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otherwise would permit a case-by-case evaluation of the estimated severity of the application of economic force — a result the objective effects test seeks to eliminate. In drawing the inference of improper motive, reference to the prior history of labor-managment relations and the relative strengths of employer and union with respect to both financial resources and employee loyalty would be appropriate. Such an inquiry would have been unnecessary in *Inland Trucking* since any long-term disability incurred by the union as a result of the employers' conduct was minimal.

In *Inland Trucking*, therefore, since an antiunion motivation could be neither proven nor legitimately inferred and since the effect of the conduct left no continuing obstacles to future concerted activity, a finding of an unfair labor practice was unjustified.[46] Despite its disclaimer, the court balanced the bargaining positions and denied to one side a weapon which offended the court's sense of fairness. Workable solutions to labor disputes are more likely to result from the free use of economic pressure by both sides than from close regulation of bargaining strengths. The law should assure only the preconditions of such economic conflict. In this case, as in all cases, national labor policy is best served not by policing the use of particular bargaining tactics but by protecting the survival of the bargaining process itself.

Constitutional Law — FREEDOM OF EXPRESSION — VIOLATION OF FIRST AMENDMENT FOR RADIO AND TELEVISION STATIONS TO DENY COMPLETELY BROADCASTING TIME TO EDITORIAL ADVERTISERS WHEN TIME IS SOLD TO COMMERCIAL ADVERTISERS. — Business Executives' Move for Vietnam Peace v. FCC, No. 24,492 (D.C. Cir., Aug. 3, 1971); Democratic National Committee v. FCC, No. 24,537 (D.C. Cir., Aug. 3, 1971).

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when it is the lockout's "sole purpose." American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 313, 318 (1965). When the relative positions of labor and management are such that the bargaining advantages to be gained from a long lockout are clearly superfluous, the employer's antiunion motive should be inferred. In such a case there are no substantial and legitimate business justifications for the excessive action taken.

[46] A refusal to label a lockout with temporary replacements an unfair labor practice would not mean that a similar result would be required if the replacements were permanent. If, as has been argued in connection with the *Mackey* rule, hiring permanent replacements in connection with a strike should be condemned, a fortiori a lockout with permanent replacements would be a violation since it embodies a far greater potential for adversely affecting protected employee rights. *See* Meltzer, *supra* note 9, at 104–05.

The Business Executives' Move for Vietnam Peace (BEM), a private association, attempted to purchase time from WTOP, an all-news radio station in Washington, D.C., to broadcast one-minute antiwar recordings. WTOP refused to sell air time to BEM, citing its policy against accepting any advertisements on controversial issues. BEM thereupon filed a complaint with the Federal Communications Commission alleging violations of its first amendment rights and of the Commission's fairness doctrine. The Democratic National Committee (DNC) encountered policies similar to that of WTOP in its organization of a campaign to present the party's views on crucial issues and to solicit funds. The DNC sought a declaratory ruling from the Commission that a "broadcaster may not, as a general policy, refuse to sell time . . . for comment on public issues." [1] The Commission rejected both the BEM complaint [2] and the DNC request,[3] holding that the fairness doctrine allows licensee stations discretion to determine the format for the airing of controversial issues and that there is no constitutional right of access to the broadcasting media.

On appeal to the United States Court of Appeals for the District of Columbia Circuit *held*, 2–1 per Wright, J., broadcasters are prohibited by the first amendment from banning the sale of time for public issue announcements if they accept other types of paid announcements. The Commission and the licensees must, therefore, develop reasonable regulations to allow limited access to editorial advertisers.[4] Judge Wright reasoned that broadcasting stations which accept commercial but not editorial advertisements discriminate among those who seek access to a public forum on the basis of the content of what they intend to say. This discrimination, he contended, constitutes state action for three reasons: the government is generally involved in the regulation of broadcasting;[5] the FCC specifically approved the discriminatory policy;[6] and radio and television sets have supplanted the public park as a public forum, and hence the broadcast media have assumed a primary "importance and suitability for communication of ideas." [7]

In its recognition that editorial advertisers have a limited

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[1] Business Executives' Move for Vietnam Peace v. FCC, Slip. op. at 6.
[2] Business Executives' Move for Vietnam Peace, 25 F.C.C.2d 242 (1970).
[3] Democratic National Committee, 25 F.C.C.2d 216 (1970).
[4] Slip op. at 4.
[5] *Id.* at 15.
[6] *Id.* at 17.
[7] *Id.* at 18.

first amendment right to purchase some broadcast time, the *BEM* decision represents the first judicial grant of a first amendment right of access to the broadcast media.[8] The *BEM* court built upon the foundation laid by the Supreme Court's recent decision in *Red Lion Broadcasting Co. v. FCC*.[9] The *Red Lion* Court faced a different type of question from that presented to the *BEM* court — the validity of governmental regulation of the media in the face of first amendment interests asserted by private broadcasters. The Court held that the Commission's fairness doctrine, which requires that licensee stations give both full and fair coverage to important public issues, does not violate the broadcaster's first amendment rights.[10] The *Red Lion* Court was thus not directly presented with the question of whether public groups have a first amendment right to present their own views. It did, however, emphasize that the "paramount" first amendment interests in the broadcast media were those of the "viewers and listeners" rather than those of the broadcasters.[11]

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[8] Earlier courts refrained from accepting public claims to a first amendment right of access to the broadcasting media in situations less compelling than that with which the *BEM* court was confronted. *See* Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497 (1st Cir. 1950) (refusal of radio station to broadcast sermon does not contravene first amendment); McIntire v. William Penn Broadcasting Co., 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946) (station's cancellation of religious programs not abridgment of first amendment rights). However, as the *BEM* court noted, Slip op. at 28, several courts have granted to editorial advertisers a first amendment right of access to forums other than broadcasting where these forums had been already opened up to commercial advertisers. For example, access has been granted to state-supported newspapers, Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969), and to display panels on public transportation vehicles, Hillside Community Church, Inc. v. City of Tacoma, 76 Wash. 2d 63, 455 P.2d 350 (1969); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967). In addition, commentators have for years advocated a general right of access to the media. *See, e.g.*, Barron, *An Emerging First Amendment Right of Access to the Media*, 37 GEO. WASH. L. REV. 487 (1969).

[9] 395 U.S. 367 (1969). *Red Lion* stimulated additional discussion of a possible right of access to the media. *See, e.g.*, Note, *A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access*, 39 GEO. WASH. L. REV. 532, 557–69 (1971) (advocating the establishment of a required amount of broadcast time devoted to individual access for public issue discussion); Note, *Fairness Doctrine: Television as a Marketplace of Ideas*, 45 N.Y.U.L. Rev. 1222, 1239–40 (1970).

[10] The Court specifically upheld the constitutionality of the "personal attack" and the "political editorial" articulations of the fairness doctrine, which require a station to provide reasonable response time to individuals personally attacked on the station and to candidates who are attacked or whose opponents are endorsed by the station. 395 U.S. at 373–75.

[11] *Id.* at 390.

The *BEM* court, expanding on the theory of *Red Lion*, enumerated specific viewer and listener first amendment interests which the broadcasting stations have to protect and advance rather than stifle. Judge Wright followed the *Red Lion* Court in noting that the public have first amendment interests in the reception of a full spectrum of views on controversial issues.[12] But the judge also contended that the public have additional first amendment interests. The public, he maintained, are entitled to presentation of views in a "vigorous" and "uninhibited" fashion [13] and are entitled to participate directly in public debate by voicing their own views on radio or television.[14] Since in the *BEM* situation the private power of the broadcaster was being used to stifle these first amendment interests of the public, the countervailing power of government had to be employed to expand opportunities for free speech.[15]

The court specifically rejected the proposition that already existing government standards for regulating the broadcasting media were sufficient to protect the first amendment interests of the public.[16] The Commission and the intervening licensees had contended that editorial advertising should not be constitutionally compelled because the Commission's fairness doctrine satisfied the public's first amendment interests.[17] In rejecting this contention, Judge Wright argued that while the fairness doctrine could contribute to presentation of a full spectrum of views to the public, it was not at all addressed to the public's further interests in robust and participatory debate.[18] To completely fulfill all of the three interests, he contended, the stations must provide the public with complete control over the content and format of the views expressed and afford them opportunity to initiate community discussion of particular issues.[19] "Advertorials," unlike responses required by the fairness doctrine, do allow the public both control and initiative, and therefore must be accommodated by the licensees.[20]

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[12] Slip op. at 22, citing *Red Lion*, 395 U.S. at 390.

[13] Slip op. at 22.

[14] *Id.* at 23.

[15] Other authorities have recognized that first amendment interests can be protected as well as threatened by governmental power. *See, e.g.*, National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 207 (D.C. Cir. 1969) (dictum), *cert. denied*, 397 U.S. 922 (1970); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 902 (1963).

[16] Slip op. at 21.

[17] *See, e.g.*, Brief for Intervenor Columbia Broadcasting System, Inc. at 33–36.

[18] Slip op. at 22.

[19] *Id.* at 23–24.

[20] Current Commission proposals to strengthen the fairness doctrine would not obviate the need for editorial advertising under the analysis of the *BEM*

Although additional governmental power thus seems necessary to fully satisfy the public's first amendment interests, this power need not carry with it the threat of censorship often associated with government regulation of first amendment rights.[21] Enforcing a limited right of access will necessarily enlarge the government's authority to demand an inclusion of speech, but it will not necessarily involve the government in the exclusion or censorship of specific speech. For example, the Commission or the courts could easily be prohibited from overruling a licensee's decision to air a particular advertisement;[22] they should review only the fairness and constitutionality of a licensee's decision not to air.[23] To be sure, the inclusion of some speech will decrease the likelihood that other speech will be aired; but the social cost of this governmentally mandated inclusion is surely much less than that of unlimited private exclusion.[24]

It is the practical difficulties in implementing the *BEM* decision, not its theoretical underpinnings, that present the greatest

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court. One of these proposals would require that the broadcasters more actively seek out spokesmen to provide balance on issues on which it had previously presented only one side. 35 Fed. Reg. 7820 (1970). But such a reform would not ensure uninhibited access for the general public since solicited views might still be subject to station editing. Nor would it increase the public's opportunity to initiate community discussion.

This proposal, like others which have recently been set forth by the Commission, 36 Fed. Reg. 3902 (1971) (requiring, *inter alia*, the broadcaster to make frequent announcements to the public of his fairness obligations); 36 Fed. Reg. 3939 (1971) (requiring, *inter alia*, the broadcasters to devote specific minimum percentages of programming time to controversial issues and to give a fuller representation of efforts to fulfill its fairness obligation in its application for renewal), is directed at helping the Commission ensure that the licensee fulfills his existing duties of full and fair coverage under the fairness doctrine. The history of the Commission's inability or unwillingness to enforce the fairness doctrine, *see* Note, 39 GEO. WASH. L. REV., *supra* note 9, at 553–57, and the wide latitude it has granted stations in providing for balanced coverage, *see, e.g.*, Democratic State Central Committee, 19 F.C.C.2d 833 (1968), certainly suggest the need for more specific standards by which the philosophy of the fairness doctrine can be implemented. The dissatisfaction of the *BEM* court, however, was with the philosophy itself, not merely its implementation.

[21] *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 721 (1931).

[22] The Commission might, however, require that editorials be purged of obscenity. *See* note 42 *infra*.

[23] Those editorial advertisers who are not granted time should be able to appeal the station's decision to the FCC, and subsequently to the courts. In addition, a record which suggests discriminatory exclusion should be grounds for license revocation.

[24] *Cf.* Banzhaf v. FCC, 405 F.2d 1082, 1103 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) (FCC ruling that stations which carry cigarette advertising must afford time for anticigarette presentations does not violate first amendment); Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, 84 HARV. L. REV. 664, 677–78 (1971).

challenge to its wisdom.[25] The *BEM* court did not specify exactly how the Commission and licensees should develop constitutionally permissible guidelines to select which and how many advertorials would be aired. Rather, it dismissed the specter of disaster raised by the intervening broadcasters and, noting possible contours of regulation,[26] asserted that the Commission and licensees would be capable of executing its decision. This vesting of broad authority in the Commission and licensees was warranted by the complexity of the problem of developing a fair and workable system of regulating paid public issue advertisements.

A threshold question which will have to be confronted in the development of such a system is whether to adopt for advertorials the present commercial advertising market system. Under this approach, the market would determine which and how many advertorials would be aired. Editorial advertisers would have to compete with commercial advertisers for the advertising time sold by licensee stations.[27] Although groups of varied political and philosophical persuasions could conceivably raise the requisite funds, especially if interest in the particular issue they wished to discuss was acute, a market system would inevitably tend to discriminate against the poor.[28] For example, a group of lower income citizens whose views were too extreme to be championed

[25] Judge McGowan emphasized these difficulties in his dissent. Slip op. at 45. They were also the focus of the petitions for rehearing. *See, e.g.*, Petition for Rehearing and Suggestion for Rehearing En Banc of Intervenor Columbia Broadcasting System, Inc. The petitions for rehearing were denied without opinion.

[26] The court, for instance, stated that broadcasters should be entitled to "place an outside limit on the total amount of editorial advertising they . . . sell" and to control within limits the time of presentation. Slip op. at 40.

[27] Employing the market system to answer the question of which advertorials would be aired would not require that it be used to determine how many advertorials are aired. The market could be used to answer the former question after the latter question was answered collectively by setting aside some specific amount of time for editorial advertisements.

[28] The *Red Lion* Court, in its discussion of the need for free time to respond to personal attacks and political endorsements, indicated its disapproval of a system in which highest bidders control which views are expressed. 395 U.S. at 392. Such a system arguably would not stand an equal protection test. James v. Valtierra, 402 U.S. 137 (1971), indicates that the Court has stepped back from giving strict scrutiny to de facto wealth discrimination where fundamental rights are not involved. However, earlier cases suggest that de facto wealth discrimination involving fundamental rights such as voting, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), or a criminal appeal, Douglas v. California, 372 U.S. 353 (1963), demands a compelling justification. First amendment rights, ranking among our most fundamental, clearly invoke the compelling interest test, Williams v. Rhodes, 393 U.S. 23, 30–31 (1968), and the broadcaster's interest in maintaining his advertising rates and his profits at preexisting levels do not seem sufficiently compelling.

by consensus groups such as Common Cause or the DNC, and not sufficiently in vogue to attract wealthy patrons, might never be able to obtain expensive air time.

Some problems of wealth discrimination can be solved by making minor adjustments in the market system. First, to eliminate the potential for egregious overuse by particular wealthy advocates, a straight market system could be modified by placing an outside limit on the amount of time allowed any one group.[29] Second, as the court hypothesized,[30] the fairness doctrine could be applied to require stations to provide editorial time, either free of charge or at nominal rates, for groups who opposed the views presented in full-rate advertorials. But even this approach would not afford all sectors of the public the opportunity to initiate public discussion which was deemed critical by the *BEM* court. To provide this opportunity for initiative, a further step will have to be taken to allow editorial advertisers with insufficient funds to purchase time at below-market rates even though no full-rate advertorials on their particular issue had previously been aired.

In developing a submarket rate system, the Commission and licensees would have to consider three somewhat conflicting criteria: minimization of administrative costs, deterrence of frivolous use of the media, and maintenance of the free flow of ideas to the public. A scale graduated to reflect ability to pay would best deter frivolous use; but the complex determination of exactly what resources were actually and potentially available to each applicant would entail formidable administrative costs. Alternatively, one submarket rate might be chosen and made available to groups or persons whose potential resources were below a stated minimum. Such an approach would be more easily administrable, albeit somewhat arbitrary. The one submarket rate would have to be set by striking some compromise between the goal of access to the media for lower income groups and the need to deter frivolous use. Under such a system, the individual station might be allowed to collect further charges if it could subsequently show that a group misrepresented its financial position.[31] In order to insure that there would be no obstruction of the flow

[29] The court suggested this possibility. Slip op. at 42.

[30] The court stated that the Commission has the authority to insist that "if editorial advertisements are accepted on one side of an issue, . . . broadcasters must also accept at least some advertisements on the other side of the issue, free of charge if necessary." *Id.*

[31] The broadcasters could be empowered to bring an action before the FCC in which they would have an opportunity to prove that the advertiser concealed his true financial basis. The FCC might also be given authority to impose exemplary damages.

of ideas to the public, however, groups should be able to air their advertorials while any challenge to their low income status was pending.

A system which employed submarket rates would leave unresolved the basic questions of exactly how many and precisely which advertorials are to be aired, since the demand for cheap time would probably outstrip the supply of existing advertising time.[32] With respect to the "how many" question, the licensees and the Commission would have to establish some minimum amount of time to be available each week for the airing of advertorials,[33] since requiring the provision of cutrate advertising time would surely reinforce the stations' present resistance[34] to granting any time to controversial advertisers. The determination of the exact amount of time required for advertorials demands expert judgment; it must reflect a consideration of the financial burdens[35] that advertorials place on broadcasters and the public's interest in controversy-free relaxation[36] while avoiding a dilution of the substance of a right of access for editorial advertising.[37]

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[32] A system which simply modified the market system by affording response time at nominal rates would also leave these two questions unanswered.

[33] This amount of time could be set as a percentage of the time the broadcasters sell to commercial advertisers. But it would be preferable simply to set aside some fixed quantity of minutes for editorial advertisements so that the broadcasters would be free to sell that amount of commercial time, within existing FCC limits, which they felt would maximize profits without having to consider any impact on editorial responsibilities. However the amount is set, in order that general discussion of controversial issues not be periodically muted, election campaign advertisements should not be counted toward its fulfillment. If they are, the amount should at least be increased in the month before elections.

Some problems can be foreseen in the differentiation of commercial from editorial advertising which would be necessary to determine when the station had aired the required amount of editorial time. The simplest approach would be to classify as commercial all advertisements which were primarily purchased to promote product sale.

[34] The stations' present resistance to editorial advertisements is easy to understand. Besides wanting to avoid the burdens of administration, they probably also fear their audiences would become disgruntled and their commercial advertisers would be unwilling to purchase time in the same or adjoining program segment.

[35] The generally high profit level enjoyed by the industry, *see* Slip op. at 42–43 n.56, suggests that most stations would be able to bear the burden of alloting a significant portion of their present advertising time to reduced-rate editorials. The amount surely should be set flexibly enough to permit suspension or reduction should an individual station encounter temporary, extraordinary circumstances.

[36] As the court noted, *id.* at 40, speakers protected by the first amendment should not interfere too much with the normal uses to which their forum is put by the public in general. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 87 (1949). Radio and television audiences generally look to the broadcasting media as sources of entertainment and repose.

[37] Financial realities and the public's desires to have periodic respites from

The second and more sensitive problem which the departure from the market system leaves unresolved is how to select "which" advertorials to air. The constitutional problems in developing standards for selection would not be insignificant. The *BEM* court noted that equal protection and first amendment principles "condemn any discrimination among speakers which is based on what they intend to say," [38] and the Supreme Court has demanded that officials regulating first amendment rights be given specific standards and limited discretion under these standards.[39]

FCC Commissioner Johnson suggested a first-come-first-served standard.[40] This approach does have the virtue of being nondiscriminatory; neither the stations nor government officials would be given any discretionary latitude to abuse. But a first-come-first-served standard would be inadequate to realize fully the first amendment benefits envisioned by the *BEM* court. First, innumerable and continual requests by the same groups to voice positions on the same issues might mean that these groups and issues would dominate the limited amount of time available for editorial advertising. Second, because there would probably be a long waiting list for advertisements, it would not be possible to air some editorials before their particular commentary or even the basic issue addressed became stale. The first-come-first-served standard would not, in other words, order the advertisements by their relative immediacy.

These problems could be avoided by relaxing to a limited extent the constitutional principles against content discrimination and regulatory discretion. This limited relaxation seems warranted where, as here, speech is being regulated to advance first

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controversy do not stand in direct conflict with the first amendment interests advanced by the *BEM* court. These interests would not be served by diverting from the media viewers and listeners seeking relaxation or by forcing a station to devote so much of its advertising time to reduced rate editorials as to force it to terminate operations.

[38] Slip op. at 33.

[39] Kunz v. New York, 340 U.S. 290 (1951) (state cannot vest control over the right to speak on religious subjects in an administrative official without providing standards); Saia v. New York, 334 U.S. 558 (1948) (ordinance requiring police permit for use of loudspeaker unconstitutional for lack of definite standards); Cantwell v. Connecticut, 310 U.S. 296 (1940) (statute requiring groups to obtain official certification as religious organizations before soliciting funds affords officer excessive discretion).

[40] Democratic National Committee, 25 F.C.C.2d 216, 234–35 (1970) (dissenting opinion). However, the Commissioner would allow the broadcaster to establish his own rates. *Id.* Since broadcasters would probably charge that rate which equates the demand for time with its supply, Commissioner Johnson's suggestion actually reduces to a market system.

amendment interests rather than to balance other valid governmental regulatory interests against those of the first amendment.[41] More would be lost by curtailing the government in its attempt to advance first amendment interests than would be risked by developing standards for selection of which advertorials to air. For if the standards are carefully drawn, they will pose little danger of the discriminatory promotion of the views of one side of a particular issue.[42]

Such standards should be drawn to maximize both the number of parties given access and the number of issues aired and to deal with the problems of issue emphasis and immediacy. First, in order to provide the fullest spectrum of views, the stations should attempt to give some initial airing to all sides of every issue. Second, in order to maximize the opportunities for self-expression and participation, the stations should give controlling consideration to the previous access already afforded the competing groups when determining which groups are to present a particular side of an issue.

The stations may well have additional time to grant after giving each side of each issue some initial coverage. Some issues could then be given greater emphasis because of their especial public importance. The stations serving a given area could be required to undertake joint data collection to determine the public concern over a particular issue [43] and then to adjust their issue

[41] *See* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 918, 920 (1970). *Compare* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), *with* Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968) (suggesting that the Court will demand that the government employ very narrowly drawn regulations when it regulates material protected by the first amendment in order to shield children from corruption).

[42] One possible standard can surely be rejected from the outset. Allowing the licensee to exclude advertisements on the basis of their substantive quality would advance none of the three interests posited by the court; public debate would likely be less full, robust, and participatory if the broadcaster could reject announcements which were not presented with professional Madison Avenue polish. Moreover, there would be considerable risk that the broadcaster would exclude dissident groups from his facilities under the rationale that they were not able to present their views competently.

Whether licensees should be able to reject advertisements because they contain obscenity is a more difficult question. The broadcast of "obscene, indecent, or profane language" is proscribed by a federal statute, 18 U.S.C. § 1464 (1970), and the FCC has not considered itself limited by first amendment principles in its regulation of obscene, indecent, and profane speech. *See* Note, 84 HARV. L. REV., *supra* note 24, at 665–71. Though the FCC's position is open to constitutional challenge, *id. passim*, as long as the Commission continues to demand that the stations maintain the purity of their programs, the broadcasters should be able to demand the same from their editorial advertisers.

[43] Applicants for licenses presently are required to conduct surveys to ascertain the primary needs and interests of their communities and to submit programming

emphasis in accordance with this concern.[44] However, issues for which there is little manifest concern may still be of great potential concern; some issues may need only an initial airing to arouse the public's interest. The data collected by the stations should therefore be used only to determine the emphasis given an issue, not whether the issue should be given an initial limited airing.

Having determined both which and how often editorial messages should be aired, the broadcaster would finally have to consider which editorial messages should be given temporal priority. Those advertisements which would be outdated by some impending event or which responded directly to a recent event or statement should be aired first. However, in order that short-range concerns not be given inordinate attention, considerations of temporal priority should always be subordinate to the considerations of what to air and how often.[45]

The court clearly limited its holding to advertising time on stations already accepting commercial advertisements [46] and to the broadcast media.[47] Yet the court's emphasis on the "especial

plans to meet these needs. Patrick Henry, 30 F.C.C. 1021 (1961). Stations should be able to conduct more frequent surveys to gauge the interest in particular public issues.

[44] However much time is alloted to a particular issue, the fairness doctrine should be applied so that all sides of that issue are given similar exposure. The calculation of how much time has already been afforded to the airing of views on a particular side of an issue would pose further problems for the licensees and the Commission. They would have to decide, for instance, whether to consider views expressed during a program or a commercial advertisement. Previous decisions under the fairness doctrine indicate that at least some commercial advertisements should be considered. The social worth of a product may itself be an important issue and a commercial advertiser speaks for the affirmative on this issue when he promotes his product. *See* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) (fairness doctrine compelled stations which broadcasted cigarette advertising to grant reasonable time for anticigarette announcements); Friends of the Earth v. FCC, 40 U.S.L.W. 2097 (D.C. Cir. Aug. 16, 1971) (fairness doctrine compels stations presenting advertisements for leaded gasoline and high-powered automobiles to air antipollution information).

[45] Standards like those discussed above should not, of course, be applied mechanically. The stations would have to be granted some discretion in developing the specific meaning of such standards for particular situations. However, a station should be expected to provide a justification for its handling of a particular advertorial which is rationally related to the general standards which it is to apply.

[46] DNC sought the right to purchase program time as well as advertising time. It interpreted Judge Wright's opinion to require the sale of programs. Petition for Rehearing, *supra* note 25, at 2, n.2. But the *BEM* court's repeated emphasis that its holding did not detract from the broadcaster's control over his programming time seems directly to contradict this interpretation.

[47] The implications of the opinion extend beyond the broadcast media to the press, however. Though some commentators have argued for a right of access to privately owned daily newspapers for editorial advertisers, *see, e.g.*, Barron, *Access*

suitability" of broadcasting for "the communication of ideas" raises the issue of whether the public should be granted access to programming time [48] on the same basis as advertorials.[49] The programming question is more important than the narrow advertising question; not only are larger amounts of time involved, but also it is difficult to present intelligent positions on complex issues within the temporal confines of one-minute spot announcements.

The court distinguished programming time from advertising time on the ground that the broadcaster closely controls and edits programming, while he merely allocates advertising time to others. It suggested that the broadcaster's retention of control over programming time gave him substantial first amendment interests in this time, and that if the broadcasters were forced to sell some of this time for editorial presentations, these substantial interests would have to be balanced against the first amendment interests of the public.

The court's attempt to distinguish between advertising and programming time seems misconceived; it is in direct conflict with its recognition of the "importance and suitability" of the

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to the Press — A New First Amendment Right, 80 HARV. L. REV. 1641 (1967), the courts have rejected such a right, primarily on findings of no state action. *See, e.g.*, Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971). The court's emphasis in its finding of state action on how historical developments have placed the broadcasting media in a position of primary "importance or suitability" for the communication of ideas, Slip op. at 14, suggests that the press should also no longer be shielded from having to grant a right of access by the state action barrier. The increase in towns with only one daily newspaper or only one publisher is alarming; today over ninety-five per cent of American cities do not have competitive newspapers. *See* Note, *Resolving the Free Speech — Free Press Dichotomy: Access to the Press through Advertising*, 22 U. FLA. L. REV. 293, App. I, Table 1, at 317 (1969). The daily newspapers which remain now have an "importance" in the "communication of ideas" comparable to the public parks and streets in earlier days and to the broadcasting media today. Daily newspaper publishers, by excluding controversial discussion, can now threaten traditionally protected rights of free speech as only the government could have done in the past.

[48] By ruling that broadcasting stations cannot sell program time to commercial advertisers, Columbus Broadcasting Co., 18 P & F RADIO REG. 2D 684 (1970), the Commission has at least insured that stations cannot discriminate in favor of commercial advertisers in the sale of programming time.

[49] Although the court found no need to determine whether the broadcast medium "inherently" amounted to a "public forum," Slip op. at 31, the court's emphasis on broadcasting's "importance and suitability" also suggests that the court would have found that a licensee station which did not sell any time was a public forum. Such a finding would be more reasonable with respect to a news-oriented station such as WTOP than one which played only background mood music. Present listeners of the latter would probably switch to recordings if the station periodically aired advertorials; the audience could not be captured.

broadcasting media for the communication of ideas. Indeed, this recognition suggests that the public should have some access to all broadcasting time, however categorized. To place the programming time question in its proper perspective requires a reformulation of the relationships among broadcasters, the public, and the government. The broadcaster's first amendment interests should not be interpreted to extend with the same force to all air time; indeed, they should be limited primarily to the time expended in editorials, news, and "public interest" presentations. For other programming, as well as advertising time, the broadcaster is better viewed as being responsible for the protection and advancement of the public's first amendment interests, rather than as having a first-amendment-protected freedom to present those programs which will bring him maximum commercial success. Thus, licensees might be required to make available some minimum percentage [50] of programming time under the same guidelines discussed for editorial advertising.[51]

[50] Commissioner Johnson suggested five per cent of prime time or six hours per month as a minimum tentative level. Democratic National Committee, 25 F.C.C.2d 216, 235 (1970) (dissenting opinion).

[51] Cable television may well afford the public additional access to the broadcasting media. Requiring that at least some cable television licensees indiscriminately sell all of their time to all groups who wish to purchase is an attractive proposal. *See* Pemberton, *The Right of Access to Mass Media*, in THE RIGHTS OF AMERICANS 277, 293 (N. Dorsen ed. 1971). However, such a requirement would not obviate the right of access to the major television and radio stations as long as they remain the primary public forum in America. This will surely be the case as long as CATV is restricted to nonmetropolitan areas.

BRIEFS AND APPEARANCES OF COUNSEL

Bernard Dunau, of Washington, D. C., argued the cause and, with **Plato E. Papps, Louis P. Poulton**, both also of Washington, D. C., and **C. Paul Barker**, of New Orleans, Louisiana, filed briefs for petitioner.

For briefs of counsel, see National Labor Relations Board v Boeing Co., p 1129, supra.

Norton J. Come, of Washington, D. C., argued the cause and, with **Peter G. Nash, Patrick Hardin, Stanley R. Zirkin**, all also of Washington, D. C., Solicitor General **Erwin N. Griswold**, of the Department of Justice, Washington, D. C., **Harriet S. Shapiro**, and **John S. Irving** filed a brief for respondent National Labor Relations Board.

For briefs of counsel, see National Labor Relations Board v Boeing Co., p 1130, supra.

Samuel Lang, of New Orleans, Louisiana, argued the cause and, with **C. Dale Stout**, and **Frederick A. Kullman**, both also of New Orleans, Louisiana, filed a brief for respondent Boeing Co.

For briefs of counsel, see National Labor Relations Board v Boeing Co., p 1130, supra.

J. Albert Woll, Laurence Gold, Thomas E. Harris, and **Robert C. Mayer**, all of Washington, D. C., filed a brief for the American Federation of Labor and Congress of Industrial Organizations as amicus curiae urging reversal.

Milton Smith, O. F. Wenzler, both of Washington, D. C., **Gerard C. Smetana**, and **Jerry Kronenberg**, both of Chicago, Illinois, filed a brief for the Chamber of Commerce of the United States as amicus curiae urging affirmance.

COLUMBIA BROADCASTING SYSTEM, Inc., Petitioner,
v
DEMOCRATIC NATIONAL COMMITEE (No. 71–863)

FEDERAL COMMUNICATIONS COMMISSION et al., Petitioners,
v
BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE et al.
(No. 71–864)

POST-NEWSWEEK STATIONS, Capital Area, Inc., Petitioner,
v
BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE
(No. 71–865)

AMERICAN BROADCASTING COMPANIES, Inc., Petitioner,
v
DEMOCRATIC NATIONAL COMMITTEE (No. 71–866)

Reported in this volume: p 772, supra.

Holding: Broadcasters' general policy of refusing to sell any editorial advertising time held not violative of Federal Communications Act of 1934 or First Amendment.

BRIEFS AND APPEARANCES OF COUNSEL

J. Roger Wollenberg argued the cause and, with **Lloyd N. Cutler, Timothy B. Dyk, Daniel Marcus, Noel Anketell Kramer,** all of Washington, D. C., **Robert V. Evans, John D. Appel, Ralph E. Goldberg, Joseph DeFranco,** and **Eleanor S. Applewhaite,** all of New York City, filed briefs for petitioner in No. 71–863:

The goal of the First Amendment in broadcasting is to produce an informed public, rather than to guarantee access to partisan spokesmen to present their particular views. Bond v Floyd, 385 US 116, 136, 17 L Ed 2d 235, 87 S Ct 339; Grosjean v American Press Co. 297 US 233, 247, 80 L Ed 660, 56 S Ct 444; Red Lion Broadcasting Co. v Federal Communications Com. 395 US 367, 392, 23 L Ed 2d 371, 89 S Ct 1794.

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. Red Lion Broadcasting Co. v Federal Communications Com. 395 US 367, 388, 23 L Ed 2d 371, 89 S Ct 1794; National Broadcasting Co. v United States, 319 US 190, 226, 87 L Ed 1344, 63 S Ct 997.

The duties of broadcasting stations are to listeners, unlike those of common carriers, which run to the sender of messages. Great Lakes Broadcasting Co. 3 FRC 32, 33. Broadcasters are not common carriers and are not to be dealt with as such. Federal Communications Com. v Sanders Bros. Radio Station, 309 US 470, 474, 84 L Ed 869, 60 S Ct 693.

Licensees have discretion—within the limits of reasonableness—to choose how best to present opposing views on public issues in order to insure that the frequencies they are assigned will be used to serve the interests of the listening and viewing public. The fairness doctrine is based on the firm recognition that the statutory scheme established by Congress is one based on licensee responsibility to serve the public, not on an indiscriminate right of access to the airwaves. Report on Editorializing by Broadcast Licensees, 13 FCC 1246, 1251, 1252; Green v Federal Communications Com. 144 US App DC 353, 358, 447 F2d 323, 328; 34 Law & Contemp Prob 278, 291.

While Congress and the Commission have certain powers to regulate the broadcast medium, broadcasters remain vital organs of the free press, distinct from the government and protected by the First Amendment. Rosenbloom v Metromedia, Inc. 403 US 29, 29 L Ed 2d 296, 91 S Ct 1811; St. Amant v Thompson, 390 US 727, 20 L Ed 2d 262, 88 S Ct 1323.

The regulatory scheme of the Communications Act did not convert broadcasters' actions into state action. Moose Lodge v Irvis, 407 US 163, 175, 32 L Ed 2d 627, 92 S Ct 1965; McIntire v Wm. Penn Broadcasting Co. 151 F2d 597, cert den 327 US 779, 90 L Ed 1007, 66 S Ct 530; Massachusetts Universalist Convention v Hildreth & Rogers Co. 183 F2d 497; Post v Payton, 323 F Supp 799; 85 Harv L Rev 768, 783.

Government acquiescence in the sense of failure to compel or prohibit a private course of conduct does not transform private action into state action. Evans v Abney, 396 US 435, 445, 24 L Ed 2d 634, 90 S Ct 628; Palmer v Thompson, 403 US 217, 29 L Ed 2d 438, 91 S Ct 1940.

Despite the valuable communications functions which they perform, and despite the many aspects of their activities that are regulated or supported by the state, private newspapers are not the equivalent of the government and are under no affirmative obligation to accept editorial or other advertising. Associates & Aldrich Co. v Times Mirror Co. 440 F2d 133; Resident Participation of Denver, Inc. v Love, 322 F Supp 1100; Chicago Joint Board, etc. v Chicago Tribune Co. 435 F2d 470,

cert den 402 US 973, 29 L Ed 2d 138, 91 S Ct 1662.

The Communications Act does not require broadcasters to sell time for discussion of controversial public issues. McIntire v Wm. Penn Broadcasting Co. 151 F2d 597, 599, cert den 327 US 779, 90 L Ed 1007, 66 S Ct 530; Report on Editorializing by Broadcast Licensees, 13 FCC 1246; Boalt Hall Student Asso. 20 FCC2d 612, 615; Letter to Rep. Ottinger, 18 Pike & Fischer, Radio Reg 2d 1031, 1032.

The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt. Schwegmann Bros. v Calvert Distillers Corp. 341 US 384, 394, 395, 95 L Ed 1035, 71 S Ct 745, 19 ALR2d 1119.

Solicitor General **Erwin N. Griswold** argued the cause and, with Acting Assistant Attorney General **Comegys**, Assistant Solicitor General **Randolph, Howard E. Shapiro**, all of the Department of Justice, Washington, D. C., **John W. Pettit**, and **Charles A. Zielinski**, both of Washington, D. C., filed a brief for petitioners in No. 71–864:

Because the broadcast spectrum is limited, its use must be regulated to accommodate the interests of all. Accordingly, no individual or group has an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. It is the right of the viewers and listeners which is paramount. Red Lion Broadcasting Co. v Federal Communications Com. 395 US 367, 376, 388, 390, 23 L Ed 2d 371, 89 S Ct 1794.

The Commission's fairness doctrine requires licensees to operate as public trustees, giving coverage to public issues that is adequate and fairly reflects opposing views. This must be done at the broadcaster's own expense if necessary. In addition, the broadcaster has an affirmative obligation to discover and fulfil the needs and desires of his particular service area. Failure to comply with these duties can result in loss of the license to broadcast. Red Lion Broadcasting Co. v Federal Communications Com. 395 US 367, 386–401, 23 L Ed 2d 371, 89 S Ct 1794; Cullman Broadcasting Co. 25 Pike & Fischer Radio Reg 895; En banc Program Policy Statement, 25 Fed Reg 7291, 7295.

With respect to questions of public importance, the licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. Report on Editorializing by Broadcast Licensees, 13 FCC 1246, 1251.

The First Amendment should be interpreted so as not to cripple the regular work of 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 radio has to be considered with reference to the satisfactory performance of this job as well as to the value of open discussion. 2 Chafee, Government and Mass Communications 640, 641.

The Constitution permits a range of legislative choices as to how the public's interest in freedom of speech over the airwaves is to be advanced; in the absence of specific direction by Congress the Commission has leeway to decide not to adopt a particular course so long as it has reasonable grounds for refraining so to act and so long as the regulatory scheme it has adopted is consistent with First Amendment values. Red Lion Broadcasting Co. v Federal Communications Com. 395 US 367, 390, 391, 23 L Ed 2d 371, 89 S Ct 1794; National Broadcasting Co. v United States, 319 US 190, 219–220, 87 L Ed 1344, 63 S Ct 997; Federal Communications Com. v Pottsville Broadcasting Co. 309 US 134, 142, 84 L Ed 656, 60 S Ct 437; American Commercial Lines, Inc. v Louisville & N. R. Co. 392 US 571, 591, 592, 20 L Ed 2d

1289, 88 S Ct 2105; Office of Communications of the United Church of Christ v Federal Communications Com. 359 F2d 994, 1005.

Broadcasters are not common carriers. 47 USCS § 153(h).

Ernest W. Jennes argued the cause and, with **Charles A. Miller, Michael Boudin,** and **Tyrone Brown,** all of Washington, D. C., filed briefs for petitioner in No. 71–865:

The central purpose of the First Amendment is to maintain a marketplace of ideas open to the public. In the field of broadcasting, this end is attained when each station exercises its best journalistic judgment in furnishing representative community views on controversial issues in accordance with the fairness doctrine. Red Lion Broadcasting Co. v Federal Communications Com. 395 US 367, 390, 394, 23 L Ed 2d 371, 89 S Ct 1794.

There is no private constitutional right requiring stations to sell time to individuals to assert personal views on controversial issues subject to the fairness doctrine. NBC v United States, 319 US 190, 226, 87 L Ed 1344, 63 S Ct 997; Red Lion Broadcasting Co. v Federal Communications Com. 395 US 367, 388, 23 L Ed 2d 371, 89 S Ct 1794; McIntire v Wm. Penn Broadcasting Co. 151 F2d 597, 601, cert den 327 US 779, 90 L Ed 1007, 66 S Ct 530; Green v Federal Communications Com. 447 F2d 323, 328.

The bearing of the First Amendment on an individual medium or forum depends on its nature, the historical traditions associated with it, the regulatory regime to which it is subject, and the accommodating of free speech with other values. Particular cases are not resolved by generalities regarding forums for communication. Joseph Burstyn, Inc. v Wilson, 343 US 495, 503, 96 L Ed 1098, 72 S Ct 777.

The Commission's construction of the Communications Act as denying any right on the part of any individual member of the public to broadcast his own particular views on any matter is virtually contemporaneous with the Act itself. As the considered view of the agency charged with the statute's execution, it is entitled to great respect. Red Lion Broadcasting Co. v Federal Communications Com. 395 US 367, 381, 23 L Ed 2d 371, 89 S Ct 1794; Udall v Tallman, 380 US 1, 13 L Ed 2d 616, 85 S Ct 792.

A difference in treatment is lawful under equal protection standards when it is reasonable, not arbitrary, and bears a rational relationship to the achievement of legitimate ends. Reed v Reed, 404 US 71, 75, 76, 30 L Ed 2d 225, 92 S Ct 251; McGowan v Maryland, 366 US 420, 6 L Ed 2d 393, 81 S Ct 1101; Railway Express Agency, Inc. v New York, 336 US 106, 93 L Ed 533, 69 S Ct 463; Williamson v Lee Optical Co. 348 US 483, 99 L Ed 563, 75 S Ct 461; Lindsley v Natural Carbonic Gas Co. 220 US 61, 55 L Ed 369, 31 S Ct 337.

Congress, far from entrusting the function of broadcasting to the government, provided for licensing of numerous stations operating in free competition with one another, and forbade censorship by the Commission. Federal Communications Com. v Sanders Bros. Radio Station, 309 US 470, 474, 475, 84 L Ed 869, 60 S Ct 693.

Broadcasters are not instrumentalities of the government for state action purposes. McIntire v Wm. Penn Broadcasting Co. 151 F2d 597, 601, cert den 327 US 779, 90 L Ed 1007, 66 S Ct 530; Massachusetts Universalist Convention v Hildreth & Rogers, 183 F2d 497; Post v Payton, 323 F Supp 799.

It is not state regulation considered at large that is decisive, but whether the state has significantly involved itself with the particular conduct challenged as impermissible under the Constitution. Moose Lodge v Irvis, 407 US 163, 173, 176, 32 L Ed 2d 627, 92 S Ct 1965.

The presence of an audience and the feasibility of communicating are not themselves characteristics that convert an enterprise into a public forum

subject to the same First Amendment constraints that apply to the state itself. Lloyd Corp. v Tanner, 407 US 551, 33 L Ed 2d 131, 92 S Ct 2219.

Vernon L. Wilkinson, of Washington, D. C., argued the cause and, with **James A. McKenna, Jr.,** and **Carl R. Ramey,** both also of Washington, D. C., filed a brief for petitioner in No. 71–866:

The interrelationship between the FCC and its licensees is not such that broadcast station operation effectively represents state action to which First Amendment protections extend. McIntire v Wm. Penn Broadcasting Co. 151 F2d 597, 600, cert den 327 US 779, 90 L Ed 1007, 66 S Ct 530; Massachusetts Universalist Convention v Hildreth & Rogers Co. 183 F2d 497.

The relevant First Amendment objective is to guarantee that the listening and viewing public is not left uninformed—not to guarantee an individual right of access. Associated Press v United States, 326 US 1, 20, 89 L Ed 2013, 65 S Ct 1416; Red Lion Broadcasting Co. v Federal Communications Com. 395 US 367, 390, 23 L Ed 2d 371, 89 S Ct 1794; Meiklejohn, Political Freedom: The Constitutional Powers of The People 26; National Broadcasting Co. v United States, 319 US 190, 226, 87 L Ed 1344, 63 S Ct 997.

Application of the First Amendment turns on the purpose and function of the medium of communication involved. Joseph Burstyn, Inc. v Wilson, 343 US 495, 502, 96 L Ed 1098, 72 S Ct 777.

The public trustee concept underlying the statutory standard deliberately and inherently rejects a common carrier role for broadcasting. 47 USCS § 153(h); McIntire v Wm. Penn Broadcasting Co. 151 F2d 597, cert den 327 US 779, 90 L Ed 1007, 66 S Ct 530.

In performing that dimension of his public trustee role involving the selection of material to be broadcast, the licensee is guided by a standard which anticipates a diligent, positive, and continuing effort to discover and fulfil the tastes, needs, and desires of his community or service area. En banc Program Policy Statement, 20 Pike & Fischer, Radio Reg 1901, 1915, 25 Fed Reg 7291, 7295.

Joseph A. Califano, Jr., argued the cause and, with **John G. Kester,** both of Washington, D. C., filed a brief for respondent Democratic National Committee in Nos. 71–863, 71–864, and 71–866:

The statutory public interest requirement prohibits licensees from totally banning purchase of time to discuss political issues. United Broadcasting Co. 10 FCC 515, 518; Robert Harold Scott, 11 FCC 372; Homer P. Rainey, 11 FCC 898, 903; Albuquerque Broadcasting Co. 3 Pike & Fischer, Radio Reg 1820, 1821; City of Jacksonville, 21 FCC 334, 342, 408.

The free speech provision of 47 USCS § 326 expresses an affirmative policy that the people not be totally denied access to their airwaves whether by the government or the government's licensees. Editorializing by Broadcast Licensees, 13 FCC 1246, 1248.

When the question is one not of telephone rates or channel interferences, but rather of free speech, no administrative body has more expertise than this court. New York Times Co. v Sullivan, 376 US 254, 285, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412; Pennekamp v Florida, 328 US 331, 335, 90 L Ed 1295, 66 S Ct 1029.

Congress had no intention, in excluding broadcast licensees from the traditional category of common carriers for hire, to exempt the system of broadcasting regulation from public interest and free speech requirements. Federal Communications Com. v Sanders Bros. Radio Station, 309 US 470, 474, 84 L Ed 869, 60 S Ct 693; 2 Chafee, Government and Mass Communications 635.

Debate on public issues is to be uninhibited, robust, and wide open. Dissent in Abrams v United States, 250 US 616, 630, 63 L Ed 1173, 40 S Ct 17; New York Times Co. v Sullivan, 376 US 254, 270, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412; Pickering v Board of Education, 391 US 563,

573, 20 L Ed 2d 811, 88 S Ct 1731; Red Lion Broadcasting Co. v Federal Communications Com. 395 US 367, 390, 23 L Ed 2d 371, 89 S Ct 1794.

The public's First Amendment right to be informed includes the right of direct communication with the proponents of ideas. Red Lion Broadcasting Co. v Federal Communications Com. 395 US 367, 390, 392, 23 L Ed 2d 371, 89 S Ct 1794; Martin v Struthers, 319 US 141, 143, 87 L Ed 1313, 63 S Ct 862.

The First Amendment forbids an arbitrary and total barring of paid political broadcasts from a forum which belongs to the public, is dedicated purely to communication, and is probably the most effective medium for influencing public opinion. Grayned v Rockford, 408 US 104, 33 L Ed 2d 222, 232, 92 S Ct 2294.

The unique characteristics of publicly licensed broadcasting imply corresponding unique obligations. Red Lion Broadcasting Co. v Federal Communications Com. 395 US 367, 386, 23 L Ed 2d 371, 89 S Ct 1794; Joseph Burstyn, Inc. v Wilson, 343 US 495, 503, 96 L Ed 1098, 72 S Ct 777.

The First and Fifth Amendments forbid a ban which discriminates absolutely against paid announcements on political subjects and in favor of commercial advertisements. Police Dept. v Mosley, 408 US 92, 33 L Ed 2d 212, 92 S Ct 2286; Grayned v Rockford, 408 US 104, 33 L Ed 2d 222, 92 S Ct 2294.

The First Amendment forbids a ban which, in barring whatever a licensee labels controversial, is both unconstitutionally vague and overbroad. Shuttleswerth v Birmingham, 394 US 147, 22 L Ed 2d 162, 89 S Ct 935; Wirta v Alameda-Contra Costa Transit Dist. 64 Cal Rptr 430, 434 P2d 982.

When an agency has failed in its duty to safeguard rights it is charged to protect, no room is left for administrative or expert judgment with reference to practical difficulties. Boynton v Virginia, 364 US 454, 459, 5 L Ed 2d 206, 81 S Ct 182.

Government violates the First Amendment when it lends its authority to a system of private censorship. See Bantam Books, Inc. v Sullivan, 372 US 58, 9 L Ed 2d 584, 83 S Ct 631.

Public and private property are subject to differing constitutional standards for access. Where property is publicly owned, access for purposes of exercising First Amendment rights cannot be denied absolutely. Lloyd Corp. v Tanner, 407 US 551, 33 L Ed 2d 131, 92 S Ct 2219.

When government undertakes to regulate in detail a practice or group of practices of a regulated entity, to that extent the practice can no longer be treated as wholly private. Moose Lodge v Irvis, 407 US 163, 32 L Ed 2d 627, 92 S Ct 1965; Public Utilities Com. v Pollak, 343 US 451, 96 L Ed 1068, 72 S Ct 813.

Constitutional restrictions may not be avoided by a governmental grant of authority to take unconstitutional action, particularly when the grant contradicts previous governmental policy. Evans v Newton, 382 US 296, 15 L Ed 2d 373, 86 S Ct 486; Lombard v Louisiana, 373 US 267, 10 L Ed 2d 338, 83 S Ct 1122; McCabe v Atchison, T. & S. F. R. Co. 235 US 151, 59 L Ed 169, 35 S Ct 69; Reitman v Mulkey, 387 US 369, 379, 18 L Ed 2d 830, 87 S Ct 1627; Nixon v Condon, 286 US 73, 76 L Ed 984, 52 S Ct 484, 88 ALR 458; Burton v Wilmington Parking Authority, 365 US 715, 725, 6 L Ed 2d 45, 81 S Ct 856.

Thomas R. Asher, of Washington, D. C., argued the cause and, with **Albert H. Kramer,** also of Washington, D. C., filed a brief for Vietnam Peace in Nos. 71–864 and 71–865:

Once a forum utilized for speech has been opened up for commercial advertising, a ban on controversial advertising is unconstitutional unless clearly justified by a clear and present danger. Police Dept. of Chicago v Mosley, 408 US 92, 33 L Ed 2d 212, 217, 92 S Ct 2286; Wirta v Alameda-Contra Costa Transit Dist. 68 Cal 2d 51, 64 Cal Rptr 430, 434 P2d 982, 985.

Basic First Amendment principles are not compatible with the suggestion

that broadcast licensees should function as authoritative middlemen, picking and choosing which ideas they think the public should hear, and rejecting those it should not. Thomas v Collins, 323 US 516, 545, 89 L Ed 430, 65 S Ct 315.

The fairness doctrine was designed as a supplement to, not a substitute for, self-initiated editorial speech. United Broadcasting Co. (WHKC) 10 FCC 515; Robert Harold Scott, 11 FCC 372, 374; Homer P. Rainey, 11 FCC 898; Editorializing by Broadcast Licensees, 13 FCC 1246, 1251.

The fairness doctrine vests broad discretion in the licensee to determine which issues will initially be covered; which issue is raised by the program in question; whether the matter is controversial; the amount of time to be devoted to opposing views; the scheduling of the opposing views; the frequency with which such views are presented; the format with which contrasting views are presented; and the spokesman who will present the views. 29 Fed Reg 10415, 10416.

The fact that a judicial decision concerning First Amendment rights may create future administrative problems is no reason for the court to avoid resolving important constitutional issues; this is particularly true here since the Commission has broad discretion to formulate and adopt guidelines designed to minimize such problems. Red Lion Broadcasting Co. v Federal Communications Com. 395 US 367, 393, 23 L Ed 2d 371, 89 S Ct 1794.

A licensee's interest in keeping even highly controversial speech off the air is minimal. Anti-Defamation League of B'nai B'rith, 4 FCC2d 190, 191, affd 131 US App DC 146, 403 F2d 169, cert den 394 US 930, 22 L Ed 2d 459, 89 S Ct 1190.

The physical limitations on the amount of spectrum space available for radio broadcasting and the large demands upon radio stations for use of time make it impossible for every person desiring to use the facilities of a station to be granted this privilege. Under Communications Act § 3 (h) broadcast stations are expressly declared not to be common carriers. These facts, however, in no way impinge upon the duty of each station licensee to make sufficient time available, on a nondiscriminatory basis, for full discussion of issues, without any type of censorship. United Broadcasting Co. (WHKC) 10 FCC 515, 517, 518.

State action derives from the license or "lease" of control over public property from the government to individual licensees and the government's close supervision and control of licensees' broadcasting policies. Burton v Wilmington Parking Authority, 365 US 715, 726, 6 L Ed 2d 45, 81 S Ct 856.

State action derives from the Commission's involvement in, and approval of, its licensees' flat ban against editorial advertisements. Public Utilities Com. v Pollak, 343 US 451, 462, 96 L Ed 1068, 72 S Ct 813.

State action derives from the power and importance of the broadcast medium, one dedicated solely to communication. Marsh v Alabama, 326 US 501, 504, 90 L Ed 265, 66 S Ct 276; Amalgamated Food Employees Union v Logan Valley Plaza, Inc. 391 US 308, 20 L Ed 2d 603, 88 S Ct 1601.

Floyd Abrams and **Corydon B. Dunham**, both of New York City, filed a brief for National Broadcasting Co., Inc., as amicus curiae urging reversal.

J. Albert Woll, Laurence Gold, Robert C. Mayer, and **Thomas E. Harris,** all of Washington, D. C., filed a brief for the American Federation of Labor and Congress of Industrial Organizations as amicus curiae urging affirmance.

*[376 US 254]

*NEW YORK TIMES COMPANY, Petitioner,

v

L. B. SULLIVAN (No. 39)

RALPH D. ABERNATHY et al., Petitioners,

v

L. B. SULLIVAN (No. 40)

376 US 254, 11 L ed 2d 686, 84 S Ct 710, 95 ALR2d 1412

[Nos. 39, 40]

Argued January 6, 1964. Decided March 9, 1964.

SUMMARY

The present action for libel was brought in the Circuit Court of Montgomery County, Alabama, by a city commissioner of public affairs whose duties included the supervision of the police department; the action was brought against the New York Times for publication of a paid advertisement describing the maltreatment in the city of Negro students protesting segregation, and against four individuals whose names, among others, appeared in the advertisement. The jury awarded plaintiff damages of $500,000 against all defendants, and the judgment on the verdict was affirmed by the Supreme Court of Alabama (273 Ala 656, 144 So 2d 25) on the grounds that the statements in the advertisement were libelous per se, false, and not privileged, and that the evidence showed malice on the part of the newspaper; the defendants' constitutional objections were rejected on the ground that the First Amendment does not protect libelous publications.

On writs of certiorari, the Supreme Court of the United States reversed the judgment below and remanded the case to the Alabama Supreme Court. In an opinion by BRENNAN, J., expressing the views of six members of the Court, it was held that (1) the rule of law applied by the Alabama courts was constitutionally deficient for failure to provide the safeguards for freedom of speech and press that are required by the constitutional guaranty in a libel action brought by a public official against critics of his official conduct, and in particular, for failure to provide a qualified privilege for honest misstatements of fact, defeasible only upon a showing of actual malice; and (2) under the proper standards the evidence presented in the case was constitutionally insufficient to support the judgment for plaintiff.

BLACK, J., joined by DOUGLAS, J., and GOLDBERG, J., joined by DOUGLAS, J., concurred in the result in separate opinions. The concurring opinions

expressed the view that the constitutional guaranty of free speech and press afforded the defendants an absolute, unconditional privilege to publish their criticism of official conduct.

SUBJECT OF ANNOTATION

Beginning on page 1116, infra

The Supreme Court and the right of free speech and press

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Constitutional Law § 927.5 — freedom of speech and press — attack on public officials

1. State rules of law governing a libel action brought by a public official against critics of his official conduct are constitutionally deficient where these rules fail to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in such an action, and evidence disregarding the proper safeguards is constitutionally insufficient to support a judgment for the plaintiff.

[*See annotation references* 1, 2]

Appeal and Error § 799 — from state court — jurisdiction over foreign corporation

2. A contention of a foreign corporation that the assumption of jurisdiction over its corporate person by a state court overreaches the territorial limits of the due process clause is foreclosed from United States Supreme Court review by a ruling of the state courts, not lacking fair or substantial support in prior state court decisions, that the corporation entered a general appearance in the action and thus waived its jurisdictional objection.

Constitutional Law § 520 — Fourteenth Amendment — what is state action

3. The rule that the Fourteenth Amendment is directed against state action and not private action has no application where the state courts in a civil lawsuit have applied a state rule of law which is claimed to impose invalid restrictions on a party's constitutional freedoms of speech and press; it matters not that the state law has been applied in a civil action between private parties and that it is common law only, though supplemented by statute.

Constitutional Law § 520 — Fourteenth Amendment — test of state action

4. In determining whether the Fourteenth Amendment is violated by state action, the test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

ANNOTATION REFERENCES

1. The Supreme Court and the right of free speech and press. 93 L ed 1151, 2 L ed 2d 1706.

2. Libel and slander: actionability of statement imputing incapacity, inefficiency, misconduct, fraud, dishonesty, or the like to public employee. 53 ALR2d 8.

3. Doctrine of privilege or fair comment as applicable to misstatements of fact in publication relating to public officer or candidate for office. 110 ALR 412, 150 ALR 358.

4. Constitutionality of statutes or ordinances making one fact presumptive evidence of another. 51 ALR 1139, 86 ALR 179, 162 ALR 495.

5. Retraction as affecting right of action or amount of damages for libel or slander. 13 ALR 794.

6. Sufficiency of identification of plaintiff by publication or statement complained of as libelous or slanderous. 91 ALR 1161.

7. Libel and slander: publication or statement as defamatory, by reason of extrinsic facts, of person not referred to nor intended to be referred to. 69 ALR 734.

8. What evidence is admissible to identify plaintiff as person defamed. 95 ALR 2d 227.

Constitutional Law § 925 — freedom of speech and press

5. The First Amendment secures the widest possible dissemination of information from diverse and antagonistic sources.

[*See annotation reference* 1 *and annotation p.* 1116, *infra*]

Advertising § 1; Constitutional Law § 930 — freedom of speech and press — libelous statement

6. An allegedly libelous statement does not forfeit its protection under the constitutional guaranty of freedom of speech and press merely because it was published in the form of a paid advertisement.

[*See annotation reference* 1 *and annotation p.* 1116, *infra*]

Constitutional Law § 927.5 — freedom of speech and press — libel laws — criticism of public officials

7. Judicial statements to the effect that the Federal Constitution does not protect libelous publications do not foreclose the United States Supreme Court from measuring, by standards satisfying the First Amendment, the use of libel laws to impose sanctions upon expressions critical of the official conduct of public officials.

[*See annotation reference* 1 *and annotation p.* 1116, *infra*]

Constitutional Law § 930 — freedom of speech and press — libel

8. Like "insurrection," contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in the United States Supreme Court as violating the constitutional guaranty of freedom of speech and press, libel can claim no talismanic immunity from constitutional limitations.

[*See annotation reference* 1 *and annotation p.* 1116, *infra*]

Constitutional Law § 925 — freedom of speech and press — public questions

9. Freedom of expression upon public questions is secured by the First Amendment.

[*See annotation reference* 1 *and annotation p.* 1116, *infra*]

Constitutional Law § 925 — freedom of speech and press

10. The protection given free speech and press by the Federal Constitution was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

[*See annotation reference* 1 *and annotation p.* 1116, *infra*]

Constitutional Law § 925 — freedom of speech

11. It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion.

[*See annotation reference* 1 *and annotation p.* 1116, *infra*]

Constitutional Law §§ 927, 927.5 — freedom of speech — attack on government and public officials

12. The First Amendment requires that debate on public issues should be uninhibited, robust, and wide open, and such debate may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

[*See annotation references* 1, 2 *and annotation p.* 1116, *infra*]

Constitutional Law §§ 927.5, 930 — freedom of speech — attack on public official — truth of statements

13. An advertisement published in a newspaper describing the maltreatment in an Alabama city of Negro students protesting segregation qualifies for the First Amendment's protection and does not forfeit that protection merely because of the falsity of some of its factual statements and its alleged defamation of a city official; the First Amendment does not recognize an exception for any test of truth, whether administered by judges, juries, or administrative officials, and especially not one that puts the burden of proving truth on the speaker.

[*See annotation references* 1, 2 *and annotation p.* 1116, *infra*]

Constitutional Law § 925 — freedom of speech

14. The protection of the constitutional guaranty of freedom of speech and press does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered.

