the total broadcast time be made on a first-come, first-serve basis, accompanied by a possible suspension of the fairness doctrine. That approach does not seem to me a promising one in terms of the public's right to know.

The difficulties derive, of course, from the physical peculiarity which distinguishes radio and television communication from all other forms, namely, the limited number of frequencies and the impossibility of accommodating all who may wish to be heard over them. This, so the Supreme Court has said in Red Lion, makes it "idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of each individual to speak, write or publish." The majority, in recognition of this fact, do not purport to discern other than an "abridgeable" or "limited" First Amendment right to initiate paid editorial advertising. Petitioners themselves, it is said, may conceivably never be able to insist that their particular advertising be accepted. That will depend upon the rules which the Commission propounds.

The Commission has, at the least, been set a task of heroic proportions and one whose very complexities may undermine the premise upon which it is founded. The question is whether the Constitution requires that it be undertaken. I am not convinced that it does. 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.

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. Its existence provides a mechanism for implementation of the public's right to know which, by and

large, has been effective. Indeed, the loudest voices in criticism of it complain that it has been working too well for the comfort of governmental policy makers in the areas of greatest current concern.

It is hardly the path of wisdom to scrap it for a system in which money alone determines what issues are to be aired, and in what format, even assuming, as is likely to be the case, that those issues, whatever they may prove to be, compare favorably with the intellectual content of the great bulk of commercial advertising. The responsibility for informing the public is now squarely on the licensee. That responsibility will only be diluted and obscured by requiring the licensee, against his own better judgment, to accept paid editorial advertising. I do not think the First Amendment requires that result, at least not within the context of a regulatory scheme which has made provision for the airing of controversial issues of public importance.

Of course it is true that licensees are currently free to accept paid editorial advertising, and some do, subject always to the limitations of the fairness doctrine. It may well be that a detailed inquiry and investigation by the Commission of this area, by formal rulemaking or otherwise, would be both useful and consonant with the Commission's continuing obligation to see to it that the public interest obligations of the licensees are being met in the most effective way. The Commission's currently announced purpose to undertake a comprehensive and wide-ranging review of the operation of the fairness doctrine might well include the subject of paid editorial advertising. But, believing as I do that the First Amendment exerts no compulsion to the contrary, I would not order the Commission to undertake that review in a constitutional strait-jacket which dictates the result in advance.

ROY H. PARK B/CASTING, INC. v. COMMISSIONER OF INTERNAL REVENUE

U.S. Tax Court, July 19, 1971

56 TC No. 62

[¶170] Amortization of network contracts.

Where the purchaser of a television station had a primary affiliation with one network and a secondary affiliation with another and, following entry of a new station into the market, the network with which it had maintained a secondary affiliation cancelled its contract in favor of a primary affiliation with the new station, the station was entitled to amortization deductions and to a loss deduction in the year of the contract termination. Amortization of the primary contract was not allowable in the absence of evidence that the useful life of such contract was determinate. Roy H. Park B/casting, Inc. v. Commissioner of Internal Revenue, 22 RR 2d 2119 [US Tax Court, 1971].

J. Roger Wollenberg, Washington, D. C. (Lloyd N. Cutler, Timothy B. Dyk, Daniel Marcus, Noel Anketell Kramer, Wilmer, Cutler & Pickering, Robert V. Evans, John D. Appel, Ralph E. Goldberg, Joseph De Franco, and Eleanor S. Applewhaite, with him on the brief) for petitioner in No. 71-863; Erwin N. Griswold, Solicitor General (Walker B. Comegys, Acting Assistant Attorney General, A. Raymond Randolph, Jr., Assistant to the Solicitor General, Howard E. Shapiro, Justice Dept. attorney, John W. Pettit, General Counsel, FCC, Charles A. Zielinski, Counsel, with him on the brief) for petitioners in No. 71-864; Ernest W. Jennes, Washington, D. C. (Charles A. Miller, Michael Boudin, Covington & Burling, and Tyrone Brown, with him on the brief) for petitioner in No. 71-865; Vernon L. Wilkinson, Washington, D. C. (James A. McKenna, Jr., Carl R. Ramey, and McKenna, Wilkinson & Kittner, with him on the brief) for petitioner in No. 71-866; Joseph A. Califano, Jr., Washington, D. C. (Charles H. Wilson, Jr., and Stuart J. Beck, with him on the brief) for respondent in Nos. 71-863 & 71-866; Thomas R. Asher, Washington, D. C. (Albert H. Kramer, with him on the brief) for respondent in Nos. 71-864 & 71-865; J. Albert Woll, Robert C. Mayer, Laurence Gold, and Thomas E. Harris filed brief for AFL-CIO, as amicus curiae, seeking affirmance; Floyd Abrams, Cahill, Gordon, Sonnett, Reindel & Ohl, and Corydon B. Dunham filed brief for National Broadcasting Co., Inc., as amicus curiae, seeking reversal; William R. Dillon and Concannon Dillon Snook & Morton filed brief for Corporate Fiduciaries Assn. of Illinois, as amicus curiae.

[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.]

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 broadcast licensee's general policy of not selling advertising time to individuals or groups wishing to speak out on issues they consider important violates the Federal Communications Act of 1934, 47 USC §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 FCC 2d 216 [19 RR 2d 977]; In re Business Executives Move for Vietnam Peace, 25 FCC 2d 242 [19 RR 2d 1053]. 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 US App DC 181, 450 F 2d 642 [22 RR 2d 2089] (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 US 367 [16 RR 2d 2029] (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 FCC 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 USC §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, however, 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.
>
> "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 US 367 [16 RR 2d 2029] (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

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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.

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 US, 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 US, at 389. Although the broadcaster is not without protection under the First Amendment, United States v. Paramount Pictures, Inc., 334 US 131, 166 [4 RR 2022] (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 US, 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 US, at 375-386; National Broadcasting Co. v. United States, 319 US 190, 210-217 (1943); FCC v. Sanders Brothers Radio Station, 309 US 470, 474 [9 RR 2008] (1940); FCC v. Pottsville Broadcasting Co., 309 US 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 US, 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 private and public control. Cf. Farmers Educational & Cooperative Union of America v. WDAY, Inc., 360 US 525, 528 [18 RR 2135] (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 US 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 questic 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 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:

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.

"['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 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 consideration adopted §3(h), which specifically provides that "a person engaged in radio broadcasting

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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 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 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." 47 USC §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.

[Footnote continued on following page]

shall not, insofar as such person is so engaged, be deemed a common carrier." 5/

4/ [Footnote continued from preceding page]

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 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 USC §153(h).

Other provisions of the 1934 Act also evince a legislative desire to preserve values of private journalism 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 USC §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 proceedings, 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 US App DC 328, 359 F 2d 994 [7 RR 2d 2001] (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

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6/ 48 Stat. 1083, as amended, 47 USC §307.

7/ Section 303 of the Communications Act of 1934, 48 Stat. 1082, as amended, 47 USC §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. . . ."

...ia. 8/ Formulated under the Commission's power to issue ...onsistent with the "public interest," the doctrine imposes two ... responsibilities on the broadcaster: coverage of issues of public ...ce must be adequate and must fairly reflect differing viewpoints. See ...on, supra, 395 US, at 377. In fulfilling its Fairness Doctrine obliga-..., the broadcaster must provide free time for the presentation of opposing ...ws if a paid sponsor is unavailable, Cullman Broadcasting Co., 25 P&F ...adio 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 US, 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 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 US 254, 270 (1964); see also Red Lion Broadcasting Co., Inc. v. FCC, 395 US 367, 392 (n. 18) (1969). . . ." 25 FCC 2d, at 222-223.

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 USC §315(a).

For a summary of the development and nature of the Fairness Doctrine, see Red Lion, supra, 395 US, at 375-386.

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 FCC 1246 [25 RR 2d 1901] (1949).

Thus, under the Fairness Doctrine broadcasters are responsible for providing the listening and viewing public with access to a balanced presentation of information 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 FCC 1246, 1249 [25 RR 1901] (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. Crettenden, 18 FCC 2d 499 [17 RR 2d 151] (1969); Mrs. Margaret Z. Scherbina, 21 FCC 2d 141 (1969); Boalt Hall Student Assn., 20 FCC 2d 612 [17 RR 2d 1096] (1969); Mrs. Madalyn Murray, 40 FCC 647 [5 RR 2d 263] (1965); Democratic State Central Committee

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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 FCC 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 developed and articulated the Fairness Doctrine. See Report on Editorializing by Broadcast Licensees, 13 FCC 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.

of California, 19 FCC 2d 833 [12 RR 2d 112] (1968); U.S. Broadcasting Co., 2 FCC 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/

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 US 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).

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 USC §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 US 525, 534 [18 RR 2135] (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, 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).

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 F2d 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/

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 US 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 maintain for licensees, so far as consistent with necessary regulation, a traditional journalistic role. This 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.

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, 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.

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 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.

i.e. to participate in the editorial process! Flexibility to meet changing problems is what we don't need from FCC.

The licensee policy challenged in this case in 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

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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 960-1. 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 966-7.

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 FCC 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 US 163, 174-177 (1972), with Burton v. Wilmington Parking Authority, 365 US 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 US 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.

7 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 US 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 complained of do not constitute governmental action violative of the First Amendment. See McIntire v. William Penn Broadcasting Co., 151 F2d 597, 601 (CA3 1945), cert. denied, 327 US 779 (1946); Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F2d 497 [5 RR 2073] (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 US, 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 commercial 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 US, 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 acknowledged, 450 F2d 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-

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16/ See 25 FCC 2d 230, 234-235 (Johnson, dissenting).

initiated speech – would have little meaning to those who could not afford to purchase time in the first instance. 17/ No diff than print

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 public 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 advertisements that dealt with matters trivial or insignificant or already fairly covered by the broadcaster. 450 F2d, 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

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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). → & FD?

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 F2d, 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 F2d, 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 F2d, 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 US 67 (1953); Niemotko v. Maryland, 340 US 268 (1951). This risk is inherent in the Court of Appeals remand requiring regulations and procedures to sort our 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 US 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.

But this doesn't go to statutory issue.

FD!

18/ See n. 8, supra.

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/

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 US 451, 463 (1952); Kovacs v. Cooper, 336 US 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." 22/ As the broadcast media became more pervasive 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, 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

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19/ See Report on Editorializing by Broadcast Licensees, 13 FCC 1246, 1251-1252 (1949).

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.

