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THE FUTURE OF CABLE COMMUNICATIONS AND THE FAIRNESS DOCTRINE

*Tom A. Collins**

The legal basis of the fairness doctrine, as well as that of other affirmative program regulations of broadcasting, has traditionally rested upon the scarcity of broadcast frequencies and the consequent intense competition for broadcast time.¹ All those who wish to use the electromagnetic spectrum and have the necessary means are not able to do so because of the phenomenon of interference. This requires issuance of a limited number of broadcast licenses and other governmental regulations to create a viable system. In cable, the reverse applies. Rather than scarcity, abundance of channel capacity is likely.² Nevertheless, the fairness doctrine presently applies to cable.³ Properly structured, cable communications will transmit nearly unlimited sources of information. Thus the entire theory of the fairness doctrine as applied to cable communications requires reappraisal.

I. THE FAIRNESS DOCTRINE

Conceptually, the fairness doctrine⁴ must be divided into two parts. First, the doctrine generally requires that any broadcaster who raises a controver-

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1. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), in which the Court noted:

Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. . . . Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public convenience, interest, or necessity.

Id. at 375-77 (footnotes omitted).

2. See Barnett & Greenberg, *A Proposal for Wired City Television*, 1968 WASH. L.Q. 1; Simmons, *The Fairness Doctrine and Cable TV*, 11 HARV. J. LEGIS. 628, 640-47 (1974).

3. 47 C.F.R. § 76.209(a) (1975) provides: "A cable television system engaging in origination cablecasting shall afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

4. For an extensive discussion of the doctrine and its development, see Simmons, *supra* note 2, at 630-36.

sial issue of public importance cover all aspects of the issue fairly.⁵ The initial duty to carry out the doctrine rests upon the broadcaster, who has both the discretion to determine fair coverage⁶ and the obligation to afford free access to broadcast time if paid sponsorship is unavailable.⁷ Second, there are a series of special rules.⁸ These require that in the case of a personal attack on an individual,⁹ editorial endorsement of a candidate,¹⁰ or the appearance of a person in support of a candidate within section 315 of the Communications Act,¹¹ an offer or a reasonable opportunity to respond¹² be afforded the affected party.

Only the personal attack and editorial reply rules have been specifically approved by the United States Supreme Court.¹³ These rules involve basic and important elements of equity for both the individual and the political candidate.¹⁴ Depending upon the structure of cable communications, however, a somewhat different treatment might be given them than that required by general fairness obligations.

While the degree of government involvement and the legal justification for such intervention may depend upon the industry structure, the underlying theory is the same for cable as it is for broadcasting.¹⁵ If the ownership of the cable system and control of programming rest in the same entity, the scope for government action will be greater and its legal basis stronger. But if a cable system's ownership and program control are separated, the degree

5. See Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1255 (1949).

6. *Id.*; cf. *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 480 (2d Cir. 1971) (constitutionality of prime time access rule upheld).

7. See Letter to Cullman Broadcasting Co., Inc., Sept. 18, 1963, reprinted in 40 F.C.C. 576, 577 (1970).

8. See, e.g., 47 U.S.C. § 315 (1970); 47 C.F.R. § 76.209(d) (1975). Both rules require equal opportunity for candidates. For a brief discussion of this area, see p. 852.

9. 47 C.F.R. § 73.123(a) (1975) (broadcasting); 47 C.F.R. § 76.209(b) (1975) (cable).

10. 47 C.F.R. § 73.123(c) (1975) (broadcasting); 47 C.F.R. § 76.209(d) (1975) (cable).

11. See Letter to Nicholas Zapple, June 3, 1970, reprinted in 23 F.C.C.2d 707 (1970).

12. 47 C.F.R. § 73.123 (1975); 47 C.F.R. § 76.209 (1975).

13. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). But see *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 274-75 (D.C. Cir. 1974), in which Chief Judge Bazelon suggests reappraisal of the scarcity of broadcast frequencies rationale for radio and television regulation. *Id.* at 274-75 (Bazelon, C.J., concurring).

14. The matter is important also to the entire political system. See discussion of the Meiklejohn theory, notes 24-36 and accompanying text *infra*.

