A TWENTIETH-CENTURY SOAPBOX: THE RIGHT TO PURCHASE RADIO AND TELEVISION TIME

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Once upon a time there was a nation great in ideals and industrialization. It had businesses everywhere—and unsurpassed military might. Yet its greatest strength lay in its ideological foundation. This nation professed to be governed by the consent of its citizens. To ensure the successful functioning of this unique experiment in government, free education, libraries and full information were provided to all, so that this nation's two-hundred million governors, through wide-open debate, might govern themselves wisely. But as the years slipped by, the people spent more and more of their time in their air conditioned homes watching television, and less and less time listening to speakers in the public parks, attending town meetings, and reading handbills on the streets. Meanwhile, the number and importance of crucial issues were growing, and the need for well informed governors became paramount. Thus it was that the great debate about the great debate began.

Everyone had his own theory of how to reverse this trend and return the democratic dialogue to the people, who were all at home watching their television sets. Some advocated letters, petitions, press conferences and picketing, but they had little success. Attention shifted to those who advocated bombing, burning, shooting and looting, because before and after the televising of such activities it was usually possible to present a short message, however distorted, concerning the merits of the controversy that generated such outrageous conduct. Then a third group came along. It said, "Let us simply go to the broadcasters peacefully, ask them for the time to present our concerns—we will even pay them." But the broadcasters politely explained that there was no time available for the discussion of public issues—such as war, life and politics—because the time all had to be used for programs and announcements necessary to the very difficult but essential task of inducing consumers to buy useless, joyless, and sometimes harmful products. Yet these patient and patriotic students, businessmen, and Senators were not deterred. They continued to preach the doctrine of "working within the system." "The Government," they said, "will treat us

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> *fairly. There is reason and justice in our land. Surely a democratic people need not be violent to be heard." And so it was that they came to the Federal Communications Commission . . .*[1]

UNLIKE many parables, this one has a grounding in reality and an aftermath in fact. On August 5, 1970, the Federal Communications Commission announced two decisions that pose immensely significant questions concerning the application of first amendment speech freedoms in the broadcast media.[2] In both cases the Commission rejected the request of a national political organization that had sought to purchase radio and television airtime at existing commercial rates for the discussion of timely public issues, including the course and conduct of the Vietnam War.

This Article will explore the Commission's rationale in these two decisions—a rationale that appears to be fundamentally erroneous. By failing to apply established first amendment precedent to the forum of broadcasting, the Commission has erected an unconstitutional barrier against use of the broadcast spectrum to communicate protected political ideas.[3]

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[1] *See Hearings on S.J. Res. 209 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 91st Cong., 2d Sess. 155 (1970) (statement of Commissioner Johnson).

Senate Joint Resolution 209 was introduced on June 11, 1970, by Senator J. William Fulbright. It proposed that § 315 of the 1934 Communications Act, 47 U.S.C. § 315 (1964), be amended by the addition of a new subsection:

> (d) Licensees shall provide a reasonable amount of public service time to authorized representatives of the Senate of the United States, and the House of Representatives of the United States, to present the views of the Senate and the House of Representatives on issues of public importance. The public service time required to be provided under this subsection shall be made available to each such authorized representative at least, but not limited to, four times during each calendar year.

S.J. RES. 209, 91st Cong., 2d Sess. (1970). Senator Fulbright's Resolution expired in the Senate Subcommittee on Communications upon the adjournment of the Ninety-first Congress, and it is not expected to be reintroduced during the Ninety-second Session.

[2] Democratic Nat'l Comm., 25 F.C.C.2d 216 (1970), *appeal docketed*, No. 24,537, D.C. Cir., Aug. 13, 1970; *In re* Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242 (1970), *appeal docketed*, No. 24,492, D.C. Cir., July 31, 1970. On March 9, 1971, both *Business Executives* and *Democratic National Committee* were argued, as separate cases, before the U.S. Court of Appeals for the District of Columbia, before Circuit Judges J. Skelly Wright, Carl McGowan and Spottswood W. Robinson III. Washington Post, Mar. 10, 1971, § C, at 2, col. 1.

[3] Commissioner Johnson issued dissenting opinions in these cases. This article constitutes, in part, a development of ideas contained in those opinions and in his testimony before the Subcommittee on Communications of the Senate Committee on Commerce,

In the first decision, *Business Executives Move for Vietnam Peace*,[4] the Commission ruled that a Washington, D.C., radio station could legitimately refuse to sell one-minute segments of its "commercial" spot-announcement time to an anti-war group, the Business Executives Move for Vietnam Peace Organization (BEM). BEM proposed to use the airtime to urge the immediate withdrawal of American troops from Vietnam and other overseas military installations.[5] The radio station had denied BEM "access" to its facilities—which is freely made available to purveyors of beer, wine, soap, soup, and hand lotion—on the strength of a self-imposed policy barring the sale of spot-announcement time for the expression of "controversial" views. Although this station sold spot-announcement time to political candidates during election campaigns, often for the discussion of highly "controversial" issues, it nevertheless maintained that issues of the type presented by BEM required "a more in-depth analysis than can be provided in a 10, 20, 30, or 60 second announcement." [6] In throwing its official support behind the radio station's decision the Commission stated that a broadcast licensee is not a "common carrier" under section 3(h) of the Communications Act;[7] therefore, it "is not required to open its doors to all persons seeking to use the station's facilities for whatever purpose." [8] In arriving at this result the majority reaffirmed a prior FCC opinion[9] holding that a licensee has the power to determine "the format for presentation

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Hearings on S.J. Res. 209 Before the Subcomm. on Communications of the Senate Comm. on Commerce, 91st Cong., 2d Sess. 155 (1970).

[4] 25 F.C.C.2d at 242 (1970).

[5] The following is the text of one of the spot announcements proposed by BEM:

> ANNOUNCER: Rear Admiral Arnold E. True has an urgent message for you.
> TRUE: Many people fear that if U.S. troops are withdrawn from Vietnam there will be a resulting blood bath. The President stated that fifty thousand were killed in North Vietnam when Ho Chi Minh took over, and that three thousand more were killed by the Vietcong in Hue. He did not mention, however, that General Abrams reports that a hundred and eighty-six thousand Vietnamese have been killed by Americans this year. This policy of remaining in Vietnam indicates that we are going to prevent Vietnamese from killing Vietnamese by staying there and killing them ourselves.
> ANNOUNCER: The preceding public service message was brought to you by BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE.

On file at *Virginia Law Review*.

[6] 25 F.C.C.2d 242 (1970).

[7] 47 U.S.C. § 153(h) (1964).

[8] 25 F.C.C.2d at 247.

[9] Letter to Mrs. Madolyn Murray, 40 F.C.C. 647 (1965).

of controversial issues 'and all other facets of such programming.' " [10] The Commission concluded on a note of alarm with the observation that a contrary result "would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt." [11]

In its second decision, *Democratic National Committee*,[12] the Commission dealt with a request by the Democratic National Committee (DNC) for a declaratory ruling that broadcasters "may not, as a general policy, refuse to sell time to responsible entities . . . for the solicitation of funds and for comment on public issues." [13] The DNC had sought to purchase airtime, in limited amounts and at current commercial rates, for short "spot announcements" soliciting funds for political purposes and for full-length programs presenting the party's views on important national issues of the day. Two of the three major networks initially rejected the DNC's request to purchase airtime for these purposes. However, upon reconsidering the request, the two networks partially reversed their policy and made time available for spot announcements soliciting funds. All three, however, steadfastly adhered to their general policy of refusing to sell airtime for the discussion of controversial issues.[14]

The Commission concurred in the networks' treatment of the sale of spot-announcement time to responsible entities—airtime made available only for the solicitation of funds and not for the discussion of controversial issues—adding that stations are not required to sell spot-announcement time to non-political parties for any purpose and flatly rejecting the request that licensees be required to sell limited amounts of programming time to anyone for any purpose.[15] Amplifying the note of alarm sounded in *Business Executives*, the majority in *Democratic National Committee* stated that the DNC's request, if granted, would overturn the present scheme of broadcasting in this country, in which views on all controversial issues are presented by the licensee as "spokesman" on behalf of the public.[16] The Commission also warned that the position advocated by the DNC would subject licensees to financial hardship, since they would be required under the "fairness

[10] 25 F.C.C.2d at 247.
[11] *Id.* at 248, *citing In re* Democratic Nat'l Comm., 25 F.C.C.2d 216 (1970).
[12] 25 F.C.C.2d 216 (1970).
[13] *Id.* at 216.
[14] *Id.* at 228-29.
[15] *Id.* at 224-25.
[16] *Id.* at 228.

doctrine" to afford free time to the proponents of the contrasting viewpoint,[17] and would permit the agenda of national debate to be determined by the affluent.[18]

Several puzzling aspects of these two decisions are immediately apparent. First, they seemingly reverse traditional first-amendment priorities. The first amendment has generally been understood to prefer "political" speech over "commercial" speech.[19] Yet the Commission's decisions leave broadcast stations free to accept commercial advertising and to reject political or controversial advertisements. Ironically, the only exception to this ruling involves political spot announcements designed to raise *money*—a close parallel to commercial advertising.

A second puzzling aspect of the Commission's decisions is their internal inconsistency. Stations may, on the one hand, refuse to accept political or "controversial" spot announcements; any other result, we are told, would seriously undermine the present system of American broadcasting.[20] Yet stations still must accept spot announcements soliciting funds for political causes—many of which are highly "controversial." This rationale becomes even more perplexing in light of the stations' acceptance of many "controversial" commercials in their normal course of business. Obvious examples of such "controversial" commercials are the political advertisements accepted by broadcasters during election campaigns.[21] Until recently, cigarette commercials were also thought to involve controversial issues of public importance.[22]

A third noteworthy aspect of the Commission's decisions lies in the majority's barely concealed fear that a contrary result might weaken the control licensees presently exercise over public discussion of contro-

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[17] *Id.* at 226.

[18] *Id.* at 225.

[19] *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52, 54 (1942); Pollak v. Public Util. Comm'n, 191 F.2d 450, 456-57 (D.C. Cir. 1951), *rev'd on other grounds*, 343 U.S. 451 (1952). *See generally* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 208-09; Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965).

[20] Democratic Nat'l Comm., 25 F.C.C.2d 228 (1970); Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242, 248 (1970).

[21] Indeed, even the art of political campaign commercials has itself become "controversial." *See, e.g.*, Bailey, *Political TV Ads An Anomaly*, Washington Post, Nov. 29, 1970, § B, at 2, col. 1.

[22] *See* Application of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921 (1967), *aff'd*, Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) (cigarette commercials held to involve controversial issues of public importance and therefore opposing viewpoints must be presented under the fairness doctrine).

versial issues. Under our current system of broadcasting, which the Commission has so zealously sought to protect, a broadcast licensee functions as a "trustee" for the public—a "mouthpiece," so to speak, for the expression of all views. Pursuant to the terms of this trust the licensee decides which issues are important, isolates the opposing viewpoints on those issues, and presents all views, either in his own words or through the quoted words of other individuals. BEM and DNC sought to circumvent this paternalistic system. Both organizations requested that they be permitted to buy time to present their own views, in their own way, through a format of their own choosing. Notwithstanding the Supreme Court's prior recognition in *Red Lion Broadcasting Co. v. FCC*[23] of a preference in this country for speech by individuals who are directly involved with current issues,[24] the Commission opted to perpetuate a system in which large broadcast corporations mediate between the authors of speech and their audience.

Many of the inconsistencies and errors in *Democratic National Committee* and *Business Executives* stem from the Commission's refusal to acknowledge the importance and applicability of first-amendment principles in the medium of broadcasting. The Commission's decisions in these two cases ignore a long line of judicial precedent guaranteeing individuals a "right of access" to forums generally open to the public for the expression of controversial political views. This precedent, discussed below,[25] stands for the proposition that a private or public entity which makes property under its possession or control accessible to the general public cannot entirely prevent the expression of controversial views in that forum or discriminate among the views that are expressed.

The *Business Executives* and *Democratic National Committee* opinions provide a convenient focus for an examination of this important area. In essence, these decisions raise the following four issues. First, are controversial spot announcements and longer program segments in the broadcast forum appropriate forms of "speech," deserving of first amendment protection? Second, does the rejection of programming by a privately owned radio or television station, licensed and supervised by the FCC, a public agency, and using the "public" airways in a fiduciary capacity for the public's benefit, constitute sufficient "state action" to bring the first amendment's proscriptions into operation? Third, are

[23] 395 U.S. 367 (1969).

[24] *Id.* at 392 n.18, *quoting* J. MILL, ON LIBERTY 32 (R. McCallum ed. 1947).

[25] See text at notes 160-211 *infra*.

spot announcements and longer program segments "appropriate" forms of speech, given the nature of the broadcast forum and its competing uses? And fourth, is a limited right of "paid access" for controversial views consistent with the scheme of broadcasting envisioned by Congress when it enacted the Communications Act of 1934?[26] This Article will offer an affirmative response to each of these four questions.

A Few First Amendment Fundamentals

We start with a few fundamentals. The first involves a basic concept of our Constitution, embodied in the first amendment, that our democratic form of government will endure only as long as its citizens and their elected representatives have the leisure to think, the right to speak, and the freedom to criticize their Government. As Justices Holmes and Brandeis understood the first amendment's guarantee of freedom of expression, "the best test of truth is the power of the thought to get itself accepted in the competition of the market,"[27] and in a government of free men, "the deliberative forces should prevail over the arbitrary."[28] For this reason freedom of speech has been accorded a "preferred" position above all other constitutional rights;[29] only so long as speech remains free will other constitutionally protected liberties endure. Should freedom to speak out vanish, these other liberties would also perish, because the informed electorate necessary for the preservation of the other liberties would no longer exist.

The second fundamental is equally important. Freedom of speech is not an abstraction. It can flourish only through an appropriate *medium* in an appropriate *forum*—whether it be a public park, a school room, a town hall meeting, a soap box, a leaflet, a newspaper, a magazine, or a radio or television frequency. For this reason the first amendment protects not only the right to speak, but also the means used by a speaker to reach his audience—the media for conveying the thought or expres-

[26] Ch. 652, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151-609 (1964)).

[27] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (conviction upheld under the Espionage Act for uttering language found to provoke and encourage resistance to the government in time of war).

[28] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (conviction under California Criminal Syndicalism Act for membership in Communist Labor Party held not to constitute a restraint on freedom of speech, assembly or association).

[29] *See* Marsh v. Alabama, 326 U.S. 501, 509 (1946); Thomas v. Collins, 323 U.S. 516, 530 (1945).

sion. As the Supreme Court of California stated in *Wollam v. City of Palm Springs*,[30]

> The right of free speech necessarily embodies the *means* used for its dissemination because the right is worthless in the absence of a meaningful method of its expression. To take the position that the right of free speech consists merely of the right to be free from censorship of the content rather than any protection of the means used, would, if carried to its logical conclusion, eliminate the right entirely. The right to speak freely must encompass inherently the right to communicate. The right to speak one's views aloud, restricted by the ban that prevented anyone from listening, would frame a hollow right. Rather, *freedom of speech* entails communication; it contemplates effective communication.[31]

The Supreme Court of the United States has often recognized this principle. For example, in *Hague v. CIO*,[32] Mr. Justice Roberts made the statement, later taken as precedent by the Court in *Kunz v. New York*,[33] that

> [w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[34]

This right of access to "public forums" has been recognized in numerous other areas, including privately owned streets and sidewalks,[35] modern shopping centers,[36] public schools,[37] public bus[38] and railroad[39]

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[30] 59 Cal. 2d 276, 379 P.2d 481, 29 Cal. Rptr. 1 (1963) (ordinance prohibiting operation of sound amplifying equipment mounted on trucks unless the truck maintained a speed of at least 10 m.p.h. contravenes the first amendment).