22/ Reprinted in Hearings before the Senate Committee on Interstate Commerce on Radio Control, 69th Cong., 1st Sess., at 54 (1926).

written word." Banzhaff v. FCC, 132 US App DC 14, 405 F2d 1082, 1100-1101 [14 RR 2d 2061] (1968), cert. denied, 396 US 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. 23/ The 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 US 536 (1965); Fowler v. Rhode Island, 354 US 67 (1953); Niemotko v. Maryland, 340 US 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 US 104 (1972), and Police Dept. of City of Chicago v. Mosley, 408 US 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 in 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 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

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23/ Lee v. Board of Regents of State Colleges, 306 F Supp 1097 (WD Wis. 1969), aff'd, 441 F2d 1257 (CA7 1971); Zucker v. Panitz, 229 F Supp 102 (SDNY 1969); Kissinger v. New York City Transit Authority, 274 F Supp 438 (SDNY 1967); Hillside Community Church, Inc. v. City of Tacoma, Wash., 76 Wash. 2d 63, 455 P2d 350 (1969); Wirta v. Alameda-Contra Costa Transit District, 64 Cal. Rptr. 430, 434 P2d 982 (1967).

are 'important,' and how 'fully' to cover them, and the format, time and style of the coverage." 450 F2d, 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 F2d, 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.

bad?

We reject the suggestion the Fairness Doctrine permits broadcasters to preside over a "paternalistic" regime. See Red Lion, supra, 395 US, 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 voices and always itself presenting views in a bland, inoffensive manner. . . ." 25 FCC 2d, at 222. A broadcaster neglects that obligation only at the risk of losing his license.

exactly!

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 FR 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 FCC 2d 26, 36 FR 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 FCC 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. 24/ The Commission's inquiry on 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 US 571, 590-593 (1968).

The judgment of the Court of Appeals is reversed.

24/ 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 in Docket 19260, 33 FCC 2d 554, 37 FR 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 FCC 2d 798, 37 FR 4980.

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 USC §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 Congress 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 US 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 US 157, 183-185 (concurring); Lombard v. Louisiana, 373 US 267, 281 (dissenting); Moose Lodge v. Irvis, 407 US 163, 179 (dissenting). It is somewhat the same idea expressed by the first Mr. Justice Harlan in his dissent in Plessy v. Ferguson, 163 US 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 licensee 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 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

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

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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 stage-coach, 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 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

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2/ Congress provided in 47 USC §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, 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 Haynesworth, 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.

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 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' performance. Whether it wills 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 at 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 US 367 [16 RR 2d 2029], 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 benovolent ends. In 1973 - as in other years - there is clamoring to make the TV and radio emit the messages that console

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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. ~ but under Red Lion/DNC not entitled to express them on TV.

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 far-away 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 criminal 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 involve First Amendment rights. Conspicuous is Associated Press v. United States, 326 US 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 US 476-502-503 (Harlan, J., concurring). So far, that has been the minority view. See Malloy v. Hogan, 378 US 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 . . . ."

5/ Barron v. Mayor of Baltimore, 7 Pet. 243.

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, 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

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6/ The press in this country, like that of Britain, was at one time subject to contempt for its comments on pending litigation. Toledo Newspaper Co. v. United States, 247 US 402. But that position was changed. See Bridges v. California, 314 US 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 trail. Sheppard v. Maxwell, 384 US 33. And change of venue may be had where the local atmosphere has saturated the community with prejudice. See Rideau v. Louisiana, 373 US 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 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.

Broadcasting 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 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 US 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.

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-Main Line Radio, Inc. v. FCC, 473 F2d 16, 73-76 [25 RR 2d 2010] (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 homo-sexuality, 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 relaxation of the regime, on democracy for Brazil, and on the economic and financial situation in general."

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 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

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10/ Indeed, it can be a gued 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 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. Fishcer 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 USC §1801 et seq.

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 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 US 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 US 444, 450-453; Hague v. CIO, 307 US 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

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11/ Judge Bazelon, dissenting in Brandywine-Main Line Radio, Inc. v. FCC, 473 F2d 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 imput 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.

the FCC instituted a "non-public" inquiry 13/ to determine whether any broadcaster or cablecaster has broadcast "'obscene, indecent or profane material' in violation of" 18 USC §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 US 476, Memoirs v. Massachusetts, 383 US 413, and Ginzburg v. United States, 383 US 463, as supplying the criteria for broadcasting. It fined the corporation $2,000 under 18 USC §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." ___ FCC ___ [27 RR 2d 285].

Commissioner Johnson dissented, saying that the FCC prefers "to sit as an omniscient 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."

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 US 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.

13/ FCC Order No. 73-331, 39 Fed. Reg. 8301 (March 27, 1973).

"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 US 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."

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 US ___. 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 of people to know is further curtailed.

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.

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 US 214, involved a prosecution of a newspaper editor for publishing, contrary to a state 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.

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 responsiblity with the government for determining the "good counsels and wholesome doctrine." Ibid. But, it was precisely the mistrust of the evanescent, narrow, factional views of those in power and the belief that no one has a patent on the "truth" that underly the First Amendment.

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

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.

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 US 147 (1959); (2) the requirement that a magazine publisher investigate his advertisers. Manual Enterprises, Inc. v. Day, 370 US 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 US 60 (1960); (4) the requirement that organizations supply membership lists, Gibson v. Florida Legislative Investigation Committee, 372 US 539 (1963); Louisiana ex rel. Gremillion v. NAACP, 366 US 293 (1961); Bates v. City of Little Rock, 361 US 516 (1960); NAACP v. Alabama, 357 US 449 (1958); and (5) the requirement that individuals disclose organizational members, Shelton v. Tucker, 364 US 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.

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.

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. 924. The Court concludes that the Court of Appeals erred when it froze the "continuing 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. 931. 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.

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 are surely part of the press. United States v. Paramount Pictures, Inc., 334 US 131, 166 [4 RR 2022]. 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 Court in Public Utilities Commission v. Pollak, 343 US 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 US 308, Marsh v. Alabama, 326 US 501; cf. Lloyd Corp. v. Tanner, 407 US 551.

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. . . . "

2/ See Amalgamated Food Employees Union v. Logan Valley Plaza, 391 US 308; Railway Employees' Department v. Hanson, 351 US 225; Public Utilities Commission v. Pollak, 343 US 451; Marsh v. Alabama, 326 US 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 US 296. Earlier, in Burton v. Wilmington Parking Authority, 365 US 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.

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 USC §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 Commission), was to license broadcasters for no more than three year periods. 47 USC §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 US 470, 475 [9 RR 2008]. 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 US 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 Broadcasting Co. v. FCC, 395 US 367,

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4/ See, e.g., United States v. Paramount Pictures, Inc., 344 US 131, 166 [4 RR 2022]. The Federal Communications Act also prohibits the Commission from interfering with "the right of free speech by means of radio communication." 47 USC §326.

5/ For a history of regulatory legislation regarding broadcasters, see Red Lion Broadcasting Co. v. FCC, 395 US 367, 375-386 [16 RR 2d 2029]; National Broadcasting Co. v. United States, 319 US 190, 210-214.

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

[Footnote continued on following page]

[16 RR 2d 2029], 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 US, at 388, 390.

The Fairness Doctrine has been held applicable to paid advertising as well as to other programming, Banzhaf v. FCC, 405 F2d 1082 [14 RR 2d 2061]. 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 F2d 994 [7 RR 2d 2001].

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 makes clear what some of these freedoms are. Section 3(h) of the Act, 47 USC §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 USC §§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,

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6/ [Footnote continued from preceding page]

requires the broadcaster to give adequate coverage to public issues, fairly reflecting divergent views. United Broadcasting Co., 10 FCC 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 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.

> 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 USC §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 US 92, 98; Cox v. Louisiana, 379 US 536, 554; Poulos v. New Hampshire, 345 US 395; Cox v. New Hampshire, 312 US 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 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

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7/ Government is not restrained by the First Amendment from controlling its own expression, cf. New York Times Co. v. United States, 403 US 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 971.

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 US 92, 98; Cox v. Louisiana, 379 US 536, 554; Poulos v. New Hampshire, 345 US 395; Cox v. New Hampshire, 312 US 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.

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 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 F2d 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." Ante, at 947. 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 F2d 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/

10/ Red Lion Broadcasting Co. v. FCC, 395 US 367 [16 RR 2d 2029]; National Broadcasting Co. v. United States, 319 US 190; FCC v. Sanders Brothers Radio Station, 309 US 470 [9 RR 2008]; FCC v. Pottsville Broadcasting Co. 309 US 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 US 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 US 451.

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

[Footnote continued on following page]

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 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 someone "seeking to discuss war, peace, pollution or the suffering of the poor is denied this right to speak." Post, at 976. 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

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12/ [Footnote continued from preceding page]

"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 doctine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority." 395 US at 385.

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

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 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 USC §1801 et seq.

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.

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 absolutely 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 attach 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"

1/ See Business Executives Move for Vietnam Peace, 25 FCC 2d 242 [19 RR 2d 1053] (1970); Democratic National Committee, 25 FCC 2d 216 [19 RR 2d 977] (1970).

requirements of the Communications Act of 1934, 47 USC §§307(d), 309(a). 2/ The Court also holds that the 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

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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 USC §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 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 FCC 515, 518 (1945).

that the exclusionary policy upheld today can 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 US 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 US 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 be the nonobvious involvement of the [Government] in private conduct be attributed its true sigr ficance." Burton v. Wilmington Parking Authority, 365 US 715, 722 (1961); see Moose Lodge No. 107 v. Irvis, 407 US 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 US 369, 378 (1967); see Kotch v. Pilot Comm'rs, 330 US 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 F2d, 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.

3/ See generally Business Executives Move for Vietnam Peace, 25 FCC 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.

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 USC §301, specifically provides:

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

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 US 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 recognized 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 US 350 (1962); Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (SDNY 1967); Farmer v. Moses, 232 F. Supp. 154 (SDNY 1964).

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).

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 USC §303(g).

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 US 367, 389 [16 RR 2d 2029] (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 US App DC 328, 337, 359 F2d 994, 1003 [7 RR 2d 2001] (1966). And, along these same lines, we have consistently held 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 US 382, 401 (1950); see, e.g., Public Utilities Commission v. Pollak, 343 US 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

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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 USC §501. Thus, the Federal Government specifically insulates the licensee from any real threat of economic competition.

8/ Thus, the Communications Act of 1934 authorizes the Federal Communications Commission to assign frequency bands, 47 USC §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 licenses, §303(l), suspend licenses, §303(m)(1); 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

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guidance of broadcaster conduct is 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 F2d, at 652.

