Chapter 1

INTRODUCTION

"TV is a faraway place. When we turn on the TV, we see what they're doing there."

So runs one five-year-old's conception of television -- and it's not too different from the attitude ~~for practical purposes~~ most of us have when we sit down to watch TV. But there is an opacity about TV that seems to keep us from asking or caring much about why we see what we see. It may be the ephemeral nature of the images that flit across the screen, or the complexity of the electronics we know to lurk inside, or perhaps just that we have grown accustomed to a passive role in our encounters with the TV set. Whatever the reason, the constant presence of television in our individual and national lives somehow has the amazing new technology of television got turned into the phenomenon of "TV" that it is today. Whatever the reason, our concept of the future of TV is for the most part made up of what we will watch tonight and what may be in store for us in the new TV "season". This book is about a different kind of future for television.

It is about how television got to be TV, and about why we can't see what we can't see. It is about how corporate and governmental forces have interacted to shape the character of the American television industry. It is about the meaning of the First Amendment for government regulated media and whether the principles of free expression in a democratic society can survive into the age of electronic mass communications.. Ultimately and most importantly,

it is about the choices we Americans have, choices that we can make or can forego, about shaping the future character of television or consenting to be shaped by it.

Critics and Specialists

Most of the literature about television consists of articles about TV programs and personalities in the current season by TV critics in newspapers or magazines. Then there are the articles in technical and legal journals, written by and for specialists. But mirroring the passivity of the TV viewer, very little has been written over the three decades of the life of commercial television about the future of the medium from a larger perspective . [1]

Commentary on TV programming and personalities can be found almost everywhere, in newspapers and magazines, but seldom in books and never on TV. The common thread is concern with the content and appearance of the programs the TV industry brings to the face of the tube. TV critics often question the quality or the appropriateness of TV programs; they analyze the changes in the nightly prime-time schedule; about personalities, ratings and gossip about network ratings and scheduling decisions.

Writing for general audiences ~~. then, is for the most part concerned~~ with the two-dimensional world on the face of the ~~TV~~ screen. ~~Perhaps the only exception is that sub-species of writing about ratings and their impact on programs the kinds of programs that are chosen by the networks for their daily schedules.~~

The ~~specialized~~ literature on television, on the other hand, is concerned primarily with legal, technical, and economic matters of the television industry, the ~~world~~ behind the face of the TV screen.

Since ~~the~~ specialized literature is understood only by the specialists, ~~the~~ technology, ~~the~~ law, ~~the~~ advertising economics, and ~~the~~ industry practices have evolved without the perspective or the influence of ~~a broad segment of the populations.~~

The critical reviews and the specialized literature on television do from time to time meet and even overlap. But ~~by being~~ so largely separate, they serve to keep television largely unchanged and to keep our attention ~~from~~ a far more important and more basic perspective: How can the incentives and the restraints ~~of~~ television be ~~shifted in~~ accord with ~~various principles and preferences of the American public so~~ that it becomes a richer, more diverse, and more responsive medium? Does television ~~in~~ have a future, or is it always going to be TV?

What's at Stake?

Beyond the passivity with which we view TV and accept it as it is presented to us, we seem to have an ambivalence about its impact on us. ~~Although statistics seem to be somewhat lacking, it seems that~~ Even the most frequent TV viewers feel a mild disdain ~~about~~ the overall quality of the programming they watch.

No one seems to feel TV is particularly uplifting, except for a few ~~public TV~~ shows on public television which we are assured are good for us, but neither do many of us get very upset about it. ~~or worry about it much.~~

~~If TV has not had a strong~~

Those who do get upset, however, sometimes get very upset indeed. Some parents ~~attempt~~ try a variety of methods to curtail their children's TV watching, and one of the largest letter-writing campaigns in TV's history was organized by parents concerned about what was being offered their children on TV. [2] ~~Psychologists and social scientists have done a number of xxxx studies, mostly too narrowly in scope to be very definitive.~~ Some people get very upset by ~~the~~ violence or ~~the~~ sex ~~activities shown~~ in TV programming and worry that others (presumably less strong-minded than they) will be tempted to imitate ~~xxxxxxxxxxxxxxxxxxxxxx~~ in real life what they see on TV. Still others are upset by the appearance of a political bias or slant ~~xx~~ they seem to see in TV news coverage and documentaries. Then there is the concern about the frequency, loudness, and veracity of TV advertising which leads a fair number of ~~generally better educated~~ people to be upset by the impact of ~~somehow impure~~ commercial motives ~~xxxxxxxxxxxxxxx~~ on the content of TV shows. In spite of their concern, however, few of these groups seem to get to the point of offering concrete suggestions for how TV can be changed to correct the problems they perceive on the face of their screens.

Despite the apathy, the passivity, the ineffectualness, the ambivalence remains. Television does have an impact on our lives that is at least very wide ~~if~~ even if we don't know how deep. Television does raise important issues, and they ought to be taken seriously.

The most immediate and most visible issue raised by television, and the one most frequently discussed, ~~surely, cannot be evidenced by what causes most of the upset that does exist~~ is the social and behavioral impact of TV programming. ~~In only thirty years,~~ The set TV ~~has come to be~~ is turned on for seven hours each day in the average household ~~and average of 7 hours~~ (?;) and ~~to be watched by~~ children ~~are~~ watch an average # hours of TV per day (?;). A commercially successful TV program in prime-time commands the attention of 20 - 30 million homes, ~~or~~ about ~~perhaps~~ 15 - 20% of all Americans, at any one time. Surely , such a medium has a great impact on our society. But ~~if it does,~~ it is hard to identify the nature of that impact beyond some plausible speculation. Among the social and behavioral ~~impacts~~ effects laid at least in part to TV are: the northern support for desegregation in the south as a result of the TV coverage of racial incidents at Little Rock and elsewhere; ~~in the south;~~ the steadily lowering scores of high school students on Scholastic Aptitude Tests; the increase in crimes of violence; the anti-war movements of the sixties; ~~and~~ the preeminence of the presidency in politics; the substitution of ~~regional marketplace~~ TV station market advertising boundaries for ~~those~~ those of cities, states, or congressional districts; and the unquestioned importance of TV as "babysitter."

Then there is the related set of issues of how TV has affected politics -- and vice versa. Some of the people concerned about what seems to be a growth in the preeminence of the presidency in national politics attribute this in large measure to the ease with which the President as newsmaker can request and receive simultaneous live coverage on the three TV networks. Of course, it is at least as plausible that the networks cover the President because of his preeminence that has arisen out of other causes such as the decades of Congressional delegation of authority to the President. Moreover,

as many a politician has learned, city, state, and even congressional district boundaries are growing less important than the regional advertising boundaries established by the coverage of TV stations. ~~Then too there is the question of whether TV coverage of political activity is adequately representative of XX Political~~ minorities of all persuasions complain of the lack of attention TV pays to their concerns and causes. Intellectuals worry that ~~the~~ TV's superficial coverage of major issues ~~that TV affords~~ weakens the truly democratic nature of our political processes and makes us susceptible to the rhetoric of demagogues. Others question whether the natural ~~XXX~~ preoccupation of TV news with ~~the more interesting~~ "what's wrong" ~~with or society and our government~~ at the expense of "what's right" doesn't lead to an anti-establishment or ~~xixi~~ liberal bias in TV news. Certainly the flair of TV news for the dramatic leads to a coverage of short, dramatic political happenings ~~and speeches~~ rather than more complicated, serious reflection on the complex policy issues facing government & society. ~~We face. It is not~~ It should not be surprising to find politicians jockeying for the news coverage they need to survive politically by emphasizing what TV newsroom editors and reporters want ~~think they need~~ to put together a lively show. Nor are politicians and broadcasters unaware that TV is regulated by the government ~~through the FCC~~. Behind the scenes, the White House and the powerful congressional committees deal with the three national TV networks, just as each congressman and senator deals with his local broadcasters, ~~seek~~ all seeking to accommodate one another in regulation and in news coverage.

Running through the behavioral, social, and political impact of TV is the issue of whether television ~~is~~ is, or should be, the mirror of the society or the shaper of it.

The pervasiveness and the apparent power of television in bothe entertainment and news suggests that television is both mirror and shaper simultaneously. ((It is of course unremarkable that one or more media technologies can play a major role in the shaping of a society. Clearly the pencil has had such a role. But just as clearly, it serves no useful purpose to analyze such a medium in terms of initiating social change; it is simply a vehicle through which the people as a whole go about interacting with one another. It is only when a relatively small number of people -- a few groups or a social class -- gains predominant control of the medium that the power of the medium as shaper of society becomes relevant. The control of writing by the church in Europe before the invention of the printing press is one clear example.)) Moreover, the concentration of control over TV programming in the hands of the three TV networks and the FCC makes the question of TV's role as shaper or mirror a particularly interesting issue. With so few people makin the decisions about what goes on TV, there is much more opportunity for television to be used directly to shape social attitudes and

political issues than is the case with, say, magazines where control is so widely dispersed that little if any power to shape society can be said to exist. Moreover, the concentration of control over TV programming and the coincident manageability of controlling the large majority of TV viewing fare available to and watched by the public invites the creation of a philosophy of how such control should be exercised -- i.e., what should the public watch? The issue of TV as shaper of society then becomes not merely a subject of historical analysis, but more portentous , an issue of how our society is to be shaped and by whom.

The emergence of such an issue in the future of television would make it a very important matter for any society to determine, but it is particularly significant in a democracy. Since the essence of democracy is self-determination, how the members of a society see themselves and their society is key to all manner of individual and collective choices they will make about their future. The ways in which we can communicate with one another and the communications we have presented to us in our mass communications media affect intimately how we deal with one another, how we see ourselves as a people, as a country, and how we see our world. It affects how we exchange ideas and how we conduct our political processeses. The openness, neutrality, control, diversity, and flexibility of our communications media, then, become very important determinants of the limits of our own self-determination.

The issue of TV's role as shaper of society is important to democracy for another reason. Free speechand free press have been central to the American concept of democracy and an open society since the timeof the Revolution. This is in part because an informed populace and a robust political process depend on the free, open , and vital exchange of ideas. And it is also due to the centrality in the American system of individual freedom and liberty. Part of the genius of the American revolution and the American constitution was the recognition that the avoidance of tyranny required both the dispersal of power among the institutions of the society and the assurance of civil liberties not just to the public as a whole, but to each individual. Excessive control over the media of communications, then, clearly thwarts this Constitutional scheme and presents us with a major change in the nature of American society.

TV's rapid rise to preeminence as our most pervasive and in many ways our most relied on communications medium brings all these heavy issues to bear in any alnalysis of the future role of tleevision. ~~The First Amendment to our Constitution can be considered to be the first in importance in our Bill of rights as well.~~ While the American Constitutional scheme as a whole reflects both the structural and the civil libertarian aspects , our press institutions and our legal scholarship have afforded more attention to the civil liberties of free speech and free press than to the structural issues. ( ) One of the important matters to be settled in television's future is the extenet of the applicability of the First Amendment's free speech and free press guarantees to the television medium. Although fully applicable in theory, the Supreme Court has

been evolving rather erratically a theory of application of the first Amendment to television thatreflects a substantially different set of criteria for television than for the print media. Moreover, television presents major structural questions about the role of the media in our society and our political processes that have never been explored extensively.

We may not be able to foresee allthe issues involved in the future of television, but/two things are clear. Television is a major new kind of mass communications medium that presents us with important questions about the kind of society we wish for our own future. And because of the government's role in regulating TV and in determining the applicability of the First Amendment concepts' to the television medium, for the first time in 200 years, we Americans are faced with the need to decide explicitly what nature of mass communications media we will have.

Does Television Have a Future?

But we are all by now used to such lofty pronouncements about television, and no matter how persuasive the logic about the significance, it just seems to stay plain old TV. Indeed, one of the remarkable things about television is how little it has changed since acquiring its"mature" format in the early 60's. In spite of the writings of the social analysts claiming to see TV as a contribution to the social and political unrest of the times, TV has remained one of the/few solidly predictable and comfortable institutions left for most Americans.

Probably the most asked question in America is, "What's on TV?" Yet we all know deep down that what's on TV is ... TV. From the Sunday morning religion through the talk shows, the soaps, the prime time entertainment, the nightly news, the late movies, the Saturday cartoons and sports, and the Saturday night interdenominational prayer, television is dominated by TV. The nights change, the seasons change, the stars and the political leaders change, but TV is always there.

Advertisers try to make it seem perpetually new, feature writer try to give it life, and critics constantly work to take it seriously. But the reality is that television hasn't changed materially in 20 years, rather, it has stagnated for 20 years. Of course, one might aggue that it has matured, but hardly anyone except a few network executives would accept such a view. If it hasn't yet matured, it must have a future; yet it hasn't changed appreciably for two decades and there is no obviuous or compelling reason to expect much change. Indeed, everything points to more of the same (no not even more , just the same) in theyears ahead. The question of television's future seems to be a vacuous one. Certainly if the future is no more than more of the same, we would be justified in feeling that our marvelous electronic technology had somehow failed us and that those who have argued for its significance to democracy and society have been making mountains out of molehills in the traditional academic fashion.

But the superficial feeling that the issue of television's future is no more interesting than next week's issue of TV Guide has to be

suspect. It is one thing to be lulled by TV into apathy for an evening, but another entirely to lulled into apathy about television itself. We need to think carefully and more deeply than we usually do about television before accepting the status quo.

We need to look behind the TV screen to ask what makes it the way it is and to find whether or not some of those reasons can be changed before we make the pronouncement that TV has no future. We need to inquire whether it really is in the nature of electrons to fall into 12 channels, ((4; When was the last time you wondered where channel 1 went?)) about whether the threeness of the TV networks is a law of technology, economics, capitalism, or the gods; about why the electrons sound so good on our stereos but so bad on TV; and why the diversity of our magazines so exceeds the diversity of our TV.

But these are not questions many of us think or talk about. It is hard to conceive how changes in communications capabilities and organization might be translated into changes in what is communicated. When told of a new marvel of communication, the electric telegraph from Maine to Texas, Henry David Thoreau is reported to have asked, "But what if people in Maine have nothing to say to people in Texas?" ((check accuracy and source)) ((5: This is, befitting Mr. Thoreau, a philosophical question about the kind of future we want as well as a short-term practical question reflecting the human inability to see how new kinds of communication might be used until after they become integrated into our lives, at which point they become necessities.)) So today, it is easier to discourse on

how TV programming might be different than to ask how the television system might be changed to bring about a different result in what is programmed. Part of the problem is that we tend to talk about television in ghetto style, apart from the perspective of other media and other times. If television has a future different from its present, it is not to be found from within, but from without.

Seasons, Decades, Centuries

The time was when the fall season referred to the new fashions from Paris. Now it is the time when the prime-time TV schedule is most extensively revised during the year and when the presumably most exciting new shows are introduced by the three TV networks and on public TV. There was a time in the growth of TV that each new fall season was awaited as the latest evolution of the medium, as though the infant technology was year by year moving to its fulfillment. Now, however, the changes in TV from season to season are more nearly like the changes in clothing fashions -- the fad (or fashion, if you prefer) of the moment. Fads and fashions, of course, have their uses both commercially and psychologically, and the evident faddishness of network television is not a necessary sign of its debasement. Nor, on the other hand, is it a sign of vitality and constant improvement.

Any serious analysis of a mass medium of communications must take decades as its time scale rather than annual seasons. Involved as any sudcessful mass medium is with society, the time scale for significant change cannot be so short as a single year or even two or threee.

Yet a major part of the difficulty that most TV critics and reviewers have is a problem of time perspective -- attempting to find in the new season's shows or in the few high-budget specials of the year some signs of television's character and achievement.

More sense can be made by looking over a period of decades, even though television has been with us at this point only three decades. On such a time scale, we can see television being modelled after commercial radio broadcasting, acquiring without any apparent consideration all the characteristics of advertiser sponsorship, monopoly control of each channel, and government regulation. We can see television eclipsing radio, mass-circulation general-interest magazines, and then movies as the most popular form of entertainment and news about the nation. We can see the decline in the role of the advertiser as program selector and sponsor and the rise of the network as programmer and advertising salesman. We can see the rise of TV news and the emergence of TV as a potent force in political campaigns as it quickly became the lowest-cost way of reaching potential voters. We can see the evolution through the first decade of prototypical TV program archetypes such as the situation comedy, the evening news, the morning talk variety show, the sports programs complete with instant replays and delays in the games to match the commercials, the Sunday serious talk show, the adaptation of the radio soap operas and quiz shows, the Tonight show, and so forth. And we can see the evolution of a weekly/yearly schedule followed by all three of the commercial TV networks combining morning,

afternoon, evening prime-time, and late night programming into a composite day; combining weekday, Saturday, and Sunday into a composite week; and weaving in football, basketball, baseball, season-openings and reruns and re-reruns, and so on into a composite year -- a year that seems to have stopped evolving in the late 50's and early 60's. We can see the evolution of TV as a "literary" form, at least a form that hasn't shown much sign of changing.

But even the perspective of decades isn't sufficient for judging the the role of a major new mass medium being absorbed into society for the first time. Consider the history of the printing press and the evolutionof the role of the printed word.

History usually traces the impact of the printed word to Gutenburg who first used the movable-type printing press to print the Bible in 15__. In fact, the advent ofprinting had little impact on either the structure or the daily life of humanity for two centuries after Gutenburg. During those two centuries, there were very few printing presses and paper was expensive. Printing could be used economically only for the most important and most established books, and the content of what was printed was controlled strictly by the church and the state.

The first serious impact of the print as a medium of mass circulation was in England in the 18th century. The economics of printing had by then changed to where there were too many printers printing too much material for the state to monitor and control all that could be printed. Presses were licensed, and printers were held accountable by the state for whatever they printed. In bothe England and the colonial United States, printed matter only slowly replaced

the word of mouth as the major vehicle for the dissemination of information. By the time of the American revolution, the printed word consisted chiefly of books on historical and religious themes, pamphlets, handbills, and a few weekly newspapers. The newspapers of the day were not as we now know them, but were largely the writing of the personal views of a printer.

Sometime around the beginning of the 20th century, the economics of printing and distributing newspapers shifted again , manifesting economies of scale that led to larger and larger papers competing vigorously against oneanother for readers and advertisers. The personal view of the owner was institutionalized on the editorial page, and syndicated features such as the comics began to evolve. The 20's and 30's saw the advent of nationally circulated magazines and the development of the national advertising markets. Driven by competition from magazines, radio, andthen TV, the number of newspapers continued to shrink in most major cities so that today the newspaper is something quite different in content and in role from what it was in its prime as the major source of information and advertising for the masses.

Magazines too have undergone major changes in their half-century or so of life. Being replaced by television as the major national advertising medium, the general - interest national magazines faded and were replaced by an innumerable host of specialized magazines catering to specialty audiences and specialty advertisers.

This brief history of the printed word as a medium of mass communication suggests that it is too early to conclude either that TV has no future or that it will always be as it is. It shows how technology, economics, and social change have a way of creating new forms of communication with any mass medium.

Seen in historical perspective, the questions of television's future are not best answered by looking within the TV industry, but rather by looking at TV from without to see the social, economic, and technological forces that are acting on it.

TV's Place in the Scheme of Things

The Federal Communications Commission regulates TV broadcasters as though each TV channel were the only outlet of mass communications information available to the public. Fairness in covering all sides of controversial issues, public service, and non-economic programming such as religion and agriculture are required of each station with no consideration of what other stations in the area are programming, much less what other media are available. Yet in spite of the fact that the average American spends far more of his time in front of the TV set than he does with any other mass media, there are other media that compete with TV for audience, advertisers, and that even supply kinds of entertainment and information that Tv can't or doesn't.

Movies have become a staple in the composite TV programming week, and in larger cities with 5 or 6 tv stations, some channels specialize in carrying old movies any time of the day you might want to watch (that is as much as they think they can get away with without the FCC warning them to do more uplifting stuff). Yet motion picture theatres still find a market for first-release films, special-audience films, and for those people who like to get out of the house or to see the big screen instead of the commercial-ridden small screen.

Newspapers provide more local advertising than does TV and provides it in a format you can clip out and write on. They also provide more local news and information about people and events not unusual or of sufficient general interst to fit the TV format. Magazines compete with TV for the national and the local advertising market either by carrying advertising directed a less-than-general interest and/or advertising with a high content level. Moreover, magazines provide audiences/xxxxxxxxxxxxxx news, information, or entertainment xxxxxxxxxxxxxxxx on subjects not suitable for TV's format for a variety of reasons: Magazines can provide more in-depth information on a subject; they can be perused at the reader's convenience and even studied; they can provide a x highly informative mixture of articles and advertising on a relatively specialized subject such as music, photography, or home decorating that would not attract either audience or advertisers to TV in large enough numbers to sustain the xxxxxx costs or the profits to which the xx TV business has become accustomed. Even books compete with TV either by providing material in depth or by providing a pleasant way to while away an evening at home.

Radio also competes with TV in several ways. Although most people xxxxxxxxx (according to the polls) get most of their news about the nation and the world from TV, theyx get their news first from radio. Radio provides more variety in music than TV, offers special-formats such as all-news, all-classical music, or all-rock. It is the premier medium to provide companionship and noise around the house (and a reassurance that the world outside is going on pretty much as usual). ((6: TV according to some studies provides this same function in homes where it is left on for hours without being watched much if at all.)) Radio competes with TV for a part of the national advertising market and with newspapers for certain types of local

advertising.

And even the performing arts compete with television, if only because TV for the most part ignores them. More people may have seen Shakespeare's _____ on network TV than ever saw it on stage, but it is hardly the same with commercials between scenes and it has no doubt been seen on stage more by those who care and know enough to appreciate it. Ballet and opera just don't seem to translate to the screen, be it the movie screen or the TV screen, and provide a small alternative to TV for an evening's entertainment. And then there is the variety of local performing arts largely not-mentioned in the mass nedia that nonetheless provide an alternative fo TV -- the local sports, the high school plays, the little theatre groups, the local symphonies, and so on.

In the field of communications, TV may be preeminent in time consumed and dollars spent, but it is hardly preeminent in vitality or diversity. Television is TV, and TV is after all only a broad but shallow slice of the communications in the country. And that is because TV's competitive edge is in general-interest national advertising where the cost per minute is very high, but the cost per potential customer is very low.

Another perspective on TV is to view it as the industry that it is. Many TV critics reluctantly accept TV as a business (that "seeks ratings" and thereby "makes profits,"), but few of us are aware of the industrial organization and incentives that shape the broadcasters' decisions about what goes out over the air. And that isn't some romantic quasi-Hollywood show-biz kind of business, at least no more if it ever was.

