University of Baltimore Law Review

Volume 2
Issue 1 *Winter 1972*

Article 14

1972

Law Review Summaries: Right to Equal Time on the Mass Media

LAW REVIEW SUMMARIES

This section summarizes recent law review articles on a topic chosen for its significance to contemporary controversial issues. Due to recent advances in the electronic media on lifestyles—particularly in this, an election year—this issue will devote itself to a review of recently published law review articles dealing with the broadcasting industry. The opinions expressed in the following summaries are those of the authors of the articles reviewed.

Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972).

This article proposes that television's influence, especially its political influence, on its viewers is greatly overestimated; consequently, recent Federal decisions imposing harsh guidelines on the broadcasting industry concerning the application of the fairness and access doctrines should be carefully limited to prevent discriminatory abuse and economic disaster. While accepting as correct that 95% of all homes in the United States are equipped with televisions, and further, that the average male viewer will spend over 3,000 entire days in his lifetime watching television, the author suggests that television's influence on any particular viewer varies inversely with that viewer's latent and expressed resistance (and other personal attributes), and that viewer resistance to political influence is high.

Concerning the application of the fairness doctrine, the Federal Communications Commission in 1967 enacted a regulation which provided that a licensee must provide free rebuttal time to the opponent of a party which has purchased time to present views on a controversial issue of public importance. These regulations were upheld by the Supreme Court in *Red Lion Broadcasting Co. v. F.C.C.*[1]

While the altruistic motives of those concerned in producing these regulations are not in question, the administrative nightmare which would accompany strict implementation is completely unnecessary inasmuch as television does not have the persuasive impact these individuals have credited it with. To maintain that all or most viewers will be glued to their chairs anxiously awaiting the rebuttal is absurd.

But even the administrative horrors take a back seat when faced with the specter of the possibility of economic disaster. In 1968 the Court of Appeals for the District of Columbia upheld the application of the fairness doctrine to advertisements. Because all advertising places its product in its most favorable light without enumerating its possible deficiencies, the logic of this decision, if strictly applied, could be expanded to justify so many demands for free time as to threaten broadcasting's advertising base, thus signaling economic doom.

---

1. 345 U.S. 367 (1969).

The applicability of the fairness doctrine to advertising should be retained, but in a way that will not jeopardize the very existence of the broadcasting industry. This could be done by formulating clear but flexible guidelines which could be administered by the broadcaster himself, thus putting to rest the present uncertainty in the industry and thereby avoiding unnecessary administrative expense.

The controversy involving the access doctrine is best exemplified by the *Business Executives' Move for Vietnam Peace*[2] decision where the Court of Appeals of the District of Columbia reversed the decision of the FCC. In that case, the broadcaster had refused to accept paid "advertorials" which carried an anti-Vietnam war message to the public. The Court of Appeals held that not only did broadcasting constitute state action, but that a flat ban on all editorial advertising was invalid. The case was remanded with instructions to the FCC to formulate reasonable regulations that would prevent the domination of the airwaves by a few groups or a few viewpoints.

The author feels that the Court has set a dangerous precedent by basing its decision on constitutional rather than statutory (FCC) grounds, thereby severely limiting the flexibility needed in the regulatory scheme which it called for. Also, he has raised the collateral question of whether *printed* publications involve state action. Further, as in the fairness doctrine, the implementation of this access doctrine soon-to-be-formulated raises the probability of another administrative quagmire; the path therefrom being made treacherous by such formidable problems as percentage of prime time for "advertorials", special rates (or even no rates) for indigents, percentage of time for substantial length programming, and percentage of total access time for various minorities.

Johnson and Westen, *A Twentieth-Century Soapbox: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574 (1971).