Even more important than this general regulatory scheme, however is the specific governmental involvement in the broadcaster 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 926. Similarly, the Court maintains that, in light of the Fairness 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 930.10/ Although I do not in any sense agree with the substance of these propositions, they serve at

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8/ [Footnote continued from preceding page]

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.

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 licenses 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.

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 929.

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 FCC 2d 242 (1970); Democratic National Committee, 25 FCC 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 acquiescence in challenged action by a private entity indicates "governmental action."

Thus, in McCabe v. Atchison, Topeka & Santa Fe R. Co., 235 US 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 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 US 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 US 144, 202 (1970) (separate opinion); see, e.g., Moose Lodge No. 107 v. Irvis, supra; Hunter v. Erickson, 393 US 385 (1969); Reitman v. Mulkey, supra; Evans v. Newton, supra; Robinson v. Florida, 378 US 153 (1964); Lombard v. Louisiana, 373 US 267 (1963); Peterson v. City of Greenville, 373 US 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 US 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 US, 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 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/

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 US 308 (1968); Marsh v. Alabama, 326 US 501 (1946). Here, as the Court of Appeals recognized, "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 F2d, 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 948 (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

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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 US 131, 166 [4 RR 2022] (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 and purposes of the First Amendment." Red Lion Broadcasting Co. v. FCC, supra, at 390.

12/ [Footnote continued from preceding page]

suggestion that a finding of governmental involvement in this case "would simply strip broadcasters of their own First Amendment rights." Ante, at 952. 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, 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.

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 US 616, 630 (1919) (dissenting opinion); see also Whitney v. California, 274 US 357, 375-376 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 US 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 US 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 US 1, 4 (1949); see also Thornhill v. Alabama, 310 US 88, 102 (1940); Palko v. Connecticut, 302 US 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, 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

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

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 US 141, 143 (1943); see, e.g., Stanley v. Georgia, 394 US 557, 564 (1969); Time, Inc. v. Hill, 385 US 374, 388 (1967); Griswold v. Connecticut, 381 US 479, 482 (1965); Lamont v. Postmaster General, 381 US 301 (1965).

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 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/ "to determine what issues

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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 47 USC §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 FCC 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 USC §§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 FCC 620 (1964). If the broadcaster rejects a volunteer spokesman as "inappropriate," he must seek out others. See Richard G Ruff, 19 FCC 2d 838 [19 RR 2d 43] (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 Fiarness Doctrine in the Handling of Controversial Issues of Public Importance, supra, n. 16, at 10424.

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, 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

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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 FCC 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 USC §315. See also Nicholas Zapple, 23 FCC 2d 707 [19 RR 2d 421] (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.

22/ Associated Press v. United States, 326 US 1, 20 (1945).

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/

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

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23/ Jaffe, The Editorial Responsibility of the Broadcaster: Reflectious 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; Jaffee, 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 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 930 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 FCC 2d 1 (1969).

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, 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 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,

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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).

26/ Democratic National Committee, supra, n. 1, at 222.

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 sufficiently "important" to warrant discussion. The briefs of the broadcaster-petitioners in this case illustrate the type of "journalistic 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 F2d 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

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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 US 39, 50-51 (1966) (Douglas, J., dissenting).

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 US 503 (1969)

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

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 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 US 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 US 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 US 516, 537 (1945); cf. NAACP v. Button, 371 US 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 US 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 US 551, 559 (1972); Tinker v. Des Moines

Independent Community School District, 393 US 503 (1969); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 US 308 (1968); Brown v. Louisiana, 383 US 131 (1966); Edwards v. South Carolina, 372 US 229 (1963); Kunz v. New York, 340 US 290 (1951); Marsh v. Alabama, 326 US 501 (1946); Jamison v. Texas, 318 US 413 (1943); Schneider v. State, 308 US 147 (1939); Hague v. CIO, 307 US 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 adoption 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

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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 928. In support of this proposition, the Court cites our decisions in Public Utilities Commission v. Pollak, supra, and Kovacs v. Cooper, 336 US 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 US 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.

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 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

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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 §§73.35, 73.240, and 73.636 of the Commission's Rules, 22 FCC 2d 339, 344 (1970) (59% of Americans depend on television as their principal source of news).

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.

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 frequencies 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 US 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.

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

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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 US 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.

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

[Footnote continued on following page]

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 airways, 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 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

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42/ [Footnote continued from preceding page]

> 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 US 92, 98 (1972); cf. Cox v. Louisiana, 379 US 536, 554 (1965); Cox v. New Hampshire, 312 US 369, 374 (1940); Schneider v. State, 308 US 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 USC §326.

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 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, 46/ "[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 US 147 (1969); Edwards v. South Carolina, supra; Fowler v. Rhode Island, 354 US 67 (1953); Niemotko v. Maryland, 340 US 268 (1951); Saia v. New York, 334 US 558 (1948). Here, of course, the differential treatment accorded "commercial" 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 US 622 (1951); Valentine v. Chrestensen, 316 D.S. 52 (1942).

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 F2d, at 654.

46/ 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 US 395, 398 (1953); Cox v. New Hampshire, supra, at 575-576; Schneider v. State, supra, at 160.

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.

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 airways. In reality, however, the issue in this case is not whether there is an absolute right of access but, rather, whether there may 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 FCC 515, 518 (1945).

I can see no reason why the Commission and licensees should be deemed any less competent today than 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 Dragan: 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 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/

This misses the essence of the argument — & probably FD But OK otherwise

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 total amount of editorial advertising they will sell," and "reasonable regulation of the placement of advertisements is altogether proper." 450 F2d, at 663.

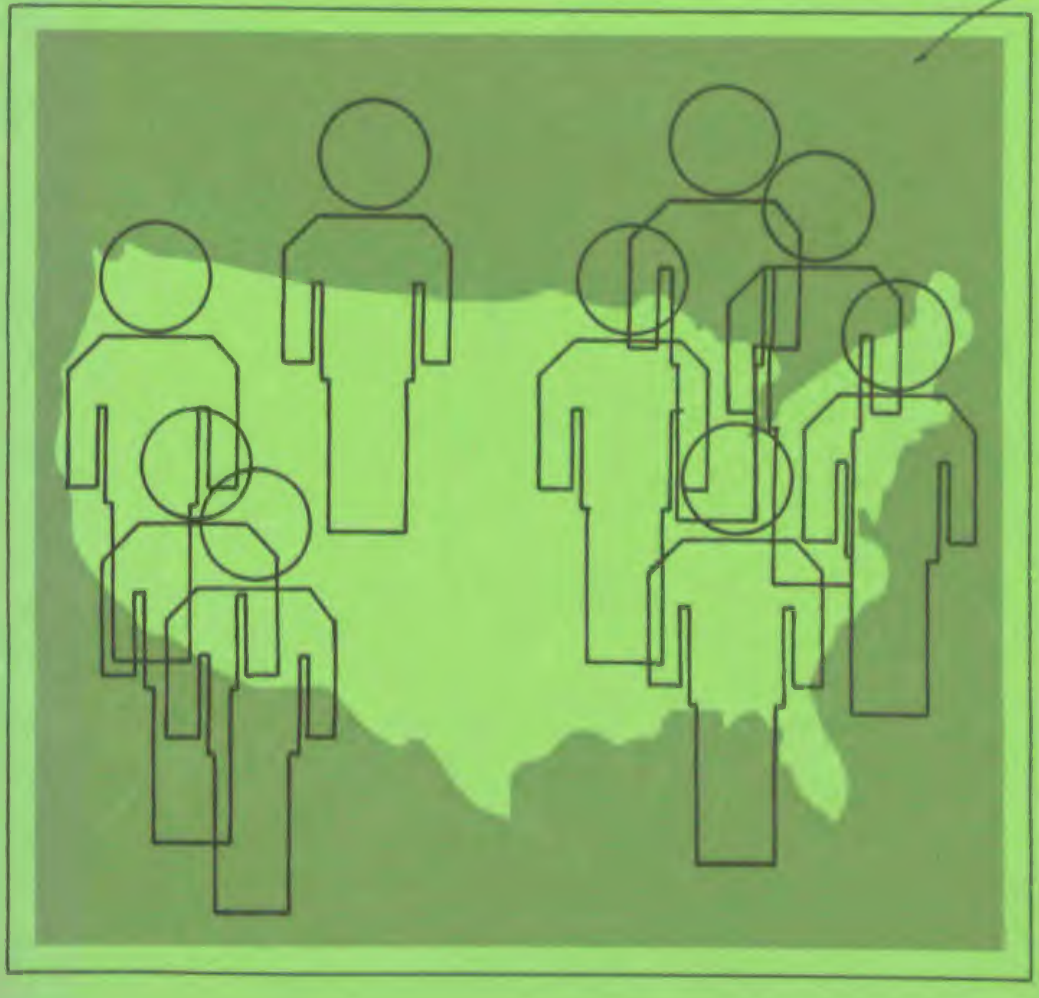
49/ 450 F2d, at 665-666.

DOMESTIC AFFAIRS STUDIES

CAMPAIGN FINANCING AND POLITICAL FREEDOM

good material w/ points related to paid access.

Ralph K. Winter, Jr.
in association with John R. Bolton



CAMPAIGN FINANCING AND POLITICAL FREEDOM

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CONTENTS

CAMPAIGN FINANCING AND POLITICAL FREEDOM

The conviction that something has gone awry in our political process is again growing stronger in the United States Congress. In particular, the view that wealth has excessive influence on election results and that election campaigns are too costly seems almost a routine assumption. These claims come on the heels of the Federal Election Campaign Act of 1971, a restrictive law regulating the contribution and use of campaign money. That act has been greeted by constitutional authorities with comments ranging from "would seem to violate the First Amendment" [1] to "flatly unconstitutional" [2] and has been challenged by lawyers for the *New York Times* as "shot through with constitutional deficiencies." [3] Hence considerable caution would seem warranted before federal regulation of campaign financing is expanded. Nevertheless, the Congress is seriously considering even more drastic legislation.

The principal proposals now under debate are relatively old and deceptively simple. In general outline they include a substantial subsidy from public funds to be given to federal candidates to pay all or part of their campaign costs.[4] This subsidy would be complemented by legal limits on (1) the amount spent by a candidate or those furthering a candidacy and (2) the size of individual financial contributions to a candidate's campaign.

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[1] A. Rosenthal, *Federal Regulation of Campaign Finance: Some Constitutional Questions* (Princeton, N. J.: Citizens' Research Foundation (ed.), 1972), p. 63.