[*See annotation reference* 1 *and annotation p.* 1116, *infra*]

Constitutional Law § 927.5 — freedom of speech — attack on public officials

15. Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error; criticism of official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes official reputations.

[*See annotation references* 1–3 *and annotation p.* 1116, *infra*]

Constitutional Law § 927.5 — attack on official conduct

16. Since neither factual error nor defamatory content suffices to remove the protection of the constitutional guaranty of freedom of speech and press from criticism of official conduct, the combination of the two elements is no less inadequate.

[*See annotation references* 1, 2 *and annotation p.* 1116, *infra*]

Constitutional Law § 925.5 — freedom of speech and press — applicability to states

17. The Fourteenth Amendment makes the First Amendment applicable to the states.

Constitutional Law § 930 — freedom of speech — libel

18. What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.

[*See annotation reference* 1 *and annotation p.* 1116, *infra*]

Constitutional Law § 930 — freedom of speech — libel — defense of truth

19. A state law of civil libel which infringes the constitutional guaranty of freedom of speech and press is not saved by its allowance of the defense of truth.

[*See annotation reference* 1 *and annotation p.* 1116, *infra*]

Constitutional Law § 927.5 — attack on public officials — necessity of actual malice

20. The constitutional guaranty of freedom of speech and press prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard of whether it was false or not; such a qualified privilege of honest mistake of fact is required by the First and Fourteenth Amendments.

[*See annotation references* 1–3 *and annotation p.* 1116, *infra*]

Constitutional Law § 927.5 — freedom of speech — attack on public officials — presumption of malice

21. A presumption of malice where general damages in a libel action are concerned is, as applied to a libel action brought by a public official against critics of his official conduct, inconsistent with the constitutional guaranty of freedom of speech and press, which affords the defendant a qualified privilege of honest mistake.

[*See annotation references* 1–4 *and annotation p.* 1116, *infra*]

Constitutional Law § 829 — presumptions

22. The power of the legislature to create presumptions is not a means of escape from constitutional restrictions.

[*See annotation reference* 4]

Appeal and Error § 1641 — reversal — uncertainty of verdict

23. A state judgment affirming a judgment for a public official in his libel action against critics of his official conduct must be reversed by the United States Supreme Court where state law, inconsistent with the requirement of the constitutional guaranty of freedom of speech and press, presumes malice insofar as

general damages are concerned, the trial judge did not instruct the jury to differentiate between general and punitive damages, and in view of the general verdict returned by the jury it is impossible to know whether the verdict was wholly an award of one or the other.

Appeal and Error § 745 — from state court — libel action of public official — review of evidence

24. Considerations of effective judicial administration require the United State Supreme Court to review the evidence in the record for the purpose of determining whether it could constitutionally support a judgment for a public official in his state court libel action against critics of his official conduct, where the judgment is reversed on the ground that the state law applied violates the constitutional guaranty of freedom of speech and press, and the official may seek a new trial.

Appeal and Error § 745 — from state court — review of evidence

25. Upon review of a state court judgment, the United States Supreme Court's duty is not limited to the elaboration of constitutional principles; the Court must also in proper cases review the evidence to make certain that those principles have been constitutionally applied.

Appeal and Error § 751 — from state court — review of evidence — freedom of speech and press

26. On review of a state court judgment in cases in which a line must be drawn between speech unconditionally guaranteed and speech which may legitimately be regulated, the United States Supreme Court examines for itself the statements in issue and the circumstances under which they were made to see whether they are of a character protected by the constitutional guaranty of freedom of speech; the Court must make an independent examination of the whole record so as to assure itself that the judgment below does not constitute a forbidden intrusion on the field of free expression.

Constitutional Law § 38 — Seventh Amendment — applicability to state cases

27. The Seventh Amendment, providing that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, is applicable to state cases coming to the United States Supreme Court.

Jury § 2 — Seventh Amendment — review of facts by United States Supreme Court

28. The Seventh Amendment's ban on re-examination of facts tried by a jury does not preclude the United States Supreme Court from determining whether governing rules of federal law have been properly applied to the facts.

Appeal and Error § 751 — from state court — review of findings of fact

29. The United States Supreme Court will review the findings of fact by a state court where conclusions of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.

Evidence § 918 — sufficiency — malice

30. In a libel action brought in a state court by a public official against signers of a newspaper advertisement describing the maltreatment in an Alabama city of Negro students protesting segregation, proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence does not constitutionally sustain a judgment for the plaintiff, where, assuming that the defendants could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard.

[*See annotation reference* 3]

Evidence § 174 — libel — inference of malice

31. In a libel action brought in a state court by a public official against a newspaper for publication of an advertisement describing the maltreat-

ment in an Alabama city of Negro students protesting segregation, a statement by the secretary of the newspaper that he thought that the advertisement was substantially correct affords no constitutional warrant for inferring actual malice from his ignoring the falsity of the advertisement, where his opinion was at least a reasonable one, and there was no evidence to impeach his good faith.

[*See annotation reference* 3]

Evidence § 174 — libel — inference of malice

32. In a libel action brought in a state court by a public official against a newspaper for publication of an advertisement describing the maltreatment in an Alabama city of Negro students protesting segregation, the newspaper's failure to retract upon plaintiff's demand is not adequate evidence of actual malice for constitutional purposes, even though the newspaper later retracted upon the demand of the governor of Alabama.

[*See annotation reference* 5]

Evidence § 175 — libel against newspaper — inference of malice

33. In a libel action brought in a state court by a public official against a newspaper for publication of an advertisement describing the maltreatment in an Alabama city of Negro students protesting segregation, evidence that the newspaper published the advertisement without checking its accuracy against the news stories in its own files is not adequate evidence of actual malice for constitutional purposes, where the record shows that the employees of the newspaper having responsibility for the publication of the advertisement relied upon their knowledge of the good reputation of many of the signers of the advertisement and upon a letter from a person known to them as a responsible individual, certifying that the use of the names of the signers was authorized; evidence supporting a finding of negligence in failing to discover the misstatements in the advertisement is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.

Evidence § 913 — libel — identifying defamed person

34. In a libel action brought in a state court by a city commissioner of public affairs against a newspaper for publication of an advertisement describing the maltreatment in an Alabama city of Negro students protesting segregation, the evidence is constitutionally incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" plaintiff, where (1) there was no reference to the plaintiff in the advertisement either by name or official position, (2) the statements in the advertisement could not reasonably be read as accusing plaintiff of personal involvement in the acts described therein, (3) these statements, although possibly referring to the police, did not on their face make even an oblique reference to plaintiff as an individual, and (4) none of the plaintiff's witnesses suggested any basis for the belief that plaintiff himself was attacked in the advertisement beyond the bare fact that he was in overall charge of the police department and thus bore official responsibility for police conduct.

[*See annotation references* 6–8]

Libel and Slander § 11 — libel of government and government officials

35. Prosecution for libel on government has no place in the American system of jurisprudence, and this rule cannot be sidestepped by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed.

Libel and Slander § 21 — defamation of police commissioner — fair comment

36. In the absence of a showing of actual malice, recovery in a libel action brought by a police commissioner against critics of his ability to run the police department is precluded by the doctrine of fair comment.

[*See annotation reference* 3]

Constitutional Law § 927.5 — free speech — defamation of public official

37. Since in an action brought by a public official against critics of his official conduct the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact, both defenses being defeasible if the public official proves actual malice.

[*See annotation references* 1, 3 *and annotation p.* 1116, *infra*]

Constitutional Law § 927.5 — freedom of speech — attack on government operations as attack on government officials

38. The constitutional guaranty of freedom of speech and press precludes an otherwise impersonal attack on governmental operations from being treated as a libel of an official responsible for those operations.

APPEARANCES OF COUNSEL

Herbert Wechsler argued the cause for petitioner in No. 39.

William P. Rogers and **Samuel R. Pierce, Jr.**, argued the cause for petitioners in No. 40.

M. Roland Nachman, Jr., argued the cause for respondent in Nos. 39 and 40.

Briefs of Counsel, p 1109, infra.

OPINION OF THE COURT

*[376 US 256]

*Mr. Justice **Brennan** delivered the opinion of the Court.

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He testified that he was "Commissioner of Public Affairs and the duties are supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales." He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company, a New York corporation which publishes the New York Times, a daily newspaper. A jury in the Circuit Court of Montgomery County awarded him damages of $500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed. 273 Ala 656, 144 So 2d 25.

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the New York Times on March 29, 1960.[1] Entitled "Heed Their Rising Voices," the advertisement began by stating that "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights." It went on to charge that "in their efforts to uphold these guarantees, they are being met by

1. A copy of the advertisement is printed in the Appendix.

an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . ."

*[376 US 257]

Succeeding *paragraphs purported to illustrate the "wave of terror" by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, "the struggle for the right-to-vote," and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

The text appeared over the names of 64 persons, many widely known for their activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal," appeared the names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," and the officers of the Committee were listed.

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:

Third paragraph:

"In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."

Sixth paragraph:

"Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and

*[376 US 258]

child. They have *assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten years*. . . ."

Although neither of these statements mentions respondent by name, he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of "ringing" the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission.[2] As to the sixth paragraph, he contended that since arrests are ordinarily made by the police, the statement "They have arrested [Dr. King] seven times" would be read as referring to him; he further contended that the "They" who did the arresting would be equated with the "They" who committed the other described acts and with the "Southern violators." Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with

2. Respondent did not consider the charge of expelling the students to be applicable to him, since "that responsibility rests with the State Department of Education."

"intimidation and violence," bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capitol steps, they sang the National Anthem and not "My

*[376 US 259]

*Country, 'Tis of Thee." Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. Although Dr. King's home had in fact been bombed twice when his wife and child were there, both of these occasions antedated respondent's tenure as Commissioner, and the police were not only not implicated in the bombings, but had made every effort to apprehend those who were. Three of Dr. King's four arrests took place before respondent became Commissioner. Although Dr. King had in fact been indicted (he was subsequently acquitted) on two counts of perjury, each of which carried a possible five-year sentence, respondent had nothing to do with procuring the indictment.

*[376 US 260]

*Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel.[3] One of his witnesses, a former employer, testified that if he had believed the statements, he doubted whether he "would want to be associated with anybody who would be a party to such things that are stated in that ad," and that he would not re-employ respondent if he believed "that he allowed the Police Department to do the things that the paper say he did." But neither this witness nor any of the others testified that he had actually believed the statements in their supposed reference to respondent.

The cost of the advertisement was approximately $4800, and it was

3. Approximately 394 copies of the edition of the Times containing the advertisement were circulated in Alabama. Of these, about 35 copies were distributed in Montgomery County. The total circulation of the Times for that day was approximately 650,000 copies.

published by the Times upon an order from a New York advertising agency acting for the signatory Committee. The agency submitted the advertisement with a letter from A. Philip Randolph, Chairman of the Committee, certifying that the persons whose names appeared on the advertisement had given their permission. Mr. Randolph was known to the Times' Advertising Acceptability Department as a responsible person, and in accepting the letter as sufficient proof of authorization it followed its established practice. There was testimony that the copy of the advertisement which accompanied the letter listed only the 64 names appearing under the text, and that the statement, "We in the south . . . warmly endorse this appeal," and the list of names thereunder, which included those of the individual petitioners, were subsequently added when the first proof of the advertisement was received. Each of the individual petitioners testified that he had not authorized the use of his name, and that he had been unaware of its use until receipt of respondent's demand for a retraction. The manager of the

*[376 US 261]

Advertising *Acceptability Department testified that he had approved the advertisement for publication because he knew nothing to cause him to believe that anything in it was false, and because it bore the endorsement of "a number of people who are well known and whose reputation" he "had no reason to question." Neither he nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.

Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Alabama Code, Tit. 7, § 914. Respondent served such a demand upon each of the petitioners. None of the individual petitioners responded to the demand, primarily because each took the position that he had not authorized the use of his name on the advertisement and therefore had not published the statements that respondent alleged had libeled him. The Times did not publish a retraction in response to the demand, but wrote respondent a letter stating, among other things, that "we . . . are somewhat puzzled as to how you think the statements in any way reflect on you," and "you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you." Respondent filed this suit a few days later without answering the letter. The Times did, however, subsequently publish a retraction of the advertisement upon the demand of Governor John Patterson of Alabama, who asserted that the publication charged him with "grave misconduct and . . . improper actions and omissions as Governor of Alabama and Ex-Officio Chairman of the State Board of Education of Alabama." When asked to explain why there had been a retraction for the Governor but not

*[376 US 262]

for respondent, the *Secretary of the Times testified: "We did that because we didn't want anything that was published by The Times to be a reflection on the State of Alabama and the Governor was, as far as we could see, the embodiment of the State of Alabama and the proper representative of the State and, furthermore, we had by that time learned more of the actual facts which the ad purported to recite and,

finally, the ad did refer to the action of the State authorities and the Board of Education presumably of which the Governor is the ex-officio chairman . . . ." On the other hand, he testified that he did not think that "any of the language in there referred to Mr. Sullivan."

The trial judge submitted the case to the jury under instructions that the statements in the advertisement were "libelous per se" and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made "of and concerning" respondent. The jury was instructed that, because the statements were libelous per se, "the law . . . implies legal injury from the bare fact of publication itself," "falsity and malice are presumed," "general damages need not be alleged or proved but are presumed," and "punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown." An award of punitive damages—as distinguished from "general" damages, which are compensatory in nature—apparently requires proof of actual malice under Alabama law, and the judge charged that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages." He refused to charge, however, that the jury must be "convinced" of malice, in the sense of "actual intent" to harm or "gross negligence and recklessness," to make such an award, and he also refused to require that a verdict for respondent differentiate between compensatory and punitive damages.

*[376 US 263]

The judge rejected petitioners' *contention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.

In affirming the judgment, the Supreme Court of Alabama sustained the trial judge's rulings and instructions in all respects. 273 Ala 656, 144 So 2d 25. It held that "where the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tend to bring the individual into public contempt," they are "libelous per se"; that "the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff"; and that it was actionable without "proof of pecuniary injury . . . , such injury being implied." Id., at 673, 676, 144 So 2d, at 37, 41. It approved the trial court's ruling that the jury could find the statements to have been made "of and concerning" respondent, stating: "We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body." Id., at 674–675, 144 So 2d, at 39. In sustaining the trial court's determination that the verdict was not excessive, the court said that malice could be inferred from the Times' "irresponsibility" in printing the advertisement while "the Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement"; from the Times' failure to retract for respondent while retracting for the Governor, whereas the falsity of some of the allegations was then

known to the Times and "the matter contained in the advertisement was equally false as to both parties"; and from the testimony of the

*[376 US 264]

Times' Secretary that, *apart from the statement that the dining hall was padlocked, he thought the two paragraphs were "substantially correct." Id., at 686–687, 144 So 2d, at 50–51. The court reaffirmed a statement in an earlier opinion that "There is no legal measure of damages in cases of this character." Id., at 686, 144 So 2d, at 50. It rejected petitioners' constitutional contentions with the brief statements that "The First Amendment of the U. S. Constitution does not protect libelous publications" and "The Fourteenth Amendment is directed against State action and not private action." Id., at 676, 144 So 2d, at 40.

Because of the importance of the constitutional issues involved, we granted the separate petitions for certiorari of the individual petitioners and of the Times. 371 US 946, 9 L ed 2d 496, 83 S Ct 510. We reverse the judgment. We hold that

Headnote 1 the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official con-

*[376 US 265]

duct.[4] We *further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

I.

We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court—that "The Fourteenth Amendment is directed against State action and not private action." That proposition has no application to this case.

Headnote 3 Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. See, e. g., Alabama Code, Tit 7, §§ 908–917. The

Headnote 4 test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. See Ex parte Virginia, 100 US 339, 346–347,

4. Since we sustain the contentions of all the petitioners under the First Amendment's guarantees of freedom of speech and of the press as applied to the States by the Fourteenth Amendment, we do not decide the questions presented by the other claims of violation of the Fourteenth Amendment. The individual petitioners contend that the judgment against them offends the Due Process Clause because there was no evidence to show that they had published or authorized the publication of the alleged libel, and that the Due Process and Equal Protection Clauses were violated by racial segregation and racial bias in the courtroom. The Times contends that the assumption of jurisdiction over its corporate person by the

Headnote 2 Alabama courts overreaches the territorial limits of the Due Process Clause. The latter claim is foreclosed from our review by the ruling of the Alabama courts that the Times entered a general appearance in the action and thus waived its jurisdictional objection; we cannot say that this ruling lacks "fair or substantial support" in prior Alabama decisions. See Thompson v Wilson, 224 Ala 299, 140 So 439 (1932); compare N. A. A. C. P. v Alabama, 357 US 449, 454–458, 2 L ed 2d 1488, 1495–1497, 78 S Ct 1163.

25 L ed 676, 679, 680; American Federation of Labor v Swing, 312 US 321, 85 L ed 855, 61 S Ct 568.

The second contention is that the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, "commercial" advertisement. The argument relies on Valentine v Chrestensen, 316 US 52, 86 L ed 1262, 62 S Ct 920, where the Court held that a city ordinance forbidding street distribution of commercial and business advertising matter did not abridge the First Amendment freedoms, even as applied to a handbill having a commercial message on one side but a protest against certain official action on the other. The reliance is wholly misplaced. The Court in Chrestensen reaffirmed the constitutional protection for "the freedom of com-

*[376 US 266]

municating *information and disseminating opinion"; its holding was based upon the factual conclusions that the handbill was "purely commercial advertising" and that the protest against official action had been added only to evade the ordinance.

The publication here was not a "commercial" advertisement in the sense in which the word was used in Chrestensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. See N. A. A. C. P. v Button 371 US 415, 435, 9 L ed 2d 405, 419, 83 S Ct 328. That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. Smith v California, 361 US 147, 150, 4 L ed 2d 205, 209, 80 S Ct 215; cf. Bantam Books, Inc. v Sullivan, 372 US 58, 64, note 6, 9 L ed 2d 584, 589, 83 S Ct 631. Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so 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. Cf. Lovell v Griffin, 303 US 444, 452, 82 L ed 949, 954, 58 S Ct 666; Schneider v State, 308 US 147, 164, 84 L ed 155, 166, 60 S Ct 146. The effect would be to shackle the First Amendment in its attempt to secure

Headnote 5
Headnote 6

"the widest possible dissemination of information from diverse and antagonistic sources." Associated Press v United States, 326 US 1, 20, 89 L ed 2013, 2030, 65 S Ct 1416. To avoid placing such a handicap upon the freedoms of expression, we hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement.[5]

II.

*[376 US 267]

*Under Alabama law as applied in this case, a publication is "libelous per se" if the words "tend to injure a person . . . in his reputation" or to "bring [him] into public contempt"; the trial court stated that the standard was met if the words are such as to "injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust . . . ." The jury

5. See American Law Institute, Restatement of Torts, § 593, Comment b (1938).

must find that the words were published "of and concerning" the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once "libel per se" has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. Alabama Ride Co. v Vance, 235 Ala 263, 178 So 438 (1938); Johnson Publishing Co. v Davis, 271 Ala 474, 494–495, 124 So 2d 441, 457–458 (1960). His privilege of "fair comment" for expressions of opinion depends on the truth of the facts upon which the comment is based. Parsons v Age-Herald Publishing Co. 181 Ala 439, 450, 61 So 345, 350 (1913). Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a primitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. Johnson Publishing Co. v Davis, supra, 271 Ala, at 495, 124 So 2d at 458.

*[376 US 268]

*The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

Headnote 7

Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications.[6] Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. The dictum in Pennekamp v Florida, 328 US 331, 348–349, 90 L ed 1295, 1305, 66 S Ct 1029, that "when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants," implied no view as to what remedy might constitutionally be afforded to public officials. In Beauharnais v Illinois, 343 US 250, 96 L ed 919, 72 S Ct 725, the Court sustained an Illinois criminal libel statute as applied to a publication held to be both defamatory of a racial group and "liable to cause violence and disorder." But the Court was careful to note that it "retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel"; for "public men, are, as it were, public property," and "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." Id., 343 US at 263–264, and note 18, 96 L ed at 931. In the only previous case that did present the question of constitutional limitations upon the power to award damages for libel of a public official, the

6. Konigsberg v State Bar of California, 366 US 36, 49, and note 10, 6 L ed 2d 105, 116, 81 S Ct 997; Times Film Corp. v City of Chicago, 365 US 43, 48, 5 L ed 2d 403, 406, 81 S Ct 391; Roth v United States 354 US 476, 486–487, 1 L ed 2d 1498, 1507, 1508, 77 S Ct 1304; Beauharnais v Illinois 343 US 250, 266, 96 L ed 919, 932, 72 S Ct 725; Pennekamp v Florida, 328 US 331, 348–349, 90 L ed 1295, 1304, 1305, 66 S Ct 1029; Chaplinsky v New Hampshire, 315 US 568, 572, 86 L ed 1031, 1035, 62 S Ct 766; Near v Minnesota, 283 US 697, 715, 75 L ed 1357, 1367, 51 S Ct 625.

Court was equally divided and the question was not decided. Schenectady Union Pub. Co. v Sweeney, 316 US 642, 86 L ed 1727, 62 S Ct 1031.

*[376 US 269]

*In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. N. A. A. C. P. v Button, 371 US 415, 429, 9 L ed 2d 405, 415, 83 S Ct 328. Like insurrection,[7] contempt,[8] advocacy of unlawful acts,[9] breach of the peace,[10] obscenity,[11] solicitation of legal business,[12] and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

Headnote 8

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v United States, 354 US 476, 484, 1 L ed 2d 1498, 1506, 77 S Ct 1304. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." Stromberg v California, 283 US 359, 369, 75 L ed 1117, 1123, 51 S Ct 532, 73 ALR 1484. "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," Bridges v California, 314 US 252, 270, 86 L ed 192, 207, 62 S Ct 190, 159 ALR 1346, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." N. A. A. C. P. v Button, 371 US 415, 429, 9 L ed 2d 405, 416, 83 S Ct 328. *The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." United States v Associated Press, 52 F Supp 362, 372 (DC SD NY 1943). Mr. Justice Brandeis, in his concurring opinion in Whitney v California, 274 US 357, 375–376, 71 L ed 1095, 1105, 1106, 47 S Ct 641, gave the principle its classic formulation:

Headnote 9
Headnote 10
Headnote 11

*[376 US 270]

"Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression

7. Herndon v Lowry, 301 US 242, 81 L ed 1066, 57 S Ct 732.

8. Bridges v California, 314 US 252, 86 L ed 192, 62 S Ct 190, 159 ALR 1346; Pennekamp v Florida, 328 US 331, 90 L ed 1295, 66 S Ct 1029.

9. De Jonge v Oregon, 299 US 353, 81 L ed 278, 57 S Ct 255.

10. Edwards v South Carolina, 372 US 229, 9 L ed 2d 697, 83 S Ct 680.

11. Roth v United States, 354 US 476, 1 L ed 2d 1498, 77 S Ct 1304.

12. N. A. A. C. P. v Button, 371 US 415, 9 L ed 2d 405, 83 S Ct 328.

breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See Terminiello v Chicago, 337 US 1, 4, 93 L ed 1131, 1134, 69 S Ct 894; De Jonge v Oregon, 299 US 353, 365, 81

Headnote 12

*[376 US 271]

L ed 278, 57 S Ct 255. *The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

Headnote 13

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. Cf. Speiser v Randall, 357 US 513, 525–526, 2 L ed 2d 1460, 1472, 78 S Ct 1332. The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." N. A. A. C. P. v Button, 371 US 415, 445, 9 L ed 2d 405, 425, 83 S Ct 328. As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 Elliot's Debates on the Federal Constitution (1876) p. 571. In Cantwell v Connecticut, 310 US 296, 310, 84 L ed 1213, 1221, 60 S Ct 900, 128 ALR 1352, the Court declared:

Headnote 14

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms

*[376 US 272]

of expression *are to have the "breathing space" that they "need . . . to survive," N. A. A. C. P. v Button, 371 US 415, 433, 9 L ed 2d 405, 418, 83 S Ct 328, was also recognized by the Court of Appeals for the District of Columbia Circuit in Sweeney v Patterson, 76 App DC 23, 24, 128 F2d 457, 458 (1942), cert. denied, 317 US 678. Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressman's libel suit based upon a news-

paper article charging him with anti-Semitism in opposing a judicial appointment. He said:

"Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. . . . The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. . . . Whatever is added to the field of libel is taken from the field of free debate."[13]

Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment *as criminal contempt of criticism of the judge or his decision. Bridges v California, 314 US 252, 86 L ed 192, 62 S Ct 190, 159 ALR 1346. This is true even though the utterance contains "half-truths" and "misinformation." Pennekamp v Florida, 328 US 331, 342, 343, note 5, 345, 90 L ed 1295, 1301, 1302, 66 S Ct 1029. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. See also Craig v Harney, 331 US 367, 91 L ed 1546, 67 S Ct 1249; Wood v Georgia, 370 US 375, 8 L ed 2d 569, 82 S Ct 1364. If judges are to be treated as "men of fortitude, able to thrive in a hardy climate," Craig v Harney, supra, 331 US, at 376, 91 L ed at 1552, surely the same must be true of other government officials, such as elected city commissioners.[14] Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

Headnote 15

*[376 US 273]

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat 596, which first crystallized a national awareness of the central meaning of the First Amendment. See Levy, Legacy of Suppression (1960), at 258 et seq.; Smith, Freedom's Fetters (1956), at 426, 431,

Headnote 16

13. See also Mill, On Liberty (Oxford: Blackwell, 1947), at 47:

". . . [T]o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion . . . all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct."

14. The climate in which public officials operate, especially during a political campaign, has been described by one commentator in the following terms: "Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent." Noel, Defamation of Public Officers and Candidates, 49 Col L Rev 875 (1949).

For a similar description written 60 years earlier, see Chase, Criticism of Public Officers and Candidates for Office, 23 Am L Rev 346 (1889).

and passim. That statute made it a crime, punishable by a $5,000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any false, scandalous
*[376 US 274]
and malicious *writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." The Act allowed the defendant the defense of truth, and provided that the jury were to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. In the famous Virginia Resolutions of 1798, the General Assembly of Virginia resolved that it "doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the 'Alien and Sedition Acts,' passed at the last session of Congress . . . . [The Sedition Act] exercises . . . a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto—a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." 4 Elliot's Debates, supra, pp. 553–554.

Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which "The people, not the government, possess the absolute sovereignty." The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels. This form of government was "altogether different" from the British form, under which the Crown was sovereign and the people
*[376 US 275]
were subjects. "Is *it not natural and necessary, under such different circumstances," he asked, "that a different degree of freedom in the use of the press should be contemplated?" Id., pp. 569–570. Earlier, in a debate in the House of Representatives, Madison had said: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Congress, p. 934 (1794). Of the exercise of that power by the press, his Report said: "In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . . ." 4 Elliot's Debates, supra, p. 570. The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government.[15]

15. The Report on the Virginia Resolutions further stated:

"[I]t is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; . . . which, again, is equivalent to a protection of those who administer the government, if they should at any

*[376 US 276]

*Although the Sedition Act was never tested in this Court,[16] the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. See e. g., Act of July 4, 1840, c 45, 6 Stat 802, accompanied by HR Rep No. 86, 26th Cong, 1st Sess (1840). Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter "which no one now doubts." Report with Senate Bill No. 122, 24th Cong, 1st Sess, p. 3. Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." Letter to Mrs. Adams, July 22, 1804, 4 Jefferson's Works (Washington ed), pp. 555, 556. The invalidity of the Act has also been assumed by Justices of this Court. See Holmes, J., dissenting and joined by Brandeis, J., in Abrams v United States, 250 US 616, 630, 63 L ed 1173, 1180, 40 S Ct 17; Jackson, J., dissenting in Beauharnais v Illinois, 343 US 250, 288–289, 96 L ed 919, 944, 945, 72 S Ct 725; Douglas, The Right of the People (1958), p. 47. See also Cooley, Constitutional Limitations (8th ed, Carrington, 1927), pp. 899–900; Chafee, Free Speech in the United States (1942), pp. 27–28. These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

There is no force in respondent's argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. It is true that the First Amendment was originally addressed only to action by the Federal Government,

Headnote 17

*[376 US 277]

and that Jefferson, *for one, while denying the power of Congress "to controul the freedom of the press," recognized such a power in the States. See the 1804 Letter to Abigail Adams quoted in Dennis v United States, 341 US 494, 522, note 4, 95 L ed 1137, 1159, 71 S Ct 857 (concurring opinion). But this distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment's restrictions. See e.g., Gitlow v New York, 268 US 652, 666, 69 L ed 1138, 1145, 45 S Ct 625; Schneider v State, 308 US 147, 160, 84 L ed 155, 164, 60 S Ct 146; Bridges v California, 314 US 252, 268, 86 L ed 192, 206, 62 S Ct 190, 159 ALR 1346; Edwards v South Carolina, 372 US 229, 235, 9 L ed 2d 697, 701, 83 S Ct 680.

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time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct. Nor can there be a doubt . . . that a government thus intrenched in penal statutes against the just and natural effects of a culpable administration, will easily evade the responsibility which is essential to a faithful discharge of its duty.

"Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal fredom, consequently, of examining and discussing these merits and demerits of the candidates respectively." 4 Elliot's Debates, supra, p. 575.

16. The Act expired by its terms in 1801.

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.[17] The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. See City of Chicago v Tribune Co. 307 Ill 595, 607, 139 NE 86, 90 (1923). Alabama, for example, has a criminal libel law which subjects to prosecution "any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude," and which allows as punishment upon conviction a fine not exceeding $500 and a prison sentence of six months. Alabama Code, Tit 14, § 350. Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case —without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that pro-

Headnote 18

*[376 US 278]

vided by the Sedition Act. *And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication.[18] Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." Bantam Books, Inc. v Sullivan, 372 US 58, 70, 9 L ed 2d 584, 593, 83 S Ct 631.

The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in Smith v California, 361 US 147, 4 L ed 2d 205, 80 S Ct 215, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale. We said:

Headnote 19

"For if the bookseller is criminally liable without knowledge of the contents, . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . And the book-seller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. . . . [H]is timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word

17. Cf. Farmers Union v WDAY, 360 US 525, 535, 3 L ed 2d 1407, 1414, 79 S Ct 1302.

18. The Times states that four other libel suits based on the advertisement have been filed against it by others who have served as Montgomery City Commissioners and by the Governor of Alabama; that another $500,000 verdict has been awarded in the only one of these cases that has yet gone to trial; and that the damages sought in the other three total $2,000,000.

which the State could not constitu-
*[376 US 279]
tionally *suppress directly. The bookseller's selfcensorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." (361 US 147, 153–154, 4 L ed 2d 205, 211.)

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.[19] Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. See, e.g., Post Publishing Co. v Hallam, 59 F 530, 540 (CA6th Cir 1893); see also Noel, Defamation of Public Officers and Candidates, 49 Col L Rev 875, 892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." Speiser v Randall, supra, 357 US, at 526, 2 L ed 2d at 1473. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official
Headnote 20
from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it
*[376 US 280]
was *false or with reckless disregard of whether it was false or not. An oft-cited statement of a like rule, which has been adopted by a number of state courts,[20] is found in the

19. Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about "the clearer perception and livelier impression of truth, produced by its collision with error." Mill, On Liberty (Oxford: Blackwell, 1947), at 15; see also Milton, Areopagitica, in Prose Works (Yale, 1959), Vol II, at 561.

20. E.g., Ponder v Cobb, 257 NC 281, 299, 126 SE2d 67, 80 (1962); Lawrence v Fox, 357 Mich 134, 146, 97 NW2d 719, 725 (1959); Stice v Beacon Newspaper Corp. 185 Kan 61, 65–67, 340 P2d 396, 400–401 (1959); Bailey v Charleston Mail Assn. 126 W Va 292, 307, 27 SE2d 837, 844 (1943); Salinger v Cowles, 195 Iowa 873, 889, 191 NW 167, 174 (1922); Snively v Record Publishing Co. 185 Cal 565, 571–576, 198 P 1 (1921); McLean v Merriman, 42 SD 394, 175 NW 878 (1920). Applying the same rule to candidates for public office, see, e.g., Phoenix Newspapers v Choisser, 82 Ariz 271, 276–277, 312 P2d 150, 154 (1957); Friedell v Blakely Printing Co. 163 Minn 226, 230, 203 NW 974, 975 (1925). And see Chagnon v Union-Leader Corp. 103 NH 426, 438, 174 A2d 825, 833 (1961), cert den, 369 US 830.

The consensus of scholarly opinion apparently favors the rule that is here adopted. E.g., 1 Harper and James, Torts § 5.26, at 449–450 (1956); Noel, Defamation of Public Officers and Candidates, 49 Col L Rev 875, 891–895, 897, 903 (1949); Hallen, Fair Comment, 8 Tex L Rev 41, 61 (1929); Smith, Charges Against Candidates, 18 Mich L Rev 1, 115 (1919); Chase, Criticism of Public Officers and Candidates for Office, 23 Am L Rev 346, 367–371 (1889); Cooley, Constitutional Limitations (7th ed, Lane, 1903), at 604, 616–628. But see, e.g., American Law Institute, Restatement of Torts, § 598, Comment a (1938) (reversing the position taken in Tentative Draft 13, § 1041(2) (1936)); Veeder, Freedom of Public Discussion, 23 Harv L Rev 413, 419 (1910).

Kansas case of Coleman v MacLennan, 78 Kan 711, 98 P 281 (1908). The State Attorney-General, a candidate for re-election and a member of the commission charged with the management and control of the state school fund, sued a newspaper publisher for alleged libel in an article purporting to state facts relating to his official conduct in connection with a school-fund transaction. The defendant pleaded privilege and the trial judge, over the plaintiff's objection, instructed the jury that "where an article is published and circulated among voters for the sole purpose of giving what the defend-

*[376 US 281]

ant *believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff; and in such a case the burden is on the plaintiff to show actual malice in the publication of the article."

In answer to a special question, the jury found that the plaintiff had not proved actual malice, and a general verdict was returned for the defendant. On appeal the Supreme Court of Kansas, in an opinion by Justice Burch, reasoned as follows (78 Kan, at 724, 98 P, at 286):

"It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged."

The court thus sustained the trial court's instruction as a correct statement of the law, saying:

"In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes

*[376 US 282]

matters of *public concern, public men, and candidates for office." 78 Kan, at 723, 98 P, at 285.

Such a privilege for criticism of official conduct[21] is appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen. In Barr v Matteo, 360 US 564, 575, 3 L ed 2d 1434, 1443, 79 S Ct 1335, this Court held the utterance of a federal official to be absolutely privileged if made "within the outer perimeter" of his duties. The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy.[22] But all hold that all officials are protected unless actual malice

21. The privilege immunizing honest misstatements of fact is often referred to as a "conditional" privilege to distinguish it from the "absolute" privilege recognized in judicial, legislative, administrative and executive proceedings. See, e.g., Prosser, Torts (2d ed 1955), § 95.

22. See 1 Harper and James, Torts, § 5.23, at 429–430 (1956); Prosser, Torts (2d ed, 1955), at 612–613; American Law Institute, Restatement of Torts (1938), § 591.

can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." Barr v Matteo, supra, 360 US, at 571, 3 L ed 2d at 1441. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. See Whitney v California, 274 US 357, 375, 71 L ed 1095, 1105, 47 S Ct 641 (concurring opinion of Mr. Justice Brandeis), quoted supra, p. 700. As Madison said, see supra, p. 703, "the censorial power is in the people over the Government, and not in the Government over the people." It would give public servants an unjustified preference over the public they serve, if critics

*[376 US 283]

of official conduct *did not have a fair equivalent of the immunity granted to the officials themselves.

We conclude that such a privilege is required by the First and Fourteenth Amendments.

III.

We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action,[23] the rule requiring proof of actual malice is applicable. While Alabama law apparently requires proof of actual malice for an award of punitive damages,[24] where general damages are concerned malice is "presumed." Such a pre-

Headnote 21
Headnote 22

*[376 US 284]

sumption is inconsistent *with the

23. We have no occasion here to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. Barr v Matteo, 360 US 564, 573–575, 3 L ed 2d 1434, 1442, 1443, 79 S Ct 1335. Nor need we here determine the boundaries of the "official conduct" concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department. As to the statements alleging the assaulting of Dr. King and the bombing of his home, it is immaterial that they might not be considered to involve respondent's official conduct if he himself had been accused of perpetrating the assault and the bombing. Respondent does not claim that the statements charged him personally with these acts; his contention is that the advertisement connects him with them only in his official capacity as the Commissioner supervising the police, on the theory that the police might be equated with the "They" who did the bombing and assaulting. Thus, if these allegations can be read as referring to respondent at all, they must be read as describing his performance of his official duties.

24. Johnson Publishing Co. v Davis, 271 Ala 474, 487, 124 So 2d 441, 450 (1960). Thus, the trial judge here instructed the jury that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages in an action for libel."

The court refused, however, to give the following instruction which had been requested by the Times:

"I charge you . . . that punitive damages, as the name indicates, are designed to punish the defendant, the New York Times Company, a corporation, and the other defendants in this case, . . . and I further charge you that such punitive damages may be awarded only in the event that you, the jury, are convinced by a fair preponderance of the evidence that the defendant . . . was motivated by personal ill will, that is actual intent to do the plaintiff harm, or that the defendant . . . was guilty of gross negligence and recklessness and not of just ordinary negligence or carelessness in publishing the matter

federal rule. "The power to create presumptions is not a means of escape from constitutional restrictions," Bailey v Alabama, 219 US 219, 239, 55 L ed 191, 200, 31 S Ct 145; "the showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff . . . ." Lawrence v Fox, 357 Mich 134, 146, 97 NW 2d 719, 725 (1959).[25] Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded. Stromberg v California, 283 US 359, 367–368, 75 L ed 1117, 1122, 1123, 51 S Ct 532, 73 ALR 1484; Williams v North Carolina, 317 US 287, 291–292, 87 L ed 279, 281, 282, 63 S Ct 207, 143 ALR 1273; see Yates v United States, 354 US 298, 311–312, 1 L ed 2d 1356, 1371, 77 S Ct 1064; Cramer v United States, 325 US 1, 36, note 45, 89 L ed 1441, 1461, 65 S Ct 918.

Headnote 23

Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine *whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." Speiser v Randall, 357 US 513, 525, 2 L ed 2d 1460, 1472, 78 S Ct 1332. In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." Pennekamp v Florida, 328 US 331, 335, 90 L ed 1295, 1297, 66 S Ct 1029; see also One, Inc., v Olesen, 355 US 371, 2 L ed 2d 352, 78 S Ct 364; Sunshine Book Co. v Summerfield, 355 US 372, 2 L ed 2d 352, 78 S Ct 365. We must "make an independent examination of the whole record," Edwards v South Carolina, 372 US 229, 235, 9 L ed 2d 697, 702, 83 S Ct 680, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.[26]

Headnote 24
Headnote 25
Headnote 26

*[376 US 285]

complained of so as to indicate a wanton disregard of plaintiff's rights."

The trial court's error in failing to require any finding of actual malice for an award of general damages makes it unnecessary for us to consider the sufficiency under the federal standard of the instructions regarding actual malice that were given as to punitive damages.

25. Accord, Coleman v MacLennan, supra, 78 Kan, at 741, 98 P, at 292; Gough v Tribune-Journal Co. 75 Idaho 502, 510, 275 P2d 663, 668 (1954).

26. The Seventh Amendment does not, as respondent contends, preclude such an examination by this Court. That Amendment, providing that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," is applicable to state cases coming here. Chicago, B. & Q. R. Co. v Chicago, 166 US 226, 242–243, 41 L ed 979, 986, 987, 17 S Ct 581; cf. The Justices v Murray, 9 Wall 274, 19 L ed

Headnote 27
Headnote 28
Headnote 29

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing *clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support.

*[376 US 286]

Headnote 30

As to the Times, we similarly conclude that the facts do not support a finding of actual malice. The statement by the Times' Secretary that, apart from the padlocking allegation, he thought the advertisement was "substantially correct," affords no constitutional warrant for the Alabama Supreme Court's conclusion that it was a "cavalier ignoring of the falsity of the advertisement [from which] the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom." The statement does not indicate malice at the time of the publication; even if the advertisement was not "substantially correct"—although respondent's own proofs tend to show that it was—that opinion was at least a reasonable one, and there was no evidence to impeach the witness' good faith in holding it. The Times' failure to retract upon respondent's demand, although it later retracted upon the demand of Governor Patterson, is likewise not adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. *First*, the letter written by the Times reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. *Second*, it was not a final refusal, since it asked for an explanation on this point—a request that respondent chose to ignore. Nor does the retraction upon the demand of the Governor supply the *necessary proof. It may be doubted that a failure to retract which is not itself evidence of malice can retroactively become such by virtue of a retraction subsequently made to another party. But in any event that did not happen here, since the explanation given by the Times' Secretary for the distinction drawn between respondent and the Governor was a reasonable one, the good faith of which was not impeached.

Headnote 31

Headnote 32

*[376 US 287]

Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times "knew" the advertisement was false, since the state of mind required for

Headnote 33

658. But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. "[T]his Court will review the finding of facts by a State court . . . where a conclusion of law as to a Federal rights and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." Fiske v Kansas, 274 US 380, 385–386, 71 L ed 1108, 1111, 47 S Ct 655. See also Haynes v Washington, 373 US 503, 515–516, 10 L ed 2d 513, 522, 83 S Ct 1336.

actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. There was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable under the Times' policy of rejecting advertisements containing "attacks of a personal character";[27] their failure to reject it on this ground was not unreasonable.

*[376 US 288]

We think *the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice. Cf. Charles Parker Co. v Silver City Crystal Co., 142 Conn 605, 618, 116 A2d 440, 446 (1955); Phoenix Newspapers, Inc., v Choisser, 82 Ariz 271, 277–278, 312 P2d 150, 154–155 (1957).

We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent. Respondent relies on the words of the advertisement and the testimony of six witnesses to establish a connection between it and himself. Thus, in his brief to this Court, he states:

Headnote 34

"The reference to respondent as police commissioner is clear from the ad. In addition, the jury heard the testimony of a newspaper editor . . . ; a real estate and insurance man . . . ; the sales manager of a men's clothing store . . . ; a food equipment man . . . ; a service station operator . . . ; and the operator of a truck line for whom respondent had formerly worked . . . . Each of these witnesses stated that he associated the statements with respondent . . . ." (Citations to record omitted.)

There was no reference to respondent in the advertisement, either by name or official position. A number of the allegedly libelous statements —the charges that the dining hall was padlocked and that Dr. King's home was bombed, his person assaulted, and a perjury prosecution instituted against him—did not even concern the police; despite the ingenuity of the arguments which would attach this significance to the word "They," it is plain that these statements could not reasonably be read as accusing respondent of per-

*[376 US 289]

sonal involvement in the acts *in question. The statements upon which respondent principally relies as referring to him are the two allegations that did concern the police or police functions: that "truckloads of police . . . ringed the Alabama

27. The Times has set forth in a booklet its "Advertising Acceptability Standards." Listed among the classes of advertising that the newspaper does not accept are advertisements that are "fraudulent or deceptive," that are "ambiguous in wording and . . . may mislead," and that contain "attacks of a personal character." In replying to respondent's interrogatories before the trial, the Secretary of the Times stated that "as the advertisement made no attacks of a personal character upon any individual and otherwise met the advertising acceptability standards promulgated," it had been approved for publication.

State College Campus" after the demonstration on the State Capitol steps, and that Dr. King had been "arrested . . . seven times." These statements were false only in that the police had been "deployed near" the campus but had not actually "ringed" it and had not gone there in connection with the State Capitol demonstration, and in that Dr. King had been arrested only four times. The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here. Although the statements may be taken as referring to the police, they did not on their face make even an oblique reference to respondent as an individual. Support for the asserted reference must, therefore, be sought in the testimony of respondent's witnesses. But none of them suggested any basis for the belief that respondent himself was attacked in the advertisement beyond the bare fact that he was in overall charge of the Police Department and thus bore official responsibility for police conduct; to the extent that some of the witnesses thought respondent to have been charged with ordering or approving the conduct or otherwise being personally involved in it, they based this notion not on any statements in the advertisement, and not on any evidence that he had in fact been so involved, but solely on the unsupported assumption that, because of his official position, he must have been.[28] This reliance on the bare

28. Respondent's own testimony was that "as Commissioner of Public Affairs it is part of my duty to supervise the Police Department and I certainly feel like it [a statement] is associated with me when it describes police activities." He thought that "by virtue of being Police Commissioner and Commissioner of Public Affairs," he was charged with "any activity on the part of the Police Department." "When it describes police action, certainly I feel it reflects on me as an individual." He added that "It is my feeling that it reflects not only on me but on the other Commissioners and the community."

Grove C. Hall testified that to him the third paragraph of the advertisement called to mind "the City government—the Commissioners," and that "now that you ask it I would naturally think a little more about the police Commissioner because his responsibility is exclusively with the constabulary." It was "the phrase about starvation" that led to the association; "the other didn't hit me with any particular force."

Arnold D. Blackwell testified that the third paragraph was associated in his mind with "the Police Commissioner and the police force. The people on the police force." If he had believed the statement about the padlocking of the dining hall, he would have thought "that the people on our police force or the heads of our police force were acting without their jurisdiction and would not be competent for the position." "I would assume that the Commissioner had ordered the police force to do that and therefore it would be his responsibility."

Harry W. Kaminsky associated the statement about "truckloads of police" with respondent "because he is the Police Commissioner." He thought that the reference to arrests in the sixth paragraph "implicates the Police Department, I think, or the authorities that would do that—arrest folks for speeding and loitering and such as that." Asked whether he would associate with respondent a newspaper report that the police had "beat somebody up or assaulted them on the streets of Montgomery," he replied: "I still say he is the Police Commissioner and those men are working directly under him and therefore I would think that he would have something to do with it." In general, he said, "I look at Mr. Sullivan when I see the Police Department."

H. M. Price, Sr., testified that he associated the first sentence of the third paragraph with respondent because: "I would just automatically consider that the Police Commissioner in Montgomery would have to put his approval on those kind of things as an individual."

William M. Parker, Jr., testified that he associated the statements in the two para-

*[376 US 290]

*fact of respondent's official position[29] was made explicit by the Supreme Court of Alabama. That court, in holding that the trial court "did not err in overruling the demurrer [of the Times] in the aspect that

*[376 US 291]

the libelous *matter was not of and concerning the plaintiffs," based its ruling on the proposition that:

"We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body." 273 Ala, at 674–675, 144 So 2d, at 39.

This proposition has disquieting implications for criticism of governmental conduct. For good reason, "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." City of Chicago v Tribune Co. 307 Ill 595, 601, 139 NE 86, 88 (1923).

Headnote 35

*[376 US 292]

*The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. There is no legal alchemy by which a State may thus create the cause of action that would otherwise be denied for a publication which, as respondent himself said of the advertisement, "reflects not only on me but on the other Commissioners and the community." Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression.[30] We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other

Headnote 38

graphs with "the Commissioners of the City of Montgomery," and since respondent "was the Police Commissioner," he "thought of him first." He told the examining counsel: "I think if you were the Police Commissioner I would have thought it was speaking of you."

Horace W. White, respondent's former employer, testified that the statement about "truck-loads of police" made him think of respondent "as being the head of the Police Department." Asked whether he read the statement as charging respondent himself with ringing the campus or having shotguns and tear-gas, he replied: "Well, I thought of his department being charged with it, yes, sir. He is the head of the Police Department as I understand it." He further said that the reason he would have been unwilling to re-employ respondent if he had believed the advertisement was "the fact that he allowed the Police Department to do the things that the paper say he did."

29. Compare Ponder v Cobb, 257 NC 281, 126 SE2d 67 (1962).

30. Insofar as the proposition means only that the statements about police conduct libeled respondent by implicitly criticizing his ability to run the Police Department, recovery is also precluded in this case by the doctrine of fair comment. See American Law Institute, Restatement of Torts (1938), § 607. Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice, as was not done here.

Headnote 36
Headnote 37

evidence to connect the statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent.

The judgment of the Supreme Court of Alabama is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

THE NEW YORK TIMES, TUESDAY, MARCH 29, 1960. L 11 —

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APPENDIX

"The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable.... Let Congress heed their rising voices, for they will be heard."

—New York Times editorial
Saturday, March 19, 1960

Heed Their Rising Voices

As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom....

In Orangeburg, South Carolina, when 400 students peacefully sought to buy doughnuts and coffee at lunch counters in the business district, they were forcibly ejected, tear-gassed, soaked to the skin in freezing weather with fire hoses, arrested en masse and herded into an open barbed-wire stockade to stand for hours in the bitter cold.

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

In Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charlotte, and a host of other cities in the South, young American teenagers, in face of the entire weight of official state apparatus and police power, have boldly stepped forth as protagonists of democracy. Their courage and amazing restraint have inspired millions and given a new dignity to the cause of freedom.

Small wonder that the Southern violators of the Constitution fear this new, non-violent brand of freedom fighter . . . even as they fear the upswelling right-to-vote movement. Small wonder that they are determined to destroy the one man who, more than any other, symbolizes the new spirit now sweeping the South—the Rev. Dr. Martin Luther King, Jr., world-famous leader of the Montgomery Bus Protest. For it is his doctrine of non-violence which has inspired and guided the students in their widening wave of sit-ins; and it this same Dr. King who founded and is president of the Southern Christian Leadership Conference—the organization which is spearheading the surging right-to-vote movement. Under Dr. King's direction the Leadership Conference conducts Student Workshops and Seminars in the philosophy and technique of non-violent resistance.

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury"—a *felony* under which they could imprison him for *ten years*. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate *all* leaders who may rise in the South. Their *strategy* is to behead this affirmative movement, and thus to demoralize Negro Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of the total struggle for freedom in the South.

Decent-minded Americans cannot help but applaud the creative daring of the students and the quiet heroism of Dr. King. But this is one of those moments in the stormy history of Freedom when men and women of good will must do more than applaud the rising-to-glory of others. The America whose good name hangs in the balance before a watchful world, the America whose heritage of Liberty these Southern Upholders of the Constitution are defending, is *our* America as well as theirs...

We must heed their rising voices—yes—but we must add our own.

We must extend ourselves above and beyond moral support and render the material help so urgently needed by those who are taking the risks, facing jail, and even death in a glorious re-affirmation of our Constitution and its Bill of Rights.

We urge you to join hands with our fellow Americans in the South by supporting, with your dollars, this Combined Appeal for all three needs—the defense of Martin Luther King—the support of the embattled students—and the struggle for the right-to-vote.

Your Help Is Urgently Needed . . . NOW!!

Dr. Alan Knight Chalmers
Richard Cox
Nat King Cole
Cheryl Crawford
Dorothy Dandridge
Ossie Davis
Sammy Davis, Jr.
Ruby Dee
Dr. Philip Elliott
Dr. Harry Emerson Fosdick

Anthony Franciosa
Lorraine Hansberry
Rev. Donald Harrington
Nat Hentoff
James Hicks
Mary Hinkson
Van Heflin
Langston Hughes
Morris Ishewitz
Nahalia Jackson
Mordecai Johnson

John Killens
Bertha Kitt
Rabbi Edward Klein
Hope Lange
John Lewis
Viveca Lindfors
Carl Murphy
Don Murray
John Murray
A. J. Muste
Frederick O'Neal

L. Joseph Overton
Clarence Pickett
Dad Polier
Sidney Poitier
A. Philip Randolph
John Reitt
Elmer Rice
Jackie Robinson
Mrs. Eleanor Roosevelt
Bayard Rustin
Robert Ryan

Maureen Stapleton
Frank Sinatra
Hope Stevens
George Tabeal
Rev. Gardner C. Taylor
Norman Thomas
Kenneth Tynan
Charles White
Shelley Winters
Max Youngstein

We in the south who are struggling daily for dignity and freedom warmly endorse this appeal

Rev. Ralph D. Abernathy (Montgomery, Ala.)
Rev. Fred L. Shuttlesworth (Birmingham, Ala.)
Rev. Kelley Miller Smith (Nashville, Tenn.)
Rev. W. A. Dennis (Chattanooga, Tenn.)
Rev. C. K. Steele (Tallahassee, Fla.)

Rev. Matthew D. McCollom (Orangeburg, S. C.)
Rev. William Holmes Borders (Atlanta, Ga.)
Rev. Douglas Moore (Durham, N. C.)
Rev. Wyatt Tee Walker (Petersburg, Va.)

Rev. Walter L. Hamilton (Norfolk, Va.)
I. S. Levy (Columbia, S. C.)
Rev. Martin Luther King, Jr. (Atlanta, Ga.)
Rev. Henry C. Bunton (Memphis, Tenn.)
Rev. S. S. Seay, Sr. (Montgomery, Ala.)
Rev. Samuel W. Williams (Atlanta, Ga.)

Rev. A. L. Davis (New Orleans, La.)
Rev. Kelly E. Whitham (New Orleans, La.)
Rev. W. H. Hall (Hattiesburg, Miss.)
Rev. J. E. Lowery (Mobile, Ala.)
Rev. T. J. Jemison (Baton Rouge, La.)

COMMITTEE TO DEFEND MARTIN LUTHER KING AND THE STRUGGLE FOR FREEDOM IN THE SOUTH
312 West 125th Street, New York 27, N. Y. UNiversity 6-1700

Chairmen: A. Philip Randolph, Dr. Gardner C. Taylor; *Chairmen of Cultural Division:* Harry Belafonte, Sidney Poitier; *Treasurer:* Nat King Cole; *Executive Director:* Bayard Rustin; *Chairmen of Church Division:* Father George B. Ford, Rev. Harry Emerson Fosdick, Rev. Thomas Kilgore, Jr., Rabbi Edward E. Klein; *Chairmen of Labor Division:* Morris Ishewitz

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The Struggle For Freedom in The South
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UNiversity 6-1700

I am enclosing my contribution of $_____
for the work of the Committee.

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(PLEASE PRINT)

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City _____ Zone _____ State _____

☐ I want to help ☐ Want more information

Please make checks payable to:
Committee To Defend Martin Luther King

SEPARATE OPINIONS

*[376 US 293]

*Mr. Justice **Black**, with whom Mr. Justice **Douglas** joins, concurring.

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. In reversing the Court holds that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." Ante, p. 708. I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct" but completely prohibit a State from exercising such a power. The Court goes on to hold that a State can subject such critics to damages if "actual malice" can be proved against them. "Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials. I do not base my vote to reverse on any failure to prove that these individual defendants signed the advertisement or that their criticism of the Police Department was aimed at the plaintiff Sullivan, who was then the Montgomery City Commissioner having supervision of the city's police; for present purposes I assume these things were proved. Nor is my reason for reversal the size of the half-million-dollar judgment, large as it is. If Alabama has constitutional power to use its civil libel law to impose damages on the press for criticizing the way public officials

*[376 US 294]

perform or fail *to perform their duties, I know of no provision in the Federal Constitution which either expressly or impliedly bars the State from fixing the amount of damages.

The half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. The factual background of this case emphasizes the imminence and enormity of that threat. One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places, despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment. Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called "outside agitators," a term which can be made to fit papers like the Times, which is published in New York. The scarcity of testimony to show that Commissioner Sullivan suffered any actual damages at all suggests that these feelings of hostility had at least as much to do with rendition of this half-million-dollar

verdict as did an appraisal of damages. Viewed realistically, this record lends support to an inference that instead of being damaged Commissioner Sullivan's political, social, and financial prestige has likely been enhanced by the Times' publication. Moreover, a second half-million-dollar libel verdict against the Times based on the same advertisement has already been awarded to another Commissioner. There a jury again gave the full amount claimed. There is no reason to believe that there are not more such huge verdicts lurking just around the corner for the Times or any other newspaper

*[376 US 295]

or broadcaster which *might dare to criticize public officials. In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the Times seeking $5,600,000, and five such suits against the Columbia Broadcasting System seeking $1,700,000. Moreover, this technique for harassing and punishing a free press—now that it has been shown to be possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.

In my opinion the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction—by granting the press an absolute immunity for criticism of the way public officials do their public duty. Compare Barr v Matteo, 360 US 564, 3 L ed 2d 1434, 79 S Ct 1335. Stopgap measures like those the Court adopts are in my judgment not enough. This record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about "malice," "truth," "good motives," "justifiable ends," or any other legal formulas which in theory would protect the press. Nor does the record indicate that any of these legalistic words would have caused the courts below to set aside or to reduce the half-million-dollar verdict in any amount.

I agree with the Court that the Fourteenth Amendment made the First applicable to the States.[1] This means to me that since the adoption of the Fourteenth Amendment a State has no more power than the Federal Government to use a civil libel law or any other law to impose damages for merely discussing public affairs and criticizing public officials. The power of the United

*[376 US 296]

*States to do that is, in my judgment, precisely nil. Such was the general view held when the First Amendment was adopted and ever since.[2] Congress never has sought to challenge this viewpoint by passing any civil libel law. It did pass the Sedition Act in 1798,[3] which made it a crime—"seditious libel"—to criticize federal officials or the Federal Government. As the Court's opinion correctly points out, however, ante, pp. 702, 703, that Act came to an ignominious end and by common consent has generally been treated as having been a wholly unjustifiable and much to be regretted violation of

1. See cases collected in Speiser v Randall, 357 US 513, 530, 2 L ed 2d 1460, 1475, 78 S Ct 1332 (concurring opinion).

2. See, e.g., 1 Tucker, Blackstone's Commentaries (1803), 297–299 (editor's appendix). St. George Tucker, a distinguished Virginia jurist, took part in the Annapolis Convention of 1786, sat on both state and federal courts, and was widely known for his writings on judicial and constitutional subjects.

3. Act of July 14, 1798, 1 Stat 596.

the First Amendment. Since the First Amendment is now made applicable to the States by the Fourteenth, it no more permits the States to impose damages for libel than it does the Federal Government.

We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and the press free to criticize officials and discuss public affairs with impunity. This Nation of ours elects many of its important officials; so do the States, the municipalities, the counties, and even many precincts. These officials are responsible to the people for the way they perform their duties. While our Court has held that some kinds of speech and writings, such as "obscenity," Roth v United States, 354 US 476, 1 L ed 2d 1498, 77 S Ct 1304, and "fighting words," Chaplinsky v New Hampshire, 315 US 568, 86 L ed 1031, 62 S Ct 766, are not expression within the protection of the First Amendment,[4] freedom to discuss public affairs and

*[376 US 297]

public officials *is unquestionably, as the Court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion. To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. "For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it."[5] An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.[6]

I regret that the Court has stopped short of this holding indispensable to preserve our free press from destruction.

Mr. Justice **Goldberg**, with whom Mr. Justice **Douglas** joins, concurring in the result.

The Court today announces a constitutional standard which prohibits "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was

*[376 US 298]

made with *'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Ante, at 706. The Court thus rules that the Constitution gives citizens and newspapers a "conditional privilege" immunizing nonmalicious misstatements of fact regarding the official conduct of a government officer. The impressive array of history[1] and precedent marshaled by the Court,

4. But see Smith v California, 361 US 147, 155, 4 L ed 2d 205, 212, 80 S Ct 215 (concurring opinion); Roth v United States, 354 US 476, 508, 1 L ed 2d 1498, 1520, 77 S Ct 1304 (dissenting opinion).

5. 1 Tucker, Blackstone's Commentaries (1803), 297 (editor's appendix); cf. Brant, Seditious Libel: Myth and Reality, 39 NYU L Rev 1.

6. Cf. Meiklejohn, Free Speech and Its Relation to Self-Government (1948).

1. I fully agree with the Court that the attack upon the validity of the Sedition Act of 1798, 1 Stat 596, "has carried the

however, confirms my belief that the Constitution affords greater protection than that provided by the Court's standard to citizen and press in exercising the right of public criticism.