Today, the TV industry is typical of most American big business,

organized around a central few large corporations surrounded by a host of smaller businesses, entrepreneurs, and subsidiary service agencies. The corporate structure of TV is due more to the precedents of radio broadcasting and the policies of the 1934 Communications Act than to any inherent nature of the television medium itself, so to understand TV and how television might be differently used, we have to understand the corporate structure of television.

The foundation (but not the center) of the industry is the individual TV broadcaster who is licensed by the government to operate his TV transmitter on a particular channel assigned by the government to cover a particular city and its surrounding area. By law, the broadcaster is a monopolist/on that channel -- he is responsible for and controls everything that is broadcast over his channel. As a practical matter, he cannot charge the viewers for the programs they watch (although more about that later), so he generates the revenues to cover his costs and his profits by selling time to advertisers who wish to reach the audience he has accumulated to watch his shows. (Public TV is the exception to this rule and has to be discussed separately.)

((6: note on "monopoly" and monopoly power as used in book))

Although a monopolist on his particular channel, the broadcaster must attract viewers away from movies, magazines, radio, conversation, and other TV broadcasters in the same community. To do so, he tries to put on ~~xxxxxxx~~ programming that will attract the most viewers. But the productionof TV shows is expensive and gets more so as various gimmicks and famous personalities are employed in an effort compete for the public's attention. Clarly, more money, talent, and professional know-how can be devoted to a show if the costs can be spread among a number of broadcasters in diffferent communities, each showing the same show. And that is the rationale for the TV networks.

Since radio broadcasters were the first businessmen to get into the TV broadcasting business, and since the FCC chose to establish television broadcasting as "radio with pictures" in the identical way it treated radio broadcasting, it was both natural and inevitable that the radio networks would seek to establish TV networks. By acquiring licenses for TV channels in major metropolitan areas (for themost part where they already owned radio stations), the companies that owned the radio networks established the base for their TV networks. Programs were produced for their own TV stations where costs could be spread among the 5 stations which cumulatively had the potential of a very large audience. Since advertisers were willing to pay more to sponsor a show that reached a large audience than a small audience, the economics of producing shows twice favored the TV networks from the outset: their stations were in cities with big audiences and they had many stations among which to spread the costs. From this economic base, the networks expanded with contracts with other broadcasters to carry the network shows. ((7.: they probably would have expanded by acquiring more stations if the FCC would have allowed it)) Now the network pays the local broadcaster to carry the network shows, complete with advertising, so that it can charge the advertisers more for reaching a larger audience. The broadcaster who affiliates with a network earns his revenues in part from selling some of his time to the network and in part by selling time directly to advertisers for commercials in those shows he produces himself or buys from non-network sources.

Because they distribute the predominance of TV programs and commercials nationally, the networks possess a considerable degree of

monopoly power in two respects: over the sale of national television commercial time and over theproduction of TV programs. The days of advertisers sponsoring shows with which they were identified and for which they bore some responsibility are largely gone. Instead, the networks put together a collection of programs with commercial breaks and sell the time for the commercials to the advertisers through advertising agencies that create advertising campaigns and book the time on behalf of the advertiser.

The networks for the most part buy their programs from other companies, many located in Hollywood, although there aresome exceptions, such as news, which they produce themselves. While a program producer may sell his programs directly to individual TV broadcasters around the country, in practice the only way to get enough stations together to pay enough to cover the costs of the production is through one of the three networks. Only by getting one of the networks to buy a show can the show reach enough communities to become nationally popular. And only the networks can pay the producer enough for him to justify the risk of developing the show in the first place. In fact, because the networks are the only practical market for the producer to sell his new shows, they are able to drive down the price they pay below the producer's costs; and the producer in turn hopes the exposure on network TV will make his show popular enough that he can re-sell the show to individual stations enough for reruns at a reduced price that he can make a profit after several years.

The three networks areclearly at the center of the corporate organization of the TV industry, and their character is not appreciably

different from that of any large American corporation. With the individualistic founders and owners no longer in command, the corporate hierarchy is populated by professional managers whose principal motivation is annual profit maximization for the simple reason that that is how their performance is measured for purposes of compensation and promotion. All the normal corporate behavior of risk-avoidance, competition-minimizing, bureaucracy-generating, cost-cutting, and revenue-expanding is to be found in these thre corporations. All three have become diversified conglomerates, into many businesses besides TV, from spacecraft manufacture to amusement parks. And in common with all regualted industries, the three networks have developed a symbiotic relationship with the politicians and bureaucrats who regulate them in the Federal government.

Understanding something of the corporate structure of the TV business is only half of the understanding needed of TV as an industry. We also have to understand more clearly than we normally talk about it the commodity that is produced, bought, and sold by the industry. Just as it would be wrong to consider that Coca-Cola is in the business of selling bottles, so it would be wrong to consider the television industry to be in the business of selling enetrtainment or news. The economic reality is that the TV industry creates audiences which are sold to advertisers. You and I are not the consumers of the TV industry product, we <u>are</u> the product.

Of course, the audiences must be assembled before they can be sold, and that is done by providing free programming of sufficient interest to get them watching. The advertiser pays the broadcaster or the network for time in his broadcast schedule to present his commercials -- but the advertiser pays ~~not~~ for the time because of the audience, and he pays a rate for the time based on its audience. "Dollars per thousand" is the basic unit price of the TV industry, not dollars per show or dollars per minute. A "good" TV show is one which attracts a large audience to a TV channel at a particular time. By attracting a large audience, the broadcaster's revenues are increasdd because the advertiser pays "cost per thousand" times thousands of viewers, so the broadcaster has more money to pay to create a "good" show and more margin for profit. Of course, each show must be good enough not only to get the viewer to his TV set, but to hold the viewer's attention against the distraction of the other "good" shows on other channels. So there is a ~~already~~ pressure in TV broadcasting to bid up the costs of those star personalities and expert producers who have the ability to create entertainment that will attract audience away from other channels. ~~And it is easy to see why a show that fails~~

~~An important part of the economics of TV is the scarcity of TV channels. Because the a total viewing audience is divided among only a few channels,~~

~~to attract the expected audience~~

The scarcity of channels and the fixed amount of time in the day are also important determinants of the behavior of the TV industry. Both limit the amountof advertising time that can be sold and therefore

broadcasters can increase revenues only by increasing the audience viewing each minute. Since minutes are both fixed and fleeting, unlike newspaper or magazine pages, there is pressure to sell each advertising minute to advertisers and to attract the largest possible audience to each program. It is easy to see why broadcasting executives are so quick to drop a show with low ratings, since costs are more or less the same for all shows of a type and since income is directly proportional to the number of homes watching. The value of this scarce commodity of the TV industry, time, is, as we have said, the value of the audience to the advertiser -- and that is about ½¢ per home per commercial minute. And since all the revenues come from advertising in the TV industry today, that means we are constrained to programming in the range of about 5¢ per home per half-hour in cost.

But the broadcasters' income, remember, is 5¢ times the number of homes watching -- and a show not watched is 5¢ less profit. Hence the TV industry executive's imperative: maximize ratings.

The scarcity of television broadcast channels is also responsible for some of the characteristics of the TV networks. In particular, each network seeks to reach the largest possible audience with its programs to maximize its ratings. But that can be done only if the network has an outlet in all the major cities and most smaller ones as well -- homes can't be sold if they can't receive your signal. But only the larger cities have large numbers of TV stations on the favored VHF channels 2 - 13 which give a better picture and cover a larger number of homes than the UHF channels 14 - 82. Therefored, only the network with a VHF outlet in most American

communities can hope to get really big audiences for its programs. In fact, The FCC has assigned the TV channels around the country in such a way that only three national networks of VHF outlets are possible that can reach a substantial majority of the population. Thus, we have three networks. If we were to create more VHF channels we would have more networks, because each new network seeking to increase its ratings would put on attractive programs and could pay for those programs because of its national audience potential. A network denied such national connections cannot possibly reach enough homes to generate enough revenue (at the standard ½¢ per commercial minute per home) to permit it to pay as much for programs as the national networks, so the talent would be paid to come to the bigger networks and the smaller network would collapse. ((8: note the argument goes the other way jtoo; if a network were allowed to program two channels in each community, we would have only two (or 1½ neworks) as indeed was the case in the late 40's when the NBC red and blue nets were split by government order to form NBC and ABC.))

A
B

In contrast with this view of TV as an industry, we must also view TV in the perspective of a government-regulated quasi-public utility. The legal fact is that the TV industry is highly regulated by the Federal government by the Congress through the Federal communications Commission. Under theCommunications Act passed by the Congress in 1934, the FCC regulated TV broadcasting (as a variety of radio broadcastin --"radio with pictures") so as to further "the public interest, convenience, and necessity."

The average viewer's psychological perception, among other thingsm, includes a strong componenet of TV being one of those things the government "bught to do something about." In fact, TV as currently organized has a strong public utility flavor. It is pervasively "there," available in the home whenever we choose to turn it on, and no money changes hands -- ~~we don't buy TV theway we buy products and most other services.~~ It is government regulated. There is no opportunity for new firms to enter the field because of the monopoly character of channel assignments. It is not surprising that the public from time to time thinks of TV as a public utility.

Seeing TV in the perspective of other mass communications media, as an industry having much in common with, but some important differences from other industries; and as a quasi-public utility helps to clarify some of the reasons American televisio has acquired the charactir that it has. But unlike most businesses and unlike most phenomena of American life, TV in the 70's is perhaps more a creature of the Federal government than any natural outfrowth of technological, social, or economic pressures. And to understand TV, we have to understand how it is structured by the law and the limitations and the incentives of the Federal regulatory process.

The Adoption and Rigidification of Public Policy

But TV is not regulated as a public utility, even though its basic structure and certain aspects of its operations are the result of Federal regulations. We have already mentioned how TV came

to acquire the same structure and many of ~~the~~ the characteristics or idiosyncracies of radio broadcasting, and how the regulatory concepts devised in the 1927 Radio Act by the Congress came without any critical examination to govern the TV industry. This structural constraint is probably the bisggest single factor accounting for the nature of American tV today, for it not only acts to determine the place TV holds vis-a-vis other media andthe economic incentives of these who control the industry, it also ~~xxxxxx~~ has created a Federal ~~xxxxxxx~~ regulatory bureaucracy and a ~~xxxxxx~~ body of ~~xxxxxxxx~~ legal precedents that have a great deal of power and incentive to defend ~~xxx~~ and maintain the basic structure of the TV broadcasting system.

We have had enough experience since World War II with political and bureaucratic controls over industry to begin to evolve some understanding of the behdvior of regulated industries andthe agencies ~~x~~ that regulate them. Although the model for much of this regulation is the public interest standard adopted for the Interstate Commerce Commission's regulation of railroads in 1898(?) , what has in fact evolved is symbiotic relationship between the reulated corporate bureaucracies and the bureaucracy of the regulating agency, with the public and the Congress having very little control over the process.

Among the characteristics of such regulated industries, including banking, railroads, airlines, telephone, and broadcasting are minimal competition on prices, no opportunity for new firms to enter the market to offer new services, and acceptance of technological change only

to the extent that it reinforces current business practices. And among the characteristics of the regulating agencies are a preference for mandated service improvements over price reductions, responsiveness to politically powerful special interest groups (ranging from vocal minorities to the White House to powerful members of Congress), and minimization of competition in favor of expanded purview for regulation. The net effect of this arrangement is the substitution of political processes for market processes and the discouragementof marketplace competition for the consumers' interests.

These general tendencies are manifest in the television broadcast industry. Although the FCC lacks the authority to regulate the rates charged by broadcasters, it levies a number of public service requirements on broadcasters just like those agencies that do have the power to regulated rates. Competition is limited by limiting the size and number of broadcast outlets and by extending the broadcst scheme to CATV (community antenna TV)systems to limit the number and content of channels. The two most important aspects of Federal regulatory apparatus for the future of television are the tendency of the FCC and the courts toward increasing detail in specifying the nature of the broadcast service (i.e., the programming) the broadcasters must offer andthe limitation of competition in television by extending regulation into the cable TV field and limiting its growth as a source of more consumer choice and more competition.

The general public's wishes for the government to "do something" about TV programming is matched only by that of the FCC to "do something" when faced with a politically significant special interest group's ~~petition~~ complaints that broadcasters are ignoring their special part of the "public interest". In a variety of ways, the FCC has come to regulate manyaspects of the broadcasters program schedule, ~~An increasing number of program categories such as religion, agriculture, news, and children's programming, are specified by the FCC as indicia of the "public interest" and the broadcaster's frequency of carrying such programs is considered when his license is being considered for renewal.~~ and the Congress too has from time to time adopted specific legislation limiting the broadcasters' programming freedom.

The FCC has specified a number (15 as of 1975) of special program categories such as agriculture, religion, and children's programs, which it considers especially important to the public interest and which it expects the broadcaster to program for a number of hours weekly. Broadcasters also are required to ascertain the significant controversial issues in their community and to provide programming on those issues. Additionally, they are expected to be "fair" in covering all sides of such issues and must provide time for any side the FCC deems unfairly slighted. Broadcasters may take only three hours each evening between 7 and 11 pm from the TV networks (news programs excepted). They may not advertise cigarettes, and other advertising practices such as too many commercials may call for an explanation to the FCC.

The 1927 Radio Act and the 1934 Communications Act provide the rationale for this type of programming regulation and also provide the enforcement mechanism. The rationale is that because the broadcaster is given a monoply right to use his channel by the government to use for the public interest, he must be reviewed by the government to assure that he is in fact programming to meet the public interest. The enforcement mechanism is the requirement in the law that the FCC affirmatively determine every three years that the "public interest, convenience, and necessity" would be served in renewing the license. Now as we know, the broadcaster makes considerable profit from his broadcasting, ~~a large part of which~~ and that profit is larger than it otherwise would be because the government limits the competition by limiting the channels. The broadcaster, not wanting to forego these profits, naturally wants to keep his license longer than the three years the law allows. He must therefore be sure to satisfy the FCC's judgments about how well his programming meets the public interest standard in order to be sure that his license will be renewed every three years.

The FCC's power in this scheme is not that it takes away licenses, but rather that it knows that every sane broadcast executive will seek to provide whatever programming the FCC requires so as not to lose the license upon which his continuing profitalble business depends. There have been appeals to the courts from time to time by broadcasters who diagreed with particular FCC rulings, but the courts have more often than not upheld the legality of such FCC programming criteria, and the broadcaster ultimately must provide the programmin the government requires or be put out of business.

Asided from the questions about the effectiveness of the regulatory process, whether the process serves the consumer or the industry being regulated, and whether determination of prices and services through political processes rather than market processes is wise, there is another issue unique to the regulation of broadcasting. That is the issue of government control of a mass medium of communication. The Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." Clearly, broadcasting is protected under the freedom of the press, for the journalistic function cannot be defined in terms of those who use ink but not electrons, and even the Congress cannot supersede the Constitution with the Communications Act, even if that were there intent. The Supreem Court, in upholding the legality of the FCC's general trend in regulating broadcasters' programming, has apparently been as confused as most of the rest of us in reconciling the Constitution with the provisions of the Communications Act. As a result, the FCC and the Court have over the years evolved a rather elaborate and confused litany professing the full application of the First Amendment to broadcasting, eschewing censorship, and steadily increasing the FCC controls over what the broadcaster may and may not program under various conditions.

Aside from the narrow issue of legality, there is ther broader question of the wisdom of allowing so much government control over what we may see and hear on an important and pervasive new medium. At some point, the Court or the Congress is going to have to deal with this growing inconsistency between the practice of TV regulation and the American concept of a firm separation between the media and the

state/ Without question, the First Amendment to the Consititution was adopted at a time when different conceptions of the press prevailed than is the case today -- and it was written by men who could not have foreseen either the structure or the technology of the mass media of America 200 years later. While we cannot avoid re-interpreting the First Amendment, as we do indeed with the whole constitution, to fit changed times and changed circumstances, we cannot avoid either the question of how much theConstitution is to be bent as opposed to the circumstances and the technology.

This is especially true with something like/electronic communications of which TV is only a part, where the essential structure of the industry has been and continues to be shaped by state action. Some will see such state action as reason(or excuse) to treat broadcasting as a basically governmental activity, turning the First Amendment on its head to apply the restrictions of the amendment to the broadcaster rather than the freedoms which apply to the public. Others will see the need to shape the state action in such a way that the strain on the freedoms of the Constitution are minimized so that television may develop with all the essential freedoms of the print media.

However we decide, we hopefully will decide such important issues deliberately and with as much wisdom and foresight we can muster. Unfortunately, the FCC, the Congress, and the Courts have not made any serious efforts to address such matters, and we and the televisiom industry are drifting along in the direction of more government control under the presumptions of an outmoded regulatory structure. While public policy in America in the 70's is generally confused and without coherent philospphy or direction, it is nowhere worse

than in television. Indeed, there has been no serious examination of public policy in this country toward television.

Even more important than the more immediate problems of how the FCC is regulating broadcast television service, there is the question of how newer television technologies will develop. At about the time that television broadcasting was beginning as a commercial service, the transistor was invented. In the three decades since, electronic solid state technology has grown explosively, making possible a whole host of new services and new activities ranging from computers to spaceflight to stereo casettes to pocket calculators to automatic cameras. But looking at television's development over the same period, about the only examples of the electronic explosion are color, instant-on TV sets, and instant-replays.

The absence of significant innovation in television is not due to some unique exception of television from other electronic technology. It is due to the constraints of the FCC and the monopoly power of the TV broadcasters and the TV networks and other broadcasters. The techology itself has evolved truly major alternatives to the character and limitations of today's system of broadcast TV; the question is whether such potential alternatives will be allowed to test themselves for consumer interest in the marketplace or will be forbidden politically because they do not fit the 1934 scheme and theincentives of the broadcast industry and the regulators in government.

Among the possibilities of the new technologies are: Unlimited channels coming into the home so that there will be no arbitrary restrictions on the volume of material that can be made available for the consumer to choose from; this is made possible by advances

in coaxial cable (cable TV), microwave and satellite transmission, and computer switching technologies to keep it all sorted out. Low-cost, widely available video-recording equipment making it possible through recorders located in the home, or in the cable system, for individuals to watch selected programs or movies at almost any time they wish to do so rather than being forced to watch at the only ltime it is available as is now the case. Data transmission and display techniques that make the storage and processing capabilities of the largest computers available via video links so that calculation, library reference, and catalog sales information can be called up from the home and displayed on the TV screen. Simple electronic accounting and billing techniques that permit consumers to buy programs, movies, sports, information, or computer services over their cable system with the same ease that long-distance calls or magazine subscriptions are placed and paid for. Higher quality pictures and stereo quality sound for special artistic events, musical xxxxx performances, and larger xxxx wall screens.

The time-scale and the terms and conditions of the introduction of such new technologies and their associated services lies completely in the hands of the Federal government,xxxxxxx. Unlike most industries and unlike most of Qmerican xxx history, the television industry and the electronics industries have no strong incentives to develop the potential of these new areas of television service. Broadcasters don't need the added competition, and other businesses would be foolish to spend the sums necessary to develop such services in the face of FCC prohibitions on new technologies. For its part, the FCC has perfected the catch-22 technique of all time in communications: No new services may be offered until it can be

shown that existing services will not be hurt by the competition and that the public needs such a new service; but any new service is worth having only if the public prefers it to the older service and shifts its business, thereby "hurting" the older service, and of course the public cannot know if it needs or wants a new service until it has been offered to them so that they can assess it and its cost. In effect, we have a strong barrier, if not an outright ban, for the the introduction of new television services on any significan scale.

Getting Ahold of Ourselves

In spite of the stagnation of TV and our individual and public apathy about it, the future of television in America is out of control. The character of the American mass communications is in doubt as a private sector function separate from and coequal with government. The principle of the First Amendment that government may not, even for the best of causes, ~~either negatively censor or affirmatively require the communication of particular~~ control what we communicate among one another and what we are allowed to see and hear, is being eroded in television as the First Amendment is increasingly bent to fit the corporate and bureaucratic and political impentives set in place by the Communications Act. The feedom of the citizen as consumer to choose freely from a range of services and products is being eroded by the regulatory philosophy that the status quo must be protected -- ironically in the name of the "public" interest.

Worse, the Congress and the Courts are by default letting this situation fester, building the precedent of the status quo stronger and stronger and eroding our chances for change.

We are past the day when radio and TV broadcasting can be treated as some clever but inconsequential novelty, past the day when it can be argued (as it was in the Senate dabate over the 1927 Radio Act which later was incorporated into television regulation) that it is ridiculous to speak of broadcasting having any First Amendment protections. Our mass communications media are steadily becoming electronic, just as the telephone has done to our private communications. And we must deal seriously with the structuring of these communications so as to advance the concept of the kind of society we seek to be.

Public communications in a democracy are key to determining the character of a society, and we must decide wheter the control of those communications is to be in the government's hands, a few corporate hands, or in all our hands. We can decide by apathy-induced default or we can assess the alternatives for our own future and choose through debate and decision. We can choose to be shaped by an electronic communications structure we never considered or we can shape that structure to further our higher purposes. But we can hope to turn television's future in our directions only if we understand better than we do now what the future possibilities are and where we have the opportunity to shape thefuture

The rest of this book is devoted to that end.

Conceivably the FCC could change its interpretation of the public interest standard to require licensees not to discriminate in the sale of broadcast advertising time as to the subject matter of the messages presented in the time sold. (42) ((See quote from CBS v. DNC in footnote above.)) But to do so would be a major policy change uncharacteristic of the Commission, and it would raise questions about its consistency with the Congressional rejection of common carrier status in broadcasting. Moreover, Congress has acquiesced in the current regulatory scheme; and while it is likely that the Congress did not foresee the extensive sale of commercial advertising time when the 1927 and 1934 Acts were passed, so major a change more properly ought to come from the Congress.

Substantive issues involved in the requirement that sale of advertising time include: 1) definition of advertising time; 2) the nature of the requirement on the broadcaster; 3) prices; 4) interaction with the Fairness Doctrine; 5) scheduling; and 6) social and political effects.

The easiest definition of advertising time is that time the broadcaster designates in his schedule as being for sale. This could vary among days of the week, time periods, and individual programs. Thus, broadcasters could schedule programs with appropriate breaks for advertising just as they do now and offer up for sale whatever blocks of time within those programs they thought best. There would be no infringement on the broadcast program schedule in such an arrangement. The broadcaster could choose to make time available for sale in 30-second, 1-minute, or even 30 minute blocks. He could presumably vary this

allotment from time to time, including from season to season or even week to week, to reflect the demand or the needs of his schedule Thus we might expect 5-minute sales to be limited to pre-election campaign time and 30-minute sales limited to Sunday mornings (if at all). Some broadcasters might choose to limit time sales to shorter periods such as 1-minute in order to retain tight control over their schedule, while others might allow more flexibility. ((An important definitional question is whether the time the broadcaster xxxxxx uses to promote his own programs should be considered advertising time that he uses for his own advertising purposes. There seems to be no reason to do so, but this should be made clear in any legislative proposal.))