[2] Statement of Alexander Bickel, ibid., p. 66.

[3] Brief for *New York Times* as amicus curiae, p. 16, American Civil Liberties Union v. Jennings, Civil No. 1967-72 (D.D.C., 1972).

[4] See, for example, S. 1103, 93d Congress, 1st session (1973); hereinafter referred to as the Hart bill, after its author, Senator Hart.

Such proposals are of critical importance. If adopted, they will alter the political process and may have results transcending the issue of campaign financing. Moreover, because they regulate campaign advocacy, they may interfere with freedom of expression.

The proposals ought, therefore, to be implemented only after a persuasive demonstration of necessity and after a weighing of all potentially undesirable effects. The position taken here is that the case for further regulation, when scrutinized, seems based on speculation rather than demonstrated fact, ignores the grave dangers to a free society such regulation threatens, and emanates in part from groups which have political interests of their own to further.

1. Campaign Money in Perspective

The Functions of Private Campaign Money. Much of the doomsday rhetoric accompanying discussions of campaign finance can be discounted as political exaggeration. Candidates seem never to lose because the public is indifferent to them or to their platforms; they seem to lose because they cannot raise enough money. Tom Wicker tells us that Fred Harris and Paul McCloskey saw their campaigns founder "for want of means to wage a primary campaign," [5] a statement that is true in the same sense that if a mayoral candidate in New York City were exposed as Martin Bormann, his withdrawal statement would mention only difficulties in raising campaign funds.

Lack of campaign money provides a face-saving exit from a delicate (losing) situation. Thus, many attributed Senator Humphrey's loss in the California primary to Senator McGovern's money, and his loss to President Nixon to Nixon's money.

No one denies that elections are expensive, but the importance of money is almost universally exaggerated. Although allegations about the high campaign costs of recent years are repeatedly made, we really do not know how much was spent before the days of television when campaign expenditures were neither open nor easily regulable. Even now, the estimated amount spent for all elective offices in 1972, national, state and local, was less than was spent by each of two commercial advertisers.[6]

Still, since campaigns are expensive, large contributions seem an easy way to gain favor. Potential donors may be reminded of

[5] Tom Wicker, "Subsidizing Politics," *New York Times*, June 8, 1973, p. 39, col. 5.

[6] Statement of Herbert E. Alexander, *Hearings on S. 372 before the Subcommittee on Communications of the Senate Committee on Commerce*, 93d Congress, 1st session (1973), p. 219; hereinafter referred to as *Hearings*.

their dependence on governmental decisions by public officials or their representatives; some individuals give seemingly inordinate amounts; finally, continued allegations seem to have generated considerable skepticism about the financing of campaigns and to have eroded confidence in the political process.

Given all this, the case for regulation cannot be summarily dismissed, and the roles played by private campaign money must be carefully weighed. Certain functions *are* undesirable. Some donors doubtless make contributions hoping to obtain personal favors ranging from the trivial, for example, dinner invitations, to the malevolent. Awarding ambassadorships in return for large contributions is not the most desirable method of choosing American representatives to foreign nations. To exercise administrative discretion in favor of larger political contributors, for example, in awarding a government contract, is not only undesirable but in most cases illegal. Where the contribution follows a pointed reminder from a public official, governmental power is misused. Similarly, we feel uneasy when an otherwise undistinguished individual makes a serious stab at high office by expending a family fortune.

Horror stories illustrating the misuses of campaign money abound; but precisely because they horrify, they may obscure more than they illuminate. Many of the roles played by private campaign money are desirable, indeed, indispensable to a free and stable society.

Our threshold question must be whether money ought to play any role in politics. If we value freedom, the question can safely be answered affirmatively. All political activities make claims on society's resources. Speeches, advertisements, broadcasts, canvassing, and so on, all consume labor, newsprint, buildings, electrical equipment, transportation, and other resources. Money is a medium of exchange by which individuals employ resources to put to personal use, to work for others, or to devote to political purposes. If political activities are left to private financing, individuals are free to choose which activities to engage in, on behalf of which causes, or whether to do so at all. When the individual is deprived of this choice, either because government limits or prohibits his using money for political purposes or takes his money in taxes and subsidizes the political activities it chooses, his freedom is impaired.

The argument generally advanced in response is that money is so maldistributed that the political process is undesirably skewed. To foreshadow the conclusions below, it may briefly be said: first, because access to the resources most suitable for political use may be even more unevenly distributed than wealth, limitations solely on the

use of money may aggravate rather than diminish the distortion; and second, money performs many valuable functions which far outweigh whatever harm it may do.

Candidates seeking change, for example, may have far greater need for, and make better use of, campaign money than those with established images or those defending the existing system. Money is, after all, subject to the law of diminishing returns and is of less use to the well known than to the newcomer. The existence of "seed money" may thus be an important agent of change. Both the Wallace campaigns and the antiwar candidacies achieved the significance they did largely because they raised and used "new" political money.

The solicitation and contribution of money also allow citizens who have little, or desire more, opportunity to participate meaningfully in the political process the chance to do so. Because of the obsession with horror stories, we forget that persons without much free time have few alternatives to contributions other than inaction.

Campaign contributions are also vehicles of expression for donors seeking to persuade other citizens on public issues. A contribution to a candidate holding convictions similar to the donor's employs the candidate as a surrogate for the expression of those ideas. Contributing to a candidate permits individuals to pool their resources and voice their message far more effectively than if each spoke singly. This is critically important because it permits citizens to join a potent organization and propagate their views beyond their voting districts. Persons who feel strongly about appointments to the Supreme Court, for example, can demonstrate their convictions by contributing to the campaigns of sympathetic congressmen. Those who give money to Mr. John Gardner's Common Cause and conceive of that act as a form of free association and expression should not automatically deny the same status to those who give to political campaigns.

Nor is there anything inherently wrong with contributing to candidates who agree with one's views on broad social and economic policies, even where those policies may benefit the donor. Obviously, groups pursue their self-interests and seek to persuade others to support them. That is a salient characteristic of a free political system. Persons who seek to regulate that kind of contribution can stand with those who would deny the vote to welfare recipients to prevent that vote from being "bought" by promises of higher benefits.

Many such contributions also represent broad interests that might otherwise be underrepresented. Suppose land developers mount a campaign against proposals to restrict the use of large undeveloped areas. Certainly they represent their own economic interests, but they

also functionally represent potential purchasers, an interest group that would otherwise go unnoticed since few persons would consider themselves future purchasers.

These functions of campaign contributions are all too often ignored because critics of the present system mistake cause and effect. That a senator receives large union contributions might be perceived as the reason he often supports union causes. Is not the reverse far more commonly the case: the candidate receives contributions because he holds these convictions?

Contributions also serve as a barometer of the intensity of voter feeling. In a majoritarian system voters who feel exceptionally strongly about particular issues may be unable to reflect their feelings adequately in periodic votes.[7] As members of the antiwar movement often pointed out, the strength of their feelings as well as their numbers should have been taken into account. Indeed, if a substantial group feels intensely about an issue, a system which does not allow that feeling to be heard effectively may well be endangered. Campaign contributions are perhaps the most important means by which such intensity can be expressed. People who feel strongly about the defense of Israel, for example, are able to voice that conviction with greater effect through carefully directed campaign donations than in periodic elections in which the meaning of individual votes may be ambiguous.

This function might be discounted if large contributions reflected only intense but idiosyncratic views. For the most part, however, intense feelings will not generate substantial funds unless large numbers without great wealth also share those convictions. Campaign contributors in these circumstances serve as representatives or surrogates for the entire group. That Mr. X, who favors free trade, can make larger contributions than Mr. Y, who does not, really matters little, since Mr. Z agrees with Mr. Y and gives heavily.

Finally, the need for campaign money weeds out candidates who lack substantial public support. An attractive candidate with an attractive issue will draw money as well as votes. Money dries up because the candidate has little public support more often than public support dries up because the candidate has little money.[8] To avoid the anarchy of an overabundance of candidates, this function must be performed. Campaign contributions do just that and in a way that

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[7] See, generally, Robert A. Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956).

[8] David A. Leuthold, *Electioneering in a Democracy: Campaigns for Congress* (New York: John Wiley and Sons, 1968), pp. 67-68.

roughly reflects voter support, or at least reflects it as well as any known alternative. Senator Harris could not raise funds because he had lost his political base in Oklahoma and was mining a political vein already being worked by Senator McGovern. And Congressman McCloskey's campaign was an attempt to capitalize on one issue rather than a serious bid for the nomination.

Private Campaign Money: Where Is the Balance? Does the available evidence support the claims that the undesirable functions of private campaign money outweigh the desirable? If so, does that evidence call for regulation of the breadth and scope being suggested? To both these questions, the answer is no.

The strongest case for the proponents of regulation is that of money being used to gain personal favor through the exercise of executive discretion. But even with full credit given to all the allegations, the call for over-arching restrictive laws cannot be justified. Ambassadorships, for instance, are subject to a veto by the very same Senate that seeks to regulate campaign financing. Similarly, if government contracts are being awarded to large campaign contributors, the irresistible conclusion is that it is the process of determining awards that is fundamentally wrong. Ending the use of private money will not eliminate political influence. Contracts will simply be awarded to those displaying political loyalty in other ways.

Where the candidacies of the rich are concerned, the allegations about wealth also contain truth but are of inconclusive impact. Otherwise, one must conclude that the political careers of Nelson Rockefeller and the Kennedys, for example, are illegitimate, a conclusion from which one ought to shy because their political success is so obviously based on more than wealth. The allegations fail in not demonstrating a net harm to the system. Of course, wealth aids a candidate in a way that seems unfair. But if the influence of campaign money were eliminated, even more irrational factors, for example, the media exposure which falls to astronauts and sportscasters (Senator Cosell?), might become more significant. Nor is there evidence that the political behavior of office holders with personal wealth differs greatly from that of those without.

In any event, where wealth alone generates the candidacy, the evidence does not support the more extreme charges. Two recent candidacies alleged to be wholly based on personal wealth—those of Mr. Metzenbaum of Ohio and Mr. Ottinger of New York—failed in the general election. (Had Mr. Metzenbaum not run, the Democratic candidate would have been John Glenn.) If campaign money is so

important an issue, persons running against the wealthy can use it to their advantage.

No one seriously contends that money has been decisive in presidential elections.[9] Of course, candidates of third parties raise less money, but that is to be expected because of their weakness at the polls and not because fringe movements are wholly unable to raise funds. History is replete with movements which began at the fringe of American politics and, because they raised salient issues, were able to attract funds and, over time, to affect the course of American history. Consider the achievements of the NAACP Legal Defense Fund. (Not to mention the money-raising ability of the Black Panthers.)[10] And once such movements take hold, candidates representing their points of view get campaign money.