15. See discussion of *United States v. Midwest Video Corp.*, notes 56-58 and accompanying text *infra*.

of individual power will be less, correspondingly weakening the legal justification for governmental regulation.¹⁶ In either situation, during a transition period prior to the full development of a cable's potential, the scarcity and ancillary service concepts¹⁷ will continue to support the application of the fairness doctrine to cable.¹⁸ Thereafter, any theory supporting the doctrine must center primarily upon the right of the viewer to receive suitable news, entertainment, public affairs, and aesthetic experiences.¹⁹

There must be a balance of first amendment related rights if the fairness doctrine is to be retained for cablecasting.²⁰ Thus, an initial inquiry must consider the case law and theory of the rights of the viewing public, the individuals directly affected, and the media, the latter both as businessmen and as journalists. The status of first amendment theory in mass communications, however, is such that although some guidance is available, it cannot provide definitive answers. Accordingly, other matters more peripheral to the first amendment must be turned to for a determination of the place of the fairness doctrine in cable communications. There are several converging factors. The primary one is that under the first amendment not only the broadcaster, but also the viewer, ought to receive affirmative protection.²¹ Accordingly, while the broadcaster has important rights which warrant protection, including his own first amendment rights, controls such as the fairness doctrine are permissible to protect the viewer.

Other concepts are also important. Cablecasting is presently considered an ancillary or supplemental service to over-the-air broadcasting.²² As such, like over-the-air broadcasting, it is bound to follow the fairness doctrine

16. See CABINET COMMITTEE ON CABLE COMMUNICATIONS, CABLE, REPORT TO THE PRESIDENT 37-38 (1974). Cooperative ownership is an alternative possibility. However, with one segment of the community controlling such an undertaking, the basic fairness problem would remain.

17. See notes 52-58 and accompanying text *infra*.

18. See CABINET COMMITTEE ON CABLE COMMUNICATIONS, *supra* note 16, at 54.

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

20. See *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974), in which Chief Judge Bazelon stated:

Since the principle that a multitude of voices will produce a multitude of ideas is at bottom premised on free entry into the media of communication, that principle must be re-examined to insure that the process of limitation of entry does not itself deny the First Amendment rights of those who might otherwise speak through the scarce media.

Id. at 274 (emphasis in original).

21. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* at 390.

22. For a description of the functions of cable television, see *United States v. Southwestern Cable Co.*, 392 U.S. 157, 163 (1968).

once programs are originated. Because of the pervasive, immediate nature of the electronic media and the extreme impact caused by its vividness,²³ the regulation of electronic communication, whether over-the-air or cable, must be undertaken. Indeed, because of its potentially greater range of services, cable's impact may be even greater than that of over-the-air transmissions, and perhaps should be more carefully scrutinized. Furthermore, since the individual franchises of cable are natural monopolies granted by the state, a determination must be made as to whether they are instruments of state action.

II. THE VIEWER'S RIGHT

The contemporary concept of the viewer's right of access to information derives largely from the writings of Alexander Meiklejohn.²⁴ Criticizing the clear and present danger doctrine enunciated by Justices Holmes and Brandeis and developed by the Supreme Court, Meiklejohn takes the position that all speech necessary for informed self-government is protected,²⁵ and that "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."²⁶ This conclusion is reached through a twofold analysis. First, Meiklejohn reasons that a textual reading of the first amendment forbids only abridgement of *freedom* of speech, not of speech itself.²⁷ This concept of freedom embraces and is limited to self-government.²⁸ Second, he relies heavily on the immunity in speech and debate afforded members of Congress, urging that they are in fact acting for the larger body politic. By analogy, this larger body, which encompasses all citizens, enjoys the same right to speak on any subject involving governmental issues.²⁹ He pointedly observes that radio did not merit first amendment protection because it did not foster political debate. Rather, it was regarded as a commercial and entertainment venture, which should receive only due process protection under the fifth amendment.³⁰ The Meiklejohn view

23. See notes 59-72 and accompanying text *infra*.

24. E.g., A. MEIKLEJOHN, *POLITICAL FREEDOM* (1948); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

25. A. MEIKLEJOHN, *POLITICAL FREEDOM* 29-50 (1960). Although Meiklejohn's views were originally believed to be limited to political material, he later clarified his position to include aesthetic and social materials which provide insight into the nature of man.

26. *Id.* at 26.

27. *Id.* at 19-21.

28. *Id.* at 24-28.

29. *Id.* at 35-36.

30. *Id.* at 86-88.

initially did not command an overwhelming following or majority acceptance; however, it was influential in the period that followed.³¹

In *New York Times Co. v. Sullivan*,³² the Meiklejohn theory became a center point of constitutional debate on the first amendment. The language of the decision suggesting that there exists a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"³³ was viewed by some commentators as an adoption of the Meiklejohn theory.³⁴ Whether this view was shared by the majority of the Court is hard to say; in any case, it had entered constitutional jurisprudence.