In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses. The prized American right "to speak one's mind," cf. Bridges v California, 314 US 252, 270, 86 L ed 192, 207, 62 S Ct 190, 159 ALR 1346, about public officials and affairs needs "breathing space to survive," N. A. A. C. P. v Button, 371 US 415, 433, 9 L ed 2d 405, 418, 83 S Ct 328. The right should not depend upon a probing by the jury of the motivation[2] of the citizen or press. The

*[376 US 299]

theory *of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.

It has been recognized that "prosecutions for libel on government have [no] place in the American system of jurisprudence." City of Chicago v Tribune Co. 307 Ill 595, 601, 139 NE 86, 88. I fully agree. Government, however, is not an abstraction; it is made up of individuals—of governors responsible to the governed. In a democratic society where men are free by ballots to remove those in power, any statement critical of governmental action is necessarily "of and concerning" the governors and any statement critical of the governors' official conduct is necessarily "of and concerning" the government. If the rule that libel on government has no place in our Constitution is to have real meaning, then libel on the official conduct of the governors likewise can have no place in our Constitution.

We must recognize that we are writing upon a clean slate.[3] As the

day in the court of history," ante, at 704, and that the Act would today be declared unconstitutional. It should be pointed out, however, that the Sedition Act proscribed writings which were "false, scandalous *and malicious*." (Emphasis added.) For prosecutions under the Sedition Act charging malice, see, e.g., Trial of Matthew Lyon (1798), in Wharton, State Trials of the United States (1849), p. 333; Trial of Thomas Cooper (1800), in id., at 659; Trial of Anthony Haswell (1800), in id., at 684; Trial of James Thompson Callender (1800), in id., at 688.

2. The requirement of proving actual malice or reckless disregard may, in the mind of the jury, add little to the requirement of proving falsity, a requirement which the Court recognizes not to be an adequate safeguard. The thought suggested by Mr. Justice Jackson in United States v Ballard, 322 US 78, 92–93, 88 L ed 1148, 1157, 64 S Ct 882, is relevant here: "[A]s a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen." See note 4, infra.

3. It was not until Gitlow v New York, 268 US 652, 69 L ed 1138, 45 S Ct 625, decided in 1925, that it was intimated that the freedom of speech guaranteed by the

Court notes, although there have
*[376 US 300]
been *"statements of this Court to the effect that the Constitution does not protect libelous publication . . . . [n] one of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials." Ante, at 699. We should be particularly careful, therefore, adequately to protect the liberties which are embodied in the First and Fourteenth Amendments. It may be urged that deliberately and maliciously false statements have no conceivable value as free speech. That argument, however, is not responsive to the real issue presented by this case, which is whether that freedom of speech which all agree is constitutionally protected can be effectively safeguarded by a rule allowing the imposition of liability upon a jury's evaluation of the speaker's state of mind. If individual citizens may be held liable in damages for strong words, which a jury finds false and maliciously motivated, there can be little doubt that public debate and advocacy will be constrained. And if newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished. Cf. Farmers Educational & Coop. Union v WDAY, Inc., 360 US 525, 530, 3 L ed 2d 1407, 1412, 79 S Ct 1302.

The opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First
*[376 US 301]
Amendment freedoms *in the area of race relations. The American Colonists were not willing, nor should we be, to take the risk that "[m]en who injure and oppress the people under their administration [and] provoke them to cry out and complain" will also be empowered to "make that very complaint the foundation for new oppressions and prosecutions." The Trial of John Peter Zenger, 17 Howell's St Tr 675, 721–722 (1735) (argument of counsel to the jury). To impose liability for critical, albeit erroneous or even malicious, comments on official conduct would effectively resurrect "the obsolete doctrine that the governed must not criticize their governors." Cf. Sweeney v Patterson, 76 App DC 23, 24, 128 F2d 457, 458.

Our national experience teaches that repressions breed hate and "that hate menaces stable government." Whitney v California, 274 US 357, 375, 71 L ed 1095, 1106, 47 S Ct 641 (Brandeis, J., concurring). We should be ever mindful of the wise counsel of Chief Justice Hughes:

"[I]mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if

First Amendment was applicable to the States by reason of the Fourteenth Amendment. Other intimations followed. See Whitney v California, 274 US 357, 71 L ed 1095, 47 S Ct 641; Fiske v Kansas, 274 US 380, 71 L ed 1108, 47 S Ct 645. In 1931 Chief Justice Hughes speaking for the Court in Stromberg v California, 283 US 359, 368, 75 L ed 1117, 1122, 51 S Ct 532, 73 ALR 1484, declared: "It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech." Thus we deal with a constitutional principle enunciated less than four decades ago, and consider for the first time the application of that principle to issues arising in libel cases brought by state officials.

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desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." De Jonge v Oregon, 299 US 353, 365, 81 L ed 278, 284, 57 S Ct 255.

This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not

*[376 US 302]

*abridge the freedom of public speech or any other freedom protected by the First Amendment.[4] This, of course, cannot be said "where public officials are concerned or where public matters are involved . . . . [O]ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it." Douglas, The Right of the People (1958), p. 41.

In many jurisdictions, legislators, judges and executive officers are clothed with absolute immunity against liability for defamatory words uttered in the discharge of their public duties. See, e. g., Barr v Matteo, 360 US 564, 3 L ed 2d 1434, 79 S Ct 1335; City of Chicago v Tribune Co. 307 Ill, at 610, 139 NE, at 91. Judge Learned Hand ably summarized the policies underlying the rule:

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded

*[376 US 303]

until the *case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In

4. In most cases, as in the case at bar, there will be little difficulty in distinguishing defamatory speech relating to private conduct from that relating to official conduct. I recognize, of course, that there will be a gray area. The difficulties of applying a public-private standard are, however, certainly of a different genre from those attending the differentiation between a malicious and nonmalicious state of mind. If the constitutional standard is to be shaped by a concept of malice, the speaker takes the risk not only that the jury will inaccurately determine his state of mind but also that the jury will fail properly to apply the constitutional standard set by the elusive concept of malice. See note 2, supra.

this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .

"The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . ." Gregoire v Biddle, 177 F2d 579, 581.

*[376 US 304]

*If the government official should be immune from libel actions so that his ardor to serve the public will not be dampened and "fearless, vigorous, and effective administration of policies of government" not be inhibited, Barr v Matteo, supra 360 US at 571, 3 L ed 2d at 1441, then the citizen and the press should likewise be immune from libel actions for their criticism of official conduct. Their ardor as citizens will thus not be dampened and they will be free "to applaud or to criticize the way public employees do their jobs, from the least to the most important."[5] If liability can attach to political criticism because it damages the reputation of a public official as a public official, then no critical citizen can safely utter anything but faint praise about the government or its officials. The vigorous criticism by press and citizen of the conduct of the government of the day by the officials of the day will soon yield to silence if officials in control of government agencies, instead of answering criticisms, can resort to friendly juries to forestall criticism of their official conduct.[6]

The conclusion that the Constitution affords the citizen and the press an absolute privilege for criticism of official conduct does not leave the public official without defenses against unsubstantiated opinions or deliberate misstatements. "Under our system of government, counter-argument and education are the weapons available to expose these matters, not abridgment . . . of free speech . . . ." Wood v Georgia, 370 US 375, 389, 8 L ed 2d 569, 579, 82 S Ct 1364. The public

*[376 US 305]

*official certainly has equal if not greater access than most private citizens to media of communication. In any event, despite the possibility that some excesses and abuses may go unremedied, we must recognize that "the people of this nation have ordained in the light of history, that, in spite of the probability of excesses

5. Mr. Justice Black concurring in Barr v Matteo, 360 US 564, 577, 3 L ed 2d 1434, 1444, 79 S Ct 1335, observed that: "The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important."

6. See notes 2, 4, supra.

and abuses, [certain] liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." Cantwell v Connecticut, 310 US 296, 310, 84 L ed 1213, 1221, 60 S Ct 900, 128 ALR 1352. As Mr. Justice Brandeis correctly observed, "sunlight is the most powerful of all disinfectants."[7]

For these reasons, I strongly believe that the Constitution accords citizens and press an unconditional freedom to criticize official conduct. It necessarily follows that in a case such as this, where all agree that the allegedly defamatory statements related to official conduct, the judgments for libel cannot constitutionally be sustained.

7. See Freund, The Supreme Court of the United States (1949), p. 61.

EDITOR'S NOTE

An annotation on "The Supreme Court and the right of free speech and press" appears p. 1116, infra.

than the maximum rate of the grade when such higher rate is permitted by the Classification Act of 1923, and is specifically authorized by other law.

Approved, February 23, 1927.

February 23, 1927.
[H. R. 9971.]
[Public, No. 632.]

CHAP. 169.—An Act For the regulation of radio communications, and for other purposes.

Radio Act of 1927.
Regulation and control of all radio transmission intended hereby.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act is intended to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its Territories and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corporations, 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. That no person, firm, company, or corporation shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel of the United States; or (f) upon any aircraft or other mobile stations within the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Licenses required for use of radio apparatus.

Interstate and foreign transmission.

Within a State if use extends beyond its borders.

American vessels, aircraft, etc.

Zones designated.

SEC. 2. For the purposes of this Act, the United States is divided into five zones, as follows: The first zone shall embrace the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Delaware, Maryland, the District of Columbia, Porto Rico, and the Virgin Islands; the second zone shall embrace the States of Pennsylvania, Virginia, West Virginia, Ohio, Michigan, and Kentucky; the third zone shall embrace the States of North Carolina, South Carolina, Georgia, Florida, Alabama, Tennessee, Mississippi, Arkansas, Louisiana, Texas, and Oklahoma; the fourth zone shall embrace the States of Indiana, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Iowa, Nebraska, Kansas, and Missouri; and the fifth zone shall embrace the States of Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon, California, the Territory of Hawaii, and Alaska.

Federal Radio Commission.
Creation, composition, and appointment.

SEC. 3. That a commission is hereby created and established to be known as the Federal Radio Commission, hereinafter referred to as the commission, which shall be composed of five commissioners appointed by the President, by and with the advice and consent of

the Senate, and one of whom the President shall designate as chairman: *Provided*, That chairmen thereafter elected shall be chosen by the commission itself.

Chairman.

Each member of the commission shall be a citizen of the United States and an actual resident citizen of a State within the zone from which appointed at the time of said appointment. Not more than one commissioner shall be appointed from any zone. No member of the commission shall be financially interested in the manufacture or sale of radio apparatus or in the transmission or operation of radiotelegraphy, radiotelephony, or radio broadcasting. Not more than three commissioners shall be members of the same political party.

Citizenship and residence qualifications.

Financial interests prohibited.

Political party selection.

The first commissioners shall be appointed for the terms of two, three, four, five, and six years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed.

Tenure of first appointees.

Successors.

The first meeting of the commission shall be held in the city of Washington at such time and place as the chairman of the commission may fix. The commission shall convene thereafter at such times and places as a majority of the commission may determine, or upon call of the chairman thereof.

Meetings.

The commission may appoint a secretary, and such clerks, special counsel, experts, examiners, and other employees as it may from time to time find necessary for the proper performance of its duties and as from time to time may be appropriated for by Congress.

Secretary and personnel.

The commission shall have an official seal and shall annually make a full report of its operations to the Congress.

Seal, and reports.

The members of the commission shall receive a compensation of $10,000 for the first year of their service, said year to date from the first meeting of said commission, and thereafter a compensation of $30 per day for each day's attendance upon sessions of the commission or while engaged upon work of the commission and while traveling to and from such sessions, and also their necessary traveling expenses.

Compensation for first year.

Thereafter.

SEC. 4. Except as otherwise provided in this Act, the commission, from time to time, as public convenience, interest, or necessity requires, shall—

Duties specified.

(a) Classify radio stations;

Classify stations.

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

Service to be rendered.

(c) Assign bands of frequencies or wave lengths to the various classes of stations, and assign frequencies or wave lengths for each individual station and determine the power which each station shall use and the time during which it may operate;

Assign wave lengths, etc.

(d) Determine the location of classes of stations or individual stations;

Locate stations.

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

Regulate apparatus, etc.

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however*, That changes in the wave lengths, authorized power, in the character of emitted signals, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, in the judgment of the commission, such changes will promote public convenience or

Regulations to prevent interference.

Proviso.
Restriction on changes.

interest or will serve public necessity or the provisions of this Act will be more fully complied with;

Areas to be served.

(g) Have authority to establish areas or zones to be served by any station;

Chain broadcasting.

(h) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

Require station records,

(i) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

Exclude railroad rolling stock, etc.

(j) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

General authority.

(k) Have authority to hold hearings, summon witnesses, administer oaths, compel the production of books, documents, and papers and to make such investigations as may be necessary in the performance of its duties. The commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding) as may be necessary for the execution of the functions vested in the commission and, as from time to time may be appropriated for by Congress. All expenditures of the commission shall be allowed and paid upon the presentation of itemized vouchers therefor approved by the chairman.

Expenditures allowed.

Powers to be vested in Secretary of Commerce after first year.

SEC. 5. From and after one year after the first meeting of the commission created by this Act, all the powers and authority vested in the commission under the terms of this Act, except as to the revocation of licenses, shall be vested in and exercised by the Secretary of Commerce; except that thereafter the commission shall have power and jurisdiction to act upon and determine any and all matters brought before it under the terms of this section.

Jurisdiction of Commission thereafter.

Duties of Secretary.

It shall also be the duty of the Secretary of Commerce—

During first year.

(A) For and during a period of one year from the first meeting of the commission created by this Act, to immediately refer to the commission all applications for station licenses or for the renewal or modification of existing station licenses.

Thereafter to refer to Commission disputes as to granting station licenses.

(B) From and after one year from the first meeting of the commission created by this Act, to refer to the commission for its action any application for a station license or for the renewal or modification of any existing station license as to the granting of which dispute, controversy, or conflict arises or against the granting of which protest is filed within ten days after the date of filing said application by any party in interest and any application as to which such reference is requested by the applicant at the time of filing said application.

Issue station operators' licenses.

(C) To prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such persons as he finds qualified.

Suspend operators' licenses.
Grounds for specified.

(D) To suspend the license of any operator for a period not exceeding two years upon proof sufficient to satisfy him that the licensee (a) has violated any provision of any Act or treaty binding on the United States which the Secretary of Commerce or the commission is authorized by this Act to administer or by any regulation made by the commission or the Secretary of Commerce under any such Act or treaty; or (b) has failed to carry out the lawful orders of the master of the vessel on which he is employed; or (c) has willfully damaged or permitted radio apparatus to be damaged; or (d) has transmitted superfluous radio communications or signals or radio communications containing profane or obscene words or language; or (e) has willfully or maliciously interfered with any other radio communications or signals.

(E) To inspect all transmitting apparatus to ascertain whether in construction and operation it conforms to the requirements of this Act, the rules and regulations of the licensing authority, and the license under which it is constructed or operated. Inspect transmitting apparatus.

(F) To report to the commission from time to time any violations of this Act, the rules, regulations, or orders of the commission, or of the terms or conditions of any license. Report to Commission, violations, etc.

(G) To designate call letters of all stations. Designate call letters.

(H) To cause to be published such call letters and such other announcements and data as in his judgment may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this Act. Publish call letters, announcements, etc.

The Secretary may refer to the commission at any time any matter the determination of which is vested in him by the terms of this Act. Refer any matter to Commission.

Any person, firm, company, or corporation, any State or political division thereof aggrieved or whose interests are adversely affected by any decision, determination, or regulation of the Secretary of Commerce may appeal therefrom to the commission by filing with the Secretary of Commerce notice of such appeal within thirty days after such decision or determination or promulgation of such regulation. All papers, documents, and other records pertaining to such application on file with the Secretary shall thereupon be transferred by him to the commission. The commission shall hear such appeal de novo under such rules and regulations as it may determine. Appeals allowed to Commission from decisions of Secretary. Hearings on, by Commission.

Decisions by the commission as to matters so appealed and as to all other matters over which it has jurisdiction shall be final, subject to the right of appeal herein given. Effect of Commission's decision.

No station license shall be granted by the commission or the Secretary of Commerce until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise. Waiver of claims required of applicants for station licenses.

SEC. 6. Radio stations belonging to and operated by the United States shall not be subject to the provisions of sections 1, 4, and 5 of this Act. All such Government stations shall use such frequencies or wave lengths as shall be assigned to each or to each class by the President. All such stations, except stations on board naval and other Government vessels while at sea or beyond the limits of the continental United States, when transmitting any radio communication or signal other than a communication or signal relating to Government business shall conform to such rules and regulations designed to prevent interference with other radio stations and the rights of others as the licensing authority may prescribe. Upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed by the licensing authority, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station and/or its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners. Radio stations on board vessels of the United States Shipping Board or the United States Shipping Board Emergency Fleet Corporation or the Inland and Coastwise Waterways Service shall be subject to the provisions of this Act. Government stations. Provisions governing. President may suspend regulations, etc., in time of war or other emergency. Authorize use of stations by departments, etc. Shipping Board, etc., vessels subject to this Act.

SEC. 7. The President shall ascertain the just compensation for such use or control and certify the amount ascertained to Congress Compensation for Government use.

Appeal if amount unsatisfactory.

for appropriation and payment to the person entitled thereto. If the amount so certified is unsatisfactory to the person entitled thereto, such person shall be paid only 75 per centum of the amount and shall be entitled to sue the United States to recover such further sum as added to such payment of 75 per centum which will make such amount as will be just compensation for the use and control. Such suit shall be brought in the manner provided by paragraph 20 of section 24, or by section 145 of the Judicial Code, as amended.

Procedure.
Vol. 36, pp. 1093, 1131.

Special letters for Government stations.

SEC. 8. All stations owned and operated by the United States, except mobile stations of the Army of the United States, and all other stations on land and sea, shall have special call letters designated by the Secretary of Commerce.

Licenses not applicable to foreign ships in American jurisdiction.
Regulations for.

Section 1 of this Act shall not apply to any person, firm, company, or corporation sending radio communications or signals on a foreign ship while the same is within the jurisdiction of the United States, but such communications or signals shall be transmitted only in accordance with such regulations designed to prevent interference as may be promulgated under the authority of this Act.

Granting of station licenses.

SEC. 9. The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

Consideration of applications.

In considering applications for licenses and renewals of licenses, when and in so far as there is a demand for the same, the licensing authority shall make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different States and communities as to give fair, efficient, and equitable radio service to each of the same.

Terms allowed for operating stations.

No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses.

Renewals.

Time for granting renewals.

No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license.

Application requirements.
Facts to be stated in.

SEC. 10. The licensing authority may grant station licenses only upon written application therefor addressed to it. All applications shall be filed with the Secretary of Commerce. All such applications shall set forth such facts as the licensing authority by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies or wave lengths and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The licensing authority at any time after the filing of such original application and during the term of any such license may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

Additional statements may be required.

Oath to application.

Conditions, etc., if use in intercourse with foreign countries intended.

The licensing authority in granting any license for a station intended or used for commercial communication between the United

States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an Act entitled "An Act relating to the landing and the operation of submarine cables in the United States," approved May 24, 1921.

Vol. 42, p. 8.

Issue authorized if public interest would be served thereby.

SEC. 11. If upon examination of any application for a station license or for the renewal or modification of a station license the licensing authority shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the licensing authority upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Hearings, etc., if no decision reached.

Additional statement on licenses.

Such station licenses as the licensing authority may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

Operation only as designated.

(A) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein.

Limiting assignments.

(B) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

Subject to Government control.

Ante, p. 1165.

(C) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 6 hereof.

Temporary emergency, authority of Secretary during first year.

In cases of emergency arising during the period of one year from and after the first meeting of the commission created hereby, or on applications filed during said time for temporary changes in terms of licenses when the commission is not in session and prompt action is deemed necessary, the Secretary of Commerce shall have authority to exercise the powers and duties of the commission, except as to revocation of licenses, but all such exercise of powers shall be promptly reported to the members of the commission, and any action by the Secretary authorized under this paragraph shall continue in force and have effect only until such time as the commission shall act thereon.

Limitations.

Prohibition of granting or transfers to aliens, etc.

Classification of.

SEC. 12. The station license required hereby shall not be granted to, or after the granting thereof such license shall not be transferred in any manner, either voluntarily or involuntarily, to (a) any alien or the representative of any alien; (b) to any foreign government, or the representative thereof; (c) to any company, corporation, or association organized under the laws of any foreign government; (d) to any company, corporation, or association of which any officer or director is an alien, or of which more than one-fifth of the capital stock may be voted by aliens or their representatives or by a foreign government or representative thereof, or by any company, corporation, or association organized under the laws of a foreign country.

No transfers without consent of licensing authority.

The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority.

Licenses refused to any party guilty of monopoly, unfair competition, etc.

SEC. 13. The licensing authority is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person, firm, company, or corporation,

or any subsidiary thereof, which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, after this Act takes effect, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person, firm, company, or corporation for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such firm, company, or corporation.

Granting a license no estoppal of proceedings against violators of antitrust laws, etc.

Revocation of license. Grounds for, specified.

SEC. 14. Any station license shall be revocable by the commission for false statements either in the application or in the statement of fact which may be required by section 10 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the licensing authority in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, for violation of or failure to observe any of the restrictions and conditions of this Act, or of any regulation of the licensing authority authorized by this Act or by a treaty ratified by the United States, or whenever the Interstate Commerce Commission, or any other Federal body in the exercise of authority conferred upon it by law, shall find and shall certify to the commission that any licensee bound so to do, has failed to provide reasonable facilities for the transmission of radio communications, or that any licensee has made any unjust and unreasonable charge, or has been guilty of any discrimination, either as to charge or as to service or has made or prescribed any unjust and unreasonable classification, regulation, or practice with respect to the transmission of radio communications or service: *Provided*, That no such order of revocation shall take effect until thirty days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the parties known by the commission to be interested in such license. Any person in interest aggrieved by said order may make written application to the commission at any time within said thirty days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing herein directed. Notice in writing of said hearing shall be given by the commission to all the parties known to it to be interested in such license twenty days prior to the time of said hearing. Said hearing shall be conducted under such rules and in such manner as the commission may prescribe. Upon the conclusion hereof the commission may affirm, modify, or revoke said orders of revocation.

Proviso. Notice to interested parties.

Application for hearing.

Notice of hearing, and procedure

Authority of Commission.

SEC. 15. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge

Antitrust laws applicable to dealers in radio apparatus, etc.

Revocation of license, etc., in addition to other penalties, if licensee guilty of violating.

order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however*, That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court.

Proviso. Right of appeal.

SEC. 16. Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia; and any licensee whose license is revoked by the commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within twenty days after the decision complained of is effective, notice in writing of said appeal and of the reasons therefor.

Applicants for construction permits, licenses, etc., refused by licensing authority, may appeal to Court of Appeals, D. C.

Appeal if license revoked.

The licensing authority from whose decision an appeal is taken shall be notified of said appeal by service upon it, prior to the filing thereof, of a certified copy of said appeal and of the reasons therefor. Within twenty days after the filing of said appeal the licensing authority shall file with the court the originals or certified copies of all papers and evidence presented to it upon the original application for a permit or license or in the hearing upon said order of revocation, and also a like copy of its decision thereon and a full statement in writing of the facts and the grounds for its decision as found and given by it. Within twenty days after the filing of said statement by the licensing authority either party may give notice to the court of his desire to adduce additional evidence. Said notice shall be in the form of a verified petition stating the nature and character of said additional evidence, and the court may thereupon order such evidence to be taken in such manner and upon such terms and conditions as it may deem proper.

Action on appeals.

Papers to be filed in court.

Additional evidence may be adduced.

At the earliest convenient time the court shall hear, review, and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just. The revision by the court shall be confined to the points set forth in the reasons of appeal.

Early action of court.

Limits of revision.

SEC. 17. After the passage of this Act no person, firm, company, or corporation now or hereafter directly or indirectly through any subsidiary, associated, or affiliated person, firm, company, corporation, or agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this Act, shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share of any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States or in the District of Columbia and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person, firm, company, or corporation now or hereafter engaged directly or indirectly through any subsidiary, associated, or affiliated person,

Radio licensees forbidden to acquire, etc., telegraph or telephone systems between United States and foreign countries effecting monopoly, etc.

Telegraph and telephone systems, forbidden to acquire, etc., radio stations if thereby creating a monopoly in commerce, etc.

company, corporation, or agent, or otherwise, in the business of transmitting and/or receiving for hire messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce.

Candidates for office to be accorded equal opportunity, for using broadcasting stations.

SEC. 18. 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, and the licensing authority shall make rules and regulations to carry this provision into effect: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

Proviso. No censorship allowed, etc.

Paid broadcast matter to be so announced.

SEC. 19. All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, firm, company, or corporation, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person, firm, company, or corporation.

Transmissions only by licensed operators.

SEC. 20. The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Act shall be carried on only by a person holding an operator's license issued hereunder. No person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Secretary of Commerce.

Construction permits required.

SEC. 21. No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the licensing authority upon written application therefor. The licensing authority may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the licensing authority by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies and wave length or wave lengths desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be

Facts to be set forth in applications.

completed and in operation, and such other information as the licensing authority may require. Such application shall be signed by the applicant under oath or affirmation.

Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the licensing authority may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person, firm, company, or corporation without the approval of the licensing authority. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction for which a permit has been granted, and upon it being made to appear to the licensing authority that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the licensing authority since the granting of the permit would, in the judgment of the licensing authority, make the operation of such station against the public interest, the licensing authority shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

Permits to show dates of operation, etc.

Assignment of rights restricted.

License for operation granted if conditions complied with.

SEC. 22. The licensing authority is authorized to designate from time to time radio stations the communications or signals of which, in its opinion, are liable to interfere with the transmission or reception of distress signals of ships. Such stations are required to keep a licensed radio operator listening in on the wave lengths designated for signals of distress and radio communications relating thereto during the entire period the transmitter of such station is in operation.

Stations liable to interfere with distress calls, to be designated.

Requirements for.

SEC. 23. Every radio station on shipboard shall be equipped to transmit radio communications or signals of distress on the frequency or wave length specified by the licensing authority, with apparatus capable of transmitting and receiving messages over a distance of at least one hundred miles by day or night. When sending radio communications or signals of distress and radio communications relating thereto the transmitting set may be adjusted in such a manner as to produce a maximum of radiation irrespective of the amount of interference which may thus be caused.

Distress signals. Requirements for, on shipboard stations.

All radio stations, including Government stations and stations on board foreign vessels when within the territorial waters of the United States, shall give absolute priority to radio communications or signals relating to ships in distress; shall cease all sending on frequencies or wave lengths which will interfere with hearing a radio communication or signal of distress, and, except when engaged in answering or aiding the ship in distress, shall refrain from sending any radio communications or signals until there is assurance that no interference will be caused with the radio communications or signals relating thereto, and shall assist the vessel in distress, so far as possible, by complying with its instructions.

Priority to distress signals to be given by all stations.

SEC. 24. Every shore station open to general public service between the coast and vessels at sea shall be bound to exchange radio communications or signals with any ship station without distinction as to radio systems or instruments adopted by such stations, respectively, and each station on shipboard shall be bound to exchange radio communications or signals with any other station on shipboard

Public shore stations to exchange communications with shipboard, and shipboard with each other.

without distinction as to radio systems or instruments adopted by each station.

Time arrangement for land stations to prevent interference with Government ones in proximity.

SEC. 25. At all places where Government and private or commercial radio stations on land operate in such close proximity that interference with the work of Government stations can not be avoided when they are operating simultaneously such private or commercial stations as do interfere with the transmission or reception of radio communications or signals by the Government stations concerned shall not use their transmitters during the first fifteen minutes of each hour, local standard time.

Government stations to have first 15 minutes in each hour.

The Government stations for which the above-mentioned division of time is established shall transmit radio communications or signals only during the first fifteen minutes of each hour, local standard time, except in case of signals or radio communications relating to vessels in distress and vessel requests for information as to course, location, or compass direction.

Minimum power to be used.

SEC. 26. In all circumstances, except in case of radio communications or signals relating to vessels in distress, all radio stations, including those owned and operated by the United States, shall use the minimum amount of power necessary to carry out the communication desired.

Unauthorized divulgence of radio communication by receiver, forbidden.

SEC. 27. No person receiving or assisting in receiving any radio communication shall divulge or publish the contents, substance, purport, effect, or meaning thereof except through authorized channels of transmission or reception to any person other than the addressee, his agent, or attorney, or to a telephone, telegraph, cable, or radio station employed or authorized to forward such radio communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the radio communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpœna issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person; and no person not being entitled thereto shall receive or assist in receiving any radio communication and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcasted or transmitted by amateurs or others for the use of the general public or relating to ships in distress.

Unauthorized intercepting any message.

Divulging contents, etc., of intercepted message.

Proviso.
Not applicable to broadcasting or distress signals.

Uttering false distress signals, forbidden.

SEC. 28. No person, firm, company, or corporation within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.

Rebroadcasting prohibitions.

No censorship, etc., allowed.

SEC. 29. Nothing in this Act shall be understood or construed to give the licensing authority 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 licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

Communication of obscene, etc., language by radio, prohibited.

SEC. 30. The Secretary of the Navy is hereby authorized unless restrained by international agreement, under the terms and conditions and at rates prescribed by him, which rates shall be just and reasonable, and which, upon complaint, shall be subject to review and revision by the Interstate Commerce Commission, to use all radio stations and apparatus, wherever located, owned by the United States and under the control of the Navy Department (a) for the reception and transmission of press messages offered by any newspaper published in the United States, its Territories or possessions, or published by citizens of the United States in foreign countries, or by any press association of the United States, and (b) for the reception and transmission of private commercial messages between ships, between ship and shore, between localities in Alaska and between Alaska and the continental United States: *Provided*, That the rates fixed for the reception and transmission of all such messages, other than press messages between the Pacific coast of the United States, Hawaii, Alaska, the Philippine Islands, and the Orient, and between the United States and the Virgin Islands, shall not be less than the rates charged by privately owned and operated stations for like messages and service: *Provided further*, That the right to use such stations for any of the purposes named in this section shall terminate and cease as between any countries or localities or between any locality and privately operated ships whenever privately owned and operated stations are capable of meeting the normal communication requirements between such countries or localities or between any locality and privately operated ships, and the licensing authority shall have notified the Secretary of the Navy thereof.

Naval stations. Use of, authorized.

Press messages.

Private commercial messages with ships, and Alaska.

Provisos. Rates, other than Pacific coast press messages.

Termination of use when private stations able to meet requirements.

Notification to Secretary of the Navy.

SEC. 31. The expression "radio communication" or "radio communications" wherever used in this Act means any intelligence, message, signal, power, pictures, or communication of any nature transferred by electrical energy from one point to another without the aid of any wire connecting the points from and at which the electrical energy is sent or received and any system by means of which such transfer of energy is effected.

Meaning of "radio communication."

SEC. 32. Any person, firm, company, or corporation failing or refusing to observe or violating any rule, regulation, restriction, or condition made or imposed by the licensing authority under the authority of this Act or of any international radio convention or treaty ratified or adhered to by the United States, in addition to any other penalties provided by law, upon conviction thereof by a court of competent jurisdiction, shall be punished by a fine of not more than $500 for each and every offense.

Penalty for violating regulations, etc.

SEC. 33. Any person, firm, company, or corporation who shall violate any provision of this Act, or shall knowingly make any false oath or affirmation in any affidavit required or authorized by this Act, or shall knowingly swear falsely to a material matter in any hearing authorized by this Act, upon conviction thereof in any court of competent jurisdiction shall be punished by a fine of not more than $5,000 or by imprisonment for a term of not more than five years or both for each and every such offense.

Punishment for violating provisions, false swearing, etc.

SEC. 34. The trial of any offense under this Act shall be in the district in which it is committed; or if the offense is committed upon the high seas, or out of the jurisdiction of any particular State or district, the trial shall be in the district where the offender may be found or into which he shall be first brought.

Venue of trials.

Not applicable to Philippines or Canal Zone.

SEC. 35. This Act shall not apply to the Philippine Islands or to the Canal Zone. In international radio matters the Philippine Islands and the Canal Zone shall be represented by the Secretary of State.

Authority of Secretary of State.

Administrative officers in Territories and possessions.

SEC. 36. The licensing authority is authorized to designate any officer or employee of any other department of the Government on duty in any Territory or possession of the United States other than the Philippine Islands and the Canal Zone, to render therein such services in connection with the administration of the radio laws of the United States as such authority may prescribe: *Provided*, That such designation shall be approved by the head of the department in which such person is employed.

Provise. Approval of.

Wireless communication. Unexpended balances for, made available. *Ante*, p. 355.

SEC. 37. The unexpended balance of the moneys appropriated in the item for "wireless communication laws," under the caption "Bureau of Navigation" in Title III of the Act entitled "An Act making appropriations for the Departments of State and Justice and for the judiciary, and for the Departments of Commerce and Labor, for the fiscal year ending June 30, 1927, and for other purposes," approved April 29, 1926, and the appropriation for the same purposes for the fiscal year ending June 30, 1928, shall be available both for expenditures incurred in the administration of this Act and for expenditures for the purposes specified in such items. There is hereby authorized to be appropriated for each fiscal year such sums as may be necessary for the administration of this Act and for the purposes specified in such item.

In appropriations for 1928. *Post*, p. 1206.

Future authorization.

Invalidity of any provision not to affect remainder of Act.

SEC. 38. If any provision of this Act or the application thereof to any person, firm, company, or corporation, or to any circumstances, is held invalid, the remainder of the Act and the application of such provision to other persons, firms, companies, or corporations, or to other circumstances, shall not be affected thereby.

Laws repealed. Vol. 37, p. 302; Vol. 41, p. 1001; Vol. 42, p. 1495; Vol. 43, p. 1091. *Ante*, p. 917.

SEC. 39. The Act entitled "An Act to regulate radio communication," approved August 13, 1912, the joint resolution to authorize the operation of Government-owned radio stations for the general public, and for other purposes, approved June 5, 1920, as amended, and the joint resolution entitled "Joint resolution limiting the time for which licenses for radio transmission may be granted, and for other purposes," approved December 8, 1926, are hereby repealed.

Pending suits, etc., not affected by repeal.

Such repeal, however, shall not affect any act done or any right accrued or any suit or proceeding had or commenced in any civil cause prior to said repeal, but all liabilities under said laws shall continue and may be enforced in the same manner as if committed; and all penalties, forfeitures, or liabilities incurred prior to taking effect hereof, under any law embraced in, changed, modified, or repealed by this Act, may be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed.

Use of radio apparatus except as herein provided forbidden.

Nothing in this section shall be construed as authorizing any person now using or operating any apparatus for the transmission of radio energy or radio communications or signals to continue such use except under and in accordance with this Act and with a license granted in accordance with the authority hereinbefore conferred.

In force on approval. Penalties not enforced for 60 days.

SEC. 40. This Act shall take effect and be in force upon its passage and approval, except that for and during a period of sixty days after such approval no holder of a license or an extension thereof issued by the Secretary of Commerce under said Act of August 13, 1912, shall be subject to the penalties provided herein for operating a station without the license herein required.

Title of Act.

SEC. 41. This Act may be referred to and cited as the Radio Act of 1927.

Approved, February 23, 1927.

[CHAPTER 651.]

AN ACT

June 19, 1934.
[S. 3040.]
[Public, No. 415.]

To give the Supreme Court of the United States authority to make and publish rules in actions at law.

Supreme Court of United States.
Power to prescribe rules in civil actions at law.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Rights of litigant.
Effective date.

Rules in equity and law may be united.

SEC. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however*, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.

Proviso.
Right of trial by jury.

Effective date of united rules.

Approved, June 19, 1934.

[CHAPTER 652.]

AN ACT

June 19, 1934.
[S. 3285.]
[Public, No. 416.]

To provide for the regulation of interstate and foreign communication by wire or radio, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Communications Act of 1934.

TITLE I—GENERAL PROVISIONS

Purposes of Act.

PURPOSES OF ACT; CREATION OF FEDERAL COMMUNICATIONS COMMISSION

SECTION 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Federal Communications Commission created.

Application of Act.

APPLICATION OF ACT

To interstate and foreign communications; transmission of energy by radio.

SEC. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all

Persons to whom applicable.

radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Philippine Islands or the Canal Zone, or to wire or radio communication or transmission wholly within the Philippine Islands or the Canal Zone. Exception.

(b) Subject to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier; except that sections 201 to 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clause (2). Limitation on jurisdiction of Commission.

Post, p. 1081.

Post, p. 1070.

DEFINITIONS

Definitions.

SEC. 3. For the purposes of this Act, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission. "Wire communication"; "communication by wire."

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission. "Radio communication"; "communication by radio."

(c) "Licensee" means the holder of a radio station license granted or continued in force under authority of this Act. "Licensee."

(d) "Transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission. "Transmission of energy by radio"; "radio transmission of energy."

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Philippine Islands and the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Philippine Islands and the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Philippine Islands or the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not include wire communication between points within the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission. "Interstate communication"; "interstate transmission."

(f) "Foreign communication" or "foreign transmission" means communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States. "Foreign communication"; "foreign transmission."

(g) "United States" means the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include the Philippine Islands or the Canal Zone. "United States."

"Common carrier"; "carrier."

(h) "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 Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

"Person."

(i) "Person" includes an individual, partnership, association, joint-stock company, trust, or corporation.

"Corporation."

(j) "Corporation" includes any corporation, joint-stock company, or association.

"Radio station"; "station."

(k) "Radio station" or "station" means a station equipped to engage in radio communication or radio transmission of energy.

"Mobile station."

(l) "Mobile station" means a radio-communication station capable of being moved and which ordinarily does move.

"Land stations."

(m) "Land station" means a station, other than a mobile station, used for radio communication with mobile stations.

"Mobile service."

(n) "Mobile service" means the radio-communication service carried on between mobile stations and land stations, and by mobile stations communicating among themselves.

"Broadcasting."

(o) "Broadcasting" means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

"Chain broadcasting."

(p) "Chain broadcasting" means simultaneous broadcasting of an identical program by two or more connected stations.

"Amateur station."

(q) "Amateur station" means a radio station operated by a duly authorized person interested in radio technique solely with a personal aim and without pecuniary interest.

"Telephone exchange service."

(r) "Telephone exchange service" means service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge.

"Telephone toll service."

(s) "Telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

"State commission."

(t) "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.

"Connecting carrier."

(u) "Connecting carrier" means a carrier described in clause (2) of section 2 (b).

"State."

(v) "State" includes the District of Columbia and the Territories and possessions.

PROVISIONS RELATING TO THE COMMISSION

Federal Communications Commission. Composition; appointment.

SEC. 4. (a) The Federal Communications Commission (in this Act referred to as the "Commission") shall be composed of seven commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman.

Qualifications. Citizenship. Financial interests denied.

(b) Each member of the Commission shall be a citizen of the United States. No member of the Commission or person in its employ shall be financially interested in the manufacture or sale of radio apparatus or of apparatus for wire or radio communication; in communication by wire or radio or in radio transmission of

energy; in any company furnishing services or such apparatus to any company engaged in communication by wire or radio or to any company manufacturing or selling apparatus used for communication by wire or radio; or in any company owning stocks, bonds, or other securities of any such company; nor be in the employ of or hold any official relation to any person subject to any of the provisions of this Act, nor own stocks, bonds, or other securities of any corporation subject to any of the provisions of this Act. Such commissioners shall not engage in any other business, vocation, or employment. Not more than four commissioners shall be members of the same political party.

Political affiliations.

(c) The commissioners first appointed under this Act shall continue in office for the terms of one, two, three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years; except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he succeeds. No vacancy in the Commission shall impair the right of the remaining commissioners to exercise all the powers of the Commission.

Terms of office.

Successors.

Vacancies.

Effect of.

(d) Each commissioner shall receive an annual salary of $10,000, payable in monthly installments.

Compensation.

(e) The principal office of the Commission shall be in the District of Columbia, where its general sessions shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States.

Principal office.

(f) Without regard to the civil-service laws or the Classification Act of 1923, as amended, (1) the Commission may appoint and prescribe the duties and fix the salaries of a secretary, a director for each division, a chief engineer and not more than three assistants, a general counsel and not more than three assistants, and temporary counsel designated by the Commission for the performance of special services, and (2) each commissioner may appoint and prescribe the duties of a secretary at an annual salary not to exceed $4,000. The general counsel and the chief engineer shall each receive an annual salary of not to exceed $9,000; the secretary shall receive an annual salary of not to exceed $7,500; the director of each division shall receive an annual salary of not to exceed $7,500; and no assistant shall receive an annual salary in excess of $7,500. The Commission shall have authority, subject to the provisions of the civil-service laws and the Classification Act of 1923, as amended, to appoint such other officers, engineers, inspectors, attorneys, examiners, and other employees as are necessary in the execution of its functions.

Appointments by Commission.

Secretary, division director, chief engineer and assistants.

Salaries.

(g) The Commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for office supplies, law books, periodicals, and books of reference, and for printing and binding) as may be necessary for the execution of the functions vested in the Commission and as from time to time may be appropriated for by Congress. All expenditures of the Commission, including all necessary expenses for transportation incurred by the commissioners or by their employees, under their orders, in making any investigation or upon any official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission or by such other member or officer thereof as may be designated by the Commission for that purpose.

Expenditures authorized.

Quorum.
Seal.

(h) Four members of the Commission shall constitute a quorum thereof. The Commission shall have an official seal which shall be judicially noticed.

Rules and regulations.

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Proceedings of Commission.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

Records.

Annual report to Congress.
Information to contain.

(k) The Commission shall make an annual report to Congress, copies of which shall be distributed as are other reports transmitted to Congress. Such report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of interstate and foreign wire and radio communication and radio transmission of energy, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary: *Provided*, That the Commission shall make a special report not later than February 1, 1935, recommending such amendments to this Act as it deems desirable in the public interest.

Proviso.
Special report, February 1, 1935.

Reports of investigations.

(l) All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier or licensee that may have been complained of.

Publication of.

(m) The Commission shall provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof.

Rates of compensation; deductions.

(n) Rates of compensation of persons appointed under this section shall be subject to the reduction applicable to officers and employees of the Federal Government generally.

Divisions of Commission.

DIVISIONS OF THE COMMISSION

Number authorized.

SEC. 5. (a) The Commission is hereby authorized by its order to divide the members thereof into not more than three divisions, each to consist of not less than three members. Any commissioner may be assigned to and may serve upon such division or divisions as the Commission may direct, and each division shall choose its own chairman.

Assignment of Commissioners.
Vacancies.

In case of a vacancy in any division, or of absence or inability to serve thereon of any commissioner thereto assigned, the chairman of the Commission or any commissioner designated by him for that purpose may temporarily serve on said division until the Commission shall otherwise order.

Assignment of work to division.

(b) The Commission may by order direct that any of its work, business, or functions arising under this Act, or under any other Act of Congress, or in respect of any matter which has been or may be referred to the Commission by Congress or by either branch thereof, be assigned or referred to any of said divisions for action thereon, and may by order at any time amend, modify, supple-

ment, or rescind any such direction. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the Commission.

Assignment orders.

(c) In conformity with and subject to the order or orders of the Commission in the premises, each division so constituted shall have power and authority by a majority thereof to hear and determine, order, certify, report, or otherwise act as to any of said work, business, or functions so assigned or referred to it for action by the Commission, and in respect thereof the division shall have all the jurisdiction and powers now or then conferred by law upon the Commission, and be subject to the same duties and obligations. Any order, decision, or report made or other action taken by any of said divisions in respect of any matters so assigned or referred to it shall have the same force and effect, and may be made, evidenced, and enforced in the same manner as if made, or taken by the Commission, subject to rehearing by the Commission as provided in section 405 of this Act for rehearing cases decided by the Commission. The secretary and seal of the Commission shall be the secretary and seal of each division thereof.

Jurisdiction and power of division in executing assigned work.

Rehearing.
Post, p. 1095.

(d) Nothing in this section contained, or done pursuant thereto, shall be deemed to divest the Commission of any of its powers.

(e) The Commission is hereby authorized by its order to assign or refer any portion of its work, business, or functions arising under this or any other Act of Congress or referred to it by Congress, or either branch thereof, to an individual commissioner, or to a board composed of an employee or employees of the Commission, to be designated by such order, for action thereon, and by its order at any time to amend, modify, supplement, or rescind any such assignment or reference: *Provided, however*, That this authority shall not extend to investigations instituted upon the Commission's own motion or, without the consent of the parties thereto, to contested proceedings involving the taking of testimony at public hearings, or to investigations specifically required by this Act. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the Commission. In case of the absence or inability for any other reason to act of any such individual commissioner or employee designated to serve upon any such board, the chairman of the Commission may designate another commissioner or employee, as the case may be, to serve temporarily until the Commission shall otherwise order. In conformity with and subject to the order or orders of the Commission in the premises, any such individual commissioner, or board acting by a majority thereof, shall have power and authority to hear and determine, order, certify, report, or otherwise act as to any of said work, business, or functions so assigned or referred to him or it for action by the Commission and in respect thereof shall have all the jurisdiction and powers now or then conferred by law upon the Commission and be subject to the same duties and obligations. Any order, decision, or report made or other action taken by any such individual commissioner or board in respect of any matters so assigned or referred shall have the same force and effect, and may be made, evidenced, and enforced in the same manner as if made or taken by the Commission. Any party affected by any order, decision, or report of any such individual commissioner or board may file a petition for rehearing by the Commission or a division thereof and every such petition shall be passed upon by the Commission or a division thereof. Any action by a division upon such a petition shall itself be subject to rehearing by the Commission, as provided in section 405 of this Act and in subsection (c).

Assignment of work to Commissioner.

Proviso.
Restriction in case of investigations or contested proceedings.

Assignment orders, effectiveness.

Vacancies.

Power of Commissioner in executing assigned work.

Petition for rehearing by affected party.

Rehearing on action by a division.
Post, p. 1095.

Rules governing conduct of proceedings.

The Commission may make and amend rules for the conduct of proceedings before such individual commissioner or board and for the rehearing of such action before a division of the Commission or the Commission. The secretary and seal of the Commission shall be the secretary and seal of such individual commissioner or board.

Common Carriers.

TITLE II—COMMON CARRIERS

Service and charges.

SERVICE AND CHARGES

Duty of common carrier to furnish.

SECTION 201. (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; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

To establish physical connections with other carriers.

Charges, etc., for communication services.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: *Provided*, That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest.

Proviso. Classification of communications.

Different charges authorized.

Common carrier contracts for exchange of services permitted.

Discrimination and preferences.

DISCRIMINATION AND PREFERENCES

Unlawful to make in charges, services, etc.

SEC. 202. (a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Charges or services, construed.

(b) Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of wires in chain broadcasting or incidental to radio communication of any kind.

Penalty for violation.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense.

Schedules of charges.

SCHEDULES OF CHARGES

Filing with Commission.

Information to contain.

SEC. 203. (a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting

carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

Regulations.

Schedules to be furnished connecting carriers.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

Filing and publication of notice to change charges, etc.

Modification of requirements.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

Prohibited acts.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

Rejection of schedule.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense.

Penalty provision.

HEARING AS TO LAWFULNESS OF NEW CHARGES; SUSPENSION

New charges.

SEC. 204. Whenever there is filed with the Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as

Hearing upon lawfulness.

Notice.

Temporary suspension of charges.

Effectiveness of change if order not issued during suspension period.

would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified.

Account of amounts received in case of increased charge.

Burden of proof in justifying increased charge.

At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Charges.

COMMISSION AUTHORIZED TO PRESCRIBE JUST AND REASONABLE CHARGES

Determination of reasonable charges by Commission.

SEC. 205. (a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Cease and desist orders.

Penalty provision.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

Liability of carriers for damages.

LIABILITY OF CARRIERS FOR DAMAGES

SEC. 206. In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Amount.

RECOVERY OF DAMAGES

Recovery of damages.

SEC. 207. Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

Complaint to Commission.

Jurisdiction of district courts.

COMPLAINTS TO THE COMMISSION

Complaints to Commission.

SEC. 208. Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Statement of complaint.

Commission to forward to carrier.

Answer to be filed within time specified.

Carrier relieved if reparation made.

Investigation of complaint by Commission.

ORDERS FOR PAYMENT OF MONEY

Orders for payment of money.

SEC. 209. If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Commission to make, when finding for complainant.

FRANKS AND PASSES

Franks and passes.

SEC. 210. Nothing in this Act or in any other provision of law shall be construed to prohibit common carriers from issuing or giving franks to, or exchanging franks with each other for the use of, their officers, agents, employees, and their families, or, subject to such rules as the Commission may prescribe, from issuing, giving, or exchanging franks and passes to or with other common carriers not subject to the provisions of this Act, for the use of their officers, agents, employees, and their families. The term "employees", as used in this section, shall include furloughed, pensioned, and superannuated employees.

Right of carriers to exchange.

"Employees", construed.

COPIES OF CONTRACTS TO BE FILED

Contracts, agreements, and arrangements between carriers.

SEC. 211. (a) Every carrier subject to this Act shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this Act, in relation to any traffic affected by the provisions of this Act to which it may be a party.

Copies filed with Commission.

Other contracts of carrier.

(b) The Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine.

Interlocking directorates.

INTERLOCKING DIRECTORATES—OFFICIALS DEALING IN SECURITIES

Unlawful, unless Commission authorizes.

SEC. 212. After sixty days from the enactment of this Act it shall be unlawful for any person to hold the position of officer or director of more than one carrier subject to this Act, unless such holding shall have been authorized by order of the Commission, upon due showing in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby. After this section takes effect it shall be unlawful for any officer or director of any such carrier to receive for his own benefit, directly or indirectly, any money or thing of value in respect of negotiation, hypothecation, or sale of any securities issued or to be issued by such carrier, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of such carrier from any funds properly included in capital account.

Unlawful dealing in securities by officials.

Carrier property.

VALUATION OF CARRIER PROPERTY

Valuation of, by Commission.

SEC. 213. (a) The Commission may from time to time, as may be necessary for the proper administration of this Act, and after opportunity for hearing, make a valuation of all or of any part of the property owned or used by any carrier subject to this Act, as of such date as the Commission may fix.

Inventories.

(b) The Commission may at any time require any such carrier to file with the Commission an inventory of all or of any part of the property owned or used by said carrier, which inventory shall show the units of said property classified in such detail, and in such manner, as the Commission shall direct, and shall show the estimated cost of reproduction new of said units, and their reproduction cost new less depreciation, as of such date as the Commission may direct; and such carrier shall file such inventory within such reasonable time as the Commission by order shall require.

Information to contain.

Statement of original cost.

(c) The Commission may at any time require any such carrier to file with the Commission a statement showing the original cost at the time of dedication to the public use of all or of any part of the property owned or used by said carrier. For the showing of such original cost said property shall be classified, and the original cost shall be defined, in such manner as the Commission may prescribe; and if any part of such cost cannot be determined from accounting or other records, the portion of the property for which such cost cannot be determined shall be reported to the Commission; and, if the Commission shall so direct, the original cost thereof shall be estimated in such manner as the Commission may prescribe. If the carrier owning the property at the time such original cost is reported shall have paid more or less than the original cost to acquire the same, the amount of such cost of acquisition, and any facts which the Commission may require in connection therewith, shall be reported with such original cost. The report made by a carrier under this paragraph shall show the source or sources from which the original cost reported was obtained, and such other information as to the manner in which the report was prepared, as the Commission shall require.

Classification of property.

Report when original cost cannot be determined.

Estimates.

Report when purchase price greater than original cost.

Sources of original cost report to be shown.

Expense of obtaining easement, license, or franchise.

(d) Nothing shall be included in the original cost reported for the property of any carrier under paragraph (c) of this section on account of any easement, license, or franchise granted by the United

States or by any State or political subdivision thereof, beyond the reasonable necessary expense lawfully incurred in obtaining such easement, license, or franchise from the public authority aforesaid, which expense shall be reported separately from all other costs in such detail as the Commission may require; and nothing shall be included in any valuation of the property of any carrier made by the Commission on account of any such easement, license, or franchise, beyond such reasonable necessary expense lawfully incurred as aforesaid.

New construction, extensions, etc., Commission to keep informed.

(e) The Commission shall keep itself informed of all new construction, extensions, improvements, retirements, or other changes in the condition, quantity, use, and classification of the property of common carriers, and of the cost of all additions and betterments thereto and of all changes in the investment therein, and may keep itself informed of current changes in costs and values of carrier properties.

Carrier to furnish information regarding valuation of property.

(f) For the purpose of enabling the Commission to make a valuation of any of the property of any such carrier, or to find the original cost of such property, or to find any other facts concerning the same which are required for use by the Commission, it shall be the duty of each such carrier to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and to cooperate with and aid the Commission in the work of making any such valuation or finding in such manner and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering this section shall have the full force and effect of law. Unless otherwise ordered by the Commission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public. The Commission, in making any such valuation, shall be free to adopt any method of valuation which shall be lawful.

Copies of maps, contracts, reports, etc.

Records and data open to public inspection.

Method of valuation.

Interstate Commerce Commission. Valuation of properties by.

(g) Notwithstanding any provision of this Act the Interstate Commerce Commission, if requested to do so by the Commission, shall complete, at the earliest practicable date, such valuations of properties of carriers subject to this Act as are now in progress, and shall thereafter transfer to the Commission the records relating thereto.

Powers of State commissions.

(h) Nothing in this section shall impair or diminish the powers of any State commission.

EXTENSION OF LINES

Extension of lines.

Certificate authorizing required.

SEC. 214. (a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, operation, or extension of (1) a line within a single State unless said line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any lines

Provisos. When certificate not required.

Temporary or emergency service authorized.

acquired under section 221 of this Act: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section.

Application for certificate.
Notice and copy to Governor of affected State.

(b) Upon receipt of an application for any such certificate the Commission shall cause notice thereof to be given to and a copy filed with the Governor of each State in which such additional or extended line is proposed to be constructed or operated, with the right to be heard as provided with respect to the hearing of complaints; and the Commission may require such published notice as it shall determine.

Issue of certificate.

(c) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may

Terms and conditions imposed.

attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may,

Compliance with, required.

without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of

Injunction to restrain unauthorized construction.

such certificate and proceed with the construction, acquisition, operation, or extension covered thereby. Any construction, acquisition, operation, or extension contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

Carrier to provide adequate facilities upon order.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for performing its service as a common carrier and to extend its line; but no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses

Penalty provision, refusal to comply.

or neglects to comply with any order of the Commission made in pursuance of this paragraph shall forfeit to the United States $100 for each day during which such refusal or neglect continues.

TRANSACTIONS RELATING TO SERVICES, EQUIPMENT, AND SO FORTH

Transactions relating to services, equipment, etc.
Examination of, by Commission.

SEC. 215. (a) The Commission shall examine into transactions entered into by any common carrier which relate to the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier and/or which may affect the charges made or to be made and/or the services rendered or to be rendered by such carrier, in wire or radio communication subject to this Act, and shall

Report to Congress.

report to the Congress whether any such transactions have affected or are likely to affect adversely the ability of the carrier to render adequate service to the public, or may result in any undue or unreasonable increase in charges or in the maintenance of undue or unreasonable charges for such service; and in order to fully examine into

Inspection of carrier's accounts, records, etc.

such transactions the Commission shall have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, of persons furnishing such equipment, supplies, research, services, finances, credit, or personnel. The Commission

Report of recommendation for legislation affecting transactions.

shall include in its report its recommendations for necessary legislation in connection with such transactions, and shall report specifically

whether in its opinion legislation should be enacted (1) authorizing the Commission to declare any such transactions void or to permit such transactions to be carried out subject to such modification of their terms and conditions as the Commission shall deem desirable in the public interest; and/or (2) subjecting such transactions to the approval of the Commission where the person furnishing or seeking to furnish the equipment, supplies, research, services, finances, credit, or personnel is a person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier; and/or (3) authorizing the Commission to require that all or any transactions of carriers involving the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier be upon competitive bids on such terms and conditions and subject to such regulations as it shall prescribe as necessary in the public interest.

Report of findings regarding services of wire telephone and telegraph companies.

(b) The Commission shall investigate the methods by which and the extent to which wire telephone companies are furnishing wire telegraph service and wire telegraph companies are furnishing wire telephone service, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable.

Report of restrictive contracts of carriers.

(c) The Commission shall examine all contracts of common carriers subject to this Act which prevent the other party thereto from dealing with another common carrier subject to this Act, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable.

APPLICATION OF ACT TO RECEIVERS AND TRUSTEES

Application of act to receivers and trustees.

SEC. 216. The provisions of this Act shall apply to all receivers and operating trustees of carriers subject to this Act to the same extent that it applies to carriers.

LIABILITY OF CARRIER FOR ACTS AND OMISSIONS OF AGENTS

Liability of carrier for acts and omissions of agents.

SEC. 217. In construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person.

INQUIRIES INTO MANAGEMENT

Inquiries into management.

Authority of Commission to make.

SEC. 218. The Commission may inquire into the management of the business of all carriers subject to this Act, and shall keep itself informed as to the manner and method in which the same is conducted and as to technical developments and improvements in wire and radio communication and radio transmission of energy to the end that the benefits of new inventions and developments may be made available to the people of the United States. The Commission may obtain from such carriers and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created.

Information from carriers.

ANNUAL AND OTHER REPORTS

Reports.

Requirement from carriers.

SEC. 219. (a) The Commission is authorized to require annual reports under oath from all carriers subject to this Act, and from persons directly or indirectly controlling or controlled by, or under

Manner to be made.

direct or indirect common control with, any such carrier, to prescribe the manner in which such reports shall be made, and to require from such persons specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amount and privileges of each class of stock, the amounts paid therefor, and the manner of payment for the same; the dividends paid and the surplus fund, if any; the number of stockholders (and the names of the thirty largest holders of each class of stock and the amount held by each); the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the names of all officers and directors, and the amount of salary, bonus, and all other compensation paid to each; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to charges or regulations concerning charges, or agreements, arrangements, or contracts affecting the same, as the Commission may require.

Information to contain.
Capital stock issued.
Dividend payments; surplus fund.
Number of stockholders.
Debts.
Valuation of property.
Employees and salaries.
Officers, etc.
Improvement expenditures.
Earnings and receipts.
Profit and loss balance.
Exhibit of financial operations.
Charges or regulations.

(b) Such reports shall be for such twelve months' period as the Commission shall designate and shall be filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time is granted in any case by the Commission; and if any person subject to the provisions of this section shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such person shall forfeit to the United States the sum of $100 for each and every day it shall continue to be in default with respect thereto. The Commission may by general or special orders require any such carriers to file monthly reports of earnings and expenses and to file periodical and/or special reports concerning any matters with respect to which the Commission is authorized or required by law to act; and such periodical or special reports shall be under oath whenever the Commission so requires. If any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures above provided.

Period of time reports to comprise.
Filing.
Penalty for failure.
Monthly reports of earnings and expenses.

ACCOUNTS, RECORDS, AND MEMORANDA; DEPRECIATION CHARGES

Accounts, records, and memoranda.
Forms.

SEC. 220. (a) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys.

Depreciation charges. Classification of property for which may be included.

(b) The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such

Modifications.

carriers shall not, after the Commission has prescribed the clasess[1] of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

Unauthorized charging to operating expenses forbidden.

Duplicating depreciation charges, etc., forbidden.

(c) The Commission shall at all times have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry and the Commission may suspend a charge or credit pending submission of proof by such person. Any provision of law prohibiting the disclosure of the contents of messages or communications shall not be deemed to prohibit the disclosure of any matter in accordance with the provisions of this section.

Records, accounts, etc., of carriers.
Inspection of, by Commission.

Burden of proof in justifying questioned accounting entry.

Disclosure of contents of messages.

(d) In case of failure or refusal on the part of any such carrier to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, memoranda, documents, papers, and correspondence as are kept to the inspection of the Commission or any of its authorized agents, such carrier shall forfeit to the United States the sum of $500 for each day of the continuance of each such offense.

Penalty for failure to keep accounts, etc.

(e) Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by any such carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction, to a fine of not less than $1,000 nor more than $5,000 or imprisonment for a term of not less than one year nor more than three years, or both such fine and imprisonment: *Provided*, That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, or documents which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

For false entry.
For destroying records.

