NEW YORK LAW SCHOOL

digitalcommons.nyls.edu

Faculty Scholarship

Articles & Chapters

1969

Federal Communications Commission's Fairness Regulations a First StepTowards Creation of a Right of Access to the Mass Media

Michael Botein
New York Law School, michael.botein@nyls.edu

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters

Part of the Communications Law Commons, and the Constitutional Law Commons

Recommended Citation
54 Cornell L. Rev. 294 (1968-1969)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

THE FEDERAL COMMUNICATIONS COMMISSION'S FAIRNESS REGULATIONS: A FIRST STEP TOWARDS CREATION OF A RIGHT OF ACCESS TO THE MASS MEDIA

Broadcasters whose facilities are used to express one point of view have traditionally been required to provide reply time to the opposing point of view.[1] Recently, the Federal Communications Commission codified two aspects of this traditional "fairness doctrine"—the requirements of reply time to both personal attacks and editorial endorsements.[2] A current challenge to these new regulations raises a compelling

---

1 The Federal Communications Commission's predecessor, the Federal Radio Commission, tried to discourage what it called "propaganda stations." *See* Great Lakes Broadcasting Co., No. 4900, FEDERAL RADIO COMM'N, THIRD ANNUAL REPORT 32, 34-35 (1929).

The FCC's "fairness doctrine" was first crystallized in Editorializing by Broadcast Licensees, No. 8516, 14 Fed. Reg. 3055 (1949) [hereinafter cited as Editorializing Report]. The fairness doctrine is different from the equal time provisions of the Communications Act of 1934, § 315, 47 U.S.C. § 315 (1964), which apply only to appearances by "legally qualified" candidates.

2 47 C.F.R. § 73.123 (1968), *as amended*, 33 Fed. Reg. 5364 (1968):

Personal attacks; political editorials.

> (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.
>
> (b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public fignres; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidate in the campaign; and (3) to bona fide newscasts, bona fide news interviews and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).
>
> (c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

The personal attack doctrine was first promulgated in a series of proceedings in 1962.

first amendment question. Are the regulations the unreasonable inhibition on free speech which the Seventh Circuit found them to be in *Radio Television News Directors Association v. United States;*[3] or are they instead the first step towards the creation of a right of access to the mass media? The courts should reevaluate the fairness doctrine and emphasize its underlying purpose as a step towards recoguition of true first amendment freedom.

I

Economic Motives for a Constitutional Challenge

Since both the new regulations and the fairness doctrine require reply time only after a broadcaster has made or countenanced an initial statement,[4] the major differences between the traditional doctrine and the regulations are in procedure, sanctions, and perhaps psychology. Under the doctrine, the mechanics of offering reply time were discretionary with the broadcaster; the regulations, however, set definite standards. More significantly, the Commission formerly could enforce the doctrine only by the cumbersome and extreme sanctions of revoking or refusing to renew a license; neither was ever done.[5] Under the new

Times-Mirror Broadcasting Co., 24 P & F Radio Reg. 404 (1962); Billings Broadcasting Co., 23 P & F Radio Reg. 951 (1962); Clayton W. Mapoles, 23 P & F Radio Reg. 586 (1962). It was developed more fully in Stations' Responsibilities Under Fairness Doctrine as to Controversial Issue Programming, 28 Fed. Reg. 7962 (1963). The editorial endorsement section stems directly from the Editorializing Report.

3 Radio Telev. News Dir. Ass'n v. United States, 400 F.2d 1002 (7th Cir. 1968), *petition for cert. filed,* 37 U.S.L.W. 3185 (U.S. Nov. 19, 1968) (No. 717) [hereinafter cited as RTNDA v. United States]. The petitioners in the two companion actions were the National Broadcasting Co. and the Columbia Broadcasting System. Petitioners attempted, by the extraordinary means of certiorari before the judgment of the Seventh Circuit, to have their actions set down for argument with Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967), *cert. granted,* 389 U.S. 968 (1967) (No. 600, 1967 Term; renumbered No. 2, 1968 Term, 37 U.S.L.W. 3001 (1968)), which challenged the prior personal attack doctrine on first amendment grounds. Their petition was denied, 390 U.S. 922 (1968), but the *Red Lion* case was stayed until decision by the Seventh Circuit. 390 U.S. 916 (1968).