The Meiklejohn theory is fully consistent with the only Supreme Court opinion on the fairness doctrine, *Red Lion Broadcasting Co. v. FCC*,³⁵ in which the Court found the right of viewers to be paramount: "It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial. . . . That right may not constitutionally be abridged either by Congress or by the FCC."³⁶ The broadcast-viewing public, then, is given a substantial right under the first amendment to receive differing ideas in an uninhibited marketplace. The other side of the balance, however, has been set forth in two cases in which efforts were made to expand the citizen's right from one that involved a fair presentation of controversial issues to one that involved an individual's access to the media.³⁷ These cases made it clear that there were values other than those of the viewer or reader involved, including the constitutionally protected right of editorial freedom in the media.

In *Columbia Broadcasting System, Inc. v. Democratic National Committee*,³⁸ the issue was whether or not a broadcaster was precluded by either the Communications Act of 1934³⁹ or the first amendment from

31. See, e.g., *Dennis v. United States*, 341 U.S. 494, 524 n.5 (1951) (Frankfurter, J., concurring) (criticism of the Meiklejohn view); Chafee, Book Review, 62 HARV. L. REV. 891 (1949).

32. 376 U.S. 254 (1964).

33. *Id.* at 270.

34. See, e.g., Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191. In 1964, Justice Brennan, the author of *New York Times*, implied that perhaps Meiklejohn's views have prevailed. See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 10-20 (1965).

35. 395 U.S. 367 (1969).

36. *Id.* at 390.

37. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (broadcasting access); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper access).

38. 412 U.S. 94 (1973).

39. 47 U.S.C. § 151-609 (1970).

refusing to sell broadcast time to people who wished to express certain views. After analyzing the legislative history of the Communications Act and the relationship of the broadcast industry to the Federal Communications Commission, the Court found that Congress intended to avoid excessive government involvement in the industry's operation.⁴⁰ Without resolving the question of whether access could be compelled in the electronic media by rule or statute, the Court found neither a legislative intent within the Communications Act compelling such access nor a constitutional right mandating access to advertising time. In so doing, the Court looked at the conflicting needs of the public, the individual and the broadcaster. The Court found a need to protect the professional discretion of the broadcast journalist in the absence of a legislative mandate to the contrary⁴¹ and it emphasized its view that under the proposed right-of-access system, government involvement in broadcasting would become too great.⁴² The Court found that journalistic freedom conferred a greater benefit upon society than would a right-of-access, stating: "Regimenting broadcasters is too radical a theory for the ailment respondents complain of."⁴³

In *Miami Herald Publishing Co. v. Tornillo*,⁴⁴ the Court was faced with a poorly drafted Florida criminal statute of early 20th century vintage which gave a right of reply, without cost, to a political candidate attacked by a newspaper. Although the Court noted the relative concentration of control of media today as compared to earlier times,⁴⁵ it found that such concentration of control was not sufficient reason to compel a newspaper to print material which it did not see fit to print.⁴⁶ Despite assertions that the newspaper would not be hampered in choosing what to publish, but would only be required to achieve balance,⁴⁷ thus arguably furthering the first amendment rights of the public and the individual attacked, the Court found countervailing values. The impact on the publisher was of great concern, including the fact that at least some costs were involved.⁴⁸ Further, compelled publication might impose a chilling effect upon the publisher. Such an effect would be detrimental to the public interest.⁴⁹ After building these bases

40. 412 U.S. at 105-10. The Court declared that "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations." *Id.* at 110.

41. *Id.* at 121, 124-25.

42. *Id.* at 126-27.

43. *Id.* at 127.

44. 418 U.S. 241 (1974).

45. *Id.* at 248-54.

46. *Id.* at 254-58.

47. *See id.* at 256.

48. *Id.* at 256-57.

49. *See id.* at 257.

of possible public harm, the Court placed ultimate reliance on a journalistic discretion rationale.⁵⁰

By reconciling the various opinions of *Democratic National Committee*,⁵¹ however, *Tornillo* did make clear the idea that different media might be treated differently to ensure first amendment freedoms. Thus, while the statute under consideration in *Tornillo* had an effect similar to that of the fairness doctrine, the declaration that the statute was unconstitutional does not impair the doctrine in broadcasting or resolve its future in cable. It does establish, however, that in a first amendment balance, journalistic discretion is to be given substantial weight. It is not eclipsed by the right of the public set forth in *Red Lion*; neither are the rights of the public, and, by implication, the individual, rejected. Since these cases did not settle the general problem of first amendment media theory, other factors beyond this balance must be considered in order to resolve the particular problem of the fairness doctrine in cable communications. These factors include the nature of cable television; the impact of television, and cable television, on the viewing public; the issue of whether or not cable is an instrument of state action; and a determination of who has program control in cable communications.