Federal Communications Commissioner Nicholas Johnson, sensitive to the coercive censorship emanating from private corporations that govern the media, expands his dissenting opinions in two recent Federal Communications Commission decisions[1] that significantly affect applicability of first amendment speech freedoms in the broadcasting sector. In each case the Commission denied the request of a national political organization to purchase radio and television airtime at existing commercial rates for the communication of timely political

---

2. Business Executives' Move for Vietnam Peace, 25 F.C.C.2d 242 (1970), *rev'd*, 450 F.2d 642 (D.D.C. 1971).

1. Democratic Nat'l Comm., 25 F.C.C.2d 216 (1970), *rev'd*, 450 F.2d 642 (D.D.C. 1971); Business Executives' Move for Vietnam Peace, 25 F.C.C.2d 242 (1970), *rev'd*, 450 F.2d 642 (D.D.C. 1971).

speeches. Commissioner Johnson, in essence, argues that broadcast licensees are in fact compelled by the first amendment and by statute to honor the right of access-for-purchase to communicate protected political ideas, and are precluded from regulating the form or substance of such free expression. The Commissioner's analysis is predicated upon the resolution of three issues: First, are first amendment principles applicable to the broadcast media? Second, is the media an "appropriate forum" to guarantee the public the "right of access"? Third, does the 1934 Communications Act[2] impose such a requirement, if indeed the first amendment does not?

The author sustains his affirmative conclusion to the initial issue by reference to the State Action, Self Enforcement, and Public Interest Theories. The first advocates, that where governmental regulation facilitates private activity in such a manner that private conduct becomes action by the state in a constitutional context, then the private sector is constrained by the first amendment. Johnson reasons that the broadcast industry's functions are so integrated with state action that it places its licensees within the ambit of the first amendment, in that the federal government, through the Federal Communications Commission has delegated the state's power over broadcast frequencies to a private user of such public property in the form of a three year license.

Assuming that the "marketplace of ideas" is the mass media in our contemporary society, the Commissioner concludes that under the Self Enforcement Theory, the first amendment, standing alone, prohibits all forms of both governmental and private censorship. He argues that the amendment's underlying purpose is the creation of a "marketplace of ideas" into which all thoughts and forms of expression can freely enter, notwithstanding the nature of title of ownership in the particular forum. Finally, the author contends that licensees are subject to first amendment restraint by virtue of the Public Interest Standard. Since they must conduct their activities in accordance with "public interest, convenience, and necessity"[3] as mandated by the 1934 Communications Act, Congress could not have intended to exclude the prohibitions of the first amendment from these standards.

Resolution of the second issue is contingent on whether the property had traditionally been utilized as a forum for communication, and 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. The Commissioner maintains that the frequencies allocated to radio and television licensees are appropriate forums in that the expression of ideas, whether political, commercial or otherwise, appears to be the broadcast industry's exclusive purpose; there is no doubt that

2. 47 U.S.C. §§ 151-609 (1970), *formerly* Ch. 652, 48 Stat. 1064 (1934).
3. *Id.* at § 303.

the media has "opened up" its frequencies to the general public by making commercial programming time readily accessible to any interested purchasers. The author argues that broadcast licensees, as trustees for the public, do not possess an absolute unrestricted right to monopolize the frequencies, but have only authority to establish "reasonable" restrictions to assure the right of access. Commissioner Johnson examines state and federal court decisions that have resolved controversies involving precisely the same issue at hand (i.e., similar groups seeking to purchase advertising and programming time otherwise available for commerical use) and concludes that precedents have held conclusively that the owner of a facility open to the public could not accept commercial business and at the same time reject all political offers to purchase.

Finally, if there is no constitutional right to access, the alternative consideration is whether Congress has created one. In deciding these two controversial cases, the FCC has effectively ruled that no right of access is granted by the Communications Act of 1934. In his dissent, Johnson contends that the Commission contravened its binding interpretation of the Act in *United Broadcasting Company (WHKC)*[4] in which the majority specifically stated that broadcast licensees are bound to make sufficient time available on a nondiscriminating basis for the discussion of problems of public concern without any form of censorship. FCC decisions subsequent to *United Broadcasting Company* are interpreted by the author as construing the substantive provisions of the Act in a manner intended by Congress and consistent with first amendment criteria.

In his conclusion, the author proposes his recommendations to facilitate implementation of a "system" of access for purchase. Although conceding some deficiencies, he maintains that his scheme offers more promise for resolution of the inherent inequities in the broadcast system than the present personal attack, equal time or fairness doctrines, and he reiterates his note of alarm at the absolute censorial power possessed by the broadcast industry in the absence of such a system.

Houser, *The Fairness Doctrine—An Historical Perspective*, 47 NOTRE DAME LAW, 550 (1972).