4 Although the Commission has sometimes intimated that a licensee has a duty to initiate debate, Editorializing Report at 3057, a licensee can avoid controversy without sanction. Affirmative action is required only after the broadcaster has initially taken a position. WSOC Broadcasting Co., 17 P & F Radio Reg. 548 (1958); Jefferson Std. Broadcasting Co., 17 P & F Radio Reg. 339 (1958); Alabama Broadcasting System, Inc., 17 P & F Radio Reg. 273 (1958). A failure to handle any controversial subjects might, of course, be taken into consideration on application for renewal. *See* note 56 *infra.*

5 Two Commissioners recently commented that "the only way in which members of the public can prevent renewal of an unworthy station's license is to steal the document from the wall of the station's studio in the dead of night . . . ." Lamar Life Broadcasting Co.,

regulations, however, more flexible statutory sanctions are applicable[6] —perhaps indicating a real intent to enforce the regulations.

Although the regulations promote public information and fairness in controversial issues, they pose an economic threat to the industry. Slightly more than a month before promulgation of the regulations, the Commission held that the doctrine required reply time to cigarette commercials.[7] The spectre of Commission codification of the cigarette ruling, its extension to other types of advertising, and its vigorous enforcement must have greatly disturbed both broadcasters and advertising men.

Broadcasters, both individually and in concert, have traditionally avoided controversial programming because sponsors are hesitant to become even subliminally associated with opinions disagreeable to potential purchasers.[8] In 1939, for example, a convention of broadcasters resolved to restrict themselves in the broadcast of controversial material.[9] And when the Commission, two years later, handed down a blanket prohibition on radio editorializing,[10] broadcasters were silent; during the eight years that the ruling was in effect, it was never challenged.[11]

---

13 P & F RADIO REG. 2d 769, 817 (1968) (Comm'rs Cox and Johnson, dissenting). Shortly after the *Lamar Life* decision, and perhaps as a sop to the critics of that decision, the Commission began a rule-making procedure relating to racial discrimination by licensees. Nondiscrimination in Employment Practices of Broadcast Licensees, 33 Fed. Reg. 9960 (1968). A case which may represent a break with this tradition of inaction, however, is *WXUR*, which was designated for hearing in Brandywine-Mainline Radio, Inc., 9 P & F RADIO REG. 2d 126 (1967). In that case, unlike the *Lamar Life* case, the Broadcast Bureau has recommended that the Commission refuse to renew the station's license. *See also* Barron, *The Federal Communications Commission's Fairness Doctrine: An Evaluation*, 30 GEO. WASH. L. REV. 1, 19-20 (1961). The Commission's ability to resist political pressure may be questionable. *See* Note, *Regulation of Program Content By the Federal Communications Commission*, 77 HARV. L. REV. 701, 716 (1964).

Perhaps the clearest indication that the Commission has been less than effective in enforcing the fairness doctrine is that broadcasters themselves have never been particularly disturbed over the doctrine. *Hearings on H.R. 7072, 7550, 7612 Before the House Comm. On Interstate and Foreign Commerce*, 88th Cong., 1st Sess. 195-96, 263-64 (1963) (Testimony of D. Kops, Nat'l Ass'n of Broadcasters, and F. Stanton, CBS).

6 The sanctions include cease and desist orders, criminal fines, and civil forfeitures. 47 U.S.C. §§ 312(b), 502, 503 (1964).

7 WCBS-TV, 9 P & F RADIO REG. 2d 1423, 1425 (1967). This short ruling was reaffirmed in WCBS-TV, 11 P & F RADIO REG. 2d 1901 (1967).

8 N. MINOW, EQUAL TIME: THE PRIVATE BROADCASTER AND THE PUBLIC INTEREST 74-76 (L. Laurent ed. 1964). Ironically, Mr. Minow is counsel for CBS in the RTNDA case.

9 L. WHITE, THE AMERICAN RADIO 74-76, 245-51 (1948).

10 Mayflower Broadcasting Co., 8 F.C.C. 333 (1941).

11 But was it constitutional? The broadcasters were not disposed to find out. After all, WAAB had been renewed, and that was the main thing. Why risk losing your license just to get a case to the Supreme Court?