Proviso.
Authorized destruction of records.

(f) No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

Unauthorized disclosure of information forbidden.

(g) After the Commission has prescribed the forms and manner of keeping of accounts, records, and memoranda to be kept by any person as herein provided, it shall be unlawful for such person to keep any other accounts, records, or memoranda than those so prescribed or such as may be approved by the Commission or to keep

Keeping unauthorized accounts, records, etc., forbidden.

[1] So in original.

the accounts in any other manner than that prescribed or approved by the Commission. Notice of alterations by the Commission in the required manner or form of keeping accounts shall be given to such persons by the Commission at least six months before the same are to take effect.

Classification of carriers.
Requirements to be prescribed for classes.

(h) The Commission may classify carriers subject to this Act and prescribe different requirements under this section for different classes of carriers, and may, if it deems such action consistent with the public interest, except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates.

Prior notification to State commissions.

(i) The Commission, before prescribing any requirements as to accounts, records, or memoranda, shall notify each State commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

Report to Congress.

(j) The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.

Telephone companies.

SPECIAL PROVISIONS RELATING TO TELEPHONE COMPANIES

Application for authority to consolidate.

SEC. 221. (a) Upon application of one or more telephone companies for authority to consolidate their properties or a part thereof into a single company, or for authority for one or more such companies to acquire the whole or any part of the property of another telephone company or other telephone companies or the control thereof by the purchase of securities or by lease or in any other like manner, when such consolidated company would be subject to this Act, the Commission shall fix a time and place for a public hearing upon such application and shall thereupon give reasonable notice in writing to the Governor of each of the States in which the physical property affected, or any part thereof, is situated, and to the State commission having jurisdiction over telephone companies, and to such other persons as it may deem advisable. After such public hearing, if the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply. Nothing in this subsection shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies.

Hearing.
Notice.

Certification of Commission's findings.

Effect.

Powers of States not restricted.

Telephone exchange service subject to State regulation.
Jurisdiction of Commission.

(b) Nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire telephone exchange service, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

Classification of carriers.

(c) For the purpose of administering this Act as to carriers engaged in wire telephone communication, the Commission may classify the property of any such carrier used for wire telephone communication, and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service.

Inspect transmitting apparatus.

(n) Have authority to inspect all transmitting apparatus to ascertain whether in construction and operation it conforms to the requirements of this Act, the rules and regulations of the Commission, and the license under which it is constructed or operated;

Designate call letters.

(o) Have authority to designate call letters of all stations;

Cause publication of call letters.

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this Act;

Require lighting of radio towers.

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation.

Waiver by licensee.

WAIVER BY LICENSEE

Claim to use of particular frequency.

SEC. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

Government-owned stations.

GOVERNMENT-OWNED STATIONS

Exemption from designated provisions, *Ante*, p. 1082.

SEC. 305. (a) Radio stations belonging to and operated by the United States shall not be subject to the provisions of sections 301 and 303 of this Act. All such Government stations shall use such frequencies as shall be assigned to each or to each class by the President. All such stations, except stations on board naval and other Government vessels while at sea or beyond the limits of the continental United States, when transmitting any radio communication or signal other than a communication or signal relating to Government business, shall conform to such rules and regulations designed to prevent interference with other radio stations and the rights of others as the Commission may prescribe.

Assignment of frequencies to.

Requirement to conform to regulations to prevent interference.

Regulation of stations aboard United States vessels.

(b) Radio stations on board vessels of the United States Shipping Board Bureau or the United States Shipping Board Merchant Fleet Corporation or the Inland and Coastwise Waterways Service shall be subject to the provisions of this title.

Call letters of Federal stations.

(c) All stations owned and operated by the United States, except mobile stations of the Army of the United States, and all other stations on land and sea, shall have special call letters designated by the Commission.

Foreign ships.

FOREIGN SHIPS

Regulations governing signals on, within U.S. jurisdiction.

SEC. 306. Section 301 of this Act shall not apply to any person sending radio communications or signals on a foreign ship while the same is within the jurisdiction of the United States, but such communications or signals shall be transmitted only in accordance with such regulations designed to prevent interference as may be promulgated under the authority of this Act.

Allocation of facilities.

ALLOCATION OF FACILITIES; TERM OF LICENSES

Station license, granting authorized.

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

Allocation of broadcasting licenses.

(b) It is hereby declared that the people of all the zones established by this title are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the Commission shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency, of periods of time for operation, and of station power, to each of said zones when and insofar as there are applications therefor; and shall make a fair and equitable allocation of licenses, frequencies, time for operation, and station power to each of the States and the District of Columbia, within each zone, according to population. The Commission shall carry into effect the equality of broadcasting service hereinbefore directed, whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power, when applications are made for licenses or renewals of licenses: *Provided*, That if and when there is a lack of applications from any zone for the proportionate share of licenses, frequencies, time of operation, or station power to which such zone is entitled, the Commission may issue licenses for the balance of the proportion not applied for from any zone, to applicants from other zones for a temporary period of ninety days each, and shall specifically designate that said apportionment is only for said temporary period. Allocations shall be charged to the State or District wherein the studio of the station is located and not where the transmitter is located: *Provided further*, That the Commission may also grant applications for additional licenses for stations not exceeding one hundred watts of power if the Commission finds that such stations will serve the public convenience, interest, or necessity, and that their operation will not interfere with the fair and efficient radio service of stations licensed under the provisions of this section.

Of frequencies, time of operation, and station power.

Modifications to effect equality within zones, authorized.

Provisos.

When lack of applications for available facilities within zone.

Issue of temporary licenses to applicants from other zones.

Charging of allocations to States.

Proviso.

Applications for additional licenses.

Allocation of fixed percentages of radio facilities.

(c) The Commission shall study the proposal that Congress by statute allocate fixed percentages of radio broadcasting facilities to particular types or kinds of non-profit radio programs or to persons identified with particular types or kinds of non-profit activities, and shall report to Congress, not later than February 1, 1935, its recommendations together with the reasons for the same.

Commission to study proposal.

License, term of.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

Renewals.

Granting of.

(e) No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license.

Licenses.

APPLICATIONS FOR LICENSES; CONDITIONS IN LICENSE FOR FOREIGN COMMUNICATION

Applications for.

SEC. 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: *Provided, however*, That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Com-

Provisos.

Emergency granting for Federal stations on vessels or aircraft.

mission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months: *Provided further*, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

Term of.

Issue of.

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

Information in applications.

(c) The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an Act entitled "An Act relating to the landing and the operation of submarine cables in the United States", approved May 24, 1921.

License for foreign communication.

Terms, conditions, etc., in.

Vol. 42, p. 8.

HEARINGS ON APPLICATIONS FOR LICENSES; FORM OF LICENSES; CONDITIONS ATTACHED TO LICENSES

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Examination of application.

Hearing if decision of Commission adverse.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

Form of license.

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

Conditions.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

LIMITATION ON HOLDING AND TRANSFER OF LICENSES

Limitation on holding and transfer of licenses.

Aliens.

Foreign governments.

Foreign corporations.

Corporation having alien officer.

Corporation controlled by other corporation having alien officers.

SEC. 310. (a) The station license required hereby shall not be granted to or held by—

(1) Any alien or the representative of any alien;

(2) Any foreign government or the representative thereof;

(3) Any corporation organized under the laws of any foreign government;

(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;

(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

Limitations not applicable, Federal vessels, aircraft, etc.

Nothing in this subsection shall prevent the licensing of radio apparatus on board any vessel, aircraft, or other mobile station of the United States when the installation and use of such apparatus is required by Act of Congress or any treaty to which the United States is a party.

Rights, etc., of license not transferable.

(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.

REFUSAL OF LICENSES AND PERMITS IN CERTAIN CASES

Refusal of licenses and permits.

Grounds for.

Post, p. 1087.

SEC. 311. The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313, and is hereby authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such corporation.

Granting of license not to estop aggrieved person.

REVOCATION OF LICENSES

Revocation of license.

Grounds for.

Ante, p. 1084.

SEC. 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions

revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however*, That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

Proviso.
Revocation order, when effective.

Application for hearing.

Temporary suspension of order.

Final decision.

(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however*, That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue.

Modification of license or permit.

Proviso.
Notice to holder required.

APPLICATION OF ANTITRUST LAWS

Antitrust laws.

Application of.

SEC. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however*, That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court.

Penalties for violations.

License revocation.

Proviso.
Appeals.

PRESERVATION OF COMPETITION IN COMMERCE

Preservation of competition in commerce.

Limitation on ownership of communication facilities.

SEC. 314. After the effective date of this Act no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this Act, shall by purchase, lease, construction,

On ownership of stock.

or otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor

By person engaged in transmitting for hire interstate or foreign messages.

shall any person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce.

FACILITIES FOR CANDIDATES FOR PUBLIC OFFICE

Facilities for candidates for public office.

Equal opportunity required.

Rules.

Proviso.
Limitation on licensee power of censorship.

SEC. 315. 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, and the Commission shall make rules and regulations to carry this provision into effect: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

LOTTERIES AND OTHER SIMILAR SCHEMES

Lotteries and similar schemes.

Broadcasting prohibited.

Penalty provision.

SEC. 316. No person shall broadcast by means of any radio station for which a license is required by any law of the United States, and no person operating any such station shall knowingly permit the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes. Any person violating any provision of this section shall,

upon conviction thereof, be fined not more than $1,000 or imprisoned not more than one year, or both, for each and every day during which such offense occurs.

ANNOUNCEMENT THAT MATTER IS PAID FOR

Announcement that broadcast is paid for.

SEC. 317. All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.

OPERATION OF TRANSMITTING APPARATUS

Operation of transmitting apparatus.

Requirement of qualified operator.

SEC. 318. The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Act shall be carried on only by a person holding an operator's license issued hereunder. No person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission.

CONSTRUCTION PERMITS

Construction permits.

Requirement.

SEC. 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

Granting by Commission.

Application for.

Contents.

Signature.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of

Dates of station operation to be specified.

Automatic forfeiture if not met.

Exception.

Assignment of rights prohibited.

Limitation on requirement of permits.

License for operation to issue when conditions met.

Nature of license.

the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

Stations liable to interfere with distress signals.
Designation of.

DESIGNATION OF STATIONS LIABLE TO INTERFERE WITH DISTRESS SIGNALS

SEC. 320. The Commission is authorized to designate from time to time radio stations the communications or signals of which, in its opinion, are liable to interfere with the transmission or reception of distress signals of ships. Such stations are required to keep a licensed radio operator listening in on the frequencies designated for signals of distress and radio communications relating thereto during the entire period the transmitter of such station is in operation.

Requirement during operation.

Distress signals and communications.

DISTRESS SIGNALS AND COMMUNICATIONS

Transmission of; requirement.

SEC. 321. (a) Every radio station on shipboard shall be equipped to transmit radio communications or signals of distress on the frequency specified by the Commission, with apparatus capable of transmitting and receiving messages over a distance of at least one hundred miles by day or night. When sending radio communications or signals of distress and radio communications relating thereto the transmitting set may be adjusted in such a manner as to produce a maximum of radiation irrespective of the amount of interference which may thus be caused.

Adjustment of transmitting set.

Absolute priority of.

(b) All radio stations, including Government stations and stations on board foreign vessels when within the territorial waters of the United States, shall give absolute priority to radio communications or signals relating to ships in distress; shall cease all sending on frequencies which will interfere with hearing a radio communication or signal of distress, and, except when engaged in answering or aiding the ship in distress, shall refrain from sending any radio communications or signals until there is assurance that no interference will be caused with the radio communications or signals relating thereto, and shall assist the vessel in distress, so far as possible, by complying with its instructions.

Interfering signals to cease.

Intercommunication in mobile service.

INTERCOMMUNICATION IN MOBILE SERVICE

Requirement.

SEC. 322. Every land station open to general public service between the coast and vessels at sea shall be bound to exchange radio communications or signals with any ship station without distinction as to radio systems or instruments adopted by such stations, respectively, and each station on shipboard shall be bound to exchange radio communications or signals with any other station on shipboard without distinction as to radio systems or instruments adopted by each station.

Interference between Government and commercial stations.
Division of time.

INTERFERENCE BETWEEN GOVERNMENT AND COMMERCIAL STATIONS

SEC. 323. (a) At all places where Government and private or commercial radio stations on land operate in such close proximity that interference with the work of Government stations cannot be avoided when they are operating simultaneously, such private or commercial stations as do interfere with the transmission or reception of radio communications or signals by the Government stations concerned shall not use their transmitters during the first fifteen minutes of each hour, local standard time.

Time for operating Government station.

(b) The Government stations for which the above-mentioned division of time is established shall transmit radio communications or signals only during the first fifteen minutes of each hour, local standard time, except in case of signals or radio communications relating to vessels in distress and vessel requests for information as to course, location, or compass direction.

Exception, when distress signals.

USE OF MINIMUM POWER

Use of minimum power.

Requirement.

SEC. 324. In all circumstances, except in case of radio communications or signals relating to vessels in distress, all radio stations, including those owned and operated by the United States, shall use the minimum amount of power necessary to carry out the communication desired.

FALSE DISTRESS SIGNALS; REBROADCASTING; STUDIOS OF FOREIGN STATIONS

False distress signals.

Prohibition on transmitting.

SEC. 325. (a) No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.

On unauthorized rebroadcasting.

Studios of foreign stations.

(b) No person shall be permitted to locate, use, or maintain a radio broadcast studio or other place or apparatus from which or whereby sound waves are converted into electrical energy, or mechanical or physical reproduction of sound waves produced, and caused to be transmitted or delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there having a power output of sufficient intensity and/or being so located geographically that its emissions may be received consistently in the United States, without first obtaining a permit from the Commission upon proper application therefor.

Permits required.

Application therefor.

(c) Such application shall contain such information as the Commission may by regulation prescribe, and the granting or refusal thereof shall be subject to the requirements of section 309 hereof with respect to applications for station licenses or renewal or modification thereof, and the license or permission so granted shall be revocable for false statements in the application so required or when the Commission, after hearings, shall find its continuation no longer in the public interest.

Ante, p. 1085.

CENSORSHIP; INDECENT LANGUAGE

Power of censorship denied Commission.

SEC. 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

Indecent language.

USE OF NAVAL STATIONS FOR COMMERCIAL MESSAGES

Naval stations for commercial messages.

Secretary of Navy authorized to use.

Rates.

SEC. 327. The Secretary of the Navy is hereby authorized, unless restrained by international agreement, under the terms and conditions and at rates prescribed by him, which rates shall be just and reasonable, and which, upon complaint, shall be subject to review and revision by the Commisison,[1] to use all radio stations and apparatus, wherever located, owned by the United States and under the

[1] So in original.

control of the Navy Department, (a) for the reception and transmission of press messages offered by any newspaper published in the United States, its Territories or possessions, or published by citizens of the United States in foreign countries, or by any press association of the United States, and (b) for the reception and transmission of private commercial messages between ships, between ship and shore, between localities in Alaska and between Alaska and the continental United States: *Provided*, That the rates fixed for the reception and transmission of all such messages, other than press messages between the Pacific coast of the United States, Hawaii, Alaska, Guam, American Samoa, the Philippine Islands, and the Orient, and between the United States and the Virgin Islands, shall not be less than the rates charged by privately owned and operated stations for like messages and service: *Provided further*, That the right to use such stations for any of the purposes named in this section shall terminate and cease as between any countries or localities or between any locality and privately operated ships whenever privately owned and operated stations are capable of meeting the normal communication requirements between such countries or localities or between any locality and privately operated ships, and the Commission shall have notified the Secretary of the Navy thereof.

Proviso.
Minimum rates.

When right to use naval stations terminates.

Special provision as to Philippine Islands and Canal Zone.

SPECIAL PROVISION AS TO PHILIPPINE ISLANDS AND CANAL ZONE

SEC. 328. This title shall not apply to the Philippine Islands or to the Canal Zone. In international radio matters the Philippine Islands and the Canal Zone shall be represented by the Secretary of State.

Radio laws in territories and possessions.
Administration of.
Designation of officers.

ADMINISTRATION OF RADIO LAWS IN TERRITORIES AND POSSESSIONS

SEC. 329. The Commission is authorized to designate any officer or employee of any other department of the Government on duty in any Territory or possession of the United States other than the Philippine Islands and the Canal Zone, to render therein such services in connection with the administration of the radio laws of the United States as the Commission may prescribe: *Provided*, That such designation shall be approved by the head of the department in which such person is employed.

Proviso.
Approval required.

Procedural and administrative provisions.

TITLE IV—PROCEDURAL AND ADMINISTRATIVE PROVISIONS

Jurisdiction to enforce act and Commission orders.
District courts.

JURISDICTION TO ENFORCE ACT AND ORDERS OF COMMISSION

SECTION 401. (a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

Enforcement of Commission orders.

(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or other-

Process.

of the court may be punished by such court as a contempt thereof.

Depositions.

(e) The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any United States commissioner, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor, or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided.

Notice of intention to take testimony.

Oath of witness.

(f) Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

Subscribing by witness.

Witness in foreign country.

(g) If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

Depositions filed with Commission.

Witness fees.

(h) Witnesses whose depositions are taken as authorized in this Act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Production of books, records, etc.

(i) No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpena of the Commission, whether such subpena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this Act, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Penalty provision.

(j) Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, schedules of charges, contracts, agreements, and documents, if in his power to do so, in obedience to the subpena or lawful requirement

of the Commission, shall be guilty of a misdemeanor and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $100 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Joint boards—State Commissions.

USE OF JOINT BOARDS—COOPERATION WITH STATE COMMISSIONS

Reference of administrative matters to joint boards authorized.

Composition of board.

Powers, duties, liabilities.

Force of board's action.

Nomination of State membership.

Rejection of nominee.

Allowances.

SEC. 410. (a) The Commission may refer any matter arising in the administration of this Act to a joint board to be composed of a member, or of an equal number of members, as determined by the Commission, from each of the States in which the wire or radio communication affected by or involved in the proceeding takes place or is proposed, and any such board shall be vested with the same powers and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold a hearing as hereinbefore authorized. The action of a joint board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The joint board member or members for each State shall be nominated by the State commission of the State or by the Governor if there is no State commission, and appointed by the Federal Communications Commission. The Commission shall have discretion to reject any nominee. Joint board members shall receive such allowances for expenses as the Commission shall provide.

State commission. Commission conferences with.

Joint hearings.

Cooperation of State commission.

(b) The Commission may confer with any State commission having regulatory jurisdiction with respect to carriers, regarding the relationship between rate structures, accounts, charges, practices, classifications, and regulations of carriers subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized under such rules and regulations as it shall prescribe to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this Act to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

Joinder of parties.

JOINDER OF PARTIES

Authority to join interested parties.

SEC. 411. (a) In any proceeding for the enforcement of the provisions of this Act, whether such proceeding be instituted before the Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the charge, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

Suits for enforcement of order for money payment.

(b) In any suit for the enforcement of an order for the payment of money all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where

Process.

such defendant carrier has its principal operating office. In case of such joint suit, the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

DOCUMENTS FILED TO BE PUBLIC RECORDS—USE IN PROCEEDINGS

Documents filed with Commission.

Preservation as public records.

Force as evidence in proceedings.

SEC. 412. The copies of schedules of charges, classifications, and of all contracts, agreements, and arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers and other persons made to the Commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the Commission's seal, shall be received in evidence with like effect as the originals: *Provided*, That the Commission may, if the public interest will be served thereby, keep confidential any contract, agreement, or arrangement relating to foreign wire or radio communication when the publication of such contract, agreement, or arrangement would place American communication companies at a disadvantage in meeting the competition of foreign communication companies.

Proviso.
Confidential nature of contracts, etc., relating to foreign communications.

DESIGNATION OF AGENT FOR SERVICE

Services of notice, process.

Agent to be designated by carrier.

Filing of designation.

Effect of service upon agent.

SEC. 413. It shall be the duty of every carrier subject to this Act, within sixty days after the taking effect of this Act, to designate in writing an agent in the District of Columbia, upon whom service of all notices and process and all orders, decisions, and requirements of the Commission may be made for and on behalf of said carrier in any proceeding or suit pending before the Commission, and to file such designation in the office of the secretary of the Commission, which designation may from time to time be changed by like writing similarly filed; and thereupon service of all notices and process and orders, decisions, and requirements of the Commission may be made upon such carrier by leaving a copy thereof with such designated agent at his office or usual place of residence in the District of Columbia, with like effect as if made personally upon such carrier, and in default of such designation of such agent, service of any notice or other process in any proceeding before said Commission, or of any order, decision, or requirement of the Commission, may be made by posting such notice, process, order, requirement, or decision in the office of the secretary of the Commission.

REMEDIES IN THIS ACT NOT EXCLUSIVE

Remedies in act not exclusive.

SEC. 414. Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

LIMITATIONS AS TO ACTIONS

Limitations as to actions.

Actions by carriers for recovery of charges.

SEC. 415. (a) All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun within one year from the time the cause of action accrues, and not after.

Complaints against carriers for damages.

(b) All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within one year from the time the cause of action accrues, and not after, subject to subsection (d) of this section.

Actions for recovery of overcharges.

(c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within one year from the time the cause of action accrues, and not after, subject to subsection (d) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the one-year period of limitation said period shall be extended to include one year from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

Extension of limitation period.

(d) If on or before expiration of the period of limitation in subsection (b) or (c) a carrier begins action under subsection (a) for recovery of lawful charges in respect of the same service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

Action respecting transmission of message.

(e) The cause of action in respect of the transmission of a message shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

Petition for enforcement of order for money payment.

(f) A petition for the enforcement of an order of the Commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

"Overcharges" construed.

(g) The term "overcharges" as used in this section shall be deemed to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission.

PROVISIONS RELATING TO ORDERS

Orders of Commission.

Service upon designated agent.

SEC. 416. (a) Every order of the Commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law.

Modification of, upon notice given.

(b) Except as otherwise provided in this Act, the Commission is hereby authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

Compliance with, required.

(c) It shall be the duty of every person, its agents and employees, and any receiver or trustee thereof, to observe and comply with such orders so long as the same shall remain in effect.

Penal provisions.

TITLE V—PENAL PROVISIONS—FORFEITURES

General penalty.

GENERAL PENALTY

SECTION 501. Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

Violations of rules, regulations.

VIOLATIONS OF RULES, REGULATIONS, AND SO FORTH

SEC. 502. Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation,

restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs.

FORFEITURE IN CASES OF REBATES AND OFFSETS

Rebates and offsets.

Forfeiture for receiving.

SEC. 503. Any person who shall deliver messages for interstate or foreign transmission to any carrier, or for whom as sender or receiver, any such carrier shall transmit any interstate or foreign wire or radio communication, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transmission of such messages as fixed by the schedules of charges provided for in this Act, shall in addition to any other penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

Additional to other penalties provided.

Amount of forfeiture.

PROVISIONS RELATING TO FORFEITURES

Forfeitures.

Provisions relating to.

Payment of.

Recoverable in civil suit.

SEC. 504. The forfeitures provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the person or carrier has its principal operating office, or in any district through which the line or system of the carrier runs. Such forfeitures shall be in addition to any other general or specific penalties herein provided. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this Act. The costs and expenses of such prosecutions shall be paid from the appropriation for the expenses of the courts of the United States.

Proceeding to recover.

Costs and expenses.

VENUE OF OFFENSES

Venue of offenses.

SEC. 505. The trial of any offense under this Act shall be in the district in which it is committed; or if the offense is committed upon the high seas, or out of the jurisdiction of any particular State or district, the trial shall be in the district where the offender may be found or into which he shall be first brought. Whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

TITLE VI—MISCELLANEOUS PROVISIONS

Miscellaneous provisions.

TRANSFER TO COMMISSION OF DUTIES, POWERS, AND FUNCTIONS UNDER EXISTING LAW

Transfer of duties, powers, and functions under existing law.

SECTION 601. (a) All duties, powers, and functions of the Interstate Commerce Commission under the Act of August 7, 1888 (25 Stat. 382), relating to operation of telegraph lines by railroad and

Of Interstate Commerce Commission.

Vol. 25, p. 382.

telegraph companies granted Government aid in the construction of their lines, are hereby imposed upon and vested in the Commission: *Provided*, That such transfer of duties, powers, and functions shall not be construed to affect the duties, powers, functions, or jurisdiction of the Interstate Commerce Commission under, or to interfere with or prevent the enforcement of, the Interstate Commerce Act and all Acts amendatory thereof or supplemental thereto.

Proviso.
Not to interfere with enforcement of act.

(b) All duties, powers, and functions of the Postmaster General with respect to telegraph companies and telegraph lines under any existing provision of law are hereby imposed upon and vested in the Commission.

Functions of Postmaster General respecting telegraph companies.

REPEALS AND AMENDMENTS

Repeals and amendments.

SEC. 602. (a) The Radio Act of 1927, as amended, is hereby repealed.

Radio Act of 1927.
Vol. 44, p. 1162.

(b) The provisions of the Interstate Commerce Act, as amended, insofar as they relate to communication by wire or wireless, or to telegraph, telephone, or cable companies operating by wire or wireless, except the last proviso of section 1 (5) and the provisions of section 1 (7), are hereby repealed.

Certain provisions of Interstate Commerce Act.

(c) The last sentence of section 2 of the Act entitled "An Act relating to the landing and operation of submarine cables in the United States", approved May 27, 1921, is amended to read as follows: "Nothing herein contained shall be construed to limit the power and jurisdiction of the Federal Communications Commission with respect to the transmission of messages."

Submarine cables.
Vol. 42, p. 8.

(d) The first paragraph of section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, is amended to read as follows:

Powers of Federal Communications Commission.

Anti-trust Act.
Vol. 38, p. 730.

"SEC. 11. That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:"

Authority to enforce compliance with designated sections.

TRANSFER OF EMPLOYEES, RECORDS, PROPERTY, AND APPROPRIATIONS

Employees, records, property, and appropriations.

SEC. 603. (a) All officers and employees of the Federal Radio Commission (except the members thereof, whose offices are hereby abolished) whose services in the judgment of the Commission are necessary to the efficient operation of the Commission are hereby transferred to the Commission, without change in classification or compensation; except that the Commission may provide for the adjustment of such classification or compensation to conform to the duties to which such officers and employees may be assigned.

Transfer from Federal Radio Commission.

(b) There are hereby transferred to the jurisdiction and control of the Commission (1) all records and property (including office furniture and equipment, and including monitoring radio stations) under the jurisdiction of the Federal Radio Commission, and (2) all records under the jurisdiction of the Interstate Commerce Commission and of the Postmaster General relating to the duties, powers, and functions imposed upon and vested in the Commission by this Act.

From Interstate Commerce Commission.

From Postmaster General.

(c) All appropriations and unexpended balances of appropriations available for expenditure by the Federal Radio Commission shall be available for expenditure by the Commission for any and all objects of expenditure authorized by this Act in the discretion of the Commission, without regard to the requirement of apportionment under the Antideficiency Act of February 27, 1906.

Unexpended appropriations.

EFFECT OF TRANSFERS, REPEALS, AND AMENDMENTS

Transfers, repeals, and amendments.

SEC. 604. (a) All orders, determinations, rules, regulations, permits, contracts, licenses, and privileges which have been issued, made, or granted by the Interstate Commerce Commission, the Federal Radio Commission, or the Postmaster General, under any provision of law repealed or amended by this Act or in the exercise of duties, powers, or functions transferred to the Commission by this Act, and which are in effect at the time this section takes effect, shall continue in effect until modified, terminated, superseded, or repealed by the Commission or by operation of law.

Effectiveness of orders, etc., made under authority of repealed, etc., acts.

(b) Any proceeding, hearing, or investigation commenced or pending before the Federal Radio Commission, the Interstate Commerce Commission, or the Postmaster General, at the time of the organization of the Commission, shall be continued by the Commission in the same manner as though originally commenced before the Commission, if such proceeding, hearing, or investigation (1) involves the administration of duties, powers, and functions transferred to the Commission by this Act, or (2) involves the exercise of jurisdiction similar to that granted to the Commission under the provisions of this Act.

Continuation of pending proceeding, hearings, etc.

(c) All records transferred to the Commission under this Act shall be available for use by the Commission to the same extent as if such records were originally records of the Commission. All final valuations and determinations of depreciation charges by the Interstate Commerce Commission with respect to common carriers engaged in radio or wire communication, and all orders of the Interstate Commerce Commission with respect to such valuations and determinations, shall have the same force and effect as though made by the Commission under this Act.

Availability of transferred records.

Force of final valuations and determinations of Interstate Commerce Commission.

(d) The provisions of this Act shall not affect suits commenced prior to the date of the organization of the Commission; and all such suits shall be continued, proceedings therein had, appeals therein taken and judgments therein rendered, in the same manner and with the same effect as if this Act had not been passed. No suit, action, or other proceeding lawfully commenced by or against any agency or officer of the United States, in relation to the discharge of official duties, shall abate by reason of any transfer of authority, power, and duties from such agency or officer to the Commission under the provisions of this Act, but the court, upon motion or supplemental petition filed at any time within twelve months after such transfer, showing the necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, may allow the same to be maintained by or against the Commission.

Limitations.
Suits commenced prior to organization of Commission.

UNAUTHORIZED PUBLICATION OF COMMUNICATIONS

Unauthorized publication of communications.

SEC. 605. No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such

Prohibition on.

communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Intercepting communication prohibited.

Unauthorized use of information contained in communication.

Unauthorized publication of intercepted communication.

Proviso.
Limitation on application.

WAR EMERGENCY—POWERS OF PRESIDENT

Powers of President—War emergency.

Priority of communications essential to national defense.

Orders of President.

Carrier complying with priority orders; exemption from liabilities.

Obstruction of communications; prohibited.

Employment of armed forces to prevent.

Proviso.
Sections of Antitrust Act not repealed.
Vol. 38, p. 730.

Suspension of Commission regulations during national emergency.

SEC. 606. (a) During the continuance of a war in which the United States is engaged, the President is authorized, if he finds it necessary for the national defense and security, to direct that such communications as in his judgment may be essential to the national defense and security shall have preference or priority with any carrier subject to this Act. He may give these directions at and for such times as he may determine, and may modify, change, suspend, or annul them and for any such purpose he is hereby authorized to issue orders directly, or through such person or persons as he designates for the purpose, or through the Commission. Any carrier complying with any such order or direction for preference or priority herein authorized shall be exempt from any and all provisions in existing law imposing civil or criminal penalties, obligations, or liabilities upon carriers by reason of giving preference or priority in compliance with such order or direction.

(b) It shall be unlawful for any person during any war in which the United States is engaged to knowingly or willfully, by physical force or intimidation by threats of physical force, obstruct or retard or aid in obstructing or retarding interstate or foreign communication by radio or wire. The President is hereby authorized, whenever in his judgment the public interest requires, to employ the armed forces of the United States to prevent any such obstruction or retardation of communication: *Provided*, That nothing in this section shall be construed to repeal, modify, or affect either section 6 or section 20 of an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914.

(c) Upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed

by the Commission, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station and/or its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners.

Closing of station discretionary.

(d) The President shall ascertain the just compensation for such use or control and certify the amount ascertained to Congress for appropriation and payment to the person entitled thereto. If the amount so certified is unsatisfactory to the person entitled thereto, such person shall be paid only 75 per centum of the amount and shall be entitled to sue the United States to recover such further sum as added to such payment of 75 per centum will make such amount as will be just compensation for the use and control. Such suit shall be brought in the manner provided by paragraph 20 of section 24, or by section 145, of the Judicial Code, as amended.

Award of compensation.

Suit if award unsatisfactory.

EFFECTIVE DATE OF ACT

Effective date of act.

SEC. 607. This Act shall take effect upon the organization of the Commission, except that this section and sections 1 and 4 shall take effect July 1, 1934. The Commission shall be deemed to be organized upon such date as four members of the Commission have taken office.

Ante, p. 1064.

SEPARABILITY CLAUSE

Separability clause.

SEC. 608. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

SHORT TITLE

Short title.

SEC. 609. This Act may be cited as the "Communications Act of 1934."

Approved, June 19, 1934.

[CHAPTER 653.]

AN ACT

Relating to direct loans for industrial purposes by Federal Reserve banks, and for other purposes.

June 19, 1934.
[S. 3487.]
[Public, No. 417.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Federal Reserve Act, as amended, is amended by adding after section 13a thereof a new section reading as follows:

Federal Reserve Act, amendment.
Vol. 38, p. 263; Vol. 42, p. 1479.
U.S.C., p. 282.

"SEC. 13b. (a) In exceptional circumstances, when it appears to the satisfaction of a Federal Reserve bank that an established industrial or commercial business located in its district is unable to obtain requisite financial assistance on a reasonable basis from the usual sources, the Federal Reserve bank, pursuant to authority granted by the Federal Reserve Board, may make loans to, or purchase obligations of, such business, or may make commitments with respect thereto, on a reasonable and sound basis, for the purpose of providing it with working capital, but no obligation shall be acquired or commitment made hereunder with a maturity exceeding five years.

Direct loans for industrial purposes by Reserve banks.

To established industry needing financial assistance.

Purchase of obligations thereof.

"(b) Each Federal Reserve bank shall also have power to discount for, or purchase from, any bank, trust company, mortgage company, credit corporation for industry, or other financing institution operating in its district, obligations having maturities not exceeding five years, entered into for the purpose of obtaining working

Discount or purchase of obligation.

Maturities.

MORALITY AND THE BROADCAST MEDIA: A CONSTITUTIONAL ANALYSIS OF FCC REGULATORY STANDARDS

I. FCC Regulation of "Morally Offensive" Programming

Radio and television have long been recognized as forms of communication affected with a first amendment interest.[1] Section 326 of the Communications Act of 1934 [2] proscribes the exercise of any censorship power by the Federal Communications Commission (FCC), the agency given various regulatory controls over the industry. In broadcasting, however, as in other forms of expression, legal restrictions of varying degrees of formality result in something less than complete freedom of speech. Reflecting a popular judgment that some expression is so universally offensive that its dissemination may be prohibited, a federal criminal statute, section 1464 of title 18 of the *United States Code*, prohibits the broadcast of "any obscene, indecent, or profane language." [3] Further, Congress has given the FCC administrative power to revoke a station license [4] or to fine a station up to $1000 [5] for violation of the statutory prohibition.

The Commission recognizes that it is confronted by constitutional limits in dealing directly with speech and expression.[6] It is hesitant, therefore, when specific programming is complained of as offensive, to respond directly against the programming, since invocation of section 1464 would force the Commission

[1] *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969); United States v. Paramount Pictures, 334 U.S. 131, 166 (1948); Superior Films v. Department of Educ., 346 U.S. 587, 589 (1954) (Douglas, J., concurring); American Broadcasting Co. v. United States, 110 F. Supp. 374, 389 (S.D.N.Y. 1953), *aff'd*, 347 U.S. 284 (1954). Any argument that first amendment protection extends only to speech that is informational on its face, such as political discussions or news reports, but not to entertainment, was rejected in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952), and Winters v. New York, 333 U.S. 507, 510 (1948). *Cf.* Z. Chafee, Free Speech in the United States 545–46 (1941).

[2] 47 U.S.C. § 326 (1964).

[3] 18 U.S.C. § 1464 (1964).

[4] 47 U.S.C. § 312(a)(6) (1964).

[5] 47 U.S.C. § 503(b)(1)(E) (1964).

[6] *See, e.g.*, Oliver R. Grace, 18 P & F Radio Reg. 2d 1071, 1073 (FCC 1970) (reply to complaint that most programming is "devoted to vulgarity and violence"); *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 20 P & F Radio Reg. 1901 (1960) [hereinafter cited as *1960 Programming Report*]. For discussion of the intention of Congress not to give any power to interfere with freedom of speech in considering a license revocation, see 67 Cong. Rec. 5480, 12615 (1926); Ashby, *Legal Aspects of Radio Broadcasting*, Air Law Rev. 331, 346 (1930).

to deal with the constitutional questions.[7] This restraint does not, however, signify Commission acceptance of the thesis that any programming is permissible as long as it is protected by first amendment standards governing "morally offensive" [8] material in non-broadcast modes of expression. On the contrary, the FCC stated in a programming report that

> traditional or legislative exceptions to a strict application of the freedom of speech requirements of the . . . Constitution may very well also convey wider scope in judicial interpretations as applied to licensed radio than they have had or would have as applied to other communications media.[9]

The Commission, instead of looking to constitutional standards, has effectively inhibited certain kinds of programming by considering program content in exercising its statutory power to determine whether a station's performance recommends renewal of its license. The FCC is authorized by the Act to grant an application for renewal if it finds that the "public interest, convenience, and necessity" would be served thereby.[10] Since a broadcast license usually has great commercial value, the FCC's discretion to determine on public interest grounds whether the current licensee will serve the public better than a rival applicant constitutes an effective lever over the policies and operation of the existing management.[11] In *Palmetto Broadcasting Co.*,[12] for instance, the Commission denied a license renewal to a radio station

[7] In the form letter sent to those who complain about certain programming, the FCC states:

> The broadcast of obscene, indecent or profane language is prohibited by a federal criminal statute. Although the Department of Justice is responsible for prosecution of federal law violations, the Commission is authorized to impose certain sanctions on broadcast licensees for violation of this statute, including revocation of license or the imposition of a monetary forfeiture. However, both the Commission and the Department of Justice are governed by past decisions of the courts as to what constitutes obscenity, and the broadcast of material which may be offensive to many persons would not necessarily be held by the courts to violate the statute.

FCC Form 100 at 3–4 (on file with the *Harvard Law Review*).

[8] The term "morally offensive" will be employed in this Note to describe material which, irrespective of questions of constitutional protection, is commonly the subject of morally-based complaints of obscenity, indecency, profanity, offensiveness, vulgarity, filth, and so forth.

[9] *1960 Programming Report* at 1909.

[10] 47 U.S.C. § 309(a) (1964). *See also* 47 U.S.C. § 307(a) (1964); *1960 Programming Report* at 1909.

[11] *See* K. Davis, Administrative Law § 403 (1958); Note, *The FCC and Program Regulation — Violation of the First Amendment?*, 41 Neb. L. Rev. 826, 836 (1962).

[12] 33 F.C.C. 250, 23 P & F Radio Reg. 483 (1962), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964).

partly because of an announcer's "offensive and patently vulgar" speech. The FCC had received a number of complaints, although it had indications that the announcer was quite popular with a substantial audience. It made no attempt to determine whether the speech was obscene in constitutional terms; rather, it simply concluded that because of such persistently offensive programming the licensee was not operating his station in the "public interest." [13] Presumably, the licensee did not meet his obligation to fulfill "the needs of the areas and populations served by the station." [14] This attempt at qualitative regulation of offensive programming did not, however, receive judicial review on its merits. The public interest standard by its inherent breadth encompasses a broad range of criteria, and on appeal *Palmetto* was affirmed on another ground.[15]

The FCC more frequently responds to "inappropriate" program content by imposing sanctions less drastic than the denial of a renewal. The licensee is informed when his programming is thought so offensive as to exceed the boundaries of the public interest and is reminded that his license is rather fragile property held by temporary grant from the FCC. The Commission passes

[13] The Commission said the question of a violation of section 1464 "is not encompassed" within the issue of the acceptability of the material presented. If section 1464 provided the only relevant standard for evaluating offensive programming, the Commission argued, then:

> Radio could become predominantly a purveyor of smut and patent vulgarity — yet unless the matter broadcast reached the level of obscenity under 18 U.S.C. 1464, the Commission even though charged to issue licenses only when it is in the public interest, would be powerless to prevent this perversion or misuse of a valuable national resource.

33 F.C.C. at 256, 23 P & F Radio Reg. at 485g.

Under the Supreme Court's constitutional standard then in effect for determining what expression is unprotected as obscene, it is most doubtful that the jokes (*e.g.*, "I asked him why he thought his old dog was a Baptist and he says 'you know Uncle Charlie it is that he's done baptized every hub cap around' . . .;" "Betsy says it is that not only will she flirt with dynamite, but it is that if it's single she'll propose to it. . . . Betsy says it is that she don't mind marrying a stick of dynamite if he's got a long fuse." *Id.* at 278, 23 P & F Radio Reg. at 498–99) could have been found to appeal to the "prurient interest" of the listeners. *See* Roth v. United States, 354 U.S. 476 (1957); p. 672 *infra*.

[14] 33 F.C.C. at 251, 23 P & F Radio Reg. at 485a; FCC Form 100, *supra* note 7, at 1:

> [N]o application for a broadcasting license will be granted unless the Commission finds that the public interest, convenience and necessity will be served by such a grant, and . . . the 'principal ingredient of the licensee's obligation to operate his station in the public interest is the diligent, positive, and continuing effort by the licensee to discover and fulfill the tastes, needs, and desires of his community or service area, for broadcast service.'

[15] The licensee was found to have made misrepresentations to the FCC by falsely claiming that he was unaware of both the material presented by his announcer and complaints about that material.

along to the station in question programming complaints it receives and it requests explanations. The FCC emphasizes that these complaints may be made the basis for later sanctions.

For example, in *Mile High Stations, Inc.*,[16] the licensee broadcast allegedly "offensive" sound effects and disk jockey comments.[17] After the FCC passed along the complaints received, it again brought the broadcasts to the licensee's attention by ordering him to show cause why the license should not be revoked. The station by then had fired the disc jockey and given excuses and assurances, and the Commission simply issued a cease-and-desist order. This result gave the licensee no great incentive to seek judicial review, but, as demonstrated by the station's response, it left no doubt as to the effectiveness of the FCC's administrative actions in deterring such material. The mere dispatch of complaints with requests for explanation is itself a form of rather unsubtle pressure on a station in view of the reminder that the complaints will be available for review in a license renewal proceeding [18] to determine "whether the overall operation of the station has served the public interest." [19]

The Commission has tools of coercion beyond letters, orders, or the more drastic action of a refusal to renew the license of a station failing to serve the public interest. The FCC may communicate its feelings upon an application for renewal or an application from an existing licensee for an additional station license by imposing certain conditions or limitations upon its grant. An example — and an illustration of the Commission's tendency to employ the rhetoric of freedom of expression while retaining a firm hand on programming that strays too far from an implicit moral consensus — is the round of cases involving the Pacifica Foundation. Pacifica operates a number of noncommercial, educational radio stations. The Commission received complaints that some of the programming of Pacifica's station in Berkeley, California — KPFA — was offensive or

[16] 28 F.C.C. 795, 20 P & F Radio Reg. 345 (1960).

[17] *E.g.*, *id.* at 798, 20 P & F Radio Reg. at 348 (appendix):

> A card from a listener stating that she took KIMN radio with her wherever she went occasioned this remark: "I wonder where she puts KIMN radio when she takes a bath — I may peek — watch yourself, Charlotte."
>
> . . . .
>
> After a commercial for a ladies clothing shop had been read, the announcer commented: "Somehow or other when he said ladies' fall bags it sounded positively vulgar, didn't it?"
>
> . . . .
>
> The sound effect of a lavatory being flushed was frequently used. . . .

[18] *See, e.g.*, the cover letter — accompanying FCC Form 100, *supra* note 7 — from the Complaints and Compliance Division of the FCC Broadcast Bureau.

[19] Mile High Stations, Inc., 28 F.C.C. at 797, 20 P & F Radio Reg. at 347.

"filthy." KPFA had broadcast avant-garde drama and poetry, and a discussion by homosexuals of their predilection.[20] The FCC — saying that it had to view programming on an overall basis — regarded the complaints as insufficient ground for disapproving license renewals for several Pacifica West Coast stations in 1964.[21] A denial because of the episodes in question, it declared, would so limit programming that "only the wholly inoffensive, the bland, could gain access to the radio microphone . . . ." [22] Already, however, Pacifica had deleted some objectionable language and had bent over backward to explain "isolated errors" as oversights. Most significantly, when the offending station itself sought renewal at the end of 1965, the FCC limited the normal three year license [23] to a single year.[24] The Commission spoke of the station's admitted failure to conform to Pacifica's stated policies, and told it that "[a]t the expiration of this period you will be afforded the further opportunity to demonstrate adherence to your program supervisory representations." [25]

More recently, Pacifica applied for a permit to construct a noncommercial, educational station in Houston. The FCC approved the application but conditioned its action on the outcome of a hearing which the FCC scheduled to weigh Pacifica's qualifications for a proposed station in Washington.[26] That hearing would apparently consider additional charges [27] against Pacifica's programming, stemming from a panel discussion of academic freedom broadcast by its Los Angeles station in the wake of the dismissal of two local college English instructors. Their classes had studied a poem — "Jehovah's Child" — in which four letter words were used to "ascribe sexual acts to God." [28] The poem

[20] Among other broadcasts, KPFA had presented a performance of Albee's *The Zoo Story* and a reading by Lawrence Ferlinghetti of some of his own poetry. Pacifica Foundation, 36 F.C.C. 147, 1 P & F Radio Reg. 2d 747 (1964).

[21] *Id.*

[22] *Id.* at 149, 1 P & F Radio Reg. 2d at 750–51.

[23] 47 U.S.C. § 307(d) (1964).

[24] Pacifica Foundation, 2 F.C.C. 2d 1066, 6 P & F Radio Reg. 2d 570 (1965).

[25] 6 P & F Radio Reg. 2d at 571.

[26] FCC Public Notice Report No. 8593, *Broadcast Action*, October 31, 1969.

[27] *See Hearings on S. 2004 Before the Subcomm. on Communications of the Senate Commerce Committee*, 91st Cong., 1st Sess., pt. 2, at 373–74 (1969) [hereinafter cited as *Hearings*] (testimony of Commissioner R.E. Lee).

[28] N.Y. Times, Dec. 2, 1969, at 29, col. 6. The poem read in part:

In Christ's Name, kindness is sucking the cock
of a turned cheek — Jesus style — Jehovah would
have bitten it off.
Straw legged Cindy . . . .
. . . mounts her
own golden daughters on a pay-as-you-go
Zircon and is off
through the American meatgrinder
seeking enlightenment by guru in gas stations
across the country teaching reading by billboard
and arithmetic by credit card . . . .
Then it's New York. . . .
. . . hailing Marys on gold teeth
extracted in Catholic Subway muggings,
she retreats to Convent Dolores, Dolores, Dolores.
Repentent she reconciles testaments:
fucks only Jehovah; sucks only Christ.

[29] Commissioner R.E. Lee dissented from the conditional approval of Pacifica's Houston construction permit because of past complaints against Pacifica's programming in Los Angeles, Berkeley, and New York City. What particularly disturbed Lee was the reading of "Jehovah's Child." He claimed without further discussion that the poem had no redeeming social value. *See also Hearings* 346. Commissioner Cox concurred in the Commission's approval of the permit and replied to Lee. *See also id.* at 348. He stressed that "Jehovah's Child" had been the subject of local controversy over the academic freedom issue. He noted the responsible and professional makeup of the panel and described the considerable care exercised by the station, through rescheduling of the program and warnings as to its content, in an attempt to minimize exposure to children or to adults who would rather avoid the material. *See* note 93 *infra*. Cox, citing the "guiding standard of law" as section 1464 and applying the prevailing obscenity test enunciated in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966), found no violation of the statute, particularly because the poem did not meet the tests of prurient appeal in sex or lack of redeeming social value, *see* p. 672 *infra*.

Commissioner Lee also raised a question of Pacifica's financial qualifications. This addition shows the ease of moving a "public interest" decision to alternate grounds that muddy or avoid the first amendment issues.

[30] The FCC's tendency to avoid entirely first amendment questions in reliance on broad administrative discretion — which it presumably considers intact even in considering program content — was well illustrated recently in Jack Straw Mem'l Foundation, 21 F.C.C.2d 833, 18 P & F Radio Reg. 2d 414, *reconsidered and aff'd*, 24 F.C.C.2d 266, 19 P & F Radio Reg. 2d 611 (1970). The FCC granted

was read over the air and discussed by a panel consisting of a poet and critic, several psychologists, and an editor of a literary journal.[29] When a program on academic freedom results in such governmentally imposed burdens on the broadcaster, the threat to free expression cannot be ignored.

In short, its battery of methods for influencing program content provides the Commission with varying degrees of immediacy and force in its approach to "morally offensive" programming. They all, however, allow the FCC to avoid a determination of the character of programming in terms of the constitutional protections of the first amendment and to substitute its own "public interest" standard. Further, they tend to preclude judicial consideration of the applicability of first amendment protections to the controversial programming at stake. The resulting effect on broadcasting is clear. Certain programming is deterred by a process operating outside the scope of constitutional adjudication.[30]

The end result, therefore, of the FCC's exercise of administrative discretion in this area raises serious constitutional questions. Motion pictures and the theater are dealing more explicitly than ever with provocative material, while the broadcast media continue to offer programs of milquetoast blandness and staggering irrelevance to the day's pressing issues.[31] Despite increased recognition of a constitutional right to *receive* varying forms of expression,[32] much of the current literature and many motion pictures are taboo for radio and television. While a consumer-pleasing economic posture reflecting a fear of offending audiences with controversial material is at least partly to blame for this moral blandness, the presence of noncommercial broadcasting, the varying sensitivities and interests of different and separable audiences, and the recent attempts of some stations to escape the general mold preclude this as a complete explanation.[33]

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only a one year renewal to a noncommercial station in Seattle which, despite contrary policies and "safeguards," had broadcast a thirty-hour program that included some four-letter words before premature termination by the station management. The Commission did not disclose what words it considered inappropriate. It said its concern upon application for renewal was not whether action was warranted under section 1464, but whether the station was acting in the public interest by "exercising proper supervision of its operations and . . . following its stated policies. . . ." 21 F.C.C.2d at 833, 18 P & F RADIO REG. 2D at 414. The station's internal review procedures, however, were wholly voluntary. Since the existence of such review has been beyond any announced concern of the Commission, *see* 24 F.C.C.2d at 268, 19 P & F RADIO REG. 2D at 612–13 (dissenting opinion of Commissioner Johnson), the real interest was seemingly in the substance of the programming. Yet the Commission completely avoided any explanation of the reasons why presentation of this program was impermissible. The FCC had no transcript with which to consider the context of the words, had received only one complaint, and had discovered no history of such occurrences. It gave no indication of what words were offensive. This action illustrates the Commission's ability to apply arbitrary pressure upon stations to refrain from broadcasting certain material, without reference to constitutional boundaries of protected expression and, moreover, without even indicating the boundaries it deems proper for the media.

[31] *See, e.g.*, CENSORSHIP IN THE UNITED STATES 161–64 (G. McClellan ed. 1967) ("People expect television to be an island of serenity in a troubled sea"); N.Y. Times, March 31, 1970, at 83, col. 1 (comments made on *Dick Cavett Show* by Judy Collins about her experiences as a witness in the "Chicago Seven" trial blipped out by ABC Television).

[32] *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863 (1970); *cf.* Stanley v. Georgia, 394 U.S. 557, 563–64 (1969).

[33] The Pacifica situation is a good example. Pacifica operates noncommercial educational stations which are supported by contributions from the public. And the number of incidents coming to the FCC's attention demonstrates Pacifica's willingness to present a broad spectrum of challenging programming. *See Hearings* 353, 362 (testimony of Commissioner Cox).

The constant that pervades broadcasting is the presence of FCC regulation. The Commission argues that its actions do not violate the prohibition on censorship because they do not impose prior restraints.[34] Nevertheless, the FCC's practice of examining program content without reference to constitutional standards in conjunction with its control over licensing gives it a tremendous censorial influence.[35] The Commission has maintained that its regulatory approach is justified for the broadcast media by their unique characteristics.[36] Furthermore, it presently purports to seek a court test that would establish the necessity for this approach.[37] This Note will examine in light of public needs and changing constitutional doctrine the asserted justifications for according radio and television expression a narrower first amendment protection than that which governs other forms of expression, and will explore the substantive standards that should prevail. Further, it will evaluate the Commission's procedures and the scope of its discretion in an area subject to important constitutional guarantees.[38]

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[34] *See, e.g.*, WBNX Broadcasting Co., Inc., 12 F.C.C. 837, 842–44, 4 P & F RADIO REG. 242, 249–50 (1948); S. MCCLELLAN, CENSORSHIP OF RADIO BROADCASTS 16 (1938).

[35] Professor Kalven regards governmental fostering of self-censorship as an area ripe for major Supreme Court attention:

> A regulation of communication may run afoul of the Constitution not because it is aimed directly at free speech, but because in operation it may trigger a set of behavioral consequences which amount in effect to people censoring themselves in order to avoid trouble with the law. The idea has appeared in several cases, and, while the Court has not yet addressed a major opinion to it, it has all the earmarks of a seminal concept.

Kalven, *"Uninhibited, Robust, and Wide-Open" — A Note on Free Speech and the Warren Court*, 67 MICH. L. REV. 289, 297 (1968).

[36] *See, e.g.*, *1960 Programming Report* 1906; *Hearings* 345 (testimony of Commissioner R.E. Lee); NBC Television Program *Meet the Press*, Jan. 25, 1970, at 4 (Merkle Press transcript) (statement of FCC Chairman Burch).

[37] *See* Eastern Educational Radio, 24 F.C.C.2d 408, 415, 417, 18 P & F RADIO REG. 2D 860, 868–71 (1970); *Hearings* 367–68 (testimony of FCC Chairman Burch).

In *Eastern Educational Radio*, the Commission fined WUHY-FM, a noncommercial, educational station in Philadelphia, $100 under 47 U.S.C. § 503(b)(1)(E) (1964) for violation of section 1464 and under 47 U.S.C. § 503(b)(1)(A), (B) (1964) for failure to operate in the public interest. *See* note 54 *infra*. The Commission invited an appeal to judicial review, 24 F.C.C.2d at 417, 18 P & F RADIO REG. 2D at 868, 871, but the offer was not accepted.

[38] For general background on the status and problems of programming regulation, see Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15 (1967); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967); Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701 (1964); Note, *Offensive Speech and the FCC*, 79 YALE L.J. 1343 (1970).

II. The Applicability of Constitutional Standards to Broadcasting

A. Current Constitutional Standards for Morally Offensive Material

The effects of FCC action for the regime of free expression can be fully appreciated only by contrast with prevailing constitutional standards surrounding morally offensive expression. First amendment doctrine in this area has been addressed mainly to the problem of "obscenity." In *Roth v. United States*,[39] the Supreme Court held that obscenity — material "the dominant theme of [which] . . . taken as a whole appeals to prurient interest [in sex]" [40] — is expression unprotected by the first amendment. The Court said that "[a]ll ideas having even the slightest redeeming social importance" are generally protected by the first amendment,[41] but obscenity is without such importance.[42] The decision left unclear, however, whether constitutional protection could be denied to an expressive work if one of several themes appealed to a prurient interest in sex.[43] Thus in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*,[44] Mr. Justice Brennan [45] elaborated on *Roth* by placing greater emphasis on the context in which questionable material appears. Under *Memoirs*, in order to deny protection, "three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." [46]

[39] 354 U.S. 476 (1957).

[40] 354 U.S. at 489.

[41] 354 U.S. at 484. *See also* Associated Press v. United States, 326 U.S. 1, 20 (1945).

[42] 354 U.S. at 484.

[43] *Id.* at 507 (Harlan, J., dissenting).

[44] 383 U.S. 413 (1966).

[45] Mr. Justice Brennan announced the decision of the Court in an opinion joined by Chief Justice Warren and Justice Fortas.

[46] 383 U.S. at 418.

The importance of the inclusion of the social value test in the *Memoirs* trilogy represents a subtle but important shift in constitutional analysis. Under *Roth*, material was obscene if it appealed to one's prurient interest in sex. If it was found obscene, it was outside first amendment protection because obscene expression is ipso facto without socially redeeming purpose. Under the analysis suggested by Mr. Justice Brennan in Jacobellis v. Ohio, 378 U.S. 184 (1964), and reaching full flower in *Memoirs*, the lack of social value is no longer simply a way of

Far less judicial attention has been given to "profanity" and "indecency," the other kinds of offensive language barred from the air by section 1464. Recently, in *Williams v. District of Columbia*,[47] the Court of Appeals for the District of Columbia Circuit refused to sustain a conviction under a statute prohibiting the use in a public street of "profane language, indecent and obscene words." In harmony with the Supreme Court's treatment of obscenity, Judge McGowan emphasized the context in which words are spoken; particular language cannot be denied first amendment protection per se. He quoted from *Terminiello v. Chicago*,[48] where the Court said:

> Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects. . . . [It] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.[49]

The court held that allegedly profane, obscene, or indecent language is privileged unless it threatens a breach of the peace. A breach of the peace could be effected either because the language created a "substantial risk of provoking violence" or because it was "under 'contemporary community standards' so grossly offensive" to those who overheard it "as to amount to a nuisance." [50]

Apparently, then, prohibitions on profane or indecent expression must be restricted to certain contexts. For the most part, a prohibition that turns on the risk of provoking violence is obviously inapplicable to broadcasting.[51] The problem of offense

describing or *characterizing* obscene expression. Rather, it is now a *standard* or *criterion* to be included with other inputs in determining whether expression is in fact obscene. *See* Stein v. Batchelor, 300 F. Supp. 602, 608 (N.D. Tex.) (three-judge court), *prob. juris. noted sub nom.* Dyson v. Stein 396 U.S. 954 (1969) (No. 565, 1969 Term; renumbered No. 41, 1970 Term); *cf.* Engdahl, *Requiem for Roth: Obscenity Doctrine is Changing*, 68 Mich. L. Rev. 185, 190, 201 (1970); Haimbaugh, *Obscenity: An End to Weighing*, 21 S. Car. L. Rev. 357 (1969).

[47] 419 F.2d 638 (D.C. Cir. 1969) (en banc).

[48] 337 U.S. 1 (1949).

[49] 419 F.2d at 645 n.18, *quoting* 337 U.S. at 4.

[50] 419 F.2d at 646.

[51] Of course, one can imagine a case where a speaker over the broadcast media might, for example, incite members of the audience to riot. This situation, however, could not generally be said to be the result of "morally offensive" expression. Perhaps the rare exception where the latter expression created a risk of provoking violence would be a case where a moral insult or slur is so strong that it may provoke a later retaliation even after a cooling period. Even with this case, however, we have essentially left the realm of "morally offensive" expression and are

to broadcast listeners or viewers, however, is a real one. Yet it is most unlikely that expression could be suppressed solely because it offended certain recipients.[52] While Judge McGowan's "gross offense" test finds a parallel in the "patent offensiveness" prong of the *Memoirs* trilogy, surely the "lack of redeeming social value" element must be an implied term in his treatment of language of this nature. In the first place, much language of clear importance, such as the political rhetoric of the right or left, may be "grossly offensive" to many persons. Nevertheless, it would be unthinkable that the first amendment would permit censorship of language designed to influence peacefully the course of government, language which has inherent social value. Similarly, profane or "indecent" expression, just as obscene expression, may be employed — for example, via social realism or shock effect — to encourage consideration of moral issues.

Although the "prurient interest in sex" test is almost by definition limited to obscenity, its focus on the theme of expression taken as a whole demonstrates the need to examine any expressive work in its entire context. That is, certain isolated words may be offensive to some persons and by themselves appear to have no redeeming social value. But if the speaker is conveying content of social value, to limit his use of words may be to seriously restrict his vehicle for communication. As long as expression is constitutionally protected because it adds to the range of social, moral, or political ideas which the first amendment promotes,[53] a speaker's choice of words should not result in forfeiture of that protection.[54]

dealing with other and potentially overriding interests, as in the case of "fighting words." *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[52] *See* Engdahl, *supra* note 46, at 231.

[53] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

[54] *See* Grove Press v. Christenberry, 276 F.2d 433, 438 (2d Cir. 1960); *cf.* THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 58, 60–61 (1970).

The view asserted in text would bar the FCC from deciding that certain words are worthless per se, as in Warren J. Currence, 34 F.C.C. 761 (1963). *Cf.* Commonwealth v. Gude, 255 N.E.2d 599, 600 (Mass. 1970).