Any definition other than the above would require a measure of FCC oversight to administer. For example, any effort to require the broadcaster to allot a measure of program time for sale or to establish some "reasonable" amount of time in blocks longer than 1-minute would lead inevitably to FCC standards for definitions of "program" time vs. advertising time and to the amount of longer time blocks that would be in the public interest. Also, it would almost certainly lead to some form of price regulation since a broadcaster could price his program time or longer advertising time blocks at higher rates to discuourage its use -- presumably contrary to the FCC's standards of reasonableness. ~~This kind of consideration must have been in the mind of Chief Justice Burger in writing the Court's opinion in CBS v. DNC when he wrote~~ While such a system surely could be made to work, it would also tend to lead to some

pressure for the FCC to take account of the types of uses for which the time was sought. Thus an argument could be made that programming religious messages required more uninterrupted time to achieve their purpose so that broadcasters should be required to offer religious groups a certain amount of longer time periods.

While leaving the definition of advertising time to be sold to the discretion of the broadcaster may tend to favor those with short messages and may have some effect on the way in which issues arediscussed on television, the alternative seems worse. However, it is not clear that all or even most broadcasters would so limit the time they were willing to sell, especially if they retained some discretion over the scheduling of messages and time periods. Some broadcasters now for example sell time on Sunday mornings to religious organizations in half-hour and hour blocks and probably make more money that way in that time period than they could if they had to buy or produce their own programming and then sell individual spots for commercials. Similarly, it might be good programming practice to schedule a half-hour show sometime during the week consisting of five to ten minute editorial messages for which the time was purchased.

2 The nature of the requirement placed on the broadcaster is probably the most important and critical consideration in creating a statutory right of access. It could be accomplished in several ways, some better than others. Probably the simplest approach would be to require that the broadcaster not discriminate in the sale of time among prospective users. This would require the broadcaster to sell ~~the 1-minute block~~ beginning at 8

each advertising time period to whomever was prepared to pay his asking price. He would not be allowed to refuse any time period to any advertiser, at least on the basis of the advertiser's message. The simplicity of this approach, which could be achieved by a simple amendment to the Communications Act, ((Such an amendment could read: "No licensee shall discriminate among prospective purchasers of such time as the licensee shall decide to make available for sale on his station based upon the nature of the message to be presented in such time period, nor upon the race, creed, or religion of the prospective purchaser; except however that the licensee may refuse to carry any message he deems unlawful under Section _____ of this Act, pending a determination of such lawfulness by the Federal Communications Commission.")) however, must be balanced by other considerations. One problem is obscenity and tastefulness; another is scheduling for compatibility with adjacent programming and advertising material.

The problem of obscenity seems rather easily solved. So long as broadcasting comes directly into the home without any provisions for the set owner to exclude certain channels or program sources as can be done with the mails and with cable television, FCC oversight of obscenity seems inevitable. Thus a provision requiring the licensee to screen material supplied for use in paid time for obscenity and pornography that would violate the Communications Act seems in order. ((See above footnote for one possible way of enacting such a requirement.)) Alternatively, the licensee could be

exempted from all responsibility for the material he transmits during paid time and the FCC or the Justice Department could be responsible for prosecution of the persons who bought the time and used it to present obscene material. While this latter approach avoids the problem of prior ~~censorship~~ restraint, it seems to do so at too high a cost in confusion and cumbersome enforcement mechanisms. Certainly broadcast television ((at least that which is not paid for by the viewer)) is a very public forum, and it is quite appropriate to establish procedures that will protect the majority from unwanted intrusions into the privacy of their homes in such matters. ((This is especially true since their are a variety of other media and distribution mechanisms for making obscene or pornographic material available to those who want it -- e.g., film, video tapes, mail, and movie houses. The same point, of course can be made of editorial messages; but the system of free expression in a democracy requires maximum opportunity for the expression and dissemination of points of view on important political and social topics and does not necessarily require the same promotion or protection of obscene materials, nor are the risks of allowing the government or a few large corporations to set a priori limits on what constitutes an unacceptable invasion of the viewer's privacy so great in the area of obscenity as in other areas.)) The viewer, of course retains the power to shut off the set, but that power can be exercised practically only when there is some prior indication of the nature of the upcoming material. ((As for example with a magazine known to publish nude photographs or a subscription TV channel known for its occasionally risque material.) This point is elaborated in a broader context in the discussions of scheduling and social impact.))

The problem of unwanted obscene television programming will fade away if cable television policies are structured around a common carrier model with appropriate privacy safeguards rewembling today's postal privacy laws.((See the report of the Cabinet Committee on Cable Communications, supra. note ___.)) Certainly, however the problem is handled for broadcast television, unwanated obscene programming can be separated from the question of access for other topics.

Another, quite different, type of access requirement that could be placed on the broadcaster is that which would be entailed in the (overthrown) decision of the DC Court of Appeals in BEM v. FCC ((450 F 2d 642 (1971).)) The Court in that case determined that broadcasters should be required only to accept "some" editorial advertising," with the emphasis in original. FCC to establish "reasonable regulations" ((450 F 2d 663, 664.)) regarding scheduling and amounts of time that may be sold to any one person or group. The Court left open the possibility that the Fairness Doctrine might require free time to be given to balance points of view expressed in paid advertising time, but felet that the Commission could make necessary adjustments, presumably to the Doctrine or to the rules for access, to overcome such difficulties.

The considerations involved in such "reasonable regulation" would appear to be similar to those that have come into play in the evolution of the Fairness Doctrine. It would be possible, for example, for the FCC to review at license renewal time or upon complaint how many minutes per week each licensee sold for editorial advertising. It might apply the Fairness Doctrine to the totality of the licensees programming including the paid editorial

advertising, or might apply the Fairness Doctrine separately to the editorial advertising time to provide "access" to groups other than the licensee and those who have bought time. Standards would be evolved for the acceptable number of minutes in prime time and other time the licensee allots to editorial advertising. ((There is alsways the possibility that the damand for advertising time for editorial messages would be quite low, say lower than the initial standards set by the Commission; and it might vary considerably from community to community and with the intensity of the broadcaster's marketing efforts. It is not excessively cynical to observe that this could lead the FCC and perhaps the Court of Appeals to require preferential advertising rates or free time to assure that the right to buy time was effectively exercised --i.e., since it is the viewer's right to see and hear that is paramount, his interest in open and robust debate require that once adcess is allowed it may not be frustrated by unreasonably low use of the aceess right by individuals.)) Complaints that paid or free time to balance paid time was scheduled in less desirable time periods, thereby reaching lower or different audiences, would be adjudicated and establish prededents for administration of the limited access right by the broadcasters. Should demand for the editorial advertising time at existing advertising rates exceed the "reasonable" quota set by the licensee, the FCC could require expansion of the time available or could require rules limiting the right to buy such time to once per year per individual or group or could sanction some first-come, first-served rule or a random selection from competing applicants for the limited time. ((Such a hypothetical discussion could go on at great lengths. Anyone who thinks it fanciful should look at the original expression of the

Fairness Doctrine and compare the confusion of rules, rulings, and precedents that have characterized the enforcement and administration of the Doctrine.))

While such a system of limited access subject to reasonable regulation by the FCC could be made to work, it is quite vulnerable to the criticism made by the Supreme Court in rejecting such an approach. Although the Court merely refused to accept the lower Court's interpretation that the Constitution demanded such a right of access, the Court criticized the concept of limited Commission-regulated access on two grounds. ((See CBS v. DNC, 27 RR 2d at 924 - 930.))

1. It is important that OTP exist
   a. policy perspective
   b. EB partner w/ FCC & Congress
   c. importance of confirmation & reporting to Pres
   d. NTIA alternative

2. It is important that communications policy get onto the national agenda.
   a. Controversy is key to debate
   b. Debate is preferable to quiet political deals
   c. The issues are fundamental: economic; social; civil liberties & go to core of kind of society we will be.

3. It is important that govt & media be separate & apart, for better & for worse.
   a. Fairness Doctrine v. access
   b. License renewal: categories or good faith
   c. PSA production
   d. Public broadcast funding
   e. Anti-Trust v. PTAR

4. It is important that the consumer have meaningful choice.
   a. The limits of broadcast channels
   b. The limits of advertiser support
   c. The ~~ultimate~~ importance of "cable"
   d. Cable's promise isn't cable today
   e. Separations is key
   f. Possibilities: technology + arts, educ, humanities, politics
   g. Do we have the will to choose?

"CW Notes
for Re Sook"

(A)

Note for chap ——

The Exec Branch is respons for executing the law; it is the oper arm of the govt. The potential harm of ~~disinclination of FCC to~~ ~~respond to~~ EB impinges control of BC prog ~~is~~ via FCC is greater than Congs.

VII Observations

A. Initial power vacuum

B. Power struggle

1. Petty &/or personal
2. for influence & position
3. or issue

C. { Press in left field; dep on knowing who's in power
   { Value of staging how visib: input v power

D. One man's response → another power grab (thing)

E. Gresham's law of work: unimportant drives out important

F. Mediocrity is contagious

G. Things don't look the same; what is more real.

H. Change in power but terribly difficult & maybe impract

1. Introduction

A. Lack of much good future-oriented discussion of TV

B. The importance of the issues

1. Social and behavioral impact

3. Mirror and shaper of society; the conflict

2. TV and politics

4. Ultimate importance of communications in democracy

6. The 20-year stagnation of TV -- does it have a future?

D. The sterility and rigidity of public policy

1. The problem of regulation

2. The communications regulations process and TV

3. The dilemma of electronic innovation & TV stagnation

E. Time perspective problems: seasons, decades, centuries

F. Historical perspective

1. The mass media (printing presses in UK, US; pamphlets and village green, etc.; newspapers; magazines; radio)

~~2. History and rationale (original and current) of First Amendment~~

G. TV in current perspective

1. TV & other media

2. TV as an industry

3. Scarcity and time

4. TV as utility under public interest regulation

~~H. Perceptions of TV: Impressionism v. structural analysis (McLuhan v. Innis)~~

I. We aren't in control, but we need to get hold of the situation, and that's what this book is all about

"CW
Book outline"

- OTP
- TV
- CW commentary

email us

(A)

2. How Television Got to Be TV

A. The invention of television

1. Early Technology 1927

2. Radio with pictures

B. Radio broadcasting as precedent

1. The nature of broadcasting and evolution of the industry

2. The Radio and Communications Act

3. Perceptions:

a. Assumptions of technology and the "press"

b. Issues and debate

c. Routes not taken; what was and wasn't decided

C. The beginnings of the industry

1. First commercial efforts & regulatory attitudes

2. Evolution of industry and regulation in the 50's

D. Television becomes TV

1. TV in the 60's and 70's

2. Impact on society, economy and other media

3. Evolution of regulation in the 60's and 70's

E. The growth of our perceptions of TV (critics, commentators, polls, and politicians)

F. TV as a form

3. Why TV Is What It Is Today

A. What is TV?

1. ~~TV as form~~ Collection of forms

also 2. TV as ~~industry~~ medium

3. TV as industry

4. TV as public utility

~~ExxThexfewnessxxxofxxxxtimexx~~

B. Constraints

1. The fewness of stations

2. The nature of the commodity of time

3. Vertical integration and responsibility

4. The advertising base and lack of workable pay mechanism/precedent

C. The economics of television

1. Advertisingand audiences: what is bought and sold?

2. Networking and localism

3. Ratings and competition: local/national; other stations/other media

D. The programming process and incentives

1. What is bought and sold

2. Front office v. talent

3. Competition v. vying and the lack of new entry possibilities

~~Ex~~ 4. Outside influences: critics, regulators, politicians

E. TV journalism and the political process

1. Journalism on TV

2. Politics and TV

~~F. Fairness and access~~

G. The symbiosis of Washington and New York (regulator and regulated)

4. Two Exceptions: Public TV and CATV

SKIP

A. Public TV and CATV as exceptions to the scheme

1. Scarcity and geographical coverage of allocations & economics

2. Economics

B. Public Television

1. Original reservations for educational non-commerfial use

2. History of educational television

3. Carnegie Commission report and CPB

4. Funding issues

5. Conflicts in public TV and its role

a. Audience

b. Answerability and control

c. Federal funding and role of CPB, NEA, HEW

d. Governmental programming & control

C. CATV

1. Growth of CATV and translators

2. Distant signal issues

3. Pay and copyright

4. Regulation as adjunct to broadcasting

5. Program origination

6. Regulatory issues and uncertainty

D. Implications

1. As with radio and commercial TV , we have a problem perceiving what ultimate character and role of these institutions is, as opposed to minutiae of the moment

2. Clear that neither public TV or CATV(qua distant signals) can serve as vehicle for significant change in television

5. The Box the Tube Is In

A. The Issues

1. Homogeneity, diversity, quality, etc.

2. Access, fairness, equal time, etc.

3. Public service requirements and favored programming

4. License renewal -- who decides? how?

5. Public TV -- government funding & control; ~~and taste~~ how much diversity for whom?

6. Cable -- adjunct ~~or~~ new medium? Pay or free

7. Is it press under the First Amendment? yes, but ...

B. Structural incentives ~~for~~ public policy goals { first order approx: audience not out: limits diversity quality access ~~response~~

C. ~~Licensing the media and the First Amendment~~

1. ~~Compatability and implications~~

2. ~~Current symbiosis between industry and politicians~~

D. The rigidity and sterility of ~~the~~ regulated media

1. Locking out/new technologies and services

2. Inability to restructure

3. If you don't have it, how do you know you need it?

E. The Communications Act ~~and~~ or the First Amendment

- compatability of licensing & FA

1. Court interpretations of FCC authority & licensee response.
Freedom for whom? ~~of~~ right to hear, to be informed

2. Wisdom v. legality

~~3. The problem of perception (cf. D3 above)~~

4. Which comes first, the Act and ~~its structure~~ the power it creates, or the First Amendment?

~~F. How television could have been different~~

1. ~~Television in other countries~~

2. ~~How it could be different (deintermixture, low power UHF, common carriers, drop-ins, limited affiliations, cable as new medium, etc.~~

6. New Kinds of Television for Tomorrow

A. Why and how we should look at new technologies

1. May complicate or ease our policy dilemma & perceptions

2. Look at transmission separately from production/selection

B. New transmission tecnologies, & their implications

1. Cable, fiber optics, lasers, satellites, etc.

2. Wholesaleing v. local distribution

3. Channel scarcity exchanged for abundance

4. Economies of scale in new and old technologies

5. Access, responsibility and control in channel abundance

C. New programming technologies

1. Cameras, studios, etc.

2. Distributed transmit & record capability

3. Uplink technology and TV set design

4. Information services

5. Billing mechanisms

D. What it means for programming

1. We can buy what we want

2. Flexibility in time of watching

3. Choosing to watch programs rather than to watch TV

4. Flexibility of economics: specialty advertising and pay

5. Changed viewer habits → don't R. how

E. The problem of incentives

1. The critical mass problem and economic incentives

2. If it can't be offered you can't know you want it

3. The cable operators role as monopolist & incentives for innovation

F. The inadequacy of broadcasting as a precedent for the new kinds of television

X. Perspective: The Bigger Issues In the Future of Television

A. A time to reexamine premises and perceptions

1. Contrast possibilities of Chap. 6 with box of Chap. 5
2. Forcing cable into the broadcast TV model; it will fit, but is it wise?
3. Bureaucratic drift of FCC program regulation
4. Sooner or later the Court will have to decide → that's part of the problem
5. We should decide clearly & openly rather than relying on the FCC and the Court deciding narrowly if the FCC can act

B. The 3 big directions for the future (including discussion of each)

1. Continued muddling under the '34 Act
2. Public interest regulation of broadcaster & cable operator as public trustee
3. Common carrier transmission and programming competition

~~C. The future of the media industry~~

C. The public stake, the varying industry stakes, in transmission and programming

2. Vertical integration: can Big Media be a Free Press?

D. Access: free speech v. free press

E. Mirror or shaper of society? Power and danger of concentration of control

F. The momentum of the current scheme

G. The choice is clear, but can we ~~structure~~ realistic competition to avoid monopoly and government control?

8. The Way Out

A. The impossibility of getting out of the box without "cable"
Comp ⇒ entry ⇒ abundance of channels ⇒ cable.

B. The print media as model and the need for ~~conceptual~~

conceptual discipline (aimed at Court and Congress)

C. The cable policy

1. Long-term goals

2. Transition period

D. The future of TV broadcasting

1. Need to work from where we are

2. Access v. fairness

3. Program regulation and license renewal criteria

4. Networks and competition

E. Television in the future

1. Cable and broadcasting as businesses

2. Video as a business (programming)

3. The consumer and the media business

4. The politician and the media

5. What would be produced and/or watched? what will it be like?

F. How do we decide if it's what we want?

1. Are we willing to forego individual freedom for bigger public goals?

2. Is the public interest in TV program prodn & distn something to be explicitly determined and enforced, or something to evolve within the society?

~~3. What is a "society" anyway; how different from a "public" that is governed, even if by people chosen from the society itself?~~

3. What will we make of FA in electronic media future?

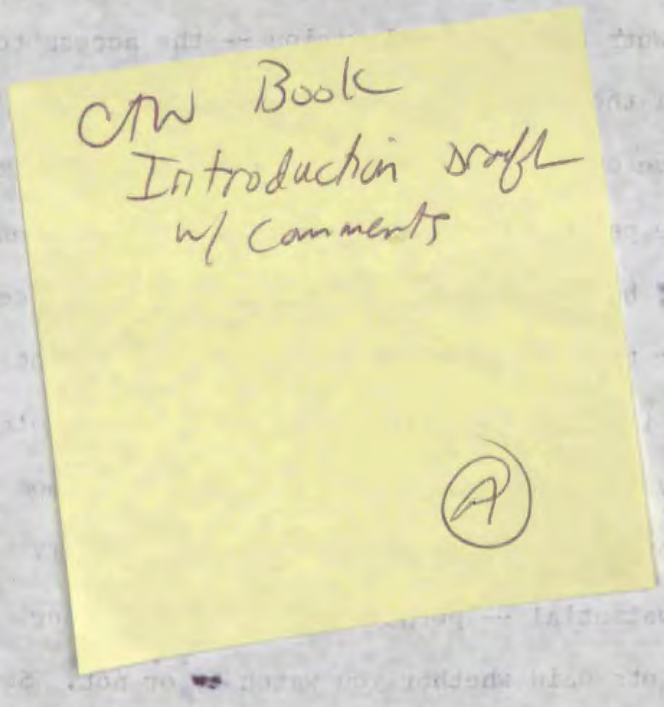
ACCESS TO TELEVISION

Clay T. Whitehead

INTRODUCTION

The idea of access to television -- what is easily our most accessible, if not totally unavoidable, medium of communications -- may seem redundant. But it is in fact a difficult, complex, and intriguing subject. Consider first the viewer's access to television -- the access to see and hear. On one level there is no problem to speak of; 97% of American households have one or more TV sets (almost half have more than one). Some people perhaps can't afford to buy even a used black & white TV set; but more than likely, those three per cent who don't have a TV for the most part don't want one. Once the purchase of the TV set is made, TV is essentially free. The electricity cost is minor, probably less than the cost of lighting the room to read. The extra cost of products purchased attributable to TV advertising is more substantial -- perhaps $5 per month per household -- but that gets paid whether you watch TV or not. So access to see and hear TV has very, very few barriers. Indeed, it is safe to say that more emotional energy is devoted in the United States to how to avoid the TV set rather than how to get to it.

On the other hand, there is the question of access to see and hear what? Here we get to the topic of most debate and criticism of television in America. Why are the shows of the three commercial networks so similar; why is there so little choice in prime time?


CW Book
Introduction draft
w/ comments
A

Why is there so much violence? Why is the quality of TV programming so low? Why are there so many commercials? Why did they cancel a popular series? Why is the news so superficial? Why did they pre-empt a popular show for a news documentary? Why do all three networks have sports on Saturday afternoons? There are some interesting and important issues in this aspect of the viewer's access to TV.

Then there is the question of access to TV to show and tell. Surely what viewers have access to see and hear depends on who has access to show and tell. It is this aspect of television access that is the subject of this paper.

TELEVISION IS DIFFERENT

Most people never think about getting in front of the TV cameras to convey some message or to put on their own TV show. No doubt many youngsters daydream of becoming star personalities on tv entertainment or news, just as in earlier days they dreamed of being in movies, theater, or radio. But even though most of us don't think of going on TV ourselves, we take it more or less for granted that what does go on TV is somehow reflective of the talents and knowledge of people around the country who do feel they have something to show & tell that others of us would like to see and hear.

Yet there are reasons why that implicit assumption is not true for tv. The reason cited in most legal and economic texts is simply that there are not enough channels for everyone who wants to start up there own TV station the way newspapers or magazines or community theater groups can be started. And that is a true enough

reason. The government has set aside a certain range of frequencies for TV broadcasting, represented by channels 2-84, and decides how many stations can broadcast on what channels in any given community. (1) ((More channels could be assigned for tv broadcasting, but there are strong competing needs for those frequencies ~~being used by industry and government~~ for two-way radio, mobile telephones, microwave relays, satellite communications, navigation, etc. Each TV channel takes up the frequency space of about 2000 voice channels and covers a very large geographical area within which each voice channel might be used several times over, so that the reassignment of ~~[illegible]~~ frequencies to create even a few new TV channels ~~[illegible]~~ (say channels 85-99) would require massive dislocations of radio communications. ~~[illegible]~~)) While it is possible with new technology ~~for transmitters and receivers~~ to allow broadcasting on some of the channels now empty in many communities without creating interference with existing stations, the limitations of frequencies and interference remain so tight that the number of allowable tv broadcast ~~[illegible]~~ stations will remain relatively low. (2) ((The FCC's table of TV assignments, ~~for~~ designating what channels can be used in what communities, was drawn up in 1952. Recent studies suggest ~~that~~ that as many as 100 new stations might be authorized around the country in VHF channels 2 - 13. See " ", U.S. Office of Telecommunications Policy, May, 1974. ~~[illegible]~~ Similar expansions in UHF channels, 14 - 84, are also possible. Moreover, if the power and studio equipment requirements placed on UHF TV broadcasting were reduced, even more channels would be possible.))