[31] *Id.* at 284; 379 P.2d at 486, 29 Cal. Rptr. at 6 (emphasis added); *see* Kovacs v. Cooper, 336 U.S. 77, 87 (1949).

[32] 307 U.S. 496 (1939).

[33] 340 U.S. 290, 293 (1951).

[34] 307 U.S. at 515 (Roberts, J., separate opinion).

[35] Marsh v. Alabama, 326 U.S. 501 (1946).

[36] Local 590, Amalgamated Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

[37] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

[38] Wolin v. Port Authority, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

[39] *In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

terminals, the grounds of a state capitol building,[40] and the confines of a public library.[41]

While the Court has not to date recognized a right of access to electronic forums, it has acknowledged the importance of the mass communications media as forums for speech. This applies both to the media of print[42] and broadcasting.[43] Indeed, sixty percent of all Americans report that television has become their most important source of news and information.[44] For this reason, perhaps, the Supreme Court has declared that "broadcasting is clearly a medium affected by a First Amendment interest. . . ." [45] The question we must consider is whether the first amendment equates the public forums of broadcasting with the "streets and parks" of *Hague v. CIO*, and whether rights of access to those media should be included among the basic "privileges, immunities, rights and liberties of citizens." [46] We must determine whether privately owned broadcast licensees have any more right to exclude citizens from their facilities than a privately owned "company town" [47] has a right to exclude citizens from its streets.

The third fundamental also deserves close attention. In any "limited access" medium, like broadcasting, in which not all can speak at once, or even speak at all, some rules of procedure are necessary for the preservation of good order. If speakers are to be heard, they must speak in order, await their turn, confine their remarks to a limited period of time, and stick to the topic for discussion. This need for procedural rules is no better illustrated than by one commentator's description of the classical town meeting:

> In the town meeting the people of a community assemble to discuss and to act upon matters of public interest—roads, schools, poor houses,

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[40] Edwards v. South Carolina, 372 U.S. 229 (1963).

[41] Brown v. Louisiana, 383 U.S. 131 (1966).

[42] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964); Associated Press v. United States, 326 U.S. 1, 20 (1945); *accord*, Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097, 1101 (W.D. Wis. 1969); Zucker v. Panitz, 299 F. Supp. 102, 105 (S.D.N.Y. 1969).

[43] *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-90 (1969); United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

[44] Broadcasting Magazine, Nov. 2, 1970, at 48.

[45] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969); *see* United States v. Paramount Pictures, 334 U.S. 131, 166 (1948); *cf.* Superior Films v. Department of Educ., 346 U.S. 587, 589 (1954) (Douglas, J., concurring).

[46] Hague v. CIO, 307 U.S. 496, 515 (1939) (Roberts, J., separate opinion).

[47] Marsh v. Alabama, 326 U.S. 501 (1946).

> health, external defense, and the like. . . . The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen. He "calls the meeting to order." And the hush which follows that call is a clear indication that restrictions upon speech have been set up. . . . [N]o one shall speak unless "recognized by the chair." Also, debators must confine their remarks to "the question before the house." . . . The town meeting, as it seeks for freedom of discussion, would be wholly ineffectual unless speech were thus abridged.[48]

Procedural rules, in other words, may "suppress" the right of an individual to speak in order to maximize the opportunity of all citizens to speak. Although first-amendment attention has traditionally been focused on censorship of speech content, the application of procedural rules restricting access to the forums of public discussion has become increasingly a matter of concern. If a moderator, Speaker of the House, or radio-television licensee were to allow one speaker less time than another, or no time at all, then censorship as invidious as outright thought control would clearly exist. Can it be doubted that the first amendment *compels* the implementation of procedural rules governing access to limited-use forums so as to enable as many to speak and to be heard as is practicable?[49]

Unfortunately, the clear analogies to broadcasting that one can draw from the example of the town hall meeting have been ignored. Instead, we have permitted a system of broadcasting to develop in this country in which private broadcast licensees serve, not only as "moderators" for the electronic forums of communication, but also as all the "speakers" as well. It is as if the Speaker of the House called the meeting to order, chose the topic for discussion, alloted time to all sides, and then did all the talking himself. The groundskeeper in a public park is entitled to keep the crowds off the flowers; he is not entitled to keep everyone off all the soap boxes as well. Yet this is precisely what we have permitted in the "public parks" of broadcasting.

No one would deny the need for a "trustee" system in broadcasting; someone must maintain the costly temples of communication that house

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[48] A. MEIKLEJOHN, POLITICAL FREEDOM 24-25 (1960).

[49] The first "[a]mendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ." Associated Press v. United States, 326 U.S. 1, 20 (1945).

the elaborate radio and television equipment, the technical prerequisite to any speech at all. The existence of this "trustee" system should not be at issue here. The question is whether a broadcast licensee is required by the first amendment and his "fiduciary" position to sell reasonable portions of broadcast time at the prevailing commercial rates to responsible members of the public.

In a paradoxical way the broadcast industry itself has resolved this question. As the system now operates, immediate "access" is granted to one privileged class of applicants, the commercial peddlers of goods and services. Any person wishing to sell toothpaste or feminine deodorant spray, for example, has direct, personal, and instant access to the broadcast media. He can present his message in any form he wishes and at a time of his own choosing. No "trustee" argues the merits of his cause. He does it himself. Yet the Federal Communications Commission has denied this same right of access to persons who attempted to present programming and spot announcements dealing with issues of public importance, and who offered to pay the same rate as commercial advertisers pay.

This practice of the broadcast industry illustrates a fourth tenet of the first amendment. The Supreme Court has drawn a distinction between two types of speech. The first, political or social speech, is entitled to the fullest protection.[50] Indeed, the "central meaning of the first amendment" is that the citizen has a right to criticize those who govern.[51]

"Commercial" speech, however, has been viewed differently. In the quarter century since *Valentine v. Chrestensen*[52] "the notion that commercial advertising is not protected by the first amendment has been enshrined among the commonplaces of constitutional law." [53] In *Valentine* the Court upheld a municipal ban on the distribution of commercial pamphlets on city streets. The Court observed simply that "the

[50] *See, e.g.*, Kingsley Pictures Corp. v. Regents of the Univ. of the State of New York, 360 U.S. 684, 689 (1959) (first amendment protects expression of unconventional views on social issues); Stromberg v. California, 283 U.S. 359, 369 (1931) (maintenance of the opportunity for free political discussion is a basic tenet of the constitutional system).

[51] Kalven, *supra* note 19, at 208-09.

[52] 316 U.S. 52 (1942).

[53] *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027 (1967); *see, e.g.*, Ginzberg v. United States, 383 U.S. 463, 474 n.17 (1966); Pollak v. Public Util. Comm'n, 191 F.2d 450, 456-57 (D.C. Cir. 1951) (dictum), *rev'd on other grounds*, 343 U.S. 451 (1952). *See also* Note, *supra* note 19.

Constitution imposes no analogous restraint on government as respects purely commercial advertising." [54]

Although the distinction between political and commercial speech is often an elusive one, it can perhaps be viewed as dividing speech into categories defined by the speaker's intent—speech intended to influence political and social decisions in the marketplace of ideas, and speech intended to influence private economic decisions in the marketplace of goods.[55] And while this distinction has been criticized,[56] perhaps with reason, justification for its continued application may be grounded on the premise that the dissemination of "false" political ideas will evoke discussion or controversy, which in turn will refute or highlight the falsity of the original statement. "False" commercial assertions, on the other hand, can be expected to breed only additional false claims as each competitor seeks to out-promise the other.[57]

Viewed in this light, the Federal Communications Commission has relegated political speech to a peculiarly inferior role. With the assistance of the Commission the broadcasting industry has built what is potentially the most efficient and effective "marketplace of ideas" ever conceived. But the industry finds it more profitable to use that marketplace only for the sale of products, not for the robust, wide-open debate of a free society. Our procedural rules of access to the broadcast forum are, therefore, seriously skewed. These rules offer a right of access only to hucksters of industrial garbage. Anyone wishing to discuss war, peace, mental health or the suffering of the poor must content himself with the beneficence of a corporate "trustee," appointed by the Government to speak for him.

The last first amendment fundamental concerns the importance of permitting individual groups or citizens to speak directly for themselves on issues that concern them. The Supreme Court recently emphasized this point in *Red Lion* by adopting the words of John Stuart Mill:

> Nor is it enough that he should hear the arguments of adversaries

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[54] 316 U.S. at 54.

[55] *Compare* Murdock v. Pennsylvania, 319 U.S. 105 (1943) (door-to-door solicitation of contributions for religious literature protected), *and* Jamison v. Texas, 318 U.S. 413 (1943) (advertisement on back of religious handbill a protected form of speech), *with* Beard v. Alexandria, 341 U.S. 622 (1951) (conviction for door-to-door solicitation of commercial magazine subscriptions upheld).

[56] *See* Cammarano v. United States, 358 U.S. 498, 513-15 (1959) (Douglas, J., concurring).

[57] *Developments in the Law*, *supra* note 53, at 1030.

> from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them.[58]

Even the Federal Communications Commission has acknowledged the importance of this principle. For example, the majority in *Democratic National Committee* stated that a broadcast licensee as public trustee must present representative views and voices on controversial issues, "some of [which] must be partisan." [59] However, the majority did not go so far as to find a right in any individual member of the public to present his own views, but concluded that a licensee could discharge his obligation by "devot[ing] a reasonable amount of time to public issues and to do so fairly." [60]

Notwithstanding the fact that the Commission in *Democratic National Committee* refused to accept the implications of its statement, the speech attempted in both *Business Executives* and *Democratic National Committee* reflected an effort by individual groups to speak directly for themselves through the media of radio and television. The fact that BEM and the DNC were willing to pay for the air time they sought should not invalidate the constitutional protection otherwise afforded their speech. The Supreme Court in *New York Times Co. v. Sullivan*[61] expressly emphasized the importance of paid editorials as a unique and valuable form of individual expression. Commenting on a paid editorial in the New York Times, the Court remarked:

> The publication here was not a "commercial" advertisement in the sense in which the word was used in [Valentine v. Chrestensen, 316 U. S. 52 (1942)]. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern . . . . That . . . the advertisement [was paid for] is as immaterial . . . as is the fact that news-

[58] J. Mill, On Liberty 32 (1947), *quoted in* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 n.18 (1969). *See also* National Advisory Comm'n on Civil Disorders, Report to the President 383 (Bantam ed. 1968) (failure of the mass media to portray the plight of black Americans found in part to stem from refusals to allow them to speak for themselves).

[59] 25 F.C.C.2d at 222.

[60] *Id.*

[61] 376 U.S. 254 (1964).

> papers and books are sold. . . . Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. . . . The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." [62]

The implication that may be drawn by analogy from the Court's observation in *New York Times* is that the spot announcements and programming access requested by BEM and the DNC involve protected forms of political speech in the highly important forum of broadcasting. Yet the Federal Communications Commission, by rejecting the efforts of BEM and the DNC to reach an audience with their own views, chose instead to elevate "commercial" speech above "political" speech. The Commission left intact a system of broadcasting that gives all discretion over the presentation of controversial issues to federally licensed corporate "trustees." Before a case can be made, however, for the proposition that the first amendment requires a reversal of the Commission's precedents, it must first be shown that the Constitution protects individuals and groups against censorship by "privately" owned broadcast licensees.

State Action

The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." Although the language of the amendment restrains only the national Government, the Supreme Court has extended its protection to action by the states as well.[63] A literal reading of the amendment would suggest that it does not prohibit cen-

[62] *Id.* at 266. The Court concluded that the advertisement, "as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection." *Id.* at 271; *accord,* Banzhaf v. FCC, 405 F.2d 1082, 1101-02 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969); Zucker v. Panitz, 299 F. Supp. 102, 104 (S.D.N.Y. 1969); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 54-55, 434, P.2d 982, 984-85, 64 Cal. Rptr. 430, 432-33 (1967). "[W]hen an advertisement is the medium for noncommercial expression, constitutional freedoms apply in spite of its commercial nature." Note, *Resolving the Free Speech-Free Press Dichotomy: Access to the Press Through Advertising,* 22 U. Fla. L. Rev. 293, 309 & n.131 (1969).

[63] Gitlow v. New York, 268 U.S. 652, 666 (1925).

sorship by *private* entities. And at least one court has ruled that the amendment does not prevent privately owned newspapers from rejecting requests to purchase advertising space.[64] Rejections of offers to purchase broadcasting time by broadcast licensees would, therefore, violate the first amendment only if the rejections constituted "state action" which deprives individuals of protected speech freedoms.

On first glance one might conclude that the refusal of a broadcast licensee to accept political spot announcements or programming is "private action" not subject to constitutional restraint. After all, most broadcast stations are privately owned businesses, controlled by an individual, a family, or a closely held corporation.[65] But, notwithstanding the cloak of private control, the actions of many nongovernmental persons and corporations have been found to satisfy the fourteenth amendment's state action requirement. In each of these cases the action of the private party was so "involved" with the state that the restraints of the Constitution were found to apply. To paraphrase the court in *Farmer v. Moses*,[66] the inquiry should be whether a broadcast licensee's action in rejecting offers to purchase spot announcement or programming time "are so impregnated with and supported by state . . . action as to place them within the ambit of the [First] Amendment, . . . even though [a licensee] . . . possess[es] certain indicia and aspects of 'private' ownership and dominion." [67]

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[64] Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co., 307 F. Supp. 422 (N.D. Ill. 1969), *aff'd*, No. 18,300 (7th Cir., Dec. 17, 1970). The lower court in *Chicago Joint Board* rejected the plaintiff's argument that the first amendment prohibits the action taken by the Chicago Tribune, stating that "while the [first and] Fourteenth Amendment[s] [afford] protection from state action as well as that from the national government, [they do] not protect against wrongs done by private persons." 307 F. Supp. at 425.

In affirming, the Seventh Circuit rejected as "unconvincing" a similar argument put forth by plaintiff-appellant, stating that "[t]he Union's right to free speech does not give it the right to make use of the defendants' printing presses and distribution systems without defendants' consent." No. 18,300 at 13.

[65] There seems little doubt, however, that the first amendment would clearly apply to broadcast stations controlled by public entities, such as state and local governments, public schools and universities, or publicly funded private education institutions. *Cf.* Trujillo v. Love, Civil No. C-2785 (D. Colo., Feb. 11, 1971) (school newspaper); Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097 (W.D. Wis. 1969) (school newspaper); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969) (school newspaper).

[66] 232 F. Supp. 154, 158 (S.D.N.Y. 1964) (grounds of World's Fair held to be equivalent in status to public property, and thus within the ambit of the fourteenth amendment, because the Fair Corporation's operations were found to be "impregnanted with and supported by city and state action").

[67] *Id.* at 158.

Although the Supreme Court itself views the creation of a precise state action formula as an "impossible task," [68] the facts and the theories of past state action decisions offer guidance in the present undertaking.