A hard case was recently presented in Eastern Educational Radio, 24 F.C.C.2d 408, 18 P & F RADIO REG. 2D 860 (1970). There WUHY-FM, a noncommercial station in Philadelphia, featured an interview with Jerry Garcia, the leader of "The Grateful Dead" musical group. The FCC fined the station pursuant to section 503(b)(1)(A), (B) and (E) of the Communications Act, finding that the presentation of the program, in which Garcia used "indecent" language, violated section 1464 and the "public interest" standard. The FCC's opinion (excluding the more detailed appendix) lumps together examples of this language so that one might argue that the allegedly worthless and offensive language dominated the material and precluded any possibility of social value. This conclusion, however, seems much weaker on a closer examination of the broadcast. Both Commissioners Cox and Johnson, dissenting in separate opinions, stressed that the program offered much more than the use of words such as "shit" and "fuck." Garcia had used such words in discussing his views on ecology, philosophy, music, and interpersonal relations. Discussion of these issues is clearly of public importance generally. Furthermore, as Commissioner Cox emphasized, we need to know the views of the young on society and its ills. And prohibiting a discussion because of the mere use of certain words, without regard to the content or essence of the expression, may result in stifling the expression of those who regularly employ such words. One must question whether it is appropriate to try to protect the sensibilities of one group or subculture at the expense of denying the expression of another. As long as the expression is of social import, and there is no evidence of harm beyond offense, the answer under the first amendment must be in the negative.

While profanity is a concept which relates to particular words or short combinations of words, indecency may well refer to the entire content of an expressive act. Taken at face meaning, "indecency" seems to suggest mere offensiveness or unseemliness.[55] But in recent decisions, this kind of expression has apparently been taken under the wings of "obscenity" or "profanity."[56] Expression not susceptible to these categories may be offensive to some persons, but surely it cannot be suppressed without a showing of worthlessness or substantive harm.[57] For example, the dramatic portrayal of violence in various media may be offensive to many persons[58] and thus might be termed "indecent," though its message may be of great social importance.

B. The Unique Characteristics of the Broadcast Media

As the FCC's actions have demonstrated, the Commission generally does not limit its regulation of morally offensive programming to established constitutional standards applicable to

[55] The imprecision of the word "indecent" probably makes it unconstitutionally vague and overbroad unless it is so defined as to set off a recognizable category of expression as unprotected. *See* Stein v. Batchelor, 300 F. Supp. 602, 608 (N.D. Tex.) (three-judge court), *prob. juris. noted sub nom.* Dyson v. Stein, 396 U.S. 954 (1969) (No. 565, 1969 Term, renumbered No. 41, 1970 Term); *cf.* Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968) (statute governing exposure of offensive expression to minors must be narrowly drawn); Holmby Productions, Inc. v. Vaughn, 350 U.S. 870, *rev'g per curiam*, 177 Kan. 728, 282 P.2d 412 (1955); Gagliardo v. United States, 366 F.2d 720 (9th Cir. 1966) ("indecency" under section 1464 must be judged against constitutional standards); Katz, *Privacy & Pornography: Stanley v. Georgia*, 1969 SUP. CT. REV. 203, 207. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

[56] *See, e.g.*, A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 418 n.6 (1966).

[57] *See* Stein v. Batchelor, 300 F. Supp. 602, 608 (N.D. Tex.) (three-judge court), *prob. juris. noted sub nom.* Dyson v. Stein, 396 U.S. 954 (1969) (No. 565, 1969 Term; renumbered No. 41, 1970 Term); *cf.* Associated Press v. United States, 326 U.S. 1, 20 (1945).

[58] *See, e.g.*, Oliver R. Grace, 18 P & F RADIO REG. 2D 1071 (FCC 1970).

obscenity, nor does it generally engage in a constitutional analysis of allegedly profane or indecent speech.[59] The usual justification for the FCC's "public interest" approach to this regulation is the uniqueness of the broadcast media. Since the number of operable frequencies is physically limited, it is primarily argued that offensiveness of programming must be considered as part of an overall judgment as to how the broadcast licenses should best be distributed, in order to protect listeners from misuse or waste of the scarce resources. In *FCC v. Pottsville Broadcasting Co.*,[60] the Supreme Court upheld the power of the FCC to employ broad public interest criteria in reviewing station performance because of the "complicated factors" present in broadcasting. Elaborating in *National Broadcasting Co. v. United States*,[61] the Court said that the Commission, because of the unique nature of the industry, may deal with more than the technical and engineering aspects of broadcasting — the "traffic regulation;" in addition, it has "the burden of determining the composition of that traffic" on the air.[62]

These broadly stated holdings, however, did not establish that the FCC may regulate "offensive" or "vulgar" programming without regard to constitutional standards. The issues presented in *Pottsville* and *NBC* involved aspects of competition and control in the radio industry;[63] the decisions reflected concern lest a powerful medium of limited access be dominated by a very small number of persons or organizations. The scope of Commission review was necessarily defined broadly, because the field was new and the problems unknown.[64] Suppression of constitutionally protected speech is a distant step from fears about concentration of control in the developing communications media.[65] In fact, Mr. Justice Frankfurter hinted in *NBC* that suppression of political, economic, or social expression in granting licenses would not be justified by the "public interest" standard.[66]

The same constitutional end — encouraging a broad range of opinions and experiences[67] — both justifies regulation of media control and suggests non-regulation (except in accordance with constitutional standards) of program content. This need for program diversity is bluntly reflected in the Commission's policy of examining station performance to see if licensees are offering the public a variety of programming, including news, entertainment, and public service.[68] It is inconsistent with this desired variety that material may be kept off the air simply because it offends some persons.

The view that special regulation is justified because of the industry's physical boundaries is further undercut by an analysis of when and how the fact of scarce broadcasting resources affects the character of program content. The number of stations in a particular locale may be a function of local economic demand rather than technological limits on the frequency spectrum. In *Palmetto*, for example, the FCC complained that the broadcast of the "vulgar" material was an intolerable waste of the only operating facilities in the area. No evidence, however, established that the reason for the local monopoly was airwave scarcity. Rather, competitors were probably deterred from entering the market by their assessment that the popularity of the existing station would preclude their capturing a sufficient audience to succeed financially. The only valid criticism of a broadcast monopoly based on economic realities is that the competition for the available market will result in presentation of only the most

[59] *See* pp. 664–69 *supra*.

[60] 309 U.S. 134 (1940).

[61] 319 U.S. 190 (1943).

[62] *Id.* at 216; *see* Marks, *Broadcasting and Censorship: First Amendment Theory After Red Lion*, 38 GEO. WASH. L. REV. 974, 975 (1970).

[63] In *Pottsville*, the FCC had denied a license application where it found that the applicant was financially disqualified and did not sufficiently represent local interests. The Court gave implicit credence to this latter finding in describing the motivation for the Communications Act:

> Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses.

309 U.S. at 137.

At issue in *NBC* were certain "chain regulations" restricting network control over local programming. The Court concluded that these regulations were justified by substantial evidence that network control maintained broadcasting service at a level below that possible under a system of free competition. 391 U.S. at 218.

[64] Congress desired "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940); *see* Caldwell, *The Standard of Public Interest, Convenience or Necessity As Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930).

[65] *See* Robinson, *supra* note 38, at 143–44.

[66] 319 U.S. at 226.

[67] *Cf.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Note, *supra* note 32.

[68] *See 1960 Programming Report* 1913.

In an area where many stations serve the public, as is the case with radio in many metropolitan areas, the Commission need not require each station to divide up its day among various kinds of programming. If the goal is to assure an overall wide variety of radio programming, it can be accomplished more efficiently by letting individual stations specialize and cater to certain kinds of interests. *See* Jaffe, *Program Control*, 14 VILL. L. REV. 619, 620 (1969): "As more and more outlets become operational . . . it should become less and less necessary to look upon any one station as an all-purpose communications medium." *See also* Note, *supra* note 32, at 884.

popular views.[69] If this popular programming were not presented, a new entrant could eventually capture the market by offering it. The Commission may be unwilling to trust a monopolist to present different kinds of programming so as to serve a wider audience, and may thus demand that he diversify his programming.[70] But the fact of a monopoly can never justify narrowing permissible expression by coercing the *exclusion* of material that may offend some members of the community.

Many localities are, of course, served by so many stations that the physical limitation on frequencies becomes the relevant barrier to entry. In large metropolitan areas, for example, the maximum number of VHF and a large number of UHF television frequencies are often in use, and the full spectrum of radio frequencies is normally filled. In this situation, it may be impossible for someone to enter the market in an attempt to satisfy an unmet consumer demand.[71] Where all frequencies are allocated, the regulatory concern should be that too many stations will attempt to capture the large market of the majority,[72] with the result that the tastes and interests of minority audiences are too likely to go unsatisfied.[73] Even here, however, if the frequency spectrum is filled, one of the stations may find it profitable to pick off a minority audience. This is especially likely in the case of radio in metropolitan areas, where costs are sufficiently low and stations sufficiently numerous that a station may profitably cater to a specific, homogeneous audience.[74]

[69] *See* Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 704–05 (1964).

[70] The FCC, in evaluating whether station performance is in the public interest, considers whether a station presents a "balanced program" — a schedule presenting different types of material in order to provide service to the varied "tastes, needs, and desires of the public." *1960 Programming Report* 1912–13. This policy is justified as promoting diversity and thereby serving minority interests; however, when a concomitant rule develops that no part of the audience should be morally offended, the potential breadth of "balanced" programming is severly restricted. *Cf.* Marks, *supra* note 62, at 983–84. The demands of those persons whose values, tastes, or interests do not coincide with the dominant view of morality are then not met. Nor is a broadcaster free to instruct and enlighten the public, *see* Note, *supra* note 69, at 701–05, by examining differences between contrasting moralities.

[71] While it may still be possible even in metropolitan areas for a new entrant to break into UHF, UHF stations have not generally been able to achieve the financial stability necessary to induce strong, quality competition in serving the public. *See* Chazen & Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 HARV. L. REV. 1820, 1824–25 (1970). Nevertheless, UHF does help by providing some marginal programming that would not otherwise be broadcast.

[72] *Cf.* D. LACY, FREEDOM AND COMMUNICATIONS 80 (1961).

[73] *See* Note, *supra* note 32, at 864.

[74] *Id.* at 884.

Whether or not the market structure will permit such diversification, a full frequency spectrum does not support the asserted need for suppressing morally offensive material. If some material is offensive to most persons, many — if not too many — of the stations will avoid such material for commercial reasons alone. If the number of those persons who may be offended by certain material is substantial but less than that required to influence programming through commercial pressure, the regulatory response again should be to encourage or perhaps require diversity [75] of material, in order to serve that sub-audience, rather than to exclude the offending material; even this regulation may be unnecessary if certain stations will cater to this particular audience.

Thus, the FCC's regulatory powers over program content are best directed toward counteracting the possible narrowing effects of limited access to broadcast frequencies, whatever its cause. Moreover, those effects — which vary both with economic demand and with the particular frequency spectrum, whether radio, UHF TV, or VHF TV — may be altered by further technological change. As developments in UHF and cable TV and in satellite communications open up present and potential broadcasting facilities,[76] the need for regulation to foster diversity of programming by a station should decrease and the number of specializing stations serving particular needs or tastes will probably grow. And, concomitantly, this expanding ability to serve

[75] For example, by demanding diversity in control of various media in an area, *see* WHDH, Inc., 16 F.C.C.2d 1, 15 P & F RADIO REG. 2D 411 (1969), *aff'd sub. nom.* Greater Boston Television Corp. v. FCC, 39 U.S.L.W. 2273 (D.C. Cir., Nov. 13, 1970); *cf.* Note, *Conflicts of Interest in News Broadcasting*, 69 COLUM. L. REV. 881, 887–95 (1969); by favoring owner-managers who will be more sensitive to needs of the community, *see* Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693, 1696 (1969); by requiring that applicants secure reasonable knowledge of the community and its varying tastes and needs, *see* Oliver R. Grace, 18 P & F RADIO REG. 2D 1071, 1073 (FCC 1970); *1960 Programming Report* 1915; by encouraging diversity and not censorship through denial of renewal for what is *not* broadcast, rather than because of what is broadcast, *see* Marks, *supra* note 62, at 993; and by fostering new broadcasting outlets, *e.g.*, noncommercial stations and CATV program origination. *See generally* Note, *supra* note 32, at 891–901.

[76] Professor Turner summarized the status of the physical limitation argument:

> Although a severe bottleneck to entry in local markets has resulted from the physical limitations of the usable frequency spectrum, that factor should rapidly diminish in significance with the growth of cable and UHF television, and in any event it has not prevented major population areas from attracting several — today as many as nine — different over-the-air television stations alone. Moreover, coming developments in satellite transmission may further open up local television areas to multiple entry and diversity.

Turner, *The Role of Antitrust Policy in the Communications Industry*, 13 ANTITRUST BULL. 873, 874 (1968).

a broad continuum of sub-audiences makes suppression of material even more unwise, since the consequence of expansion is to provide areas of choice for listeners and viewers.

Proponents of administrative, public interest regulation of broadcast programming argue further, however, that radio and television, coming directly into the home and occupying so much time of such a large audience, are too pervasive to be allowed to present material offensive to many potential recipients.[77] The incredible reach of television and radio, however, should lead to the opposite conclusion. If the broadcast media are our most influential forums and if most persons rely on them as their principal source of information and entertainment, then broadcasters should not be forced to reinforce one moral, intellectual, or social viewpoint.[78] The essence of the first amendment is wide and free exchange of ideas. That protection seems meaningless if content regulation — enforcement of a moral norm as to what or how material may be presented — becomes justified as soon as a substantial audience becomes attracted. Instead, the freedom to discuss moral issues or present different lifestyles seems especially essential when persons are most susceptible to manipulation or influence. Furthermore, large segments of the population, including the poor, residents of rural areas, and shut-ins may lack the opportunity or means to use motion pictures or the theatre to supplement the broadcasting media.[79] To preclude the broadcast of expression protected in other media or forums is to deny totally the availability of this material to a sizable audience.

Currently the most widely accepted argument[80] for especially

[77] *See, e.g.*, *Hearings* 345–46 (testimony of Commissioner R.E. Lee); NBC Television Program *Meet the Press*, January 25, 1970, at 4 (Merkle Press transcript) (statement of FCC Chairman Burch); *cf.* Eastern Educational Radio, 24 F.C.C.2d 408, 410–12, 18 P & F Radio Reg. 2d 860, 864–65 (1970).

[78] *Cf.* Z. Chafee, *supra* note 1, at 546.

Moral behavior and values vary with particular cultures, generations, economic and educational differences, and along numerous other lines. That the ability of radio and television to reach these different groups should argue for restriction of the media to material regarded under dominant views as "decent" or "non-offensive" reflects a most questionable assumption that these media should be predominantly a vehicle for the enjoyment of the one large group sharing that dominant morality. Such an assumption is also made when language styles appropriate for the media are dictated by the FCC, rather than by a station's audience or commercial needs. *See* Eastern Educational Radio, 24 F.C.C.2d 408, 18 P & F Radio Reg. 2d 860 (1970).

[79] *Cf.* Karalexis v. Byrne, 306 F. Supp. 1363, 1367 (D. Mass. 1969) (three-judge court), *prob. juris noted*, 397 U.S. 984 (1970) (No. 1149, 1969 Term; renumbered No. 83, 1970 Term) (protecting right to view obscene film in home but not in movie theatre would discriminate against poor).

[80] *See, e.g.*, FCC Public Notice, Address by FCC Chairman Burch Before the Big Brothers of the San Francisco Bay Area, Jan. 30, 1970.

rigorous regulation of expression on radio and television is that the broadcast media are so pervasive or intrusive that morally offensive material, whether or not constitutionally protected, should be suppressed or deterred in order to avoid exposing it to children[81] or to adults who may not want to receive it.[82] On the first score, parents and the state are said to have a legitimate interest in the development of children, and thus in the materials to which they have access. Without evidence to support an affirmative governmental interest in protecting children from exposure to morally offensive material,[83] the state's role is largely justified as one of protecting and supporting the freedom of parents to raise and educate their children as they deem best,[84] though the Supreme Court has allowed legislatures some leeway to reflect statutorily an "independent interest in the well-being of . . . youth."[85] In the area of morally offensive expression, the Court has upheld state prohibition on distribution to minors of printed material which would be protected, if distributed to adults, under the *Roth-Memoirs* test.[86]

Generally, proponents of more restrictive FCC regulation of expression reason from this doctrine that much offensive material protected as to adults should be kept off the air because of the

[81] *Cf.* Ginsberg v. New York, 390 U.S. 629 (1968).

[82] *Cf.* Ginzburg v. United States, 383 U.S. 463, 470 (1966).

[83] No empirical evidence exists that sexual stimuli, for example, have any effect on overt behavior, or on behavior and mental health in the long run. *See* Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and The Empirical Evidence*, 46 Minn. L. Rev. 1009, 1034 (1962). *See also* The Report of the Commission on Obscenity and Pornography 27, 52 (1970).

One commentator has argued that suppression of material as immoral can have an unhealthy effect:

> An equally serious objection to the treatment of obscenity as a largely legal problem arises from the distorting effect this has on any discussion of sexual morality. Concentration on what is forbidden, according to such arbitrary and variable rules, distracts attention from what is permitted . . . it is the native environment of the neurotic.

Larrabee, *The Cultural Context of Sex Censorship*, 20 Law & Contemp. Probs. 672, 681 (1955).

[84] *See* H. Clor, Obscenity and Public Morality 84 (1969); 21 Vand. L. Rev. 844, 848 (1968).

Whether the prevention of the exposure of this material to children is desirable or not, it is undoubtedly true that government control of youth access to obscenity satisfies deep psychological needs of many parents even it is is not based on an accurate reflection of the psychic development of minors. Krislov, *From Ginzburg to Ginsberg: The Unhurried Children's Hour in Obscenity Litigation*, 1968 Sup. Ct. Rev. 153, 193–94. *See also* Cairns, Paul & Wishner, *supra* note 83, at 1040: "Obscenity also seems to be an outrage to some people. . . . [T]he strength of these feelings — especially among parents — must be accommodated as a matter of *Realpolitik*."

[85] Ginsberg v. New York, 390 U.S. 629, 640–43 (1968).

[86] Ginsberg v. New York, 390 U.S. 629 (1968).

ease with which children can watch and listen. Children, because of their lesser maturity, are said to form a more captive audience, less able to turn off a program, And since the young constitute such a large segment of the viewing audience, special standards and regulation are supposedly compelled.[87]

Although the Supreme Court has supported the application of controls on the distribution to children of morally offensive material otherwise protected by the first amendment, it has, on the other hand, continually emphasized that the constitutional right of *adults* to receive expressive materials may not consequently be submerged. In *Butler v. Michigan*,[88] the Court held unconstitutional a state law which prohibited the sale of any books containing immoral language or pictures "tending to the corruption of the morals of youth." The Court found that the statute, designed presumably to protect children, denied adults access to constitutionally protected materials, and concluded:[89]

> The incidence of this enactment is *to reduce the adult population . . . to reading only what is fit for children*. It thereby arbitrarily curtails one of those liberties of the individual, . . . that history has attested as [one of] the indispensable conditions for the maintenance and progress of a free society.

Such a quarantine on general distribution would in the *Butler* context "burn the house to roast the pig;"[90] only a scheme limited to cutting off the availability of such material to children would be approved.

Radio and television, however, do not readily yield to an analysis that for constitutional purposes separates children from the adult audience. Magazine and book sellers can be prohibited from selling to those under a certain age, and movie theaters

[87] *See, e.g.*, Eastern Educational Radio, 24 F.C.C.2d 408, 411 n.6, 18 P & F Radio Reg. 2d 860, 864 n.6 (1970); Mile High Stations, Inc., 28 F.C.C. 795, 796, 3 P & F Radio Reg. 345, 346 (1960); *1960 Programming Report* 1906; *cf.* Kalven, *supra* note 38, at 35.

[88] 352 U.S. 380 (1957).

[89] *Id.* at 383–84 (emphasis added).

[90] *Id.* at 383.

In Jacobellis v. Ohio, 378 U.S. 184 (1964), Mr. Justice Brennan announced the judgment of the Court and reaffirmed the unconstitutionality of indiscriminately suppressing protected material in order to prevent distribution of material deemed harmful to children. Dealing with the exhibition of a motion picture, the Justice framed the issue in terms of the audience at which the film and statute were directed:

> Since the present conviction is based upon exhibition of the film to the public at large and not upon its exhibition to children, the judgment must be reviewed under the strict standard applicable in determining the scope of the expression that is protected by the Constitution.

Id. at 195.

can admit "adults only."[91] The broadcast media, however, enter directly into the home. Parents cannot check continually on what their children are watching, and may neither want nor bother to do so even if they could.[92] Consequently, the adult and child audiences are not easily segregated.

Nevertheless, means are not totally lacking to exercise some control over the exposure to children of material thought improper for them. Reasonable controls over scheduling, promotion, and the general context of the presentation of material provide tools for partial segregation of the audience without total suppression of the material.[93] When possible, programs likely to morally offend some persons may be broadcast late in the evening; warnings may be given both preceding and during the program; and promotions both on the broadcast media and elsewhere may be restricted to a solely informational role so as to avoid sensationalist exploitation. Obviously, scheduling, warnings, and the like will not prevent all children from exposure to some questionable programming. But the numbers that are the subject of legitimate government concern can be significantly narrowed. Although some persons may complain that those most susceptible are not small children but young adolescents who are more mobile and who generally are awake during the later evening hours, a system of scheduling and warnings will at least let parents know when such material will be on the air and the presentation will occur when most parents are at home and have discretion to exercise some control over the activities of their children. Furthermore, as children grow older and consequently both freer from parental control and more exposed to the world at large, the state interest in supporting parental censorship of material reach-

[91] The Court in *Butler* noted that Michigan had another more limited statute "specifically designed to protect its children against obscene matter 'tending to the corruption of the morals of youth.'" 352 U.S. at 383.

[92] *See* p. 684 *infra*.

[93] Commissioner Cox, concurring in the recent approval of Pacifica's application for the Houston construction permit, *see* pp. 668–69 *supra*, stressed that the poem read in Los Angeles was presented, because of controversial language and theme, at 10:30 p.m. on a discussion program normally broadcast at 10.30 a.m. The station announced in the morning that the program was being rescheduled so that children would be less likely to listen, since some material "might be considered by some to be offensive . . . ." When presented, the reading was preceded by a warning that some persons might find the language "blasphemous or obscene," and thus those who would be easily offended should turn off the radio and those with children present should either turn off the program or have the children leave. FCC Public Notice Report No. 8593, *supra* note 26 (concurring statement of Commissioner Cox at 1–2). *Cf.* Cox, *The FCC's Role in TV Programming Regulation*, 14 Vill. L. Rev. 590, 595 (implicitly condemning scheduling of violent programming on Saturday morning television, prime time for child viewing).

ing their children is weakened.[94] Finally, a system regulating the context of presentation rather than content would reflect a "variable obscenity standard,"[95] deterring broadcasters from directing offensive material toward minors specifically, while widening the opportunities for adults to have access to more divergent and controversial discussion and presentations.

Some parents, of course, might not care whether their children listen to or watch questionable material. Others, moreover, may affirmatively welcome the presentation of more explicitly provocative material on television and radio. Such a presentation may help overcome inhibitions and open up sensitive yet important issues of human behavior to family discussion.[96] For these parents, contextual regulations suffice to satisfy their interest in raising their offspring as they wish. They allow individual, concerned parents to evaluate the level of maturity of their child. In the absence of demonstrated harm from exposure to morally offensive expression, any state interest in deterring, as to this class of children, programming content otherwise protected by the first amendment should therefore be subordinated to the interest of parents in deciding what expression they and their children should receive.[97] Only the problem of children whose parents cannot supervise their activities at night, though they would wish to do so, remains. Against this potential interest, however, must be balanced the first amendment guarantee to the adult members of society, who employ — whether through inertia, desire, or necessity — the broadcast media as their primary source of information, entertainment, ideas, and education.

The interest of adults in avoiding their own exposure to morally offensive material also does not provide a justification for prohibiting morally offensive programming. An adult's interest is solely personal. Without evidence of social harm from exposure, the state has little interest in sheltering him from expression unless it is both patently offensive and lacking in social value. Thus, the simple answer to adult programming complaints

[94] *Cf.* Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969) (Aldrich, C. J.) (censorship of material with offensive language studied by high school students is inappropriate). *See also* Rowan v. United States Post Office Dep't, 397 U.S. 728, 741 (1970) (Brennan & Douglas, JJ., concurring in part).

[95] Krislov, *supra* note 84, at 176.

[96] *Cf.* THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 48 (1970).

[97] *Cf.* Stanley v. Georgia, 394 U.S. 557, 564–67 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965). *See also* Z. CHAFEE, *supra* note 1, at 543–44:

> [W]e might even go back to *laissez-faire* and trust sensible parents to keep their children at home from mature films. As for the children of foolish parents, they know so much already that it doubtful . . . [the film] could make them any worse.

is that the adult himself may turn a dial and avoid material which offends his moral sensibilities. A moment's offense may have to be endured by some persons,[98] but that is a small social cost necessarily borne in order to assure the availability of expression protected by the first amendment.[99] Furthermore, the same contextual steps which may be taken to allow segregation of adult and child audiences may, if the potential listener or viewer is concerned and alert, enable adults to avoid even momentary offense. For the adult who may wish to avoid this kind of programming but who, once exposed, cannot emotionally resist the temptation to continue to receive it,[100] these suggested controls may help him, like the concerned parent, to head off the problem before it arises.

In view of the importance of free adult expression and the availability of means to give adults some control over reception of morally offensive material, the FCC should not be permitted to coerce suppression of programming which meets prevailing constitutional standards.[101] The first amendment protects against attempts to curb an "uninhibited, robust and wide-open" interchange of thought and ideas.[102] Because of the importance of broadcast media as sources of expression and communication to a vast number of Americans, programming should not be judged in terms of its acceptability to a consensus audience, but by whether it is patently offensive and has no social worth for the adult public that is most active in and responsible for the direction of the society. This conclusion may require reoriented expectations from some persons accustomed to bland programming, though those persons undoubtedly will remain quite able to find such material. Nevertheless, the Pacifica controversies have demonstrated that the achievement of quality and social importance in programming [103] may necessarily bring with it expression that morally offends some persons by challenging lifestyles and accepted concepts of value and taste. Thus, FCC content reg-

[98] *See Hearings* 357–58.

[99] *Id.* at 358 (testimony of Commissioner Cox); *cf.* Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y.), *aff'd mem.*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968).

[100] *See The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 122–23 (1970).

[101] *Cf. id.* at 121 (noncontent regulation rather than prohibition of speech provides an accommodation of both desire for individual privacy and right of free expression).

[102] New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

[103] *See* Pacifica Foundation, 36 F.C.C. 147, 149, 1 P & F RADIO REG. 2D 747, 750 (1964); Jack Straw Mem'l Foundation, 21 F.C.C.2d 833, 838, 840, 18 P & F RADIO REG. 2D 414, 419, 422 (1970) (dissenting statement of Commissioner Cox); *Hearings* 362 (testimony of Commissioner Cox).

ıtion should be restricted to prevailing constitutional stand-
ls for public communication. Further control should be limited
regulating the context of presentation — through such meth-
s as scheduling, promotional controls, and warnings — so as
best delineate between adult and child audiences and be-
een willing and unwilling adult recipients.[104] Direct or in-
ect suppression of morally offensive though constitutionally
›tected material would emasculate the public's first amend-
nt "right . . . to receive suitable access to social, political,
thetic, moral and other ideas and experiences which . . . may
constitutionally be abridged either by Congress or by the
'C." [105] It is no answer that because of the vagueness of FCC
ndards, "[t]he present regulatory process directly affects only
marginal licensee whose programming is patently below the
m," [106] for the concern here *is* with the broadcaster whose
gramming does significantly deviate or would deviate from
›ular morality but for fear of losing his license. Moreover, the
ue standards may affect far more than the "marginal licensee,"
ce many broadcasters will shy away from the imprecise boun-
ies of "good taste" for fear of incurring FCC disapproval.

C. The Constitutional Boundaries for Broadcast Media Regulation

If FCC content regulation is to be limited to prevailing con-
utional standards, the principles relevant to the broadcast
lia must be determined from the confusing movements of
stitutional doctrine dealing with morally offensive expression.
hough the sexually oriented "prurient interest" prong of the
moirs test seems to offer little meaning for "profanity" and

[104] Cairns, Paul, and Wishner, finding no effects on overt or long-run behavior
sexual stimuli, would condemn only commercial distribution which is
ier intentionally aimed at youth . . . or which is carried on with reckless
gard of the quality of the audience whose patronage is solicited." Cairns,
& Wishner, *supra* note 83, at 1040–41.
.ockhart and McClure, also students of the empirical evidence, reach similar
lusions: while regulation may reflect a variable standard which differentiates
een audiences, the Supreme Court might well invalidate statutes which, be-
e of the fear of "peripheral audiences of adolescents," effectuate the reduction
adult reading material to a level suitable for adolescents." Lockhart & McClure,
orship of Obscenity: The Developing Constitutional Standards, 45 MINN.
EV. 5, 85–86 (1960).

[105] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

[106] Note, *supra* note 69, at 716. *See also* Policy Statement on Comparative
adcast Hearings, 1 F.C.C. 2d 393, 398, 5 P & F RADIO REG. 2D 1901, 1912
5) (FCC disregards broadcast record that is "within the bounds of average
ormance . . . . since average future preformance is expected").

"indecency," and at times seems even inapt as to obscenity,[107] the requirements that material in order to be unprotected have no social value and be patently offensive to the audience are meaningful in the context of the broadcast media. Yet a further and most important question in view of recent developments in "obscenity law" is whether even these criteria are applicable, or whether all expression is to be protected whether or not it is, in current constitutional terms, obscene or otherwise worthless expression — in short, whether a first amendment test with any utility has survived.

Until recently, the Court generally avoided any discussion of what governmental interests may support obscenity laws.[108] *Roth* had emphasized that expression which is obscene in constitutional terms is unprotected by the first amendment, but, in the absence of evidence of social or personal harm resulting from such material, there was little clue as to what affirmative reason supported suppressive governmental action. The implication was that since there was nothing to be said in favor of such expression, abridgement could be based on a mere suspicion of harm or simply a legislative dislike. In *Redrup v. New York*,[109] however, the Court hinted at a quasi-nuisance theory that would justify anti-obscenity laws only when they are directed toward prohibiting expression that would invade the personal province of those not desiring it. In a per curiam reversal of a conviction for the sale of allegedly obscene publications, the Court, although also finding the material not obscene, noted that [110]

> [i]n none of the cases was there a claim that the statutes in question reflected a specific and limited state concern for juveniles . . . . In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. . . . And in none was there evidence of the sort of "pandering" which the Court found significant in *Ginzburg* . . . .

The first two stated concerns suggest that there is a legitimate state interest in combating even obscene material only when the material creates a kind of nuisance,[111] either by intruding upon the sensibilities of adult recipients who do not want to receive the

[107] *See* Gaylin, Book Review, *The Prickly Problems of Pornography*, 77 YALE L.J. 579, 582–83 (1968).

[108] *See* Monaghan, *Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 YALE L.J. 127 (1966).

[109] 386 U.S. 767 (1967) (per curiam).

[110] *Id.* at 769.

[111] *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 324–25 (1968); *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 153 (1969).

material or by reaching children whose parents have an interest in avoiding such exposure. The third interest noted — that of preventing pandering — is less explainable on this basis. In *Ginzburg v. United States*,[112] the Court held that evidence of pandering in the distribution of materials was relevant to a determination of obscenity. In the course of the opinion, however, the Court noted that "the deliberate representation of petitioners' publications as erotically arousing . . . would tend to force public confrontation with the potentially offensive aspects of the work." [113] In the retrospective light cast by the *Redrup* dictum, it seems likely that the *Ginzburg* Court was bothered by the purpose of the panderer in attracting an audience that might normally prefer to avoid obscene material; by the greater likelihood from pandering that this purpose would be accomplished; and by the possibility that the mere act of pandering, drawing attention to aspects of expression that are most offensive and lacking in social value (though the material taken as a whole may be borderline [114]), should be prohibited on the basis of its intrusion upon the sensibilities of unwilling adults or its exposure to children.

In *Stanley v. Georgia*,[115] the Court, holding that a person's mere possession in his own home of even concededly obscene material could not constitutionally be made a crime, gave substance to its previous implications. Mr. Justice Marshall declared that "the right to control the moral content of a person's thoughts . . . . is wholly inconsistent with the philosophy of the First Amendment;" [116] thus, the state could not override constitutional protection and prohibit "mere possession of obscene matter on the ground that it *may* lead to antisocial conduct . . . ." [117] Since the Court asserted that *Roth* was unimpaired,[118] it was obliged to discuss what valid interests could justify suppression of worthless material. It emphasized that *Roth* and subsequent cases had dealt with the public distribution of obscenity; in that context there was a danger that obscene material might "fall into the hands of children" or "intrude upon the sensibilities or privacy of the general public." [119] Thus, the Court implied that obscenity

[112] 383 U.S. 463 (1966).

[113] *Id.* at 470.

[114] In *Ginzburg*, the Court assumed for purposes of its decision that the materials in question were not facially obscene; the pandering context was therefore the determinative factor. *Id.* at 465–66.

[115] 394 U.S. 557 (1969).

[116] *Id.* at 565–66.

[117] *Id.* at 567 (emphasis supplied).

[118] *Id.* at 568.

[119] *Id.* at 567.

laws designed to prevent those dangers from arising could be upheld.

Regulation of obscenity has thus moved from the *Roth-Memoirs* focus on solely the quality of material to a position which incorporates to some extent the interests of willing recipients of the material. It appears that worthless material may be suppressed only if its distribution constitutes a quasi-nuisance; for example, it may contravene the legitimate interests of the public if it intrudes upon the sensibilities of unwilling adult recipients or is directed toward children whose parents might oppose their seeing it. Similarly, pandering may be constitutionally prohibited only if it increases the likelihood that children or unwilling adults will confront obscene material, or if the pandering preys upon children and upon adults indiscriminately and itself is so offensive and lacking in any social value that it may be denied protection. Since the harm, however, is not one inflicted on society because of demonstrated dangers, but rather one felt by the unwilling adult or parent whose interests are subverted, the state would have no interest in interfering with the receipt of the hardest-core pornography by a willing adult.

Whether the Supreme Court will pursue this course arguably augured by *Stanley* cannot be predicted with full assurance. *Stanley*, of course, dealt only with one's possession of obscenity in the privacy of his own home, a fact not without importance.[120] Nevertheless, it seems difficult to limit a privacy notion to the physical limits of the home, as long as activities or behavior do not trench on the legitimate interests of others. Similarly, if one can *possess* obscene materials, it is difficult to deny a right to *receive* as well, as long as the act of distribution or communication also avoids any invasion of the sensibilities of others.[121]

[120] *See, e.g.*, United States v. Melvin, 419 F.2d 136, 139 (4th Cir. 1969); United States v. Ten Erotic Paintings, 311 F. Supp. 884, 886 (D. Md. 1970); State v. Reese, 222 So. 2d 732, 736 (Fla. 1969).

[121] *See* United States v. 37 Photographs, 309 F. Supp. 36 (C.D. Cal. 1970) (three-judge court), *prob. juris. noted*, 39 U.S.L.W. 3146 (U.S., Oct. 13, 1970); Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969) (three-judge court), *prob. juris. noted*, 397 U.S. 985 (1970) (No. 1149, 1969 Term; renumbered No. 83, 1970 Term); H. PACKER, *supra* note 111, at 324; Katz, *supra* note 55, at 212–213; *cf.* Stanley v. Georgia, 394 U.S. 557, 564–65 (1969); Note, *supra* note 32, at 871. *But see* Copland v. O'Connor, 306 F. Supp. 375 (N.D. Cal. 1969).

The *Stanley* Court did imply that the right to receive obscene material may be limited. But the Court said that *Roth* and its progeny justified encroachment of first amendment freedoms only for such important interests as the "regulation of commercial distribution of obscene material." 394 U.S. at 563–64. That first amendment protection, otherwise in force as to even obscene materials, may be subordinated in order to regulate distribution of obscene materials, however, is not by itself a very accurate statement of earlier cases. In *Ginzburg*, for example,

Moreover, the Court, by noting in *Redrup* the absence of certain specific intrusions on others, gave credence to the notion that the government may not interfere as long as expression or distribution is a private matter between willing adults.[122]

Even if morally offensive material must now be found to be intrusive upon a captive audience before it can be governmentally deterred, the constitutional standard formulated in *Memoirs* has certainly not evaporated. If the *Memoirs* test were irrelevant, expression which would have been regarded under *Roth* or *Memoirs* as constitutionally protected whatever the circumstances of distribution could now be suppressed if found to be seriously offensive to the relevant audience. Since important and contro-

the material in question was very questionably obscene, if that. The Court, however, found that in "close cases evidence of pandering may be probative with respect to the nature of the material . . . ." 383 U.S. at 474. Nowhere in *Ginzburg* did the Court give up the specific *Roth* holding that material was not protected if it was obscene and thus worthless. Thus, while certain distribution methods (*e.g.*, those which emphasize the offensive and perhaps worthless qualities of the material) were held capable of subjecting material to prohibition, clearly obscene materials could also be prohibited in the absence of distribution. Now that *Stanley* has hinted that the latter prohibition is unconstitutional when the material is subject solely to the personal use of an adult the mere fact of a commercial distribution may be irrelevant. That this kind of distribution of borderline materials may allow the state to treat them as obscene adds nothing when obscene material is free from prohibition. The test after *Stanley* for whether material may be prohibited, then, seems not to be whether there is a distribution as opposed to mere possession, but whether the distribution or possession intrudes on unwilling adults or subverts parental interests in preventing exposure to children. A commercial distribution that is not intrusive in this way should not provide legitimate cause for prohibition. *See* Karalexis v. Byrne, *supra*, at 1366. Furthermore, *Stanley* has served to emphasize that the pandering in *Ginzburg* was cause for state action not simply because it clarified the character of the material; it supplied the additional requisite that the worthless and patently offensive aspects of the material be flaunted indiscriminately before the general public. *See* Katz, *supra* note 55, at 207; Krislov, *supra* note 84, at 193.

[122] *See* Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969), *prob. juris. noted*, 397 U.S. 985 (1970) (No. 1149, 1963 Term; renumbered No. 83, 1970 Term). *See also* United States v. 37 Photographs, 309 F. Supp 36 (C.D. Cal. 1970) (three-judge court), *prob. juris. noted*, 39 U.S.L.W. 3146 (U.S., Oct. 13, 1970); THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 53 (1970). *But see* United States v. Melvin 419 F.2d 136, 139 (4th Cir. 1969); Copland v. O'Connor, 306 F. Supp. 375 (N.D. Cal. 1969). In *Karalexis*, a three-judge federal district court has extended the *Stanley* privacy theory to motion pictures when the audience was limited to willing adults. The court, while assuming the film, *I Am Curious (Yellow)*, was obscene, granted a preliminary injunction against prosecution for exhibition. Circuit Judge Aldrich found that the viewing public was sufficiently aware of the possible offensiveness of the film, that the film was "not advertised in any pandering manner," and "that the theatre [was] policed, so that no minors [were] permitted to enter." 306 F. Supp. at 1365. Thus, the court felt it could conclude, "equally with *Stanley*" that the motion picture avoided the dangers involved in more open "public distribution." *Id.* at 1366.

versial ideas are often seriously offensive ones to large numbers of persons, the likely meaning of the changing law is that the *Memoirs* test of what content is obscene is invoked to permit suppression only if such material also is either offensive to an unwilling audience or an invasion of parental interests. In short, both intrusion — or exposure-to-children — and a finding of obscenity (or at least a finding that the material is worthless and morally offensive) would have to coalesce to justify content regulation.

Should this development receive Supreme Court approval, one must ask whether the broadcast media could be deterred from presenting socially worthless *and* patently offensive programming, or whether all content regulation is to be constitutionally infirm on the theory that it would preclude the receipt of "protected" expression by adults. Of course, since *Stanley* involved personal possession of obscene material in the home, there was no imminent threat of exposure to children or unwilling adults. The Court's reliance on *Griswold v. Connecticut* [123] emphasized the importance to the decision of this element of personal choice. Radio and television broadcasts by contrast are directed indiscriminately toward the public at large. They easily enter homes, automobiles, places of work, and public accommodations. While an affirmative step is necessary to obtain literature or see a motion picture, broadcast programming is more likely to confront a shifting audience not exercising this same kind of volition.

Nevertheless, if all expression were fully protected by the first amendment, to hold the line [124] at the case of an adult who affirmatively seeks and acquires obscene materials would be unacceptable. Such a limit would restrict adults to broadcast expression deemed appropriate for children or easily-offended adults, and thus again would run into the *Butler* prohibition of overbroad suppression; less restrictive contextual regulations would have to suffice.

Yet this conclusion need not follow. The misconception in extending a "right to broadcast" to cover any expression whatever is the assumption that *Roth* is dead [125] — that all expression is now speech "protected" by the first amendment unless it intrudes on a "fully captive audience" or invades the legitimate province of parents.

A different analysis seems better to reflect the Court's inten-

[123] 381 U.S. 479 (1965), *cited* at 394 U.S. at 564.

[124] *Cf.* Engdahl, *supra* note 46, at 220 n.178.

[125] *See* Note, *Obscenity from Stanley to Karalexis: A Back Door Approach to First Amendment Protection*, 23 VAND. L. REV. 369, 381–82 (1970); *cf.* Engdahl, *supra* note 46, at 219; Katz, *supra* note 55, at 210–11, 217.

tion in *Stanley* while still allowing room for development. By this interpretation, material judged obscene by constitutional standards is still unprotected under *Roth-Memoirs*. But a lack of protection is not equivalent to an authorization to the government to suppress or prosecute under any circumstances.[126] In effect, the Court indicated that obscenity, while unprotected if legitimately attacked, does not by its mere existence call for a governmental response. Thus, an adult can possess it in his own home. And perhaps he will be allowed to attend an obscene motion picture or purchase a pornographic magazine. All these actions are proper because they involve personal, private choices that do not give others any legitimate concern.[127] There is no constitutional interest in promoting the availability of patently offensive and socially valueless expression. Nevertheless, as long as receipt of the expression is a personal, voluntary matter, the government has no reason to interfere.

If, however, obscene material is publicly pandered or broadcast over the air, citizens not seeking the material or desiring to prevent exposure to their children have a legitimate concern. And obscenity, being socially valueless and thus lacking first amendment protection, has nothing in its favor to balance against any gross offense to a relevant audience. That members of the shifting audience have to put up with a serious intrusion on their sensibilities or that children whose parents would object may be exposed is thus sufficient to bar the material. Even if this exposure is limited by various contextual controls, there is no longer any constitutional interest opposing the objections; protection extends only to a realm of solely personal, private choices — not to the material.[128]

Still protected under the first amendment, either by this theory or if the *Stanley* privacy sphere is not enlarged beyond the confines of the home, is the presentation of expression which has social value or is not patently offensive; only material not meeting these standards should be barred from the broadcast media. Yet by whose standards should this test be applied to radio and television programming? A "variable obscenity" framework that looks to the moral standards of the particular relevant audience

[126] *Cf.* Katz, *supra* note 55, at 214 (desirability of requiring government to produce a victim). *See also* H. PACKER, *supra* note 111, at 325 (nuisance approach that requires some offense to or intrusion on a complainant "forces a sharper focus on the reality and gravity of the threatened offensiveness . . . . law enforcement officers would no longer have a roving commission to stamp out the unorthodox and the avant garde").

[127] *Cf.* Griswold v. Connecticut, 381 U.S. 479 (1965); THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 53–55 (1970).

[128] *Cf. The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 153–54 (1969).

seems appropriate.[129] Although the test should not allow all material thought by any single individual to have social value, nevertheless where different stations or programming attract a specific audience that may be defined or classified by a particular set of values, it seems proper to consider programming at least with reference to the average man of that audience. Otherwise, the result tends toward a rather unresponsive consensus of expression and values, and represents a perversion of first amendment purposes.

A variable standard determined by a particular audience is justified mainly for purposes of evaluating radio programming. Radio stations are sufficiently numerous, and have correspondingly lower economies of scale, that they can attempt to appeal to specific audiences that are separable from a mass audience, by ethnic, cultural, developmental, or educational characteristics. The variable standard would tend to be more static with regard to television, at least for the present, since most commercial stations must attempt to attract a mass audience. In any case, if the particular relevant audience finds social value, no justification appears for overruling such a finding because of the view of an abstract "average man," a Commission member, or a law enforcement official. This freedom is especially important for stations that try to serve minority interests. The FCC theoretically recognizes service to minority groups as one of the relevant criteria of the public interest standard.[130] Yet in *WREC Broadcasting Service*,[131] after a radio station had argued that its broadcast of certain allegedly vulgar songs was part of its fulfillment "as an outlet for local self-expression" in that it "must program not only to majority tastes,"[132] the Commission without offering a constitutional judgment said that a radio licensee was not free to pander to any taste. It found the station's attitude to reflect adversely on its judgment and sense of responsibility, and awarded the license to a competing applicant. The implication that no programming should deviate from some majority moral norm is especially troubling in the context of a metropolitan area served by many stations. In that setting there are obvious advantages in allowing certain stations to broadcast specially for certain groups expression which is perhaps not available on larger

[129] The Court laid groundwork for the approach offered in text in Mishkin v. New York, 383 U.S. 502, 508–09 (1966), by holding that the relevent audience for application of the "prurient interest" test was that to which the material was primarily addressed rather than some abstract "average" man.

[130] *1960 Programming Report* 1913.

[131] 19 F.C.C. 1082, 10 P & F RADIO REG. 1323 (1955).

[132] *Id.* at 1113, 10 P & F RADIO REG. at 1357–58.

stations more interested in reaching a diverse audience. If it is possible to make significant distinctions between audiences, the public interest should not preclude a station from inquiring into the tastes and values of the hypothetical member of its audience [133] — whether he be an intellectual, a blue collar worker, or a member of a certain ethnic or racial group — and then programming material found by its audience to have socially redeeming value.

III. The Regulatory Approach of the FCC and Its Consequences for Programming Standards

If prevailing first amendment standards apply substantively to FCC content regulation of morally offensive programming, the Commission's procedures must be reviewed and modified to the degree necessary to secure constitutional protection for broadcasters. The Commission's indirect "public interest" approach has tended to utilize pressure upon stations to deter morally controversial programming while avoiding any direct invocation of the available statutory penalties for obscenity, profanity, or indecency [134] which would presumably test judicially the limits of substantive regulation. If a challenge to a public interest determination did wind up in the courts, the Commission might manage with its discretion to find grounds for support other than the moral character of the programming,[135] or might simply argue that the station's performance was generally such that another applicant could better meet the needs and tastes of the community.

The FCC's assertion that its actions do not run afoul of the

[133] *Cf.* Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 Sup. Ct. Rev. 7, 64.

[134] *But see* Eastern Educational Radio, 24 F.C.C.2d 408, 18 P & F Radio Reg. 2d 860 (1970).

Although *Eastern Educational Radio* apparently will not result in judicial consideration of the Commission's standards, it is significant beyond the mere fact that the FCC encouraged an appeal to the courts; in addition, the FCC decided the case in part in terms of its construction of the section 1464 statutory prohibition on "indecent" expression (though the Commission relied alternatively on a violation of the public interest standard).

[135] *See, e.g.*, Jack Straw Mem'l Foundation, 21 F.C.C.2d 833, 18 P & F Radio Reg. 2d 414, *reconsidered and aff'd*, 24 F.C.C.2d 266, 19 P & F Radio Reg. 2d 611 (1970) (failure to comply with policies adopted voluntarily by station); Palmetto Broadcasting Co., 33 F.C.C. 250, 23 P & F Radio Reg. 483 (1962), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964) (misrepresentations to Commission by licensee); FCC Public Notice No. 8593, *supra* note 26 (attempt of Commissioner R. E. Lee to find Pacifica financially unqualified).

section 326 ban on censorship because they do not constitute prior restraints seems misguided in view of the enormous impact of FCC action upon the entire industry. The fear of Commission discretion to refuse to renew a license exceeds most advantages that a licensee might obtain by challenging a Commission position. Furthermore, while a system of prior restraints could at least demonstrate the kinds of material that are taboo, the broad public interest standard as invoked against offensive programming provides few guidelines for action. A licensee must suppress borderline material, or even programming with only slight possibility of instigating an FCC response, for fear of losing the right to conduct his business.[136] Consequently, the licensee cannot adequately or efficiently balance the social interest in a wide range of social, political, and moral expression against his private costs — possible entrepreneurial demise — risked by stepping too close to the shadowy line.

The FCC's present power and discretion effectively to establish and to enforce administrative standards for morally offensive material seem very likely to violate prevailing constitutional requirements.[137] In *Bantam Books v. Sullivan*,[138] a Rhode Island commission notified book distributors that certain books had been declared objectionable for sale to youth. The notices asked for cooperation in stopping circulation, and reminded the distributors of the commission's duty to recommend prosecution of purveyors of the material. The Supreme Court held this procedure unconstitutional for lack of required safeguards, since the result was that distributors stopped circulation rather than risk the possibility of criminal prosecution. By this response, some concededly nonobscene books were suppressed. The Court pointed out that although obscenity is unprotected speech, the test is so complex that rigorous safeguards are required to ensure that constitutionally protected expression is not curtailed.[139]

[136] *Cf.* Note, *supra* note 55, at 865.

[137] *Cf.* Banzhaf v. FCC, 405 F.2d 1082, 1096 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969):

> [T]here is high risk that [public interest rulings relating to specific program content] will reflect the Commission's selection among tastes, opinions, and value judgments, rather than a recognizable public interest. Especially with First Amendment issues lurking in the near background, the "public interest" is too vague a criterion for administrative action unless it is narrowed by definable standards.

See also National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 208 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970): "[T]he Commission must be cautious in the manner in which it acts; regulations which are vague and overbroad create a risk of chilling free speech . . ."

[138] 372 U.S. 58 (1963).

[139] *Id.* at 65–66; *see* Freedman v. Maryland, 380 U.S. 51, 57–58 (1965); Marcus v. Search Warrant, 367 U.S. 717, 731 (1961); Monaghan, *First Amendment*

FCC regulation under the broad public interest standard lacks any such safeguards. First, the great value of the broadcasting license at stake normally restrains a licensee from vigorously asserting first amendment rights when he would thereby risk a denial of renewal on grounds that do not adequately assure strict constitutional review. The inhibition is especially likely since the burden is on the licensee to show that he can best serve the community.[140] Second, the Commission's approach of judging material by nonspecific standards of offense, indecency, and public interest creates a further risk that constitutionally protected expression will be suppressed. Although the FCC does not object to specific material in advance of its broadcast, past Commission responses to offensive programming serve to achieve the same inhibition, and, by their vagueness, jeopardize an even wider range of expression.[141] Nor is it a sufficient answer that generally the FCC simply encourages good taste broadcasting, without the use of penalties, by passing along letters or limiting a license renewal to one year in order to more carefully consider a station's programming. In *Bantam Books*, the Court responded to the state agency's defense that its actions constituted mere exhortation by finding that the record demonstrated an intent, through informal sanction, to suppress, and the consequent achievement of that end.[142] In the broadcast media as well, the effect of letters, limited renewals, and the like is to achieve indirect censorship by the industry itself.[143] The threat of future criminal proceedings was not easily ignored by book distributors, although they might have withstood a small number of prosecutions. A loss of a broadcast license renewal and consequently a profitable business is still less easily risked by the broadcaster. In spite of section 326, therefore, one finds in present media regulation, as in the *Bantam Books* situation, an administrative censorial system having the constitutional infirmities found in a system of prior restraints[144] — suppression, in the absence of

"Due Process," 83 HARV. L. REV. 518, 519, 551 (1970); *cf.* A Quantity of Books v. Kansas, 378 U.S. 205, 213 (1964).

[140] *Cf.* Freedman v. Maryland, 380 U.S. 51, 58 (1965).

[141] *See* Note, *supra* note 55, at 872.

[142] 372 U.S. at 66–68.

[143] *See* Jack Straw Mem'l Foundation, 24 F.C.C. 2d 266, 268–69, 19 P & F RADIO REG. 2D 611, 613 (1970) (dissenting opinion of Commissioner Johnson); S. MCCLELLAN, *supra* note 34, at 14–16.

[144] The argument that the FCC does not engage in "censorship" since it does not impose "prior restraints" on specific programming obscures the larger meaning of prior restraints. *Subsequent* punishment of protected speech is of course also barred by the first amendment. *See* Marks, *supra* note 62, at 988. Prior restraints are barred as one obvious form of unconstitutional censorship because they generally constitute an arbitrary limitation on speech without a judicial determination of whether the expression is protected; thus, the risk arises that protected as well as unprotected expression may be infringed. *See* M. SHAPIRO, FREEDOM OF SPEECH 154 (1966).

The central import of the judicial prohibition on prior restraints is that a judicial determination of the constitutional status of expression must either precede or immediately follow any governmental interference with expression. *See* Monaghan, *supra* note 139, at 532; *cf.* Reed Enterprises v. Clark, 278 F. Supp. 372, 381 (D. D.C. 1967) (three-judge court), *aff'd per curiam*, 390 U.S. 457 (1968). Regardless of whether restraints are prior, the crucial determination must be whether the Commission's practices, powers, and discretion together have a discouraging or "chilling" effect on expression. *See* Smith v. California, 361 U.S. 147, 153–54 (1959); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 827–28 (1969).

[145] *See* Freedman v. Maryland, 380 U.S. 51 (1965); M. SHAPIRO, *supra* note 144, at 155; Caldwell, *Censorship of Radio Programs*, 1 J. RADIO LAW 441, 442, 470 (1931); Comment, *Indirect Censorship of Radio Programs*, 40 YALE L.J. 967, 968 (1931).

The assurance of judicial determination or superintendence is lacking for radio and television licensees who cannot attain a successful result by simply defending specific programming in court as nonobscene, but must affirmatively prove that their overall programming best serves the public interest despite offense to some in the audience. In short, the Commission's undertaking extends beyond a determination of the constitutionality of specific material; any degree of offense tends to remain as a minus or black mark that places a licensee in a disadvantageous comparative position.

Mr. Justice Brennan has questioned whether the boundaries of morally offensive expression may ever be determined in the first instance in other than a judicial forum. Manual Enterprises v. Day, 370 U.S. 478, 497–98 (1962) (Brennan, J., concurring); *see* Monaghan, *supra* note 139, at 520. *See also* Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968) (per curiam) (requirement of prompt judicial decision as to alleged obscenity).

[146] *See, e.g., Hearings* 372 (statement of Senator Gurney); Note, *supra* note 32, at 883.

[147] *See* Freedman v. Maryland, 380 U.S. 51, 57–58 (1965); *cf.* Note, *supra* note 55, at 876.

Administrative agencies are institutionally different from courts; whatever the proceedings, Commissioners lack the personal independence granted federal judges by life tenure, and their limited terms and the more political basis for appointment deprive them of the judicial insulation that leads itself to taking a "long view."

clear standards, of expression whose constitutional status will generally not be judicially determined.[145]

The effective control over morally offensive programming by the FCC raises a further and related problem. An administrative agency, directed by political appointees with terms of limited duration, is likely to be subject to pressures from the executive and legislative branches.[146] In light of that political cast and the agency's assumed responsibility for evaluating programming, the Commission is apt to be less responsive than a court to constitutionally protected interests of free expression.[147] Since the

burden is on the licensee to persuade the FCC that his programming is in the public interest, the Commission essentially sits in judgment over what programming passes muster while it also has the task of promoting and furthering its own notions of what programming may best serve the public.

It seems most doubtful, then, that the Commission's procedures in regulating programming display "the necessary sensitivity to freedom of expression." [148] The standard of the public interest is vague,[149] and applicable to an overly broad [150] range of expression when left to the extensive discretion of the Commission.[151] The potential arbitrariness and the consequent uncertainty flow from unconstitutional procedures. These procedures are not justifiable as necessary corollaries of the application of administrative expertise to diverse fact situations, because the consequence is a deterrent effect on privileged behavior — expression protected by the first amendment.[152] Consequently, the effective prohibition of morally offensive programming on radio and television should be removed from the Commission's broad power to judge whether the performance of a licensee is in the public interest. Contextual regulation may be justified in the interest of giving members of the audience more control over what they choose to see.[153] Also, regulation to promote diversity of expression and access to these media may be justified [154] to reach and serve many sub-audiences and to avoid dominance of the airways by a limited range of social, moral, and political expression.

But determinations that programming is inappropriate for broadcast because of moral offensiveness should be reflected only in direct action that may be effectively tested in the courts. For example, the Commission may determine that section 1464 has been violated, and may exercise its statutory authority to impose a fine. This course was recently taken by the FCC, although the Commission's invitation to appeal the sanction to the courts was not accepted by the station.[155] If the expression is thought by the Commission to be particularly egregious, or if the station has committed frequent violations which are upheld in the courts, the FCC may exercise its far more drastic power of license revocation. While this sanction provides less flexibility, it also will at least provide a basis for a court determination, in the context of particular material, of the programming standards to be applied by the Commission. A decision in the courts in a particular case will give stations some indication of what they may safely broadcast. Such a decision, moreover, would hopefully open the media to a full range of privileged expression.

See Monaghan, *supra* note 139, at 522–23. *See also* Krislov, *supra* note 84, at 192–93.

[148] Freedman v. Maryland, 380 U.S. 51, 58 (1965).

[149] *Cf.* Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 682–85 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 71 (1963).

[150] *Cf.* Freedman v. Maryland, 380 U.S. 51, 56 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 69–70 (1963).

In *Bantam Books*, the Court noted that although the agency's supposed concern was limited to the availability of the offensive material to children, the resulting overly broad suppression would deprive the adult population of expression protected by the first amendment. *Id.* at 71. *See* Butler v. Michigan, 352 U.S. 380 (1957); p. 682 *supra*.

[151] *See* Note, *supra* note 55, at 872, 921; Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 828 (1969); *cf.* Note, *Governmental Regulation of the Program Content of Television Broadcasting*, 19 GEO. WASH. L. REV. 312, 333 (1951).

As the Supreme Court said in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 504–05 (1952) (voiding statute prohibiting "sacrilegious" movies):

> [T]he censor is set adrift upon a boundless sea . . . . Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority.

[152] *See* Banzhaf v. FCC, 405 F.2d 1082, 1096 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

Regulation of program content might be acceptable if the standards for suppression had reference to a clearly determinate rule of privilege. This is arguably the case when a statute bans "obscenity," since the Supreme Court has developed a rule of privilege against which persons can test or at least evaluate intended expression, *see* Note, *supra* note 55, at 884. Even this test arguably falls short of supplying the necessary clarity. *Id.* at 885–86. The public interest standard provides no realistic guidelines at all — a licensee must simply guess at what the Commission might find offensive enough to conclude that the station is not serving the community satisfactorily. And there is no clear notion of how the Commission will define this community. Moreover, the corresponding unlikelihood of judicial review and the placing of the burden on the licensee result in procedural overbreadth, *see id.* at 924, which lessens the possibility that the overbreadth and vagueness in the substantive standards may be removed by the courts through case-by-case adjudication.

[153] *See* pp. 683–65 *supra*.

[154] One may fruitfully compare *remedial* regulations, such as those designed to broaden the range of expression on the broadcast media, with *censorial* regulations, which prohibit certain kinds of expression. The first amendment overbreadth problems are not so severe with the former, since the effect is generally to further the exchange of ideas sought to be protected by the first amendment. The latter regulations, however, by excluding certain expression from that exchange, raise fears that the part excluded will not be precisely limited to unprotected expression. *See* Note, *supra* note 55, at 918–20.

[155] *See* Eastern Educational Radio, 24 F.C.C.2d 408, 18 P & F RADIO REG. 2D 860 (1970). The amount of the fine — only $100 — perhaps discouraged the station from seeking judicial review.