L. WHITE, *supra* note 9, at 177.

Thus broadcasters actually look to the first amendment as a guarantee of economic rather than civil rights. When a potential financial interest is at stake, however, they are quick to raise the free speech standard, portraying themselves as earnest educators of the public and the Commission as a bureaucratic and malicious censor.

Unfortunately, the Seventh Circuit in *News Directors Association* accepted this caricature. With a narrow outlook that must have enraged some members of the Commission, the court sniped: "Apparently the Commission views programming which takes sides on a given issue to be somehow improper . . . ."[12] It seemed, in fact, sympathetic to the broadcasters' protest that "an opportunity to reply might result in the public airing of obnoxious or extreme views."[13]

II

Do the Regulations Violate the First Amendment?

There are two approaches to the fallacious argument that broadcasting enjoys only limited first amendment protection.[14] The first—and the only one considered by the Seventh Circuit—is based upon some unclear comments by the Supreme Court that regulation is proper because the number of frequencies is limited.[15] As the Seventh Circuit

12 400 F.2d at 1014.

13 *Id.*

14 There is also a simplistic and specious argument that the first amendment does not apply to radio because the Supreme Court has never directly so held. In National Broadcasting Co. v. United States, 319 U.S. 190, 226-27 (1943), however, the Court held that the Commission's chain broadcasting regulations did not violate the first amendment—which would seem to imply that the amendment applied to radio. The District of Columbia Circuit seemed to read the *National Broadcasting* case this way in Red Lion Broadcasting Co. v. FCC, 381 F.2d 908, 923 (1967), *cert. granted*, 389 U.S. 968 (1967) (No. 600, 1967 Term; renumbered No. 2, 1968 Term, 37 U.S.L.W. 3001 (1968)). *See also* United States v. Paramount Pictures, 334 U.S. 131, 166 (1948) (dictum).

The Communications Act of 1934, § 326, 47 U.S.C. § 326 (1964), requires the Commission not to "interfere with the right of free speech by means of radio communication." This statute is probably contiguous with the first amendment and, accordingly, any decision that the regulations violate the first amendment could be based on the statute, thereby avoiding the whole constitutional issue.

15 In National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943), the Court said, "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." The language of the Court might indicate that it was endorsing only the naked requirement of a license. It ended its discussion by saying, "The right of free speech does not include, however, the right to use the facilities of radio without a license." *Id.* at 227. Nevertheless, the case did uphold much more than mere licensing. The Court approved a very complex set of regulations which, *inter alia*, limited the networks' ability to take away local station autonomy, *id.* at 200, 202, 204, 206, and which

correctly pointed out, this "scarcity doctrine" is open to a dual challenge.[16] First, as a matter of law, the dicta that gave birth to it did not delineate the degree of allowable regulation. Second, the number of usable frequencies has mushroomed in recent years, making possible at least an FM or UHF allocation for anyone able to buy the basic equipment.[17]

A second possible basis for denying or limiting first amendment protection for broadcasting is that free speech guarantees do not attach when the primary purpose of communication is profit.[18] Arguably, the advertisers' infiltration of broadcasting places the whole industry in this category. But the "commercial purpose" doctrine has other limitations. First, the news and discussion programs on which personal attacks and editorial endorsements are most likely to take place are often run at a loss. Second, it is doubtful that the present Supreme Court would find motive so determinative of first amendment rights. The Court's recent emphasis on public issues shows that it is interested in whether speech adds to the public debate and not in its originator's state of mind.[19]

---

accordingly affected the actual output of local stations. Thus *National Broadcasting* must be read as authorizing at least limited program control by the Commission.

It must be remembered that the Court has approved affirmative antitrust action which probably had some effect upon speech. *Cf.* Associated Press v. United States, 326 U.S. 1 (1945). Almost directly in point with the fairness regulations is Lorain Journal Co. v. United States, 342 U.S. 143 (1951). There the Court upheld an antitrust decree which ordered the defendant newspaper to accept advertisements from merchants who also advertised on a local radio station. The Court relied upon the *Associated Press* case. *Id.* at 155-56. Thus the Seventh Circuit's statement that the regulations impose burdens "which would be in flat violation of the first amendment if applied to newspaper publishers," 400 F.2d at 1018, is highly questionable. It should also be noted that some commentators propose applying fairness-like requirements to the press. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Note, *A Fairness Doctrine For The Press*, 40 N.D.L. REV. 317 (1964).