Public Property

The broadcast frequencies are a valuable and scarce resource belonging to the public. Although broadcast licensees are given the temporary use of this property for terminable three-year periods, ownership and ultimate control remain vested in the people of the United States. The proposition that the broadcast frequencies were intended to remain "public property" in spite of their temporary use by broadcast licensees is further supported by congressional enactment of the Communications Act of 1934. In section 301 of that Act Congress expressed a clear intention that the broadcast spectrum should remain public property:

> It is the purpose of this [Act] . . . to maintain the control of the United States over all channels of interstate and foreign radio transmission; and to provide for the use of such channels, *but not the ownership thereof*, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.[69]

If the broadcast frequencies may be viewed as constituting "public property," then any licensee action taken with respect to such property should suffice to satisfy the "state action" requirement. The Supreme Court reached an analogous result in *Tucker v. Texas*.[70] There the Court held that control exercised by municipal officials over the property of a government-owned town constituted "state action."

Private Lessee of Public Property

It seems equally clear that a public entity cannot evade constitutional proscriptions by leasing its property to private individuals. Discrimination by private lessees with respect to public property has, for the purposes of the first amendment, unequivocally been deemed state action

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[68] Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), *citing* Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947).

[69] 47 U.S.C. § 301 (1964) (emphasis added).

[70] 326 U.S. 517 (1946).

by the courts.[71] For example, the court in *Anderson v. Moses*[72] held that the refusal to serve a group of patrons of a private corporation operating a public restaurant under license from the New York City Commissioner of Parks, solely because of the unpopularity of their views, constituted action by "an instrumentality of the State and [as such] come[s] within the ambit of the protections afforded by the Fourteenth Amendment . . . ." [73]

Many of the decisions holding private lessees of public property subject to first amendment prohibitions have relied upon the analogous decision of the Court in *Burton v. Wilmington Parking Authority*.[74] In *Burton* the Court found the proscriptions of the fourteenth amendment applicable to a privately owned restaurant occupying space in a publicly owned building leased from the state. The management refused to serve Negro patrons. In finding the requisite state action the Court remarked:

> The land and building were publicly owned. As an entity, the building was dedicated to "public uses" . . . .
>
> . . . [T]he obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn . . . . Specifically . . ., what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.[75]

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[71] *See, e.g.*, Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967) (city "leased" public advertising space on city buses to "private" advertising agency); Farmer v. Moses, 232 F. Supp. 154, 159 (S.D.N.Y. 1964) ("when a city or state leases public property [such that] . . . services . . . are actually performed by a 'private' lessee, the latter stands in the shoes of the government"); Anderson v. Moses, 185 F. Supp. 727, 733 (S.D.N.Y. 1960) ("private . . . concessionaire [operated] on public . . . property for the convenience and comfort of the public"); Hillside Community Church, Inc. v. City of Tacoma, 76 Wash. 2d 63, 455 P.2d 350 (1969) (action by private advertising agency, pursuant to "contract" with city, in removing advertisements from municipal buses constituted state action); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967) (publicly owned advertising space on municipal buses "leased" to private advertising company).

[72] 185 F. Supp. 727 (S.D.N.Y. 1960).

[73] *Id.* at 733.

[74] 365 U.S. 715 (1961).

[75] *Id.* at 723-24, 726.

As previously indicated, many other courts have reached identical conclusions under similar circumstances,[76] although in the public transportation cases the result was more easily achieved because of the power retained by the transit authority to disapprove advertisements found to be either objectionable or too controversial.[77]

An extension of the *Burton* rationale may be found in the Court's opinion in *Marsh v. Alabama*.[78] In *Marsh* the Court held that a privately owned "company town" serving a "public function" could not enlist the aid of the state to exclude from its sidewalks persons distributing religious literature. If, as in *Marsh*, the conduct of a private owner of private property serving a public function is subject to first amendment restraint, then surely conduct by a private *user* of *public* property is similarly governed.[79]

In applying these constitutional principles to broadcast licensees, it should be apparent that "[a] broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." [80] To paraphrase the Court in *Burton*, surely we cannot assume that the Federal Government in leasing public property to private individuals intended the private lessees to operate the leased property free of obligations imposed by the Constitution, obligations that would be binding on the Government itself if it undertook to perform the identical task performed by the private lessee.

"Delegation" of State Power

Whenever a state "delegates" important aspects of its sovereignty to the use and control of a private entity, that entity, in exercising the

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[76] See cases cited note 71 *supra*.

[77] *See* Kissinger v. New York City Transit Authority, 274 F. Supp. 438, 441 (S.D.N.Y. 1967); Hillside Community Church, Inc. v. City of Tacoma, 76 Wash. 2d 63, 64-65, 455 P.2d 350, 351 (1969); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 53-54, 434 P.2d 982, 984, 64 Cal. Rptr. 430, 432 (1967).

[78] 326 U.S. 501 (1946).

[79] *Cf.* Tanner v. Lloyd Corp., 308 F. Supp. 128, 130 (D. Ore. 1970) (privately owned shopping center found to be "the functional equivalent of a public business district"); Schwartz-Torrance Inv. Corp. v. Local 31, Bakery & Confectionery Workers', 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied*, 380 U.S. 906 (1965) (privately owned shopping center found to possess a "public character").

[80] Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966) (Burger, J.) (responsible representatives of listening public held to have standing to contest license renewal), *noted in* 52 VA. L. REV. 1360 (1966).

power delegated to it, is governed by the restraints of the Constitution. This theory of state action was recently reiterated by the Court in *Evans v. Newton.*[81] Commenting on the constitutional prohibition of "state-sponsored racial inequity," the Court stated that

> where a State delegates an aspect of the elective process to private groups, they become subject to the same restraints as the State. . . . That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.[82]

This same principle should apply in the sphere of radio and television broadcasting, because a broadcast licensee, like any other lessee, is empowered to exercise control over his broadcast frequency only by virtue of the terminable grant of power flowing from the Federal Government in the form of a three-year license. For this reason, whenever a broadcast licensee excludes individuals wishing to express their views through a publicly owned medium, it is, in effect, exercising a governmental power, because its ability to act in this manner stems solely from a power delegated by the Government.[83] Viewed in this light, any private action taken by a broadcast-licensee-trustee with respect to his trust "*res*" is imbued with the attributes of state action.

Involvement of a Regulatory Agency

Action by a purely private individual or entity may produce the requisite state action necessary to render the fourteenth amendment's proscriptions applicable if the entity or individual is subject to regulation by a regulatory body. In *Public Utilities Commission v. Pollak*[84] the Court addressed itself to the question whether action by a bus company, a "privately owned public utility corporation" regulated by a public utilities commission, was to be treated for purposes of the Con-

[81] 382 U.S. 296 (1966) (although state "delegated" its authority over public park to private trustees, discriminatory conduct of trustees was found to constitute state action).

[82] *Id.* at 299.

[83] *Cf.* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (discrimination by private restaurant lessee occupying publicly owned building held to be state action); Smith v. Allwright, 321 U.S. 649, 660 (1944) ("state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State").

[84] 343 U.S. 451 (1952).

stitution as action by a governmental entity. In finding a nexus between the Federal Government and the bus company sufficient to render the latter's conduct state action, the Court specifically relied upon the fact that the bus company "operate[d] its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress." [85] The Court held that this relationship was sufficient to render action by the bus company action by the state. As authority for its holding the Court cited the following proposition from *American Communications Association v. Douds:*[86] "[W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." [87]

There can be little doubt that both the Congress and the Federal Communications Commission are substantially involved in many aspects of broadcasting. In accordance with the rationale of both the *Pollak* and *Douds* cases this involvement should comprehend the requisite relationship found to be controlling in *Pollak* and should render action by the licensee equivalent to action by the Federal Government. Indeed the Federal Communications Commission has acknowledged that discrimination by licensees may constitute improper state action. Although prefacing its comment with the remark that it "need not decide this point," the Commission stated that

> a substantial case has been made that because of the relationship of the Government of the United States to broadcast stations, the Commission has a constitutional duty to assure equal employment opportunity . . . . The contention [rests upon] such decisions as *Burton v. Wilmington Parking Authority* . . . .[88]

State Encouragement or Lack of Neutrality

Private conduct abridging individual rights has been held to constitute "state action" within the meaning of the fourteenth amendment where the state has either actively encouraged the individual discrim-

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[85] *Id.* at 462 (footnote omitted).

[86] 339 U.S. 382 (1950) (federal statutory requirement that labor organizations submit non-Communist affidavits, held constitutional).

[87] 343 U.S. at 462 n.8, *quoting* 339 U.S. at 401.

[88] Nondiscrimination Employment Practices of Broadcast Licensees, 18 F.C.C.2d 240, 241 & n.2 (1969).

ination[89] or adopted a nonneutral stance with respect to discriminatory conduct.[90] An example of this type of state action is presented by the facts underlying the Court's decision in *Evans v. Newton*.[91] In that case a state court had permitted a municipality to transfer its control over a public park to private trustees who denied Negroes access to the facility. The transfer was made because the municipality itself could not constitutionally deny Negroes access to the park, a condition attached by the testator who had given the park to the municipality. The majority opinion in *Evans* barred discrimination by the private trustee on the ground that the park continued to be "municipal in nature," regardless of the fact that it had been transferred to "the private sector." [92]

Mr. Justice White, concurring in *Evans*, took the position that the racial condition in the trust should have been denied effect because of the state law that permitted private settlors to establish charitable trusts dedicating their property to the public for use as a park, while limiting the property's use "to the white race only." [93] Although state law did not *compel* a settlor to insert a racial restriction in his bequest, the law suggested that such action would be *valid*. Accordingly, Mr. Justice White found that the statute significantly "depart[ed] from a policy of strict neutrality in matters of private discrimination by enlisting the State's assistance only in aid of racial discrimination and . . . involve[d] the State in the private choice . . . ." [94] Finding that the statute encouraged discrimination, Mr. Justice White concluded that the state had so involved itself with the private-settlor's discriminatory conduct that his private action was, in effect, action by the state.[95]

The conduct of the state in *Evans* parallels FCC regulation of broadcast licensees. Section 3(h) of the Communications Act provides that licensees shall not be deemed to be "common carriers." [96] Although the Commission has for many years interpreted this provision in a manner consistent with a limited right of access for spot announcements on

[89] Sweet Briar Institute v. Button, 280 F. Supp. 312 (W.D. Va.), *rev'd & remanded per curiam*, 387 U.S. 423 (1967).

[90] Peterson v. City of Greenville, 373 U.S. 244 (1963).

[91] 382 U.S. 296 (1966).

[92] *Id.* at 301.

[93] *Id.* at 305 n.1, *quoting* Act of Aug. 23, 1905, No. 329, §§ 1, 2, [1905] Ga. Laws 117.

[94] *Id.* at 306.

[95] *Id.* at 306-07; *accord*, Reitman v. Mulkey, 387 U.S. 369 (1967).

[96] 47 U.S.C. § 153(h) (1964).

controversial subjects,[97] it has recently reversed itself, declaring that licensees have discretion to close their doors to persons seeking to use the station's facilities.[98] This interpretation of the Act, which represents a clear reversal of prior Commission policy, can be analogized to the action of the California electorate in enacting Proposition 14, a constitutional amendment which provided that "[n]either the State nor any subdivision . . . thereof shall deny . . . the right of any person . . . to decline to sell, lease, or rent . . . property . . . as he, in his absolute discretion, chooses." [99] In affirming the judgment of the California Supreme Court that Proposition 14 violated the equal protection clause of the fourteenth amendment, the Court in *Reitman v. Mulkey*[100] observed that Proposition 14 made "[t]he right to discriminate . . . one of the basic policies of the State" by encouraging private individuals to practice racial discrimination in the housing market.[101] The Commission's reversal of its prior policy may be viewed as providing a similar "encouragement" of broadcast licensees to discriminate in their selection of advertisements and programming, permitting them to accept commercial advertisements and reject political ones.[102] This "encouragement" effect should suffice to bring the conduct of broadcast licensees within the ambit of the first amendment.

State Action Through Quasi-Judicial FCC Action

Where private parties have enlisted the aid of state tribunals to enforce *private* discriminatory practices, judicial action has been held to transform the purely private act of discrimination into discrimination by the state. This theory was first announced by the Court in *Shelley v. Kraemer*,[103] where the majority stated that "action of state courts and judicial officers in their official capacities is to be regarded as action of

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97 *See, e.g.*, Homer P. Rainey, 11 F.C.C. 898 (1947); Robert Harold Scott, 11 F.C.C. 372 (1946); United Broadcasting Co. (WHKC), 10 F.C.C. 515 (1945).

98 *See, e.g.*, Letter to Washington Women's Strike for Peace, Nov. 22, 1965 (unpublished), *cited in* Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242, 246 n.6 (1970).

99 CAL. CONST. art. I, § 26 (1964).

100 387 U.S. 369 (1967).

101 *Id.* at 381.

102 *Cf.* Adickes v. S.H. Kress & Co., 398 U.S. 144, 190-203 (1970) (Brennan, J., concurring in part & dissenting); Lombard v. Louisiana, 373 U.S. 267 (1963) (statements by Mayor and Superintendent of Police encouraging private discrimination found to constitute state action).

103 334 U.S. 1 (1948).

the State." [104] Attempting to delimit the scope of its holding, the Court went so far as to suggest that state action might not be found in those instances where a state tribunal merely "abstained from action, leaving private individuals free to impose such discriminations as they see fit." [105] Subsequent decisions, however, have blurred this distinction. For example, in *New York Times Co. v. Sullivan*[106] the Court stated that the species of state action in a given case may be irrelevant to the result: "The test is not the form in which state power has been applied but, *whatever the form*, whether such power has in fact been exercised." [107]

In a more recent case, *Edwards v. Habib*,[108] Judge Skelly Wright, speaking for the United States Court of Appeals for the District of Columbia, discussed in detail the current status of the *Shelley v. Kraemer* theory of state action. After reviewing recent precedent and other prevailing views, Judge Wright concluded:

> It has been suggested that there is state action, not only when an individual asserts a claim of right against a state, but also when he asserts a claim of right against the claims of right of other persons and the state resolves the conflict according to its policy of what is reasonable under the circumstances, *i.e.*, according to its law. Once this "state action" is established, the question then becomes simply "whether the particular state action in the particular circumstances, determining legal relations between private persons, is constitutional when tested against the various federal constitutional restrictions on state action."
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> . . . On this theory, if it would be unreasonable to prefer [a particular private person's] . . . interest[s], it would also be unconstitutional.[109]

Marsh v. Alabama[110] provides additional support for this view of state action. There, private owners sought to enlist the aid of the state's criminal process to exclude from their property individuals who sought to exercise first amendment rights. The Court balanced the competing

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[104] *Id.* at 14.

[105] *Id.* at 19.

[106] 376 U.S. 254 (1964).

[107] *Id.* at 265 (emphasis added).

[108] 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

[109] *Id.* at 695 (footnotes omitted), *quoting in part from* Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 209 (1957). For a list of other commentators discussing this view, see authorities cited at 397 F.2d at 695 n.23.