THE ROLE OF THE ACCESS DOCTRINE IN THE REGULATION OF THE MASS MEDIA: A CRITICAL REVIEW AND ASSESSMENT

DAVID L. LANGE†

I. INTRODUCTION

Among the issues which confront the American mass media, surely few are more important than the issues posed by the question of access: who finally shall decide which voices will be heard, which questions raised, and which events and matters covered in the nation's press?

In broadest terms, the access question is nothing less than an inquiry into the proper structure and purpose of the American press. More recently, however, the question has arisen in the narrower context of immediate confrontations between the owners of the media and their gatekeepers,[1] on the one hand, and individual members of the public on the other. Thus, a group of businessmen organized against the war in Vietnam demand the right to air their views in sixty-second broadcast editorials.[2] Members of a clothing workers union propose to buy a page of advertising space in a metropolitan daily newspaper to protest the importation of foreign-manufactured clothing.[3] Individual citizens insist that they be allowed to use the origination facilities of their community's cable television system to express their personal views on any subject.[4] In each case proponents of a point of view seek direct access to a communications medium that they do not generally control. If access is to be granted, some accommodation obviously is required among interests that are likely to conflict.

With increasing frequency, scholars, courts and regulators have proposed that the accommodation be implemented through an affirmative right of access in the proponents as against the owners and manag-

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[1]The "gatekeepers" metaphor was first employed by David Manning White is his classic study of the screening role of editors. *See The "Gate Keeper": A Case Study in the Selection of News*, JOURNALISM QUARTERLY 383-90 (1950).

[2]Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom.* CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080 (1973).

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

[4]*See generally* Botein, *Access to Cable Television*, 57 CORNELL L. REV. 419 (1972).

ers of the media enterprise.[5] The proposals reflect a growing uneasiness

[5]The access question has inspired a considerable literature. The weight of opinion in the law reviews favors some form of limited access. A majority of the access proposals have been offered in the context of the broadcast and cable media, but there is substantial support for access to the print media as well. *See* Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969); Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Barron, *Access—The Only Choice for the Media?*, 48 TEXAS L. REV. 766 (1970); Botein, *Clearing the Airwaves for Access*, 59 A.B.A.J. 38 (1973); Botein, *The Federal Communications Commission's Fairness Regulations: A First Step Towards Creation of a Right of Access to the Mass Media*, 54 CORNELL L. REV. 294 (1969); Canby, *The First Amendment Right to Persuade: Access to Radio and Television*, 19 U.C.L.A.L. REV. 723 (1972); Clark & Hutchison, *Self-Censorship in Broadcasting—The Cowardly Lions*, 18 N.Y.L.F. 1 (1972); Drabelle & Taylor, *The President, The Fairness Doctrine, and Political Access to the Broadcast Media*, 15 ST. LOUIS U.L.J. 73 (1970); Firestein, *Red Lion and the Fairness Doctrine: Regulation of Broadcasting "In the Public Interest,"* 11 ARIZ. L. REV. 807 (1969); Johnson & Westen, *A Twentieth-Century Soap-box: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574 (1971); Mallamud, *The Broadcast Licensee as Fiduciary: Toward the Enforcement of Discretion*, 1973 DUKE L.J. 89; Malone, *Broadcasting, The Reluctant Dragon: Will the First Amendment Right of Access End the Suppressing of Controversial Ideas?*, 5 U. MICH. J. LAW REFORM 194 (1972); Scanlon, *The FTC, the FCC, and the "Counter-Ad' Controversy: An Invitation to 'Let's You and Him Fight?'*, 5 ANTITRUST LAW & ECON. REV. 43 (1971); Zack, *F.C.C. and the Fairness Doctrine*, 19 CLEV. ST. L. REV. 579 (1970); Comment, *The Broadcast Media and the First Amendment: A Redefinition*, 22 AM. L. REV. 180 (1972); Comment, *And Now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising*, 60 CALIF. L. REV. 1416 (1972); 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, *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 867, 904-07 (1972); Note, *Broadcasting and the Right of Access to Public Forums: Business Executives' Move for Vietnam Peace v. FCC*, 6 GA. L. REV. 208 (1971); Comment, *From the FCC's Fairness Doctrine to Red Lion's Fiduciary Principle*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 89 (1970); Note, *The Duty of Newspapers to Accept Political Advertising—An Attack on Tradition*, 44 IND. L.J. 222 (1969); Comment, *Freedom of Speech and the Individual's Right of Access to the Airwaves*, 1970 LAW & SOC. ORDER 424; Note, *The Public Domain and a Right of Access: Affect Upon the Broadcast Media*, 3 LOYOLA U.L.A.L. REV. 451 (1970); Comment, *Constitutional Law: The Right of Access to the Press*, 50 NEB. L. REV. 120 (1971); Note, *Freedom of Expression in the Media: The Public's Claim for a Right of Access*, 33 OHIO ST. L.J. 151 (1972); Note, *We Pick 'Em, You Watch 'Em: First Amendment Rights of Television Viewers*, 43 S. CAL. L. REV. 826 (1970); Note, *"Public Interest," "Fairness," And the First Amendment: A Broadcaster's Dilemma*, 4 SUFFOLK L. REV. 509 (1970); Note, *Resolving the Free Speech—Free Press Dichotomy: Access to the Press Through Advertising*, 22 U. FLA. L. REV. 293 (1969); 40 U. CIN. L. REV. 870 (1971); 85 HARV. L. REV. 689 (1972); 15 S.D.L. REV. 172 (1970); 24 VAND. L. REV. 131 (1971). There is, in addition, a substantial body of complementary writings which can be classified as neither clearly "for" nor "against" the proposals for access, but which nonetheless offer useful insights into the areas. *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 653-71 (1970); Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, 37 U. COLO. L. REV. 31 (1964); Botein, *supra* note 4; Cohn, *Access to Television to Rebut the President of the United States: An Analysis and Proposal*, 45 TEMP. L.Q. 141 (1972); Houser, *The Fairness Doctrine—An Historical Perspective*, 47 NOTRE DAME LAWYER 550 (1972); Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation: Implicatons of Technological Change*, 37 U. CIN. L. REV. 550 (1968); Johnson, *Freedom to Create:*

with the apparent concentration of power in the American media and a corresponding concern for the viability of effective and diverse public debate.[6]

In their most extreme form, the proposals have called for recognition of access to the press as "a new First Amendment right."[7] But the courts have not yet accepted these proposals. In particular, private newspaper publishers have argued successfully that the first amendment ordinarily protects them in their traditional right to edit the contents of their publications.[8] Thus, the clothing workers either must persuade the publishers to print their editorial advertisements or look elsewhere to find an outlet for their views.

Broadcasters, on the other hand, have not enjoyed the editorial autonomy of the publishers. Unlike publishers, broadcasters have long been subject to the "fairness doctrine," the requirement that they provide a balanced treatment of controversial public issues.[9] To be sure,

The Implications of Anti Trust Policy for Television Programming Content, 8 OSGOODE HALL L.J. 11 (1970); Kalven, *"Uninhibited, Robust, and Wide-Open"—A Note on Free Speech and the Warren Court*, 67 MICH. L. REV. 289 (1968); Putz, *Fairness and Commercial Advertising: A Review and a Proposal*, 6 U. SAN. FRAN. L. REV. 215 (1972); Symposium, *The FCC's Role in TV Programming Regulation*, 14 VILL. L. REV. 629 (1969); Comment, *A Constitutional Remedy For the HighCost of Broadcast and Newspaper Advertising in Political Campaigns*, 60 CALIF. L. REV. 1371 (1972); Note, *The First Amendment and Regulation of Television News*, 72 COLUM. L. REV. 746 (1972); Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008 (1971); Note, *The Public Interest in Balanced Programming Content: The Case for FCC Regulation of Broadcasters' Format Changes*, 40 GEO. WASH. L. REV. 933 (1972); Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, 84 HARV. L. REV. 664 (1971); Note, *Frontiers of Fairness in Broadcasting*, 22 S.C.L. REV. 208 (1970); Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863 (1970); Comment, *The Broadcast Industry: The Commercial Television Licensee and the Editorial Function*, 18 WAYNE L. REV. 683 (1972); 44 NOTRE DAME LAWYER 447 (1969); 6 U. RICH. L. REV. 370, 448 (1972).

[6]*See, e.g.*, Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1644-47, 1678; Johnson & Westen, *supra* note 5 at 606.

[7]Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5.

[8]*See, e.g.*, Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971); Chicago Joint Bd. v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); Cook v. Advertiser Co., 323 F. Supp. 1212 (N.D. Ala. 1971), *aff'd on other grounds*, 458 F.2d 1119 (5th Cir. 1972); Resident Participation, Inc. v. Love, 322 F. Supp. 1100 (D. Colo. 1971). *But cf.* Tornillo v. The Miami Herald Publishing Co., No. 43,009 (Fla. Sup. Ct., filed July 18, 1973), *rehearing denied*, Oct. 10, 1973.

[9]The fairness doctrine was conceived in the FCC's 1946 "Blue Book," within which the Commission promulgated the principle that stations must reserve broadcast time for discussion of public issues. FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946). The doctrine reached a maturity of sorts in 1949, when the Commission issued a report regarding editorializing by licensees. FCC, *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949). Attacked as a violation of the precepts of the first amendment, the doctrine was nonetheless held to be constitutional in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The fairness doctrine

they have retained a degree of independence: while the fairness doctrine has called for balanced treatment of the issues, the broadcasters have been relatively free to define in the first instance the issues that they would treat.[10] But their discretion has been largely circumscribed by the overriding requirement that they provide service "in the public interest"[11]—a command which the Federal Communications Commission has interpreted to mean that broadcasters must attempt to identify and treat issues of particular concern to their audience.[12] Moreover, the fairness doctrine contemplates—and in some cases demands[13]—that the balance which is required of broadcast licensees be achieved through opportunities for direct expression by interested members of the public.[14] Thus, we have grown accustomed to the broadcast editorial followed in turn by a reply from some "responsible" spokesman for another point of view. This right to reply is, of course, a species of access even though it arises as a result of some position taken initially by the licensee.

Meanwhile, cable television audiences in the so-called "top one hundred markets" in the country are the beneficiaries of a maze of recent FCC regulations intended in part to ensure public access to CTV

has been the subject of extensive commentary. For a useful discussion of its general development, see Houser, *supra* note 5.

[10]*See, e.g.*, CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080 (1973), in which Chief Justice Burger observes:

> 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. . . . [S]o 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.

Id. at 2093-94 (emphasis added).

[11]Communications Act of 1934, 47 U.S.C. §§ 303, 309 (1970). The congressional standard of "public interest, convenience and necessity" runs throughout the Act as it applies to broadcasting.

[12]*See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377-79 (1969), in which the Court stated:

> There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). The broadcaster must give adequate coverage to public issues . . . and coverage must be fair in that it accurately reflects the opposing views. . . . The statutory authority of the FCC to promulgate these 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 this chapter. . . ." 47 U.S.C. § 303 and § 303(r).

[13]395 U.S. at 373-75.

[14]*See* Democratic Nat'l Comm., 25 F.C.C.2d 216, 222-23 (1970).

channels.[15] In most of these markets, cable operators are required to originate programming for a "substantial part of the broadcast day";[16] this programming is subject to the fairness doctrine and thus incorporates its reply provisions.[17] But cable operators in these markets are also required to dedicate certain channels to the public on terms which recognize affirmative, individual rights of public access entirely independent of any position taken by the operators.[18] The result is to force cable systems to operate *pro tanto* as common carriers.

Recently, it appeared that a more immediate right of access to the broadcast media might also be required. In a sweeping 1971 decision, a panel of the Court of Appeals for the District of Columbia held that the first amendment forbids broadcast licensees to reject all paid editorial advertising, at least in cases in which commercial advertising was otherwise accepted.[19] But that tentaive acceptance of an affirmative right of access was short-lived. In *CBS v. Democratic National Committee*,[20] a majority of the Supreme Court has held that the first amendment does not impose this requirement on broadcasters operating under present broadcast regulatory policies.

For those who have doubted the wisdom of an enforceable right of access to the mass media[21]—and I am among them for reasons I shall

[15]47 C.F.R. §§ 73.201, .205, .209, .213, .215, .217, .221, .225, .251 (1972).

[16]47 C.F.R. § 73.201(b) (1972).

[17]*See* 47 C.F.R. § 73.209 (1972); Public Notice, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964).

[18]47 C.F.R. §§ 73.251(4)-(8), .251(10)(ii)-(11) (1972).

[19]Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom.* CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080 (1973).

[20]93 S. Ct. 2080 (1973).

[21]While not all of the following authorities have considered the access proposals specifically or at comprehensive length, the tenor of their observations is generally at odds with the concept of an enforceable right of access. *See* 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 624-50 (1947); Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes*, 23 FED. COM. B.J. 75 (1969); Daniel, *Right of Access to Mass Media—Government Obligation to Enforce First Amendment?*, 48 TEXAS L. REV. 783 (1970); Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972); Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15 (1967); Marks, *Broadcasting and Censorship: First Amendment Theory After Red Lion*, 38 GEO. WASH. L. REV. 974 (1970); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967); Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 GEO. WASH. L. REV. 719 (1964); Note, *Concepts of the Broadcast Media Under the First Amendment: A Reevaluation and a Proposal*, 47 N.Y.U.L. REV. 83 (1972); Note, *Newspaper Regulation nd the Public Interest: The Unmasking of a Myth*, 32 U. PITT. L. REV. 595 (1971); Note, *Free Speech and the Mass Media*, 57 VA. L. REV. 636 (1971).

explain at some length in this article—the decision in *Democratic National Committee* is encouraging. And yet it clearly does not end the battle for a right of access to the broadcast media. On the contrary, a majority of the Court decides merely that the broadcast media present unique regulatory problems which are primarily within the province of Congress and the Federal Communications Commission;[22] that the Communications Act of 1934 does not itself impose common carrier status on broadcast licensees;[23] and that, whether or not broadcast licensees are engaged in governmental action, they need not accept unwanted editorial announcements unless they are required to do so by the FCC.[24] In the view of the majority, balanced coverage of public issues under a system of editorial trusteeship is an adequate alternative to a right of access in individuals.[25] The question whether the FCC itself may impose a right of access without violating the first amendment is not actually decided, although a majority of the Court rather clearly supposes that it may.[26] Meanwhile, the majority continues to appear untroubled by the limitations imposed on broadcasters' discretion by the fairness doctrine and, in dictum, actually appears to welcome the relatively recent restraints on cable television.[27]

Other dicta in the case suggest that a majority of the Court would find efforts to establish a right of access to the print media substantially more difficult to approve.[28] Traditional first amendment thinking has long held that the print media are unlike the broadcast media in that the latter are uniquely scarce:[29] anyone may establish a printing press;

[22]CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2086 (1973).

[23]*Id.* at 2087-92.

[24]*Id.* at 2096-101, 2108-09.

[25]*Id.* at 2097-98.

[26]*See id.* at 2100.

[27]*See id.* at 2100-01.

[28]Chief Justice Burger, supported by Justices Rehnquist and Stewart, makes this comment: "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." *Id.* at 2094. And Justice Brennan, joined by Justice Marshall, notes in his dissenting opinion that: "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." *Id.* at 2126 n.12.

[29]The most frequently quoted statement of the scarcity rationale was set forth by Mr. Justice Frankfurter: "Unlike other modes of expression, radio 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." NBC v. United States, 319 U.S. 190, 226 (1943). While other theories of broadcast regulation have been offered—including, notably, the concept of public ownership of the airwaves—it is the scarcity argument which has enjoyed the widest acceptance. *See, e.g.*, Note, *Concepts of the Broadcast Media Under the First Amendment: A Reevaluation and a Proposal*, *supra* note 21, at 88-89; Note, *Newspaper Regulation and the Public Interest: The Unmasking of a Myth*, *supra* note 21, at 601-03.

broadcast frequencies, on the other hand, are drawn from the limited electromagnetic spectrum and therefore must be regulated to avoid chaotic interference.[30] Thus a right of access to the broadcast media might be justified as a concomitant of an otherwise necessary regulatory structure. Access to the print media, on the other hand, would involve a more fundamental first amendment conflict. Although the access proponents have strongly questioned this traditional orientation on grounds which I shall discuss more fully, the Supreme Court itself has never squarely faced the issue. It now appears, however, that it may soon have an opportunity to do so. In *Tornillo v. The Miami Herald Publishing Co.*,[31] which followed within weeks the decision in *Democratic National Committee*, a majority of the Florida Supreme Court has upheld a statute[32] which, in effect, requires newspapers to give "equal space" to political candidates who are attacked either in news reports or on the editorial pages. In strictest terms, the Florida statute does not grant a full right of access. It more nearly resembles the FCC's fairness doctrine or, more nearly still, the "equal time" provisions of section 315 of the Communications Act of 1934.[33] Under the equal space statute, no one has a right to reply who is not a political candidate and who has not first been attacked. One needs no special insight, however, to see that the statute cannot be applied to privately owned newspapers unless quite basic assumptions about the traditional first amendment position of the print media are altered. If they are, it seems altogether possible that,

[30]*See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-86 (1969); NBC v. United States, 319 U.S. 190, 210-17 (1943); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940). More recently, the Chief Justice has observed: "We have noted that prior to the passage of the Radio Act of 1927 . . . 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. . . ." CBS v. Democratic Nat'l Comm., 93 St. Ct. 2080, 2087 (1973).

[31]No. 43,009 (Fla. Supp. Ct., filed July 18, 1973), *rehearing denied* Oct. 10, 1973.

[32]FLA. STAT. ANN. § 104.38 (Supp. 1972).

[33]47 U.S.C. § 315 (1964). It is true, of course, that the fairness doctrine and the earlier equal time provisions are distinct from each other. Yet the underlying rationale—fairness and balance—is essentially the same for both, and the commission has regarded the fairness doctrine as having been ratified by Congressional amendments to the equal time provisions in 1959. *See* Robinson, *supra* note 21, at 131-36. While there is room for substantial debate concerning the specific relationship between fairness and equal time, most observers of broadcast regulation would probably agree that the conceptual genesis of the fairness doctrine is more clearly expressed in § 315 than in other provisions of the Act. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 379-86 (1969).

just as the fairness doctrine has evolved from the original equal time provisions, a similar regulatory scheme may evolve in the print media.

It is worth noting that Professor Jerome Barron, who has been the leading proponent of an affirmative right of access, has published a new book coincidentally with the decisions in *Democratic National Committee* and *Tornillo*. In *Freedom of the Press for Whom?*[34] Professor Barron renews the arguments for an affirmative first amendment right of access which he has been making persuasively during the past half-dozen years. The book has been written with his customary vigor and is altogether a useful and important restatement of the basic position of the access proponents. Its appearance at this time suggests, again, that the arguments for access are alive and well, however slightly they may have been set back by *Democratic National Committee*.

Obviously, both *Democratic National Committee* and *Tornillo* deserve extended analysis. But they can best be understood against an even more extensive review of the access question itself. That review appropriately begins with an appreciation of the case for access.

II. The Case for Access

The typical argument for an affirmative right of access to the mass media begins essentially as follows: it is desirable to promote widespread debate on matters of public importance and to provide an opportunity for the expression of all points of view—not merely those which are in the mainstream of conventional thought.[35] The first amendment was intended to ensure the realization of these goals through what has popularly been called the "market-place of ideas."[36] Unhappily, whatever success we may once have had in securing effective public debate, it is "romantic nonsense" now to suggest that there is an adequate market-place in the privately owned mass media.[37] To the contrary, the mass media have become vast repositories of privilege and what is worse, power.[38] Today's media, it is suggested, are all-pervasive, with

[34] J. Barron, Freedom of the Press for Whom? (1973).

[35] *See* Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1641. Most of the pro-access articles collected in note 5, *supra*, also make this point.

[36] The concept of the first amendment as the guardian of a "market-place" was articulated originally by Mr. Justice Holmes; *e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919).

[37] Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1642-43.

[38] Characteristic of the access proponents' attitudes on this point are the following remarks:

> Radio and Television . . . represent the most effective single forum for presenting any idea to a national audience, and are generally recognized as one of the most persuasive influences in our culture. Because of its tremendous ability to impart ideas and influence thought, it is vital that access to the electronic mass communications medium not be controlled by a relatively small group.

Comment, *Freedom of Speech and the Individual's Right of Access to the Airwaves*, *supra* note 5, at 425 (footnotes omitted); *see e.g.*, Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1644-47; Note, *Freedom of Expression in the Media: The Public's Claim For a Right of Access*, *supra* note 5, at 151.

[39] Former Federal Communications Commissioner Nicholas Johnson has observed:

> To place control of the broadcast media in the hands of a few gives them an inordinate amount of political, economic and social power. . . . Further, a media chain wields enormous national political power. . . . Democracies can only function with an informed and responsible electorate. But if the flow of information to that electorate is distorted or inhibited by private concentrations of control, then the democratic decision-making process will cease to function.

Johnson, *Freedom to Create: The Implications of Anti Trust Policy for Television Programming Content*, *supra* note 5, at 19-20. Commissioner Johnson does not stand alone in his perceptions of the media. *See, e.g.*, Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1660; Clark & Hutchison, *supra* note 5, at 2.

[40] *E.g.*, Johnson & Westen, *supra* note 5, at 604; Comment, *The Broadcast Media and the First Amendment: A Redefinition*, *supra* note 5, at 218-19.

[41] *See, e.g.*, Barron, *An Emerging First Amendment Right of Access to the Media?*, *supra* note 5, at 509; Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1678; Clark & Hutchison, *supra* note 5, at 7.

[42] *See, e.g.*, Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1678. Mallamud, *supra* note 5, at 127-33; Note, *The Public Domain and a Right of Access: Affect Upon the Broadcast Media*, *supra* note 5, at 474.

[43] *See, e.g.*, Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1663, 1675 1678.

enormous capabilities to influence, to suggest, to shape articulated thought—in short, to lead us into error at the will or through the sheer indifference of their owners.[39] Indeed, the argument runs, the owners and managers of the media have become the real sources of suppression and censorship in America, with perhaps an even greater capacity to suppress thought than the government itself.[40]

The proponents of an access doctrine conclude, therefore, that something must be done to create new and effective forums for free expression in the media.[41] Whether a right of access is predicated directly upon the first amendment or whether it is derived instead from other sources, this much is clear to the proponents: traditional first amendment arguments in favor of media owners must yield to the larger interest of the public in free expression.[42] A first amendment intended to prevent suppression of thought and to foster a climate in which its expression may flourish can no more tolerate private censorship than public censorship. What must be attacked is the power to censor in whatever form it may appear.[43]

The arguments summarized here are in many ways persuasive. There are elements in the major premises which seem clear enough to amount to common ground. For example, individual participation in the democratic process and, more broadly, in the inquiry after truth is surely desirable and in some measure provided for by the first amendment. If little else is clear about the first amendment, this proposition at least is implicit in all of the decisions which have considered the meaning of freedom of speech and press. But the issue posed by the proposals for access is whether the right to participate is sufficiently secured if protected against suppression by the state or whether, instead, participation ought affirmatively to be provided for. Neither the arguments nor the cases which have considered the problem have resolved this issue. I suggest that this ultimate failure results in large part from the initial difficulty in making out the case for access.

A. Access as a function of the "market-place myth."

The arguments for access are at their least persuasive when they rely on some aspect of the "market-place myth,"[44] the notion that the first amendment was intended to create a market-place of ideas. Indeed, Professor Barron has dismissed the concept of the market-place as "romantic," a "banality."[45] I agree. Yet a careful reading of his arguments in support of access suggests that he is himself a victim of the market-place myth. Thus, he argues that the purposes of the first amendment can be realized only if the media are made to become "effective forum[s] for expression of divergent opinion."[46] The difficulty is that his "effective forums" are really just another version of the "market-place of ideas." Perhaps the first amendment ought to be read as ensuring affirmative opportunities for effective public discussion. But that it is itself the question and surely one is not permitted to answer it by defining it away.

We may readily agree that public debate, "uninhibited, robust and wide-open,"[47] ought to be permitted. As Professor Glen Robinson has

[44]The phrase appears in chapter five of *Media Task Force, National Commission on the Causes and Prevention of Violence, IX Mass Media and Violence* 67 (1969) [hereinafter cited as MASS MEDIA and VIOLENCE].

[45]Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1641-43, 1649.

[46]*Id.* at 1678.

[47]This phrase, which came to be a kind of talisman for the Warren Court's approach to first amendment theory, was coined by Mr. Justice Brennan in New York Times v. Sullivan, 376 U.S. 254, 270 (1964); *see* Kalven, *supra* note 5.

observed, however, that does not mean that there is any intrinsic value in babel.[48] Diversity of opinion is not the necessary goal of the first amendment. On the contrary, diverse points of view may be tolerated not because diversity itself is prized, but rather because the first amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any sort of authoritative selection."[49] Of course, this means that views which do not reflect the conventional wisdom are entitled to expression, as against authoritative suppression, but the goal remains the same: conclusions, not a multitude of tongues.

If the first amendment protects against the suppression of ideas, it follows that a market-place of sorts *may* emerge. It does not follow that a market-place necessarily will emerge or that if it does the result will seem fair or balanced. Most clearly it does not follow that a balanced market-place ought to be established. The question is entirely fair, and its answer may even seem clear on other grounds, but it is not answered by proposals for effective public forums. The question remains whether the market-place can or ought to be anything more than accident or myth.

B. Access and the imaginary past.

It might be unnecessary to devote space to the task of debunking the market-place myth if the notion of a balanced market-place were not so much a part of a larger notion that once upon a time the press stood uncorrupted, above venality and self-service, free to act as "the champion of new ideas and the watch dog against government abuse."[50] Together, the market-place myth and this idealized conception of our heritage of free expression have provided a convenient background against which to present the arguments for access. It is convenient, and it is also largely misleading.

Set against this background, the access arguments have acquired a kind of spurious dignity. The suggestion is made that access is the only way to regain the "equilibrium" in the market-place which "changes in

[48]*See* Robinson, *supra* note 21.

[49]Associated Press v. United States, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.), *aff'd*, 326 U.S. 1 (1945).

[50]*Foreword* to Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1641.

the communications industry have destroyed. . . ."[51] Access is recommended, in other words, as the late Twentieth Century response to forces which have worked a new and dangerous imbalance in the market-place of ideas. Thus access is presented as something more than an *ad hoc* proposition: it appears instead to assume the role of successor to some venerable but now obsolete mechanism for achieving a balance among competing points of view. The difficulty with this role for access is that the quest for balance—and very nearly the whole idea of a free *and* responsible press—is the product of this century and a late arrival at that.

Certainly, little evidence suggests that the first amendment was adopted in order to achieve this sort of balance. Dean Leonard Levy has presented a persuasive argument that the framers did not arrive at an expansive libertarian conception of the amendment until well after its adoption, and then largely in order to meet the threat of prosecution for seditious libel brought about by the election of the Federalists in 1798.[52] One need not accept all of Dean Levy's reconstruction of this period to agree with Zechariah Chafee's observation: "The truth is, I think, that the framers [of the First Amendment] had no very clear idea what they meant. . . ."[53] One may add that even if they did, there still is little evidence that they sought balance in the press. On the contrary, to the extent that the framers may be identified with philosophical movements underlying then contemporary concepts of free speech and press, it seems unlikely that they would have equated freedom with responsibility in the manner now suggested. More precisely, it would not have occurred to them that a "responsible" member of the press is one who takes a "balanced" position. Responsibility meant passionate, not dispassionate, commitment in the context of ideological debate.[54] Indeed they were themselves the most passionate of spokesmen for their own points of view. For example, during his tenure in Washington's cabinet

[51]Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1548.

[52]*See* L.W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 245-48 (1960).

[53]Chafee, Book Review, 62 HARV. L. REV. 891, 898 (1949).

[54]*See* MASS MEDIA AND VIOLENCE, *supra* note 44, at 1-23. The discussion which appears in that Report is based on the manuscript articles "Historical Development of the Media in American Life," by J.W. Jensen and T. Peterson of the University of Illinois, and "The Role of the Press in the Process of Change," by W. Rivers of Stanford University, each manuscript prepared under private contract for the Media Task Force and under the editorial direction of the author of this article. Copies of the manuscripts are on file in the office of the University of North Carolina Law Review. *See generally* E. EMERY, THE PRESS AND AMERICA (1962).

Jefferson employed as "translator" a man named Freneau whose real work for Jefferson was the publication of a partisan journal so vitriolic in its attacks on Washington's policies that the President was driven into near-apoplectic fits of rage.[55] It is an amusing story, but an instructive one as well: surely the framers of the first amendment could scarcely have found it strange to find the press partisan, hostile or one-sided.

In fact, the press of that day was almost entirely partisan. The economic and political circumstances in which publishers found themselves invited, if they did not require, an alliance between each publisher and some patron in power. This was required not only because patronage meant lucrative printing contracts and similar privileges but also because effective alternative sources of news and public information did not exist.[56] If a publisher did not have the sympathetic attention of someone in office, his own access to the day's events[57]—never mind the public's—was far from assured.

Not until the middle of the Nineteenth Century did the partisan press begin to pass largely out of existence. But its passing did not mark the emergence of a new period of altruism. Instead, the partisan press simply fell victim to circumstances which would in time lead to the mass media as we now know them. During this period, for example, the proprietors of the "penny press" discovered that mass circulation revenues were a profitable alternative to patronage.[58] It was also during this period that the establishment of the wire services brought new and cheaper means of gathering the news.[59] The results of these developments were perhaps inevitable. Daily newspapers with large circulations emerged and struggled for survival through the great press wars of the late Nineteenth Century. The battles were fought for mass public patronage and the resulting advertising revenues which soon replaced circulation revenues as the economic anchor of the press.[60] When the smoke had cleared, the partisan journals were gone, and their places were taken by a new institution comprised of major business enterprises.[61] With all its faults the new press might have been defended as having contributed indirectly to a somewhat greater sophistication and

[55]MASS MEDIA AND VIOLENCE, *supra* note 44, at 16.

[56]*Id.* at 15-18.

[57]*Id.*

[58]*Id.* at 19.

[59]*Id.*

[60]*Id.* at 18-23.

[61]*Id.* at 25.

awareness among the masses.[62] It certainly could not have been described as balanced.

The concepts of fairness and responsibility that we now routinely demand of the media did not emerge until this century. The Radio Act of 1927,[63] and later the Communications Act of 1934,[64] incorporated standards which presupposed the need for service in the public interest. In 1947, the privately financed Hutchins Commission published a report based on an extensive examination into the structure and purpose of the press; the title of the report, *A Free and Responsible Press*,[65] reflected the Commission's judgment that the press must accept a measure of responsibility if in larger measure it was to remain free.[66] Certainly, these developments suggested a growing public sentiment that the press ought to be made more responsible, but the fact remains that our present-day concern for balance in the press is late-born.

There is, in short, little direct support for the access doctrine in either the history of the framing of the first amendment or in the history of the American press.[67] To the extent that the access doctrine would restore a lost "equilibrium" in the press, it is based on an imaginary past. Imbalance is not a new problem nor one which has been brought about by technological revolution. As a new and largely *ad hoc* solution to an old problem, the access doctrine deserves a careful hearing. But it also deserves to be seen as no more than it is.

C. *Access to the new media.*

To dismiss arguments for access which unwittingly or deliberately rely on the market-place myth or some other form of historical revisionism is relatively easy. It is another matter, however, to respond to arguments which rely on the changed character of the modern mass media and in particular on what is seen as their increased impact upon society. Essentially, the arguments for access in this context resolve themselves into two propositions. First, the mass media have become pervasive and influential to a degree unknown to any previous generation. Their evolution has placed them among the main instruments of

[62] *Id.* at 17.

[63] Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162 (pt. II).

[64] Act of June 19, 1934, ch. 652, 48 Stat. 1064, *as amended* 47 U.S.C. §§ 151-609 (1970).

[65] COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947).

[66] *Id.* at 90-96.

[67] For additional perspective on the press in the post-colonial period, *see generally* Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 874-82.

contemporary socialization. As such they are simply too important for their owners and managers to be permitted to be altogether free to determine their content.[68] Second, the emergence of the mass media has brought new threats to the free exchange of thought in the form of concentrated economic power which inhibits ideological debate and offers constantly increasing barriers to those who would establish new media outlets.[69]

The development of the media is without precedent. Indeed, the statistics which describe this growth are staggering. From a beginning in 1690 which saw the first American newspaper die after a single issue,[70] through a colonial and revolutionary period in which journals were circulated periodically to some 40,000 homes,[71] the press has evolved "from medium to media":[72] 1,749 daily newspapers[73] and 8,301 weeklies;[74] some 9,000 other periodicals, including more than 150 magainzes of general circulation;[75] more than 280 million books published each year;[76] nearly 200 new motion pictures released annually for general exhibition in more than 13,000 theaters;[77] 6,782 commercial and 549 educational radio stations;[78] 701 commercial and 221 educational television stations.[79] The evolutionary process has not ended. Cable television and "the wired city" are at hand as more than 2,839 existing cable systems[80] can expect to be joined by some 4,392 more within the decade.[81] Only slightly further off is the day of the home videotape cassette player, a television play-back-and-recording device which promises to

[68] *See, e.g.*, Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CIN. L. REV. 447, 545-49 (1968); Johnson & Westen, *supra* note 5, at 582, 603-04; Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 993-1000.

[69] *See, e.g.*, Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1646-47, 1666; Malone, *supra* note 5, at 203; Note, *Resolving the Free Speech—Free Press Dichotomy: Access to the Press Through Advertising*, *supra* note 5, at 295-99.

[70] MASS MEDIA AND VIOLENCE, *supra* note 44, at 6.

[71] *Id.* at 16.

[72] *Id.* at 25-32.

[73] EDITOR AND PUBLISHER YEARBOOK (1972).

[74] AYER DIRECTORY OF PUBLICATIONS (1973).

[75] MASS MEDIA AND VIOLENCE, *supra* note 44, at 1.

[76] *Id.* at 165. The figure refers to press runs, not individual titles, but does suggest something of the public's continuing appetite for books.

[77] *Id.*

[78] BROADCASTING YEARBOOK 12 (1973).

[79] *Id.*

[80] Cable Television Information Center, Cable Data (1972).

[81] *Id.* Of this number, franchises have been awarded for 1,663 systems which have not begun operation, and applications for franchises were pending in another 2,729 communities.

permit individuals to acquire a home library of television recordings in much the same way as they now buy sound recordings in a record shop.[82]

No one denies, then, that the media have been transformed in this century. Indeed the metamorphosis has been so remarkable that it seems almost impolite to suggest that these obvious manifestations of change do not necessarily demand new attitudes toward media regulation. Still, it is fair to ask for some evidence of the need for change which goes beyond the obvious growth of the media. Insofar as the case for an affirmative right of access is concerned, the evidence is less than clear.

1. The new impact of the media. Throughout the arguments for access run certain commonly held assumptions concerning the new impact of the mass media in American life. These assumptions reflect the underlying premise that the new media are possessed of extraordinary capacities for producing particular effects upon their audience. Not infrequently, these supposed properties of the media are described in terms which suggest a new kind of magic: the media, it is said, "mesmerize";[83] we are their "captives",[84] caught up together in a new, and somewhat frightening, "global village".[85] Even when the more hyperbolic assertions are discounted, a nearly overwhelming residue of conviction remains that the media have the power to contribute quite directly to the resolution of the great social issues—"to advance the progress of civilization or to thwart it."[86] In particular, it is commonly assumed that the media are the principal means by which public opinion is shaped.[87] Not surprisingly, then, they are also seen as the main instruments for effective public dissent. These assumptions take on added importance in times of crisis. To the extent that the media deny access to dissenting points of view, they appear to abdicate their proper role and deny their own capacity to contribute peaceful solutions to prevailing unrest.[88]

[82]Meanwhile, inexpensive videotape systems already form the backbond of much programming originated for cable television. *See* N.Y. Times, June 13, 1972, at 14, cols. 1-3.

[83]Barron, *Access to the Media—A New First Amendment Right*, *supra* note 5, at 1645.

[84]*Id.*

[85]H.M. McLuhan & Q. Fiore, War and Peace in the Global Village (1968).

[86]Commission on the Freedom of the Press, A Free and Responsible Press 3 (1947).

[87]*See, e.g., id.*; H.M., McLuhan, Understanding Media (1964), *cited in* Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1645 n.11; Fisher, *Program Control and the Federal Communications Commission: A Limited Role*, 14 Vill. L. Rev. 602 (1969); Johnson & Westen, *supra* note 5, at 582.

[88]*See generally* Clark & Hutchison, *supra* note 5, at 1-15; Mallamud, *supra* note 5, at 96-106; Note, *The First Amendment and Regulation of Television News*, *supra* note 5, at 765-67; Note, 24 Vand. L. Rev. 1273 (1971).

These assumptions are so widely held that it is easy to forget that they are also largely unproven. The radical growth and pervasiveness of the media make it tempting to suppose that they must be possessed of equally radical potential for producing specific effects upon the society which harbors them. As Professor Louis Jaffe has noted, influence is too easily confused with ubiquity.[89]

The growth of the media is not in doubt and neither, in the obvious sense, is their pervasiveness. The Media Task Force of the National Commission on the Causes and Prevention of Violence found, for example, that "from any standpoint, the media clearly play an important, and perhaps critical, role in daily American living":[90]

> Some media are available to nearly everyone, and nearly everyone makes some use of them. Most (95 percent) American homes include at least one TV set: nearly all (99 percent) own at least one radio. In a typical weekday, 82 percent of adults watch television; the average time invested is more than two hours. Two-thirds of America's adults listen to the radio, on the average more than an hour a day. More than nine out of every ten adults read a magazine sometime during the month and approximately three-fourths of the adult population read one or more newspapers on a typical weekday. Although movie-going is less universal, a third of the adult population sees at least one film in a typical month.
>
> . . . For most . . . children, as for most Americans generally, television provides more than entertainment: it also provides Americans with the single most important and credible source of news about the world around them.[91]

These statistics are reliable as indicators of media usage. We can also accept an assertion that for the "typical" American television is a more "credible" source of news than are the other mass media.[92] But statistics and general assertions do not answer far more difficult and significant questions concerning specific media effects. Assuming that a child watches television four hours on Sunday afternoon, what of it?

[89]*See* Jaffe, *supra* note 21, at 769. *See also* Robinson, *supra* note 21, at 151, 154-56.

[90]Mass Media and Violence, *supra* note 44, at 2.

[91]*Id.*

[92]The credibility of television news must be assessed against other media, rather than all other sources. The larger suggestion in the passage is, I confess, an example of the hyperbole which tends to find its way into otherwise careful assessments of the media. *See, e.g.*, Commission of the Freedom of the Press, A Free and Responsible Press 3 (1947).

What happens to him? How are his perceptions of the world around him shaped or influenced? If his father and his mother watch television but also read a newspaper, how, exactly, are their ultimate opinions influenced? More particularly, how are their opinions influenced by the mass media as compared with the influence exerted by their friends across the street, by bad stomachs, hard times, ungrateful children, by army buddies, old school chums, employers, employees or fellow workers—or by their wealthy bachelor uncle in upstate New York?

Few statements beyond the level of generalization can be made with confidence about the role of the media in contemporary American society unless questions like these can be answered with some degree of certainty. Yet the fact is that they cannot. Meaningful communications research in this country has barely begun. The answers—assuming that research can provide them—are yet to be found.

In a thoughtful summary of existing research into media effects, sociologist William R. Catton, Jr., has identified three distinct bodies of opinion which have enjoyed some currency since the late Nineteenth Century. The first he has described as the "hypodermic" theory, an early but persistent view in which the media were seen as "insidious shapers of consent . . . [and] their audiences . . . as atomized and defenseless targets of deliberate or inadvertent propaganda."[93] He writes:

> The early supposition that mass media can "inject" effects into a passively recipient audience was based on a supposition about the nature of modern societies. It was assumed that western civilization had become a "mass" society, in which individuals were relatively detached from each other and from a social fabric, and therefore homogeneously susceptible to stimuli from impersonal media. It was supposed that the urban way of life, in which primary group relations had been largely displaced by secondary group relatons, made this so. The traditional basis of solidarity had been undermined, it was assumed, the family had lost its place in the social order and the neighborhood as a social entity was disappearing. Segmentalization of human relations was seen as characteristic of but not confined to cities.

[93]MASS MEDIA AND VIOLENCE, *supra* note 44, at 247. This section of the Task Force report was prepared by W.R. Catton, Jr., of the University of Washington, in an article, "Mass Media As Producers of Effects: An Overview of Research Trends." Professor Catton's paper is especially useful as an antidote to the conventional law journal citation of individual communications theorists. For reasons which he explains, individual theories be assessed against the larger theoretical framework within which they have been written.

> The heterogeneity of urban populations, the sheer numbers of people, and increased mobility all tended to detach people from stable groups and to foster increased reliance on formal mechanisms of norm enforcement. Kinship ties, it was assumed, lose their effectiveness in urban environments, and territorial units such as the residential neighborhood cease to function as a basis for social solidarity. The city becomes "a series of tenuous segmental relationships superimposed upon a territorial base with a definite center but without a definite periphery."[94]

The difficulty with the hypodermic theory, Catton goes on to say, is that this early view of urban society was not all so clearly borne out by the American experience in the first half of the Twentieth Century:

> Family and neighborhood ties were found to be still functioning in varying degrees in all parts of even the largest cities. Astronomical numbers of people did not alone turn a community into a mass society where individuals were psychologically isolated from one another. There was diminishing acceptance of the assumption that a kind of social pathology called *anomie*, wherein human beings lose their capacity to relate to each other effectively, was the necessary result of over-elaboration of the division of labor. Thus there was growing skepticism among social scientists about the notion that a functionally heterogeneous population produces such a segementalized life that in relation to mass media, the people are uniformly submissive[95]

Skepticism in the 1950's ripened into disparagement of the hypodermic theory.[96] In its place a second theory gained acceptance. Perhaps predictably, it rejected the concept of media effects altogether:

> As research accumulated, it became necessary to introduce more and more "intervening variables" into this simple stimulus-response model. It became necessary to recognize significant variations in the desires and inclinations of audience members, in the way they received media stimuli, and in their socially-shaped opportunities to respond. The upshot of all these complications was that it began to seem as if the answer to the question "What effects do mass media produce?" had to be, "It all depends . . . ," and it was only a short step from that to a feeling that the media really don't *produce* effects at all. The contingent nature of mass media impact made it seem that the effects ought to be attributed to the intervening variables instead of (rather

[94]MASS MEDIA AND VIOLENCE, *supra* note 44, at 247-48.
[95]*Id.* at 248.
[96]*Id.* at 249.

than in conjunction with) the mass media stimuli.

> Thinking was moved in this direction by research that established the selective nature of perception. Individuals with different values, or whose other personality characteristics differ, perceive the same stimuli differently. At first, this discovery resulted merely in a modification of the "hypodermic" concept of mass communication: media may produce different effects with different kinds of people, but if people can be put in categories, the effects of mass communications injections into a particular category may still be predictable and powerful. Later the emphasis on perceptual selectivity led to outright disparagement of the notion that media have effects at all.[97]

Another two decades have brought still a third theoretical orientation toward media effects. Less cohesive than its predecessors and more tentative, the contemporary theory acknowledges that the media may not produce effects unmediated "by a complex nexus of social and psychological factors";[98] at the same time, it recognizes the probability that the media do possess some capacity to create effects, however modified.[99] Two factors have contributed to the emergence of this contemporary theoretical "middle ground." One is that in the past twenty years television appears to have achieved unprecedented capacity "to simulate primary interaction:"[100] Walter Cronkite, the theory goes, has become another member of the family. The second is somewhat more complex and involves a modest irony. It stems from a certain innate "lag" in social science research: even as LaPiere was discovering in the early 1950's that urban society had not yet developed according to the initial hypotheses, the society itself may in fact have been in the very process of developing along the lines originally suggested by Tonnies and other classic theorists.[101]

Does all of this presage an imminent return to the hypodermic theory of the media? It does not. Social scientists, twice burned by premature attempts to formulate viable comprehensive theories of media effects, are no longer sanguine about the complex problems which this area of research poses. In contemporary theory, the media are seen as neither clearly guilty nor clearly innocent as producers of specific effects. They are instead, in Catton's phrase, "incompletely

[97] *Id.* at 248-49.
[98] *Id.* at 251.
[99] *Id.*
[100] *Id.*
[101] *Id.* at 254.

exonerated":[102]

> To sum up, research has shown that mass media do not easily and inevitably produce intended effects . . . Serious investigation is needed now to determine what long-range-unintended consequences will occur from the way we have organized our lives around the mass media, and especially around that simulator of primary groups, television.[103]

Meanwhile, what lies at the core of nearly all specific decisions implementing communications policy is not knowledge but conventional wisdom. More precisely, what is being served is not the certainty or even the reasonable assurance of some particular effect but rather a set of perceptions, often obscured although equally often disguised as known truth. The arguments for access also have been attended, in at least an off-hand way, by the conventional suppositions about what the media can or ought to do for us. Former Federal Communications Commissioner Nicholas Johnson, another leading access proponent, has been among the least restrained: television, he has said, is "the American people's principal source of information, opinion, aesthetic taste, moral values, political participation, education, and national priorities."[104] If statements like these do not invite outright rejection, they serve at least to call attention to one of the difficulties with the case for access. The access proponents are unable to demonstrate the existence of specific media impact for the reasons previously suggested. Existing research is simply inadequate to permit it.

I do not argue that that ought to end the inquiry into access. In the first place, I am persuaded by the contemporary theoretical orientation toward the media that some of the more reasonable speculations about media effects are probably correct. In particular, I am inclined to agree with Professor Jaffe that, subject to a host of other factors, the mass media probably do have a modest direct capacity to reinforce existing attitudes and, in cases in which attitudes are unformed or only tentatively held, to shape them.[105] I shall argue later that even if these speculations are true, they argue *against*, rather than for, an enforceable right of access for very practical reasons. In any event, we are free to formulate media policy without waiting for the social scientists to sup-

[102] *Id.* at 253-58.
[103] *Id.* at 258.
[104] Johnson, *supra* note 5, at 15.
[105] Jaffe, *supra* note 21, at 769-70.

port our judgments.[106] And yet, where the media are concerned, we have traditionally displayed a certain reluctance to call for action by the state, preferring instead to call upon the media themselves for an increased measure of self-regulation. Why is it, then, that the proposals for an access doctrine have developed to the contrary? Why have the access proponents called for an affirmative, enforceable right of access rather than increased access through voluntary media compliance?

There are obviously a number of reasons, but among them two are paramount. The first is that our restraint toward the media has not been rewarded with the degree of responsiveness which seems desired. Left to their own devices, the media—with occasional noteworthy exceptions—tend to continue in the very practices which have occasioned criticism in the first place. Politically, this tendency alone might well prove their undoing. The contemporary assessment of the media is that they *do* produce effects, that they *are* among the main instruments of contemporary socialization. That these hypotheses cannot be proven in very specific terms is true; it is also largely irrelevant so long as this assessment persists and so long as the media themselves remain blind

[106] *But see* Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 993-1000. Professor Canby has argued that "the mere fact that radio and television do not convert the opposition does not make them of small political consequence, nor should it diminish the first amendment value of access. Political campaigns concentrate on activating the favorably committed, and this is what media persuasion does best." Canby, *supra* note 5, at 740. He adds:

> The importance of access to the media is almost certain to be undervalued, then, if primary emphasis is laid upon the rarity of the media's effecting conversions of attitude. The reinforcing effect of media persuasion has more than sufficient political impact to give it substantial first amendment value. Nor is a high degree of informational content of importance to the reinforcing effect of campaign advertising. For the purposes of activating those already favorably committed, the less informational, one-sided presentation is probably more effective than a fully balanced one which attempts to deal with and refute points favoring the other side.
>
> The persuasive impact of the broadcast media is also likely to be undervalued if viewed only in terms of national political campaigns or issues like the Vietnam war, where ideological lines have become sharply drawn. A media message may introduce viewers have few predispositions, and there is reasons to believe that the persuasive effect in such cases is accordingly higher. The same holds true for local political issues as to which the voters' general political inclinations may be irrelevant. Yet these new or local issues are frequently of undeniable public importance. One need not be guilty of oversimplification, then, to conclude that persuasion by means of the broadcast media is sufficiently effective and significant to justify the administrative and practical difficulties which may result from extending it first amendment protection. (Footnotes omitted.)

This is an attractive argument. But the "administrative and practical difficulties" are formidable, as Professor Canby himself acknowledges. *Id.* at 754-57. One can argue that the impact of the media at its greatest cannot be employed effectively because of these very difficulties. See text accompanying notes 331-32 *infra*.

to it. The Hutchins Commission was undoubtedly correct twenty-five years ago when it warned that continued media practices "which the society condemns" would inevitably result in media regulation and control. That day may well be at hand.

But there is a second, even more immediate reason why access doctrine promises to develop with, rather than without, the assistance of the state. As we have seen, the case for access is predicated in part upon unproven but commonly held perceptions concerning the new impact of the media. It is also predicated upon the altogether real concentration of media ownership in increasingly fewer hands. The pressures for the developing access doctrine cannot be appreciated without an understanding of this economic predicate.

2. *The economic predicate.* To begin with, the economic argument for the access doctrine rests on statistics which reveal, in broad terms, two facts about media ownership and control. One is that in any given medium there has been a tendency toward concentrated ownership and a corresponding concentration of economic power.[107] The other is that there has been a correlative tendency toward cross-ownership of the media.[108] Newspaper owners, for example, often control more than one paper;[109] they have also been inclined to seek ownership of the broadcast media as well.[110]

To the access proponents, the implications of these facts are obvious and inescapable. In the first place, they contend, the pressures to which media proprietors are subject are primarily economic, not ideological.[111] The modern mass media have developed because their owners

[107] *See* Bennett, *Media Concentration and the FCC: Focusing with a Section Seven Lens*, 66 NW. U.L. REV. 159, 181-86 (1971); Flynn, *Antitrust and the Newspapers*, 22 VAND. L. REV. 103, 120 (1968); Johnson & Hoak, *Media Concentration: Some Observations on the United States' Experience*, 56 IOWA L. REV. 267, 269-70 (1970); Comment, *"Cross-Media" Ownership and the Antitrust Laws—A Critical Analysis and a Suggested Solution*, 47 N.C.L. REV. 794, 802 (1969). *See generally* Johnson, *supra* note 5, at 17-22.

[108] *See* Bennett, *supra* note 107, at 181-86; Johnson & Hoak, *supra* note 107, at 269; Comment, *"Cross-Media" Ownership and the Antitrust Laws—A Critical Analysis and a Suggested Solution*, *supra* note 107, at 794-805.

[109] *See* Bennett, *supra* note 107, at 181-86; Flynn, *supra* note 107, at 120; Comment, *"Cross-Media" Ownership and the Antitrust Laws—A Critical Analysis and a Suggested Solution*, *supra* note 107, at 802.

[110] *See* Bennett, *supra* note 107, at 181-86; Johnson & Hoak, *supra* note 107, at 269-71; Comment, *"Cross-Media" Ownership and the Antitrust Laws—A Critical Analysis and a Suggested Solution*, *supra* note 107, at 805.

[111] *E.g.*, Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1641, 1646-47; Johnson, *supra* note 5, at 36-37; Comment, *Freedom of Speech and the Individual's Right of Access to the Airwaves*, *supra* note 5, at 424-29.

realize that mass patronage is the source of substantial revenues. The penny press depended on direct circulation revenues; the modern large circulation newspaper, magazine or television station depends primarily on advertising revenues. In either case, the key to success lies in an appeal to the mass audience. In these circumstances, it is said, media owners literally cannot afford to serve aberrant ideology if, in the process, they are likely to lose the audience upon which they depend.[112]

Meanwhile, according to the argument, individuals who are ideologically motivated may find themselves barred from the mass media on two grounds. On the one hand, their views may be unacceptable to the media proprietor because they may offend or otherwise alienate the audience the proprietor dares not lose. On the other, the ideologues cannot realistically hope to enter into competition with existing mass media. The media are too well entrenched to permit viable competition.[113]

Some of these statements may be readily conceded: size, a certain concentration of ownership, and the decided economic advantages of the existing media are obvious. But the economic arguments thus far do not state a complete case for access. Access may well be difficult to obtain for economic reasons. The question remains whether that matters. In particular, one might ask whether it is not enough that dissent may find expression in alternative media. The underground press, for example, billboards, posters, pamphlets—even the hallowed, if somewhat embarrassing, tradition of the soapbox in the public square—presumably are all available to the spokesmen for points of view excluded from the more established media. The answer to these suggestsions, of course, lies in the access proponents' ready assumptions concerning the unique capacities of the mass media to produce intended effects in their audiences. "The test of a community's opportunities for free expression," it is argued, "rests not so much in the abundance of alternative media but rather in an abundance of opportunities to secure expression in media with the largest impact."[114]

It is this marriage of the economic predicate with the uneasy as-

[112]The point is made in the authorities cited in note 111, *supra*, and is recognized generally in the literature.

[113]*E.g.*, Johnson, *supra* note 5, at 29, 32-33, 35-40; Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 891-96; Comment, *We Pick 'Em, You Watch 'Em: First Amendment Rights of Television Viewers*, *supra* note 5, at 831-34. *But see* Daniel, *supra* note 21, at 789.

[114]Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1653. *See* Canby, *supra* note 5, at 744-46.

sumptions of particular media impact which provides the major source of motivation for the affirmative proposals for access. The access proponents are not primarily interested in the availability of alternative media. They are not even always interested in the potential of the antitrust laws; in the main, they do not argue that the mass media ought to be broken up into smaller—presumably more accessible—components.[115] Instead, the proponents appear to assume that the mass media are in effect natural monopolies. The media resemble natural monopolies not because they have grown large nor because ownership is concentrated in a few hands, but because they alone are effective instruments of communications in a mass urban society. In this sense, the media resemble a rather limited kind of natural monopoly: like the fountain of youth or the goose that laid golden eggs, these enterprises are thought to possess special properties which are not available elsewhere.

Yet unregulated monopolies are conventionally to be feared. It may still be true, as the Supreme Court once suggested in a rather distant context, that there is no "national policy" in favor of competition,[116] but the contemporary judgment is widely held that monopoly power is evil unless regulated. That judgment is reinforced when it is made to appear that the cost of uncontrolled monopoly is the suppression of effective public debate. The solution, then, is thought to lie in some form of regulation which will at once allow the supposed benefits of the mass media to continue unimpaired while assuring that those benefits inure to the public interest. Accordingly, the monopoly power of the media is not merely occasion for alarm; it is the very excuse for affirmative action which otherwise might itself be feared.

The point is illustrated more specifically in the cases in which access to private newspapers was sought prior to *Tornillo*.[117] In these earlier cases, the plaintiffs argued that a newspaper which enjoys a monopoly position does so in an area of "vital public concern"[118] and is

[115]*See* Barron, *An Emerging First Amendment Right of Access to the Media?*, *supra* note 5, at 490, 498; Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1653; *cf.* Blake, *supra* note 21, at 91. There is still a substantial body of opinion which argues for a more rigorous application of the antitrust laws to the media, either independently or as an accompaniment to a right of access. *See, e.g.*, Bennett, *supra* note 107; Johnson & Hoak, *supra* note 107, at 273-74; Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 902-04.

[116]FCC v. RCA Communications, Inc., 346 U.S. 86, 91-92 (1953).

[117]No. 43,009 (Fla. Sup. Ct., filed July 18, 1973), *rehearing denied*, Oct. 10, 1973.

[118]The equation between state action and monopoly power in an area of vital concern seems to have been suggested first in Marjorie Webster Jr. College, Inc. v. Middle States Ass'n of

therefore engaged in "state action" giving rise to a right of access, in much the same way that "private" shopping centers or "company towns" can be seen as serving essentially public functions which may in turn open them to the public.[119] The basic analogy was first suggested by Professor Barron in his initial article proposing a right of access to the press.[120] While it has not yet been accepted, its appeal is undeniable. In a single equation, it posits not only the need for access but also the necessary jurisdictional predicate for action by the courts.

The courts which have rejected the "monopoly-state action" claims to access have done so on grounds which reveal at least an intuitive grasp of the real tensions in the claims. *Chicago Joint Board v. Chicago Tribune Co.*[121] was the first case to test the theory. The case resulted essentially from a dispute between a local of the Amalgamated Clothing Workers Union and Chicago's largest department store, Marshall Field and Company. Field sold imported clothing which it advertised in Chicago's four major daily newspapers. The union, which was attempting to secure restrictive quotas on the importation of foreign clothing, sought to place a full page advertisement outlining its position in the papers. When four of the papers refused to carry the advertisement as submitted, the union sought injunctive relief. The main thrust of the union's attack consisted of an effort to establish that the papers were "quasi-public entities", either because they enjoyed a "special relationship" with the State of Illinois or because they enjoyed a monopoly position.[122] In support of its first ground, the union pointed to an Illinois statute which exempted newspaper employees from jury duty, to other statutes providing for the publication of legal notices, to statutes which excluded newspaper publishers' suppliers (furnishing commodities such as ink and newsprint) from certain state taxes, to a Chicago ordinance purporting to restrict the use of newsstands on city streets to the sale of Chicago newspapers, and to the custom of providing press rooms in public buildings.[123] It was, in all, not an unimpressive list, and in another context it conceivably might have been enough to establish the requisite showing of state action. As to the press, however, the court of appeals responded, as had the district court, with a firm finding against state action:

> Rather than regarded as an extension of the state exercising delegated powers of a governmental nature, the press has long and consistently been recognized as an independent check on governmental power. . . . [T]he function of the press . . . has never been conceived as anything but a private enterprise, free and independent of government control and supervision. Rather than state power and participation pervading the operation of the press, the mass media and the government have had a history of disassociation.[124]

In its response, the court clearly was influenced by its perception of the press as an institution engaged in a function essentially divorced from the state. Thus circumstances which might have contributed to a finding of state action in a more neutral setting were not enough to overcome what amounted in essence to a presumption against state involvement in the functions of the press. *Marsh v. Alabama*[125] and *Food Employees Union Local 590 v. Logan Valley Plaza*[126]—in which a company town and a private shopping center had been held by the Supreme Court to have assumed traditional municipal functions—were distinguished by the court in *Chicago Joint Board* not only because the newspaper publishers had not consented to unrestricted public access but also because newspaper publication itself is not, in traditional contemplation, a public function.[127] *Terry v. Adams*,[128] in which the Supreme Court had found the Texas Jaybird Party to be an integral part of the state's primary process and therefore in violation of the fifteenth amendment in its policies of racial exclusion, was rejected as precedent in *Chicago Joint Board* because the court found no indication of "intermeshing of action or non-action by public officials with the action of the defendants . . . pursuant to a design or purpose to frustrate any First or Fourteenth Amendment right of the Union."[129] *Burton v. Wilmington Parking*

Colleges, 302 F. Supp. 459 (D.D.C. 1969). The case deals with educational resources, rather than the communications media, and did not actually find state action. Thus its only contribution has been the equation itself.

[119] *See* Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Marsh v. Alabama, 326 U.S. 501 (1946).

[120] Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1669.

[121] 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971). The author of this article was among counsel for the defendant newspapers in the case.

[122] *Id.* at 473-74.

[123] *Id.* at 473

[124] *Id.* at 474 (*quoting* the District Court opinion, Chicago Joint Bd. v. Chicago Tribune Co., 307 F. Supp. 422, 427 (N.D. Ill. 1969)).

[125] 326 U.S. 501 (1946).

[126] 391 U.S. 308 (1968).

[127] Chicago Joint Bd. v. Chicago Tribune Co., 435 F.2d 470, 474-75 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

[128] 345 U.S. 461 (1953).

[129] 435 F.2d at 475.