16 400 F.2d at 1019.

17 *Id.*

Limitations on VHF-TV allocations may also be seen as solely economic, since community antenna television's phenomenal growth makes it possible for any entrepreneur to set himself up in the television business—albeit by means of a cable rather than the airwaves.

This raises the thorny question of whether the scarcity doctrine applies to broadcasting as a whole, or only to the parts of it in which there is an existing scarcity of frequencies. If the latter is the case, the anomalous result of holding that the FM but not the AM part of a simultaneous AM-FM operation is protected by the first amendment may be logically demanded.

18 Valentine v. Chrestensen, 316 U.S. 52 (1942). New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964), indicates that the doctrine is still viable today.

19 *See* Time, Inc. v. Hill, 385 U.S. 374, 388 (1967); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

In considering the merits of the broadcasters' first amendment argument, the Seventh Circuit used an "unreasonable burden" test[20] which it derived from *New York Times Co. v. Sullivan*[21] and later cases. Although refusing to pass on the constitutionality of the traditional fairness doctrine,[22] the court found that the regulations constituted a greater and more constitutionally impermissible inhibition on free speech than did the doctrine.[23] It decided first that the regulations' requirement of specific procedures for notification and granting of reply time limited licensee discretion more than did the traditional doctrine.[24] This position is questionable because the actual differences between the doctrine and the regulations are only in procedure and sanction. There is no significant change in the programs covered, and the decision whether, for example, a given broadcast represents an editorial endorsement remains within the initial judgment of the licensee. His discretion is limited only in his actions after a positive judgment. Prior to the regulations, questionable conduct would not cause concern because the only available sanction was too severe for the conduct. With the regulations, however, the broadcaster need only wrestle in good faith with the question.[25]

More significantly, the Seventh Circuit objected on two grounds to the statutory sanctions by which the Commission could enforce the regulations:[26] (*1*) that the new, wider range of sanctions made punishment more severe; and (*2*) that the sanctions could be imposed after a

---

20 400 F.2d at 1012.

21 376 U.S. 254 (1964). The regulations bear some resemblance to the statute involved in *New York Times*. The Alabama libel statute there involved conditioned the plaintiff's right to recover punitive damages upon the defendant's refusal to retract; under the regulations, a broadcaster's failure or refusal to offer to provide reply time exposes him to the sanctions of the Commission. This similarity, however, is somewhat misleading. *New York Times* involved a staggering punitive damages award, and the most amateur judicial-entrail reader can fairly speculate that if the *Times* had retracted and if plaintiff Sullivan had recovered only nominal compensatory damages the Court would not have viewed the Alabama judgment as such a massive inhibition on free speech.

22 400 F.2d at 1017-18.

23 *Id.* at 1012-13.

24 *Id.*

25 Amendment of Part 73 of the Rules, No. 16574, 8 F.C.C.2d 721 (1967). The Seventh Circuit seemed to think that the good faith immunity made the rules "broader than necessary," since it made them applicable to all licensees while punishing only those who acted in bad faith. 400 F.2d at 1021. First, this seems to be a fairly general principle of regulatory law. Second, the traditional fairness doctrine carries such an immunity, without running afoul of any constitutional bar. Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415, 10416 (1964).

26 400 F.2d at 1013.

single objectionable broadcast. But when the only sanction, failure to renew a license, amounted to economic elimination, the offenses involved must necessarily have been most grave. With the introduction of limited sanctions, *e.g.*, fines of up to one thousand dollars per day of violation,[27] lesser misconduct can be punished. It is difficult to imagine fines for violation of the regulations giving rise to the "virtually unlimited" liability which the Supreme Court envisaged in *New York Times*.[28] Moreover, the Commission has always had the power to revoke a license *during the term of a license* for failure to comply with the fairness doctrine.[29] As a practical matter, of course, the promulgation of the regulations demonstrates the Commission's desire for sanctions which it can effectively enforce. But it is anomalous to rest the constitutionality of a regulation on the psychology underlying its administrative creation.

Finally, the Court held that the regulations were too vague for licensees to follow effectively.[30] Although this decision involves an element of judicial fact finding, it is also questionable. First, the regulations can be construed in the light of the many decisions under the traditional fairness doctrine.[31] Second, that they were promulgated for

---

27 Communications Act of 1934, §§ 502, 503, 47 U.S.C. §§ 502, 503 (1964).

28 376 U.S. at 279.