The Fairness Doctrine, which was eventually codified in 1949, evolved from a provision of the Radio Act of 1927[1] which delineated the standard to be utilized in the comparative evaluation of competing broadcast aspirants. The passage of this Act was necessitated by the

4. 10 F.C.C. 515 (1945).
1. Radio Act of 1927, ch. 652 § 602(a), 44 Stat. 1162.

enormous growth of the radio industry in the early 1920's coupled with the impotency of existing legislation. Prior to this Act the industry was regulated by the Secretary of Commerce under the authority granted by the Radio Act of 1912[2] which, although granting him licensing authority and other powers, failed to provide enough discretionary power to meet the demands of this early expansionary period. The 1927 version of this Act set up a five member Commission to limit strictly the number of new licenses granted and to ferret out the unworthy among those already holding broadcast licenses by a comparative analysis utilizing "public convenience, interest, or necessity" as a standard.

By 1940 the Commission, with the support of the courts, had established as a general rule that licensees who used the airways to promote the viewpoint of any individual or group without a balanced presentation of ideas was not operating "in the public interest" and, consequently, was subject to remedial action. These decisions, instead of insuring the desired balanced presentation, produced a curious result—the station eliminated all editorializing and discussion of controversial topics thus bypassing the impending sanctions and thoroughly frustrating the Commission in its objective.

To break this stalemate and to clarify its own position, the Commission eventually codified and published what has come to be known as the "Fairness Doctrine." The licensees, as public trustees, had two obligations: (1) to provide adequate coverage of important public issues of interest in the community, and (2) to present both sides of the issues for the public's consideration and acceptance or rejection. The Commission issued no explanatory or concrete guidelines; but, rather, decided to implement the doctrine on a case by case method, which, as could be expected, produced no small amount of confusion and uncertainty in the broadcast industry.

In 1967 an important corollary to the Fairness Doctrine, known as the "Personal Attack Rules" was promulgated by the Federal Communications Commission. These rules provide that if the honesty, integrity or character of an individual or group is attacked, that individual or group must be: (1) notified of the broadcast; (2) sent a script, and (3) offered a reasonable opportunity to respond. These rules immediately produced a challenge by the broadcasters but were upheld by the Supreme Court in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969),[3] which in addition, held that, if necessary, a licensee must make time available to such persons at his own expense in order to fulfill his fairness obligation.

The most current inquiries concerning the applicability of the Fairness

2. Radio Act of 1912, ch. 287, 37 Stat. 302.
3. 395 U.S. 367 (1969).

Doctrine are in the areas of advertising and political presentations. Again, the ad hoc approach of the Federal Communications Commission has not produced consistency.

The Commission held that cigarette advertisements raised a "controversial issue," therefore necessitating a balanced presentation; but then declared that this was a unique decision and refused to extend the decision to cover other advertisements, which on first glance, appear at least as controversial. The Commission's treatment of political presentations and advertisements is even less illuminating. Faced with a myriad of rather unique problems which, if left unsolved, could produce voluminous litigation, the FCC again has refrained from issuing concrete guidelines.

Understandably, the Fairness Doctrine is currently under review; and, while not proposing the ultimate solution, this author is wholly in favor of a major review of the current policy.

Barron, *An Emerging First Amendment Right of Access to the Media?* 37 GEO. WASH. L. REV. 487 (1969).

Differing from the conventional pessimistic perspective of his contemporary "access-oriented" colleagues, the author perceives encouraging signs that an expanded approach to the first amendment is gaining legal momentum and spawning a judicial foundation for the right of access to the mass media. Recent state and federal court decisions have responded more sensitively to an awareness that the "marketplace of ideas" concept of the first amendment cannot effectively guarantee a forum for free expression of ideas in a society which has concentrated control in a few hands through accelerated technological development of the mass media. The existence of this concentration of control compels the simultaneous exercise of an affirmative obligation on the government and the private sector to provide access for ideas in addition to protection of ideas.