[110] 326 U.S. 501 (1946).

interests. Not "[un]mindful of the fact that [first amendment freedoms] occupy a preferred position," Mr. Justice Black found that the scales of justice did not tip in favor of restricting such fundamental liberties and condemned the state court's "enforcement of such restraint by the application of a state [criminal trespass] statute." [111]

More recently, in *Local 590, Amalgamated Food Employees v. Logan Valley Plaza, Inc.*[112] and *New York Times Co. v. Sullivan*[113] state courts were called upon to resolve essentially private disputes involving protected speech freedoms. In each case the state action requirement was satisfied in a technical sense, by a threatened application of state law: a criminal trespass statute in *Amalgamated Food Employees* and a libel law in *New York Times*. But the Court resolved the controversies by balancing the first amendment rights of the defendants against the plaintiffs' countervailing interests in property and reputation. If in *Amalgamated Food Employees*, therefore, the shopping center had employed private guards, not public police, to deny the defendants access to their sidewalks, it is probable that the Court would have struck the same balance, even in the absence of a prima facie trespass violation.[114]

Admittedly, there are factual distinctions between *Business Executives* and *Democratic National Committee* on the one hand, and *Marsh* and *Amalgamated Food Employees* on the other. For example, in both *Democratic National Committee* and *Business Executives* the petitioners did not attempt to enter the licensees' broadcasting facilities and transmit their message by "self-help" tactics. Nor were they ejected from broadcast facilities or subsequently prosecuted under state trespass laws. Instead, BEM and DNC came directly to the Federal Communications Commission seeking a legal declaration of their right of access to the broadcast media. By its own action, action just as effective as that taken against the union in the *Amalgamated Food Employees* case, the Commission, after conducting a hearing,[115] effectively ejected BEM and the DNC from *all* broadcast facilities and banished them to silence. By declaring the rights and liabilities of parties in these proceedings, the

[111] *Id.* at 509 (footnote omitted).

[112] 391 U.S. 308 (1968).

[113] 376 U.S. 254 (1964).

[114] *Cf.* Tanner v. Lloyd Corp., 308 F. Supp. 128 (D. Ore. 1970). The plaintiffs in *Tanner* instituted an action under 42 U.S.C. § 1983 (1964) and 28 U.S.C. § 2201 (1964) seeking a declaratory judgment that "they have the right to distibute handbills in the Mall of [defendant's] shopping center." The court, therefore, was not called upon to enforce state trespass laws against defendants seeking to speak on private property.

[115] *Cf.* Public Util. Comm'n v. Pollak, 343 U.S. 451, 462 (1952).

Commission invoked the "full panoply of [federal] power,"[116] power not unlike that found to constitute state action in *Shelley v. Kraemer*.[117] The fact that BEM and the DNC were not subject to criminal prosecution, as were the Jehovah's Witnesses in *Marsh*, is of no constitutional significance. The FCC's exercise of adjudicatory power was in itself sufficient to render the restraints of the first amendment applicable to conduct of broadcast licensees.

In a larger sense, the necessary "state action" may also be found in the FCC's action in renewing broadcast station licenses every three years. Broadcast licenses are granted for a three-year term, and they expire unless the Commission takes affirmative action to renew them. Every three years the Commission reviews the performance record of each station during the preceding three-year period. Thus, if a license is to be renewed, its renewal is based on that record and the station's promise of future performance. This action by the Commission is analogous to the actions taken by the Supreme Courts of Michigan and Missouri in *Shelley*.

In *Shelley* the United States Supreme Court was called upon to enforce a racially restrictive covenant and to eject a Negro tenant from property he recently purchased. The Court refused. It would not become a party to an action that turned a tenant into the street because of his race. Yet every three years the Federal Communications Commission is called upon to "inject" broadcast licensees back into their limited tenancies on the basis of their record. Presumably the records of many stations contain reference to instances where the licensee has rejected applicants, such as BEM and the DNC, who sought only to purchase air time. In such a case, by "injecting" licensees back into their tenancies, the FCC acts in precisely the same fashion as the Court would have acted in *Shelley*, had it enforced the restrictive covenant. The three-year renewal process, by analogy, constitutes state action under the *Shelley* rationale.

A number of commentators have argued that a state cannot tolerate private abridgement of preferred constitutional rights. Accordingly, they have suggested that whenever a state fails to enact curative legislation barring private discrimination, it implicates itself in the private discriminatory act.[118] The technical requirement of state action, so the

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[116] Shelley v. Kraemer, 334 U.S. 1, 19 (1948).

[117] 334 U.S. 1 (1948).

[118] *See, e.g.*, Black, *Foreward: "State Action," Equal Protection, and California's*

argument goes, is found, under the rationale of *Shelley v. Kraemer*, in any judicial resolution of controversies involving private discrimination not prohibited by state law. Since in theory the scope of *Shelley* is very broad, proponents of this view draw the line at the point where state prohibition of private discrimination would abridge countervailing individual rights to discriminate.[119]

This theory of state action has never been *expressly* applied to discriminatory "state action" infringing rights protected under the first amendment.[120] However, as the court of appeals in *Edwards v. Habib*[121] noted, *New York Times Co. v. Sullivan* extended the protection of the first amendment to a privately owned newspaper in a suit by a *private* individual,[122] indicating, by implication, that the theory has some vitality. The fact that neither Congress nor the State of Alabama had enacted a statute prohibiting libel was apparently thought to be irrelevant, since the Court found that the state court's adjudication of the rights of the two private parties constituted sufficient state action to render the fourteenth amendment applicable.[123]

Arguably, the Supreme Court of California adopted this position in

Proposition 14, 81 HARV. L. REV. 69, 73-74 (1967); Henkin, *Shelley v. Kraemer, Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 481-85 (1962).

[119] *See, eg.*, Black, *supra* note 118, at 100-03. Even under this standard, state courts would still be free to enforce certain kinds of private discrimination, even though a state itself could not discriminate in a similar manner. A state court could, for example, "constitutionally probate a will leaving the deceased's property to the Catholic Church, even though the state could not constitutionally make a comparable disposition of its own funds." Edwards v. Habib, 397 F.2d 687, 692 n.13 (D.C. Cir. 1968) (dictum), *cert. denied*, 393 U.S. 1016 (1969). In addition, "[t]he state, through its police or courts, could aid an individual in his quest to keep Negroes from a dinner party in his home even though it could not keep Negroes from a courthouse cafeteria or even from a privately owned hotel solely on account of their race." *Id.* at 693 (dictum) (footnote omitted). Beyond a shadow of a doubt, state action would exist in both of these situations; however, the constitutionality or unconstitutionality of that action is based upon the balance struck between the rights of liberty, property or privacy, on the one hand, and freedom from racial discrimination on the other.

[120] One reason for this, perhaps, is the difference in the language of the first and fourteenth amendments. For example, section 5 of the fourteenth amendment gives Congress the power to "enforce" the provisions of that amendment, *see* Note, *Fourteenth Amendment Enforcement and Congressional Power to Abolish the States*, 55 CALIF. L. REV. 293 (1967), whereas, the first amendment does not contain a similar provision expressly authorizing the Congress to "enforce" the proscriptions of that amendment.

[121] 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

[122] *Id.* at 693-94.

[123] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

In re Hoffman.[124] The petitioners in *Hoffman* had sought to distribute anti-war leaflets on the property of a privately owned railroad terminal. They were convicted of violating a municipal ordinance that prohibited loitering in transportation terminals. They sought a writ of habeas corpus. Citing *New York Times Co. v. Sullivan* and *Marsh v. Alabama*, the Supreme Court of California announced that "state action" within the meaning of the fourteenth amendment inhered in its own decision, regardless of the result, whenever it resolved the competing claims of private individuals:

> If the state curtails First Amendment freedoms to protect an interest that is nonexistent, whether claimed on behalf of the government or on behalf of a private individual, it violates the First and Fourteenth Amendments.[125]

The court's reference to the "curtailment" of first amendment freedoms by the state could only have contemplated the sanctions deriving from its own action in the case. In other words, the court was itself subject to first amendment restraint. Thus the critical question was whether the court could strike an appropriately weighted balance between the petitioners' freedom of speech and the rights of property and privacy protected by state criminal process. The balance was easily struck in *Hoffman*, for there the rights of property and privacy were found to be "nonexistent." When the owners of the railway terminal "opened up" their property to the general public for profit, they waived any right to "privacy" they might otherwise have had. Although the station owners could have reclaimed their right by closing the terminal to the public, they could not open it for some purposes and close it for others.

Many courts and legal scholars have emphasized the need for affirmative action by the government to ensure that the rights guaranteed by the first amendment will be preserved. For example, Mr. Justice Black, speaking for the majority in *Associated Press v. United States*,[126] stated:

> It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to

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[124] 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

[125] *Id.* at 850, 434 P.2d at 356, 64 Cal. Rptr. at 100.

[126] 326 U.S. 1 (1945) (application of the Sherman Act to AP by-laws and contracts restraining trade in news held not to abridge the first amendment).

> protect that freedom . . . . Surely a command that that government itself shall not impede the free flow of ideas does not afford non-government combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[127]

There is a need to enlarge the scope of legislative involvement in the sphere of first amendment freedoms, but there is similar need for judicial involvement as well. As Mr. Justice Fortas, in dissent, remarked in *Time, Inc. v. Hill*,[128] "[t]he courts may not and must not permit either public or private action that censors the press." [129] Affirmative judicial action to prevent censorship of speech or the press is entirely consistent with the constitutional guarantee contemplated by the authors of the first amendment: "a right of the people in a democracy to unrestricted information and presentation of views on government . . . ." [130]

State "Acquiescence"

Under all the theories of "state action" discussed in the preceding sections of this Article, the courts have struggled to find some connection between the private party, whose conduct was discriminatory, and the state. However, the courts have found state action to exist where government did not participate directly or affirmatively in private discrimination, but merely "acquiesced." In some cases the state "acquiesced" by relinquishing power to the private party, as in *Burton v. Wilmington Parking Authority*,[131] where the state leased a portion of its facilities

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127 *Id.* at 20.

128 385 U.S. 374 (1967).

129 *Id.* at 420 (Fortas, J., dissenting).

130 Firstamerica Dev. Corp. v. Daytona Beach News-Journal Corp., 196 So. 2d 97, 99 (Fla. Sup. Ct. 1966); *accord*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) ("Those [constitutional] guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society."); State v. Buchanan, 250 Ore. 244, 249, 436 P.2d 729, 731, *cert. denied*, 392 U.S. 905 (1968) ("Freedom of the press is a right which belongs to the public; it is not the private preserve of those who possess the implements of publishing.").

131 365 U.S. 715 (1961).

to a private entity. In other cases the state abdicated its power entirely, as in *Marsh v. Alabama*,[132] where the state failed to prevent discrimination by municipal entities under its licensing control. "Acquiescence" in an act of discrimination which the state would otherwise have the power to prevent transforms the private act into action by the state itself. Thus, if a state should refuse to enforce an individual's right to speak freely in a forum under its potential control, this refusal constitutes sufficient state action to render unconstitutional the discriminatory activities of the private parties who deny the individual the right to speak.

In *Marsh* Mr. Justice Black, writing for the majority, stated that the "mere acquiescence by the State in the [private party's] use of its property . . . would still have been performance of a public function. . . ." [133] There was no significance in the fact that the private act of discrimination occurred on premises held "by others than the public," where the state by its inaction was "*permitting* a corporation to govern a community of citizens so as to restrict their fundamental liberties . . . ." [134] Thus the state's abdication of authority constituted state action, rendering unconstitutional the company town's discrimination, since the town was licensed by the state and performed a "public function" similar to that of any municipality.[135]

The Court reached a similar conclusion in *Burton v. Wilmington Parking Authority*,[136] finding the requisite "state action" in the private lessee's refusal to serve Negro patrons on premises leased from the state. As in *Marsh*, the Court characterized the element of governmental inaction as the necessary link between private discriminatory conduct and the constraints of the Constitution:

> [I]n its lease with [the restaurant] the [State Parking] Authority could have affirmatively required [the restaurant] to discharge the responsibilities under the Fourteenth Amendment imposed upon the

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[132] 326 U.S. 501 (1946).

[133] *Id.* at 507.

[134] *Id.* at 509 (emphasis added).

[135] Technically, "state action" was present in *Marsh*, since the state was called upon to enforce its criminal trespass laws. But the existence of this element should not be viewed as controlling, since, under the rationale of the majority in *Marsh*, the result would not have been different if the company town had attempted to exclude the Jehovah's Witnesses from the corporation's property by seeking injunctive relief. *See* Tanner v. Lloyd Corp., 308 F. Supp. 128 (D. Ore. 1970) (action to compel entry to shopping center).

[136] 365 U.S. 715 (1961).

> private enterprise as a consequence of state participation. But no State may effectively *abdicate* its responsibilities by either *ignoring* them or by merely *failing to discharge* them whatever the motive may be .... By its *inaction,* the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.[137]

Several other decisions of the Court appear to be in accord with this view of state inaction.[138]

There are clear and direct analogies between the state inaction in *Marsh* and *Burton* and the role of the Congress and the Federal Communications Commission in the realm of broadcasting. For a limited period the Government has relinquished its rights in valuable public property to private broadcast licensees. Occasionally Congress has exercised its power over this property in order to prevent certain kinds of licensee censorship, stating, for example, in section 315(a) of the Communications Act that "licensee[s] shall have no power of censorship over the material broadcast under the provisions of this section." [139] Although the Congress has not enacted implementing legislation to bar other specific forms of licensee censorship, such an exercise of power would seem to be permissible under the Constitution.[140]

"Self-Enforcement" of the First Amendment

As indicated above, under the traditional "state action" theories the courts have sought to find some nexus between the power of government and the contested private conduct before they have invoked the restraints of the Constitution. The "self-enforcement" theory of the first amendment, however, rejects this approach. Here the assumption is that the first amendment, standing alone, prohibits all forms of both governmental and *private* censorship. This interpretation has its origin in the amendment's underlying purpose, the creation of a marketplace of ideas into which all thoughts and forms of expression can freely enter. The framers of the Constitution sought to achieve this goal by

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[137] *Id.* at 725 (emphasis added).

[138] *See, e.g.,* Evans v. Newton, 382 U.S. 296 (1966); Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

[139] 47 U.S.C. § 315(a) (1964).

[140] *Cf.* Katzenbach v. Morgan, 384 U.S. 641 (1966); United States v. Price, 383 U.S. 787 (1966); United States v. Guest, 383 U.S. 745 (1966).

restricting the powers of the government, the only source of censorship they foresaw. Since that time, however, private economic cartels have acquired monopolistic control over the newsprint and broadcast media. Today the great threat of censorship comes, not from the Government, but from the vested economic interests that restrict access to print and broadcast forums. If the first amendment may be construed to be "self-enforcing," operating to secure a free marketplace for all ideas in all media, this construction would have the salutary and necessary effect of barring censorship by government and private interests alike.[141]

Today the "marketplace of ideas" *is* the mass media. Yet there are very few ways one can gain access to the media for purposes of communicating noncommercial speech. One can either purchase a radio or television station, or produce peacefully or violently an event worthy of news coverage. If an individual is the subject of a personal commentary, he may be able to secure rebuttal time under the personal attack doctrine; or he may be able to solicit the aid of an editorial staff member who will present his views by "proxy." Lastly, he may pursue the most rational of the alternatives considered thus far: he may attempt to purchase air time.