29 The Communications Act of 1934, § 312(a)(2), 47 U.S.C. § 312(a)(2) (1964), empowers the Commission to revoke a license on any grounds for which it would deny a license. It seems reasonable, therefore, that any conduct which would justify a refusal to renew a license would also justify license revocation.

It may, of course, be argued that revocation of a license for such a limited course of conduct would be so harsh as to violate the due process clause of the fifth amendment. The Supreme Court has, however, never approached the question. And in the somewhat related area of the severity of fines it has more or less given the states a free hand. *See* Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909).

30 400 F.2d at 1014-17. The court did not, however, go so far as to hold the rules void for vagueness. Rather, it rested its argument on the self-censoring potential of vague laws in first amendment areas.

It would be difficult to make out a case that the regulations are void for vagueness; they are at least reasonably comprehensible and a violation does not lead to criminal sanctions. *See* Boyce Motor Lines v. United States, 342 U.S. 337 (1951). The court noted that while any vague laws are unconstitutional, those involving first amendment rights receive special scrutiny. 400 F.2d at 1011, *citing* Ashton v. Kentucky, 384 U.S. 195, 200 (1966). Arguably the vagueness doctrine applies to administrative regulations imposing non-criminal liability because it applies to statutes imposing such liability. Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 123 (1967). Otherwse it does not apply at all.

31 Cases cited note 2 *supra*. While the administrative agency cases are hardly binding on the Seventh Circuit, they must contain some lessons for both broadcasters and their counsel. Moreover, so long as the fairness doctrine is not uprooted by the Supreme Court, cases applying its substance will be directly relevant to these successor regulations.

the explicit purpose of clarifying the traditional fairness doctrine[32] gives rise to at least an inference of definiteness. Third, although the Seventh Circuit attempted to demonstrate possible theoretical ambiguities in the regulations, it did not suggest how they could be made more definite. In fact, attempting to break down the word "character," for example, into various categories—*e.g.*, treatment of family, generosity, sexual attitudes—would not appreciably increase the word's definiteness. More seriously, it would create loopholes which would vitiate the whole purpose of the regulations. The complex and continually changing nature of expression seems to make any such attempt inherently impossible. Finally, the Court's assertion that a licensee "will engage in [more] rigorous self-censorship . . . than if he were subject only to the Fairness Doctrine"[33] seems completely wrong. Any marginal increase in self-censorship will be a function *not* of the substance of the regulations but rather of the sanctions for noncompliance. In other words, although the Seventh Circuit explicitly eschewed the question of the constitutionality of the fairness doctrine, it effectively held the concept of fairness-plus-sanction unconstitutional. No one was especially disturbed about a fairness doctrine which carried an overkill punishment, but when the same rules were mated with realistic punishments, the rules themselves suddenly became a first amendment threat.

Perhaps the most striking aspect of the opinion is the manner in which it offers up its reasoning for a sacrificial reversal by the Supreme Court. Juxtaposed with the holding of unconstitutionality based on vagueness, the burden on the licensee, and the potential for censorship, is the afterthought that the rules could be sustained on a showing of both public necessity and inability to draw "less restrictive and oppressive" regulations.[34] Although the Seventh Circuit did not believe that the Commission had demonstrated the existence of either factor, this appears to be a reversible conclusion of law. The court's confusion becomes apparent when it demands that the Commission demonstrate "a significant public interest in the attainment of fairness in broadcasting,"[35] but finds that there is no evidence of the "existence of widespread noncompliance."[36] The court, in condemning the regulations, confused the existence of a legitimate public interest with its determina-

32 32 Fed. Reg. 10,305 (1968).

33 400 F.2d at 1016 (footnote omitted).

34 *Id.* at 1020.

35 *Id.*

36 *Id.* at 1021.

tion that the regulations were unnecessary; public interest and necessity can exist quite independently of each other.