This article initially analyzes the significance of two recent New York federal court opinions in support of an affirmative conception of the first amendment. Although both cases discussed resolution of freedom of expression issues arising in New York City subway stations and bus terminals, the court implied that such quasi-public facilities represent a forum similar to that which the streets have traditionally offered for communication of ideas. The author contends that the important and novel impact of the courts' rationale is the judicial recognition that a protesting group has a constitutionally cognizant interest in selecting a forum because that is where the relevant audience is found, not because the forum is the object of the protest. Additional access oriented support appears to have emanated from the Supreme

Court's rationale in *Food Employees Local 590 v. Logan Valley Plaza, Inc.*,[1] 391 U.S. 308 (1968), which sustained informational picketing in a privately owned shopping center. The majority reasoned that the shopping center is the community focal point in suburban America, so that access to its parking lot may be the only indispensable quasi-public facility to insure access to that community.

Concluding that the judiciary now appears on the threshold of expanding the opportunities for access to a more diverse class of forums, the article submits that the test for such access will evolve from the traditional public-or-private determination of the facility to an inquiry into the necessity of access to the forum for the communication at issue. In essence, wherever there are facilities through which large numbers of people can be easily reached there arises a right of access to those forums by groups interested in using them to express political or social ideas. Facilities in the private sector, if dedicated to the public use, would be subject to an identical affirmative obligation to establish a reasonable scheme of access for free communication. The author maintains that the judicial process must consider the printed media along traditional guidelines established by other first amendment problems such as obscenity and libel. The inherent danger of prejudice emanating from government administrators or juries making value judgments as to the substance and form of press access compels resolution by the appellate justices of this country of complex constitutional issues. In contrast, the broadcasting industry appears to require less judicial supervision in view of present legislation. Some affirmative obligations already exist in the statutory mandates of the equal time rule and the fairness doctrine found in the Federal Communications Act, but the author stresses the necessity for a more comprehensive correlation by the FCC between the section 315 responsibilities and the emerging access-oriented approach to the first amendment. Citing the language of section 315 (a) which defines the premise of the fairness doctrine, that broadcast licensees are required ". . . to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance,"[2] the article reasons that this statutory duty represents a mandate to do more than merely provide an opportunity for response once the licensee has decided to give time to a particular view holder. The FCC has interpreted the language as merely giving statutory force to the fairness doctrine, but a broader construction of the directive would justify imposition of an affirmative duty of access for controversial issues. Congress need not assume the task of promulgating new legislation to enforce the public's right of access: the burden falls on the FCC to recognize the contemporary relationship of section 315

1. 391 U.S. 308 (1968).
2. 47 U.S.C. § 315(a) (1970).

responsibilities to basic first amendment objectives, and to utilize the existing structure of broadcast regulations to insure communication of political and controversial issues in the electronic media.

Douberley, *The Free Speech-Free Press Dichotomy: Access to the Press Through Advertising*, 22 FLA. L. REV. 293 (1969).

This article avoids the rhetorical and emotional approach that many "right to access" advocates have employed, and adopts a pragmatic analysis of the free-speech-free-press dichotomy, providing the reader statistical research data to support its thesis. The author assigns responsibility for the development of this first amendment conflict to essentially two significant forces—the judiciary and the newspaper industry itself. On the one hand, the courts are criticized for their traditionally separate and distinct considerations of free speech and free press concepts. Historically, the cases have enforced and expanded freedom of expression rights; yet jurists have continued to augment protection for the press at a pace that has come to place the industry in a position to suppress, legitimately, free expression in the nation's newspapers. The author maintains that the dichotomy could have been resolved in its initial stages, if not altogether avoided, had the judiciary adopted a policy of simultaneous treatment of both concepts, since the press itself is the focal point for dissemination of ideas. On the other hand, concentration of ownership in the newspaper industry has converted the competitive "profession" of responsive journalism into a "business" of autonomous censorship, controlling both the availability of the media as a forum for free communication and the content of the information disseminated. Publishing policy is determined by these powerful monopolists and influenced by other industries which contribute philosophies, as well as finances, in seeking commercial advertising space. The subtle pressure of subscribers who anticipate majority views by virtue of prevailing public opinion on contemporary issues is another significant factor. Although there is obvious administrative and judicial concern over the economic combination designs of the electronic media, as manifested by the regulatory function of the FCC and its judicial supporting cast, the press has no such governmental supervision, even though the same symptoms have appeared therein.