In each of these instances, however, access to the media has been drastically curtailed. First of all, the Federal Communications Commission has made it difficult for an individual or group to acquire an existing radio or television station.[142] Secondly, peaceful demonstrations,

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[141] Many commentators have voiced concern over the fact that the ideal of a "marketplace of ideas" has grown dim since the founding of this country some two centuries ago, largely because of the concentration of power over the media of mass communication. *See* R. CROSSMAN, THE POLITICS OF SOCIALISM 44 (1965); J. FULBRIGHT, THE PENTAGON PROPAGANDA MACHINE *passim* (1970). Other commentators have expressed concern because the mass communication industry is using "the free speech and free press guarantees to avoid opinions instead of acting as a sounding board for their expression." Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1646 (1967); *accord*, V. KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY 378-79 (1961). *See also* N. JOHNSON, HOW TO TALK BACK TO YOUR TELEVISION SET *passim* (1970).

[142] *See* Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 35 Fed. Reg. 822 (1970); Petition by BEST, 21 F.C.C.2d 355, *reconsideration denied*, 24 F.C.C.2d 383 (1970). Prior to the issuance of the 1970 Policy Statement, groups wishing to apply for the license of an existing station were assured a factual hearing, at which time they were given an opportunity to present their programming proposals and to compare them against the incumbent licensee's record. Although an applicant's chances for success were slim at best, this procedure gave groups with better programming ideas an opportunity to make them known. *See* WHDH, Inc., 16 F.C.C.2d

even violent ones, soon fade in newsworthiness; and violent ones fade in credibility. Thus the second technique for gaining access to the media is viable only where those who rely upon it are willing, and able, to resort to tactics increasingly extreme.[143] The third means of obtaining access, the request for equal time, may prove to be ineffectual in individual cases, for the Federal Communications Commission has been reluctant to apply the fairness doctrine evenhandedly to all individuals or groups holding minority or dissenting views.[144] The fourth method, the presentation of one's views by "proxy," may also prove to be an ineffective means of capturing the largess of the airways. It may be difficult to obtain the sympathy of a radio or television station's editorial staff; and what is difficult in some communities may be impossible where only a few radio and television outlets are available.[145]

Thus only the fifth alternative, the purchase of airtime at the going commercial rate, offers individuals an opportunity to make their views known to the public. Although the framers of the first amendment did not write it with a view toward sanctifying the views of the owners of the print and broadcast forums, governmental inaction in failing to ensure that *all* citizens have a right of access to these forums has had this effect.

What is more, by failing to recognize a right of access in *Democratic National Committee* and *Business Executives*, the Commission by its own

1 (1969). The Policy Statement, however, provided that new applicants for existing stations would not be given a hearing if the incumbent licensee's programming was judged to substantially accord with community needs and interests. Once the incumbent passed a certain threshold of quality, determined by the FCC, it would be assured renewal, no matter how much better the competing applicant's proposals might be. STAFF OF SPECIAL SUBCOMM. ON INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 91st Cong., 2d Sess, ANALYSIS OF FCC's 1970 POLICY STATEMENT ON COMPARATIVE HEARINGS INVOLVING REGULAR RENEWAL APPLICANTS *passim* (1970).

[143] *See* Von Hoffman, *Television Blackout*, Washington Post, Nov. 17, 1969, § D, at 1, col. 1 (television coverage of the largest political gathering in the history of the United States, the anti-Vietnam war moratorium on Nov. 15, 1969, was almost nonexistent).

[144] *See, e.g.*, Friends of the Earth, 24 F.C.C.2d 743 (1970) (anti-pollution announcements); Letter to Mrs. Dorothy Healey, 24 F.C.C.2d 487 (1970) (attack on member of Communist Party for "unpatriotic" views); Letter to Mr. Donald A. Jelinek, 24 F.C.C.2d 156 (1970).

[145] Mrs. Katherine Graham, owner of the Washington Post, a daily newspaper, and the Post-Newsweek Stations, including WTOP-AM-FM-TV in Washington, D.C., and WJXT-TV in Jacksonville, Fla., expressed her dismay over the "right of access to the press" on the part of people who are being unfairly treated. "I worry about this subject because I feel it where I sit . . . . People feel at a disadvantage now in this age of bigness. They think they have nowhere to go unless they know an editor, or know me." Goulden, *The Washington Post*, WASHINGTONIAN MAGAZINE, Oct. 1970, at 59, 88.

action encouraged a frantic push toward more and more commercial advertising on the airways, to the exclusion of those who wish to make their views known to the public through purely political or social speech. In essence the FCC has abdicated control over the electronic forums of speech to monolithic commercial enterprises.

Private corporate censorship by radio and television licensees must be eliminated if dissent is to flourish in this country. If freedom of speech is to be preserved, the growing concentration of economic power over the media of mass communications must be halted.[146] Unless the Court adopts a new concept of state action to preserve first amendment speech freedoms, some nexus must be found between the power of the mass media, whose owners stand like Colossus astride the channels of communication, and a government-related entity.

Perhaps the basic solution to this problem lies in viewing the first amendment as "self-enforcing." Under this view, as noted above, the first amendment itself is interpreted as prohibiting censorship by the Government or by "private" entities holding life-and-death control over the media. Arbitrary, content-related restraint on communication, whether imposed by the Government or by private entities, would contravene the first amendment guarantee of free speech and freedom of the press.[147] Recognition of a limited right of noncommercial access for paid editorial announcements and programs, facilitated by this approach, would then contribute to the establishment of a true marketplace of ideas in the electronic media.[148]

Marsh v. Alabama[149] may perhaps be viewed as opening the wedge.

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[146] *See generally* Letter to Rep. Richard L. Ottinger [Judy Collins Incident], No. 70B-47876 (F.C.C., Apr. 20, 1970) (Cox & Johnson, Comm'rs, dissenting), in 18 P & F RADIO REG. 2D 1031 (1970); Johnson, *Public Channels & Private Censors,* THE NATION, Mar. 23, 1970, at 329.

[147] *See, e.g.,* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Associated Press v. United States, 326 U.S. 1, 20 (1945). Speaking within the context of the mandate that licensees act in the "public interest," Mr. Justice White, writing for a unanimous Court in *Red Lion,* stated that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself *or a private licensee.*" 395 U.S. at 390 (emphasis added).

[148] *See* Barron, *An Emerging First Amendment Right of Access to the Media?,* 37 GEO. WASH. L. REV. 487 (1969); Barron, *supra* note 141, at 1644-50; Gorlick, *Right to a Forum,* 71 DICK. L. REV. 273 (1967); Horning, *The First Amendment Right to a Public Forum,* 1969 DUKE L. J. 931; Silver, *Free Speech on Private Property,* 19 CLEV. ST. L. REV. 372 (1970); Note, *supra* note 62, at 304; Note, *The Listener's Right to Hear in Broadcasting,* 22 STAN. L. REV. 863 (1970).

[149] 326 U.S. 501 (1946).

The Court's ultimate holding—that a private corporation may not abridge personal freedoms at will, but must operate within the restraints of the Constitution—is consistent with the view that the first amendment is "self enforcing." One commentator has stated this important principle with great perceptivity:

> The emerging principle appears to be that the corporation . . . is as subject to constitutional limitations which limit action as is the state itself. . . . The preconditions of application are two: the undeniable fact that the corporation was created by the state and the existence of sufficient economic power concentrated in this vehicle to invade the constitutional right of an individual to a material degree. This is new as a rule of law, but it is typically American in tradition. . . . The principle is logical because . . . the modern state has set up, and come to rely on, the corporate system to carry out functions for which in modern life by community demand the government is held ultimately responsible. It is unlimited because it follows corporate power whenever that power actually exists. . . . Instead of nationalizing the enterprise, this doctrine "constitutionalizes" the operation.[150]

The "Public Interest" Standard

The Communications Act of 1934 embodies a comprehensive scheme for broadcast regulation.[151] It gives the Federal Communications Commission broad powers to license and regulate broadcast outlets with reference to the "public interest, convenience, and necessity."[152] This "public interest" standard has been upheld on numerous occasions as a valid regulatory device[153] and has been viewed as the *quid pro quo*

[150] Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 942-43 (1952); *accord*, Miller, *The Constitutional Law of the "Security State,"* 10 STAN. L. REV. 620, 661-66 (1958); St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961).

[151] 47 U.S.C. §§ 151-609 (1964).

[152] *See, e.g., id.* § 309(a). The 1934 Act gives the Commission the power to license stations, *id.* § 301, "classify stations," prescribe the nature of the services to be rendered by each class, "assign bands of frequencies" and "encourage the larger and more effective use of radio in the public interest," *id.* §§ 303(a), (b), (c), (g), grant license renewals, *id.* §§ 307(a), (d), revoke or modify licenses or construction permits, *id.* §§ 312, 316, preserve competition in broadcasting, *id.* § 314, ensure fairness in broadcasting, *id.* § 315, and protect "the right of free speech by means of radio communication," *id.* § 326.

[153] *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); National Broadcasting Co. v. United States, 319 U.S. 190 (1943); FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940).

for monopolistic use of this scarce public resource. "A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." [154]

If broadcast licensees must conduct their activities in accordance with "public interest, convenience, and necessity," then surely the obligation imposes the further requirement that they operate in a manner consistent with the first amendment. Congress has authority to enforce the prohibitions of the fourteenth amendment through appropriate legislation.[155] Since the substantive content of that amendment incorporates first amendment prohibitions, Congress presumably has power to enforce the first amendment as well.[156] Indeed, such power may derive directly from the first amendment itself.[157]

Possessed of this power, Congress could not have intended to exclude the prohibitions of the first amendment from the standards incorporated into the 1934 Communications Act.[158] If this assumption is warranted, the search for evidence of "state action" in the conduct of broadcast licensees is unnecessary: licensees are already subject to first amendment restraint by virtue of the operation of the "public interest" standard, understood in this light.

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[154] Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966).

[155] *See* Katzenbach v. Morgan, 384 U.S. 641 (1966); United States v. Guest, 383 U.S. 745 (1966); Note, *supra* note 120.

[156] Section 5 of the fourteenth amendment gives Congress the power to enforce the provisions of that amendment through appropiate legislation. The fourteenth amendment has long been viewed as incorporating, and thus rendering applicable to the states, the first amendment's prohibition against censorship. *See* Fiske v. Kansas, 274 U.S. 380, 387 (1927); Gitlow v. New York, 268 U.S. 652, 666 (1925). Presumably, therefore, Congress has the power to "enforce" the first amendment against private censorship by equally appropriate legislation. *See* Associated Press v. United States, 326 U.S. 1, 20 (1945).

[157] *Cf.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Associated Press v. United States, 326 U.S. 1, 20 (1945). *See also* Hale v. FCC, 425 F.2d 556, 561-62 (D.C. Cir. 1970) (Tamm, J., concurring). In both *Red Lion* and *Associated Press* the Court described limitations on the power of "private" communications media to restrain freedom of speech and implied that the Congress possessed the power to ensure the preservation of first amendment freedoms. *See* 395 U.S. at 388-92; 326 U.S. at 19-20.

[158] Indeed, the FCC itself appears to have adopted this view at one time. For example, in United Broadcasting Co. (WHKC), 10 F.C.C. 515 (1945), the Commission observed that "[t]he spirit of the Communications Act of 1934 requires radio to be an instrument of free speech," and it warned against "any type of censorship which would undertake to impose the views of the licensee upon the material to be broadcast." *Id.* at 517-18.

Summary

This discussion of "state action" should lay to rest the argument that broadcast licensees have the power to censor at will, unrestrained by the first amendment. Constitutionally, they must be treated as agents of the Government. They have no greater, or lesser, right to ban speech from *their* forum than do the groundskeepers of a public park. Thus in cases like *Democratic National Committee* and *Business Executives*, where a private party demands "access" to the mass media and offers to pay the going commercial rate, the only remaining inquiry concerns the reasonableness of the policies that limit access. A licensee may in certain instances find it necessary to impose "time, place and manner" restrictions on the availability of his facilities; but he is powerless to impose an absolute ban inconsistent with constitutional demands.[159]

THE "APPROPRIATENESS" OF THE SPEECH IN THE PARTICULAR FORUM

In recent years the courts have resolved a number of controversies involving attempts by private parties to exercise first amendment speech freedoms through utilization of public or private property—for example, public streets and parks, railroad and bus terminals, schools, and so forth. In these cases the courts first established the existence of "state action," if relevant. They then addressed two questions. First, was the property an appropriate forum for the communication of the speech involved? Second, did the person who owned or controlled the forum "discriminate" among individuals or particular points of view? The resolution of the first issue was held to depend on whether the property had traditionally been used as a forum for communication,[160] or whether the owner had "opened up" the property in such a way that free access and expression were not inconsistent with the property's normal use. On the other hand, the "reasonableness" of the restrictions imposed by the owner was generally held to be the determinative factor in the resolution of the second issue. The measure of reasonableness was, in turn, held to depend on whether the free exercise of speech conflicted with a right of the forum's owner—for example, his right to privacy, or his right to be free from unwarranted intrusions. But a restriction was "reasonable" only where the owner's right merited protection in the face of the speaker's conflcting claim. Thus, as the Supreme Court of

[159] *Cf.* Hague v. CIO, 307 U.S. 496 (1939).

[160] *See id.* at 514-17.

California put it in *In re Hoffman*, "[i]f the state curtails First Amendment freedoms to protect an interest that is *nonexistent*, . . . it violates the First and Fourteenth Amendments." [161]

The doctrine may be stated thus: When private or public property is an appropriate forum for communication and is "opened up" to general use by the public, then the person exercising ownership or control over that property "waives" his traditional property rights to privacy and exclusivity of use and cannot discriminate among the views of individuals seeking to use his forum. If an owner of private property has entirely closed his property to the public (an unlikely circumstance in the realm of broadcasting), he may not then open it for the public use and selectively exclude specific persons or particular views, since by his conduct he has indicated that his interest in privacy is nonexistent and not worth preserving.

Existence of a "Forum"

The "streets and sidewalks" of a privately owned company town were held to be an open forum in *Marsh v. Alabama*.[162] In that case Jehovah's Witnesses sought to distribute religious literature on the streets of a company town and were prosecuted for criminal trespass at the insistance of the town's owners. In reversing their conviction the Court held that a privately owned town had no more right to discriminate against individual citizens seeking to exercise first amendment freedoms than a public municipality. The Court observed:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . .
>
> . . . Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such a manner that the channels of communication remain free.[163]

Although the Court acknowledged that the owners of the town could close its sidewalks to the public entirely,[164] it stated that once the town

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[161] 67 Cal. 2d 845, 850, 434 P.2d 353, 356, 64 Cal. Rptr. 97, 100 (1967) (emphasis added).
[162] 326 U.S. 501 (1946).
[163] *Id.* at 506, 507.
[164] *Id.* at 505 n.2.

had opened the sidewalks to the public, it could not discriminate against individuals on the basis of the views that they held.[165]

Several themes emerge from the portion of the Court's opinion quoted above. First, traditional channels of communication must be protected from censorship, whatever its source, public or private. In this regard it is interesting to note that the Court appears to have adopted a version of the "self-enforcement" theory of the first amendment.[166] A second theme concerns "waiver." Although a property owner may have certain rights in his property—rights to privacy or exclusivity of use—these are deemed to be waived, or "circumscribed," if the owner's actions with respect to his property are inconsistent with their existence. A person who opens his property to the public in order to sell goods and services, for example, cannot argue that he still retains a right of "privacy." Whatever right he may have had was relinquished voluntarily.