In fact, the regulations advance first amendment goals as freshly defined by *New York Times* and later cases emphasizing the public's need to hear debate on public issues.[37] The regulations, without forcing the broadcaster to initiate discussion, require him at least to give reply time to an opposing point of view—even if that view is "obnoxious or extreme." And it was a forceful reply, rather than a suit for damages, which the Supreme Court in *New York Times* endorsed as the best way to assuage the sting of a damaging statement.[38] Further, under *New York Times* a defendant can be liable only in the presence of actual malice; under the regulations, a licensee will be sanctioned only in the absence of good faith. In neither case is a good faith action penalized. Thus the Seventh Circuit's conclusion that the regulations represent an unreasonable burden under *New York Times* appears to be erroneous.

III

Does the First Amendment Require Regulation of Access to Broadcast Media?

The first argument in favor of constitutionally mandated regulations is that the government has an affirmative duty to correct a broadcaster's discrimination between competing points of views because such discrimination is imputable to the government. There are three closely-related bases for making such an imputation: that the sovereign owns the airwaves;[39] that broadcasting is a governmental activity analogous to the Post Office;[40] and that the granting of a license constitutes gov-

---

[37] By their very terms the regulations operate only in the context of public issues. 47 C.F.R. § 73.123(a) (1968) is restricted to "controversial issues," and § 73.123(c) applies only to elections—which are certainly public issues.

[38] 376 U.S. at 304-05. Although the broadcasters claimed that the regulations were as inhibiting as the absolute ban on newspaper editorials which the Supreme Court struck down in Mills v. Alabama, 384 U.S. 214 (1966), Brief for Petitioner RTNDA at 31, RTNDA v. United States, they provide precisely that which the Court found to be the "fatal flaw" of the *Mills* statute—a right of reply. 384 U.S. at 220.

[39] *See* FCC v. Sanders Bros. Radio Sta., 309 U.S. 470, 475 (1940). *See also* Communications Act of 1934, §§ 301, 309(h), 47 U.S.C. §§ 301, 309(h) (1964). The recently-passed Public Broadcasting Act of 1967, 47 U.S.C.A. § 399 (Supp. 1968), forbids editorializing on publicly-subsidized, noncommercial, educational stations.

[40] In Hannegan v. Esquire, Inc., 327 U.S. 146 (1946), and Public Clearing House v. Coyne, 194 U.S. 497 (1904) (dictum), the Court said that the Post Office could not deny mailing privileges to disapproved literature. It is interesting to note that in *Esquire*

ernment action inhering in private acts of the licensee.[41] All three theories support the same conclusion—that radio and television stations operate only by the grace of Congress.

A more realistic, albeit more revolutionary, approach is that the first amendment requires a right of access for, or, correlatively, a duty to present, all points of view on public issues.[42] The rationale behind the first amendment is that the people should be exposed to the full spectrum of opinion on the important issues of the day.[43] In the past, freedom from government oppression may have been enough to guarantee this exposure,[44] but something more is needed today. The mass media have a mass orientation.[45] Consequently, they indulge in a form of mercenary self-censorship, that is probably as thorough a prior restraint as a bishop's imprimatur.[46] In this situation, greater protection for the mass media would more firmly entrench an unacceptable status quo.[47] What is needed, instead of any absolute right of free speech, is an affirmative right of access to the media.

Thus far, the Supreme Court has not approached the issue.[48] But *New York Times* and later cases show the Court's increasing concern

Justice Frankfurter concurred in order to point out the possible affirmative constitutional mandate in the Court's decision. 327 U.S. at 159.

41 Justice Douglas has provided a few lone comments to the effect that licensing an activity cloaks it with state action. Reitman v. Mulkey, 387 U.S. 369, 385 (1967) (concurring); Lombard v. Louisiana, 373 U.S. 267, 281-83 (1963) (concurring); Garner v. Louisiana, 368 U.S. 157, 182-84 (1961) (concurring).

42 For two groundbreaking and thorough studies of this proposition, see 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 471-719 (1947); Barron, *Access To The Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

43 XENOPHON: Would there be any objection to a single point of view if it really was the truth?

MILTON: Do you mean, would we object to God's owning all the newspapers and radio stations?

PLATO: According to the doctrine of free will, even this would be bad.

2 CHAFEE, *supra* note 42, at 596. *Cf.* Terminiello v. Chicago, 337 U.S. 1 (1949).

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

Id. at 4.

44 2 CHAFEE, *supra* note 42, at 473.

45 Barron, *supra* note 42, at 1646.

46 *See* pp. 296-97 *supra*.