III. CABLE AS A SERVICE ANCILLARY TO BROADCAST TELEVISION

The FCC's current regulatory authority over cable is based upon the theory that such regulation is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting,"⁵² and upon the general authority over wire communications provided for in the Communications Act.⁵³ In regard to the fairness doctrine, the first is far more important to the present stage of cable and its future industry structure.

50. The Court concluded:

A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees . . .

Id. at 258.

51. In *Democratic National Committee*, Justices Brennan and Marshall dissented. The *Miami Herald* opinion was unanimous.

52. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). For a critique of the ancillary service concept, see Simmons, *supra* note 2, at 648-53.

53. 47 U.S.C. § 152(a) (1970) provides in part: "[T]he provisions of this chapter shall apply to all interstate and foreign communication by wire or radio . . ."

After the successful assertion of jurisdiction over cable, the FCC imposed a rule requiring the origination of programming by cable systems having more than 3,500 subscribers.⁵⁴ The policy statement establishing this requirement is the source of the present application of the fairness doctrine to cable.⁵⁵ Although the program origination requirement was ultimately abandoned, the fairness doctrine remains applicable to voluntarily originated cable programming. As a service that the FCC and the courts appeared to deem ancillary to broadcasting, cable became subject to the same varied first amendment treatment as the over-the-air media.

The cable program origination requirement was upheld by the Supreme Court in *United States v. Midwest Video Corp.*⁵⁶ Although this was only a plurality decision,⁵⁷ the four dissenting justices agreed that if a cable system determines to enter into program origination, then, like broadcasting, it is subject to FCC regulation of its programs.⁵⁸ The position of the dissent, read with the plurality and concurring opinions which permit the FCC to compel program origination, makes clear that as long as cable is functioning as a service ancillary to regular broadcast stations through program origination, cable may be subject to the same program regulation as over-the-air broadcasting, including the fairness doctrine.

IV. THE IMPACT OF TELEVISION

Control over television program content is sought in part because many people regard its impact on the thought and action processes of society to be extensive.⁵⁹ This belief contains elements of truth, informed conjecture, and mythology. In any event, the degree of impact does not lend itself to empirical ascertainment.⁶⁰ Structuring research beyond the gathering of data on

54. 47 C.F.R. § 76.201 (1974), *deleted*, 39 Fed. Reg. 43310 (1974).

55. First Report and Order on CATV, 20 F.C.C.2d 201, 218-22 (1969) (fairness doctrine and reply rules applicable to originated cable programming).

56. 406 U.S. 649 (1972).

57. Justice Brennan wrote the opinion and was joined by Justices White, Marshall and Blackmun. Chief Justice Burger concurred in the result and Justice Douglas, joined by Justices Stewart, Powell and Rehnquist, dissented.

58. 406 U.S. at 680 (Douglas, J., dissenting).

59. Marshall McLuhan suggests that the very nature of the media causes it to have tremendous impact on society. See M. McLuhan, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* (1964). His writings, however, which are based on historical knowledge and analysis of contemporary society, are supported by a paucity of empirical data. His writings are lucid and persuasive, but they provide no more than the basic thesis that television *may* have an exceptional role in society.

60. See, e.g., Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. REV. 1, 16-22 (1973). See also Comment, *Power in the Marketplace of Ideas: The Fairness Doctrine and the First Amendment*, 52 TEX. L. REV. 727, 753-57 (1974).

the number of people television reaches and the amount of time they watch television per day is difficult. Surveys can include a question as to the effect of television on survey participants, but the answers provide no more than a starting point for an inquiry into the impact of television. Moreover, given the fact that our society is saturated by television, it is virtually impossible to set up an experiment that would isolate television as a factor. The very effort at isolation would itself be a distorting variable.⁶¹

The starting point must be, however, what we do know. First, television has a near captive audience.⁶² It is both immediate and vivid. Coverage of the civil disorders of the 1960's, the moon expeditions, the Vietnam War, and Watergate was brought into American homes with a vividness and quickness unmatched by other media. But while a picture may be worth a thousand words and thus accentuate the impact of television, it conveys relatively little verbal information about the news covered and it is verbal information which provides the preferred basis for political and social decisionmaking.