Authority[130] was similarly distinguished: in *Burton*, a private restaurant and the state agency from which the restaurant's facilities were leased had established a relationship of "interdependence" which, on the facts, had persuaded the Supreme Court that a joint venture existed;[131] in *Chicago Joint Board*, however, the court of appeals found no comparable relationship.[132] In each of these cases, the court relied in part on specific factual distinctions as a basis for rejection; yet it seems clear that in a larger sense the court was influenced by a rather firm presumption against a finding of state action. The court was no less firm in its rejection of the union's second point—the monopoly argument—but the grounds for rejection were less direct than one might have wanted. In point of fact, Chicago—with four major daily papers and a number of smaller dailies in addition—is hardly the town in which to claim monopolization of the print media. And it was on this ground—that is, no monopoly in fact—rather than a more sweeping analysis of the point, that the Court rejected the claim.[133]

Other courts after *Chicago Joint Board* have also heard and rejected state action arguments predicated on the exercise of monopoly control. In *Cook v. Advertiser Co.*[134] the plaintiffs brought a class action on behalf of themselves and other Negroes against the publisher of the only daily and Sunday newspapers in Montgomery, Alabama. The suit alleged that the newspapers discriminated against Negroes in that white engagement and wedding announcements were published on the papers' regular society pages while similar announcements involving Negroes were published on a separate "Negro news page." The plaintiffs argued that due process and equal protection were denied when discrimination was practiced by an entity which exercises "monopoly control in an area of vital public concern." Although the court stated that it found the argument "quite appealing," it declined without elaboration to accept it.[135] Instead, citing *Chicago Joint Board*, the court granted the defendant's motion to dismiss.[136] In an opinion only slightly more instructive, the Ninth Circuit held that a newspaper could not be required to accept a movie advertisement exactly as submitted. In

[130]365 U.S. 715 (1961).
[131]*Id.* at 724-2.
[132]435 F.2d at 476.
[133]*Id.* at 477. *But see* D. GILLMOR & J. BARRON, MASS COMMUNICATION LAW 33 (Supp. 1971).
[134]323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd on other grounds*, 458 F.2d 1119 (5th Cir. 1972).
[135]323 F. Supp. at 1214.
[136]*Id.* at 1214 n.4.

Associates & Aldrich Co., Inc. v. Times Mirror Co.,[137] the plaintiff sought an order directing the *Los Angeles Times* to publish advertisements for "The Killing of Sister George" without blue-pencilling the copy to suit the *Times*' editorial policy. The plaintiff pointed to the *Times*' "semi-monopoly and quasi-public position" in support of arguments for a finding of state action.[138] The court, citing *Chicago Joint Board*, rejected the argument in an opinion which did not squarely discuss the relationship between monopoly power and state action.[139] Instead, the court was apparently influenced by the same presumption against a finding of state action in the publication of a privately owned newspapers which had first appeared in *Chicago Joint Board*. Thus, in an echo of the earlier case, the court observed merely that "the press and government have had a history of disassociation."[140]

A more expansive discussion of the monopoly issue appears in *Resident Participation of Denver, Inc. v. Love*.[141] The plaintiffs, a group of Denver citizens seeking to block the construction of a meat processing plant, had submitted advertisements to two Denver newspapers which had refused to print them. The papers later moved to dismiss portions of a complaint alleging state action in the refusal to publish. A three-judge panel of the federal district court granted the motion in an opinion which squarely addressed the issue:

> Plaintiffs argue that newspapers ought to have a duty to provide reasonable space for citizens to express their views because in Denver, as elsewhere, newspapers exercise "monopoly control in an area of vital public concern." This does not mean, we take it, that defendants are monopolies within the meaning of the antitrust laws, since no violation of those laws is alleged, but rather than the soapbox has yielded to radio and the political pamphlet to the newspaper. . . . However, the fact that defendants control a method of reaching a large audience and that this is a matter of importance to us all does not mean defendants' conduct should be considered government conduct. . . .[142]

The court distinguished the same group of earlier state action cases which had been rejected in *Chicago Joint Board*, and added a passage which recalled the Seventh Circuit's presumption against government

[137]440 F.2d 133 (9th Cir. 1970).
[138]*Id.* at 134.
[139]*Id.* at 134-35.
[140]*Id.* at 136.
[141]322 F. Supp. 1100 (D. Colo. 1971).
[142]*Id.* at 1104.

involvement in the press:

> Of course, state action, like government itself, is not a fixed notion, and we do not mean to suggest that enquiry comes to an end merely because the cases which plaintiffs cite do not, in our view, support their theory. However, the above-mentioned cases [*Logan Valley Plaza*; *Marsh v. Alabama*; and *Terry v. Adams*] do indicate that, where private conduct is concerned, there must be some justification for concluding that the private party serves as an alter ego for government, either because officialdom has in some important way become involved with the private party or because the latter performs a function of a governmental nature. Whatever may be the reach of these imprecise ideas, we find them peculiarly inappropriate for describing the relationship between defendant newspapers and the State of Colorado and City of Denver. Plaintiffs have made no allegation which would suggest a marriage among these parties, and the historic function of newspapers, like the pamphlets of a prior day, has been to oppose government, to be its critic not its accomplice.[143]

While these cases obviously suggest that courts may be unwilling to accept Professor Barron's "monopoly-state action" theory without something more, that additional element may unwittingly have been supplied by the newspaper publishers themselves in their recent successful efforts to gain exemptions from the antitrust laws under the so-called "Failing Newspaper Act."[144] The Act permits competing newspapers in

[143] *Id.* at 1105.

[144] Newspaper Preservation Act, 15 U.S.C. §§ 1801-04 (1970). The Act provides:

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operation arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter. § 1802. Definitions. As used in this chapter—

(1) The term "antitrust law" means the Federal Trade Commission Act and each statute defined by section 44 of this title as "Antitrust Acts" and all amendments to such Act and such statutes and any other Acts in pari materia.

(2) The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspapers owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: *Provided*, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.

(3) The term "newspaper owner" means any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications.

(4) The term "newspaper publication" means a publication produced on newsprint paper which is published in one or more issues weekly (including as one publication any daily newspaper and any Sunday newspaper published by the same owner inthe same city, community, or metropolitan area), and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.

(5) The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

(6) The term "person" means any individual, and any partnership, corporation, association, or other legal entity existing under or authorized by the law of the United States, any State or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country.

§ 1803. Antitrust exemption.

(a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24n 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication: *Provided*, That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement.

(b) It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effecute the policy and purpose of this chapter.

(c) Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

§ 1804. Reinstatement of joint operating arrangements previously adjudged unlawful under antitrust laws.

(a) Notwithstanding any final judgment rendered in any action brought by the United States under which a joint operating arrangement has been held to be unlawful under any antitrust law, any party to such final judgment may reinstitute said joint newspaper operating arrangement to the extent permissible under section 1803(a) of this title.

(b) The provisions of section 1803 of this title shall apply to the determination of any civil or criminal action pending in any district court of the United States on July 24, 1970, in which it is alleged that any such joint operating agreement is unlawful under any antitrust law.

distressed circumstances to combine their business functions—advertising, production and circulation in particular—in order to

permit them to continue independent editorial functions. As others are beginning to observe,[145] the Act itself suggests something of the government involvement in newspaper operations which the courts have thus far refused to find. To be sure, this additional element may not be enough to tip the balance. The essential purpose of the Act is to encourage continued competition among editorial voices in circumstances which might otherwise result in the entire failure of effective competition,[146] and the actual degree of government involvement under the Act is rather slight. There is, in particular, no provision for overseeing the editorial policies of the "failing newspapers" and only modest requirements for complying with the act in other respects. Certainly the act provides no scheme approaching the regulation of broadcasting under the Communications Act. This may be of some importance, since at present the Supreme Court lacks a clear majority for the holding that broadcast licensees are engaged in state action when they deny access in the exercise of editorial discretion, and has a substantial minority for the proposition that they are not.[147]

Moreover, the concept of state action itself appears to have experienced at least a slight contraction as a result of two recent cases. In *Moose Lodge No. 107 v. Irvis*,[148] the Court has held that a private club which discriminated against Negroes did not engage in state action even though it held a liquor license under a state regulation which required the club to observe its own by-laws and thus, incidentally, their discriminatory provisions. The remedy, a majority held, was injunctive relief against enforcement of the regulation, not against the discriminatory practices themselves. The case is not directly relevant, but it does tend to offset some of the more expansive language in earlier state action cases. It is perhaps most useful for its suggestion that "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations' . . . in order for the discriminatory action to fall within the ambit of the Constitutional prohibi-

[145] *See, e.g.*, Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 906.

[146] *See* H.R. REP. No. 91-1193, 91st Cong., 2d Sess. 1-2 (1970).

[147] *See* text accompanying notes 197, 213, *infra*. It should be noted that one of the reasons that five Justices in CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080 (1973), agree that access to the broadcast media is not required is because Congress and the FCC have already developed adequate regulatory patterns, regardless of whether licensees are affected by governmental action. *See* text accompanying notes 194-96 *infra*. It is arguable that the very absence of established regulatory patterns might require access to the print media if state action could otherwise be established.

[148] 407 U.S. 163 (1972).

tion."[149] There is at least some support in this language for the proposition that the state must involve itself in some significant way with newspaper editorial policies before state action can be found. A second case, *Lloyd Corp. v. Tanner*,[150] is somewhat more closely related to the state action arguments made in the newspaper cases. Those arguments have placed particular reliance on both *Marsh*[151] and *Logan Valley Plaza*.[152] In *Lloyd*, a majority of the Court has restricted the reading to be given to *Logan Valley Plaza* and may actually have limited *Marsh* to its own facts. Like *Logan Valley Plaza*, the *Lloyd* case involved a private shopping center which had been made the forum of first amendment expression. In *Logan Valley Plaza* a labor union had picketed one of the shopping center stores; in *Lloyd*, however, antiwar protestors had distributed handbills unrelated to the operation of the shopping center itself. Although the Court had approved the picketing in *Logan Valley Plaza*,[153] it found that the distribution of handbills violated legitimate private property interests where the speech "had no relation to any purpose for which the center was built and being used"[154] and where "adequate alternative avenues of communication exist."[155] Obviously, this language has two edges: access proponents will argue that newspapers are devoted to the purpose of communication and, with the other media, are the only effective means of communication. Taken alone, the language might support the argument, although one could debate at least its second half. In the context of the case, however, the language has a rather different meaning. The Court obviously intended to limit the notion that private property arguably serving a public function is thereby implicated in state action. Thus *Marsh* is explained as having involved "an economic anomaly of the past, 'the company town.' "[156] And *Logan Valley Plaza* is distinguished on its facts.[157] In short, the

[149] *Id.* at 173.

[150] 407 U.S. 551 (1972).

[151] 326 U.S. 501 (1946).

[152] 391 U.S. 308 (1968).

[153] All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through' . . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.
Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319-20 (1968).

[154] 407 U.S. at 564.

[155] *Id.* at 567.

[156] *Id.* at 561.

[157] *Id.* at 563.

Court's opinion can hardly be argued to expand the frontiers of state action. Indeed, the Court places particular emphasis on "the scope of the invitation extended to the public" by the private enterprise.[158] It notes, for example, that in the case of the shopping center in question "there is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests . . . [being served]."[159] By analogy, one can also argue that private newspapers extend no "open-ended invitation" to publish material which is "incompatible" with the editorial interests that they wish to serve.[160]

For the time being, then, the principal response to the state action arguments for access to the print media will probably continue to be that given by the courts in *Chicago Joint Board* and *Love*: the traditional "disassociation" between newspapers and government and the resulting presumption against state involvement. That response is weakened as tradition is displaced by new legislation under which the government appears to provide special support for the press. Yet no general legislation to date appears clearly to suggest the "significant involvement" of the state which is required in order to find state action.[161]

It would be misleading, however, to suggest that the future of the access doctrine depends on the resolution of the state action question. The question is intriguing, as much for its very ingenuity as for the possibility it offers of establishing a right of access without initial recourse to Congress, the legislatures or administrative agencies. Yet these cases are important chiefly as illustrations of the substantial motivation for access which is provided by the economic predicate. So long as the concentration of economic power in the established media is identified with the premise of the new impact of the media, the pressures for access will continue. And as *Democratic National Committee* and *Tornillo* suggest there may still be room for the development of a comprehensive right of access along lines not present in the earlier cases.

[158] *Id.* at 564.

[159] *Id.* at 565.

[160] Cases prior to *Chicago Joint Bd.* have typically found that newspapers do not hold themselves out as willing to accept unwanted material. *E.g.*, Approved Personnel, Inc. v. Tribune Co., 177 So. 2d 704 (Fla. App. 1965) (1968). *See* Note, *Newspaper Regulation and The Public Interest: The Unmasking of a Myth*, *supra* note 21, at 603-05.

[161] Efforts to gain legislation in support of a "newsman's privilege" against compulsory disclosure of sources, if successful, would undoubtedly raise again the question of state action. At least some members of the press are beginning to recognize the dangers in this kind of legislation. *See* Laphaw, *The Temptation of a Sacred Cow*, HARPER'S, Aug. 1973, at 52, 54.

III. CBS v. Democratic National Committee and Tornillo v. The Miami Herald Publishing Co.: Access at the Crossroads

A. Democratic National Committee.

The background of the decision in *Democratic National Committee* has been rather extensively discussed in earlier articles and needs only a brief rehearsal here.[162] The case is really two cases involving similar claims by groups which had sought access to the broadcast media in 1970. The Democratic National Committee had attempted to buy advertising time in order to air the political viewpoints of the Democratic Party and, one supposes not wholly incidentally, to invite contributions to the party's coffers. A second organization, the Business Executives Move for Vietnam Peace, had sought to broadcast paid advertisements in opposition to the Vietnam War. Rebuffed by the broadcasters, both organizations had sought an FCC ruling in their favor, again without success.[163] A consolidated appeal to the Court of Appeals for the District of Columbia proved more fruitful. In a majority opinion, Judge Wright held that a broadcaster who accepts commercial announcements may not wholly ban "paid public issue announcements."[164] Instead, Judge Wright posited an "abridgeable" first amendment right to access under "reasonable procedures and regulations" to be established by the FCC on remand.[165] Thus, neither the Democratic National Committee nor the Business Executives were themselves specifically assured of access; they were assured only that the broadcasters could no longer simply refuse to sell them time.

For Judge Wright, the central issue was whether the first amendment itself affirmatively requires some form of direct access to the commercial broadcast media.[166] In his opinion, the answer was to be found in two "functional considerations." First, he suggested, the broadcasting industry has been founded upon the basis of government regulatory patterns which have established a relationship of "interde-

[162] *See, e.g.*, Jaffe, *supra* note 21, at 781-88; 40 U. CIN. L. REV. 870 (1971); 6 U. RICH. L. REV. 448 (1972); 24 VAND. L. REV. 1273 (1971).

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

[164] Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 646 (1971).

[165] *Id.* at 646, 655.

[166] "[W]e 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." *Id.* at 649.

pendence" and "joint participation;" thus the broadcast media have become involved with government along lines which strongly suggest the presence of state action.[167] State action was particularly indicated, he thought, by the FCC's role in upholding the broadcasters' policies concerning the advertisements.[168] Secondly, he added, the broadcast media are not only "specifically dedicated to communication," but have become "our foremost forum for public speech and our most important educator of an informed people."[169] Judge Wright therefore concluded 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."[170] These obligations, he went on to say, are met only partly by the requirements of the fairness doctrine. Some procedures must also allow direct public access to the commercial broadcast media: controversial speech may not be discriminated against by those who have opened their facilities to commercial or noncontroversial speech.[171] Accordingly he held "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."[172]

It is this holding which a majority of the Supreme Court has rejected. In an opinion by the Chief Justice, with several concurrences, the majority concludes that although broadcasting is appropriately the subject of regulation in the public interest, the regulatory scheme envisioned by Congress and the FCC does not embrace the principle of a direct right of access—and under the first amendment need not do so.

Beginning with what has been the standard, if increasingly less persuasive, justification for broadcast regulation, Chief Justice Burger acknowledges the "inherent physical limitation" imposed by the electro-

[167] *Id.* at 651.
[168] *Id.* at 652.
[169] *Id.* at 653.
[170] *Id.* at 655.
[171] *Id.* at 658-60.
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.
Id. at 660. Judge Wright found no such factor evident in the case.
[172] *Id.* at 646.

magnetic spectrum.[173] Broadcasting must be regulated, in this view, because it is a scarce medium: "all who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated."[174] And having accepted the proposition that broadcasting must be regulated in the public interest, he moves easily to an acceptance of the corollary which holds that competing first amendment claims must be carefully weighed against the purposes served by the established regulatory structure.[175]

In a review of the legislative history of the Radio Act of 1927 and the Communications Act of 1934, the Chief Justice concludes that Congress considered—and rather specifically rejected—proposals which would have required the broadcast media to serve as common carriers for all points of view concerning public issues.[176] Instead, he writes, "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 private journalistic interests of the broadcasters will government power be asserted within the framework of the Act."[177] The Chief Justice's analysis of the legislative history of the two acts is persuasively drawn, although it may well suggest more than he intends. In an article written nearly a decade ago, Professor John Sullivan employed a similar analysis to suggest that the fairness doctrine itself contravened the intentions of those who framed the acts.[178] For the Chief Justice and those who join him, however, it is the fairness doctrine which has provided an essential balance in the legislative scheme:

> Of particular importance in light of Congress' flat refusal to impose a "common carrier" right of access for all persons wishing to speak out on public issues, is the Commission's "Fairness Doctrine," which evolved gradually over the years spanning federal regulation of the broadcast media. Formulated under the Commission's power to issue regulations consistent with the "public interest," the doctrine imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing

[173] CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2086 (1973).
[174] *Id.*
[175] 93 S. Ct. at 2086, 2090.
[176] *Id.* at 2088-90.
[177] *Id.* at 2090.
[178] *See* Sullivan, *supra* note 21, in which the author notes the ambivalent nature of the fairness doctrine in its early stages, and traces its evolution into a major legal concept in broadcast regulation. *See also* Blake, *supra* note 21, at 76-82.

> viewpoints. . . . In fulfilling its Fairness Doctrine obligations, the broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable . . . and it must initiate programming on public issues if no one else seeks to do so.[179]

In short, the fairness doctrine provides both balance and a bridge between opposing considerations. Broadcasting is constrained by limitations which make it "physically impossible to provide time for all viewpoints;" yet the public interest requires robust discussion of issues so that the public is fully and fairly informed. Under the fairness doctrine, it is the broadcaster who, in the exercise of editorial judgment, is "responsible for providing the listening and viewing public with access to a balanced presentation of information on issues of public importance."[180]

This view of the case is scarcely new. In fact, it is quite consistent with the Court's opinion in *Red Lion Broadcasting Co. v. FCC*[181] in which the fairness doctrine was upheld against attacks by broadcasters. In *Red Lion*, Justice White had said:

> A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be banned from the air-waves.[182]

To be sure, this language had not clearly established that the broadcaster's role as "proxy or fiduciary" would be sufficient to satisfy individual claims to access. In particular, the access proponents had found encouraging a subsequent passage in the opinion which had seemed to suggest that at least a limited right of access might be forthcoming:[183]

> 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

[179] 93 S. Ct. at 2090 (footnotes omitted).
[180] *Id.* at 2091 (footnotes omitted).
[181] 395 U.S. 367 (1969).
[182] *Id.* at 389.
[183] *See, e.g.*, Comment, *From the FCC's Fairness Doctrine to Red Lion's Fiduciary Principle*, *supra* note 5, at 95; Note, *The Listener's Right to Hear in Broadcasting*, *supra* note 5, at 866-72; 15 S.D.L. Rev. 172 (1970).

> 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 . . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government . . . ." It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutonally be abridged either by Congress or by the FCC.[184]

Yet whatever promise this and similar language in *Red Lion* may have held, the majority in *Democratic National Committee* suggests rather clearly that balanced coverage under a system of trusteeship is an adequate alternative to a right of access in individual members of the public.[185]

The concept of the broadcaster as a kind of editorial trustee is indeed central to the case. For a majority of the Court assumes that under either the "public interest" standard of the Communications Act or the standard imposed by the first amendment there is but one answer to the question whether an affirmative individual right of access to the broadcast media is required. Under either standard, a right of access not only is not required, but might actually jeopardize the "delicate balance" which has been developed through a system based on editorial trusteeship. A right to have access through paid advertisements might result in domination of the media by the affluent;[186] even if fairness doctrine principles were invoked to permit response by those who could not initially afford to pay, the thrust of public discussion would still be determined by those who could.[187] There is reason to be concerned, the Chief Justice adds, when broadcasting's "captive audience" may be subjected to the views of those who, unlike licensees, are held to no standards of accountability.[188] Of more importance than these objections, however, is the likelihood that "[u]nder such a regime the congressional objective of balanced coverage of public issues would be seriously

[184] 395 U.S. at 390.
[185] *See* text accompanying notes 225-27 *infra*.
[186] 93 S. Ct. at 2097-98.
[187] *Id.* at 2096-97.
[188] *Id.* at 2097.

threatened."[189]

One cannot read the concluding passages of the opinion without gaining some insight into the essential ambivalance inherent in the concept of editorial trusteeship. On the one hand, there are classic statements of the most traditional view of *laissez-faire* journalism under the first amendment:

> 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.[190]

There is corresponding concern that an affirmative right of access may lead to an enlargement of government control over the content of broadcast discussion of public issues.[191] Yet it is abundantly clear that the majority is unprepared either wholly to accept the "risks of abuse" posed by unlimited editorial discretion or to abandon the "government control" already imposed upon broadcast content. On the contrary, the majority readily accepts what it interprets as the Congressional judgment that broadcast content be shaped by standards of regulated accountability:

> It was reasonable for Congress to conclude that the public interest in being informed requires periodic accountabilityon the part of those who are entrusted with the use of broadcast frequencies, scarce as they are. In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet their legitimate needs. No such accountability attaches to the private individual whose only qualifications for using the broadcast facility may be abundant funds and a point of view. To agree that debate on public issues should be "robust, and wide-open" does not mean that we should exchange "public trustee" broadcasting, with all its limitatons, for a system of self-appointed editorial commentators.[192]

[189] *Id.*
[190] *Id.*
[191] *Id.*

There is, again, nothing really new in this ambivalence. Broadcasting regulation has always posed the paradoxes reflected in the majority opinion.[193] The disposition by the majority is in no important sense a retreat from the well-established principles under which broadcast regulation has developed. Broadcasting must be regulated because it is scarce—and the task is essentially one for Congress and the FCC together with the licensees. The creation of an affirmative right of access also will depend upon their initiative. Meanwhile, the first amendment does not require it under the established regulatory scheme.

While this summary is essentially accurate, the case is more subtle and requires some further explanation. Indeed, the case is of interest more for what it does not do than for what it does. In the first place, it affords little insight into the difficult question of the degree to which the American mass media have become affected by "governmental action." The Court, including the members of the majority, are quite unable to agree on that question even in the relatively limited context of the broadcoast media in which one might have supposed the answer reasonably clear. Justices White, Blackmun, and Powell find it unnecessary to decide the question since, in their view, a broadcaster's refusal to accept paid editorial advertising does not necessarily contravene the first amendment even if government action is involved.[194] For them in particular, the existence of the fairness doctrine and the balanced coverage that it requires is enough.[195] They are joined in this view by Mr. Justice Rehnquist and the Chief Justice who assume its correctness even though they are prepared to find no government action in the case.[196]

Justice Stewart joins Justice Rehnquist and the Chief Justice in concluding that government action is not implicated either in the broadcasters' refusal to accept the controversial advertisements or in the FCC's acquiescence in that position.[197] In their view, Congress has es-

[192] *Id.* at 2097-98.
[193] *Id.*
[194] *See* Kalven, *supra* note 21, at 24-26; Robinson, *supra* note 21, at 67-68, 87-97; Sullivan, *supra* note 21, at 721, 728.
[195] 93 S. Ct. at 2108-09.
[196] *Id.* at 2092-96. The point is explicit in Justice White's concurring opinion. Justice Blackmun's concurring opinion is more cryptic but seems to suggest the same point.
[197] *Id.*

tablished a regulatory structure under which broadcasters are subject to general oversight in the public interest but nonetheless retain substantial independent "journalistic discretion."[198] Under this approach, broadcasters presumably reject the advertisements in their independent capacities.[199] FCC acquiescence amounts to no more than the performance of a function compatible with the Commission's role as general overseer in the public interest, an overseer divorced from the particular exercise of journalistic discretion involved in the case.[200] The analysis calls to mind the problems encountered by the legendary tailor who found himself instructed by the King to sew a vest with sleeves. Yet it is intriguing and, in an area in which paradoxes are to be expected, not without appeal. Contrary to the earlier conclusions reached by Judge Wright, the three Justices find no "symbiotic relationship" between the broadcast licensee and the FCC under the Communications Act.[201] *Public Utilities Commission v. Pollak*[202]—in which the Court had found government action in the approval by a public agency of loudspeakers for a bus system—is distinguished on at least three grounds:

> 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.[203]

It is true, of course, that differences exist between broadcast regulation and the regulation of public utilities like bus companies. Individual programming decisions and changes are not routinely examined in the way that changes in utility services are. Yet, it must be conceded that few major program decisions are taken without some thought for FCC

[198] *Id.* at 2091, 2102-06.
[199] *See id.* at 2090, 2102-05.
[200] *Id.* at 2094.
[201] *Id.*
[202] 343 U.S. 451 (1952).
[203] 93 S. Ct. at 2095.

attitudes and the possibility of difficulty at license renewal time.[204] Even before the license has expired, broadcasters who offend their audience may find themselves required to respond to complaints lodged with the FCC[205]—as, indeed, the very cases in issue demonstrate. Thus one might suppose that pervasiveness of regulation is not the ground on which chiefly to rely in distinguishng *Pollak*. The other grounds, however, are somewhat more appealing. The Chief Justice suggests, in this minority portion of his opinion, that a right of access would not only undermine Congressional efforts to establish a system of "essentially private broadcast journalism," it would also do much to undermine the most basic premises upon which free expression rests:

> 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.[206]

One can find this passage both appealing and troublesome. Its central thesis—that a right of access is at odds with robust debate—will be discussed at some length later. Yet this thesis in itself is surely insufficient to resolve the government action issue unless the first amendment is given more nearly absolute sway than the Chief Justice seems prepared to do in this context. As the last sentence of the quoted passage makes clear, broadcasters, though their individual programming decisions may be made in the exercise of journalistic discretion, remain, nonetheless, accountable in the public interest. Nothing in the opinion threatens the fairness doctrine; the question of the constitutionality of an access doctrine imposed on broadcasters is expressly reserved in this portion of the opinion;[207] and a majority of the Court—including the Chief Justice and Justice Rehnquist—appear later to suppose that

[204] *See* Sullivan, *supra* note 21, at 723-24; Note, *The Public Interest in Balanced Programming Content: The Case For FCC Regulation of Broadcaster's Format Changes*, *supra* note 5, at 940.
[205] *See* Robinson, *supra* note 21, at 118-21.
[206] 93 S. Ct. at 2095.
[207] *Id.* at 2094.

a limited right of access might one day be recognized.[208] Thus it is not at all clear that the first amendment, as it applies to broadcast regulation, is enough to affect the question of government action on more than a somewhat troublesome *ad hoc* basis.

The point is clearer when one considers the concurring opinion of Mr. Justice Douglas. He assumes that commercial broadcasters are not engaged in government action and, reasoning from that assumption, concludes not only that a right of access need not be imposed by the FCC but that the fairness doctrine itself is unconstitutional under the first amendment.[209] Though he does not quite say so, his opinion suggests that most of the public interest standards for program content—indeed, most of the licensing procedures established by the FCC under the Communications Act of 1934—are probably also unconstitutional.[210] For its value as precedent, one can agree with his opinion while recognizing that it probably is, in Professor Harry Kalven's phrase, "an insight more fundamental than we can use."[211] Broadcasting is simply not likely to be "de-regulated" at this date.[212] But Justice Douglas' opinion is useful, nonetheless, because it suggests the conclusions that one might ordinarily expect from a finding that broadcast licensees' judgments as to program selection are essentially private. If one were prepared to reach these conclusions on the basis of traditional first amendment thinking, then it would not be particularly troublesome in conceptual terms to employ similar first amendment premises to resolve the initial question of government action. In effect, one would call upon the kind of presumption that appeared in *Chicago Joint Board* or *Resident Participation of Denver, Inc. v. Love*. To be sure, that is not what Justice Douglas himself does. He assumes no government action, but only because he has been unsuccessful in persuading the Court on other occasions that government licensees are government agencies.[213] But his reasoning still possesses something of the conceptual consistency which is lacking in the opinion of the Chief Justice.

It is quite possible, however, to accept the Chief Justice's opinion for what it is: an attempt to deal with the never simple government action concept in an area which does not lend itself to ready analogies

[208] *See id.* at 2100-01.
[209] *Id.* at 2110-12.
[210] *See id.* at 2110-17.
[211] Kalven, *supra* note 21, at 30-32.
[212] *See id.* at 30; Robinson, *supra* note 21, at 85-86.
[213] 93 S. Ct. at 2110.

with earlier cases.[214] That is, indeed, the view taken by Mr. Justice Stewart in a separate concurring opinion:

> 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. 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.[215]

A more conventional view of the question is taken by Mr. Justice Brennan, who is joined in a dissenting opinion by Justice Marshall. Although Justice Brennan acknowledges that there is no single test for deciding "whether particular conduct must be deemed private or governmental,"[216] he finds present in the case indicia which have contributed to findings of governmental action in other cases: the use of public resources (in this case, the electromagnetic spectrum);[217] the establishment of preferred positions through the discriminating exercise of the licensing power;[218] the existence of "continuing and pervasive" government regulation;[219] and the particular involvement of the government in the very issues in the case—issues which are resolved by the FCC in favor of the broadcasters' position in at least partial reliance upon its own fairness doctrine.[220] Referring to the last of these indicia, Justice Brennan notes that the FCC has not merely acquiesced in but has affirmatively approved the broadcasters' policies.[221] In these circumstances, he argues, *Pollak* cannot meaningfully be distinguished:

> 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,

[214] *See* Jaffe, *supra* note 21, at 782; Note, *Free Speech and the Mass Media*, *supra* note 21, at 642-44; *cf.* Kalven, *supra* note 21, at 37-45.
[215] 93 S. Ct. at 2102.
[216] *Id.* at 2121.
[217] *Id.* at 2122.
[218] *Id.* at 2122-23.
[219] *Id.* at 2123.
[220] *Id.* at 2124-25.
[221] *Id. But cf.* Jaffe, *supra* note 21, at 783; Note, *Free Speech and the Mass Media*, *supra* note 21, at 646-47.

> 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.[222]

Thus, he concludes that FCC participation in the broadcasters' position is so substantial that government action is implicated inescapably in the broadcasters' action.

One can wonder about this issue which the Court has left unresolved.[223] In particular, if broadcast licensees are not engaged in government action when, with FCC approval, they refuse to allow paying advertisers to air particular points of view, then one may ask whether the print media could ever be found to be so engaged in any circumstances not involving the kind of outright ownership and control represented, for example, in state college publications.[224] Surely operation under the Failing Newspaper Act would not be enough, for the analogy between the issues in *Democratic National Committee* and the issues one would expect in the failing newspaper case would almost certainly be greater than the analogies to other state action cases not involving the media.

An effort to resolve the issue as to broadcasting however, would be not only an essentially pointless undertaking but, a misdirected one as well. For seven members of the Court in *Democratic National Committee* are prepared either to hold or to assume that governmental action is involved in the case. Yet only two among this number agree that this conclusion requires the recognition of an affirmative right of access. The remaining five either hold or assume instead that the alternative regulatory scheme—the one imposed by Congress and developed by the FCC—is sufficient to answer whatever claims to access the proponents may have. This division of opinion invites a more important set of observations than does the question of governmental action itself.

[222] 93 S. Ct. at 2125.

[223] *See* Jaffe, *supra* note 21, at 782-87.

[224] *See, e.g.*, Lee v. Board of Regents, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969). In these cases, access followed a finding of state action in the operation of state college and public high school publications. *Cf.* Radical Lawyers Caucus v. Poole, 324 F. Supp. 368 (W.D. Tex. 1970).

The discussion begins with a somewhat more precise restatement of the disposition of the issues in the case. I have referred in my earlier summary to "the majority." Perhaps "coalition" would have been better. Clearly, a majority agrees that the first amendment does not require an individual right of access to the broadcast media under existing regulation. In fact, all of the Justices but Brennan and Marshall agree with this proposition. A smaller majority, however—or a coalition—agrees that this is so essentially because even if government action is assumed, the existing regulatory scheme provides for balanced coverage of public issues under a system which makes licensees accountable as editorial trustees. Justices White, Blackmun and Powell hold as much;[225] the Chief Justice and Justice Rehnquist join in this opinion in considered dictum.[226] It is dictum only because they have previously found no state action, and one would suppose that it is rather carefully considered since the Chief Justice himself has written the only extensive opinion on the point and since Justice Rehnquist—the only member of the Court who concurs with everything the Chief Justice has said—has written no opinion of his own.[227] Thus, while there is no holding on the point, it appears to represent at least the considered judgment of a majority.

The point itself is worth isolating because it suggests some rather important insights into what may be required when government is implicated in judgments concerning the content of the media. The central issues are whether a right of access necessarily follows a finding of government action and, if not, what alternatives may be permissible or required. These issues are first suggested clearly in the concurring opinions of Justice Douglas and Justice Stewart.

As previously mentioned, Justice Douglas has assumed that there was no government action because he has been unsuccessful in persuading the Court that licensees are government agencies. But he does observe that if licensees were government agencies, a right of access would follow "inexorably" because "a licensee, like an agency of the government, would within limits of its time be bound to disseminate all views

[225] CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2108-09 (1973).

[226] *Id.* at 2096-99.

[227] It is also worth pointing out that their opinion here is a holding on the question whether the public interest standard of the Communications Act requires access. Since they agree that "the 'public interest' standard necessarily invites reference to First Amendment principles," *id.* at 2096, they are not far from a holding on the substantive first amendment issue itself. *But see id.* at 2120-21 (Brennan, J., dissenting); *cf. id.* at 2106 (Stewart, J., concurring).

. . . . it would be unable by reason of the First Amendment to 'abridge' some sectors of thought in favor of others."[228] Justice Douglas does not make it entirely clear whether he would find a limited right of access to be enough, but one can assume that he would since he refers approvingly to "the thesis" of Justice Brennan who argues for no more than limited access.[229] Justice Stewart, on the other hand, would not accept limitations on access if government action were found. Instead, he argues that a finding that "broadcasters are government" would require common carrier status[230]—by which one supposes that he means essentially a first-come, first-served system.

In either case, the major premise seems unassailable: if government action is involved in content selection, surely the involvement must be subject to constraints which favor no particular point of view. The conclusions as to a right of access, however—whether limited or unlimited—are less clear. If some speech *must* be abridged—and a clear majority of the Court in both *Red Lion* and *Democratic National Committee* has recognized that it must be in a medium which cannot always accommodate everyone who would speak at the same time[231]—then what surely follows is any system which is reasonably designed to operate without particular favoritism. A common carrier system might meet this test in a rather narrow sense, although one could argue with justification that it would not, in Professor Thomas Emerson's formulation, "best promote the system of freedom of expression."[232] A limited right of access, carefully controlled, might also provide an adequate system. But then, so may the fairness doctrine and its companion concept of editorial trusteeship. One would suppose on general principles that if more than one system may be independently

[228] *Id.* at 2110 (Douglas, J., concurring).

[229] *Id.*; *see id.* at 2136-38 (Brennan, J., dissenting).

[230] *Id.* at 2104-05 (Stewart, J., concurring).

[231] "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." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969).

[232] T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 663 (1970). *See* Marks, *supra* note 21, at 981-82. *See also* text accompanying notes 197, 213, *infra*. *But see* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), in which Mr. Justice White, writing for the Court suggested:

> Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or broadcast week.

Id. at 390-91.

constitutional in terms of substantive first amendment requirements, the choice rests with Congress and whatever administrative agency it may select. This appears essentially to be the reasoning employed by the five Justices and, as to this point in the case, their disposition seems defensible.[233]

In his dissenting opinion, however, Justice Brennan argues with some force that the fairness doctrine is inadequate because it depends too much upon the concept of trusteeship:

> 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. 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.[234]

Critical of what he deems the unwarranted "interposition of journalistic middlemen," Justice Brennan argues that in a powerful medium specifically dedicated to communication some individual right to participate directly is required.[235]

It is clear, however, that he does not envision an unlimited right of access or a complete abandonment of broadcast licensees' "journalistic supervision over the use of their facilities."[236] Instead, he emphasizes—as had Judge Wright—that what is at stake is the "allocation of *advertising* time—airtime that broadcasters regularly relinquish to others without the retention of significant editorial control."[237] Essentially, the argument is that broadcasters who make commercial time available should not be permitted to exclude all non-commercial advertising:

[233] *See* Note, *Free Speech and the Mass Media*, *supra* note 21, at 650-53, in which the author argues that while "judicial recognition of a right of access would be consistent with the underlying policies of the first amendment, it does not follow that recognition is constitutionally compelled."

[234] 93 S. Ct. at 2128-29.

[235] *Id.* at 2130.

[236] *Id.* at 2135.

[237] *Id.*

> 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 instanteous 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, "[s]elective exclusions from a public forum may not be based on *content* alone. . . ." Here, of course, the differential treatment accorded "commercial" and "controversial" speech clearly violates that principle. 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.[238]

While these arguments have been made from time to time by the access proponents—and, of course, by Judge Wright—the logic has never seemed self-evident.[239] If there were no constitutional difference between commercial speech and speech concerning public issues, it would follow that one could not be favored over the other. But as Justice Brennan himself acknowledges, the Court has in effect excluded commercial speech from the reach of first amendment protection;[240] indeed, it has reaffirmed this position in the last term.[241] Since commercial speech is not protected, it is hardly "ironic" to find discrimination

[238] *Id.* at 2135-36 (footnotes omitted).

[239] *See* Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 1043-44; *cf.*, Jaffe, *supra* note 21, at 775-80. Professor Jaffe argues that the fairness doctrine ought not be expansively applied to advertising in cases which do not raise fairly clear public controversies.

[240] *See* Valetine v. Chrestensen, 316 U.S. 52 (1942).

[241] Pittsburgh Press Co. v. The Pittsburgh Comm'n on Human Relations, 93 S. Ct. 2553 (1973). The Court holds that bans on sex discrimination in newspaper want-ads do not violate the first amendment.

between commercial advertising and public-issue advertising. The fallacy in Justice Brennan's argument lies in the supposition that all "advertising" should be treated alike. Broadcasters presumably may discriminate among "purely commercial" advertisements: indeed they do, as the absence of liquor and condom commercials will suggest.[242] But they may not display favoritism in their coverage of public issues. When advertisements raising public issues are accepted, these advertisements surely must be considered by the licensees in their overall assessment of their coverage.[243] In this respect, broadcasters must be discriminating, in a sense, in order not to discriminate.

The reason for this discrimination is suggested in Justice Brennan's own words taken from an earlier passage in his opinion: "[U]nlike 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."[244] This is undoubtedly true,[245] but it can lead to rather different conclusions about what may be required of parks as opposed to television stations. Parks and similar forums which are generally open to the public may not ban the exercise of first amendment rights, at least when their exercise is not wholly inconsistent with the intended use of the forum.[246] In these forums, however, a somewhat crude common carrier status is imposed.[247] It works well enough in political terms because, by tradition, we are accustomed to it and because demand for space rarely exceeds supply; and it raises no important problems of invidious discrimination among competing ideas because, virtually by definition, a common carrier concept involves no selection of content at all.[248] Parks presumably are free

[242] Professor Robinson has suggested that FCC regulation of ordinary commercial advertising has been largely confined to controlling excessive spots. *See* Robinson, *supra* note 21, at 109-11.

[243] "If a [commercial] message advocates one side of an important public issue, the fairness doctrine should apply." Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 1040; *see id.* at 1039-42. *But cf.* Jaffe, *supra* note 21, at 780.

[244] CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2132-33 (1973).

[245] *But cf.* Note, *Concepts of the Broadcast Media Under the First Amendment: A Reevaluation and a Proposal*, *supra* note 21, at 100-02. The author argues that broadcasting is not necessarily a public forum. The argument is respectable but, assuming *arguendo* a finding of a governmental action, it is difficult to sustain. In any case, the question of access need not turn on whether broadcasting is a public forum or not.

[246] *See* Niemotko v. Maryland, 340 U.S. 268 (1951).

[247] In other words, speech is permitted essentially on a first-come, first-served basis, subject to reasonable "traffic" regulations.

[248] *But see* Marks, *supra* note 21, at 986-87; in which the author observes that parade permits may be issued in response to content. Thus he suggests that a permit to march down New York's Fifth Avenue on St. Patrick's Day would go to the Irish, not the DAR, assuming that both wanted

to regulate commercial advertising, however, or to ban it altogether; there is simply no complete correlation between the presence of commercial advertising and the acceptability of protected speech. I say "no complete correlation" because there is a line of cases, exemplified by *Kissinger v. New York City Transit Authority*,[249] which hold that when commercial advertising is displayed or otherwise accepted in a public place, other protected speech may not be excluded on grounds which would independently contravene the first amendment.[250] Thus, as in *Kissinger*, if commercial posters are displayed in New York subway tunnels, antiwar posters may not be excluded simply because their message is offensive.[251] While I think these cases might be explained on the grounds that the existence of commercial advertising simply demonstrates that the "forum" is indeed "open", it is not necessary to reach that position. For these cases do not sustain either of the two further propositions necessary to Justice Brennan's thesis. They do not hold that a complete ban on commercial speech forecloses the question whether protected speech must be allowed.[252] More important, they do not hold that protected speech must be accepted on a basis of complete parity with commercial advertising, or indeed, that protected speech must be accepted on a common carrier basis; the latter is simply assumed, and with some justification in a forum like a park or a subway tunnel which is not specifically dedicated to communication and is not subject to comprehensive regulation intended to draw a balance among competing claims to first amendment expression. But broadcasting is unlike parks or subway tunnels precisely because it is dedicated to communication and because it is subject to speech-oriented regulation. If that regulation is accepted, as Justice Brennan seems generally willing to do, then again, surely all that is required is that it be designed not to favor a particular point of view. A limited right of access might complement that design or even replace it in large part. But to accept the

a permit at the same time. He is probably right, and he would certainly be right if his example were transferred, say, to Chicago where even the River runs green on the good Saint's day. But exceptions simply prove the rule. Normally, this kind of conflict would not be encountered and normally parade permits would simply issue upon request.

[249]274 F. Supp. 438 (S.D.N.Y. 1967).

[250]*E.g.*, Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967); Hillside Community Church, Inc. v. City of Tacoma, 76 Wash. 2d 63, 455 P.2d 350 (1969).

[251]274 F. Supp. at 442-43 (S.D.N.Y. 1967).

[252]*But cf.* Note, *Concepts of the Broadcast Media Under the First Amendment: A Reevaluation and a Proposal*, *supra* note 21, at 93 n.54.

concept as possible is not to accept it as a necessity under the first amendment[253]—and certainly not simply on the grounds that editorial advertisements are "advertising."

Of course, Justice Brennan's position does not rest entirely on this ground. He also argues that the fairness doctrine is seriously flawed because, in practice, broadcasters find that it is in their own self-interest to limit discussion, and also because the discussion permitted tends to be a didactic reflection of "prevailing opinion" offered by those whose own points of view are merely "representative."[254] Indeed, he adds, broadcasters are required by the fairness doctrine to decide whether particular points of view even deserve discussion.[255] These limitations, in his judgment, make the fairness doctrine insufficient to promote the full and free discussion which the first amendment ordinarily presupposes.[256] Although these observations are not new, they are important and essentially correct. It is not at all clear, however, that the right of access for which Justice Brennan argues would escape these limitations. I shall argue later that a controlled right of access to all the media would be afflicted by all of these limitations and would lead to additional dangers as well. Yet even in the narrower context of the broadcast media, it is possible to see that the limitations of the fairness doctrine stem essentially from the same conceptual cost which would be borne by a controlled right of access.

The conceptual cost is ideological balance, and it is imposed as a matter of substantive first amendment doctrine. For if government is implicated in decisions or regulations directly affecting the ideological content of the media on any basis other than a common carrier principle, then it surely follows that no judgment may be taken that does not contribute essentially to the establishment of a representative balance among competing ideologies. Indeed, no other judgment can be taken if the government is to avoid the ideological favoritism which, by general consent, it may not show. In broadest terms, this limitation means that the medium affected by government loses, to that extent, its ability to commit itself. In the context of broadcasting, it means more specifically that editorials beget replies and that individual points of view are limited in favor of opposing points of view.[257] It probably does not mean

[253]Note, *Free Speech and the Mass Media*, *supra* note 21, at 651.

[254]CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2130-31 (1973).

[255]*Id.* at 2131.

[256]*Id.*

[257]This is the immediate function of the fairness doctrine. But the fairness doctrine must be

that unopposed views must be excluded on the account (although the thought is an interesting one) nor does it mean that "news" reporting and accompanying explanatory comment need be balanced[258]—here the theory, shakier now, must rest on the implicit premise of journalistic objectivity; but it clearly does mean that some individual expression must be excluded, not for its own repugnance but simply because it has been anticipated. Obviously, these requirements are at odds with traditional first amendment thinking, but they are wholly consistent with the position in which government finds itself when, on independent grounds, it must interfere in the process of media content selection.[259] Thus, as Justice White observed in *Red Lion*, "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."[260]

assessed against the FCC's still larger requirement of "balanced programming" which it imposes on licensees under the "public interest" standard. *See* Robinson, *supra* note 21, at 111-18; Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 1031-32; *cf.* Sullivan, *supra* note 21, at 725-26. The relationship between balanced programming and the ideological balance referred to in the text is tenuous, not direct, since not all broadcast content involves obvious ideology. Even so, balanced programming can be said to serve first amendment interests which arguably would be violated if the FCC permitted broadcasters generally to program without regard for variety or diversity in their content. *See* Note, *The Public Interest in Balanced Programming Content: The Case for FCC Regulation of Broadcasters' Format Changes*, *supra* note 5, at 942-43.

[258]The fairness doctrine does not apply to news reporting and commentary within news programs, although it is probable that deliberate fraud or bias would bring sanctions. *See* Note, *The First Amendment and Regulation of Television News*, *supra* note 5, at 747-48, 765; Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 941-44.

[259]For the most part, they are nothing more than extensions of standard fairness doctrine theory. The most difficult questions arise in the context of entertainment programming. Although the FCC traditionally has displayed little interest in entertainment beyond requiring that it be offset by at least some more serious fare, it can certainly be argued that entertainment may reflect ideology. When it does, then, as in the case of commercial advertising which raises public issues, the requirement of balance arguably ought to be applicable. This general requirement might be overcome in most cases, however, on the ground that the ideological content reflected in standard entertainment fare is essentially *de minimis*. *See generally* Note, *The Fairness Doctrine and Entertainment Programming: All in the Family*, 7 GA. L. REV. 554 (1973); Note, *The Public Interest in Balanced Programming Content: The Case for FCC Regulation of Broadcasters' Format Changes*, *supra* note 5, at 937, 942-44, 963; Note, *Media and the First Amendment in a Free Society*, *supra* note 21, at 944-49; Note, *Concepts of the Broadcast Media Under the First Amendment: A Reevaluation and a Proposal*, *supra* note 21, at 99-100.

[260]Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969). The comprehensive regulatory theory suggested here is similar to theories offered by Professor Barron some years ago in defense of the fairness doctrine. It was his view that licensees could be seen as "governmental actors" and the fairness doctrine therefore justified as a necessary limitation upon government power to censor. *See* Barron, *In Defense of Fairness: A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, *supra* note 5, at 44-45. Assuming governmental action in the licensing process, his view seems correct, although the requirement of ideological balance actually subsumes the fairness doctrine and, in the process, undoes his later first amendment arguments for individual access to the broadcast media.

The requirement of balance also surely cannot turn, as both Justice Stewart and Justice Brennan appear to suppose, on whether licensees *are* government or are merely affected by government action. Instead, the requirement arises in the latter case *pro tanto*, and becomes complete as government involvement is complete. If government action is implicated in the entire licensing transaction, licensees are wholly subject to the requirement of balance.[261] Yet as individual bits of expression contribute to a balance, each bit is entirely free of restraint; to this extent, the licensees themselves retain the right to advocacy within the larger framework of their obligation to provide a balance. This is the point I understand Professor Emerson to make in part in his discussion of the concept of the editorial trustee:

> The licensee therefore can only be considered as the agent of the government, or 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. The First Amendment right would run from the individual or group seeking to engage in expression, or seeking to listen, to the government; not from the licensee (except as to his own expression) to the government. This would mean that there could be no censorship of the actual user of the facilities, but there could be controls over the Licensee to assure that he made a fair allocation of the limited facilities both to users and to listeners. Only through such a system, indeed, would the requirements of the First Amendment be met.[262]

As Professor Emerson says, this was essentially the Court's position in *Red Lion*. It appears still to be the position of the five Justices who concur in the judgment that the fairness doctrine and editorial trustees are adequate under the first amendment. To be sure, there are many references in the Chief Justice's opinion to the licensees' "journalistic discretion." But they are never far from equally insistent references to licensees' "accountability" for their performance or to the "congressional objective of balanced coverage of public issues." These references can be harmonized, I think, only when it is recognized that the discre-

[261]This would be true, however, only to the extent that program content were ideologically oriented. Other programming would remain subject to the more general public interest standards imposed by the Communications Act.

[262]T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 663 (1970).

tion here is quite unlike the discretion of convenional editors who are free to select for publication whatever they please. The discretion of a licensee is the discretion of an editorial trustee accountable to the public for balanced coverage of public issues. This proposition is virtually explicit in the Chief Justice's opinion, as is the proposition that the established system itself is substantively adequate; what is implicit in the two propositions is that the concept of balanced coverage is not merely an acceptable Congressional policy but is an expression of first amendment doctrine as well.[263]

Editorial discretion in this context must therefore mean, as I have suggested, not the conventional discretion to discriminate but rather to be discriminating in the pursuit of balance. Indeed, one can see the licensee as a kind of surrogate, doing essentially what must be done under any system which does not depend on a first-come, first-served allocation of resources but depends instead on government supervision. The licensee might be replaced as functionary, but the function must be performed. This inevitability seems to be what the Chief Justice has in mind when he describes what the FCC would find it necessary to do in administering a limited right of access:

> 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 braodcasters' 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.[264]

With these observations, one can again consider Justice Brennan's objections to the fairness doctrine. He is, of course, correct: it works imperfectly.[265] Yet the controlled right of access for which he contends would be subject to the same conceptual requirement of balance as the fairness doctrine and to almost certainly as many practical impediments. In the circumstances, one can accept the position of the five Justices not so much because it represents the best choice as because no other choice is clearly better.[266]

[263] *Cf.*, Jaffe, *supra* note 21, at 773-74.

[264] CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2098 (1973).

[265] *See* Blake, *supra* note 21, at 82-86.

[266] It should be emphasized that the requirement of ideological balance depends on a finding of governmental involvement in the determination of content. It is possible to limit that finding and thus to fashion alternative rationales substantially limiting the scope of the balance requirement as well as the fairness doctrine. Mr. Justice Douglas' opinion in *Democratic National Committee* proceeds readily from the initial assumption of no governmental action. No rationale is free from difficulty, however, so long as it accepts the public interest standard of the Communications Act as applicable to ideological programming.

Two final points need to be made concerning this analysis. First, it must be conceded that the analysis itself is tendentious. As Justice Brennan notes, the Court does not quite hold that the fairness doctrine

For example, one commentator has suggested that "scarcity is the central theory of broadcast regulation, and balancing is brought in only to cover the one area the scarcity theory may not reach marginal issues projected into controversy by a licensee." Marks, *supra* note 21, at 993. The author adds:

> The courts must nonetheless be sure that the Commission's enforcement of public service requirements does not infringe licensee free speech rights. The sanctions available in the renewal process, and the other less drastic means of enforcement open to the Commission, must be applied so as not to punish protected speech in contravention of [Near v. Minnesota, 283 U.S. 697 (1931)]. Accordingly, the Commission can avoid punishment of all protected speech only if it denies renewal for what is *not* broadcast. That is, the FCC should deny renewal only for failure to cover a subject whose coverage was necessary for adequate community broadcast service. To restate this rule in terms of any views which the licensee expresses over the air, *the Commission should be prohibited from denying renewal because of any broadcast*. In that way, the licensees would know that views they expressed could not result in administrative sanctions.

Id. (Emphasis in original). However, whether the Commission ostensibly enforces the public interest standard by denying renewals for what is or is not broadcast, its power of review is conceptually the same. What *is* broadcast will have to be considered and may necessarily have to be limited in order to accommodate what otherwise would *not* be broadcast. It is difficult to see how the charge of government involvement in the determination of content can be avoided under either approach. This seems to be recognized by Professor Robinson, who argues that the Commission may not establish general standards of programming acceptability under a public interest standard. Yet he dismisses as "extreme" and "naive" the argument that the Commission should be confined to regulation of "only the technological aspects of radio and television." Instead, he observes:

> [I]t does not necessarily follow that because the Commission may not constitutionally impose its own standards of orthodox programming or its own standards of balance, fairness, and diversity that it may not in general insist that a licensee investigate and be responsive to demonstrated needs of his community. The first amendment does not require that a licensee must be permitted to operate a radio facility purely in his private and selfish interest with no concern for public needs and interests. The first amendment comes into play, however, when the Commission, in the name of reviewing a licensee's responsiveness, begins to concern itself with programming or program operations to the point of establishing standards of acceptable and nonacceptable programming. It has already reached and gone beyond this point.

Robinson, *supra* note 21, at 162-63. Certainly, the Commission has no business engaging in conventional censorship. It would also undoubtedly be better for the Commission to impose standards flexibly suited to local situations than to insist on a blind application of a single national standard. And it would be possible for licensees, in their role as trustees, to be given more initial discretion than they now have to determine those standards. However, if the Commission is to remain the final arbiter, it is again difficult to avoid the argument that it is engaged in the determination of content. Indeed, one could argue that clear standards—even somewhat silly ones—are less likely in the long run to result in suppression and censorship than is a "simple" value-laden prohibition against selfish unconcern.

against Tornillo who, in turn, demanded the right to reply[272] under a

[272]Tornillo submitted two responses for publication. To the first editorial he offered the following reply:

FROM: PAT L. TORNILLO, JR.
CTA Executive Director
1809 Brickell Avenue
Miami, Florida 33129

Legislative Candidate, District 103

TO: MIAMI HERALD
One Herald Plaza
Miami, Florida

PAT TORNILLO AND THE CTA RECORD

Five years ago, the teachers participated in a statewide walkout to protest deteriorating educational conditions.

Financing was inadequate then and we now face a financial crisis.

The Herald told us that what we did was illegal and that we should use legal processes instead. We are doing just that through legal and political action.

My candidacy is an integral part of this process.

During the past four years:

—CTA brought suit to give Dade County its share of state money to relieve local taxpayers.
—CTA won a suit which gave public employees the right to collectively bargain.
—CTA won a suit which allowed the School Board to raise $7.8 million to air-condition schools and is helping to keep this money.

Unfortunately, the Herald dwells on past history and ignores CTA's totally legal efforts of the past four years.

We are proud of our record.

Brief for Appellant, Exhibit #2. The second editorial brought a second reply:

FROM: PAT L. TORNILLO, JR.
CTA Executive Director
and Candidate (Dem.) for
State Rep., Dist. 103
1809 Brickell Avenue
Miami, Florida 33129
Phone: 854-0220

September 30, 1972

EDITORIAL REPLY

Since the *Herald* has chosen to publicly attack my record, accomplishments, and positions on various issues, and those of the CTA, I again request that under Florida Statute 104.38, the *Herald* print the following record of affirmative and legal action.

In 1968, CTA signed a no-strike affidavit.

In 1969, CTA filed and won a suit in the Supreme Court of Florida, which gives all public employees the right to bargain collectively without the right to strike.

long standing, but never tested, Florida statute.[273] The newspaper refused; Tornillo brought suit, and the lower court found the statute unconstitutonal on its face. A majority of the Florida Supreme Court holds, however, that the statute is consistent with the election provisions of the Florida Constitution and with the free speech and press provisions of both the Florida and United States Constitutions.[274]

The statute provides that a newspaper must give equal space for replies by political candidates who have been attacked in the newspaper's columns:

> If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immedi-

In 1971, CTA filed the Tornillo suit, which enabled the School Board to receive $7.6 million and are presently cooperating with the Board in their effort to retain this money and avoid further financial chaos.

Since 1968, CTA has reimbursed the taxpayers of Dade County for the full salary and all fringe benefits of its President.

Since 1970, CTA has not used the school mail service to communicate with its members.

Since 1970, CTA has paid all costs of payroll deduction of dues for its members.

We have attempted to obey all the laws of the state, not intentionally violating any, while continuing our efforts to alert the public to the impending financial crisis facing the schools.

We have, however, also retained our belief in the right of public employees to engage in political activity and to support the candidates of our choice, as is the right of any citizen in this great country of ours.

Aye, there's the rub.

Brief for Appellant, Exhibit # 4. The Herald did not publish either reply as such, although in its regular news columns it did report the substance of Tornillo's defense. Tornillo's replies were denied free publication on the basis of the Herald's long-standing policy against allowing its "letters" column to be used by political candidates during election campaigns. The policy reflects the paper's editorial judgment that political candidates should not be permitted to "swamp" the letters column to the exclusion of the average writer. It is feared that this would be the practical result if the column were opened to candidates.

[273]FLA. STAT. ANN. § 104.38 (Supp. 1972). The statute was earlier declared unconstitutional at the trial court level in State v. News-Journal Corporation (County Judge's Court, Volusia County, February 14, 1972) (opinion attached as Exhibit A to Brief for Appellee, Tornillo v. The Miami Herald Publ. Co., No. 43,009 (Fla. Sup. Ct., filed July 18, 1973). The Attorney General of Florida refused to appeal from this ruling because of his own doubts about the statute's constitutionality. *See* Brief for Appellee at 2-3.

[274]*Tornillo Opinion* 2-3.

is an adequate alternative to access, although a majority seems to think so. Nor is the role of balance as constitutional doctrine explicit in the case, although, again, I think it fairly implicit. The second point, however, tends to offset the concessions in the first. For reasons discussed later, it seems clear that whether or not balance is required by the first amendment as an affirmative matter, it is wanted by most of the access proponents on practical grounds which will, in political terms, require acknowledgment. Thus the practical limitations implicit in the concept of balance will almost certainly influence the development of the access doctrine in any event.

Meanwhile, the net effect of *Democratic National Committee* can be fairly easily summarized. It is clear that nothing in the case forbids Congress or the FCC to impose an affirmative right of access to the broadcast media. Indeed, the opinion of the Chief Justice leaves room for a change of regulatory policy which would convert broadcasters from their position as editorial trustees into mere common carriers. Although virtually unthinkable as a political proposition, a conversion is still possible under a view which assigns broadcasters to a unique first amendment role predicated on spectrum-imposed scarcity.[267] In any event, five Justices assume that "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."[268] In short, the question of access to the broadcast media is not foreclosed. It is simply transferred from the courts to the commission and Congress where, one may safely speculate, it will continue to be vigorously pursued.

It is equally clear that the cable television access policies already established by the commission are unaffected by the case. In fact, the Chief Justice cites the commission's cable regulations with evident approval[269]—presumably in order to suggest that the commission has not been stubbornly unwilling to require access in circumstances which warrant it. To be sure, the reference is in the briefest dictum, but there is at least no suggestion that the validity of the regulations is in doubt.

When *Democratic National Committee* is considered with the decision in *Tornillo*,[270] it is fair to say that the access doctrine has arrived at a kind of crossroads. Its course is not yet certain, but there is at least

[267] *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390-91 (1969).

[268] CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2100 (1973).

[269] *Id.* at 2100-01.

[270] No. 43,009 (Fla. Sup. Ct., filed July 18, 1973), *rehearing denied*, Oct. 10, 1973, [hereinafter cited as *Tornillo Opinion*].

the possibility that time will bring about the development of a comprehensive, controlled right of access to the media at large.