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[9] The Democratic Party, for instance, elected Presidents from 1932 to 1952, but spent less money than the Republicans. In more recent years, John Kennedy spent his party into debt in 1960, but that may well have been necessary to overcome what was at that time a religious disability. As one scholar computed 1960 spending, "the 1960 ratio of Democratic to Republican spending appears to have been almost as close as the 1960 election returns." See Herbert E. Alexander, *Financing the 1960 Election* (Princeton, N. J.: Citizens' Research Foundation, 1961), pp. 9-11. In 1964 Barry Goldwater considerably broadened the Republican Party's financial base and outspent his Democratic opponent. Nevertheless, the best-financed and most narrowly based Democratic campaign in history to that point, plus the advantages of incumbency, more than outweighed Goldwater's mass contributions. See ibid., pp. 7-16. The Goldwater campaign (and, to a lesser extent, the McGovern campaign) demonstrate an interesting interrelationship of two themes in the text: (1) campaign money tends to go to winners, and (2) intensely held feelings generate funds supporting those feelings. Although Goldwater and McGovern consistently showed poorly in the public opinion polls, the strong philosophical convictions of their supporters nonetheless generated considerable amounts of money, especially in relatively small donations. The Nixon 1972 victory repeated the 1960 pattern: contributions mirrored almost exactly the eventual popular vote totals of the two major candidates. Although both Goldwater and McGovern were swamped on election day, they at least had an opportunity to voice the strongly held feelings of their ardent supporters. That they did so against strongly entrenched incumbent Presidents and that two men of such differing political persuasions could become nominees of the two major parties only eight years apart is an amazing testimony to the freedom and stability of American politics. The only apparent exception to the proposition in the text accompanying this footnote is the 1968 election. Republicans outspent Democrats in the general election campaign, but the Democrats exceeded Republican outlays in the pre-conventions struggles for the nomination. The political reality of 1968 thus explains the Democrats' inability to raise money: the party began in debt and was deeply and acrimoniously split; it ended in even greater debt and with internal turmoil still unresolved. (Ibid.)

[10] See Tom Wolfe, "Radical Chic," in *Radical Chic and Mau-Mauing the Flak Catchers* (New York: Farrar, Straus and Giroux, 1970).

The role of the rich patron in bringing about change should not be ignored. As Milton Friedman has noted:

> Radical movements . . . have typically been supported by a few wealthy individuals who have become persuaded—by a Frederick Vanderbilt Field, or an Anita McCormick Blaine, or a Corliss Lamont, to mention a few names recently prominent, or by a Friedrich Engels, to go farther back. This is a role of inequality of wealth in preserving political freedom that is seldom noted—the role of the patron.[11]

Many of the allegations about money blocking social change quite simply ignore history. During the last forty years, an immense amount of social and regulatory legislation has been enacted, this alone refuting the assertion that campaign money is a barrier to change. That the charges come so hard upon the extensive legislation of the Great Society and from the very architects of those programs seems particularly inappropriate.[12]

For all the heat generated by allegations about private campaign money, there is no body of settled scholarship to support them. No one denies that contributions sometimes play an undesirable or even corrupting role. But no system is without friction and, where the system involves money, whether it be taxation, welfare or campaign contributions, there will be abuses. Contrary to the allegations so widely heard, however, serious scholars are generally in agreement that money is only one factor influencing elections and that its impact is not, on balance, either decisive or harmful.

In response to the rhetorical question, "Does money win?" Dr. Herbert E. Alexander of the Citizens' Research Foundation, for example, answered that money is the "common denominator helping to shape the factors that make for electoral success. . . ." [13] He agreed that certain minimal amounts are probably necessary, but noted that "little is known of the marginal increment per dollar or of the differential effectiveness of the various campaign techniques." [14] Among

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[11] Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), p. 17.

[12] The inconclusive results of the social programs of the 1960s may be a cause of the present flap over campaign financing. Frustrated over the failure of these programs to produce the expected results, their proponents may automatically assume that something must be wrong with the political process.

[13] Herbert E. Alexander, "Links and Contrasts Among American Parties and Party Subsystems," in Arnold J. Heidenheimer, ed., *Comparative Political Finance: The Financing of Party Organizations and Election Campaigns* (Indianapolis: Heath, D. C. and Co., 1970), p. 104.

[14] Ibid., p. 103.

other possibly determining factors, Alexander listed the predisposition of voters, the issues, group support, incumbency, chances for electoral victory, sympathy on the part of the mass media, and a collection of other factors (religion, divorce, and color).[15] On another occasion, Dr. Alexander testified:

> . . . it is well to remember that the availability of money for a given campaign may be an inherent effect of our democratic and pluralistic system—either the constitutional right to spend one's own money or to financially support candidates with congenial viewpoints or a manifestation of popularity. This is not to say that monied interests do not sometimes take advantage of a candidate's need for funds, or that candidates do not sometimes become beholden to special interests. They do, but that is part of the price we pay for a democratic system in which political party discipline is lacking and the candidate (and some of the public) may value his independence from the party.[16]

David Adamany reached essentially the same conclusions when he argued that "primarily, the patterns of campaign finance are a response to the political environment; but it is also true that the relationship is reciprocal inasmuch as the uses of money may, within very significant limits, shape the political system."[17] The programmatic orientation of parties and candidates is the resource Adamany deems most important, followed by personal charisma, finance organization, incumbency, and several others.[18] Unlike many of the reform advocates, he believes that:

> . . . a sophisticated examination shows that by most measures Americans pay a small cost for the maintenance of an adversary political process in a complicated federal system with its many elective offices at a variety of levels of government. . . . Even the scholarly work on campaign finance tends to concentrate on the amounts spent, the sources from which the money is raised, and the uses to which the money is put. These data are all helpful, but they do not show the relationship of campaign finance to the political environment—to the kinds of party systems, the available channels of com-

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[15] Ibid., pp. 103-104.

[16] Statement of Dr. Herbert E. Alexander in *Hearings*, p. 224.

[17] David Adamany, *Financing Politics: Recent Wisconsin Elections* (Madison: University of Wisconsin Press, 1969), p. 230.

[18] Ibid., pp. 231-233.

munication, and other political and social phenomena. Nor is money ordinarily viewed as a form of functional representation by groups in the community and as just one of the several ways in which groups may seek their policy objectives through the allocation of resources to the political process. . . . Yet much less attention is given to money as a form of functional representation than to the very infrequent instances in which campaign gifts are made for the purpose of procuring actions by public officials which would not have been forthcoming in the absence of contributions.[19]

Alexander Heard, in his classic work on campaign finance, *The Costs of Democracy*, has concluded:

> And it has been repeatedly demonstrated that he who pays the piper does *not* always call the tune, at least not in politics. Politicians prize votes more than dollars.
>
> Contrary to frequent assertions, American campaign monies are *not* supplied solely by a small handful of fat cats. Many millions of people now give to politics. Even those who give several hundred dollars each number in the tens of thousands.
>
> And the traditional fat cats are *not* all of one species, allied against common adversaries. Big givers show up importantly in both parties and on behalf of many opposing candidates.[20]

Finally, the much respected political scientist V. O. Key has noted:

> Considerable analysis has been made of the sources of contributions to national committees. The findings, in essence, seem to be that each party draws heavily on those elements of society traditionally associated with it. . . . The cynical view that a campaign contribution is equivalent to a bribe at times indubitably matches the facts. Yet the significance of money in politics can be grasped only by a view that places party finance in the total context of the political process. . . . That the unbridled dominance of money would run counter to the tenets of a democratic order may be indisputable. On the other hand, a democratic regime that tyrannized men of wealth would both commit injustice and perhaps destroy its instruments of production.[21]

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[19] Ibid., p. 244.

[20] Alexander Heard, *The Costs of Democracy* (Chapel Hill: University of North Carolina Press, 1960), p. 6.

[21] V. O. Key, Jr., *Politics, Parties, and Pressure Groups*, 5th ed. (New York: T. Y. Crowell, 1964), pp. 495, 513.

In the face of this scholarship, perhaps in studied ignorance of it, stand the unsupported and impressionistic assertions of groups such as Common Cause and the National Committee for an Effective Congress. Common Cause, we are told, is presently engaged in an empirical study designed to show "a real correlation" [22] between contributions and legislative decisions. There should be little doubt that such a correlation will be discovered, for two reasons. Common Cause, after all, first made up its mind and is just now studying the evidence. Given that, it would be foolhardy to anticipate findings that disputed its earlier judgment. In any event, some such correlation can probably be easily established, since contributions are rarely given either at random or to one's political enemies.

Existing scholarship is thus at odds with the charges that advocates of regulation make. In the absence of evidence to support these charges, caution in treading this dangerous political terrain seems the prudent course. Some day this evidence may come into being, but there will be time enough then to tamper with our freedoms.

Two other considerations deserve mention. First, limiting the use of private money in election campaigns will hardly decrease the influence of affluent people, for direct access to resources easily converted to political purposes is concentrated among various sectors of the well-to-do. While the power of those who rely on contributions will decline, that of at least three groups in society will be increased: (1) pressure groups which operate "issue" (rather than "political") campaigns, (2) political activists with free time, and (3) those who control the media. All three, however, represent wealth in one form or another.

Most interest organizations such as Common Cause and the American Medical Association (AMA) necessarily rely on large amounts of money and generally have an affluent constituency.[23] (Common Cause spent $847,856 on lobbying in 1971; the AMA spent

[22] Walter Pincus, "Raising the Money to Run," *The New Republic*, vol. 169, no. 12 (September 29, 1973), p. 16.

[23] Unions represent a constituency certainly less affluent than that of Common Cause and the AMA. Nonetheless, unions are wealthier than many other interest groups and, because of union security clauses, can raise money very efficiently. Moreover, unions compensate for any relative lack of funds in two ways: (1) American unions have generally limited the focus of their activities to issues which affect only the interests of their membership, in contrast to European unions, and (2) in light of the first point, union leaders have become highly skilled political technicians, developing an expertise perhaps unequalled among lobbying groups.

$114,800.)[24] It may be more than coincidence, therefore, that Common Cause, a pressure group representing relatively affluent political activists and students, has adopted this issue as its own. Moreover, an individual cannot spend a great deal of time leading movements to "dump the President" without access to wealth. Restrictions on the use of private money will also increase dependence for exposure on the goodwill of those who control the media.