Second, a majority of Americans rely on television as their primary source of information.⁶³ While not restricted to lower socioeconomic groups, this phenomenon is particularly associated with them. Presumably, these groups have less access to other sources of information and need a higher degree of protection against the influence of television than do higher socioeconomic groups.

Finally, some social science researchers have developed the theory that television viewers are likely to select those aspects of public affairs programming which reinforce their preexisting views.⁶⁴ In the context of elections, research suggests that television has little effect on the vote.⁶⁵ It should be noted,

61. People who do not watch a great deal of television are too atypical to serve as a control factor. Likewise, temporary deprivation introduces the variable of deprivation, while testing immediately after viewing introduces the variable of special viewing. Some conclusions might be drawn from people who ordinarily watch either a great deal of television or very little television, but in both cases controls would be absent and neither group could be identified as typical. Rather, a cross section of viewers with various habits would be required, checked by a control group, if such a group could be found.

62. While clearly capable of escaping television, the audience ordinarily does not do so, partly because the viewing entails no direct costs, at least for people who have access to a television.

63. See R. NOLL, M. PECK & J. McCOWAN, *ECONOMIC ASPECTS OF TELEVISION REGULATION* 13-14, 40 (1973). See also Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972).

64. See, e.g., K. LANG & G. LANG, *POLITICS AND TELEVISION* 15-16 (1969).

65. Jaffe, *supra* note 63, at 769-70. In another area in which the effect of television has been studied, that of violence, evidence suggests that those predisposed to violent activity were moved to such conduct by what they viewed on television; the evidence on this correlation, however, is far from conclusive. See SURGEON GENERAL'S SCI-

however, that advertisers and political candidates prefer television over other media. This preference may flow either from its effect or from its ability to reach large numbers of people. Television is an important information source, but it is only part of a matrix of the communication of ideas.⁶⁶

Since the impact of television on society has not been clearly established, an inquiry into the authority of Congress and the FCC to respond, through rules such as the fairness doctrine, to the alleged impact is difficult. This situation is similar to that regarding obscenity after the issuance of *The Report of the Commission on Obscenity and Pornography*.⁶⁷ The report, based upon substantial social science inquiry, determined that on the basis of present knowledge it was impossible to support the conclusion that pornography causes antisocial conduct. The Hill-Link minority report, based upon much thinner research and more speculative reasoning, concluded that antisocial conduct was probably exacerbated by exposure to pornography.⁶⁸ In *Paris Adult Theatre I v. Slaton*,⁶⁹ the Supreme Court nevertheless cited the Hill-Link minority report in reaching the conclusion that obscenity could be regulated even for audiences of consenting adults.⁷⁰ The Court indicated, however, that although legislatures must act upon unproved assumptions (given the imperfect nature of human knowledge), the judiciary ought not to intervene if there is the barest support for a legislative determination.⁷¹

Similarly, in the area of the fairness doctrine, since regulatory authority has been delegated to the FCC, the judiciary should follow the well-established doctrine that administrative determinations will be afforded great

ENTIFIC ADVISORY COMMITTEE ON TELEVISION AND SOCIAL BEHAVIOR, TELEVISION AND GROWING UP: THE IMPACT OF TELEVIEWED VIOLENCE 110-11 (1972).

66. See, Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation: Implications of Technological Change*, 37 U. CINN. L. REV. 550 (1968). The author states:

Public thinking, communication, and ultimately discussion making [*sic*] on a "controversial issue of public importance" is not a matter of a broadcast or of something heard or read here or there. It is a social process in which all of the media of communication (the informal, personal ones may be the most important) play a role. To isolate the role of television and provide a special rule for its participation seems to me questionable.

Id. at 554.

67. COMMISSION ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970).

68. *Id.* at 383-424 (minority report).

69. 413 U.S. 49 (1973).

70. *Id.* at 57-70 & n.8.

71. The Court stated: "It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself." *Id.* at 60.

deference in areas of agency expertise.⁷² Accordingly, the FCC's evaluation of the impact of television upon society and the appropriate balance of first amendment rights among individuals, the public, and television or cable operators should prevail.

V. GOVERNMENT ACTION⁷³

In considering cable and its relationship to government action, the similarity of cable to public utilities, the extent of government approval of cable systems, and cable's natural monopoly status must all be considered. Additionally, the general concept of the doctrine of government action must be examined.