B. *The Tornillo Case.*

Tornillo is the product of a dispute between a candidate for the Florida Legislature and *The Miami Herald*, Florida's largest daily newspaper. The *Herald* had published personal attacks[271] directed

[271] At least the Supreme Court of Florida calls them attacks on Tornillo's "personal character." *Tornillo Opinion* 2. The characterization is somewhat unfair. The attacks were caustic, but they were also clearly directed at Tornillos' candidacy and fitness for public office. On Wednesday, September 20, 1972, the *Herald* published the following editorial:

THE STATE'S LAWS AND PAT TORNILLO

LOOK who's upholding the law!

Pat Tornillo, boss of the Classroom Teachers Association and candidate for the State Legislature in the Oct. 3 runoff election, has denounced his opponent as lacking "the knowledge to be a legislator, as evidenced by his failure to file a list of contributions to and expenditures of his campaign as required by law."

Czar Tornillo calls "violation of this law inexcusable."

This is the same Pat Tornillo who led the CTA strike from February 19 to March 11, 1968, against the school children and taxpayers of Dade County. Call it whatever you will, it was an illegal act against the public interest and clearly prohibited by the statutes.

We cannot say it would be illegal but certainly it would be inexcusable of the voters if they sent Pat Tornillo to Tallahassee to occupy the seat for District 103 in the House of Representatives.

Brief for Appellant, Exhibit. 1.A Second editorial appeared on Friday, September 28, 1972:

SEE PAT RUN

(Picture of empty classroom)

FROM the people who brought you this—the teacher strike of '68—come now instructions on how to vote for responsible government, i.e., against Crutcher Harrison and Ethel Beckham, for Pat Tornillo. The tracts and blurbs and bumper stickers pile up daily in teachers' school mailboxes admist continuing pouts that the School Board should be delivering all this at your expense. The screeds say the strike is not an issue. We say maybe it wouldn't be were it not a part of a continuation of disregard of any and all laws the CTA might find aggravating. Whether in defiance of zoning laws at CTA Towers, contracts and laws during the strike, or more recently state prohibitions against soliciting campaign funds amongst teachers, CTA says fie and try and sue us—what's good for CTA is good for CTA and that is natural law. Tornillo's law, maybe. For years now he has been kicking the public shin to call attention to his shakedown statesmanship. He and whichever acerbic prexy is in alleged office have always felt their private ventures so chock-full of public weal that we should leap at the chance to nab the tab, be it half the Glorious Leader's salary or the dues checkoff or anything else except perhaps mileage on the staff hydrofoil. Give him public office, says Pat, and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule.

Brief for Appellant, Exhibit #3.

> ately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor . . . .[275]

Although the lower court had found the language of the statute impermissibly vague, the Florida Supreme Court has little difficulty construing the statute to avoid this objection. The court interprets the statute to mean that the reply must be "wholly responsive" to the attack and must be neither defamatory nor vulgar or profane.[276]

It is in the context of first amendment doctrine that the case is of major importance. The court holds that the statute does not violate the first amendment because it "supports the freedom of the press in its true meaning—that is, the right of the reader to the whole story, rather than half of it—and without which the reader would be 'blacked out' as to the other side of the controversy."[277] Thus in the majority's view, the statute promotes, rather than inhibits, freedom of expression:

> The statute here under consideration is designed to add to the flow of information and ideas and does not constitute an incursion upon First Amendment rights or a prior restraint, since no *specified newspaper content is excluded*. There is nothing prohibited but rather it requires, in the interest of full and fair discussion, additional information.[278]

This is, of course, a major thesis of the access proponents. Other echoes of their arguments also abound in he opinion. There are repeated references to the need for freedom of expression "*for all the people and not merely for a select few*."[279] The court acknowledges both the assumptions of media influence and the resulting economic predicate:

> The right of the public to know all sides of a controversy and from such information to be able to make an enlightened choice is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship. Through consolidation, syndication, acquisition of radio and television stations and the demise of vast numbers of newspapers, competition is rapidly vanishing and news corporations are

[275] FLA. STAT. ANN. § 104.38 (Supp. 1972).
[276] *Tornillo Opinion* 10-11.
[277] *Tornillo Opinion* 12.
[278] *Tornillo Opinion* 12 (emphasis by the court).
[279] *Tornillo Opinion* 6 (emphasis in original), *see Tornillo Opinion* 4, 5.

> acquiring monopolistic influence over huge areas of the country.[280]

In short, the case rests principally on the concept of fairness in media content. The theory of the case might easily be extended to support a broader statute imposing a fairness doctrine on newspapers or a more direct right of individual access intended to provide "both sides of controversial matters." Thus the case must be read for what it is: a straightforward assault upon the traditional position of the print media under the first amendment.

Lacking direct precedent for its decision, the court pieces together bits of dictum from earlier Supreme Court decisions which lend color to its position. Thus, the court uses a passage from the concurring opinion of Mr. Justice Frankfurter in *Pennekamp v. Florida*[281] which suggests that freedom of the press is not an absolute but instead implies "responsibility for its exercise."[282] *New York Times Co. v. Sullivan*[283] is cited for the proposition that "there is a broad societal interest in the free flow of information to the public . . . ."[284] *Associated Press v. United States*[285] suggests to the court that "[f]reedom of press . . . does not sanction repression of that freedom by private interests."[286] A particularly egregious dictum in a closing footnote to *Red Lion* also appears—shorn by the Florida court, however, of its introductory clause which is included here in italics together with the remainder of the sentence which the Court "excerpts":

> *A related argument, which we also put aside, is that quite apart from scarcity of frequencies, technological or economic*, Congress does not abridge freedom of speech or press by legislation or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public.[287]

It is not difficult to distinguish these cases. *Pennekamp* dealt with criticism of the judiciary by newspapers and decided only that the criticism in question could not be made the subject of contempt since it did

[280] *Tornillo Opinion* 6.
[281] 328 U.S. 331 (1946).
[282] *Id.* at 355. (Frankfurter, J., concurring).
[283] 376 U.S. 254 (1964).
[284] *Tornillo Opinion* 6.
[285] 326 U.S. 1 (1945).
[286] *Id.* at 20.
[287] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 401 n.28 (1969) (emphasis added).

not present a clear and present danger to the administration of justice.[288] Justice Frankfurter's concurrence was occasioned chiefly by his distaste for the use of the "clear and present danger" test as legal doctrine; he suggested, in the context of his own analysis of the issues in the case, that freedom of the press must be tempered with responsibility.[289] As an abstract proposition, most members of the present Supreme Court probably would agree with Justice Frankfurter. It is by no means clear that they would concur in its application to the issues in *Tornillo*—and certainly not on the basis of *Pennekamp* which is itself all but irrelevant.

In *New York Times*, the Court held that under the first amendment, defamatory statements concerning public officials could be made the subject of libel actions only if published with "actual malice," which the Court defined as either knowing falsity or reckless disregard for the truth.[290] Although technically a decision restricting the traditional power of the states to impose sanctions for libel, *New York Times* undoubtedly does support the Florida court's concern for a "free flow of information." But nothing in the case suggests clearly that newspapers have an affirmative obligation to print unwanted matter. Indeed, the editorial advertisement in *New York Times* was printed only after it had been "approved" by the newspaper's advertising department, a fact which the Court acknowledges with no suggestion of disapproval.[291] Moreover, in a larger sense, the case itself stands more for the proposition that robust discussion of public issues will result from unfettered criticism by the press than that the press should be required to publish in accordance with conventional concepts of fairness and balance.

Associated Press v. United States established that the first amendment does not protect predatory business practices in the press. But the Court was also careful to establish that its decision did not mean that publishers could be required initially to publish against their own judgment:

> It is argued that the decree interferes with freedom "to print as and how one's reason or one's interest dictates." The decree does not compel AP or its members to permit publication of anything which their "reason" tells them should not be published. It only provides that after their "reason" has permitted publication of news, they shall not,

[288] 328 U.S. at 349-50.

[289] *See id.* at 353, 356.

[290] New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

[291] *Id.* at 260-61.

> for their own financial advantage, unlawfully combine to limit its publication.[292]

Red Lion is perhaps most readily distinguishable on the ground that the fairness doctrine and accompanying regulations which the Court upheld were occasioned in the first place by the need to license broadcasters. As previously noted, broadcast regulation is most frequently justified on the basis of spectrum scarcity, a condition which traditionally has been thought to have no parallel in the print media. That was the explicit judgment of the Court in *Red Lion*, in which the Court actually declined to consider other grounds for regulation.[293] The argument has been made, of course, that the traditional distinction recognized between the broadcast and print media is largely specious.[294] I am inclined to agree, but abandonment of this distinction does not mean that the print media must therefore be subject to regulation; it can as well be said, as others have, that what is called for instead is an abandonment of much of the present broadcast regulatory structure.[295] Meanwhile, so long as *Red Lion* is itself predicated on a theory of unique scarcity, it has no ready application to the print media.

The Florida court does make persuasive use of statements in *Rosenbloom v. Metromedia, Inc.*,[296] the most recent of the Supreme Court decisions in the line of defamation cases begun by *New York Times*. In *Rosenbloom*, the Supreme Court held that all statements involving matters of general interest or concern are privileged against an action for damages in defamation unless the statements are knowingly false. In an opinion announcing the Court's decision, Mr. Justice Brennan had suggested that "[if] the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of assuring their ability to respond, rather than in stifling public discussion of matters of public concern."[297] And he had added the following footnote:

> Some States have adopted retraction statutes or right-of-reply statutes. . . . One writer, in arguing that the First Amendment itself

[292] 326 U.S. at 20 n.18.

[293] 395 U.S. at 400-01, 401 n.28.

[294] *See* Robinson, *supra* note 21, at 158-59; Note, *Concepts of the Broadcast Media Under the First Amendment: A Reevaluation and a Proposal*, *supra* note 21, at 104-05. *But cf.* Jaffe, *supra* note 21, at 785.

[295] *See, e.g.*, Sullivan, *supra* note 21, at 756-57. *But cf.* note 212 *supra* and accompanying text.

[296] 403 U.S. 29 (1971).

[297] *Id.* at 47.

> should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion. . . . It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly.[298]

While these statements alone might be read as supporting the Florida statute, in *Rosenbloom* they take on a more restricted meaning. *Rosenbloom* was notable chiefly because it finally made clear that the privilege in *New York Times* applied not only to defamatory statements concerning "public officials" or "public figures" but to otherwise private individuals whose activities were a matter of public concern as well. This extension was significant in part because it tended to undercut one of the grounds on which the earlier cases had seemed to rest. *New York Times* had involved public officials of whom it was later said in passing that their position might enable them to rebut defamatory statements more readily than could private individuals.[299] Similar reasoning was present in the *Butts* and *Walker*[300] cases which extended the *New York Times* privilege to statements concerning public figures whose position in life either invited public attention or whose purposeful activities had thrust them into the vortex of a public controversy.[301] The ability to command a forum for reply, however, was by no means the principal underpinning for the *Times* privilege. Indeed, well before *Rosenbloom*, it had become all but certain that the privilege was intended primarily to encourage "uninhibited, robust, and wide-open" discussion of public issues—no matter who might be involved. Numerous state and lower federal courts had so interpreted the *New York Times* rule,[302] and the

[298] *Id.* at 47 n.15.

[299] *See* Time, Inc. v. Hill, 385 U.S. 374, 391 (1967).

[300] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[301] *Id.* at 154-55 (Harlan, J.).

[302] *E.g.*, Time, Inc. v. McLaney, 406 F.2d 565, 573 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969) ("We conclude that the constitutional privilege extends to discussions by specific individuals, not associated with government, if those individuals are involved in matters of important public concern."); Garfinkel v. Twenty-First Century Publishing Co., 30 App. Div. 2d 787, 291 N.Y.S.2d 735, 737 (1968) (per curiam) (summary disposition of complaint warranted where accused publication involved "matters of general public interest").

Supreme Court itself had seemed to say as much in *Time, Inc. v. Hill* in the context of a privacy action.[303] Still, it was possible to offer the "ability to command access to a forum" argument in *Rosenbloom* because the Court had never quite foreclosed the question in a libel case. The plaintiff made that argument in *Rosenbloom* and in response to this argument Justice Brennan employed the language and footnote relied on by the court in *Tornillo*. Against this background, Justice Brennan was actually making two points, neither of which affords direct support for the Florida statute. First, he apparently supposed that some retraction or reply statutes might be appropriate in the case of "defamatory falsehoods." Narrowly limited, statutes of this sort presumably would be no more objectionable than an award of damages and might, in some cases, be more important to the injured plaintiff.[304] His second point, although acknowledging the case for access "not limited . . . to defamatory falsehoods," does so, I think, in order to suggest that libel actions themselves inhibit access to the press since they tend to discourage vigorous coverage of public issues. Thus in response to the plaintiff's argument against extending the *Times* privilege to private citizens, Justice Brennan observes that this position "conceives the individual's interest too narrowly."

While there is no precedent for *Tornillo*, there is also very little authority squarely opposed to it. Reply statutes of the Florida variety are few in number and have remained virtually untested by the courts on first amendment grounds.[305] An exception is found, however, in

[303] *See* 385 U.S. at 379, 387-88.

[304] Draftsmanship presents the principal difficulty with reply statutes in a defamation context. They must be neither vague nor overbroad, and they should not require a reply until there has been a finding of liability. Practically, therefore, they may not always be valuable to the plaintiff. The reply may not appear until the defamatory publication has already escaped effective rebuttal. A reply may also simply review and aggravate the original injury to reputation. Still, an argument can reasonably be made that a right of reply ought to be available as an additional or optional remedy in a case of defamation. *See generally* Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867 (1948); Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730 (1967). These were the two articles cited by Justice Brennan in his footnote in the *Rosenbloom* case, 403 U.S. at 47 n.15.

[305] *See* Note, *Vindication of the Reputation of a Public Official*, *supra* note 304, at 1746 n.104. At present, there appears to be no operative "equal space" statute except for the Florida provision. A former Nevada statute was repealed in 1969 by legislation which now provides only for retractions of defamatory publications. Act of April 14, 1969, ch. 310, [1969] Laws of Nevada 553; *repealing* NEV. REV. STAT. § 200.570 (1963). A Mississippi statute has been limited by judicial

Opinion of the Justices,[306] an advisory opinion of the Massachusetts Supreme Judicial Court delivered five days prior to the decision in *Tornillo*. In its *Opinion*, the Massachusetts court considers the constitutionality of a proposed statute creating a limited right of access to print media which publish paid political advertising. Under the statute, the publishers also would be obliged to carry advertisements expressing contrary views.[307] In a brief discussion, the court holds that the statute would violate the first amendment in its application to the print media.[308] Observing that the proposed bill "may produce the chilling effect of discouraging newspapers . . . from accepting any political

construction to require replies only to defamatory comment on the "honesty or integrity or moral character of the candidate. . . ." Manasco v. Walley, 216 Miss. 614, 630, 63 So. 2d 91, 96 (1953) (construing § 3175 of the Mississippi Code of 1942, ch. 19, § 12B, [1935] Miss. Laws 43 (now MISS. STAT. ANN. § 23-3-35 (1972)). Of course, this construction would be still further limited by the *New York Times* line of cases.

[306] ___ Mass. ___, 298 N.E.2d 829 (1973).

[307] Mass. House No. 3460, submitted to the Justices by the Massachusetts Senate on May 11, 1973, would provide:

> SECTION 1. Chapter 56 of the General Laws is hereby amended by inserting after section 39 the following two sections:
>
> "*Section* 39A. If the owner, editor, publisher or agent of a newspaper or other periodical of general circulation publishes any paid political advertisement designed or tending to aid, injure or defeat any candidate for public or political office or any position with respect to a question to be submitted to the voters, he shall not refuse to publish any paid political advertisement tending to aid, injure or defeat any other candidate for the same public or political office or any other position with respect to the same question to be submitted to the voters in the primary or election unless such publication would violate section forty-two or any other provision of this chapter.
>
> "Whoever refuses to comply with this section may be ordered to comply therewith in a suit in equity commenced by any aggrieved candidate or other person or persons and shall forfeit to him or them not less than one hundred dollars. The court may award such additional damages as it may deem proper, together with costs of suit, including a reasonable attorney's fee.
>
> "*Section* 39B. The owner, editor, publisher or agent of a newspaper or other periodical of general circulation shall not charge for the publication of any paid political advertisement an amount greater than the local display rate charged for a paid nonpolitical advertisement offered under similar circumstances and of comparable size, complexity, and location in the same edition or issue of such newspaper or periodical:
>
> "A candidate or other person or persons aggrieved by a violation of this section may recover treble the differential between the amount charged and the amount that should have been charged, plus court costs, and a reasonable attorney's fee."

[308] ___ Mass. at ___, 298 N.E.2d at 831-35. The court had also held that an earlier draft of § 39A would be unconstitutional, but on the grounds of "impermissible vagueness." Opinion of the Justices, ___ Mass. ___, 284 N.E.2d 919, 921 (1972), 7 SUFFOLK U.L. REV. 711 (1973). In its present *Opinion*, the Court notes that "[t]he proposed legislation now considered by us remedies almost all of the difficulties which were found in the previous bill." ___ Mass. at ___, 298 N.E.2d at 831.

advertisements,"[309] the court adds:

> The situation at which § 39A is directed may be the "monopolistic" status of certain news publications. However, compulsion to publish all responsive political advertisements, applicable to all newspapers and other publications of general circulation in the Commonwealth, goes beyond what is essential to the furtherance of any interest of a State in its citizens having a right of access to newspapers in order to express, at their expense, political ideas which otherwise would not be published. . . . Indeed, no set of circumstances may exist which would support a legislative mandate that a newspaper or other publication of general circulation must publish a political advertisement.[310]

Democratic National Committee also strongly indicates that the Supreme Court would not accept legislation of the sort presented in *Tornillo*. This conclusion is implicit in the views expressed by the Chief Justice[311] and is entirely consistent with the position taken by Justices Douglas and Stewart in their separate opinions. Justice Brennan is fairly explicit in his views concerning regulation of the print media:

> 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.[312]

Professor Emerson, although critical of a comprehensive right of access to newspapers, has suggested that reply statutes and even a broader obligation to print all editorial advertisements might conveniently be enforced without substantial adverse impact.[313] The adminis-

[309] ___ Mass. at ___, 298 N.E.2d at 834.

[310] *Id.* at ___, 298 N.E.2d at 834-35.

[311] The Chief Justice, joined by both Justices Rehnquist and Stewart, observes in *dictum*: "The power of a privately owned newspaper to advance its own political, social and economic view 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." CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2094 (1973).

[312] *Id.* at 2126 n.12.

[313] T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 669-71 (1970). In practice, many newspapers make effective provision for replies, either as a matter of journalistic ethics or even more formally. Probably few journalists would be prepared, however, to accept their own reply procedures as legal obligations. *See* Daniel, *supra* note 21, at 789-90. Professor Chafee considered reply statutes at length, but concluded that they were probably unwise:

> In spite of what has been said about the possible desirability of the compulsory right of reply, it is my opinion that the chief cure for falsehoods in mass communications should be sought outside the realm of law. Reckless misstatements in a particular

trative burdens probably would not be insurmountable. But the question of adverse effect is another matter. Reply statutes do present a substantial threat of the "chilling effect" which concerned the Massachusetts Justices. Newspapers simply may be less ready to cover election campaigns or public issues if they must provide free space for all replies.[314] While the effect probably would be felt more keenly by small publishers, even major daily papers literally cannot afford to provide free space for all the readers' contributions that they may receive.[315]

Obviously the more limited the scope of the right to reply, the more limited will be the likely impact of the right. But this is at best a weak proposition of degree which still leaves substantial room for undesirable results. The publisher of a four-page, single-fold weekly in some rural section of Florida, for example, may find little comfort in the relatively limited scope of the Florida statute if, in exchange for editorial opinion on the candidacies of a dozen would-be local school board members, he must allow perhaps one-fourth or even one-eight of a week's space for their replies. Multiply the drain on his space by another half dozen elections of local interest, and he may sacrifice as much as a week's production in every year. In these circumstances,he may easily persuade himself to cover the Loyal Bercans' potluck supper and let the candi-

newspaper are not isolated events in its life. They are an expression of the soul of that newspaper. Occasional attacks on a few falsehoods here and there, by libel suits or by new legal remedies, may accomplish a little, but they will not get the kind of newspaper it needs so long as irresponsibility prevails to a substantial extent among editors and owners. And law cannot reach what is inside human beings. The community must proceed on a broader front and with other weapons. Somehow the community must make the newspaper want to be better. If this task be hopeless, then a way must be found to get another and better newspaper started.

1 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 195 (1947). *See generally id.* at 145-95.

[314]Former *New York Times* Managing Editor Clifton Daniel has estimated that if the *Times* had printed all of the publishable letters received in 1969, "they would have filled up at least 135 complete weekday issues . . . ." Daniel, *supra* note 21, at 785.

> Every day of the year *The New York Times* receives an average of one million, three hundred thousand words of news material. At best, a tenth of it can be printed. A highly skilled, high-speed process of selection is involved—a massive act of discrimination, if you like—discrimination between the relevant and the irrelevant, the important and the unimportant. Actually, 168 bushels of wastepaper, most of it rejected news, are collected and thrown away every day in the editorial departments of *The New York Times*.

Id. at 785-86.

[315]Indeed, considerations like these led the Florida Chapter of the ACLU to argue in *Tornillo* that the Florida statute is violative of due process as a taking of property without payment of just compensation. *See* Brief for Florida ACLU as Amicus Curiae at 27-36. The Florida Court holds, however, that the statute "is a valid exercise of the state police power to assure the integrity of the electoral process." *Tornillo opinion* 11.

dates go hang. Nor is it obvious that the major daily newspaper will escape the pinch. Many metropolitan papers attempt to provide a comprehensive editorial review of candidates for state-wide elections. The review may involve dozens or even scores of candidates and may fill several editorial pages over a period of days. If an equal number of pages must then be set aside for free replies, even the largest paper may be tempted to forego or curtail at least some of its customary coverage.

While the facts in *Tornillo* do not present quite the problems just discussed, they do suggest another source of concern for the "chilling effect." The Florida statute is intended partly to prevent unfairness to the candidate who is singled out for attack. But it promotes another kind of unfairness. The candidate who is first attacked and then replies gets a kind of double bonus: the net effect of the exchange may be to cancel whatever persuasive effect either the editorial or the reply might independently have had; but the candidate still gets two exposures. In turn, the double exposures can provide an edge in terms of voter recognition. Sophisticated editors will readily understand this possibility and may decide, on balance, to withhold at least marginal comment in order to avoid exaggerating the appeal of an otherwise little-known candidate.

These problems are not at all exhaustive, but they illustrate some very practical adverse effects of even limited reply statutes. As the effects multiply, so will the pressures to "correct" them. An obligation to print paid editorial advertisements upon demand might seem a desirable alternative, but even it would not escape serious practical objections. For example, as Chief Justice Burger observes in *Democratic National Committee*, a right of access begun through paid advertising would either simply favor the wealthy or require further efforts at control in order to strike a balance.[316] In short, Professor Emerson's response to these alternatives seems too easy. The real problem with them is that they cannot be enough. Recognition of the claims to access represented in these proposals will inevitably lead to enlarged claims until, in time, we can expect a comprehensive, controlled right of access to the press at large. This will require, of course, a corresponding redefinition of the first amendment, but that will present no insurmountable obstacle either, so long as the first steps have been taken. The difficulty with the first amendment is that there are no real second lines of defense. And the result has been summarized in two sentences by Professor Emerson himself:

[316]93 S. Ct. at 2096-97.

> A limited right of access to the press can be safely enforced. But 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.[317]

One cannot make these points without experiencing a sense of *deja vu*. Certainly they have been made before.[318] Yet so long as they are not self-evident—so long, indeed, as access is at the cross-roads—one can feel an obligation to continue the debate in terms which may suggest again why the fundamental first amendment reorientation implicit in *Tornillo* ought not go unchallenged.

IV. Access to the Mass Media: A Dissenting Assessment

A "right" of access to the mass media can obviously exist in meaningful terms only if some provision is made for its enforcement. The access proponents have suggested three principal means by which an affirmative right might be implemented. The first is legislation; a second is some form of administrative oversight—patterned, perhaps, after the FCC's administration of the fairness doctrine; the third is access enforced by the courts. Probably all three will have a role to play if a comprehensive access doctrine is developed. A limited statutory right of access to the print media has been upheld in *Tornillo*; if that decision stands, additional legislation may appear in other states and, perhaps, in Congress as well. The courts, of course, can expect to be drawn into the development of an access doctrine to resolve disputes arising under the legislation. Indeed, unless the Supreme Court issues an opinion far more definitive than any it has yet handed down, the courts can also expect continued efforts to establish a right of access based on state action. Moreover, since neither courts nor legislatures are well suited to the task of administering access on a continuing basis, administrative

[317] T. Emerson, The System of Freedom of Expression 671 (1970).

[318] Professor Chafee, who wrote with greater evidence of real understanding of the media than have many commentators since, believed that increasing professionalism and a resulting sense of moral obligation would be preferable and more workable than laws intended to impose a public service obligation. While he would allow some room for FCC regulation of broadcasting, he resisted broader legislation on these grounds: first, that there is really no place to draw the line; second, that laws intended to produce impartiality cannot be drawn clearly enough to be workable in practice; and, third, that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." 2 Z. Chafee, Government and Mass Communication 628-33 (1947). *See generally id.* at 624-50. *See also* authorities cited note 21 *supra*.

agencies will almost certainly be drawn into the role of immediate umpire.[319] For these reasons, and because the objectionable aspects of a comprehensive access doctrine are not substantially affected by questions of jurisdiction, I shall not bother to draw distinctions among the three main avenues of enforcement.

Something needs to be said at this point, however, about the distinctions which might be drawn among the media. The commentators who have resisted the access proposals at length have done so primarily in the context of specific media, particularly the broadcast media. This relatively narrow focus has had some advantages; a specific focus makes it convenient to offer equally specific objections which may well carry greater force than would more general observations. Yet specific objections can tend to obscure still larger and more sweeping objections, either because they are not identified or because, although identified, they do not lend themselves to extended articulation in a specific context. In my opinion, the proposals for access are most objectionable on grounds which are amplified as they cut across the established mass media. The reasons why begin with a brief examination of the conceptual cost of the access doctrine.

A. *The Conceptual Cost*

1. The question of suppression. It is surely unnecessary to describe in detail the access doctrine's most obvious cost: the possibility that the state may exercise its power to deny enforcement in some particular case. In conceptual terms the power to enforce also necessarily imports the power to withhold enforcement. Thus an obvious but nonetheless necessary cost of the access doctrine is that the state must acquire new powers not only to require particular publications but also to suppress them. This conceptual reality is not lessened by arguments which point to instances of suppression in the traditional private editorial process. Private suppression unquestionably exists; the very essence of the editorial function obviously is to decide what shall be published. But to acknowledge this fact is not to diminish the larger reality:

[319] In *Democratic National Committee*, Chief Justice Burger suggested that a right of access would require oversight of "far more of the day-to-day operations of broadcasters' conduct . . ." 93 S. Ct. at 2098. The statement is not an exaggeration. Indeed, the equal time and fairness provisions, which are no more complex than would be required under a controlled right of access, have nevertheless required the intervention of the FCC staff into determinations of broadcast content quite literally on a day-to-day basis. *See* Wall Street Journal, Oct. 2, 1972, at 34, cols. 1-6.

reason. Unless the system were administered under comprehensive rate regulation, it would amount to little more than a series of microcosmic *laissez-faire* market-places.[324] As both the Chief Justice and Judge Wright recognized,[325] an access doctrine based solely on the ability to pay the going rate would provide access most often to those who can afford it. That might be constitutionally defensible in a common carrier system,[326] but politically it would be most unattractive and would obviate most of the gains the access proponents seek. Yet rate regulation—or even free time—would not resolve the difficulties inherent in a common carrier concept of access.[327] What works well enough with the telephone and telegraph would by no means be satisfactory in the mass media. The established media simply cannot guarantee simultaneous time or space to everyone who may wish to speak or write at the same time, and a randomly ordered "waiting list" would scarcely lend itself to effective timely discussion of public issues.[328] For very practical reasons, then, most proposals for access assume a limited right under which individual claims to access must be weighed against other competing claims, and with that sort of limited right of access, objectivity and balance are required for the reasons we have seen.

Yet if objectivity and balance are the necessary concomitants of the access doctrine, they are also its real, if subtle, conceptual costs. They are costs, in a perfectly conventional sense of the term, because they limit what is possible. The private press is free to establish its content according to whatever judgments, good or bad, suggest themselves from time to time; the state is not. What the state must do instead is avoid serving any judgment which does not essentially contribute toward the establishment of a balance. The result in the latter case is a press that may have less capacity to do harm. It will also have less capacity to do good. These are the necessary limitations of the golden mean. Of course, this observation is not new. It is implicit in much of what is said by the Justices (including those in dissent) in *Democratic National Committee*,

in Commission proceedings, Democratic Nat'l Comm., 25 F.C.C.2d 216, 234-35 (1970), and, in more muted form, in law review commentary. See Johnson & Westen, *supra* note 5, at 627-29, 628 n.235.

[324] *Cf.* Botein, *supra* note 4, at 440.

[325] CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2096-97 (1973) (Burger, C.J.); Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 664 (D.C. Cir. 1971) (Wright, J.).

[326] *But see* Marks, *supra* note 21, at 981-82.

[327] *See* Jaffe, *supra* note 21, at 787-89. Professor Jaffe is persuasively critical of proposals for rate regulation.

[328] *See* Marks, *supra* note 21, at 981-82; 85 HARV. L. REV. 689, 697 (1972).

how is this not true today?

and it is clearly what Madison had in mind in his memorandum to the French Ambassador that explained why the American press was not more closely confined:

> Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits.[329]

Still, conceptual analysis has its own limitations. One may rationally choose to pay a conceptual price in exchange for apparent improvements in one's practical circumstances. The ultimate question, then, is whether the developing access doctrine offers that exchange.

B. *The Promise and the Reality: A Pragmatic Analysis.*

The twin promises of the access doctrine are increased opportunities for the effective expression of diverse opinion and thus more "robust, wide-open" debate in "the media of greatest impact." Reality, I think, promises something quite different. It has been suggested that access will not bring about greater diversity.[330] I think that is a fair assessment of the prospects in any given medium. But the problem goes beyond that when it is considered in terms of all the media. A controlled right of access to the press at large means not only no substantial gain in diversity, but also the distinct possibility of a new consolidation of American orthodoxy in which balanced mainstream thinking will come to dominate the press even more so than at present while serious dissent will be, in relative terms, even more surely suppressed.

1. Robust debate and a balanced diversity. In the first place, the new diversity offers no real prospect of a robust debate. On the contrary, what is offered is a managed debate in the context of a balanced diversity. The reason why is suggested by the majority's basic assumption in *Democratic National Committee*: careful steps must be taken to ensure, in effect, that no side of the debate begins to gain dominance. If one side does begin to dominate, another must be promoted (and the first therefore either diluted or suppressed) in order to achieve the balance that is the price of state intervention in the process. It is in this respect

[329] *Quoted in* Near v. Minnesota, 283 U.S. 697, 717-18 (1931).

[330] *See, e.g.*, Robinson, *supra* note 21, at 161-62.

that the conceptual limitations of the access doctrine will first ripen into practical reality.

The immediate practical consequence is not altogether clear. In his opinion, Judge Wright spoke of the need for "reasonable regulations" (whatever that means);[331] law review commentary is filled with individual suggestions for implementing access. Consider the following proposal, for example:

> It is by the judicial process that we shall establish the contours for answers to questions which a working right of access obviously presents. What is a minority point of view? When and where shall such opinions be heard? Has some significant space already been given to a particular controversy? Isn't it possible to reach saturation of a given subject? When is the decision not to publish on a particular issue a "news" decision and when is it a decision based upon an effort to obstruct the opinion process? Surely resolving these problems is no less baffling than deciding when a book is "without redeeming social importance" or when it is marketed against a "background of commercial exploitation." But which task accommodates itself more easily to the basic theory of the first amendment? A task which winnows out that which is to be suppressed, or a task whose point of inquiry is whether the communications media have been in default and whether a particular point of view has been suppressed?[332]

One may doubt in passing whether the final rhetorical questions in the quoted passage resolve themselves in the way their author supposes. But that is not the point. The point is that the "contours" of the access doctrine will almost surely develop very much as this proposal suggests. These questions and others like them will have to be considered and resolved if the state, in its efforts to enforce access, is not also to undo the ideological balance in the press.

[331] Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971):

> [I]nvalidation of a flat ban on editorial advertising does not close the door to "reasonable regulations" designed to prevent domination by a few groups on a few viewpoints. Within a general regime of accepting *some* editorial advertisements, there is room for the Commission and licensees to develop such guidelines. For example, there could be some outside limits on the amount of advertising time that will be sold to one group or to representatives of one particular narrow viewpoint. The licensee should not begin to exercise the same "authoritative selection" in editorial advertising which he exercises in normal programming. . . . However, we are confident of the Commission's ability to set down guidelines which avoid that danger.

Id. at 664 (emphasis in original).

[332] Barron, *An Emerging First Amendment Right of Access to the Media?*, *supra* note 5, at 496.

Meanwhile, the larger outlines are reasonably clear. As statutes are enacted, regulations implemented and precedents established, the day of the clear editorial stand will have largely passed.[333] I suppose it requires a kind of ontological faith to lament its passing. It may require a certain naivete as well, inasmuch as the press has not always taken clear stands on even the most vital issues. And yet I suspect—unaided by the elaborate content analyses and retrospective polls it would require to prove the point—that we do owe something to the capacity of the press to change its posture from indifference to commitment when moved to do so. The course of the civil rights movement and the war in Viet Nam might have been settled in the streets alone; I could be persuaded, however, that attitudes reflected in the press have contributed something toward their resolution. If that is so, the contributions—whether viewed as good or bad—have not been the product of the kind of balance a "working right of access" will require.

Access enforced by the state almost surely means the loss of what Professor William Canby has recently termed "the right to persuade."[334] In an article which identifies the problem but, I think, fails to appreciate the reasons why it is inherent in a "right" of access, he argues that some provision ought to be made to allow individual arguments to prevail when they are meritorious—that is, when they gain a substantial number of adherents.[335] His concern is well-placed; it is not at all clear why we should want the media converted into sterile academics of balanced debate. The difficulty is that we cannot have things both ways: we cannot, in other words, expect to establish a system in which the state is asked to restore a lost "equilibrium" and, at the same time, to allow the more appealing arguments to prevail.

In the search for balance, another phenonemon will also be at work. Since it is not possible for the media to accommodate everyone who may care to speak concerning a given issue at the same time, it will frequently be necessary to search for representative points of view rather than distinctly individual arguments. Indeed, this is routinely assumed by most of the access proponents.[336] The difficulty here, however, is

[333] *See* Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes*, *supra* note 21, at 91.

[334] Canby, *supra* note 5.

[335] *See id.* at 754-57; *cf.*, Note, *The Public Interest in Balanced Programming Content: The Case for FCC Regulation of Broadcaster's Format Changes*, *supra* note 5, at 955-56, in which the author offers "a theory of proportional representation, whereby significant blocs of listeners are entitled to proportionately significant blocs of programming." *Id.* at 956.

[336] "It is self-evident that a system which contemplates personal access on demand is impossi-

that representative points of view tend in themselves to strike a balance between the extreme edges of the spectrum of opinion that they represent.[337] Thus the larger balance which is inherent in the access doctrine will be complemented and reinforced by a further balance in the very opinions that are offered.

The result of all of this will be debate only in the most pointless and distasteful sense of the term: arid, dull and, on the whole, unpersuasive.[338] Mill's contentions concerning the nature of effective discourse come to mind. Debate is meaningful, he argued, only when it is conducted passionately, without restraint, by those who advocate points of view which are themselves passionately held. Otherwise, the effect resembles learning by lecture: opinion is abstractly received and held, untested, and may interfere with real capacity for understanding:

> [E]ven if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this . . . the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience.[339]

ble. There must always be some guidelines that determine who shall speak. It is the exchange of ideas which is the goal." Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 1043 n.973.

[337]This is one of the objections which Justice Brennan offers to the fairness doctrine. *See* CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2130 (1973) (dissenting opinion). While his objection is valid, the access doctrine offers no improvement. A representative balance is the unhappy accompaniment to any extensive government effort to satisfy competing claims to speech.

[338]Professor Kalven has responded in part to the argument for fair debate this way:

> [I]t misconceives the utility of bias in public discussion. Public discussion is all a sort of adversary process on a grand scale, kept alive by the lively and firm expression of opinions. The Supreme Court has . . . recognized the point in the *New York Times* case when it speaks of the commitment to discussion on public issues that is "*uninhibited, robust, and wide open*." It is most unlikely that public discussion will have that muscle tone if each publisher must worry about being fair to both sides.

Kalven, *supra* note 21, at 47.

[339]J.S. MILL, ON LIBERTY 46-47 (McCallum ed. 1947). Of course, Mill can be cited from more than one perspective. Professor Barron suggests that Mill was moved more by fear of power than by fear of government and can therefore be read in support of the arguments for access. *See* J. BARRON, FREEDOM OF THE PRESS FOR WHOM? 81-85 (1973). But one can ask whether Mill would have thought the access doctrine, as it actually seems likely to develop, a worthwhile exchange.

One need not look far to find contemporary support for these observations.[340] The lifeless quality of mannered debate is readily apparent when one considers the fairness doctrine and the "robust" debate which it has engendered. Surely no one who has heard or seen the typical broadcast editorial or the typical "responsible" reply can fail to sense something of the futility in argument-according-to-format—argument endlessly in check in a game which admits no mate. There are exceptions, undoubtedly. Yet in the main, I think, robust debate and a balanced diversity are inherently at odds.

2. *The new centrism.* One might accept a certain loss in vigor, however, if balanced debate could be relied on to expose a truly wide-open spectrum of opinion. If the inherent centrism of the mass media were merely altered so that genuinely divergent opinion were exposed with some regularity, one could see a gain. However sterile the debate in the media, the mass audience might at least be encouraged to engage in robust debate in other, less constrained circumstances.

Practically, however, there seems little likelihood that access will bring wide-open discussion. What seems likely instead—if not certain—is simply the establishment of a new and expanded centrism. What seems equally likely is that the new centrism will be gained only at the cost of a relatively greater degree of suppression of serious dissent.

That the present media are primarily centrist in their orientation is, I take it, commonly accepted. There are fairly clear reasons why. In the first place, the desire to appeal to a mass audience fairly assures content aimed at common denominators, content which will attract more than it repels. There are additional reasons. The ethics and practice of mass journalism—a journalism which prizes the appearance of objectivity in a practice which reflects what Sander Vanocur calls the "rat pack" psychology of what is important—tend rather clearly to reflect the middle ground, the common causes and the conventional wisdom.[341] The background of the media proprietors provides a further impetus toward centrist points of view. There is little reason, after all, to expect those who operate the media to invest consistently in attacks upon the system which supports them.

[340]The Supreme Court acknowedged Mills' argument when it upheld the reply provisions of the fairness doctrine. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 n.18 (1969).

[341]Conversation with Sander Vanocur, August 7, 1973, Duke University, Durham, North Carolina.

There is also little reason to doubt that the access doctrine will tend somewhat to broaden the present spectrum of opinion in the media. Once an initial right of access is established, courts and other administrators should not find it particularly troublesome to enforce the right in cases which offer no more than another side to an established debate. Publishers and broadcasters who fail to sense the particular interests of their audience at a point in time will find the audience able, as it were, to serve itself. I think it fair to speculate, however, that in all but the exceptional case, the broadened spectrum will remain decidedly conventional in its expression and only slightly less so in its substance. Certainly that has been the experience to date in the cases which have considered access. Labor issues; discrimination in the placement of Negro wedding announcements; blue-pencilled movie advertisements; Democratic Party opposition to the Republicans; conventional opposition to the Viet Nam War—these and similar expressions of dissent have formed the substance of the proposals for access. No one could deny that they are issues which deserve to be raised in the press. But it would require a narrow view of the ideological spectrum to suggest that they are anything but establishmentarian in their range. If all of these proposals to publish had been resolved in favor of their proponents, the range of thought represented in the press might have been widened by a notch or so, but surely little more.

A tendency toward the mainstream is also suggested by the rather obvious economic implications of access. As they are most often advanced, the proposals begin with the notion that those who will gain initial admission to the media will be those who can afford to pay the going rate for advertising. Yet, as we have seen, the proposals cannot stop there. In practical, political terms, the doctrine must be broad enough to provide for at least some "right to respond" independent of ability to pay. It is at this point, however, that economic consideratons begin to confine the scope of what can be said. So long as a portion of the incremental costs of access must be absorbed by the media proprietors, the proprietors will have understandable reasons for resisting an unlimited scope of debate. That has been our experience with the fairness doctrine, and it ignores economic realities to suppose that these same pressures will not also shape the access doctrine.

Meanwhile, even as the mainstream is slightly widened and reinforced, non-mainstream thinking will still be apt to find itself excluded—the more so as its subtance and expression depart from what is conventional. The apparent grounds for exclusion will have little initial relationship to the access doctrine. Instead, relying on definitions

of obscenity, speech-action relationships, the clear and present danger test, interest balancing—even in some cases, general canons of "good taste" and "suitability for general audiences"[342]—courts and administrators can be expected to reject a fairly distinct category of potential publications. The rejections will not normally be addressed to the more abstract ideas but rather to their particular expression. For serious dissent, however, that will represent a very real form of suppression.

The New Left and related movements offer an instructive model. While they are undeniably rooted in ideology, it is nearly impossible to separate the ideology from rather particular forms of expression. There is scarcely any satisfactory translation of "fuck the draft"; obscene and indecent expression are part and parcel of the contempt for conventional society which adherents to these movements seek to convey. Yet the form of the expression, and thus the ideology itself, are of precisely the sort which we can expect to be excluded from the mass media whether a right of access is established or not.[343]

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[342] *See* Marks, *supra* note 21, at 994-97. *See generally* Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, *supra* note 5.

[343] Consider, for example, the FCC's action in the case of WUHY-FM, Eastern Education Radio, 24 F.C.C.2d 408 (1970). The licensee aired a taped interview with Jerry Garcia, leader of the rock group "The Grateful Dead." The interview was offered as part of an "underground" program intended to reach "youthful persons" in the Philadelphia area. Garcia discussed a number of subjects which, as the Commission was to point out in its subsequent opinion, might have been expressed in conventional terms: ecology, politics and music, to suggest a few. His language, however, was peppered with obscenities, primarily the words "fuck" and "shit." The Commission, with two members in dissent, reviewed the circumstances surrounding the broadcast, determined that the licensee had violated the public interest in permitting the broadcast of "indecent" matter, and imposed a "forfeiture"—that is, a cash penalty amounting to a fine. *Id.* at 415. The majority opinion provides a fairly clear illustration of the ways in which unconventional expression may be suppressed even as the principle of "robust, wide-open debate" is reaffirmed in ringing terms. A broadcast licensee, the majority asserted, has the "right to present provocative or unpopular programming which may offend some listeners." *Id.* at 410. But that right does not extend to speech which "has no redeeming social value, and is patently offensive by contemporary community standards, with very serious consequences to the 'public interest in the larger and more effective use of radio.'" *Id.* The obvious argument that Garcia's language is its own statement of his point of view did not escape Commissioners Cox and Johnson in dissent. Not so with the majority, however:

> The licensee argues that the program was not indecent, because its basic subject matters . . . "are obviously decent"; "the challenged language though not essential to the meaning of the program as a whole, reflected the personality and life style of Mr. Garcia"; and "the realistic portrayal of such an interview cannot be deemed 'indecent' because the subject incidently used strong or salty language" . . . We disagree with this approach in the broadcast field. Were it followed, any newscaster or talk moderator could intersperse his broadcast with this expressions, or indeed a disc jockey could speak of his records and related views with phrases like, "s--t, man, . . . , listen to this mother f----r", on the ground that his overall broadcast was clearly decent, and that this manner

Indecency and obscenity are not, of course, the only grounds on which unconventional expressions of dissent will be excluded from the media. There are embedded in the law of the first amendment a number of related devices for suppressing speech which is offensive or dangerous. Among these, I suggest that it is the speech-action test and its conceptual predecessor, the clear and present danger test, which will be drawn into most frequent use. Everyone knows, of course, how these tests work to propel [illegible] unchecked unless it has, in effect, the present capacity to [illegible] which is itself prohibited. Thus, in the classic example, [illegible] to yell "fire" in a crowded theater, not because [illegible] but because there is no right to indulge panic in a crowd. These elementary principles will find a ready application in the racism context. It is precisely at the point that genuinely revolutionary calls to arms [illegible] immediate action that they will be suppressed. Black militants may be heard—but not when what they propose [illegible]

[illegible] presentation reflected the "personality and lifestyle [illegible] like it is." The licensee itself notes that the [illegible] essential to the presentation of the subject matter [illegible] are obvious." We think that is the precise point here [illegible] "unwarranted or [having] no reason [illegible] Webster's Third New International Dictionary, Fifth Ed., p. 435). There is no valid basis [illegible] in promoting its widespread use in the broadcast field.

[illegible] The majority added:

"We conclude this discussion as we began it. We propose no change [illegible] in promoting robust, wide-open debate. . . . Simply stated, our position [illegible] right, in this case—is that such debate does not require that persons being interviewed on radio or television employees on talk programs have the right to begin their speech with [illegible] or use "f——", or "mother f——" as gratuitous adjectives throughout [illegible]

[illegible] at 415.

Professor Barron is critical of the Commission's decision in *WLBT*, as he is of other commission actions enforcing [illegible] morality, but seems to argue in effect that access will at least result in more [illegible] and predictable suppression:

"Enforcement of a right of access to broadcasting is not designed to broaden exposure to the obscene. The decision to do it for that matter. Access as a right is dependent to some [illegible] established set of program content standards dealing with obscenity. The corollary, therefore, is that a right of access is dependent on censorship, a minimal censorship, to be sure, but nonetheless censorship. But the censorship must be one whose standards are public and whose criteria will be constitutional instead of submerged, private extra-constitutional and egocentric as are the censorship standards now in actual use in American broadcasting."

J. BARRON, FREEDOM OF THE PRESS FOR WHOM? 287-88 (1973). If this is supposed to be an advantageous development, perhaps one can be pardoned for concealing one's gratitude behind a cough.

new violence to the cities. White racists may speak and publish—but not at the possible cost of still more violent reactions. Youthful extremists may call for institutional reforms—but not for bombing of the institutions. And so on. The list multiples itself readily, and in these kinds of cases, I submit, it is not at all unlikely that the expressions will be excluded.

But what has this to do with access? Is it not merely an illustration of the conventional proposition that first amendment rights are not absolute? That, after all, we are not to be taken literally when we speak of "robust, uninhibited, and wide-open" debate? Would not those whose points of view are excluded from the mass media still be free to go on as they now do—seeking other methods of expression while occasionally making such nuisances of themselves that they qualify as legitimate "news"? In a sense, the answer to these questions is yes. In immediate practical terms, a right of access will do little more than consolidate and reinforce the inherent centrism of the mass media. It will be a "new centrism," but only in the degree to which it is balanced and slightly widened. In other ways, however, the realities of the access doctrine will have a direct relationship to the realities of a greater suppression of dissent and the corresponding establishment of a new American orthodoxy.

3. The new American orthodoxy. This will come about, I suggest, as a result of interaction between two sets of considerations. First, those whose views continue to be suppressed will not in fact find themselves in their accustomed position. In relative terms they will be worse off. By definition, they will be fewer in number: only the seriously disaffected will remain outside the pale. As a result, they can be expected to feel still more isolated, more threatened, and thus more desperate than they do now. The implications of an increased sense of alienation among radical dissidents are scarcely minor. In a prophetic "note to liberals," New Left activist Tom Hayden has warned that violent confrontations—"an absolute right to resistance"—become necessary "when the democratic system is less than pure, when in fact it is corrupt . . . [and] First Amendment rights are ineffective . . . ."[344] Whether the democratic system is "corrupt" in some absolute sense is, of course, beside the point; the question is how the system is perceived by those who feel themselves affected by it. And the first effect of the new centrism which the access doctrine promises will almost certainly be a sharpened sense

[344] T. HAYDEN, TRIAL 44 (1970).

of institutional corruption among those who remain outside the widened mainstream. In effect, the access doctrine will mean they are no longer merely pitted against an amorphous "establishment." They will be able to contend with some justification that it is the government itself which has set them apart.

At the same time, the occasions for suppression may actually increase as courts and administrators encounter new difficulties in measuring speech against action in the unaccustomed context of the mass media. Traditionally, this kind of evaluation has taken place, in a sense, after the fact, usually in the setting of a criminal prosecution.[346] A right of access poses the problem in a different setting. It will be necessary to decide in advance what effect the proposed speech will have in circumstances not yet clearly developed. The decision will be complicated by the fact that the speech will be intended not merely for a handful of partisans but rather for an unseen and thus unpredictable audience at large. The point involved here is a fine one, and necessarily tendentious, but I do not think it wholly unwarranted to suggest that the new settings in which these decisions will take place may lead to an enlarged body of cases in which speech will be categorized, in effect, as undeserving of first amendment protection.[348] In this sense, as I have said, Professor Jaffe's concern for the suppressive effect of the access doctrine has real substance.

It is an effect which will be heightened in direct relationship to the impact of the media. If the media have merely the power to confirm existing attitudes and to influence those which are unformed, the tendency of an access doctrine which can deliver no more than a new consolidation of centrist points of view will be, nonetheless, to raise new

[346] *E.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1968); Herndon v. Lowry, 301 U.S. 242 (1937); De Jonge v. Oregon, 299 U.S. 353 (1937). Professor Barron has observed that a right of access is unlikely to develop "unless it is made very clear that . . . [the right] does not compel the broadcast media to transmit all material submitted no matter how obscene or socially corrosive." J. BARRON, FREEDOM OF THE PRESS FOR WHOM? 288 (1973). On the other hand, he has concluded "reluctantly" that there may have to be some "access for hate." *Id.* at 301. How these two positions are to be reconciled from case to case is not made clear. A suggestion of a likely approach made in the *Georgetown Law Journal* affords little peace of mind as to results:

> Clearly, groups attempting to sponsor an advertisement have an interest in seeing their ideas reach the public. The public, as a consumer of ideas, has an interest in being exposed to varying opinions. But the government has an interest in maintaining the public peace and order. The potential disruption, real or imagined, resulting from an editorial advertisement must be balanced against government's concurrent duty to protect the rights of all its citizens.

Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 888-89.

[348] *See* text accompanying note 321 *supra*.

barriers to the effective expression of dissident thought. Persons whose minds are made up obviously do not make good listeners. The problem increases as even greater powers of persuasion are ascribed to the media. If the access proponents are correct in their assumptions concerning the "media of greatest impact," the access doctrine may well establish the outlines of a new orthodoxy. It will still be an orthodoxy of middle-thinking, distinguishable in substance from what we now have only in the degree to which it is broadened and more balanced. But it will deserve the label orthodoxy, nonetheless, as it comes increasingly to shape and hold attitudes and beliefs of the American people.

I would be unwilling to posit a result so dramatic if it were not for the potential effect of a second set of considerations. Professor Jaffe has dismissed the assumption that the American people can be manipulated by the media as "maddening," an "hysterical overestimation of media power and underestimation of the good sense of the American public."[347] In traditional circumstances I would agree. But traditional circumstances have implied a healthy skepticism toward the press, a skepticism engendered in no small part, I suspect, by the fundamental assumption that the press cannot be relied upon to be fair and balanced in its content. There is probably no more satisfying evidence of a basically healthy relationship between a free press and the people who are served by it than outraged protests against bias, unfairness and other similar abuses. Of course, neither the abuse nor the outrage is valuable; what is important is that the press is free to err (which is merely to say that it is free to commit itself) and the people are sufficiently aware to sense the error.

The access doctrine and the regulatory structure which it necessarily implies threaten that relationship in both of its essential parts. To insist on a balanced diversity in the press is to diminish its capacity for good as well as bad. But the effect goes beyond that. The dangerous quality of the access doctrine lies in the suggestion that the media can be "made safe for democracy" if we will merely trust others—the regulators—to do the job. The problem is not so much that they will not succeed but rather the romantic naivete that entertains the notion that they may. It is an innocence which is dangerous, rather than merely foolish, because it can be gained only at the expense of the skepticism which is the single reliable defense against abuse of freedom of the press. To the extent that the people doubt the media, the manipulative power

[347] *Cf.* Jaffe, *supra* note 21, at 787-92.

of the media is correspondingly slight. It is only when the guard is relaxed, when the assumption is made that something meaningful has been done to eliminate media "problems," that whatever latent influence may exist in the relationship between mass media and a mass [illegible] The access doctrine, which poses as [illegible] of imbalance in the press, carries with it [illegible] the "good sense of the American [illegible] quite correctly relies.

[illegible] that that skepticism can be redirected [illegible] in the first place, the suggestion is unrealistic in [illegible] personal experience of American regulation has [illegible] most acute is the assumption that it works. [illegible] regulatory program does not satisfy, the resulting discontent tends to be directed toward the process itself rather than toward the underlying circumstances which may make regulation inherently unsatisfactory. The FCC's fairness doctrine is a classic example of this [illegible]. If a single general statement can be made with some certainty about the fairness doctrine, it is that it pleases no one: not the public nor the broadcaster nor even the FCC. I should find this surprising since nearly all that may be said against the access doctrine applies in some degree to the fairness doctrine as well. Yet for more than [illegible] years, the main focus of attention has been on how to perfect the doctrine rather than on the distinct possibility that the doctrine itself is essentially hopeless.[350] I suppose this has produced a kind of skepticism as a by-product of the discontent. But it is not the kind best [illegible] to lead individuals to bear the immediate responsibility of [illegible] broadcast content for themselves. It is instead a misdirected [illegible] which still supposes that the real burdens of judgment belong to the regulators and the regulated who must simply be made to do their [illegible].

In the press there is little advantage in replacing editors with regulators if the regulators themselves cannot be trusted—if, indeed, in order to assure that the regulators do not abuse their trust, it is necessary to impose still further restrictions that have the effect of limiting the ability of the press to take a decided stand on any issue and consolidating the

[illegible] Cross, *Advocacy and Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues*, 46 F.R.D. P.T. 1, 105 (1965).

[350] *See, e.g.*, Bickel, *supra* note 21, at 82-86; Robinson, *supra* note 21, at 159-62; Sullivan, *supra* note 21, at 1665.

[illegible] Cf. Miami Herald, *supra* note 5.

media centrism which is the very occasion for complaint in the first place. The equation is surreal, and yet that is the nature of the exchange which the access doctrine offers.

The net effect of the proposals for an enforceable right of access to the press will not be to increase effective public debate in a meaningful way. On the contrary, as a practical matter, access will be enforced only in those cases in which the discussion is relatively "safe." What we will get will not be diversity; we will only get a somewhat broadened spectrum of essentially mainstream thinking. We will hear both sides—but only both sides of the conventional wisdom. Meanwhile, real dissent—the serious disaffections, the genuine calls for revolution—will routinely be excluded from the press for reasons already well-embedded in the law: obscenity, "clear and present danger" tests, and other similar grounds for perserving the established order intact.

And the result? Simply this: serious dissent, finding itself all the more isolated, will be all the more desperate to make itself felt. Meanwhile, the American people, whose deep suspicions concerning the mass media are not unfounded, may succeed in tricking themselves into believing that something meaningful has been accomplished—that the problems of imbalance are no longer substantial. What will in fact have been accomplished, however, is something very different: the potential establishment of a new American orthodoxy and the tyranny of a balanced centrism.

IV. Some Concluding Observations

It is clear, of course, that none of the more modest proposals for access will lead immediately to the extreme results just described. A reply statute of the sort upheld in *Tornillo*, for example, will not undo us by itself. Yet, for the reasons discussed earlier, the statute will have some "chilling effect" on newspaper discussion of political candidacies and will provide little measurable practical gain. Indeed, the lesson of the modest proposals for access is that practical gain cannot be measured at all. These proposals can be defended meaningfully only if one retreats to the more general ground of fairness and balance, as the court does in *Tornillo*. But that ground is treacherous. It proceeds from little more than intuition and is difficult to contain: if fairness is accorded to political candidates, for example, how can it be denied to others? Practically, it cannot, as the continuing evolution of broadcasting's fairness doctrine demonstrates. Yet if a fairness doctrine were eventually imposed on newspapers, even Professor Emerson, who apparently would accept the statute in *Tornillo*, would find the broader requirement in-

consistent with the first amendment.[351] The conclusion, then, in the case of newspapers, seems clear: even the modest proposals must be resisted in order both to avoid the "chilling effect" that they permit and to foreclose their expansion into wider and still more obvious first amendment encroachments.

The same objections might be offered to proposals for access to the broadcast media were it not for existing regulation. The fact of broadcast regulation, however, requires a different set of considerations. For the present, the decision in *Democratic National Committee* resolves the larger first amendment issues in a defensible fashion and leaves the practical issues arising from the access proposals in the hands of Congress and the FCC. An unqualified right of access to the broadcast media—a common carrier system, in other words—would be both unattractive and quite possibly unconstitutional for reasons previously discussed. Some limited right might be acceptable, but I think ultimately it would have to be defended on political, rather than practical, grounds. A limited right is unlikely to produce any distinct improvement over the fairness doctrine. It cannot be expected to produce either greater diversity or richer debate, and it seems likely in the long run to produce as much divisive disappointment as does the fairness doctrine. No doctrine which requires choices among competing ideas offered by individual spokesmen can prove very satisfactory. Since in practice, a right of access may well raise administrative problems even more complex than the problems occasioned by the fairness doctrine,[352] the desirability of a right of access to the broadcast media is doubtful.

These observations may suggest less sensitivity to the legitimate claims of the access proponents than is meant. Insofar as the proponents of a right of access seek opportunities for members of the public to speak with a fair chance at persuasion, the search deserves support. The need for support, however, does not necessarily require direct intervention in the communications process or manipulation of first amendment doctrine. More directly, if access is unjustifiably denied because the poor cannot compete on economic grounds with the established media, the solution may more appropriately lie in a restructuring of the economy than in a rearrangement of traditional and independently valuable first amendment protections. However these broader economic issues ought to be resolved, there is little to recommend the proposition that

[351] *See* text accompanying note 317, *supra*.

[352] *See* Jaffe, *supra* note 21, at 787-89.

all ideas must be expressed in the mass media. Abstractly the proposition is attractive; as a practical reflection of legal doctrine, it would destroy more than it would yield.

It is nonetheless possible to conclude this article with a degree of cautious optimism. In my earlier discussion, I have dealt with cable television only in passing. The most challenging issues posed by cable television are yet to be resolved and are substantially beyond the scope of an article addressed mainly to the question of access to the established mass media. Yet cable television is a new and quite different medium with almost intoxicating possibilities. Essentially an extension or variation on the familiar closed circuit television system, cable transmission depends on coaxial cables which are strung from house to house like telephone wires. No allocation from the electromagnetic spectrum is necessary; a cable system can expand as demand requires. Each cable itself can carry as many as sixty channels, and each channel can be separately and originally programmed; thus cable systems offer real prospects for true diversity and real debate at incremental costs nearly approximating the costs of pamphleteering than those typically associated with the mass media. Cable television's very capacity for diversity means that it will not guarantee an audience to those who simply demand the right to be heard.[353] But for those who want the ability to speak with a fair chance to be heard by anyone who may be interested, cable television can truly prove to be the "television of abundance."[354]

[353] *See* J. BARRON, FREEDOM OF THE PRESS FOR WHOM? 258-59 (1973).

[354] REPORT OF THE SLOAN COMMISSION ON CABLE COMMUNICATION, ON THE CABLE: THE TELEVISION OF ABUNDANCE (1971). For a more comprehensive review of the issues posed by cable television, *see* Botein, *supra* note 4; Note, *The Listener's Right to Hear in Broadcasting*, *supra* note 5, at 891-902. *See also*, Note, *Cable Television and the First Amendment*, *supra* note 5.