A third theme reflected in the majority opinion is that some forums are "appropriate" for the communication of ideas. In *Marsh*, for example, the Court found the sidewalks of the company town to be an "appropriate" forum. Persons wishing to speak in an appropriate forum may not have an unlimited right of access, since in certain instances the person who owns or controls the forum may close it entirely. Nevertheless, once he opens it to the public at large, the public's interest in the free speech outweighs the property rights retained. Thus, unlike a publicly owned facility that the state arguably could not close for the purpose of precluding speech,[167] the owners of the company town in *Marsh* could have closed their streets entirely.[168] But if they chose to open the streets, they were required to do so in a manner consistent with the first amendment.

Recent cases have reflected the *Marsh* analysis and have held that under certain circumstances private property "may, at least for First Amendment purposes, be treated as though it were publicly held." [169]

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[165] *Id.* at 507.

[166] See text at notes 141-150 *supra*, for a discussion of the "self-enforcement" theory of the first amendment.

[167] *Cf.* Griffin v. County School Board, 377 U.S. 218, 231 (1964) (public school closed to avoid mandate to desegregate held to be an unconstitutional purpose).

[168] 326 U.S. at 505 n.2.

[169] Local 590, Amalgamated Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308, 316 (1968); *see, e.g.*, Tanner v. Lloyd Corp., 308 F. Supp. 128 (D. Ore. 1970); *In re* Lane, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969); Hillside Community Church, Inc. v. City of Tacoma, 76 Wash. 2d 63, 455 P.2d 350 (1969); *In re* Hoffman, 67 Cal. 2d

Whenever property, publicly or privately owned, is "opened up" to the public for general use, regardless of whether that use directly involves speech activities, the facility cannot be operated to impair the exercise of speech freedoms, unless that exercise *directly* and *substantially* interferes with the facility's primary use. This proposition, as it applies to publicly owned facilities, was epitomized by the court in *Trujillo v. Love*:[170]

> The State is not necessarily the unfettered master of all it creates. Having established a particular forum for expression, officials may not then place limitations upon the use of that forum which interfere with protected speech and are not justified by an overriding state interest.[171]

In the arena of broadcasting there can be little doubt that the frequencies allotted to the various radio and television licensees are "forums" created by the Government pursuant to the Communications Act of 1934.[172] Indeed, the expression of ideas, whether political, commercial, musical, or otherwise, appears to be the broadcast spectrum's exclusive purpose. Likewise, there is little question that radio and television stations have "opened up" their frequencies to the general public by making *commercial* advertising time widely available on a first-come, pay-as-you-go basis.

Viewing broadcast frequencies either as forums "opened up" by licensees to the general public[173] or as forums created by the Govern-

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845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967); Schwartz-Torrance Inv. Corp. v. Local 31, Bakery & Confectionery Workers, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233, *cert. denied*, 380 U.S. 906 (1965); Amalgamated Clothing Workers v. Wonderland Shopping Center, 370 Mich. 547, 122 N.W.2d 785 (1963).

The existence of a "public forum" for the communication of views has been found by the courts in numerous other instances. *See, e.g.*, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) (public school); Wolin v. Port Authority, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (bus terminal); Trujillo v. Love, Civil No. C-2785 (D. Colo., Feb. 16, 1971) (state college newspaper); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969) (public high school newspaper); Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967) (public subway walls); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967) (public buses); Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946) (public school buildings); People v. St. Clair, 56 Misc. 2d 326, 288 N.Y.S.2d 388 (Crim. Ct. 1968) (public subway platform).

170 Civil No. C-2785 (D. Colo., Feb. 16, 1971).

171 *Id.* at 9.

172 47 U.S.C. §§ 151-609 (1964).

173 In a number of recent cases the existence of a "public forum" for the communication of speech has been found in instances where the owner of private or public prop-

ment and subject to restraints imposed by the sanction of the Federal Communications Commission,[174] it would appear that a broadcast licensee's action in accepting advertisements is subject to the constraints of the first amendment.

"Reasonable" Use of the Forum

The broadcast licensees should be permitted to retain sufficient power to enable them to reject programming if it fails to meet certain quality standards, is "obscene," [175] or is otherwise in violation of federal law.[176] It is equally clear, however, that broadcast licensees, as trustees for the public, do not possess an unrestricted right to monopolize the frequencies allotted to them by the Commission. Licensees must, in accordance with their role as trustees, marshal their available time to accommodate the competing interests seeking to employ it, and adopt some rational policy for allocating that time. The question, then, is whether recognition of the right of groups like BEM and DNC to purchase broadcast time would accord with a rational system of allocation.

If broadcast licensees fail to adopt a rational scheme for allocating their available time, the courts and the Federal Communications Commission must formulate guidelines that will assure "reasonable" access. Action by the Commission and the judiciary could ensure that the electronic media of the twentieth century will be as open to public use as were the soap boxes, public parks, and town hall meetings of the last century.[177] Granted, freedom of speech, "while fundamental in our democratic society, [does] not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time;" [178] nevertheless, "the people as a whole [do] retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amend-

erty opened up his facility for the display of private commercial advertisements. *See, e.g.*, Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969) (public high school newspaper); Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967) (public subway walls); Hillside Community Church, Inc. v. City of Tacoma, 76 Wash. 2d 63, 455 P.2d 350 (1969) (public buses); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967) (public buses).

[174] *Cf.* Trujillo v. Love, Civil No. C-2785, at 9 (D. Colo., Feb. 16, 1971).

[175] 18 U.S.C. § 1464 (1964).

[176] *See, e.g.*, 18 U.S.C. § 1304 (1964) (gambling).

[177] *Cf.* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 21-32.

[178] Cox v. Louisiana, 379 U.S. 536, 554 (1965).

ment." [179] This latter goal can only be achieved if *all* who seek access to the electronic media and wish to use it in a reasonable manner are accorded similar treatment by broadcast licensees.

The Federal Communications Commission and the judiciary have already begun to formulate the variants of the access doctrines that lie dormant in the Court's opinion in *Red Lion Broadcasting Co. v. FCC.*[180] For example, the fairness, personal attack, and equal time doctrines all curtail a licensee's discretion to reject programming. Similarly, the requirement that licensees ascertain community needs and interests and devote "some significant proportion of [their] programing [*sic*]" to satisfying these objectives[181] may also be viewed as limiting a broadcast licensee's discretion to reject proffered spot announcements and programming. Arguably, a broadcast licensee's discretion is further restricted when it invites an individual to participate in a televised discussion with network personnel. In that case the licensee opens up his forum to his invited guests; and it is conceivable that, except for obscene remarks or statements that do not measure up to quality standards, the licensee may under these circumstances relinquish his "right" to censor remarks with which he does not agree.[182]

Unlike the party who achieves access under the personal attack, equal time, or fairness doctrines, both BEM and the DNC were willing to pay the going commercial rate to purchase broadcast time. This fact alone should have provided the licensees with a sufficient inducement to accept the proffered spot announcements and programs. Had they granted access, licensees would not have been subjected to any financial burden.[183]

In several recent cases state and federal courts have decided controversies involving precisely the same issues as those considered by the Commission in *Business Executives* and *Democratic National Committee.* While the "forums" in question were not electronic, in each case a group like BEM or the DNC sought to purchase advertising facilities otherwise available for commercial use. The courts ruled decisively

179 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

180 395 U.S. 367 (1969).

181 City of Camden, 18 F.C.C.2d 412, 421 (1969).

182 *See* Letter to Rep. Richard L. Ottinger [Judy Collins Incident], No. 70B-47876 (F.C.C., Apr., 20, 1970) (Cox & Johnson, Comm'rs, dissenting), in 18 P & F RADIO REG. 2d 1031 (1970).

183 *Cf.* Letter to Mr. Donald A. Jelinek [Complaint by San Francisco Women for Peace, The GI Ass'n, The Resistance], 24 F.C.C.2d 156, 168-69 (1970) (Johnson, Comm'r, dissenting) (free public service announcements impose no financial burden on licensee).

that the owner of a facility open to the public could not accept commercial advertising and reject at the same time all political advertisements.

The seminal case, *Wirta v. Alameda-Contra Costa Transit District*,[184] was decided by the Supreme Court of California in 1967. An organization known as Women for Peace brought suit against a public transit district operating a municipal bus service and a private advertising company. The company leased the advertising space above the passengers' seats from the district and re-leased it to private commercial advertisers. Women for Peace had sought to lease advertising space in the district's buses at the standard rate for the purpose of communicating the following statement to the public:

> "Mankind must put an end to war or war will put an end to mankind."—President John F. Kennedy
>
> Write to President Johnson: Negotiate Vietnam.
> Women for Peace
> P. O. Box 944, Berkeley.[185]

The private advertising company had refused to accept the organization's advertisement on the ground that it conflicted with the district's advertising policy. The district had adopted a policy of accepting "only commercial advertising for the sale of goods and services, except that political advertising will be accepted in connection with and at the time of a duly called election being held within the boundaries of the District, and further subject to the conditions that . . . space be made equally available to opposing candidates or sides of a ballot measure." [186]

At the threshold, the California Supreme Court acknowledged that the content of the proffered advertisement was "undeniably protected by the First Amendment," despite its status as a paid message.[187] The court also recognized at the outset that the advertisement submitted by the Women for Peace could in no way have interfered with the district's primary function of providing transportation for the public.[188] Having thus narrowed the issue, the court characterized the case as one

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[184] 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).

[185] *Id.* at 53, 434 P.2d at 984, 64 Cal. Rptr. at 432.

[186] *Id.*

[187] *Id.* at 54, 434 P.2d at 984-85, 64 Cal. Rptr. at 432-33, *citing* New York Times Co. v. Sullivan, 376 U.S. 254 (1963).

[188] *Id.* at 54, 434 P.2d at 985, 64 Cal. Rptr. at 433.

"in which a governmental agency has refused to accept an advertisement expressing ideas admittedly protected by the First Amendment for display in a forum which the agency has deemed suitable for the expression of ideas through the medium of paid advertisements." [189] The result was clear:

> [D]efendants, *having opened a forum* for the expression of ideas by providing facilities for advertisements on its buses, *cannot* for reasons of administrative convenience decline to accept advertisements expressings opinions and beliefs within the ambit of First Amendment protection.[190]

In the court's view the district's advertising policy ran afoul of the first amendment because it chose "between classes of ideas . . . sanctioning the expression of only those selected, and banning all others." The court found this effect to be "a most pervasive form of censorship." [191]

The court also denounced the district's policy because it afforded "total freedom of the forum to mercantile messages while banning the vast majority of opinions and beliefs extant which enjoy First Amendment protection because of their noncommercialism." [192] The perversity of elevating commercial speech above political speech led the court to remark that "in the totality of man's communicable knowledge, that which bears no relationship to material value preponderates." [193]

> A cigarette company is permitted to advertise the desirability of smoking its brand, but a cancer society is not entitled to caution by advertisements that cigarette smoking is injurious to health. A theater may advertise a motion picture that portrays sex and violence, but the Legion for Decency has no right to post a message calling for clean films. A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes. An insurance company may announce its available policies, but a senior citizens' club cannot plead for legislation to improve our social security program.[194]

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[189] *Id.* at 55, 434 P.2d at 985, 64 Cal. Rptr. at 433.
[190] *Id.* (emphasis added).
[191] *Id.* at 56, 434 P.2d at 986, 64 Cal. Rptr. at 434.
[192] *Id.* at 56-57, 434 P.2d at 986, 64 Cal. Rptr. at 434.
[193] *Id.* at 57, 434 P.2d at 986, 64 Cal. Rptr. at 434.
[194] *Id.* at 57-58, 434 P.2d at 986-87, 64 Cal. Rptr. at 434-35.

Since the transit district had conclusively determined that advertising would not interfere with its primary function of providing public transportation, the court was not faced with the necessity of determining "whether public property must be made available as a forum for the exercise of First Amendment rights," [195] a determination similar to that made by the court in *In re Hoffman*, another recent case.[196] Since the transit district had not attempted to show that the presentation of political advertisements interfered with its legitimate functions, the court easily concluded that the refusal to accept political advertising was constitutionally impermissible. Had the transit district sought to contest the issue of interference, however, the test announced by the court in *Hoffman*—"not whether petitioners' use of the station was a railway use but whether it *interfered* with that use"—would undoubtedly have been held to be controlling.[197]

The relevance of *Wirta* should be readily apparent. The Federal Communications Commission's licensing of the airways to private licensees who re-lease portions of their frequency space to commercial advertisers is remarkably similar to the arrangements between the transit district and the private advertising company in *Wirta*. Further, like the advertising company, most broadcast licensees accept commercial advertising and reject most political advertisements. The single exception is that broadcast licensees do accept spot announcements by political candidates during general elections, an inroad into licensee discretion governed by the "equal time" provisions of the Communications Act.[198] Of course, this provision is not unlike the advertising policy contested in *Wirta*.

These striking parallels seem to dictate that broadcast licensees, for purposes of the first amendment, should be treated as agents of the state, as was the private advertising company in *Wirta*. Since there was no evidence in either *Business Executives* or *Democratic National Committee* to show that acceptance of the proffered advertisements would interfere with the normal functioning of the broadcast forum, one may conclude that these broadcast licensees had no more right to reject political advertising than did the advertising company in *Wirta*.

Subsequent decisions have followed this rationale. For example, the

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[195] *Id.* at 54, 434 P.2d at 985, 64 Cal. Rptr. at 433.

[196] 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

[197] *Id.* at 851, 434 P.2d at 356, 64 Cal. Rptr. at 100 (emphasis added).

[198] *See* 47 U.S.C. § 315(a) (1964).

district court in *Kissinger v. New York City Transit Authority*[199] reached precisely the same result for precisely the same reasons. In *Kissinger* an anti-war group had sought to place advertisements on the walls in New York subway stations. The private advertising corporation in charge of wall advertisements, operating under a contract with the city, refused the group's request on the ground that the views expressed were too controversial to be placed in the subway station.

The transit authority in *Kissinger* made two arguments similar to those made by the transit district in *Wirta*. First, it asserted that the policy of accepting only commercial advertisements, public service announcements, and political advertising during elections did not constitute a generalized waiver of its "right" to refuse political advertisements. The district court quickly rejected this argument, stating that neither the authority nor the private advertising corporation could "accept some posters and refuse the plaintiffs' for reasons that conflict with the First Amendment guarantee of the right to freedom of speech." [200] The transit authority's second argument was that the posters in question were inflammatory, would be displayed to captive audiences, and might cause serious disturbances. Thus the posters would interfere with the transportation of passengers, the authority's primary function. The court swiftly disposed of this argument as well, stating that:

> [A] function of free speech . . . is to invite dispute. . . . Speech is often provocative and challenging. It may . . . have profound unsettling effects . . . . That is why freedom of speech is . . . protected against censorship . . . .[201]

Thus, absent a showing that the advertisements "would seriously endanger safety in the subways," the court concluded that the authority could not reject them merely because they were viewed as " 'entirely too controversial' " or " 'objectionable to large segments of [the] population.' " [202]

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[199] 274 F. Supp. 438 (S.D.N.Y. 1967).

[200] *Id.* at 442. Essentially, this argument was made by the transit district in *Wirta*, in its reliance on its written advertising policy. *See* 68 Cal. 2d at 55, 434 P.2d at 985, 64 Cal. Rptr. at 433.