The question of whether the regulation of cable communications cloaks the industry in government action begins with an examination of *Public Utilities Commission v. Pollak*⁷⁴ and its subsequent interpretation.⁷⁵ In *Pollak*, the District of Columbia Public Utilities Commission had approved the broadcast of radio programs on buses and streetcars belonging to Capital Transit. Capital Transit, a privately owned utility company operated under a franchise from Congress and subject to regulation by the Public Utilities Commission, enjoyed a virtual monopoly of bus and streetcar services in the District of Columbia. Although the Court held that the broadcast of the radio programs did not violate the petitioners' fifth amendment right of privacy,⁷⁶ it did find "a sufficiently close relationship between the Federal Government and the radio service to make it necessary . . . to consider [the amendment]."⁷⁷

72. See K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.11 (1958).

73. The term "government action" as used in this article is equivalent to state action. In *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 114 (1973), Chief Justice Burger used the term "governmental action" extensively.

74. 343 U.S. 451 (1952).

75. E.g., *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

76. Petitioners relied only on the fifth amendment in asserting a right of privacy.

77. 343 U.S. at 462. The Court stated:

In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation

In *Columbia Broadcasting System, Inc. v. Democratic National Committee*,⁷⁸ Chief Justice Burger discussed the issue of whether a broadcast licensee's refusal to accept a paid editorial advertisement constituted government action for first amendment purposes.⁷⁹ After finding no partnership between CBS and the government⁸⁰ despite the high degree of regulation, the Chief Justice distinguished *Pollak*:

Here, Congress has not established a regulatory scheme for broadcast licensees as pervasive as the regulation of public transportation in *Pollak*. More important, as we have noted, Congress has affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard. In *Pollak* there was no suggestion that Congress had considered worthy of protection the carrier's interest in exercising discretion over the content of communications forced on passengers. A more basic distinction, perhaps, between *Pollak* and this case is that *Pollak* was concerned with a transportation utility that itself derives no protection from the First Amendment.⁸¹

The dissent in *Democratic National Committee* analyzed the government action theory and *Pollak* in greater detail. Noting that the airwaves are in the public domain by statute,⁸² and observing that "[t]here can be no doubt that, for the industry as a whole, governmental regulation alone makes 'radio communication possible by . . . limiting the number of licenses so as not to overcrowd the spectrum,'"⁸³ the dissenters found that there did exist extensive government control over the broadcast industry. In their view, it was because of this regulatory control and because of the "obvious nexus between the Commission's Fairness Doctrine and the absolute refusal of broadcast licensees to sell any part of their air time to groups or individuals wishing to speak out on controversial issues,"⁸⁴ that there existed government action. The dissenters rejected the plurality's opinion that the fairness doctrine by it-

dismissed on the ground that the public safety, comfort and convenience were not impaired thereby.

Id. (footnote omitted).

78. 412 U.S. 94 (1973).

79. In this part of the plurality opinion, Chief Justice Burger was joined by Justices Stewart and Rehnquist.

80. 412 U.S. at 119.

81. *Id.* at 120. The Chief Justice emphasized that the "concept of journalistic independence could not co-exist with a reading of the challenged conduct of the licensee as governmental action." *Id.* at 121.

82. *Id.* at 173-74 (Brennan, J., dissenting).

83. *Id.* at 175.

84. *Id.* at 177.

self was sufficient to protect the public's first amendment rights. Additionally, the dissenters found *Pollak* to be controlling.⁸⁵ The argument of the dissent is more persuasive than that of the majority and ought to be accepted.

Nevertheless, the argument of the dissent needs to be rephrased. The phenomenon of interference creates a situation where government intervention is essential to the existence of a broadcast industry. The result is that regulation substitutes scarcity for chaos. Thus, it follows that the government must choose among the candidates for the limited number of available licenses.⁸⁶ The licensees then come into a relationship with the government similar to that of the natural monopoly of *Pollak*, even though the licensees have only quasi-monopolies. The broadcast license is as surely chosen by the government as any public utility monopoly, and thus is entangled in government action at least to the same extent as Capital Transit was in *Pollak*.⁸⁷

*Jackson v. Metropolitan Edison Co.*⁸⁸ greatly clarified the position of the majority of the Court concerning state action, public utilities, and its interpretation of *Pollak*. In that case, the termination of electrical service without notice or hearing was challenged as a deprivation of due process. In holding for the utility company, the Court found that *Pollak* rejected any reli-

85. Justice Brennan stated:

Indeed, the argument for finding "governmental action" here is even stronger than in *Pollak*, for this case concerns, not an incidental activity of a bus company, but, rather, the primary activity of the regulated entities—communication.

Id. at 180 (Brennan, J., dissenting).

86. The *Democratic National Committee* dissenters made this point in arguing that there was governmental action. *Id.* at 197-98.