Another reason why not everyone with something to show and tell can get access to television has to do with the structure of the TV industry. ~~Many more people than can get a TV channel~~ While few can afford to build ~~their~~ their own TV station and fewer still can hope to get a license to broadcast,

~~assignment from the government and can afford to build a TV studio and transmitter~~ might be able to finance the production of a single TV series or a program or a few spots. (3) ((A spot is a video production lasting typically 30 seconds or one minute. A program typically is produced in multiples of ½ hour with time out for spots, which of course are usually commercials or advertisements for upcoming programs. Five and fifteen minute productions are occasionally used, especially during political campaigns.)) But under current law, (4) ((The Communications Act of 1934)) the broadcaster who receives the license from the government to broadcast on a particular channel in a community has complete discretion as to what programs and spots he puts on his station. (5) ((The FCC in making its license renewal decisions every three years has evolved a considerable and complex body of requirements for the broadcaster's overall programming as a test of whether he has met the statutory "public interest, convenience, and necessity" test for renewal of his license to broadcast. Some of these FCC - imposed requirements do require the broadcaster to provide access to his station in certain circumstances, such as the Fairness Doctrine to be discussed later. Also, the Congress has imposed requirements that the broadcaster must sell time to all political candidates or give them free time on an equal-time basis.)) Thus, would-be producers of television programs or short spot messages must first have the approval of a broadcast licensee in order to get on the air to have access to the ~~community's TV sets~~ medium and in order for the viewers in the community to have the choice of whether to watch or switch to another program.

As a practical matter, most television broadcasters are very selective about what they allow on the air. Their main criteria in being selective are money and controversy. The commercial broadcaster is a businessman -- he operates his TV station to make a profit, and most commercial tv stations are profitable indeed. (6) ((Include data on investment, sales price, revenues, and profits.)) Contrary to popular opinion, however, the broadcaster is not in the business of selling entertainment to the viewer. Rather, the broadcaster is in the business of packaging audiences which he then sells to advertisers for so many dollars per thousand. (7) ((It might be said that the broadcaster sells his programming fare to the audience indirectly through the prices they pay for the goods advertised on tv; or it might be said that he sells time on his station. But neither of these explanations account for the incentives or economic imperatives of the TV business. Prices for consumer goods are the same to those who watch TV as for those who don't; and TV viewing is free to those who buy the products heavily advertised on TV as well as to those who don't. Moreover, the price of a minute on a TV station is usually calculated in "cost per thousand" viewers in the audience rather than simply cost per minute; the price of a minute may vary considerably with the time of day, the day of the week, and the show's ratings; the cost to an advertiser of a minute during a popular prime-time nationwide network entertainment show will be considerably more than a minute during a Sunday afternoon show on public affairs. And although a broadcaster is licensed to serve a "community", the language of TV geography is always "markets" except when applying for license renewal.)) Since the costs of operating a TV station are basically fixed, the broadcaster naturally favors putting on programs that will attract the largest possible audience at any given time ~~that is, he favors the shows with~~

~~the large highest ratings~~ so that his receipts from the advertisers who pay by the head, ~~and~~ and therefore his profits, will be as large as possible ~~— that is,~~ Simply put, the commercial broadcaster profits most from and, therefore favors the shows with the highest ratings. Moreover, the broadcaster wants to make as much as possible from all the time he can sell, so he favors shows that keep ~~as~~ the ~~large~~ largest possible audience tuned to his channel hour-by-hour, ~~and~~ day-in, day-out. By getting the largest possible number of viewers for each time period, ~~the longest possible time,~~ his weekly, monthly, and yearly profits are increased. ((~~Some~~ Most broadcasters ~~will~~ put on occasional special shows of particular local interest, or in the case of the networks, shows of particular national interest, that may be exceptionally ~~very~~ costly to produce or may not attract a large audience. It is safe to say, however, that most such examples are calculated to attract overall attention to the station or network to keep viewers favorably disposed toward watching that channel or to keep the Federal government placated so there will be no trouble getting the license renewed.)) The broadcaster, therefore, not only ~~wishes~~ expects to be paid for the shows he puts on, but he will be adverse to putting on any show that tends to cause many viewers to be bored or unhappy enough to switch to another channel and thereby ~~take~~ reduce his ~~any~~ audience, ~~and~~ advertising revenues, and profits. ~~from his overall operation.~~

The tv broadcaster is motivated to avoid controversy in the shows he puts on his station mainly because controversy can ~~cost~~ ~~him money and~~ reduce his profits, if not put him out of business entirely. ~~Controversial (or for that~~ Programs may be controversial for a variety of reasons, ranging from ~~that~~ the expression of political or moral opinions to being very ~~dull~~ violent or very dull. The cost to the broadcaster can ~~range from~~ take the form of reduced viewing

audiences (with attendant reduction in ~~advertising~~ revenues & profits), ~~or~~ a Federal government order that opposing points of view must be aired at the broadcaster's expense (again probably taking up time that could be filled with more profitable programming), ~~or~~ expensive ~~proc~~ proceedings before the FCC justifying that the public interest has ~~not been~~ been served by the controversial material. (9) ((Of course, the lack of controversial material may be an even greater disservice to the public interest, ~~and~~ while most complaints about TV deal with controversy, most serious challenges to the broadcaster's license renewal have been over the failure to present controversial material that some group believes important for the community to have the opportunity to see and hear; complaints about the lack of controversy, then, are in reality complaints about the ~~broadcaster's~~ broadcaster's limitations on access. ~~Also~~ Also, there may be a fine line between controversy and attention. The wave of sexually-oriented talk shows on radio in 1973(?) for a while created much more ~~public~~ attention/and audience than controversy and complaint. Only when the Chairman of the FCC "raised his eyebrow" in a speech expressing concern that such programs were not in the public interest did the broadcasters find the ~~attention-getting~~ attention-getting programs dangerously controversial.))

~~It is clear, then, that~~

One way of looking at the economics of commercial television is that the broadcaster sells access to his audience; that is perhaps a nicer way of saying that he sells the audience to the advertisers. But either way we choose to look at the situation, the economic

structure of the broadcast industry does provide access to the television medium to two classes of people: 1) those who ~~can provide~~ sell the broadcaster programming that ~~is not too costly and~~ will attract large viewing audiences which the broadcaster can then sell to 2)those who can pay the broadcaster the going market rate per thousand for the opportunity to present their message to the x viewing audience. ~~Moreover,~~ This system has some obvious advantages to the general public. Program producers xxx have incentives to produce programs that ~~xxx~~ large numbers of people xxxxxxxxxxxxx will watch. Broadcasters have incentives to select and schedule programs that will please most of the people most of the time. Advertisers, by spreading their costs over large audiences, get the maximum xxxxx consumer awareness for their products xxxxxxxxxxxxxxxxx with the least cost possible passed on xx to the consumer. ((There are some problems with this scheme that go beyond the scope of this paper. For example, this process takes little account of the intensity of potential viewers' preferences; it provides what the maximum number of people xxxx will watch rather than what they want to watch. Thus even though almost everyone xxxxxxxxxx might like at some time to watch a show on xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx how to deal with automobile repair shops, xxx relatively more would rather watch xxxxxx an entertainment program at any one xxxxxxxxx hour of the day. Also, only those advertisers who wish to reach the large general audience that the broadcaster attracts can afford to advertise on TV. Some relatively specialized products, like diapers, can be advertised economically on those shows that are aired during the time of day that potential consumers are relatively heavily represented,

but advertisers of hobby supplies would have to pay the same amount as ~~cope~~ soap advertisers even though the audience contained far fewer potential ~~hobbiests~~ hobbyists than potential soap users.))In spite of the advantages, however, this system has some drawbacks. For one thing, the ~~[illegible]~~ broadcaster may decide the purposes for which he will sell time for spot announcements. Most TV broadcasters have a policy of selling such time only for advertising commercial products ~~of services~~ or for political campaigns by a candidate for public office immediately predeeding an election. They mostly refuse to carry advertising ~~[illegible]~~ presenting political, moral, or other editorial points of ~~[illegible]~~ view or seeking to raise funds. (11) ((Again with the exception of candidates for public office ~~[illegible]~~ during campaigns.)) Most importantly, the three television networks have adopted this policy. 9 And of course, the broadcaster can decide what he will buy in the way of program material, so that the broadcaster has essentially complete discretion in the scheduling of his programming and advertising. Since most advertisers want to reach potential consumers, the broadcaster heavily weights ~~his~~ his prime time schedule toward/~~women~~ middle-class men and women in the 18-49 age group; ~~during peak viewing hours~~ toward women in the same age group during weekdays; ~~and~~ toward children on Saturday mornings; and so toward ~~[illegible]~~ 18-49 year old men on weekend afternoons.

Those who are not members of a consuming statistical group don't figure in the selection of programming. (12) ((This accounts for ABC-TV's cancellation ~~[illegible]~~ of The Lawrence Welk Show at the height of its popularity. Most of the audience was in the older age group, ~~[illegible]~~ many of whom were retired and had little ~~[illegible]~~ potential as consumers of mass-advertised products and services. * See Broadcasting magazine, _____.))

The access issue is complicated by the way in which the three commercial television networks have chosen to structure their business. Each network is in two different, but intertwined, businesses. Each owns five televsion stations in five of the largest cities, and each supplies a nationwide distribution of television programming to tv stations in most cities in the country. ((Each also sells television programs for which it owns the rights in many countries around the world.)) The networks produce some of their own programs (especially news), but mostly buy the TV rights to series produced by major or independent film producers, most of which are located in Hollywood. These programs are then combined with advertising spots and program promotional spots to make up the daily network schedule which is supplied over the network's microwave lines to its own stations (("owned-and-operated" or "O-and-O"" in the trade jargon.)) and to other stations with which it has affiliation contracts. Each network supplies about 15(?) hours per day of programming.

The networks' own stations, naturally, use most of the network-supplied programs, as do the affiliates, although they are free not to do so. ((An affiliate who regularly did not air a large number of the network shows would, however, be subject to network pressure to do so and might even find the network shifting its affiliation in his community to another station.)) Each affiliate station, as specified in the affiliation contract, agrees to carry on his station a substantial majority of the network programs and advertising spots, in return for which he is paid by the network. The network then sells national advertisers access

See Media Report, ——, and Broadcasting, ——.

to the audiences watching its shows on its own ~~stations~~ and ~~on the~~ affiliated stations all over the country. Thus, the networks policies on access to their schedule have a tremendous impact on the character of television programming -- on the entertainment we see, the news we see, the advertising we see, and perhaps even more importantly, the entertainment, news, and advertisng we don't see.

(17) ((The arrangement has evolved from the old radio networks which became the TV networks. The economics are attractive to broadcasters and advertisers because of the ability to spread costs over large numbers of viewers. A TV show ~~xxxxxxxxxxxxx~~ seen in a relatively small number of cities ~~can attract enough~~ can attract only a relatively audience to be sold to advertisers, and so brings in less total revenue than a similar program ~~xxxx seen~~ aired nationwide. A network show can be very expensively produced and yet have a cost per viewer considerably less than ~~xxxx~~ that of a less expensive show seen in only ~~xxxxxxxxxx~~ one or a few cities.))

~~xxxxxx~~ Perhaps the ~~xx~~ most noteworthy feature of this networking arrangement is ~~the~~ its "threeness." (18) ((I am indebted to Professor Bruce M. Owen of Stanford University for this terminology.)) There are only three national commercial TV networks, and the prospects of having any more are slim until ~~the arrival of~~ cable ~~as an economic national television distribution system.~~ is nationally available with the larger number of channels it makes possible. (19) ((This is due to the limited number of channels available for broadcast TV as discussed earlier.)) The number three arises because enough cities are assigned three or more VHF TV stations to ~~substantially~~ cover most of the national population; cities with four or more VHF stations are so few that a fourth network would reach a substantially smaller potential

(20) ((Include data; See Rolla E. Park, ______.))

audience. Thus a fourth network would have to incur essentially the same expenses as each of the three present networks in order to put on equally attractive and competitive programs, but would be seriously limited in revenue and profit because it would have a smaller audience to sell to the advertisers. If there were more national TV networks, there presumably there would be more competition and therefore more diversity in programming and in policies on access than with only three. (21) But in fact, we have only three, and they all have essentially the same access and programming policies.

(21) ((As with radio, however, we might expect that the diversity would be limited to "more of the same" so long as advertising were the sole form of economic support. This is not to say that more choice of which sitcom to watch or when to watch the news would not be worthwhile.))

The situation today regarding access to commercial television then can be summarized as follows: Each individual TV station prefers programming that attracts as large an audience as possible at each hour, and for the most part the station gets such programming from one of the three TV networks. Individual stations mostly will not sell time either for programs or for advertising that is editorial in nature or is otherwise controversial. The networks will not buy programs for their schedule that do not fit their objectives and will not sell national advertising time for editorial, controversial, or fund-raising purposes.

We cannot, of course, ignore public television in discussing access to TV. It does provide different programming than that available on commercial TV, but the access to the stations for presentation of programming or messages is at least as limited as on commercial TV. Public TV is prohibited by law from selling time, so that form of access is not available to anyone. (22) It is the policy of the Public Broadcasting System to fund and carry principally programming produced by public television stations or purchased from the BBC. Although some public

(22) ((Large corporations, foundations, and the Federal government, however, have enough money to subsidize the production of programs by public TV stations for use on the public TV network. It is obvious that they have considerable say in what they will pay to produce.))

stations have local programs that provide free time to local groups for discussion of issues important to them, this is limited in scope and is not available nationwide. Public TV therefore increases somewhat the diversity of entertainment and educational matter available to the tv viewer, but provides no substantial expansion of opportunities for access to TV.

Cable may one day change all of the above discussion. By avoiding the use of the limited frequencies available for broadcast TV, the limit on the number of channels that can be brought into the home will be essentially eliminated along with the associated "threeness" of the national commercial tv networks. By permitting the viewer to pay directly for individual programs or to subscribe to "video magazine series" in addition to the free advertiser-supported fare, more programming will be available than what mass advertisers find it economical to support, and viewer preferences will have more sway. If cable is structured as a common carrier, so that the cable system owner in a community must lease his channels to all who wish to use them, much as the Postal Service or trucking companies are required to carry the magazines and packages of anyone, then the problem of access to television will be reduced to be at least as small as the problems of access to print media. (23) ((See the report of the Cabinet Committee on Cable Communications, 1974, for a discussion and recommendations on this direction for public policy toward the development of cable. See also the report of the Committee for Economic Development entitled "_____", 1975 for a similar discussion from an industry point of view. And see ____ and ____ for a discussion of the services cable might make possible.))

The growth of cable as a medium for distributing television programs in abundance, in contrast to the scarcity of today's broadcast tv, is a most promising hope. It is opposed only by the broadcast industry and motion picture theater owners.[24] ((The reasons for this opposition are transparent, although it is interesting to note some of the reasons they stress. Broadcasters profess to be worried that people will have to pay for what they now get for free, as though people will pay for what they now already get for free and as though people don't now pay for TV in each time they buy an advertised product, with less choice in the matter than in their purchase of magazines and newspapers. Theater owners stress the social benefits of getting out of the home and the deterrent effect of theater lights on crime.)) ¶ From the point of view of access, the great benefits of cable will be that those who operate the television distribution pipeline will not be able to act as gatekeepers, deciding who will and will not have the opportunity to present programming or other messages for the public to decide if they want to watch it. The ease of access for those with something to show and tell will be much greater, and the range of access the rest of us have to what we may choose to see and hear will be greatly expanded. Moreover, the expansion of the number of channels available from the present limited number means that the costs of access will be reduced below the present artificially high level. And the opportunity for viewers to pay for programming that the advertising markets won't support means more funds will be available to produce high quality or special interest programs than at present with only advertising funds available.

Even if the FCC decides more coverage of a particular point of view is required, the broadcaster may decide will present that coverage and may well select to do so with his own staff.))

It is desirable then that whatever changes are made in the present laws and regulations and policies regarding access, ~~that they~~ be made with the ultimate availability of cable in mind so that the medium of abundance is not unduly constrained with access policies that are left over from the medium of scarcity.

FAIRNESS

Communications law at present provides only two routes for access to television to present ideas and programming: 1) the broadcaster's obligation under the FCC's interpretation of the statutory "public interest" standard to provide opportunities for ~~discussion of~~ contrasting points of view in the discussion of controversial issues of public importance, popularly known as the Fairness Doctrine, and 2) the obligation on the broadcaster under section 315 of the Communications Act to make available equal time at equal rates for all candidates for a public office if he makes available time for any one candidate, better known as the "equal time" requirement. While these two provisions of "fairness" and "equal time" are often equated in the public eye, they are in fact quite different. Fairness provides access for ideas (25) ((Actually for "sides" of a controversial issue of public importance. If the issue involved is decided by the FCC to be not of public importance, or if the "side" of the issue seeking access is deemed well represented by the station's past programming, there is no access.)), not for people or groups; the station retains the discretion to decide who is a legitimate spokesman for an idea and indeed may use its own personnel to present the idea. The equal time provision does provide access for individual people, but only that limited group who are at any given time declared candidates for public office. (26) ((Even here, the law

requires only "equal" time on equal terms; the station may decide not to allow any candidates for a particular office to ~~have free time or to buy~~ time, and ~~they~~ may also decide not to allow any time to be bought for any campaign use.)) ~~The equal time provision, being closest to the real access issues will be discussed later.~~

With the statutory proviso that broadcasters are not to be considered to be common carriers ((Section 3(h) of the Communications Act)), both the FCC and the broadcast industry have steadfastly opposed any ~~requirement~~ suggestion that broadcasters be required to provide time either for free or for pay except on their own terms or as directed by the Commission. ((The origin of this section of the Act is unclear. It may well have been inserted to clarify that in the combining of the 1927 Radio Act with the common carrier statutes in 1934, the Congress did not intend to extend the common carrier type regulation as it evolved under the ICC into broadcasting. ~~However it was specifically considered and rejected. See Robinson p. __ & note __ infra.~~)) ~~Aside from the specific provisions for politicians during campai~~ The sole exception to this is the generalized obligattion imposed on the broadcaster under the FCC's interpretation of the "public Interest" standard ~~"afford reasonable opportunity for the discussion of conflicting views on issues of public importance."~~ ~~"to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station, (and)... , with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community.~~" ((FCC Report on Editorializing by Licensees)) ~~Docket 8516, Pike and Fischer 91 204, paragraph 6~~ 1949)) This was later restated by the

~~"...that licensees devote a reasonable percentage of thier broadcasting time to the discussion of public issues of interest in the community served by their stations and that such programs be designed so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community."~~ this requires

Congress in recognizing the FCC's construction of the principle of fairness which has become the accepted definition of broadcaster's obligation under the the/Fairness Doctrine -- "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

((Section 315(a) of the Communications Act. The legislative history of this section of the Act, passed in 1959, indicates that the Congress in adopting this language was only clarifying that the remainder of the section (dealing with equal-time requirements and news shows) was not intended to alter the FCC's evolution under the public interest standard of the fairnesss obligation. The FCC, from time to time construes this language as statutory enactment of the Fairness Doctrine. However, whether the Fairness Doctrine rests on Section 315(a) or on the more general public interest standard of the Act is immaterial for purposes of a discussion of access. The history of the evolution of the Fairness Doctrine by the FCC goes back to 1929 when the Federal Radio Commission stated that the "public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies not only to addresses of political candidates but to discussion of issues of importance to the public." 1929 FRC Annual Report 33. In 1940 the FCC banned broadcast editorials on the assumption that this would aid the presentation "of all sides of important public questions, fairly, objectively and without bias." 8 FCC 333 (1940). This was reversed by the 1949 Report on Editorializing by Broadcasting Licensees.))

The two-fold requirements of the Fairness Doctrine, then, are: first, to provide coverage of controversial public issues; and second, to seek out all responsible viewpoints and to afford opportunities for those viewpoints to be seen and heard. (31) ((In this and in other formulations of the legal issues involved in broadcasting regulation I am indebted to Glenn Robinson's seminal article: "The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation" , Minnesota Law Review, Vol. 52, p. 67 (1967).)) It is the broadcast licensee who is responsible for taking the initiative in carrying out this fairness two-step; but of course the FCC stands in the wings as the arbiter of whether the licensee has succeeded, and it is the FCC's determinations of what constitutes a controversial issue of public importance and what are responsible viewpoints that inevitably guide the licensee who wishes to have his license renewed when it next comes up for renewal.

It may be useful here to trace the logic (32) ((It is not clear that all of the steps of the Fairness Doctrine's evolution deserve to be called logic, but the FCC's legal discourse styleseems to suggest thatit wants to be thought to be logical in reaching its conclusions.)) of the FCC's evolution of the Fairness Doctrine. (1)There are not enough frequencies to permit everyone who wants to establish a radio or television broadcasting station to do so. ~~(2)This also applies to TV.~~ (2) Not everyone may be licensed to operate a tv station. ~~(4) Those who are licensed therefore may not use the station for their own personal interest but must instead use it for the benefit of the public interest.~~ (3) Requests for time on licensed radio or tv stations may far exceed the amount of time reasonably available, so the broadcaster ~~cannot~~ should not be a common carrier.

(4) Issues of public importance must be seen and heard on TV.

(5) The licensee therefore must allocate part of his time to such issues.

(6) The licensee ~~myx~~ may not allocate the time according to his own views or interests, but must do so fairly and objectively. (7) This may conflict with the broadcaster's First Amendment rights, but the public's right to be informed is so much more important that the government may require~~ix~~ (5) and (6) of the broadcaster as a part of the public interest ~~rxxix~~ standard for determining if his license should be renewed. There are several weak points ~~if not non sequiture~~ in this chain of reasoning which we will deal with later.

The philosophical basis for the Fairness Doctrine ((indeed, of most of the FCC's regulation of broadcast programming)) is that there is a "right" of the public as a whole to be informed~~, and that this right conflicts with the~~ and that it is the ~~right~~ duty of the FCC and its licensees affirmatively to effectuate that right. Thus, the FCC says: "It is this right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting." ((Report on Editorializing by Licensees, 91 P&F 204 (1949).