Much of this is admittedly speculative, but as long as proposals for regulating campaign money are seriously advanced, such speculation is necessary. Interestingly enough, though, many of those in the forefront of the battle for regulation are in fact affluent and influential, rather than poor and powerless. Such ostensible self-abnegation deserves the same scrutiny as is given to large contributions to political campaigns.

Finally, all of the allegations about the influence of money reflect a basic and disturbing mistrust of the people. If campaign financing really "distorts" legislative or executive behavior, candidates can raise its effect as an issue and the voters can respond at election time. The call for legislation thus seems based on the belief that the voters cannot be relied upon to perceive their own best interests.

Moreover, if one really believes the people are easily fooled and so in need of protection, there is no end to the campaign tactics eligible for regulation and no end to the need to increase the power of those *not* fooling the public. Indeed, the most disquieting aspect of the drive to regulate campaign money is that so many of its adherents view themselves as possessing a monopoly of political truth. Thus, many of the allegations about the influence of money are based on nothing more than the fact that some pet program has not yet been approved by Congress, a fact which the supporters of those programs can explain only by corruption.[25] Since they alone act in the "public interest," moreover, they all too often see little need for permitting their opponents, who always pursue selfish interests, to further their vision of the truth. Consider the remarks of a representative of the National Committee for an Effective Congress when confronted with the argument that its spending, as well as that of other groups, might be subject to legislative control. "I'm for putting us [NCEC] out of business," she said, "I think it's the only answer. The public interest groups know they can never match the amount vested interests can give. Why preserve the right to give when you know you will be at

[24] "Lobby Spending: Common Cause Leads Again," *Congressional Quarterly*, June 9, 1973, p. 1425.

[25] Pincus, "Raising the Money to Run," p. 17.

a disadvantage?" [26] For that matter, why preserve the right to speak when you know you will not persuade?

2. Campaign Financing and the Law

A number of general considerations apply to all regulation of campaign financing and deserve independent discussion. First, regulation must be enacted by those in power and the desire to maintain and increase that power will not be suspended while the legislation is being considered. How those who allege that campaign money has such a corrupting effect on legislators can expect those same legislators to enact "neutral" regulations on its use is one of the great mysteries of the present debate.

The influence of self-interest on legislation regulating political financing is everywhere to be seen by those who care to look. Even Common Cause is, Pandora-like, worried that low limits on expenditures for House of Representatives races will protect incumbents.[27] And what applies to the House surely applies to every political office.

There are, moreover, inconsistencies in the 1971 law which can only be explained by political considerations. The amount a senatorial candidate can spend in a state, say New York, is limited, presumably to prevent one candidate from overwhelming his opponent with a "media blitz." Limitations on spending by presidential candidates, however, apply nationally, rather than state by state. Since presidential elections are determined by the electoral votes of the states, not the national popular vote, consistency would call for spending limits state by state. Otherwise a candidate might take money properly allocated to, say, southern and southwestern states to finance a "blitz" in New York. That the consistent route was not chosen doubtless was due to uncertainty as to which party would be helped, or, perhaps, to the conviction that it would be the "wrong" party.

Finally, everyone agrees that incumbents get an unfair advantage from governmental subsidies such as offices, the frank, paid staffs, and so on. Removing these advantages, or, in the alternative, giving challengers an offsetting subsidy, can be justified. Yet such legislation is politically impossible. That fact alone casts the shadow of suspicion over any measure that can pass.

Free societies must shun regulation of political speech which claims to eliminate "distortions" or to protect the public from being

[26] "Financing Campaigns: Growing Pressure for Reform," *Congressional Quarterly*, July 14, 1973, p. 1880.

[27] *Common Cause Report from Washington*, vol. 3, no. 9 (September 1973), p. 2.

fooled. No one has a monopoly on political truth and the claim that laws are needed to "correct" [28] the electoral process by regulating campaign advocacy should be viewed with alarm, particularly when those laws are passed by such interested parties. Mr. Justice Holmes once said, in a justly famous passage:

> But when men have realized that time has upset many fighting faiths they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas —that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .[29]

Those who would regulate campaign advocacy should ponder Mr. Holmes's view of freedom of expression and his spirit of tolerance, for it is the complete answer to the question—"Why preserve the right to give when you know you will be at a disadvantage?"

Because all such legislation intrudes on freedom of expression, constitutional precedent requires that it be carefully tailored to the harm it seeks to cure and not be overly broad. Thus where "less drastic" measures are available to achieve the congressional objective, the courts will invalidate a statute which encroaches on individual liberties.[30] Many of the proposals now under consideration seem infected by over-breadth, for they lump all contributions together, making no distinctions as to their sources or kinds.[31]

If ambassadorships are given in return for large campaign contributions, the Senate can refuse to confirm. If government contracts are now awarded on the basis of politics, they will continue to be so awarded whether or not there are campaign contributors. All the

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[28] See statement of Russell D. Hemenway, national director, National Committee for an Effective Congress, in *Hearings*, p. 165.

[29] Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., dissenting).

[30] In Aptheker v. Secretary of State, 378 U.S. 500 (1964), the Supreme Court declared unconstitutional Section 6 of the Subversive Activities Control Act of 1950, 50 U.S.C. Section 785. That statute denied to any member of a registered Communist organization (or one ordered to be registered) the right to apply for a passport, or the renewal of one, or to attempt to use any such passport, knowing of the registration. The Court, in an opinion by Justice Goldberg, noted that "in determining the constitutionality of Section 6, it is also important to consider that Congress has within its power 'less drastic' means of achieving the congressional objective of safeguarding our national security. . . . The section judged by its plain import and by the substantive evil which Congress sought to control, sweeps too widely and too indiscriminately across the liberty guaranteed by the First Amendment. . . . here, as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms." 378 U.S. 500, 512-514.

[31] For example, all contributions over $100 must be disclosed. See p. 21.

allegations about contracts and contributions prove is that we need laws limiting official discretion in this area.

Those who would regulate political financing should also look to reducing superfluous economic regulation. If milk producers make contributions in return for higher price supports, why should not this subsidy and all similar programs be repealed? It is no answer to say that well-placed contributions make repeal politically impossible, since that argument applies with more convincing force to legislation forbidding contributions. "Big government" vastly increases the power of public officials to give and take away and thus creates undesirable appearances as well as temptations. It never occurs to those who would regulate campaign financing that perhaps a more direct remedy would be to reduce the amount of unnecessary economic regulation. Oft times, in fact, they seem to regard that as a fate worse than death.

In addition, regulating campaign financing through the criminal law necessarily contemplates trials of political figures after elections. The danger in this, one hopes, is evident to all, for prosecutions are all too subject to political influence and all too effective a means of silencing one's opponents. The danger is not the less because present law contains so many complex requirements and contemplates such extensive bookkeeping that violations are all but unavoidable.

Furthermore, all regulation of campaign financing is based on an irrational distinction. No fully rational line separates election campaigns from all of the political and propaganda activities which occur between elections. If money is all that powerful a deceiver, it will work its evil ways between campaigns as well as during them. If spending by a candidate's election committee can be regulated, why not spending by organizations like the Committee on Political Education (COPE) or some in the Nader group. After all, *The New Republic* raised the question of the propriety of Nader's Center for Auto Safety taking money from the American Trial Lawyers Association when he and the association were silent on the no-fault issue.[32] Indeed, Mr. John Gardner himself, not to mention the representative of the National Committee for an Effective Congress quoted above, is reported to have urged the abolition of COPE.[33]

Business and union groups, for example, are irrationally forced to distinguish between "political" activities (during the campaign)

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[32] Leah Young, "A Chink in Nader's Armor?" *The New Republic*, vol. 167, no. 8 (September 2, 1972), p. 11.

[33] "Witnesses Debate Campaign Funds," *Washington Post*, December 6, 1972, reprinted in *Hearings*, p. 376.

and "educational" activities (during the interim). The only functional distinction between the periods is that the activities in the former tend to focus on particular candidates. Candidates are often known well in advance and activities designed to influence their election go on for months before the formal campaign. Consider the following passage, which happens to be discussing the activities of COPE, but which is equally applicable to business and other organizations:

> Federal law requires COPE to draw a line between its political and educational activities, but in practice the distinction is difficult to maintain. . . . The educational activities of COPE embrace a wide variety of programs, including voter registration drives, organization of local and state COPE units, news releases to union journals, posters and exhibits. Most of the money, however, is spent on preparation and distribution of informational pamphlets on political issues and candidates' voting records. In 1956, COPE distributed 30 million pieces of literature, including 10.2 million copies of its voting record on members of Congress. In 1957, an off-year, some 7 million pieces were distributed.
>
> As a practical matter, COPE officials say that anything short of a direct appeal to "Vote for Candidate X" can be included in the category of educational activities.
>
> A few examples will show how thin is the line, in practice, between education and partisan politics:
>
> Registration drives—obviously the necessary first step to any successful political action, are non-partisan in nature, hence educational.
>
> Pamphlets on political issues—current ones, include broadsides on farm policies, unemployment, the budget, taxes, social security, school legislation—are educational, even when they contain such partisan references as "Mr. Eisenhower's Big Business Administration."
>
> Voting records—in which members of Congress are scored as being "right" or "wrong" on selected roll calls involving many of these same issues, are educational, even though the implications are obviously partisan. . . .
>
> The same distinction is applied to COPE personnel. One COPE officer told CQ that part of his own salary is switched from the educational account to the political account after a certain date in each campaign year.[34]

Laws regulating campaign financing, therefore, compel accounting distinctions without political significance. The statistics reflecting

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[34] *Congressional Quarterly*, March 28, 1958, pp. 384-386.

what money was spent for "political purposes" are, moreover, wholly inaccurate since they do not include "educational" expenses or the fixed amounts of maintaining an organization which, with little effort, turns to campaign work when the time comes.

Limitations on Expenditures and Contributions: Price Controls in the Marketplace of Ideas. These limitations fall into two categories.

(1) *Limits on Spending by Candidates.* Those who seek to impose limits on expenditures by candidates face a dilemma of constitutional dimensions. On the one hand, if the limitation applies only to expenditures explicitly authorized by the candidate, it will be, in Lyndon Johnson's famous phrase, "more loophole than law." "Independent" committees will carry on the campaign. On the other hand, if it seeks to charge the candidate with all outlays (from whatever source) that further his candidacy, it must give the candidate a veto over the actions of all those who would support him through monetary expenditures. The campaign reform law of 1971 thus prohibits the media from charging for political advertising unless the candidate certifies that the charge will not cause his spending to exceed the limit.[35] The effect, therefore, is to restrict the freedom of individuals to buy advertising supporting or, under the regulations promulgated by the Comptroller General of the United States,[36] attacking, in some circumstances, a candidate.