87. This argument, however sound theoretically, is faced with the pragmatic thrust of another theory of relationships, best illustrated in *Marsh v. Alabama*, 326 U.S. 501 (1946); *Amalgamated Food Employees, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), and *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). In *Marsh*, a company town was found to be the functional equivalent of the downtown area of a city and thus first amendment rights were protected even though the private property owners objected to the dissemination of religious literature. *Logan Valley* extended the doctrine to labor picketing at a relatively small shopping center when there was an absence of other effective means of reaching the pertinent audience and a direct connection to the business center. In *Tanner*, a large shopping mall was the focal point. The Court found that anti-Vietnam War protesters had no right to pass out leaflets, in part because the mall was not the functional equivalent of a downtown area, and in part because there were other means by which the protesters could disseminate their materials. In *Tanner*, and to a degree in *Democratic National Committee*, the Court shifted toward weighing private property rights more heavily than such individual rights as speech and political activity. A continuation of such a shift would jeopardize concepts such as the fairness doctrine unless the fairness doctrine continues to be buttressed by concepts such as scarcity, legislative intent and judicial approval. Since these are at best watered down in cable communications, the philosophical shift toward private property rights brings into doubt the continuing viability of the fairness doctrine.

88. 419 U.S. 345 (1974), noted in 24 CATH. U.L. REV. 622 (1975).

ance upon the monopoly status of Capital Transit in finding government action,⁸⁹ and questioned whether government action had even been found in *Pollak*.⁹⁰ The Court suggested that *Pollak* may have assumed state action only arguendo to dispose of the case on first amendment grounds.⁹¹ In *Jackson*, the Court refused to ground state action on the essential nature of the services rendered, suggesting that such an expansion would be both open-ended and a substantial intrusion into traditionally private affairs.⁹²

The decision in *Jackson* left open three broad areas for finding state action in cable. First, a symbiotic "joint ownership" such as that found in *Burton v. Wilmington Parking Authority*⁹³ might be found. Second, if the private party performs an essentially public function (such as elections, or operation of a public park or a company town),⁹⁴ or in the case of a utility, exercises a particular power of the state (such as eminent domain), government action would exist.⁹⁵ Third, in a *Pollak* situation in which the imprimatur of the state actively promotes the policy under scrutiny, governmental action may exist.⁹⁶

Thus, regulation of cable communications should be considered government action. Cable communications constitute the same natural monopoly⁹⁷ as Capital Transit did in *Pollak*, and have the same dependence upon a government sanction to operate as the broadcasting industry. As a franchise, cable has the right not only to use public property, as in *Pollak*, but also to utilize private property.⁹⁸

Finally, under the option of continuing cable as part of an integrated over-the-air broadcast system in which cable has many of the attributes of an ancillary service, the rules of broadcasting will apply, further deepening government involvement.⁹⁹ However, if the option of recasting cable as a

89. 419 U.S. at 352.

90. *Id.* at 356.

91. *Id.*

92. *Id.* at 352-54. *But see id.* at 361-62 (Douglas, J., dissenting).

93. 365 U.S. 715 (1961). In *Burton*, the Court held that the refusal of service to a black by the owner of a restaurant which was physically and financially an integral part of a public building, constituted state action. The Court found that the state had so far insinuated itself into a position of interdependence with the restaurant that it had a joint participation in the enterprise. *Id.* at 725. *Burton* is clearly accepted, not overruled, by *Jackson*, 419 U.S. at 350-51.

94. See note 87 *supra*.

95. See 419 U.S. at 352-53.

96. See *id.* at 356-57.

97. For the Court's definition of a natural monopoly, see *id.* at 351 n.8.

98. Cable must pass over private property and often utilizes poles owned by telephone or electric companies.

99. See notes 52-58 and accompanying text *supra*.

common carrier is chosen, it would become a utility like other common carriers and fall within *Pollak* as to permissible regulation.¹⁰⁰ Additionally, the thrust of regulation would determine the programming system, thus giving to it the imprimatur of government approval.¹⁰¹

VI. PROGRAMMING CONTROL

The determination of who has program control in cable communications is extremely important to the existence of the fairness doctrine in cable. To the extent that cable is utilized as an ancillary service or is integrated into a scheme of communication in which the system owners, like over-the-air licensees, determine program content, the doctrine will apply.¹⁰²