47 Barron, *supra* note 42, at 1651-52.

48 Except, of course, insofar as it has held that government action insuring access is not itself violative of the first amendment. *See* note 15 *supra*. The District of Columbia Circuit seemed to split over this issue in Red Lion Broadcasting Co. v. FCC, 381 F.2d 908, 930 (1967), *cert. granted*, 389 U.S. 968 (1967) (No. 600, 1967 Term; renumbered No. 2, 1968 Term, 37 U.S.L.W. 3001 (1968)).

with the public's right to hear debate on controversial issues.[49] With the public issue concept as a starting point, it is a politically giant, but doctrinally short, step to the conclusion that the public's right to hear is meaningless unless implemented by a right of access.[50]

IV

Beyond The Fairness Doctrine

Although the FCC was the first governmental agency to take action toward implementing a right of access,[51] it has gone only part way—initial action by the broadcaster is still necessary to activate the fairness doctrine. First amendment rights, however, should not be left to the discretion of businessmen. The present regulations' standard of an initial personal attack or editorial should be replaced by a constitutional standard of public issue. Instead of being obligated only to provide reply time, broadcasters should be required to seek out and present differing positions on public issues. Such a requirement is, admittedly, nebulous. What is a public issue? What efforts to seek out differing opinions are required? Who shall present these opinions? How much time must be provided for given issues and opinions? When must the time be provided?

As in the traditional fairness doctrine, however, some uncertainty is necessary because of the many different factual situations that will arise. And also, as in the fairness doctrine, both administrative convenience and factual complexity require that great weight be placed upon the good faith efforts of licensees. Because licensees may make good faith mistakes, an access requirement should not be codified and enforced against individual failures to present debate.[52] Rather, any consistent failure by the licensee to present debate should be determined

---

49 In Time, Inc. v. Hill, 385 U.S. 374, 388 (1967), the Court seemed to emphasize the *need* of the public to hear debate on certain issues. That the Court today is oriented more towards the public's right to hear than the individual's right to say something is indicated by its seeming adoption of the Meiklejohn public issue concept. *See* Brennan, *supra* note 19. *See also* Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

50 Access to media may be in the nature of a "penumbral right," since without it the goal of the first amendment cannot be completely fulfilled. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

51 The Commission has long recognized the right of the public to be informed: "It is this right of the public to be informed . . . which is the foundation stone of the American system of broadcasting." Editorializing Report, *supra* note 1, at 3056.

52 The Commission might, of course, codify an access requirement but enforce the statutory sanctions only on the basis of an extended course of conduct.

on renewal after an examination of his whole course of conduct during the license period.[53]

The Supreme Court has made vague motions towards a first amendment right of access, and commentators have openly advocated it. The Commission, however, could implement an access right without finding a constitutional mandate. The Communications Act requires the Commission to take the public interest into account when renewing licenses,[54] and the Commission has long held that a licensee's service to his community is an integral factor in such a determination.[55] Thus, an examination of whether the broadcaster has presented the full scope of opinion on current public issues would merely entail a more vigorous application of present policies. Arguably, such a requirement leaves too much to the whim of the FCC,[56] but the Commission's action is reviewable. The power of the mass media carries a correlative responsibility. Unfortunately, mercenary self-censorship has led to an abdication of that responsibility. When the private sector turns censor, it is time to trust the public.

Michael Botein

---

53 The Commission appears divided as to whether a licensee's conduct after his renewal application has been designated for hearing is relevant to the renewal determination. Lamar Life Broadcasting Co., 13 P & F Radio Reg. 2d 769 (1968).

54 47 U.S.C. §§ 307(a), 309 (1964).

55 Network Programming Inquiry, 25 Fed. Reg. 7291, 7295 (1960).

56 The Seventh Circuit reflected a fear that the Commission might, through subjective interpretation of the regulations, censor those views with which it did not agree. 400 F.2d at 1010. Though such conduct is, of course, within the realm of possibility, it would be an indirect means of censorship—and no greater than that accorded to individual judges who administer the *New York Times* rule. Both can be reviewed if they abuse their power.

Furthermore, the Commission has always shied away from looking to the merits of program content. In Station KTYM, 9 P & F Radio Reg. 2d 271 (1967), the Commission refused to deny a license renewal on the ground of alleged "hate" programs. Its emphasis on good faith also reflects an attempt not to look at program content.