Publishers consistently maintain that the "letter to the editor" aspect of daily newspapers provides public access to the press, and satisfies whatever affirmative first amendment obligation the industry might bear. But the author argues that access is limited, inasmuch as the right of editorial selection, a subject of free press guarantee, has traditionally and justifiably been held to be inviolate. Relying on the fundamental thesis of the positive interpretation of the first amendment (i.e., protection of the press must not be allowed to defeat its own purpose

by denying right of access to the public), Douberley postulates his own pragmatic system of access, maintaining that publishers are obligated to provide for purchase of "advertorials": advertising space to communicate ideas and opinions. This method appears to be a reasonable compromise, since the terms and rates of commercial advertising would be applicable. In addition, advertising columns are not subject to standard economic pressures and necessities; advertising volume determines newspaper size, so that additional advertising not only creates room for its message, but also establishes a proportional amount of editorial space. Therefore, the editor's undisputed right to contradict any advertorial in his own editorial columns would dispel the industry's fear that advertisements appear to the public to have the endorsement of the publisher.

On the other hand, every newspaper retains an unrestricted right to censor or exclude any "advertorial" under the "right-to-refuse" theory. Specific regulations may vary among publishers as to subject matter, form, and size, but every member of the newspaper industry admonishes the prospective advertiser that his purchase may be refused without cause, except for political advertisements during election campaigns. The theory is supported by authoritative precedent establishing the publishing business as a private enterprise, and therefore under no legal obligation to sell advertising without discrimination.

However, the author foresees a decline of this theory and increased judicial support for his position. He notes a significant common fact in all cases that have sustained the right to refuse: the communications submitted for publication were strictly commercial in nature, while content has never been in issue. Douberley cites cases recognizing protest groups' right to advertising space in quasi-public forums to communicate political or social messages, in support of his conclusion that the courts are on the threshold of a significant departure from the right-to-refuse theory. He synthesizes his argument by contending that the courts are constitutionally bound to deny the newspaper industry's claim that the right-to-refuse concept may be utilized against advertorials, since judicial precedent as to commercial advertising is inapplicable to free expression advertisements.

Botein, *Access to Cable Television*, 57 CORNELL L. REV. 419 (1972).

This article depicts the Federal Communications Commission's past and present methods of regulating the burgeoning Cable television industry as "at best inappropriate and at worst futile".[1] Traditional methods of regulating the single channel broadcasting industry such as

1. 57 CORNELL L. REV. 419, 421 (1972).

comparative licensing hearings, or license renewal hearings would be useless as a mode of regulation in this new industry because it would place an impossible administrative burden on the already inadequate FCC staff. Other traditional approaches, such as the application of the fairness doctrine, would of necessity be discarded since the great increase in the total number of channels available both for viewing and for access would make the doctrine an anachronism. New methods of regulation must be adopted which nurture rather than "freeze out" this new industry, while at the same time promote its two most desirable attributes: a maximum of both diversity and accessibility.

While recognizing that the FCC's present policy of antisiphoning could produce the requisite diversity in spite of itself (rather than because of itself) the author suggests a combination of three novel approaches to produce the desired effect.

The first method would be to allow the industry to be regulated by the "marketplace". This "laissez faire" approach, while possibly the simplest and certainly the cheapest solution, has as its primary drawback the exclusion of all but the well-heeled from easy access. Moreover, as illustrated by the one channel broadcasting industry, diversity would be stifled by the demands of commercial advertising.

To correct these problems the second approach, "administrative regulation", could be superimposed on the marketplace to create a restricted marketplace. Here, rate regulation must be ruled out as being neither feasible nor efficient, and restrictions surface in the form of a guarantee of fairness which is implemented by requiring old cable operators to publish rates and provide three separate channels to the public on a first come, non-discriminating basis. Although this solution is an improvement over the "laissez-faire" market-place approach, the author points up its latent bugs.

The third method is designated "formula for access". This approach requires a regulatory body to adopt strict but ambulatory standards to: (1) spell out both priorities between groups competing for use of the various channels, as well as percentages of total time available to the various groups; (2) ascertain the most popular channels in terms of viewing audience, and then effect a balance between this and total time allotted to each group, and; (3) set up financial guidelines for users, both commercial and non-commercial, to promote more effective access.