[201] 274 F. Supp. at 443 n.4, *citing* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949). Although the transit district in *Wirta* did not assert that the advertisement submitted by the Women for Peace was inflammatory, it did make the "captive audience" argument. *See* 68 Cal. 2d at 60 n.3, 434 P.2d at 988 n.3, 64 Cal. Rptr. at 436 n.3.

[202] 274 F. Supp. at 443.

In another recent case, *Zucker v. Panitz*,[203] an anti-war group composed entirely of high school students sought to place in the school newspaper a paid advertisement in opposition to the Vietnam war. Their request was initially approved by the newspaper's editorial staff but subsequently was disapproved by the school's principal. In an action brought to compel acceptance of the advertisement the defendant school authority asserted in defense that a long-standing policy required the paper to accept "only purely commercial advertising" and to reject all other forms of advertising, including "paid advertising in support of student government nominees." [204] Finding the paper to be "a forum for the dissemination of ideas," the court concluded that the students' first amendment rights were to be preferred over the school authority's rules.[205] Citing *Wirta* and *Tinker v. Des Moines Independent Community School District*,[206] the court stated that:

> Here, the school paper appears to have been open to free expression of ideas in the news and editorial columns as well as in letters to the editor. It is patently unfair in light of the free speech doctrine to close to the students the forum which they deem effective to present their ideas.[207]

Since the court could not perceive how the newspaper's normal function would be disrupted by requiring it to publish the group's anti-war advertisement, it ruled in the plaintiff's favor.

Finally, in *Hillside Community Church, Inc. v. City of Tacoma*,[208] a church group placed display posters urging an end to the war in Vietnam in advertising space on public buses rented from a private advertising agency, which itself had leased the advertising space from the city. In accordance with a provision in the agency agreement empowering the city to request removal of advertisements found to be "objectionable to the City," the city manager requested the private advertising agency to remove the group's posters.[209] In an action for specific performance brought by the church group, the Supreme Court of

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203 299 F. Supp. 102 (S.D.N.Y. 1969).

204 *Id.* at 103.

205 *Id.* at 105.

206 393 U.S. 503 (1969).

207 299 F. Supp. at 105; *accord*, Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097, 1100-01 (W.D. Wis. 1969).

208 76 Wash. 2d 63, 455 P.2d 350 (1969).

209 *Id.* at 64, 455 P.2d at 351.

Washington, citing *Wirta* and *Kissinger*, ruled that "[o]nce a municipality or public body enters the field of advertising, . . . the law requires that a showing of a 'clear and present' danger must be made in order to limit such advertising without conflicting with guarantee [*sic*] of freedom of speech under the First and Fourteenth Amendments." [210] The court went on to characterize the city's action in rejecting the group's advertisement as a clear act of censorship in violation of the group's first and fourteenth amendment rights.

As these recent cases demonstrate, there is perhaps no greater evil than the discriminatory suppression of speech based on content. Yet this is precisely what the Federal Communications Commission has sanctioned by its decisions in *Business Executives* and *Democratic National Committee*. The Commission has thrown the weight of its authority behind licensee policies that permit broadcasters to accept commercial speech and reject political speech—or, at the very least, to pick and choose among varieties of political speech on the basis of "offensiveness." Absent a showing of a "compelling" justification,[211] the delegation by the Commission of power to discriminate cannot withstand constitutional scrutiny.

Application of the First Amendment to Broadcasting

Broadcast licensees, as well as the Federal Communications Commission, have argued that radio and television are unique and, therefore, that the traditional principles governing an individual's right of access to streets, parks, and other public forums should be inapplicable here.[212] A related argument is that spot announcements are too short to deal adequately with controversial issues.

In *Business Executives*, for example, the licensee argued that BEM's announcements "require a more in-depth analysis than can be provided in a 10, 20, 30, or 60 second announcement." [213] The logic of this reasoning seems faulty on several counts. First, broadcast licensees

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[210] *Id.* at 69, 455 P.2d at 354.

[211] *See* N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963) ("only a compelling state interest . . . can justify limiting First Amendment freedoms"); Thomas v. Collins, 323 U.S. 516, 530 (1945) ("any attempt to restrict [first amendment] liberties must be justified by clear public interest").

[212] *See* Democratic Nat'l Comm., 25 F.C.C.2d 216, 227 (1970), *appeal docketed*, No. 24,492, D.C. Cir., July 31, 1970.

[213] 25 F.C.C.2d 242, 251 (1970) (Johnson, Comm'r, dissenting), *appeal docketed*, No. 24,537, D.C. Cir., Aug. 13, 1970.

find short spot announcements perfectly appropriate for presenting "controversial" issues in other areas. Prior to January 2, 1971,[214] for example, cigarette commercials were a case in point. Further, it cannot be denied that political campaign announcements are controversial; yet licensees have allowed them to be broadcast in short periods of time; and if short announcements are appropriate from politicians, they should be equally appropriate for the discussion of political issues.

It is worth noting the hypocrisy in this "inadequate time" argument. The Federal Communications Commission after all, has sealed off access to longer program segments as well. In *Business Executives* a majority of the Commission held that a licensee may refuse to sell one-minute spot announcements because the issue is too complex for the limited time available.[215] Yet in *Democratic National Committee* the same majority ruled that licensees could refuse to sell time to organizations wishing to purchase half-hour segments to discuss those same issues in greater detail.

In any event, it borders on arrogance for a broadcast licensee or the Commission to tell a person that *his* message will be superficial or misleading because *he* has chosen to present it in a 10-, 20-, 30-, or 60-second time slot. It is inconceivable that the Federal Communications Commission could sanction a licensee's rejection of a simple message like "End the War," when it permits manufacturers to advertise in 30-second time slots automobiles that pollute the air and endanger human life.[216]

A second argument often advanced by broadcast licensees is that if they are required to accept political advertising, they will be forced to limit the amount of time they can allot to commercial advertising.[217] This

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[214] All cigarette advertising was banned on radio and television after January 1, 1971. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 6, 84 Stat. 89.

[215] *See* 25 F.C.C.2d at 246.

[216] Similarly harsh and unjustifiable restrictions have been struck down in many other related cases. *See, e.g.*, Wolin v. Port Authority, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (Port Authority prohibited distribution of leaflets in public bus terminal); Tanner v. Lloyd Corp., 308 F. Supp. 128 (D. Ore. 1970) (shopping center prohibited distribution of handbills); *In re* Lane, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969) (supermarket prohibited distribution of handbills on store's parking lot); *In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967) (railroad terminal prohibited distribution of handbills); Schwartz-Torrance Inv. Corp. v. Local 31, Bakery & Confectionery Workers, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied*, 380 U.S. 906 (1965) (shopping center prohibited picketing); People v. St Claire, 56 Misc. 2d 326, 288 N.Y.S.2d 388 (Crim. Ct. 1968) (transit authority prohibited distribution of handbills in subway stations).

[217] *See, e.g.*, Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242, 248 (1970) (Cox, Comm'r, concurring). "[I]f stations were required to carry *all* spots dealing with

argument has previously been considered by various courts in other contexts and has been summarily rejected. For example, in *Kissinger v. New York City Transit Authority*[218] the district court envisioned the possibility of a reasonable accommodation between constitutional and economic demands:

> Defendants also argue that if they accept the posters for display, they will have to accept other posters relating to [political issues] . . . with the result that commercial advertising will become curtailed and the subways will become a political and ideological battlefield. Even if the Authority and the Advertising Company are required to accept the posters for display, however, it does not follow that others must be accepted . . . . [T]he Authority and the Advertising Company could impose reasonable regulations on the display of plaintiffs' posters and others of a similar nature as to the number to be displayed and the time and place for their display.[219]

Granting access to a broadcast licensee's facilities for a reasonable number of political advertisements will not transform the electronic media into a vast political battleground, although in many respects this result would be a desirable alternative to the existing commercial wasteland. Under this scheme both broadcast licensees and the Commission will retain the necessary power to adopt reasonable rules relating to the number of commercial and political advertisements that may be broadcast, thus ensuring that a reasonable mix of advertising will be presented to viewers and listeners.[220]

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controversial issues for which time was ordered, this might occupy much of the time which can be devoted to nonprogram matter and could, in time, impair the effectiveness of the broadcast media for advertising purposes." *Id.* (emphasis added). This statement misses the point, since BEM never contended that broadcast stations should carry "*all*" controversial non-commercial spot announcements that were tendered. BEM maintained only that the licensee could not *reject* them all. Moreover, a broadcast licensee must be permitted to strike a balance between commercial and non-commercial advertising, and reject some of each when demand exceeds the time available. *Accord,* Kissinger v. New York City Transit Authority, 274 F. Supp. 438, 443 n.6 (S.D.N.Y. 1967); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 62, 434 P.2d 982, 990, 64 Cal. Rptr. 430, 438 (1967).

[218] 274 F. Supp. 438 (S.D.N.Y. 1967).

[219] *Id.* at 443 n.6. *See also* Farmer v. Moses, 232 F. Supp. 154 (S.D.N.Y. 1964); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).

[220] For example, a licensee could adopt a policy agreeing to fill up to 50% of its commercial air time with political announcements on controversial issues. Such a plan would at least place political speech on a "parity" with commercial speech. Only if

Since this approach accords with the dictates of the first amendment and is reasonable as well, it is not surprising that the Commission itself adopted a similar approach in previous decisions. A case in point was *United Broadcasting Co.* (*WHKC*).[221] In that case the UAW lodged a complaint with the Federal Communications Commission challenging the Commission's renewal of WHKC's license on the ground that the licensee had refused to sell the union airtime for purposes of soliciting members and discussing controversial issues. After considering the UAW's charges, the Commission designated the station's license renewal for a hearing, to determine whether WHKC had endeavored "to maintain an overall program balance by providing time on a nondiscriminatory basis for discussion of public controversial issues and for the solicitation of memberships for nonprofit organizations." [222] The Commission characterized the requirement that broadcast licensees provide balanced programming as a "duty" imposed by the statutory mandate, requiring that they operate "in the public interest, convenience, and necessity." [223]

During the course of the hearing evidence was adduced to show that the station's policies were governed by the Code of the National Association of Broadcasters, a voluntary code formulated by the National Association of Broadcasters having no legal effect on the Association's membership. The Code, designed " 'to formulate basic standards' for the guidance of broadcasters," provides that "no time shall be sold for the presentation of public controversial issues, with the exception of political broadcasts . . . ; and that solicitation of memberships in organizations, whether on paid or free time, should not be permitted except for charitable organizations, such as the American Red Cross . . . ." [224] After the hearing both the UAW and WHKC filed a joint motion requesting that the renewal proceedings in the instant case be dismissed. During the intervening period WHKC had adopted a new policy which the UAW acknowledged to be in accordance with "the duties of a licensee under the Communications Act of 1934 with respect to the

demand for political advertising time should exceed the 50% allotted for it would the licensee have to demonstrate why his selection of 50% was a reasonable limitation, taking into consideration the preferred status of political speech under the first amendment.

[221] 10 F.C.C. 515 (1945).

[222] *Id.* at 517.

[223] *Id.*

[224] *Id.* at 516.

availability of time for discussion of issues of public importance . . . ." [225] WHKC's new statement of policy provided that:

> (a) . . . Station WHKC [will] . . . consider each request for time solely on its individual merits without discriminations and without prejudice because of the identity of the personality of the individual, corporation, or organization desiring such time.
> (b) Requests . . . will . . . be considered in the light of the contribution which their use of time would make toward a well-balanced program schedule . . . .
> (c) Station WHKC will make time available, primarily on a sustaining basis, *but also on a commercial basis*, for the full and free discussion of issues of public importance, including controversial issues, and dramatizations thereof . . . . [T]here will be *no discrimination between business concerns and nonprofit organizations* . . . . Nonprofit organizations will have the right to purchase time for solicitation of memberships.
> . . .
> (f) The station will see that its broadcasts on controversial issues . . . maintain a fair balance among the various points of view . . . , both sustaining and commercial alike.[226]

On the basis of this new statement of policy, characterized as "fair and nondiscriminatory . . . [when] appl[ied] to the presentation of controversial public issues," the Commission granted the joint motion and dismissed the proceedings. In taking this action the Commission stated that:

> The Commission . . . is of the opinion that the operation of any station under the *extreme principles that no time shall be sold for the discussion of controversial public issues* and that only charitable organizations and certain commercial interests may solicit memberships is inconsistent with the concept of public interest established by the Communications Act as the criterion of radio regulations. . . . The Commission recognizes that good program balance may not permit the sale or donation of time to all who may seek it for such purposes and that difficult problems calling for careful judgment on the part of station management may be involved in deciding among applicants for time when all cannot be accommodated. However, competent management should be able to meet such problems in the public inter-

225 *Id.* at 517.
226 *Id.* at 516-17 (emphasis added).

> est and with fairness to all concerned. The fact that it places an arduous task on management should not be made a reason for evading the issue by a *strict rule against the sale of time for any programs of the type mentioned.*[227]

In *United Broadcasting* the Commission not only ruled that a refusal by a broadcast licensee to sell airtime to interested groups for the discussion of controversial issues would violate the 1934 Communications Act, but also labeled the requirement that licensees make such time available a "dut[y] of a licensee, under the statutory mandate . . . [that they] operate in the public interest, convenience, and necessity." [228] The request made by the petitioners in *Business Executives* and *Democratic National Committee* was no different than that made by the labor union in *United Broadcasting*. Yet a majority of the Federal Communications Commission refused to honor that request, notwithstanding the prior decision that a strict rule against all sales of air time for the discussion of controversial public issues would be "extreme." Not only has the viewing and listening public been denied exposure to the healthy activities of debate and dissent, the electronic media have regressed to a barren state, all as a result of the majority's refusal to follow the lead set by the Commission some twenty-five years ago in *United Broadcasting*.

The reasoning that led to this result reflects a fear that recognition of a limited right of access would permit those with strong financial resources to pre-empt normal programming time and distort the presentation of issues. A majority of the Commission adopted the view that grants of direct access to BEM and the DNC would establish a precedent that would permit the wealthy to dictate the agenda of national debate.[229] But the views of the wealthy already set the agenda for national debate, and a partial system of "access for purchase" presents nothing more than a scheme for opening a closed system to partial dissent. A long range answer to the majority's fear is based on a faith in the ideal of the marketplace. False *commercial* ideas, such as the notion that modern cars are safe or do not pollute the air, are unlikely to generate opposing claims. At best they merely goad competing manufacturers into more and extravagant exaggerations. On the other hand, the dissemination of false or one-sided *political* ideas serves a very

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[227] *Id.* at 518 (emphasis added) (citations omitted). *See also* Homer P. Rainey, 11 F.C.C. 898 (1947); Robert Harold Scott, 11 F.C.C. 372 (1946).

[228] 10 F.C.C. at 517.

[229] Democratic Nat'l Comm., 25 F.C.C.2d 216, 225 (1970).

useful purpose. Expression of political opinion in this country usually leads to argument and debate, not silent acquiescence; to vigorous opposition, not passive acceptance.[230] And vigorous and open debate is always healthy.[231] In any event, the majority's fear that the broadcast media will be dominated by the affluent is not only exaggerated but unfounded. Newspapers and magazines often accept political advertisements that state the views of particular groups on various ballot propositions or on international trade issues. The wall space of buses, train stations, and subway platforms also exhibits abundant and varied political comment. Yet this phenomenon has not resulted in a preponderance of affluent views. To the contrary, it is generally the poor, the disenfranchised minorities, who feel that they can reach the oblivious masses only through the medium of political announcements.[232] These announcements may very well become the "penny press" for this century's poor. If in the print media an imbalance favoring the views of the wealthy has not developed to date, it is highly unlikely that an imbalance will ever develop in radio and television. In any event, the licensee can use its discretionary powers under the fairness doctrine to balance the views of the wealthy by presenting countervailing positions.