Also, this concept goes back to the conceptual basis for the 1927 Radio Act. Reacting to the confusion of the situation when anyone could broadcast on any frequency, with no regulation or coordination, the congress saw a dichotomy between the "private" rights of broadcasters under the old scheme and the "public" interest ~~rxxx~~ responsibilities of those licensed to use the frequencies owned by the public. Thus, Congressman White ~~rxxxrxx~~ whose 1923 bill served as a major basis for the 1927 Act said (67 Cong. Rec. 5479, March 12, 1926): "We have

reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will, may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual to use the ether..."). And the Supreme Court in an opinion written by Justice White has more recently stated this philosophy in these words: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." (35) (395 U.S. 390 (1968). We need not address here the broader question of FCC regulation of broadcast programming and the constitutional issues surrounding such regulation. Only a fundamental revision of the broadcasting licensing structure to deny the government the authority to take away a license (except perhaps for criminal use) would eliminate the need for some governmental oversight judgment of whether the broadcaster in his programming was serving the public interest. For a thorough discussion of issues surrounding FCC program regulation and the First Amendment, see Robinson, supra note ___.)

Two points need to be made about this philosophical underpinning of the Fairness Doctrine. First, the substitution of the goal of the First Amendment for the Amendment itself creates a subtle but powerful distinction. It is one thing to believe that the protection of freedom of speech and press for individuals under the First Amendment was intended "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail..." (36) (Red Lion; 395 U.S. 390) and another entirely for the government to argue that "full effect can only be given to the concept of freedom of speech on

the radio by giving precedence to the right of the American public to be informed on all sides of public questions over any ... individual exploitation for private purposes," ((FCC Report on Editorializing by Licensees, supra at 91:211)) or that the government should affirmatively enforce the people's "collective right to have the medium function consistently with the ends and purposes of the First Amendment. ((Red Lion, at 390.))

The purposes and benefits of free expression in an open society have been the subject of debate since Milton, continuing on to Blackstone and Mill. ((John Milton, Areopagitica (1644); Blackstone, _____; John Stuart Mill, On Liberty)) Three basic principles, however stand out. Through the test of challenge and survival, good ideas or "truth" will emerge, and such a process is essential to good government. ~~If free expression is denied by the government, tyranny may be able to perpetuate itself more easily~~ Free expression is a powerful bar to the emergence of a tyrannical government. And the right to free expression of views is a valuable individual right that contributes to human dignity.

The FCC and the Supreme Court have focussed principally on the first two of these purposes of free expression, and indeed most of the traditional legal and political thinking on the subject has been along those lines. This approach caused no particular problems so long as the issues involved the print media, ((with some exceptions in the case of state sponsored media such as school newspapers or public places. See for example, Barron, Freedom of the Press for Whom, pp. ---- for a discussion of variations on the traditional First Amendment issues when state action is involved.)) where the

tradition of media diversity and competition fitted well with a governmental policy of laissez faire. In such an environment, there was a near-continuum of opportunities for expression, ranging from handbills to newssheets to magazines and newspapers. The major issues for government policy were the permissible limits of free expression, including libel, clear and present danger, and obscenity. There was no concept of the government having a responsibility for deciding who would be allowed to use a particular medium or whether the public was adequately informed on specific issues.

In broadcasting, however, a quite different approach has arisen. The idea that the public interest standard for licensing must be applied to the content of the broadcaster's programming has led to increasing governmental specification of what programming is and is not in the public interest. While maintaining the fiction that the FCC does not censor broadcasting,[41] ((as indeed the Communication Act states it may not: Section ________)) the courts have steadily allowed the FCC to enlarge the public trustee concept of the broadcaster's role -- with the FCC and the courts as the final overseers of whether the broadcaster has in fact adequately executed his trusteeship. Thus there is in broadcasting the contention that there is no censorship and that there is no "state action" in the broadcasters' programming deciisions, while the FCC with great frequency second-guesses the broadcaster's decisions. The constitutional thinking on this issue has been fuzzy at best and borders on the dangerous. The Congress in passing the 1927 Radio Act was reacting to a proliferation of private broadcasting operations and a political climate of corporate exploitation of natural resources; [42] ((Teapot Dome, etc.)) the "public trustee" role of the broadcaster fitted well the political temper of the times, even though it may not have been thought through very deeply, and we can believe that the

authors of the Act saw no conflict between this concept and the contention that there would be no censorship.

What they perhaps could not have foreseen was the FCC's steady intrusion into detailed ~~xxxxxx~~ arbitration of what programming was in the public interest and therefore required of the public trustee. At first, the rationale for this role for the government was that there was something "different" or "unique" about broadcasting -- principally that the airwaves "belonged" to ~~xx~~ the public and that not everyone could set up their own broadcast station. ((This concept that not everyone could ~~xxxxxx~~ broadcast because ~~xx~~ of the frequency limitations ~~xxxx~~ sounds strange today when the cost of setting up and operating a TV station (or even a standard radio broadcast station) is ~~such a major barrier.~~ so large But in the 1920's many of the broadcasters had homemade transmitters and stations that cost a few hundred dollars or less and many people broadcast just for the fun of it. Today, ~~in fact,~~ a decent quality AM or FM radio transmitter powerful enough to cover a small community would cost no more than a thousand dollars and could be programmed with several hundred dollars worth of tape equipment. Amateur radio operators are putting on their own TV shows on the air in the UHF amateur bands with equipment that costs ~~xxxxxx~~ no more than a few thousand dollars. And of course the rapid growth of Citizen's Band radio which the FCC originally sought to license only for limited two-way communication has become in some communities a party-line that borders on "broadcasting;" and its use on highways is hardly more than "everyone" broadcasting to a "community" several miles long that moves along the road at something more than the speed limit. The idea that "not every one can broadcast" is true mainly because the FCC has structured the use of radio frequencies and requirements on licensees so that is so. The technology and the frequencies do not inherently make it so.)) Today, however, the concept has chnged

to the freedom of ~~the people as a whole~~ any single person to exploit the medium for his own private interest."

so that the "difference" is that the broadcaster is a public trustee and must adequately ~~per~~ provide the benefits of free expression. It is not that the broadcaster or anyone else is "free" to express anythng, but that the public shall receive the benefits of free expression that is important in the calculus of the FCC and the courts. ~~Xxxxx~~ ~~"It is (the) right of the public to be informed, rather than any right on the part of the Government, any broadcast license or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone on the American system of broadcasting."~~ Thus we find the FCC saying that ~~"We fully recognize that freedom of the radio is included among the freedoms protected against governmental abridgement by the First Amendment. But this does not mean that the freedom of the people as a whole to enjoy the maximum possible utilization of this medium of mass communication may be subordinated to the freedom of any single person to exploit the medium for his own private interest."~~ ((Report on Editorializing by Lincensees, 91 P&F 211.)) ~~And the Supreme court saying:~~ "It is ~~xxx~~ the right of the public to receive suitable access to social, political, esthetic, ~~xxxxxxxxxxx~~ moral, and other ideas and experiences which is ~~xxxxxx~~ crucial here." ((Red ~~Xxxx~~ Lion Broadcasting Co. v. FCC, 395 U.S. 390 ~~(1969)xxx~~ (1969), emphasis added.)) In broadcasting at least, the modern ~~xxxxxxxxxxxx~~ First Amendment seems to provide that "Congress shall make no law abridging the freedom of speech or of the press except in the public interest." And the public interest seems ~~xxxxx~~ in the view of the Supreme Court in these matters to be the receipt of a suitable mix of things they ought to see and hear:

> This substitution of a public right for the rights of the ~~xxxxxxxx~~ individual who wishes to speak changes the government's role from one of ~~enforcing~~ protecting free speech ~~from limitations~~ to one of enforcing the provision of a suitable assortment of social, political, esthetic,

"We fully recognize that freedom of the radio is included among the freedoms protected against governmental abridgement by the First Amendment. But this does not mean that the freedom of the people as a whole to enjoy the maximum possible utilization of this medium of mass communication may be subordinated

moral, and other ideas and experiences. It is inevitable in such a scheme that the government will become involved in balancing the content of the expression we may see and hear on television, not just the conditions under which it is produced and selected. It invites a paternalistic prescription of what we as viewers and listeners should see and hear, what we should be informed about, rather than what we as a citizenry choose to show and tell each other. The right to be informed can be little more than the right to see and hear what the government decides we should see and hear. (If indeed the nature of electronic communications technology means that we have no other recourse, then we can simply accept this new interpretation of the First Amendment and turn our attention to the design of government processes that make the best of the situation. Indeed that seems to be what the Supreme court has done in Red Lion and Democratic National Committee v. CBS . It remains to be seen, however, to what extent we tuly have no other recourse and whether the Supreme Court has not been a victim of a lack of analysis of alternatives to the 1927 legislation of and 1934 and the FCC's interpretation thereof.))

It is no answer to say that the government can and will enforce such balance of ideas and messages only neutrally and only without censorship, nor that the government enforces such balance only to counteract the greater imbalance that would otherwise ensue because of the monopoly power of the television broadcast licensees and the national TV networks. The enforcement of balance likely to be achieved by the FCC is heavily influenced by the nature of that agency. The FCC is highly political at the top and highly bureaucratic

at the working level. Although the Fairness Doctrine is applied to television programming nominally only upon complaint, ((The personal attack rules require, however, that if a person is personally attacked on a TV station, then the station must notify the person of the attack and offer comparable time for reply. See Cullman_____ and see Robinson, supra.)) the FCC has moved to establish rules for how complaints will be resolved that act very obviously to influence the initial coverage of any matter that might invoke a Fairness Doctrine complaint. Like the rules of any administrative regulatory agency, the Fairness Doctrine rules have grown more and more complex; at some point, they mean whatever the bureaucrats of the Commissioners say they mean. The "neutral" balancing of the programming mix in the first instance then is likely to be biased in the direction of what is bureaucratically safe. The responsiveness of the Commissioners, however, to the Congress, the White House, and to politically influential special interest groups means that some ideas and messsges will be decided to be more "equal" than others. ((The FCC has avowedly favored programs designed to serve racial minorities, religious institutions, farmers, and children. It has not done so for women, old people, atheists, or deaf people, or shop keepers.)) Those who have enough political organization to put effective political pressure on the FCC directly or through the Congress are more likely to get a Fairness Doctrine ruling in their favor. And it is inevitable that the personal philosophy of the Commissioners along with the prevailing political philosophy of the Congress and the media will play a large role in deciding what appears balanced.

((Even the opportunity for review by the courts can limit this effect only so much. The discretion the courts have allowed the FCC in applying the public interest standard and in enforcing the Fairness Doctrine show that the FCC will be limited only in the case of flagrant abuse of its own procedures.))

Similarly, there is little merit in the argument that the government in applying the new concept of the First Amendment to enforce a balance in what we see and hear is only counterbalancing the abridgement of the people's right of free expression by the broadcasters and networks who monopolize the available channels. If indeed the Constitution requires relief from such monopoly restraints to free speech, the proper remedy is to remove the monopoly power directly rather than placing the government in the role of prescribing what the monoply power may be used to present for the citizenry to see and hear. Unfortunately, the argument that monoply requires a governmental counterbalance reinforces the perpetuation of the monopoly: The government acquires an interest in excluding competition with the existing media or with the officially prescribed balance of ideas and messages precisely so that it can continue to assure that the "proper" balance is not disturbed.

One of the more widely remarked implications of the Fairness Doctrine is its "chilling effect" ((This phrase, which defenders of the media often indiscriminately apply to any and every limitation on their actions originated in _____. In spite of its overuse, it remains a valid consideration in any nation that values free expression.)) on vigorous journalism on

television. Certainly no broadcaster can be expected to provide very much programming that will entail costly legal proceedings that may in the end require that he present additional coverage to balance the overall coverage. Nor can he simply agree to balance the coverage whenever presented with a complaint. It is common knowledge that one of the services provided by broadcasting attorneys in Washington is informal checking with the FCC ~~staff~~ on various kinds of coverage before the material is put on the ~~airwaves~~ air in order to minimize the broadcaster's vulnerability to complaints. Whether the broadcaster is deterred in the first instance from covering a controversial issue or event, or whether he is influenced by the FCC's informal reaction to his lawyer's query, it is clear that this balancing interpretation of the First Amendment is bound to reduce the amount of discussion of controversial issues on TV, to render such presentations rather more bland and less incisive, and to narrow the ~~philosophical~~ range of the view given on TV of what is important and real in our society.

Beyond the philosophical and constitutional objections to the foundations of the Fairness Doctrine are questions as to its workability. Clearly if the Doctrine is to have any meaning, it must be enforced, ~~As discussed above, the ultimate meaning of the Fairness Doctrine can be decided only by the FCC and the Courts in specific cases.~~ and equally clearly, the enforcement will be done by the government. Although the FCC and the courts have consistently cited the prohibition in the 1934 Act against censorship, the fact is that it is the government that is ultimately the arbiter of what we see and hear on controversial issues under the approach of the Fairness Doctrine, for the government may require what shall be presented even if it may not prescribe what

primary
shall not be presented. The/enforeement mechanism chosen by the FCC for the Fairness Doctrine has been the arbitration of complaints. Each complaint that a licensee has not been fair in his coverage of events is considered against past decisions and the facts of the case, and either the complaint is rejected or the licensee is ordered to provide coverage to balance the overall discussion of the issue. As with all case law, cases pass into precedent and rules evolve as to what the FCC will and will not consider fair. Old precedents are stretched to fit new circumstances, or new situations are considered de novo depending on the point of view of the FCC staff or the Commissioners. ((Thus we find the FCC declaring cigarette advertising subject to the Fairness Doctrine, and then straining to avoid applying the precedent to other product commercials.))

Insert p 29(a) here

The FCC and the Supreme Court have put great emphasis on the nature of the enforeement mechnism as avoiding traditional First Amendment problems associated with governenet censorship. In fact, however, the two-fold approach of the Fairness Doctrine, requiring not only that the discussion of any particular issue be fair, but also that there be discussion of controversial issues,((at least of "representative" controversial issues)) invites complaints that broadcasters have ignored important issues ((e.g. there have been such complaints in the case of _____. And broadcasters have for the most part ignored coverage of their own industry -- certainly a "controversial issue of public importance.")) and would seem to require the Commission under its rationale for the Fairness Doctrine to be prepared to decide when the broadcaster must cover various issues. The Commission in its enforcement of the Fairness Doctrine

It is clear that the FCC intends the past Fairness rulings to be followed by broadcasters, so that the precedents of past decisions will have the effect of a rule for the broadcasters to follow. In 1964 the Commission issued a digest of past rulings which it stated would be revised at appropriate intervals to reflect new rulings in the fairness area in order "to keep the broadcaster and the public informed of pertinent Commission determinations on the fairness doctrine, and thus reduce the number of these cases required to be referred to the Commission for resolution." (51) ((Applicability of the Fairness Doctrine in the Handling of Contoversial Issues of Public Importance, FCC 64-611, July 6, 1964.)) The Commission goes on to state that in passing on complaints brought under the fairness doctrine "the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decsions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. (52) -53 ((Ibid.))

not only must decide what is fair in broadcast journalism, it also must decide what is sufficiently controversial and of sufficient public importance that it must be on the agenda of broadcast coverage. ((To be sure, the theory of the Fairness Doctrine approach is the other way around. That is, the Commission is set up to decide when the broadcaster has been unfair and when he has failed to cover an important issue. But while we certainly can be convinced to feel more comfortable with this formulation than that just given in the text, for reasons discussed above and below, it appears to be a distinction without a difference.)) ~~Indeed, the absence of a strong difference between the affirmative and the ndgative formulations of the fairness principle in practice may provide an important argument in convincing the Court of the unconstitutionality of the whole approach.))~~ Indeed, the Supreme Court in Red Lion has stated that "if present licensees should suddenly prove timorous, the Commisssion is not powerless to insist that they gove adequate and fair attention to public issues." ((Red Lion Broadcasting Co. v. FCC, 395 U.S. 393 (1969).))

The principal problem in the workability of enforcing the Fairness Doetrine is the drawing of distinctions. Consider first the enforcement of fairness once an issue is conceded to be controversial and of public importance and is to be ~~carried~~ covered by a licensee. One problem is the determination of how many sides there are to the issue that should reasonably be carried as "contrasting points of view." Consider, for example, the proposed condemnation of land for a new city park. The broadcaster presents a ~~program~~ documentary program reasonably balanced between the views of the proponents and opponents of the new park. A group of citizens then complains that there is a third alternative of building a smaller park in a different location that achieves most of the goals of the proponents and

~~The~~

meets most of the objections of the opponents, ~~that should have been~~ and that this alternative unfairly received only passing mention in the broadcaster's program. ~~covered in the program but was not~~. Assuming the broadcaster does not wish to provide any more coverage at this time (or that he does not ~~want~~ want to be forced into it), he rejects the complaint which is taken to the FCC. The broadcaster now has several arguments open to him: (56) 58 ((His first argument is probably that the issue~~x~~ is not of public importance, but we are assuming here that ~~xhxx~~ has already been acknowledged.)) He may say that the "issue" was the construction of the park at any location and the program was therefore adequately balanced. He may say that the ~~thirdcitizens~~ citizens now complaining are a small minority, and their views are not sufficiently ~~adequately~~ important or relevant to compel additional coverage. He may say that the "issue" was the construction of the park at a particular site and the program was therefore adequately balanced. He may say that the views of the complaining group do not contrast very strongly with the "views" stated by various opponents and proponents on the program so that the issues were adequately covered even though the particular alternative offered by the group wasn't ~~specifically~~ mentioned. The complainants have obvious counterarguments. The FCC must decide, using its tests of ~~xxxxx~~ reasonableness and good faith.

It seems apparent that the FCC could not adjudicate such a complaint without delving in rather considerable detail into the particular facts and circumstances of the case. It would not be surprising therefore for the FCC to deal with the matter on grounds other than fairness per se. If it were found that the ~~xxx~~ licensee owned land in the area of the alternative park site which would loose value if comdemned, the Commission would almost certainly seize on this fact to decide the case against the licensee. (57) 57 ((Indeed, one of the valid and important stated purposes of the Fairness Doctrine is to ameliorate

the possibilities for a licensee to use his position of control over one of the few channels in a community to promote his own private interests by excluding certain information from his channel. This is not to say that the Fairness Doctrine ~~in its totality~~ is the required or preferable way of dealing with this problem.)) There is no need to go into the details of such a fairness dispute to realize that (1) it could be argued endlessly, there being no objective standard for disposing of the matter, and, (2) no matter how it is disposed of, the Federal government is an integral part of not only the presentation of the issue but the debate itself. Let us say that the station's arguments are not accepted by the Commission ~~(as reasonably they might not be)~~; then the Commission must somehow measure the reasonableness of the broadcasters judgment that the point of view that the park should be built in the second location deserved only passing mention rather than full coverage as a contrasting point of view.

Is it implicit in the Fairness Doctrine that all points of view are entitled to equal time, to equal emphasis? If not (and the Commission has said not), then should the number of words, the expressions of the reporters, the fraction of the time, or what be taken into account? Should views be given time and emphasis in accordance with their merits, the estimated number of their adherents, the respectability or importance of the organizations backing them, the need for the audience to be aware of them, their familiarity to the audience, or what? Studies of network news coverage ((which is exempt from the Fairness Doctrine by virtue of the Commission's rule

excluding "bona fide newscasts")) on various issues to determine their balance or fairness have dealt with such indicia as frequency of coverage of one point of view or another, use of "positive" adjectives, duration of coverage given to one or another point of view, use of "stop-frame" or graphics to focus the viewers' attention, and so forth. Is it fair to give more time and emphasis to one contrasting point of view because it is more complex and requires more time to be explained? Or to give it less time because most viewers won't focus in enough depth to really understand it?

When the government undertakes to become the arbiter of fairness in the presentation of ideas or other kinds of expression ((and recall the dicta (or could it become a holding?) in the Supreme Court's decision on Red Lion that it is not just political matters, but " "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." 395 U.S. 390.)) rather than the remover of barriers to freedom of individual speakers, it is inevitable that such considerations must come into play, or else the government's Fairness Doctrine responsibility is a sham to be applied only on occasion.

Let us go on for a moment to consider what might happen if the Commission upheld the complainants in the above example, and the station provided a report on its evening news show about the arguments for the second location. The station is then open to another Fairness Doctrine complaint that the total coverage of the park issue has now become biased in favor of park construction and that more coverage of the opposition to any new park must receive additional time in order to leave the matter in overall balance. Assuming the second complaint is not transparently frivolous, the Commission must

reconsider the matter and arrive at some new balance, reraising all the amorphous criteria just cited. Or the Commission could hold that the new coverage was on a "bona fide news program" and therefore exempt from challenge under the Fairness Doctrine -- which would immediately raise the question of whether a Fairness Doctrine obligation can be met on a bona fide news program or must be met in other program time that is subject to the Doctrine.

One further aspect of the paracticality of the Fairness Doctrine ((especially in relation to the ~~many~~ lofty rhetoric developed for its support by the Commission and the Courts)) is ~~its inconsistency with~~ its requirement that each station must individually meet the requirements of the doctrine. Thus the Commission will not take into account that another TV station in the same community has provided frequent and full coverage of ~~the~~ a contrasting point of view that was given short treatment by a licensee against whom a complaint has been ~~a~~ filed. Nor that local newspapers, radio stations, and town meetings have dwealt on particular issues. ((Except perhaps in trying to determine whether the broadcaster's chosen scope of the issue was or was not unreasonably narrowed or widened.)) Thus the argumentation forth Fairness Doctrine that the public's rights to know, ~~or~~ to be informed, or to hear are at stake seems rather inflated. ~~If that~~ If, it were indeed the case, it would seem necessary for the Commission to consider whether the ~~many~~ licensee's coverage actually unbalanced the overall availability of various points of view ~~a~~ for the public's consideration. Or if we ~~were to~~ consider that there is something inherently different of more powerful about TV so that only TV coverage were important (at least to a certain and significant class of the population) then the Commission should measure ~~only~~ the Fairness Doctrine against the totality of TV coverage of the issue in a community. ((If we were then treated to the argument that ((In a community with only one newspaper & one TV station, for example, would the public right to be informed be balanced best if the newspaper presented only one side of a controversial issue?)))

that these essential "rights" were at stake in a particular case,

many people watch only or predominantly one favored channel and true fairness can be obtained only by channel by channel fairness, we would have to acknowledge that the First Amendment was somehow secondary to the energy required to change channels.))

We are forced to conclude that the Fairness Doctrine, both in its concept and in the workability of its enforcement, is a most unsatisfactory approach to the regulation of televsion. It puts the Federal government into the editorial process for both local and national issues as a kind of "editor-of-last-resort." It redefines the First Amendment in a way that makes the government the paternalisic overseer of what we should see and hear rather than the protector of competitive opportunities for free expresssion. It holds up an illusion of fairness in the use of television that is based on the a posteriori evaluation of the content of the debate on issues where agreement on fairness is hard to obtain; it retards the discussion of a priori conditions of access where reasonable agreement might be reached. It accepts the statutory language of the 1927 and 1934 legislation with regard to common carrier status, and the subsequent FCC evolution of broadcast licenses and/license renewal standards, to require the First Amendment to be bent around the legislation rather than vice-versa. It forces the discussion of controversial issues on TV toward simplified "packets" or faddish political influence and favors those with the power/to get a favorable FCC ruling. It encourages bureaucratic finesse over force of argument in debate. And it advances the expectations on the part of the individual TV viewer that one or a few "balanced" channels are all he needs to be informed.