Indeed, in light of decisions of the Supreme Court, there would hardly seem reason to debate the issue at length. In *New*

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[35] 47 U.S.C. Section 803(b) states that "No person may make any charge for the use by or on behalf of any legally qualified candidate for Federal elective office (or for nomination to such office) of any newspaper, magazine, or outdoor advertising facility, unless such candidate (or a person specifically authorized by such candidate in writing to do so) certifies in writing to the person making such charge that the payment of such charge will not violate paragraph (1), (2), or (3) of subsection (a) of this section, whichever is applicable."

[36] 11 C.F.R., Section 4.5 states that: "Section 4.5: Amounts spent urging candidate's defeat or derogating his stand. (a) An expenditure for the use of communications media opposing or urging the defeat of a Federal candidate, or derogating his stand on campaign issues, shall not be deemed to be an expenditure for the use of communications media on behalf of any other Federal candidate and shall not be charged against any other Federal candidate's applicable expenditure limitation under section 104(a) of the Act and this part, unless such other Federal candidate has directly or indirectly authorized such use or unless the circumstances of such use taken as a whole are such that consent may reasonably be imputed to such other candidate."

What may or may not be "reasonably imputed to such other candidate" is not described with any specificity.

York Times v. *Sullivan*,[37] the Court held that a newspaper advertisement on public issues was entitled to First Amendment protection. The fact that the *New York Times* was paid for the advertisement was "immaterial." [38] In *Eastern Richmond President's Conference* v. *Noerr Motor Freight*,[39] moreover, the Court held that the Sherman Act did not apply to advertisements intended to influence legislation specifically designed to injure competitors. In that case, certain railroad companies had conducted a publicity campaign which was "vicious, corrupt, and fraudulent" and "designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business. . . ." [40] Rejecting the claim that such activities violated the Sherman Act, the Supreme Court, through Mr. Justice Black, stated,

> It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. . . . [T]o disqualify people from taking a public position in matters in which they are financially interested would thus deprive the government of a valuable source of information and . . . deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.[41]

The entire theory of the decision, therefore, rests on the First Amendment policy of protecting groups in their efforts to influence government to act in their interests. Moreover, the efforts in this case, namely, the financing of a systematic publicity campaign designed to induce favorable governmental action, are of particular relevance to this discussion. If Congress cannot stop individuals from conducting the kind of campaigns that were involved in *Noerr*, surely it may not do so when the issue is the election of an individual to office.

The First Amendment has given rise to considerable disagreement as to its scope. All agree, however, that it protects political speech. If we are to have "free trade in ideas" in the political sphere, individual citizens must be free to express whatever ideas they choose in whatever form they believe appropriate, whether or not it costs them money. There is no room for price controls in the marketplace of ideas.

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[37] 376 U.S. 254 (1964).

[38] Ibid., p. 266.

[39] 365 U.S. 126 (1961).

[40] Ibid., p. 129.

[41] Ibid., p. 127.

Setting a limit on candidate expenditures sets a maximum on the political activities in which American citizens can engage and is thus unconstitutional. The reasoning that speech which costs money is too persuasive cannot be contained. For one can also argue that demonstrations of more than a certain number of people, extensive voter canvassing, or too many billboards with catchy slogans also "distort" public opinion and also ought to be regulated.

The freedom to speak is not the only liberty infringed by such legislation. Because giving to a candidate permits individuals to "pool" their contributions and act as part of an effective organization, limitations on candidate spending are in effect restrictions on the freedom of association.

Furthermore, effective limits on expenditures must help incumbents, who have an established image and all the advantages of known quantities over unknown. To limit campaign spending is to limit what a challenger can do to offset these advantages.[42] That the first effective regulation approved by Congress was a limit on spending should be pondered long and hard by those supporting further legislation of this kind.

Finally, a truly effective limit on spending is not feasible. Many expenditures are individually too small to be controlled when private citizens make them—for example, buttons, bumper stickers, carfare for canvassers. In the aggregate, however, they may entail a significant amount which, because they are not regulable, would permit money to continue to "distort" elections even after extensive regulations have been enacted. Candidates would, moreover, be encouraged to emphasize such activities since they would be in effect free from restrictions. The laws we pass, therefore, may control only that which is regulable simply because it is regulable, not because the desired end, limiting the impact of money, will be achieved.

(2) *Limits on Individual Contributions.* Except where someone seeks personal gain in direct exchange for a campaign contribution, individual donations are political activities. Limitations on their size are thus an explicit restriction on political freedom. If a person feels strongly about the defense of Israel, the conduct of the Indochina War, or the continuation of farm subsidies, why should he not have the right to finance appropriate political activities, whether or not (or, particularly if) those activities are part of a political campaign?

[42] See Lester G. Telser, "Advertising and Competition," *Journal of Political Economy*, December 1964, p. 537, which finds that advertising is most effective in introducing new products.

Again, government regulation establishes a dangerous precedent. If one can limit the size of individual contributions, why cannot (or, should not) the government limit the extent of voluntary activity on behalf of candidates? Both involve giving a thing of value to a candidate, and both are designed to further his candidacy. Both, moreover, create "obligations." The only distinction is between the use of time and ability directly for the candidate and the use of income gained through the expenditure of time and ability. These activities are largely fungible, a fact that Congress recognized when it specifically excepted volunteer services from the definition of "contribution" in the 1971 statute.[43]

Again, associational rights are involved since a limit on the size of one's contribution limits one's ability to "pool" resources with others. Indeed, there is a practical risk in limiting the size of individual contributions. If the Supreme Court were to strike down the candidate's veto over individual spending but uphold a low limit on contributions to candidates, the effect would be the opposite of that intended. The wealthy would be able to conduct their independent advertising campaigns while everyone else would be limited in their ability to pool resources behind a candidate.

Reporting and Disclosure Legislation. Laws of this kind in effect require that political acts of individuals be registered with the government and publicized. Such legislation thus might subject potential contributors to the fear that persons with different views or political affiliations, for example, clients, employers, officials who award government contracts, might retaliate. The effect, therefore, might be to "chill" or deter political activity, a result with First Amendment implications.

This constitutional issue falls within a growing class of cases in which persons or organizations claim a right to anonymity. Newsmen thus claim a privilege not to disclose sources, the NAACP has resisted the efforts of southern states to compel disclosure of its membership lists, and many say a state may not require that those who distribute handbills reveal the author or sponsor. Because there is no absolute right to anonymity, these claims have met with varying success in the Supreme Court.[44] What is involved is a weighing of the claimed need for disclosure against the deterrent effect publicity may have on the exercise of individual rights.

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[43] 18 U.S.C., Section 591(e)(5).

[44] See, for example, Bates v. Little Rock, 361 U.S. 516, 524 (1960); Talley v. California, 362 U.S. 60 (1960); and U.S. v. Caldwell, 408 U.S. 665 (1972).

Reporting and disclosure statutes are generally said to rest on the need to let the public determine whether official conduct is being swayed by contributors in undesirable ways. Existing laws cannot be justified on that basis, however. For example, disclosure is required of every contribution of $100 or more to a presidential campaign.[45] Yet it is flatly unbelievable that a contribution of that size could have an undesirable impact. The law thus seems overly broad and subject to constitutional challenge.

To the extent that disclosure laws focus on contributions from those doing business with the government and on large contributions, the constitutional claims against them lose their force. To the extent that they forbid anonymity across the board to all contributors, however, the conclusion that the deterrent effect outweighs the need seems irresistible.

The Case against Public Financing. Most of the proposals for public financing of political campaigns include limitations on candidate expenditures and individual contributions.[46] To the extent that the subsidy and the limitations complement each other rather than exist independently, the case for subsidies is weaker. To the extent that the subsidy is not conditioned on limits on expenditures and contributions and is designed to aid candidates challenging incumbents by offsetting the financial advantages of incumbency, the case is stronger. Most subsidy proposals, however, do more than offset the financial advantages of incumbency.

(1) *Some Myths About Public Financing.* One allegation about providing financial subsidies to political candidates is that the temptation to engage in illegal activities would diminish.[47] Both experience and logic suggest this would not be the case. Experience with subsidies in Puerto Rico demonstrates that the subsidies are used up before the election and that the illegal solicitation of funds, for example, from government employees, ensues.[48] Such a result seems logical, for there is no fixed amount needed for a truly contested campaign. It is a myth to think that the provision of subsidies would change this. In fact, activities such as the Watergate break-in are more likely to occur in campaigns where the level of normal propa-

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[45] 2 U.S.C., Sections 431-434.

[46] See, for example, the Hart bill, Sections 11-14.

[47] See TV address of Spiro T. Agnew, *New York Times*, October 16, 1973, p. 34.

[48] Henry Wells and Robert Anderson, *Government Financing of Political Parties in Puerto Rico: A Supplement to Study Number Four* (Princeton, N. J.: Citizens' Research Foundation, 1966), p. 5.

ganda is low than in campaigns where extensive activities of the ordinary kind take place. The argument that we can reduce the number of break-ins by limiting the amount of advertising on television and by financing campaigns with public money seems a dramatic non sequitur.

A second allegation made on behalf of subsidies is that they would increase "the opportunities for meaningful participation in . . . electoral contests without regard to the financial resources available to individual candiates. . . ." [49] But how many would become candidates if we subsidized campaigns? Unrestricted access to such subsidies would be an incentive to everyone with a yen for publicity to become a candidate; elections would thus become an anarchic jungle with policy issues wholly obscured. For that reason, many subsidy proposals suggest limitations on eligibility. One formula might call for a subsidy adjusted to performance on previous elections, but that seems unfair to newcomers and overly generous to the "old guard." Another route would be to adjust the subsidy according to performance in the election itself. For example, the Hart bill (which applies only to Senate and House races but could easily be extended to presidential campaigns) would require a security deposit equal to one-fifth of the anticipated subsidy. If the candidate got less than 10 percent of the total vote, the deposit would be forfeited. If he got less than 5 percent, he would have to repay whatever subsidy he had received.[50]

Such a provision, however, is hardly consistent with the bill's ostensible purpose. A candidate such as Fred Harris, for example, might well have no chance under such a law. If he refused the subsidy, it would be a signal that he did not take his chances seriously. He would then be quite unlikely to raise substantial funds, unless he had a rich patron, an alternative closed off by limits on individual contributions. If he took the subsidy, he would risk bankruptcy. The Hart formula could thus be a Trojan horse to the average candidate.