Another argument advanced by the majority in *Democratic National Committee* was that there are only a limited number of broadcast frequencies; and therefore, some "trustee" must of necessity exercise complete control over all broadcast programming. According to the majority, any system of broadcasting which has the effect of granting even partial control over programming to individual groups outside the broadcast "establishment" engenders chaos.[233] This argument, however, rather clearly begs the question. The fact that a trustee or "gatekeeper" must control some of the broadcast time to preserve order does

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230 *See Developments in the Law, supra* note 53, at 1030.

231 John Stuart Mill recognized this principle over 100 years ago, and the passing century has not proven him wrong:

> [T]he peculiar evil of silencing the expression of opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

J. MILL, ON LIBERTY, *quoted in* Buckley v. Meng, 35 Misc. 2d 467, 474, 230 N.Y.S.2d 924, 932 (Sup. Ct. 1962).

232 *See* New York Times Co. v. Sullivan, 376 U.S. 254, 300 (1964) (Goldberg, J., concurring).

233 *See* Democratic Nat'l Comm., 25 F.C.C.2d 216, 221-25 (1970).

not mean that he must control *all* of it. A broadcaster could, for example, allot up to fifty percent of his advertising time to political announcements without relinquishing his otherwise complete control over programming. Or a broadcaster could agree to relinquish up to five or ten percent of his normal programming time and still retain complete control over the remaining ninety percent. The real issue is not whether broadcast licensees must exercise complete control over all programming in order to avoid chaos, but whether our present system of broadcasting can function effectively with a system of *partial* access, with control over the vast majority of airtime remaining in the networks and individual licensees. There is no obvious reason why such a system would not function effectively.

Again, the Commission's fears in this regard seem exaggerated. Most broadcast licensees already devote much of their broadcast day to programming designed by others. Radio stations, for example, regularly turn over up to eighteen minutes, or thirty percent, of every broadcasting hour to the pre-packaged presentations of commercial sponsors. Network affiliated television stations abdicate their authority to the three national networks for large portions of their broadcast day. These network affiliates are in fact programmed by long distance from New York—the ultimate in absentee landlordism. Finally, many television stations sell an entire hour or more of their normal programming time to sponsors like Xerox and National Geographic for widely-heralded specials. In light of these broadcasting practices, the Commission's rather frantic reliance on a system of complete "trustee" control seems excessive.

For the purpose of implementing any scheme of access to the broadcast media, it is imperative that a distinction be drawn between commercial time and programming time. In radio, for example, the upper limit for commercials is approximately eighteen minutes an hour. Television generally sets aside six to eight minutes an hour for advertising. Granting groups like BEM access to the "commercial" time segment for spot announcements would in no way affect a broadcaster's normal programming, since it would only diminish the amount of time otherwise available for the sponsors of commercial products. On balance, this hardly seems much of a loss. In the hierarchy of constitutional values political speech occupies a far more important and preferred position than commercial speech.

At a minimum broadcast licensees should make at least fifty percent

of their commercial time available to individual citizens or groups wishing to purchase airtime to make their political views known to the public. Should demand for political announcements exceed the time allotted to them, a rational system of allocation could be devised.[234] But the important point is that *some* time must be made available for the expression of minority veiwpoints. If, for example, the ghetto residents of our major cities wish to purchase spot time to decry the rat-infested, disease-ridden slums in which they are forced to live, they should be permitted to do so. Similarly, if the Daughters of the American Revolution wish to purchase an announcement to show their support for the war in Vietnam, they too must be accorded an opportunity to express their viewpoint. All individuals or groups, regardless of the subject matter of their proffered advertisement, must be accorded, within reason, the same opportunity to make their views known to the listening or viewing public. In short, the values of the first amendment are far too precious to bar *all* political speech from the most powerful media of communication known to man.

The allocation of programming time to groups like BEM and the DNC, on the other hand, poses special problems, because one-half hour of programming time would be lost for each half hour purchased. Since radio and television stations should arguably provide a substantial amount of entertainment programming—music, talk, entertainment, and the like—the amount of airtime that a broadcast licensee could make available for political programming might have to be limited. Even with this factor taken into consideration, however, it would not disrupt a broadcast licensee's normal programming to require that he make available for purchase by interested individuals or groups at least five percent of his prime-time programming space. Such a plan would only require licensees to release six hours of their prime broadcasting time per month to individuals or groups seeking direct access to the public.[235] Under this scheme individual licensees would still retain the "right" to reject programming for technical imperfections or for violations of appli-

[234] A system of rationing access for political spot announcements would impose no greater burden than that presently borne by licensees under the fairness doctrine in picking and choosing between the numerous controversial issues which that doctrine obliges them to cover.

[235] This calculation is computed on the basis of four hours of prime time every day (7:00 p.m. to 11:00 p.m.) and a thirty-day month. *Hearings on S.J. Res. 209, supra* note 3, at 158 (statement of Commissioner Johnson proposing that licensees be required to sell at least 5% of their prime time for political programming).

cable law. They could not, however, reject all political programming. At most they could only place "reasonable" limits on the amount of time available for purchase.

The Regulatory Scheme of the 1934 Communications Act

In both *Business Executives* and *Democratic National Committee* the majority placed substantial emphasis on section 3(h) of the 1934 Communications Act in arriving at its conclusion that a broadcast licensee "is not required to open its doors to all persons seeking to use the station's facilities . . . ." [236] That section provides, in a rather uninformative fashion, that:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . .; *but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.*[237]

A majority of the Federal Communications Commission has seized upon the general language in section 3(h) to bolster its argument that broadcast licensees have the unrestricted power to reject all requests to purchase spot announcement or programming time submitted by politically-oriented groups. According to the Commission, if a licensee were deemed to be a common carrier, "the result would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt." [238] The soundness of this argument may be doubted on several counts.

In the first place, the Commission has itself rejected this very argument in its prior decisions. For example, in *United Broadcasting Co. (WHKC)* [239] the Commission specifically stated that section 3 (h) in no way interfered with the "duty" of a licensee to make available for purchase reasonable amounts of broadcast time to individuals or groups wishing to express their views on vital issues of public concern. Although it recognized that as a result of "the physical limitations on the amount of spectrum space available for . . . broadcasting" [240] not every

[236] Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242, 247 (1970); *accord*, Democratic Nat'l Comm., 25 F.C.C.2d 216, 223 (1970).

[237] 47 U.S.C. § 153(h) (1964) (emphasis added).

[238] Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242, 248 (1970).

[239] 10 F.C.C. 515 (1945), discussed in the text at notes 221-28 *supra*.

[240] *Id.* at 517.

individual or group desiring to use a licensee's facilities could be accommodated, the Commission stated, with respect to section 3(h) of the Act, that:

> Under section 3(h) . . . , broadcast stations are expressly declared not to be common carriers. These facts, however, in no way impinge upon the duty of each station licensee to be sensitive to the problems of public concern in the community *and to make sufficient time available, on a nondiscriminatory basis, for full discussion thereof, without any type of censorship which would undertake to impose the views of the licensee upon the material to be broadcast.* The spirit of the [Act] requires [broadcasting] to be an instrument of free speech, subject only to the general statutory provisions imposing upon the licensee the responsibility of operating its station in the public interest.[241]

It is difficult to conceive why a majority of the Federal Communications Commission now finds this interpretation of section 3(h) of the 1934 Communications Act to be unpersuasive.

Second, it seems clear, at least from the portion of the opinion quoted above, that Congress did not intend to confer a power on licensees that would permit them to reject advertisements merely because they are noncommercial or concerned with controversial issues.[242] Rather, it would appear that Congress' sole motive in enacting section 3(h) was to ensure that the detailed and complicated "Common Carrier" provisions contained in Title II of the 1934 Act would be inapplicable to the realm of broadcasting. *In Office of Communication of the United Church of Christ v. FCC*,[243] the circuit court for the District of Columbia arguably underscored this view:

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[241] *Id.* at 517-18 (emphasis added).

[242] The courts have also rejected a literal reading of section 3(h). *See, e.g.*, Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966).

In Local 880, Retail Store Employees Union v. FCC, No. 22,605 (D.C. Cir., Oct. 27, 1970), the court dealt briefly with the Commission's reliance on McIntire v. William Penn Broadcasting Co., 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), a case often cited for the proposition that section 3(h) permits broadcasters to reject all tenders of spot announcements or programming. The court remarked:

> [T]he Commission further held that "WERO's refusal to accept additional ads from Local 880 . . . was, for the reasons advanced by the Station, within the proper limits of its discretion," citing *McIntire v. William Penn* . . . . Since *McIntire* merely held that regulation of program content was within the province of the Commission rather than the district courts, the citation can hardly be regarded as illuminating.

No. 22,605 at 15 n.49.

[243] 359 F.2d 994 (D.C. Cir. 1966).

> The argument that a broadcaster is not a public utility is beside the point. True it is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or an automobile agency.[244]

Since granting groups who wish to purchase airtime a right of reasonable access would not only be consistent with the principles enunciated by the Commission itself in *United Broadcasting*, but would in no way bring Title II's "Common Carrier" provisions into play, it is difficult to perceive how granting such groups a reasonable right of access would "be chaotic" or bring about a "wholly different broadcasting scheme" than that envisioned by Congress. Moreover, under this scheme a licensee would *not* be required to accept every noncommercial advertiser seeking to purchase airtime. As previously noted, there are many ways in which broadcast licensees could allocate their "commercial" time to grant noncommercial advertisers a reasonable right of access without accepting everyone who seeks airtime.[245] "[C]ompetent management should be able to meet such problems in the public interest . . . ." [246]

A third flaw in the majority's reasoning is that the Commission itself on several occasions has acted to limit licensee discretion in accepting or rejecting an individual's request to use broadcast facilities. For example, in *Letter to Nicholas Zapple*[247] the Commission ruled that when a spokesman for a political candidate uses a broadcaster's facilities, the licensee, even though the equal time requirements of section 315(a) of the Communications Act are inapplicable, may not refuse the opposing candidate's request for an equal opportunity to make his views known. On another occasion the Commission ruled that under certain circumstances the fairness doctrine requires a broadcast licensee to broadcast the statements of a particular person concerning a particular issue, where "[t]here is a clear and appropriate spokesman to present the other side of the attack issue—the person or group attacked." [248] At the very least, these rulings by the Commission should be viewed as standing for the

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244 *Id.* at 1003.

245 See text at note 233 *supra*.

246 United Broadcasting Co. (WHKC), 10 F.C.C. 515, 518 (1945).

247 No. 70-598 (F.C.C., June 3, 1970).

248 Amendment of Part 73 of the Rules Relating to Procedures in the Event of a Personal Attack, 12 F.C.C.2d 250, 253 (1968) (amendment made to the personal attack doctrine at the insistence of the networks to exclude its application from bona fide news, news interviews, on the spot coverage of news events, including commentary and analysis).

proposition that section 3(h) of the Act is not violated when a licensee is required to accept programming offered by a specific person.

Finally, the substantive provisions of section 3(h) must be construed in a manner consistent with both the first amendment and the "public interest" criterion of the 1934 Act; this the majority in *Business Executives* and *Democratic National Committee* failed to do. A "common carrier" is generally regarded as a business entity that must accept all customers without hesitation, at rates that are usually established or approved by a public utilities commission. The telephone company is the most familiar example of a "common carrier." It cannot refuse to install a telephone upon request, and its rates are carefully regulated by a public agency. As previously indicated, however, an access for purchase system would not require a licensee to accept *all* proferred spot announcements or tenders of programming, nor would such a scheme limit the rates that broadcasters may charge for the use of their frequencies. To this extent, then, a system of access-for-purchase would be perfectly consistent with the common carrier concept embodied in section 3(h) of the 1934 Act. Thus a finding that either the first amendment or the public interest standard requires licensees to accept a reasonable amount of political programming would not have the effect of transforming them into common carriers.

Conclusion

The questions presented in *Business Executives* and *Democratic National Committee* have implications far beyond the realm of speech. In a real sense the consequences of the Commission's action in these cases pose a serious challenge to our system of checks and balances, the separation of governmental powers. The President, for instance, is customarily granted direct, immediate, and vivid access to more than sixty million television homes on all three networks during prime evening time. Yet groups representing portions of the voting public, such as BEM, or even national party organizations such as the DNC, have been denied the opportunity to purchase time to reply to the President. The constitutional dilemma presented by the Commission's refusal is no less severe than that which would arise if, by some bizarre turn of events, the President but not the Congress gained access to computers, telephones, telegraphs, typewriters, printing presses and Xerox machines. Our tri-partite scheme of Government will suffer stress if the legislative

branch and their electors, the people, are denied a right of access to the mass media, while the President receives it freely.

A system of access for purchase, although far from perfect, offers some promise for correcting the imbalances that now inhere in the broadcast system. And unlike the fairness doctrine, which often imposes a duty on the broadcasting industry to make time available to individuals or groups free of charge,[249] a scheme of access for purchase would pay its own way. Furthermore, even if broadcast licensees were required to make a certain amount of their normal programming time available for purchase, the bulk of all newscasts, documentary, entertainment, and other normal programming would not be affected. Such a scheme could only have the effect of "opening up" the forum of the air to the fresh breeze of dissent.

Unlike a system structured by the fairness doctrine, a system of access for purchase would be self-enforcing. No governmental agency would be called upon in the first instance to determine whether a particular issue is controversial or a matter of vital public concern and, subsequently, to decide whether the licensee or a particular individual should present the issue to the public. Instead, individuals or groups possessing the necessary funds would determine for themselves which issues are of public importance and who the spokesman will be. In this way the public would be informed immediately of issues of vital public concern, avoiding thereby the many years of delay involved in a fairness doctrine controversy. And, unlike our present system of broadcasting, an access for purchase system would ensure that the views reaching the public would not be molded by the consensus committees of the corporate broadcasting establishment.

There are some who vigorously object to this scheme. They take the position, as did the majority in *Business Executives* and *Democratic National Party*, that a right of access for purchase would permit the agenda of national debate to be set by the wealthy. But this is presently the case. Most television programming already consists of format entertainment, carefully designed by the merchandisers of our land to market the merchandise they wish to peddle to the unsuspecting public. Further to the extent that a station or network elects to provide programming that offends large, influential corporations, the pressure of financial censorship is brought to bear.[250]

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[249] *See* Cullman Broadcasting Co., 40 F.C.C. 576 (1963).

[250] *See generally* Johnson, *Freedom to Create: The Implications of Anti Trust Policy*

In contrast, a system of access for purchase would offer the possibility of providing concerned members of the public with at least a small portion of a licensee's broadcast day. Such a system would ensure that some of the viewpoints broadcast over the electronic media would originate from the public itself, from individuals in all walks of life, holding various views and persuasions. If this modest degree of profitable public participation is anathema to the broadcasters, the very fact of their opposition should warn the country that the dangerous and unrestrained power possessed by the broadcast industry is even greater than we had imagined.

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for Television Programming Content, 8 OSGOODE HALL L.J. 11 (1970); Johnson, *Public Channels & Private Censors*, THE NATION, Mar. 23, 1970, at 329.