Direct Access:

"direct access" refers to some provision for individuals to gain the use of a TV channel for a limited time to present the viewing public a message. This is in contrast to the Fairness Doctrine where there is no right of access by any individual ((except in the case of personal attack. See note ___.)) but rather a right on the part of the public to have the licensee inform him adequately with a range of contrasting points of view on controversial issues of public importance. The most important thing to be said about direct access is that no one has any such right under today's system of broadcasting except the licensee during the term of his license. ((The licensee's right of access is of course a responsibility as much as a right under the public trustee concept of the licensee's status.))

The history of access to the airwaves has often been recounted. ((See, e.g., Barnouw, A History of Broadcasting in the United States, Volume I, A Tower in Babel, Oxford University Press, 1966.)) The most noteworthy aspect is the dramatic shift of national policy in the enacting of the 1927 Radio Act. From a situation where anyone who wanted could turn on a radio transmitter and have his say, the Congress went to the other extreme of allowing only a limited number of licensees to transmit and declaring that those licensees were not to be considered common carriers. ((The common carrier provision of the 1927 Act appears to have been a conscious decision on the part of the Congress that the broadcast licensee should not have the burden of being required to carry any material on his station either for free or for pay that he did not wish to carry.

((See appropriate legislative history, _____. See also the decision of the Supreme Court in CBS v. Democratic Committee ____ U.S. ___(1973).)) Although the history has been covered elsewhere, it is useful to review selected aspects as an introduction to a discussion of the changes that might be made now that we have had some 50 years experience with the regulatory structure of the 1927 Act.

The 1927 Act was passed at a time when totally unrestricted radio broadcasting ((provoked by a decision on the unconstitutionality of Secretary of Commerce Hoover's limitation on licenses)) meant that neither the broadcaster nor the public received much benefit from broadcasting and at a time when the sale of advertising time was ~~barely thought of~~ a minor phenomenon. ~~Much has been made of the chaos that ensued before the enactment of the 1927 act~~ Clearly it is the nature of the radio frequency spectrum that not everyone can enjoy unrestricted use thereof. ((Even in rather simple uses such as radio and television broadcasting, ~~selection~~ specification of frequencies and power levels is necessary to avoid interference that otherwise might render much of the broadcasting useless; ~~the situation~~ careful specification of signal characteristics is even more critical where the spectrum is used for satellite transmission or for navigation.)) And the inability to limit radio signals to state ((or national)) boundaries makes the Federal government the natural and probably inevitable place to decide on their use. It seems likely that the emphasis on the service aspects of radio broadcasting embodied in the "public interest" standard of the 1927 Act were in reaction to the lack of service and the absence of any public interest being served by the chaos of 1926-27. The licensing authority of the 1927 Act derived from a series of National Radio Conferences held between 1922 and 1925 and on the scheme for limiting licenses that was evolved by Commerce Secretary Hoover under the 1912 statute that required a license to operate a radio transmitter.

While the rationale for the limited number of licenses that may be granted is obvious, the choice of the process for deciding who would get to use the communications channels does not necessarily follow. Many economists point out, for example, that the initial assignments of operating rights could have been done at auction (as was done with mineral and forestry rights for example) and the ownership of the operating rights left to normal private market mechanisms. ((The usual counter-argument is that this would leave broadcasting only to the rich, but in fact as amateur operations over the years have shown, there were for several decades many frequencies that were unused and could have been claimed by a simple first come, first served licensing process (with perhaps a proviso that the frequencies must actually be used to prevent hoarding). This latter process is not unlike the way the FCC has in fact assigned new frequencies as technology developed to permit their use. See e.g., The Radio Spectrum: Its Use and Regulation, proceedings of a conference sponsored by the Brookings Institution and Resources for the Future, 1968.)) That this was not the course chosen by the Congress in a crisis atmosphere in dealing with a new technology is understandable, and is certainly in any event behind us for the foreseeable future.

What is more relevant is the decision of the Congress to not to make the licensees common carriers. The Senate Committee on Interstate Commerce, preparing what was to be the 1927 Radio Act, initially reported to the Senate a bill with the provision that any licensee permitting his station to be used

"for the discussion of any question affecting the public ... shall make no discrimination as to the use of such broadcasting station, and with respect to such matters the licensee shall be deemed a common carrier in interstate commerce." ((67 Congr. Rec. (1926), cited in CBS v. DNC.)) The argument made on the Senate floor for rejecting this approach (and limiting the provision of reply opportunities to candidates for public office)) was rather vague, citing the voluntary nature of broadcasting, its availability to the listener free of charge, and its purpose for the broadcaster of "building up his reputation." ((Ibid.)) Just how this rendered it "unwise to put the broadcaster under the hampering control of being a common carrier and compelled to accept anything and everything that was offered him so long as the price was paid." ((Ibid. Note: read the full text before leaving this stand!)) Certainly the reasoning could not have foreseen the pervasive use of commercial advertisements to turn the "voluntary" broadcasting service into a most profitable use of the airwaves. One can only speculate about the lobbying efforts of the broadcasters who feared that common carrier status might entail regulation of advertising rates. ((This can be only a speculative since it is unlikely that records the press reported any of if it did exist. Moreover, in 1926 advertising did not have anywhere near the importance or pervasiveness it now has, and it is not entirely fair to presume that the broadcasters intervened on this point, even though it would not seem to have been surprising in view of the efforts of the bigger commercial broadcasters in seeking the regulation of licenses

over the 1920's that favored their commercial position.))

The ~~xxxxxxxxxxxxxxx~~ common carrier provision failed on the Senate floor,((and failed again in modified form in re-enacting the 1927 Act into the 1934 Communications Act.)) and the stage was set for the FCC's evolution of the Fairness Doctrine out of the twin statutory concepts of the licensee's responsibility to serve the public interest and the denial of common carrier status as a regulatory alternative.

~~W~~ Two things stand out from this brief and selctive history of the debate over common carrier status for broadcasters. First, the choice was statutory and not constitutional.((See Red Lion, 395 U.S. 389. ~~"There is nothing in the First Amendment which~~ "...as far as the First Amendment is conserned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has-no constitutional right to be the one who ~~has~~ holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is ~~nothing in the~~ 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 barred from the airwaves."')) Second, the choice was made before ~~radio~~ television existed ((All-electronic television was invented by Philo T. Farnsworth in 1927.)) and before the ~~radio~~ broadcast medium had developed ~~extensively its use of advertising, and of national network programming,~~

its present character of profitable commercial advertising, national network ~~provision of~~ programming, and ~~affirmance of~~ serious journalistic purpose. We are free then to reconsider the statutory appropriateness of the various alternative ways access might be provided to television.

There are today four types of access to television: (1)time purchased for commercial advertisements; (2)time purchased or given for political campaigns under Section 315(a) of the Communications Act; (3) program time purchased from the station and/or programs given or sold to the station; and (4) persons invited to appear on television programs or covered in news programs. Different policy considerations apply to each because of their nature and because of viewing expectations.

Time purchased from the station for the presentation of commercial advertisements is the closest thing we have to a free market in the use of ~~television~~ television. Each TV station retains, however, the right to decide which advertisements it will or will not carry and the right to schedule the time at which the advertisements will be shown. Indeed, under the current public ~~interest~~ trustee concept ~~employed by the FCC~~ of the licensee the broadcaster must exercise discretion over and accept responsibility for all of his programming time including commercials. ((See _____)) As a practical matter, most broadcasters will accept any commercial advertisement for a product or service that is in good taste and will not give cause for a complaint to the FCC on grounds of ~~obscenity~~ obscenity or ~~fairness~~ the Fairness Doctrine. ((The FCC has held that commercial advertisements are subject to the Fairness Doctrine only to the extent that they contain explicit reference to a controversial issue under the meaning of the Fairness Doctrine. This was in the wake of the

Commission's decision that cigarette advertising should be balanced under the Fairness Doctrine by anti-smoking public service announcements when it was suggested that other product advertising raised politically controversial issues(e.g., gasoline and air pollution, toothpaste and flouridation, detergents and water pollution.). The Congressional action to outlaw cigarette advertising on TV provided the FCC the excuse it needed to exempt product advertising generally from the Fairness Doctrine.)) ~~The rise in cigarette smoking during the time when the anti-smoking spots were required gave rise to some suggestion~~

In general, the FCC and the Courts have maintained that the congressional intent in disallowing common carrier status was to permit broadcasting licensees a wide degree of journalistic freedom. ((See CBS v. DNC, 27 RR 2d 917.)) Thus, just as the editor of a newspaper or magazine may decide what articles and advertisements he will carry, so may a broadcast licensee -- subject of course to the constant oversight of the FCC under the Fairness Doctrine. ((And subject to Section 315(a) for candidates for public office,)) Thus the broadcaster may be a "journalistic 'free agent'", but must present issues "fairly and impartially informing the listening and viewing public;" and the FCC must be the "ultimate arbiter and guardian of the public interest" and must oversee without censoring." ((CBS v. DNC, 27 RR 2d 922))

The courts have held that newspapers may refuse to carry advertisements ((See Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune Co., 307 F. Supp. 422 (N.D. Ill. 1969); affirmed 435 F. 2d 470 (2d Cir. 1970); cert. den. 402 U.S. 973 (1971).)) And in CBS, Inc. v. Democratic National Committee ((27 RR 2d 909 (1971).)), the Supreme

Court held that under the Communications Act broadcasters may ~~refuse to~~ adopt a general policy of not selling advertising time to individuals or groups to speak out on issues they consider important.

The latter case is both interesting and important. The FCC had ruled that under the Communications Act a broadcaster may not be required to sell advertising time to individuals or groups to comment on public issues. ((25 FCC 2d 216, 242)) The D.C. Court of Appeals reversed to FCC and 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," ((450 F 2d 646.)) The court went on to state that a broadcaster's policy of carrying commercial advertisements, but not paid ~~comments~~ messages on controversial issues, was constitutionally discriminatory. The Court of Appeals also found that broadcasters, as licensees and public trustees, were instrumentalities of the government for purposes of the First Amendment and therefore had no right to discriminate in the sale of advertising time. ((450 F 2d 652.))

The Supreme Court reversed the Court of Appeals, and its reasoning in doing so is important. ~~The Court held that the Court of Appeals was wrong in finding that broadcasters~~ governmental action was involved in the broadcaster's policies of refusing to sell editorial time and that "the policies complained of do not constitute governmental action violative of the First Amendment. ((27 RR 2d 924.)) This interpretation seems reasonable insofar as the particular policies are concerned.

The Court was divided on the issue and in such a way that makes analysis rather complicated. It is perhaps sufficient for our purposes here to say that the Court rejected ((or at least did not decide)) the question of whether the licensee was a government agent for First Amendment purposes. Instead the Court ruled that the FCC was correct in its interpretation of the Communications Act; that indeed the Congress had not intended the Communications Act to require broadcasters to sell time to any and all who wished to purchase it. The Court did not find that broadcasters had a constitutional protection from a determination by the Commission, that the public interest required them to sell some time for expression, ((although the FCC is very unlikely to reverse 50 years of precedent)) and as in Red Lion the Court did not deny that the Congress might change the prohibition on common carrier status for broad casters. ((Conceivably at some future date Congress or the Commission -- or the broadcasters -- may devise some kind of limited right of access that is both practicable and desirable." CBS v. DNC, 27 rr 2d 930. "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." "...the First Amendment confers no right on licensees toprevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use." Red Lion, 395 U.S. 390, 391.))

ACCESS TO TELEVISION

Clay T. Whitehead

INTRODUCTION

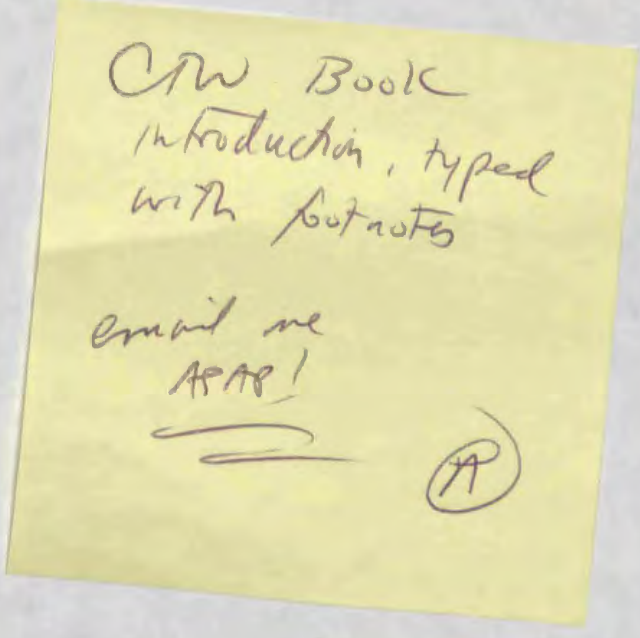
The idea of access to television--easily our most accessible, if not totally unavoidable, medium of communications--may seem redundant.

But it is in fact a difficult, complex, and intriguing subject. Consider first the viewer's access to television--the access to see and hear. On one level there is no problem to speak of; 97 percent of American households have one or more TV sets (almost half have more than one). Some people perhaps can't afford to buy even a used black and white TV set; but more than likely, those 3 percent who don't have a TV for the most part don't want one. Once the purchase of the TV set is made, TV is essentially free. The electricity cost is minor, probably less than the cost of lighting the room to read. The extra cost of products purchased attributable to TV advertising is more substantial--perhaps $5 per month per household--but that gets paid whether you watch TV or not. So access to see and hear TV has very, very few barriers. Indeed, it is safe to say that more emotional energy is devoted in the United States to how to avoid the TV set rather than how to get to it.

On the other hand, there is the question of access to see and hear what? Here we get to the topic of most debate and criticism of television in America. Why are the shows of the three commercial networks so similar; why is there so little choice in prime time? Why is there so much violence? Why is the quality of TV programming so low? Why are there so many commercials? Why did they cancel a

popular series? Why is the news so superficial? Why did they pre-empt a popular show for a news documentary? Why do all three networks have sports on Saturday afternoons? There are some interesting and important issues in this aspect of the viewer's access to TV.

Then there is the question of access to TV to show and tell. Surely what viewers have access to see and hear depends on who has access to show and tell. It is this aspect of television access that is the subject of this paper.



TELEVISION IS DIFFERENT

Most people never think about getting in front of the TV cameras to convey some message or to put on their own TV show. No doubt many youngsters daydream of becoming star personalities on TV entertainment or news, just as in earlier days they dreamed of being in movies, theater, or radio. But even though most of us don't think of going on TV ourselves, we take it more or less for granted that what does go on TV is somehow reflective of the talents and knowledge of people around the country who do feel they have something to show and tell that others of us would like to see and hear.

Yet there are reasons why that implicit assumption is not true for TV. The reason cited in most legal and economic texts is simply that there are not enough channels for everyone who wants to start up their own TV station the way newspapers or magazines or community theater groups can be started. And that is a true enough reason. The government has set aside a certain range of frequencies for TV broadcasting, represented by channels 2-84, and decides how many stations can broadcast on what channels in any given community.1/ While it is possible with new technology to allow broadcasting on some of the channels now empty in many communities without creating interference with existing stations, the limitations of frequencies and interference remain so tight that the number of allowable TV broadcast stations will remain relatively low.2/

Another reason why not everyone with something to show and tell can get access to television has to do with the structure of the TV industry. While few can afford to build their own TV station and

fewer still can hope to get a license to broadcast, a relatively large number might be able to finance the production of a TV series or a single program or a few spots.3/ But under current law, 4/ the broadcaster who receives the license from the government to broadcast on a particular channel in a community has complete discretion as to what programs and spots he puts on his station.5/ Thus, would-be producers of television programs or short spot messages must first have the approval of a broadcast licensee in order to get on the air to have access to the TV medium and in order for the viewers in the community to have the choice of whether to watch or switch to another program.

As a practical matter, most television broadcasters are very selective about what they allow on the air. Their main criteria in being selective are money and controversy. The commercial broadcaster is a businessman--he operates his TV station to make a profit, and most commercial TV stations are profitable indeed.6/ Contrary to popular opinion, however, the broadcaster is not in the business of selling entertainment to the viewer. Rather, the broadcaster is in the business of packaging audiences which he then sells to advertisers for so many dollars per thousand.7/ Since the costs of operating a TV station are basically fixed, the broadcaster naturally favors putting on programs that will attract the largest possible audience at any given time so that his receipts from the advertisers who pay by the head, and therefore his profits, will be as large as possible. Simply put, the commercial broadcaster profits most from and therefore favors the shows with the highest ratings. Moreover, the broadcaster wants to make as much as possible from all the time he can sell, so he favors shows that keep the largest possible audience tuned to his channel hour-by-

hour, day-in, day-out. By getting the largest possible number of viewers for each time period, his weekly, monthly, and yearly profits are increased.8/ The broadcaster, therefore, not only expects to be paid for the shows he puts on, but he will be adverse to putting on any show that tends to cause many viewers to be bored or unhappy enough to switch to another channel and thereby reduce his audience, advertising revenues, and profits.

The TV broadcaster is motivated to avoid controversy in the shows he puts on his station mainly because controversy can reduce his profits, if not put him out of business entirely. Programs may be controversial for a variety of reasons, ranging from the expression of political or moral opinions to being very violent or very dull. The cost to the broadcaster can take the form of reduced viewing audiences (with attendant reduction in revenues and profits), a Federal government order that opposing points of view must be aired at the broadcaster's expense (again probably taking up time that could be filled with more profitable programming), or expensive proceedings before the FCC justifying that the public interest has been served by the controversial material.9/

One way of looking at the economics of commercial television is that the broadcaster sells access to his audience; that is perhaps a nicer way of saying that he sells the audience to the advertisers. But either way we choose to look at the situation, the economic structure of the broadcast industry does provide access to the television medium to two classes of people: (1) those who sell the broadcaster programming that will attract large viewing audiences which the broadcaster can then sell to, and (2) those who can pay the broadcaster the

going market rate per thousand for the opportunity to present their message to the viewing audience. This system has some obvious advantages to the general public. Program producers have incentives to produce programs that large numbers of people will watch. Broadcasters have incentives to select and schedule programs that will please most of the people most of the time. Advertisers, by spreading their costs over large audiences, get the maximum consumer awareness for their products with the least cost possible passed on to the consumer.10/ In spite of the advantages, however, this system has some drawbacks. For one thing, the broadcaster may decide the purposes for which he will sell time for spot announcements. Most TV broadcasters have a policy of selling such time only for advertising commercial products or for political campaigns by a candidate for public office immediately preceeding an election. They mostly refuse to carry advertising presenting political, moral, or other editorial points of view or seeking to raise funds.11/ Most importantly, the three television networks have adopted this policy.

And of course, the broadcaster can decide what he will buy in the way of program material, so that the broadcaster has essentially complete discretion in the scheduling of his programming and advertising. Since most advertisers want to reach potential consumers, the broadcaster heavily weights his prime time schedule toward middle-class men and women in the 18-49 age group; toward women in the same age group during weekdays; toward children on Saturday mornings; and toward 18-49 year-old men on weekend afternoons. Those who are not members of a consuming statistical group don't figure in the selection of programming.12/

The access issue is complicated by the way in which the three commercial television networks have chosen to structure their business. Each network is in two different, but intertwined, businesses. Each owns five television stations in five of the largest cities, and each supplies a nationwide distribution of television programming to TV stations in most cities in the country.13/ The networks produce some of their own programs, 14/ but mostly buy the TV rights to series produced by major or independent film producers, most of which are located in Hollywood. These programs are then combined with advertising spots and program promotional spots to make up the daily network schedule which is supplied over the network's microwave lines to its own stations 15/ and to other stations with which it has affiliation contracts. Each network supplies about fifteen(?) hours per day of programming.

The network's own stations, naturally, use most of the network-supplied programs, as do the affiliates, although they are free not to do so.16/ Each affiliate station, as specified in the affiliation contract, agrees to carry on his station a substantial majority of the network programs and advertising spots, in return for which he is paid by the network. The network then sells national advertisers access to the audiences watching its shows on its own and affiliated stations all over the country. Thus, the networks policies on access to their schedule have a tremendous impact on the character of television programming--on the entertainment we see, the news we see, the advertising we see, and perhaps even more importantly, the entertainment, news, and advertising we don't see.17/

Perhaps the most noteworthy feature of this networking arrangement is its "threeness."18/ There are only three national commercial TV networks, and the prospects of having any more are slim until cable is nationally available with the larger number of channels it makes possible.19/ The number three arises because enough cities are assigned three or more VHF TV stations to cover most of the national population; cities with four or more VHF stations are so few that a fourth network would reach a substantially smaller potential audience.20/ Thus a fourth network would have to incur essentially the same expenses as each of the three present networks in order to put on equally attractive and competitive programs, but would be seriously limited in revenue and profit because it would have a smaller audience to sell to the advertisers. If there were more national TV networks, there presumably would be more competition and therefore more diversity in programming and in policies on access than with only three.21/ But in fact, we have only three, and they all have essentially the same access and programming policies.

The situation today regarding access to commercial television then can be summarized as follows: Each individual TV station prefers programming that attracts as large an audience as possible at each hour, and for the most part the station gets such programming from one of the three TV networks. Individual stations mostly will not sell time either for programs or for advertising that is editorial in nature or is otherwise controversial. The networks will not buy programs for their schedule that do not fit their objectives and will not sell national advertising time for editorial, controversial, or fund-raising purposes.

We cannot, of course, ignore public television in discussing access to TV. It does provide different programming than that available on commercial TV, but the access to the stations for presentation of programming or messages is at least as limited as on commercial TV. Public TV is prohibited by law from selling time, so that form of access is not available to anyone.22/ It is the policy of the Public Broadcasting System to fund and carry principally programming produced by public television stations or purchased from the BBC. Although some public stations have local programs that provide free time to local groups for discussion of issues important to them, this is limited in scope and is not available nationwide. Public TV therefore increases somewhat the diversity of entertainment and educational matter available to the TV viewer, but provides no substantial expansion of opportunities for access to TV.