What the formula would create, however, would be a temptation for those who anticipated financial gain from running for office. Under the Hart plan, the author/candidate might be encouraged to enter the race to gather material for a book. A publisher's advance could cover the cost of posting the security bond or returning the subsidy. Similarly, many young lawyers would be likely to find it profitable to enter congressional races and take their chances on the

[49] Hart bill, Section 2(1).

[50] Ibid., Section 7(a).

subsidy in order to get publicity beneficial to their practices. Even if they might have to forfeit their bond or return the subsidy, it might seem a good risk when the amount was capitalized over the period of time that the anticipated income would accrue. The Hart formula might thus increase the number of non-serious candidates while discouraging those the bill is designed to aid.

Third, subsidies, it is said, will "prevent the relatively few individuals who have access to a great wealth from having an excessive influence upon the presentation of competing viewpoints . . . and from preempting the channels of mass communication as candidates or as contributors. . . ." [51] To be sure, subsidies combined with limits on contributions might exclude some people who are presently influential. But it does not follow that the number with effective influence would be increased. Those affluent people using free time in politics would become more powerful, as would those controlling the media. It is simply illogical to believe that taking power from one group will increase the power of those who presently lack it. Quite the contrary, power might well be concentrated in a smaller and more narrow group.

Fourth, it is alleged that public financing will help determine "the extent to which expenditure levels may be substantially higher than necessary for the conduct of a competitive, informative, and effective campaign. . . ." [52] This statement, too, seems a non sequitur, since a subsidy tells us nothing about whether present non-subsidized expenditures are excessive. In addition, provision of a subsidy would almost surely increase the amounts spent, as it did in Puerto Rico.[53]

Finally, we are told that subsidies will "reduce the pressure on Congressional candidates for dependence on large campaign contributions from private sources. . . ." [54] If, however, one reduces the pressure on candidates to look to the views of contributors, to whom will the candidates look instead? The need to raise money compels candidates to address those matters about which large groups feel strongly. Candidates might well, upon receiving campaign money from the government, mute their views and become even more prepackaged. Eliminate the need for money and you eliminate much of the motive to face up to the issues. Candidates might then look more

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[51] Ibid., Section 2(2).

[52] Ibid., Section 2(3).

[53] Arlen J. Large, "How Should We Finance Elections?" *Wall Street Journal*, May 10, 1973, p. 24, col. 4.

[54] Hart bill, Section 2(4).

to attention-getting gimmicks than to attention-getting policy statements. A subsidy combined with spending limits might insulate incumbents both from challengers and the strongly held desires of constituents.

(2) *The Dangers in Public Financing.* Subsidy plans are not well conceived either as to need or impact. They are a classic case of tactics overwhelming the strategic issue, with many proponents of public financing more concerned with getting the principle accepted than with working out the "details." But attention to the details shows the principle to be erroneous, for not only are the claims made on behalf of subsidies empty, but such proposals also seem dangerous.

The use of private money is said to have weakened public confidence in the democratic process. We ought to ask, however, whether confidence is likely to be restored when taxpayers pay for campaigns they regard as frivolous, wasteful, and, in some cases, abhorrent. Would the taxpayer viewing television spots have more confidence because part of the tab came out of his paycheck? Would the voter have more confidence because he had to help pay for activities with which he disagreed? What would happen if a racist ran for office and delivered radical and quasi-violent speeches? One result might be cries for even more regulation—in particular, for regulation of the content of political speech. Those calling for public financing often point to polls showing public discontent with the high cost of campaigns. The same polls, however, show as much discontent with "too much mudslinging."[55] Indeed, the question, Why should the public pay for ——?, seems a natural response to repugnant, but subsidized, campaign rhetoric.

The existence of subsidies might well decrease citizen participation and the morale of those active in politics. Such was the result in Puerto Rico where, over time, party morale declined and voter interest in party activities was correspondingly reduced.[56] The existence of subsidies, in short, might increase the distance between voters and candidates.

Public financing would also endanger the delicate balance of our party system. If the subsidy were to go largely to party organizations, they would be immensely stronger than they are now. On the other hand, if it were to go directly to candidates, party organizations would be considerably weakened. The subsidy question thus can be rationally decided only after a number of normative as well as empirical

[55] The results are from a Gallup poll reprinted in *Hearings*, p. 456.

[56] Committee for Economic Development, *Financing a Better Election System* (New York, 1968), p. 48.

inquiries into the nature of our party system have been satisfactorily resolved. Do we need stronger national parties or stronger state parties? Do we need more candidates independent of existing party organizations, or do we need more organizations such as the Committee to Re-Elect the President? Do we need more party solidarity or will this simply lead to greater executive power?

There are no settled views on any of these questions. Yet the proposals now before Congress threaten to impose a solution to each and perhaps to change our present system radically and rapidly. The danger is not the less because the effect is random or unintentional—or perhaps even mindless.

Similarly, direct subsidization of campaigns must have an enormous but uncertain impact on third parties. If a formula like that contained in the Hart bill is employed, third parties would usually have to gamble whether to take the subsidy. The "seriousness" of a party would have little to do with its decisions since early showings in the polls might augur well—but all third parties suffer late in campaigns from the urge of voters to make their votes "count." Declining the subsidy would be taken to mean that the party was not serious and, in any event, the possibility of subsidy would deter further giving. If the formula is based on showings in previous elections, subsidies would sustain third parties long after their appeal had diminished, simply because they once received a significant portion of the vote.

Direct subsidies would also raise serious problems of freedom of expression. They would be a form of compulsory political activity which limited the freedom of those who would refrain as well as of those who chose to participate. When an individual is forced, in effect, to make a contribution to a political movement to which he is indifferent or which he finds distasteful, it may fairly be said that a basic freedom is being infringed. When this forced payment is combined with limits on contributions to favored candidates, political freedom is drastically limited. Many who today propose subsidies to political parties or candidates condemn subsidies where religious organizations are concerned. The precise constitutional issues differ but they are sufficiently analogous that one may well question whether the underlying principle is not the same. Indeed, what if a religious party were formed?

Public financing of campaigns might run afoul of the Constitution in other ways. Whatever the size of the subsidy, and particularly when combined with a limit on expenditures, the precise amount

would be subject to constitutional challenge on the grounds that it discriminated in one fashion or another. The charge would not be less forceful for the fact that it would be entirely up to those in power to say how large the subsidy would be.[57]

Any formula for determining who gets what subsidy is open to constitutional challenge, for subsidies are inherently inconsistent with a "free trade in ideas." One commentator has stated it thus:

> The traditional meaning of this concept is that government must not interfere on behalf of either a majority or a minority; if the majority's superior resources give it greater power to express its views through the mass media, this is a natural and proper result of the superior appeal the majority's "product" has to the public. Government intervention on behalf of minorities would deny first and fourteenth amendment rights to members of the majority group by undermining the preponderance which the free market has given them. Likewise, state action calculated to reduce the relative power of minorities to express their views would infringe their constitutional rights. A plan allocating funds to all parties equally would give minorities publicity out of proportion to the size of their following thus discriminating against the majority, and a plan apportioning funds according to party size would give the majority more funds with which to influence uncommitted voters, tending to increase the majority's preponderance.[58]

This dilemma seems inescapable unless we abandon the tradition that government neither help nor hinder the propagation of the views of a political movement.

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[57] A subsidy proposed for Massachusetts in 1964 would have allocated $200,000 to the two major parties in proportion to each party's share of the total vote in the last state primary. This formula would have given the Democratic Party the great bulk of the subsidy. An Opinion of the Justices, 347 Mass. 797, 197 N.E. 2d. 691 (1964), however, found the then-pending legislation not to be for a "public purpose" under state law, thus strongly implying that the bill's constitutionality was doubtful.

[58] Note, "Payment of State Funds to Political Party Committees for Use in Meeting Campaign Expenses Lacks a Public Purpose," *Harvard Law Review*, vol. 78, pp. 1260, 1262-1263. See also Williams v. Rhodes, 393 U.S. 23 (1968). There an Ohio law which made it quite difficult for third parties to get on the ballot was considered. Justice Black, writing for the majority, noted that "there is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." 393 U.S. 32. Similar considerations would seem to apply to a subsidy which gave third parties less than major parties.

3. Summary

Caution in expanding federal regulation of campaign financing seems warranted.

(1) Private campaign money performs both desirable and undesirable functions. No one denies that some campaign contributions are made in the hope of personal gain from the exercise of executive discretion and, as such, are an objectionable, if not illegal, practice. Donors, however, also act from motives which enable contributions to perform functions indispensable to a free and stable political process. The right to give or not to give to a candidate is an aspect of political freedom. Campaign money also acts as an agent of change, permits citizens with little free time to participate in politics, is a vehicle of expression by which individuals seek to persuade others, serves as a barometer of intensity of feeling over potent political issues, and weeds out candidates with little public support. On balance, the undesirable functions of campaign money either call for narrow remedies or are outweighed by the desirable. Contrary to the conventional wisdom, the weight of disinterested scholarship strongly supports this conclusion.

(2) Regulation of the use of campaign money is an undertaking with grave implications for our political freedom. The necessary legislation would have to be passed by those in power and would by its very nature regulate political speech.

(3) Limitations on campaign spending and on individual contributions set a maximum on the political expression in which American citizens can engage and are thus unconstitutional.

(4) The present law requiring disclosure of campaign contributions may chill political activity by requiring that it be registered with the government. By requiring small contributions to be reported, the law seems far broader than is justified by its ostensible purpose and is subject to constitutional challenge.

(5) The arguments made on behalf of public financing of campaigns seem largely unfounded. Public financing might be dangerous, in addition, because no fair formula has been devised for allocating the money and because a subsidy might encourage officials to avoid taking stands on controversial issues. Finally, it would compel taxpayers to engage in political activity against their wishes.

(6) If the question of how campaigns are financed is important, candidates should raise it as an issue, and the people should be allowed to show their opinions by the votes they cast in elections.

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Ralph K. Winter, Jr., is professor of law at the Yale Law School and an adjunct scholar of the American Enterprise Institute. Among his recent works are *The Unions and the Cities* (with Harry H. Wellington), published by the Brookings Institution in 1972, and *Campaign Finances: Two Views of the Political and Constitutional Implications* (with Howard R. Penniman), published by the American Enterprise Institute in 1971. John R. Bolton, B.A., Yale College (summa cum laude), is a member of the class of 1974 of the Yale Law School and an editor of the *Yale Law Journal*.

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