Cable may one day change all of the above discussion. By avoiding the use of the limited frequencies available for broadcast TV, the limit on the number of channels that can be brought into the home will be essentially eliminated along with the associated "threeness" of the national commercial TV networks. By permitting the viewer to pay directly for individual programs or to subscribe to "video magazine series" in addition to the free advertiser-supported fare, more programming will be available than what mass advertisers find it economical to support, and viewer preferences will have more sway. If cable is structured as a common carrier, so that the cable system owner in a community must lease his channels to all who wish to use them, much as the Postal Service or trucking companies are required to carry the magazines and packages of anyone, then the problem of access to television will be reduced to

be at least as small as the problems of access to print media.23/ The growth of cable as a medium for distributing television programs in abundance, in contrast to the scarcity of today's broadcast TV, is a most promising hope. It is opposed only by the broadcast industry and motion picture theater owners.24/

From the point of view of access, the great benefits of cable will be that those who operate the television distribution pipeline will not be able to act as gatekeepers, deciding who will and will not have the opportunity to present programming or other messages for the public to decide if they want to watch it. The ease of access for those with something to show and tell will be much greater, and the range of access the rest of us have to what we may choose to see and hear will be greatly expanded. Moreover, the expansion of the number of channels available from the present limited number means that the costs of access will be reduced below the present artificially high level. And the opportunity for viewers to pay for programming that the advertising markets won't support means more funds will be available to produce high quality or special interest programs than at present with only advertising funds available.

It is desirable then that whatever changes are made in the present laws and regulations and policies regarding access be made with the ultimate availability of cable in mind so that the medium of abundance is not unduly constrained with access policies that are left over from the medium of scarcity.

FAIRNESS

Communications law at present provides only two routes for access to television to present ideas and programming: (1) the broadcaster's obligation under the FCC's interpretation of the statutory "public interest" standard to provide opportunities for contrasting points of view in the discussion of controversial issues of public importance, popularly known as the Fairness Doctrine, and (2) the obligation on the broadcaster under section 315 of the Communications Act to make available equal time at equal rates for all candidates for a public office if he makes available time for any one candidate, better known as the "equal time" requirement. While these two provisions of "fairness" and "equal time" are often equated in the public eye, they are in fact quite different. Fairness provides access for ideas, 25/ not for people or groups; the station retains the discretion to decide who is a legitimate spokesman for an idea and indeed may use its own personnel to present the idea. The equal time provision does provide access for individual people, but only that limited group who are at any given time declared candidates for public office.26/

With the statutory proviso that broadcasters are not to be considered to be common carriers 27/ both the FCC and the broadcast industry have steadfastly opposed any suggestion that broadcasters be required to provide time either for free or for pay except on their own terms or as directed by the Commission in individual Fairness Doctrine disputes.28/ The sole exception to this is the generalized obligation imposed on the broadcaster under the FCC's interpretation of the "public interest" standard "...that licensees devote a reasonable percentage of their broadcasting time to the discussion of public issues of

interest in the community served by their stations and that such programs be designed so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community."29/ This was later restated by the Congress in recognizing the FCC's construction of the principle of fairness which has become the accepted definition of the broadcaster's obligation under the Fairness Doctrine--"to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."30/ The two-fold requirements of the Fairness Doctrine, then, are: first, to provide coverage of controversial public issues; and second, to seek out all responsible viewpoints and to afford opportunities for those viewpoints to be seen and heard.31/ It is the broadcast licensee who is responsible for taking the initiative in carrying out this fairness two-step; but of course the FCC stands in the wings as the arbiter of whether the licensee has succeeded, and it is the FCC's determinations of what constitutes a controversial issue of public importance and what are responsible viewpoints that inevitably guide the licensee who wishes to have his license renewed when it next comes up for renewal.

It may be useful here to trace the logic 32/ of the FCC's evolution of the Fairness. (1) There are not enough frequencies to permit everyone who wants to establish a radio or televison broadcasting station to do so. (2) Not everyone may be licensed to operate a TV station. (3) Requests for time on licensed radio or TV stations may far exceed the amount of time reasonably available, so the broadcaster should not be a common carrier. (4) Issues of public importance must be seen and heard on TV. (5) The licensee therefore must allocate

part of his time to such issues. (6) The licensee may not allocate the time according to his own views or interests, but must do so fairly and objectively. (7) This may conflict with the broadcaster's First Amendment rights, but the public's right to be informed is so much more important that the government may require (5) and (6) of the broadcaster as a part of the public interest standard for determining if his license should be renewed. There are several weak points in this chain of reasoning which we will deal with later.

The philosophical basis for the Fairness Doctrine 33/ is that there is a "right" of the public as a whole to be informed and that it is the duty of the FCC and its licensees affirmatively to effectuate that right. Thus, the FCC says: "It is this right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting."34/ And the Supreme Court in an opinion written by Justice White has more recently stated this philosophy in these words: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."35/

Two points need to be made about this philosophical underpinning of the Fairness Doctrine. First, the substitution of the goal of the First Amendment for the Amendment itself creates a subtle but powerful distinction. It is one thing to believe that protection of freedom of speech for each individual under the First Amendment was

intended "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail...."36/ and another entirely for the government to argue that "full effect can only be given to the concept of freedom of speech on the radio by giving precedence to the right of the American public to be informed on all sides of public questions over any...individual exploitation for private purposes," 37/ or that the government should affirmatively enforce the people's "collective right to have the medium faction consistently with the ends and purposes of the First Amendment."38/

The purposes and benefits of free expression in an open society have been the subject of debate since Milton, continuing on to Blackstone and Mill.39/ Three basic principles, however stand out. Through the test of challenge and survival, good ideas or "truth" will emerge, and such a process is essential to good government. Free expression is a powerful bar to the emergence of a tyrannical government. And the right to free expression of views is a valuable individual right that contributes to human dignity.

The FCC and the Supreme Court have focused principally on the first two of these purposes of free expression, and indeed most of the traditional legal and political thinking on the subject has been along those lines. This approach caused no particular problems so long as the issues involved the print media, 40/ where the tradition of media diversity and competition fitted well with a governmental policy of laissez faire. In such an environment, there was a near-continuum of opportunities for expression, ranging from handbills to newssheets to magazines and newspapers. The major issues for government policy were the permissible limits of free expression, including

libel, clear and present danger, and obscenity. There was no concept of the government having a responsibility for deciding who would be allowed to use a particular medium or whether the public was adequately informed on specific issues.

In broadcasting, however, a quite different approach has arisen. The idea that the public interest standard for licensing must be applied to the content of the broadcaster's programming has led to increasing governmental specification of what programming is and is not in the public interest. While maintaining the fiction that the FCC does not censor broadcasting, 41/ the courts have steadily allowed the FCC to enlarge the public trustee concept of the broadcaster's role--with the FCC and the courts as the final overseers of whether the broadcaster has in fact adequately executed his trusteeship. Thus there is in broadcasting the contention that there is no censorship and that there is no "state action" in the broadcasters' programming decisions, while the FCC with great frequency second-guesses the broadcaster's decisions. The constitutional thinking on this issue has been fuzzy at best and borders on the dangerous. The Congress in passing the 1927 Radio Act was reacting to a proliferation of private broadcasting operations and a political climate of corporate exploitation of natural resources; 42/ the "public trustee" role of the broadcaster fitted well the political temper of the times, even though it may not have been thought through very deeply, and we can believe that the authors of the Act saw no conflict between this concept and the contention that there would be no censorship.

What they perhaps could not have foreseen was the FCC's steady intrusion into detailed arbitration of what programming was in the

public interest and therefore required of the public trustee. At first, the rationale for this role for the government was that there was something "different" or "unique" about broadcasting--principally that the airwaves "belonged" to the public and that not everyone could set up their own broadcast station.43/ Today, however, the concept has changed so that the "difference" is that the broadcaster is a public trustee and must adequately provide the benefits of free expression. It is not that the broadcaster or anyone else is "free" to express anything, but that the public shall receive the benefits of free expression that is important in the calculus of the FCC and the courts. Thus we find the FCC saying that "We fully recognize that freedom of the radio is included among the freedoms protected against governmental abridgement by the First Amendment. But this does not mean that the freedom of the people as a whole to enjoy the maximum possible utilization of this medium of mass communication may be subordinated to the freedom of any single person to exploit the medium for his own private interest."44/ In broadcasting at least, the modern First Amendment seems to provide that "Congress shall make no law abridging the freedom of speech or of the press except in the public interest." And the public interest seems in the view of the Supreme Court in these matters to be the receipt of a suitable mix of things they ought to see and hear: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."45/

This substitution of a public right for the rights of the individual who wishes to speak changes the government's role from one of protecting free speech to one of enforcing the provision of a suitable

assortment of social, political, esthetic, moral, and other ideas and experiences. It is inevitable in such a scheme that the government will become involved in balancing the content of the expression we may see and hear on television, not just the conditions under which it is produced and selected. It invites a paternalistic prescription of what we as viewers and listeners should see and hear, what we should be informed about, rather than what we as a citizenry choose to show and tell each other. The "right to be informed" can be little more than the right to see and hear what the government decides we should see and hear.46/

It is no answer to say that the government can and will enforce such balance of ideas and messages only neutrally and only without censorship, nor that the government enforces such balance only to counteract the greater imbalance that would otherwise ensue because of the monopoly power of the television broadcast licensees and the national TV networks. The enforcement of balance likely to be achieved by the FCC is heavily influenced by the nature of that agency. The FCC is highly political at the top and highly bureaucratic at the working level. Although the Fairness Doctrine is applied to television programming nominally only upon complaint, 47/ the FCC has moved to establish rules for how complaints will be resolved that act very obviously to influence the initial coverage of any matter that might invoke a Fairness Doctrine complaint. Like the rules of any administrative regulatory agency, the Fairness Doctrine rules have grown more and more complex; at some point, they mean whatever the bureaucrats of the Commissioners say they mean. The "neutral" balancing of the programming mix in the first instance then is likely to be biased in

the direction of what is bureaucratically safe. The responsiveness of the Commissioners, however, to the Congress, the White House, and to politically influential special interest groups means that some ideas and messages will be decided to be more "equal" than others.48/ Those who have enough political organization to put effective political pressure on the FCC directly or through the Congress are more likely to get a Fairness Doctrine ruling in their favor. And it is inevitable that the personal philosophy of the Commissioners along with the prevailing political philosophy of the Congress and the media will play a large role in deciding what appears balanced.49/

Similarly, there is little merit in the argument that the government in applying the new concept of the First Amendment to enforce a balance in what we see and hear is only counterbalancing the abridgement of the people's right of free expression by the broadcasters and networks who monopolize the available channels. If indeed the Constitution requires relief from such monopoly restraints to free speech, the proper remedy is to remove the monopoly power directly rather than placing the government in the role of prescribing what the monopoly power may be used to present for the citizenry to see and hear. Unfortunately, the argument that monopoly requires a governmental counterbalance reinforces the perpetuation of the monopoly: The government acquires an interest in excluding competition with the existing media or with the officially prescribed balance of ideas and messages precisely so that it can continue to assure that the "proper" balance is not disturbed.

One of the more widely remarked implications of the Fairness Doctrine is its "chilling effect" 50/ on vigorous journalism on tele-

vision. Certainly no broadcaster can be expected to provide very much programming that will entail costly legal proceedings that may in the end require that he present additional coverage to balance the overall coverage. Nor can he simply agree to balance the coverage whenever presented with a complaint. It is common knowledge that one of the services provided by broadcasting attorneys in Washington is informal checking with the FCC on various kinds of coverage before the material is put on the air in order to minimize the broadcaster's vulnerability to complaints. Whether the broadcaster is deterred in the first instance from covering a controversial issue or event, or whether he is influenced by the FCC's informal reaction to his lawyer's query, it is clear that this balancing interpretation of the First Amendment is bound to reduce the amount of discussion of controversial issues on TV, to render such presentations rather more bland and less incisive, and to narrow the range of the view given on TV of what is important and real in our society.

Beyond the philosophical and constitutional objections to the foundations of the Fairness Doctrine are questions as to its workability. Clearly if the Doctrine is to have any meaning, it must be enforced, and equally clearly, the enforcement will be done by the government. Although the FCC and the courts have consistently cited the prohibition in the 1934 Act against censorship, the fact is that it is the government that is ultimately the arbiter of what we see and hear on controversial issues under the approach of the Fairness Doctrine, for the government may require what shall be presented even if it may not prescribe what shall not be presented. The primary enforcement mechanism chosen by the FCC for the Fairness Doctrine has been the

arbitration of complaints. Each complaint that a licensee has not been fair in his coverage of events is considered against past decisions and the facts of the case, and either the complaint is rejected or the licensee is ordered to provide coverage to balance the overall discussion of the issue. As with all case law, cases pass into precedent and rules evolve as to what the FCC will and will not consider fair. Old precedents are stretched to fit new circumstances, or new situations are considered de novo depending on the point of view of the FCC staff or the Commissioners.51/

It is clear that the FCC intends the past Fairness rulings to be followed by broadcasters, so the precedents of past decisions will have the effect of a rule for the broadcasters to follow. In 1964 the Commission issued a digest of past rulings which it stated would be revised at appropriate intervals to reflect new rulings in the fairness area in order "to keep the broadcaster and the public informed of pertinent Commission determinations on the fairness doctrine, and thus reduce the number of these cases required to be referred to the Commission for resolution."52/ The Commission goes on to state that in passing on complaints brought under the fairness doctrine "the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith."53/

The FCC and the Supreme Court have put great emphasis on the nature of the enforcement mechanism as avoiding traditional First Amendment problems associated with government censorship. In fact, however, the two-fold approach of the Fairness Doctrine, requiring not only that the discussion of any particular issue be fair, but also that

there be discussion of controversial issues, 54/ invites complaints that broadcasters have ignored important issues 55/ and would seem to require the Commission under its rationale for the Fairness Doctrine to be prepared to decide when the broadcaster must cover various issues. The Commission in its enforcement of the Fairness Doctrine not only must decide what is fair in broadcast journalism, it also must decide what is sufficiently controversial and of sufficient public importance that it must be on the agenda of broadcast coverage.56/ Indeed, the Supreme Court in Red Lion has stated that "if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues."57/

The principal problem in the workability of enforcing the Fairness Doctrine is the drawing of distinctions. Consider first the enforcement of fairness once an issue is conceded to be controversial and of public importance and is to be covered by a licensee. One problem is the determination of how many sides there are to the issue that should reasonably be carried as "contrasting points of view." Consider, for example, the proposed condemnation of land for a new city park. The broadcaster presents a documentary program reasonably balanced between the views of the proponents and opponents of the new park. A group of citizens then complains that there is a third alternative of building a smaller park in a different location that achieves most of the goals of the proponents and meets most of the objections of the opponents and that this alternative unfairly received only passing mention in the broadcaster's program. Assuming the broadcaster does not wish to provide any more coverage at this time (or that he does not want to be forced into it), he rejects the complaint which is taken to the FCC.

The broadcaster now has several arguments open to him: 58/ He may say that the "issue" was the construction of the park at any location and the program was therefore adequately balanced. He may say that the citizens now complaining are a small minority, and their views are not sufficiently important or relevant to compel additional coverage. He may say that the "issue" was the construction of the park at a particular site and the program was therefore adequately balanced. He may say that the views of the complaining group do not contrast very strongly with the "views" stated by various opponents and proponents on the program so that the issues were adequately covered even though the particular alternative offered by the group wasn't mentioned. The complainants have obvious counterarguments. The FCC must decide, using its tests of reasonableness and good faith.

It seems apparent that the FCC could not adjudicate such a complaint without delving in rather considerable detail into the particular facts and circumstances of the case. It would not be surprising therefore for the FCC to deal with the matter on grounds other than fairness per se. If it were found that the licensee owned land in the area of the alternative park site which would lose value if condemned, the Commission would almost certainly seize on this fact to decide the case against the licensee.59/ There is no need to go into the details of such a fairness dispute to realize that (1) it could be argued endlessly, there being no objective standard for disposing of the matter and, (2) no matter how it is disposed of, the Federal government is an integral part of not only presentation of the issue but the debate itself. Let us say that the station's arguments are not accepted by the Commission; then the Commission must somehow measure the reasonableness

of the broadcasters judgment that the point of view that the park should be built in the second location deserved only passing mention rather than full coverage as a contrasting point of view.

Is it implicit in the Fairness Doctrine that all points of view are entitled to equal time, to equal emphasis? If not (and the Commission has said not), then should the number of words, the expressions of the reporters, the fraction of the time, or what be taken into account? Should views be given time and emphasis in accordance with their merits, the estimated number of their adherents, the respectability or importance of the organizations backing them, the need for the audience to be aware of them, their familiarity to the audience, or what? Studies of network news coverage 60/ on various issues to determine their balance or fairness have dealt with such indicia as frequency of coverage of one point of view or another, use of "positive" adjectives, duration of coverage given to one or another point of view, use of "stop-frame" or graphics to focus the viewers' attention, and so forth. Is it fair to give more time and emphasis to one contrasting point of view because it is more complex and requires more time to be explained? Or to give it less time because most viewers won't focus in enough depth to really understand it?

When the government undertakes to become the arbiter of fairness in the presentation of ideas or other kinds of expression 61/ rather than the remover of barriers to freedom of individual speakers, it is inevitable that such considerations must come into play, or else the government's Fairness Doctrine responsibility is a sham to be applied only on occasion.

Let us go on for a moment to consider what might happen if the Commission upheld the complainants in the above example, and the station provided a report on its evening news show about the arguments for the second location. The station is then open to another Fairness Doctrine complaint that the total coverage of the park issue has now become biased in favor of park construction and that more coverage of the opposition to any new park must receive additional time in order to leave the matter in overall balance. Assuming the second complaint is not transparently frivolous, the Commission must reconsider the matter and arrive at some new balance, reraising all the amorphous criteria just cited. Or the Commission could hold that the new coverage was on a "bona fide news program" and therefore exempt from challenge under the Fairness Doctrine--which would immediately raise the question of whether a Fairness Doctrine obligation can be met on a bona fide news program or must be met in other program time that is subject to the doctrine.

One further aspect of the practicality of the Fairness Doctrine 62/ is its requirement that each station must individually meet the requirements of the doctrine. Thus the Commission will not take into account that another TV station in the same community has provided frequent and full coverage of a contrasting point of view that was given short treatment by a licensee against whom a complaint has been filed. Nor that local newspapers, radio stations, and town meetings have dealt on particular issues.63/ Thus the argumentation for the Fairness Doctrine that the public's right to know, to be informed, or to hear are at stake seems rather inflated. If it were indeed the case that these essential "rights" were at stake in a particular case, it would seem necessary for

the Commission to consider whether the licensee's coverage actually unbalanced the overall availability of various points of view for the public's consideration.64/ Or if we consider that there is something inherently different or more powerful about TV so that only TV coverage were important (at least to a certain and significant class of the population) then the Commission should measure the Fairness Doctrine against the totality of TV coverage of the issue in a community.65/

We are forced to conclude that the Fairness Doctrine, both in its concept and in the workability of its enforcement, is a most unsatisfactory approach to the regulation of television. It puts the Federal government into the editorial process for both local and national issues as a kind of "editor-of-last-resort." It redefines the First Amendment in a way that makes the government the paternalistic overseer of what we should see and hear rather than the protector of competitive opportunities for free expression. It holds up an illusion of fairness in the use of television that is based on the a posteriori evaluation of the content of the debate on issues where agreement on fairness is hard to obtain; it retards the discussion of a priori conditions of access where reasonable agreement might be reached. It accepts the statutory language of the 1927 and 1934 legislation with regard to common carrier status for broadcast licensees and the subsequent FCC evolution of license renewal standards was to require the First Amendment to be bent around the legislation rather than vice-versa. It forces the discussion of controversial issues on TV toward simplified "packets" and favors those with the power or faddish political influence to get a favorable FCC ruling. It encourages bureaucratic finesse over force of argument in debate. And it advances the expectations on the

part of the individual TV viewer that one or a few "balanced" TV channels are all he needs to be informed.

Direct Access

Direct access refers to some provision for individuals to gain the use of a TV channel for a limited time to present a message to the viewing public. This is in contrast to the Fairness Doctrine where there is no right of access by any individual 66/ but rather a right on the part of the public to have the licensee inform him adequately with a range of contrasting points of view on controversial issues of public importance. The most important thing to be said about direct access is that no one has any such right under today's system of broadcasting except the licensee during the term of his license.67/

The history of access to the airwaves has often been recounted.68/ The most noteworthy aspect is the dramatic shift of national policy in the enacting of the 1927 Radio Act. From a situation where anyone who wanted could turn on a radio transmitter and have his say, the Congress went to the other extreme of allowing only a limited number of licensees to transmit and declaring at the same time that those licensees were not to be considered common carriers.69/ Although the history has been covered elsewhere, it is useful to review selected aspects as an introduction to a discussion of the changes that might be made now that we have had some fifty years experience with the regulatory structure of the 1927 Act.

The 1927 Act was passed at a time when totally unrestricted radio broadcasting 70/ meant that neither the broadcaster nor the public received much benefit from broadcasting and at a time when the sale of

advertising time was a minor phenomenon. Clearly it is the nature of the radio frequency spectrum that not everyone can enjoy unrestricted use thereof.71/ And the inability to limit radio signals to state (or national) boundaries makes the Federal government the natural and probably inevitable place to decide on their use. The licensing authority of the 1927 Act derived from a series of National Radio Conferences held between 1922 and 1925 and on the scheme for limiting licenses that was evolved by Commerce Secretary Hoover under the 1912 statute that required a license to operate a radio transmitter. It seems likely that the emphasis on the service aspects of radio broadcasting embodied in the "public interest" standard of the 1927 Act were in reaction to the lack of service and the absence of any public interest being served by the chaos of 1926-27.

While the rationale for the limited number of licenses that may be granted is obvious, the choice of the process for deciding who would get to use the communications channels does not necessarily follow. Many economists point out, for example, that the initial assignments of operating rights could have been done at auction (as was done with mineral and forestry rights for example) and the ownership of the operating rights left to normal private market mechanisms.72/ That this was not the course chosen by the Congress in a crisis atmosphere in dealing with a new technology is understandable, and is certainly in any event behind us for the foreseeable future.

What is more relevant is the decision of the Congress to not make the licensees common carriers. The Senate Committee on Interstate Commerce, preparing what was to be the 1927 Radio Act, initially reported to the Senate a bill with the provision that any licensee permitting his

station to be used "for the discussion of any question affecting the public...shall make no discrimination as to the use of such broadcasting station, and with respect to such matters the licensee shall be deemed a common carrier in interstate commerce."73/ The argument made on the Senate floor for rejecting this approach 74/ was rather vague, citing the voluntary (and perhaps even eleemosynary) nature of broadcasting, its availability to the listener free of charge, and its purpose for the broadcaster of "building up his reputation."75/ It is unclear just how this rendered it "unwise to put the broadcaster under the hampering control of being a common carrier and compelled to accept anything and everything that was offered him so long as the price was paid."76/ Certainly the reasoning could not have foreseen the pervasive use of commercial advertisements to turn the "voluntary" broadcasting service into a most profitable use of the airwaves. One can only speculate about the lobbying efforts of the broadcasters who feared that common carrier status might entail regulation of advertising rates.77/ The common carrier provision failed on the Senate floor, 78/ and the stage was set for the FCC's evolution of the Fairness Doctrine out of the twin statutory concepts of the licensee's responsibility to serve the public interest and the denial of common carrier status as a regulatory alternative.

Two things stand out from this brief and selective history of the debate over common carrier status for broadcasters. First, the choice was statutory and not constitutional.79/ Second, the choice was made before television existed 80/ and before the broadcast medium had developed its present character of profitable commercial advertising, national network programming, and serious journalistic purpose. We are

free then to reconsider the statutory appropriateness of the various alternative ways access might be provided to television.

There are today four types of access to television: (1) time purchased for commercial advertisements; (2) time purchased or given for political campaigns under Section 315(a) of the Communications Act; (3) persons invited to appear on television programs or covered in news programs; and (4) program time purchased from the station and/or programs given or sold to the station. Different policy considerations apply to each because of their nature and because of viewing expectations.

Time purchased from the station for the presentation of commercial advertisements is the closest thing we have to a free market in the use of television. Each TV station retains, however, the right to decide which advertisements it will or will not carry and the right to schedule the time at which the advertisements will be shown. Indeed, under the current public trustee concept of the licensee the broadcaster must exercise discretion over and accept responsibility for all of his programming time including commercials.81/ As a practical matter, most broadcasters will accept any commercial advertisement for a product or service that is in good taste and will not give cause for a complaint to the FCC on grounds of obscenity or the Fairness Doctrine.82/ In general, the FCC and the Courts have maintained that the congressional intent in disallowing common carrier status was to permit broadcasting licensees a wide degree of journalistic freedom.83/ Thus, just as the editor of a newspaper or magazine may decide what articles and advertisements he will carry, so may a broadcast licensee--subject of course to the constant oversight of the FCC under the Fairness Doctrine.84/ Thus the broadcaster may be a "journalistic 'free agent,'" but must present

issues "fairly and impartially informing the listening and viewing public;" and the FCC must be the "ultimate arbiter and guardian of the public interest" and must "oversee without censoring."85/

The courts have held that newpapers may refuse to carry advertisements, 86/ the Supreme Court held that under the Communications Act broadcasters may adopt a general policy of not selling advertising time to individuals or groups to speak out on issues they consider important. The latter case is both interesting and important. The FCC had ruled that under the Communications Act a broadcaster may not be required to sell advertising time to individuals or groups to comment on public issues.87/ The D.C. Court of Appeals reversed to FCC and 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." 88/ The court went on to state that a broadcaster's policy of carrying commercial advertisements, but not paid messages on controversial issues, was constitutionally discriminatory. The Court of Appeals also found that broadcasters, as licensees and public trustees, were instrumentalities of the government for purposes of the First Amendment and therefore had no right to discriminate in the sale of advertising time.89/

The Supreme Court reversed the Court of Appeals, and its reasoning in doing so is important. The Court was divided on the issue and in such a way that makes analysis rather complicated. It is perhaps sufficient for our purposes here to say that the Court rejected (or at least did not decide) the question of whether the licensee was a government agent for First Amendment purposes. Instead the Court ruled that the FCC was correct in its interpretation of the Communications Act;

that indeed the Congress had not intended the Communications Act to require broadcasters to sell time to any and all who wished to purchase it. The Court did not find that broadcasters had a constitutional protection from a determination by the Commission or the Congress that the public interest required them to sell some time for expression, 90/ and as in Red Lion the Court did not deny that the Congress might change the prohibition on common carrier status for broadcasters.91/

NOTES TO TEXT

1/ More channels could be assigned for TV broadcasting, but there are strong competing uses for those frequencies for two-way radio, mobile telephones, microwave relays, satellite communications, navigation, etc. Each TV channel takes up the frequency space of about 2000 voice channels and covers a very large geographical area within which each voice channel might be used several times over, so that the reassignment of frequencies to create even a few new TV channels (say channels 85-99) would require massive dislocations of radio communications.

2/ The FCC's table of TV assignments, designating what channels can be used in what communities, was drawn up in 1952. Recent studies suggest that as many as 100 new stations might be authorized around the country in VHF channels 2-13. See " ," U.S. Office of Telecommunications Policy, May 1974. Similar expansions in UHF channels, 14-84, are also possible. Moreover, if the power and studio equipment requirements placed on UHF TV broadcasting were reduced, even more channels would be possible.

3/ A spot is a video production lasting typically thirty seconds or one minute. A program typically is produced in multiples of one-half hour with time out for spots, which of course are usually commercial or advertisements for upcoming programs. Five and fifteen minute productions are occasionally used, especially during political campaigns.

4/ The Communications Act of 1934.

5/ The FCC in making its license renewal decisions every three years has evolved a considerable and complex body of requirements for the broadcaster's overall programming as a test of whether he has met the

5/ (continued) statutory "public interest, convenience, and necessity" test for renewal of his license to broadcast. Some of these FCC-imposed requirements do require the broadcaster to provide access to his station in certain circumstances, such as the Fairness Doctrine to be discussed later. Also, the Congress has imposed requirements that the broadcaster must sell time to all political candidates or give them free time on an equal-time basis.

6/ Include data on investment, sales price, revenues, and profits.

7/ It might be said that the broadcaster sells his programming fare to the audience indirectly through the prices they pay for the goods advertised on TV; or it might be said that he sells time on his station. But neither of these explanations account for the incentives or economic imperatives of the TV business. Prices for consumer goods are the same to those who watch TV as for those who don't; and TV viewing is free to those who buy the products heavily advertised on TV as well as to those who don't. Moreover, the price of a minute on a TV station is usually calculated in "cost per thousand" viewers in the audience rather than simply cost per minute; the price of a minute may vary considerably with the time of day, the day of the week, and the show's ratings; the cost to an advertiser of a minute during a popular prime-time nationwide network entertainment show will be considerably more than a minute during a Sunday afternoon show on public affairs. And although a broadcaster is licensed to serve a "community," the language of TV geography is always "markets" except when applying for license renewal.

8/ Most broadcasters put on occasional special shows of particular local interest, or in the case of the networks, shows of particular national interest, that may be exceptionally costly to produce or may not attract a large audience. It is safe to say, however, that most such examples are calculated to attract overall attention to the station or network to keep viewers favorably disposed toward watching that channel or to keep the Federal government placated so there will be no trouble getting the license renewed.

9/ Of course, the lack of controversial material may be an even greater disservice to the public interest. While most complaints about TV deal with controversy, most serious challenges to the broadcaster's license renewal have been over the failure to present controversial material that some group believes important for the community to have the opportunity to see and hear; complaints about the lack of controversy, then, are in reality complaints about the broadcaster's limitations on access. Also, there may be a fine line between controversy and attention. The wave of sexually-oriented talk shows on radio in 1973(?) for a while created much more attention and audience than controversy and complaint. Only when the Chairman of the FCC "raised his eyebrow" in a speech expressing concern that such programs were not in the public interest did the broadcasters find the attention-getting programs dangerously controversial.

10/ There are some problems with this scheme that go beyond the scope of this paper. For example, this process takes little account of the intensity of potential viewers' preferences; it provides what the maximum number of people will watch rather than what they want to watch. Thus even though almost everyone might like at some time to watch a show on how to deal with automobile repair shops, relatively

10/ (continued) more would rather watch an entertainment program at any one hour of the day. Also, only those advertisers who wish to reach the large general audience that the broadcaster attracts can afford to advertise on TV. Some relatively specialized products, like diapers, can be advertised economically on those shows that are aired during the time of day that potential consumers are relatively heavily represented, but advertisers of hobby supplies would have to pay the same amount as soap advertisers even though the audience contained far fewer potential hobbyists than potential soap users.

11/ Again with the exception of candidates for public office during campaigns.

12/ This accounts for ABC-TV's cancellation of The Lawrence Welk Show at the height of its popularity. Most of the audience was in the older age group, many of whom were retired and had little potential as consumers of mass-advertised products and services. See Broadcasting magazine, _____.

13/ Each also sells television programs for which it owns the rights in many countries around the world.

14/ Especially news.

15/ "Owned-and-operated" or "O-and-O" in the trade jargon.

16/ An affiliate who regularly did not air a large number of the network shows would, however, be subject to network pressure to do so and might even find the network shifting its affiliation in his community to another station. See Media Report, _____, and Broadcasting, _____.

17/ The arrangement has evolved from the old radio networks which became the TV networks. The economics are attractive to broadcasters and

17/ (continued) advertisers because of the ability to spread costs over large numbers of viewers. A TV show seen in a relatively smaller number of cities can attract only a relatively small audience to be sold to advertisers, and so brings in less total revenue than a similar program aired nationwide. A network show can be very expensively produced and yet have a cost per viewer considerably less than that of a less expensive show seen in only one or a few cities.

18/ I am indebted to Professor Bruce M. Owen of Stanford University for this terminology.

19/ This is due to the limited number of channels available for broadcast TV as discussed earlier.

20/ Include data; See Rolla E. Park, _____

21/ As with radio, however, we might expect that the diversity would be limited to "more of the same" so long as advertising were the sole form of economic support. This is not to say that more choice of which sitcom to watch or when to watch the news wouldn't be worthwhile.

22/ Large corporations, foundations, and the Federal government, however, have enough money to subsidize the production of programs by public TV stations for use on the public TV network. It is obvious that they have considerable say in what they will pay to produce.

23/ See the report of the Cabinet Committee on Cable Communications, 1974, for a discussion and recommendations on this direction for public policy toward the development of cable. See also the report of the Committee for Economic Development entitled "_____ _____," 1975 for a similar discussion from an industry

23/ (continued) point of view. And see _____ and _____ for a discussion of the services cable might make possible.

24/ The reasons for this opposition are transparent, although it is interesting to note some of the reasons they stress. Broadcasters profess to be worried that people will have to pay for what they now get for free, as though people will pay for what they now already get for free and as though people don't now pay for TV in each time they buy an advertised product, with less choice in the matter than in their purchase of magazines and newspapers. Theater owners stress the social benefits of getting out of the home and the deterrent effect of theater lights on crime.

25/ Actually for "sides" of a controversial issue of public importance. If the issue involved is decided by the FCC to be not of public importance, or if the "side" of the issue seeking access is deemed well represented by the station's past programming, there is no access. Even if the FCC decides more coverage of a particular point of view is required, the broadcaster may decide who will present that coverage and may well elect to do so with his own staff.

26/ Even here, the law requires only "equal" time on equal terms; the station may decide not to allow any candidates for a particular office to have time and may also decide not to allow any time to be bought for any campaign use.

27/ Section 3(h) of the Communications Act.

28/ The origin of this section of the Act is unclear. It may well have been inserted to clarify that in the combining of the 1927 Radio Act with the common carrier statutes in 1934, the Congress did not intend

28/ (continued) to extend the common carrier type regulation as it evolved under the ICC into broadcasting. However, it was specifically considered and rejected. See Robinson P_____ and note_____ infra.

29/ FCC Report on Editorializing by Licensees.

30/ Section 315(a) of the Communications Act. The legislative history of this section of the Act, passed in 1959, indicates that the Congress in adopting this language was only clarifying that the remainder of the section (dealing with equal-time requirements and news shows) was not intended to alter the FCC's evolution under the public interest standard of the fairness obligation. The FCC from time to time construes this language as statutory enactment of the Fairness Doctrine. However, whether the Fairness Doctrine rests on Section 315(a) or on the more general public interest standard of the Act is immaterial for purposes of a discussion of access. The history of the evolution of the Fairness Doctrine by the FCC goes back to 1929 when the Federal Radio Commission stated that the "public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies not only to addresses of political candidates but to discussion of issues of importance to the public." 1929 FRC Annual Report 33. In 1940 the FCC banned broadcast editorials on the assumption that this would aid the presentation "of all sides of important public questions, fairly, objectively and without bias." 8 FCC 333 (1940). This was reversed by the 1949 Report on Editorializing by Broadcasting Licensees.

31/ In this and in other formulations of the legal issues involved in broadcasting regulation I am indebted to Glen Robinson's seminal article: "The FCC and the First Amendment: Observations on 40 Years of Radio

31/ (continued) and Television Regulation," Minnesota Law Review, Vol. 52, p. 67 (1967).

32/ It is not clear that all of the steps of the Fairness Doctrine's evolution deserve to be called logic, but the FCC's legal discourse style seems to suggest that it wants to be thought to be logical in reaching its conclusions.

33/ Indeed, of most of the FCC's regulation of broadcast programming.

34/ Report on Editorializing by Licensees, 91 P&F 204 (1949). Also, this concept goes back to the conceptual basis for the 1927 Radio Act. Reacting to the confusion of the situation when anyone could broadcast on any frequency, with no regulation or coordination, the Congress saw a dichotomy between the "private" rights of broadcasters under the old scheme and the "public" interest responsibilities of those licensed to use the frequencies owned by the public. Thus, Congressman White whose 1923 bill served as a major basis for the 1927 Act said (67 Cong. Rec. 5479, March 12, 1926): "We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will, may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual to use the other...."

35/ 395 U.S. 390 (1968). We need not address here the broader question of FCC regulation of broadcast programming and the constitutional issues surrounding such regulation. Only a fundamental revision of the broadcasting licensing structure to deny the government the authority to take away a license (except perhaps for criminal use)

35/ (continued) would eliminate the need for some governmental oversight judgement of whether the broadcaster in his programming was serving the public interest. For a thorough discussion of issues surrounding FCC program regulation and the First Amendment, see Robinson, supra note ____.

36/ Red Lion, 395 U.S. 390.

37/ FCC Report on Editorializing by Licensees, supra at 91:211.

38/ Red Lion, at 390.

39/ John Milton, Areopagitica (1644); Blackstone, _____; John Stuart Mill, On Liberty.

40/ With some exceptions in the case of state sponsored media such as school newspapers or public places. See for example, Barron, Freedom of the Press for Whom, pp. _____ for a discussion of variations on the traditional First Amendment issues when state action is involved.

41/ As indeed the Communication Act states it may not, Section_____.

42/ Teapot Dome, etc.

43/ This concept that not everyone could broadcast because of the frequency limitations sounds strange today when the cost of setting up and operating a TV station (or even a standard radio broadcast station) is so large. But in the 1920's many of the broadcasters had homemade transmitters and stations that cost a few hundred dollars or less and many people broadcast just for the fun of it. Today, a decent quality AM or FM radio transmitter powerful enough to cover a small community would cost no more than a thousand dollars and could be programmed with several hundred dollars worth of tape equipment. Amateur radio operators are putting on their own TV shows on the air in the UHF amateur band with equipment that costs no more than a few thousand dollars. And

43/ (continued) of course the rapid growth of Citizen's Band radio which the FCC originally sought to license only for limited two-way communication has become in some communities a party-line that borders on "broadcasting"; and its use on highways is hardly more than "everyone" broadcasting to a "community" several miles long that moves along the road at something more than the speed limit. The idea that "not every one can broadcast" is true mainly because the FCC has structured the use of radio frequencies and requirements on licenses so that is so. The technology and the frequencies do not inherently make it so.

44/ Report on Editorializing by Licensees, 91 P&F 211.

45/ Red Lion Broadcasting Co. v. FCC, 395 U.S. 390 (1969), emphasis added.

46/ If indeed the nature of electronic communications technology means that we have no other recourse, then we can simply accept this new interpretation of the First Amendment and turn our attention to the design of government processes that make the best of the situation. Indeed that seems to be what the Supreme Court has done in Red Lion and Democratic National Committee v. CBS. It remains to be seen, however, to what extent we truly have no other recourse and whether the Supreme Court has not been a victim of a lack of analysis of alternatives to the legislation of 1927 and 1934 and the FCC's interpretation thereof.

47/ The personal attack rules require, however, that if a person is personally attacked on a TV station, then the station must notify the person of the attack and offer comparable time for reply. See Cullman_____and see Robinson, supra.

48/ The FCC has avowedly favored programs designed to serve racial minorities, religious institutions, farmers, and children. It has not done so for women, old people, atheists, deaf people, or shop keepers.

49/ Even the opportunity for review by the courts can limit this effect only so much. The discretion the courts have allowed the FCC in applying the public interest standard and in enforcing the Fairness Doctrine show that the FCC will be limited only in the case of flagrant abuse of its own procedures.

50/ This phrase, which defenders of the media often apply indiscriminately to any and every limitation on their actions originated in _____. In spite of its overuse, it remains a valid consideration in any nation that values free expression.

51/ Thus we find the FCC declaring cigarette advertising subject to the Fairness Doctrine, and then straining to avoid applying the precedent to other product commercials.

52/ Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, FCC 64-611, July 6, 1964.

53/ Ibid.

54/ At least of "representative" controversial issues.

55/ e.g. There have been such complaints in the case of _____. And broadcasters have for the most part ignored coverage of their own industry--certainly a "controversial issue of public importance."

56/ To be sure, the theory of the Fairness Doctrine approach is the other way around. That is, the Commission is set up to decide when the broadcaster has been unfair and when he has failed to cover an important issue. But while we certainly can be convinced to feel more comfortable with this formulation than that just given in the text, for reasons discussed above and below, it appears to be a distinction without a difference.

57/ Red Lion Broadcasting Co. v. FCC, 395 U.S. 393 (1969).

58/ His first argument is probably that the issue is not of public importance, but we are assuming here, that has already been acknowledged.

59/ Indeed, one of the valid and important stated purposes of the Fairness Doctrine is to ameliorate the possibilities for a licensee to use his position of control over one of the few channels in a community to promote his own private interests by excluding certain information from his channel. This is not to say that the Fairness Doctrine is the required or preferable way of dealing with this problem.

60/ Which is exempt from the Fairness Doctrine by virtue of the Commission's rule excluding "bona fide newscasts."

61/ And recall the dicta (or could it become a holding?) in the Supreme Court's decision on Red Lion that it is not just political matters, but "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." 395 U.S. 390.

62/ Especially in relation to the lofty rhetoric developed for its support by the Commission and the Courts.

63/ Except perhaps in trying to determine whether the broadcaster's chosen scope of the issue was or was not unreasonably narrowed or widened.

64/ In a community with only one newspaper and one TV station, for example, how would the public right to be informed be balanced best if the newspaper presented only one side of the controversial issue?

65/ If we were then treated to the argument that many people watch only or predominately one favored channel and true fairness can be obtained only by channel by channel fairness, we would have to acknowledge that the First Amendment was somehow secondary to the energy required to change channels.

66/ Except in the case of personal attack. See note _____.

67/ The licensee's right of access is of course a responsibility as much as a right under the public trustee concept of the licensee's status.

68/ See, e.g., Barnouw, A History of Broadcasting in the United States, Volume I, A Tower in Babel, Oxford University Press, 1966.

69/ See appropriate legislative history, _____. See also the decision of the Supreme Court in CBS v. Democratic Committee _____ U.S._____(1973).

70/ Provoked by a decision on the unconstitutionality of then Secretary of Commerce Herbert Hoover's limitation on licenses.

71/ Even in rather simple uses such as radio and television broadcasting, specifications of frequencies and power levels is necessary to avoid interference that otherwise might render much of the broadcasting useless; careful specification of signal characteristics is even more critical where the spectrum is used for satellite transmission or for navigation.

72/ The usual counter-argument is that this would leave broadcasting only to the rich, but in fact as amateur operations over the years have shown, there were for several decades many frequencies that were unused and could have been claimed by a simple first come, first served licensing process (with perhaps a proviso that the frequencies must actually be used to prevent hoarding). This latter process is not unlike the way the FCC has in fact assigned new frequencies as technology developed to permit their use. See e.g., The Radio Spectrum: Its Use and Regulation, proceedings of a conference sponsored by the Brookings Institution and Resources for the Future, 1968.

73/ 67 Congressional Record (1926), cited in CBS v. DNC.

74/ And limiting the provision of reply opportunities to candidates for public office.

75/ Ibid.

76/ Ibid. Note: read the full text before leaving this stand!

77/ This can be only speculative since it is unlikely that the press reported any of this if it did exist. Moreover, in 1926 advertising did not have anywhere near the importance or pervasiveness it now has, and it is not entirely fair to presume that the broadcasters intervened on this point, even though it would not seem to have been surprising in view of the efforts of the bigger commercial broadcasters in seeking the regulation of licenses over the 1920's that favored their commercial position.

78/ And failed again in modified form in re-enacting the 1927 Act into the 1934 Communications Act.

79/ See Red Lion, 395 U.S. 389. "...as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others 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 barred from the airwaves."

80/ All-electronic television was invented by Philo T. Farnsworth in 1927.

81/ See _____.

82/ The FCC has held that commercial advertisements are subject to the Fairness Doctrine only to the extent that they contain explicit reference to a controversial issue under the meaning of the Fairness Doctrine. This was in the wake of the Commission's decision that cigarette advertising should be balanced under the Fairness Doctrine by anti-smoking public service announcements when it was suggested that other product advertising raised politically controversial issues (e.g., gasoline and air pollution, toothpaste and flouridation, detergents and water pollution). The congressional action to outlaw cigarette advertising on TV provided the FCC the excuse it needed to exempt product advertising generally from the Fairness Doctrine.

83/ See CBS v. DNC, 27 RR 2d 917.

84/ And subject to Section 315(a) for candidates for public office and (?) political parties.

85/ CBS v. DNC, 27 RR 2d 922.

86/ See Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune Co., 307 F. Supp. 422 (N.D. I11, 1969); affirmed 435 F. 2d 470 (2d Cir. 1970); cert. den. 402 U.S. 973 (1971) and in CBS v. DNC (27 RR 2d 909 (1971).

87/ 25 FCC 2d 216, 242.

88/ 450 F 2d 646.

89/ 450 F 2d 652.

90/ Although the FCC is very unlikely to reverse 50 years of precedent.

91/ "Conceivably at some future date Congress or the Commission--or the broadcasters--may devise some kind of limited right of access that is both practicable and desirable." CBS v. DNC, 27 RR 2d 930. "Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose

91/ (continued) views should be expressed on this unique medium." "...the First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use." Red Lion, 395 U.S. 390, 391.