Control of program content, however, need not rest with the system owner. Presently that control is reduced somewhat by public access channels, government channels, and educational channels. A 1973 report to the President by a special cabinet committee headed by Clay Whitehead, Director of the Office of Telecommunications Policy, proposed a division of system ownership and program control in each market.¹⁰³ After a transition period, the system could operate its channels on a common carrier basis with some possible qualifications.¹⁰⁴ During the transition period before the cable communication system begins to partake of the attributes of common carriers in a substantial way,¹⁰⁵ the fairness doctrine should be applied. Thereafter four problems would remain: how to treat over-the-air transmissions purchased by cable channels for broadcast over the cable system; what policy is appropriate for channels retained by the cable system owner; how the content of common carrier access channels should be controlled, if at all, and how problems such as personal attack and official issues will be

100. The FCC, however, has rejected common carrier status for cable. 39 Fed. Reg. 43308 (1974). The Commission stated that "it would be premature to place cable television in the mold of common carrier regulation." *Id.*

101. This conclusion is based on the author's view of *Democratic National Committee*. The counterargument to this theory is that the approving government entity will concern itself only with the general structure of the industry, not with particular programs. Thus, as in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), in which it was held that the lodge was not exercising state action when it enforced its bylaws, but that the Pennsylvania requirement that organizations enforce their bylaws exceeded the permissible bounds of state involvement, here too, it can be argued that only the general policy is approved, not a specific one. A contrary result would be the preferred one.

102. See notes 52-58 & accompanying text *supra*.

103. CABINET COMMITTEE ON CABLE COMMUNICATIONS, *supra* note 16, at 29-39.

104. *Id.* at 29-30.

105. *Id.* at 51-61. Determination of the exact point at which such an arrangement would cease being service ancillary to broadcasting and become a separate communication entity would have to await its actual development.

met. While ultimately an empirical approach will be necessary to resolve these questions, some suggestions may be postulated.

Over-the-air broadcasts will remain powerful vehicles of mass communication even after common carrier cable systems are established. We will probably not become a wired nation for decades despite a theoretical capacity to proceed more rapidly.¹⁰⁶ Because over-the-air broadcasters will retain a dominant position in television programming, it will remain necessary for cable systems to carry their programming to retain viability. Furthermore, there is no reason to believe that the relationship between broadcaster and viewer will change.¹⁰⁷ Accordingly, the broadcasts themselves will remain subject to the fairness doctrine. A potential problem arises if a cable system operator who carries such broadcasts as an inducement to subscriptions deletes certain portions of the broadcasts and thus creates a fairness imbalance, as occurred when a local licensee deleted pro-civil rights materials from its network programming in a leading fairness doctrine case.¹⁰⁸ The argument exists that as to cable subscribers, as distinct from over-the-air viewers, there exists no scarcity; therefore, balance can be achieved by those who wish to present a minority view by hiring the common carrier access channels. However, this overlooks the fact that viewers might opt primarily for the cable carriage of over-the-air broadcasts.¹⁰⁹ Assuming this, the first amendment right of the viewer to access to information, the diluted but remaining ancillary nature of the service, the especially great impact of the over-the-air programs, and the extent of government entanglement in both cable and over-the-air broadcasting combine to render a different result unavoidable. The cable system operator must be required to carry all programming of any over-the-air broadcaster carried in part,¹¹⁰ and thus be as subject as the traditional broadcaster to the fairness doctrine.

The problems regarding channels reserved to the cable system operator present a different framework for analysis. A multitude of reasons for the

106. Despite early projections of rapid growth, such growth has not yet been realized and the present economic situation does not suggest a bright future.

107. However, the aspect of scarcity will continue to affect over-the-air broadcasters.

108. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969).

109. This assumes that the present fare is what a majority actually want. Of course, some diversity is to be expected and will develop among those who want another choice. *See Citizens to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1973). *But see* the National Cable Television Association's data on the low level of audience response to "community-oriented" originated programming, summarized at 39 Fed. Reg. 43303 (1974).

110. It is possible the carriage would be required in any case, whether utilized as a means to gain viewers or because the broadcaster would purchase all of the time of a common carrier channel.

choice of reserving a channel could exist. At one extreme, it could be reserved as a propaganda channel for the system owner's viewpoints, to be subsidized by profits from the remainder of the system or other enterprises. In part, this was the motive in the broadcasting activities of the only licensee whose license the FCC ever refused to renew (without judicial prodding) for violations of the fairness doctrine.¹¹¹ At the other extreme, the channel could be operated as a purely commercial undertaking, perhaps even providing the margin of profit needed by a system operator. It is more likely that reasons for the reservation of a channel would be mixed. Desires for self-expression and the opportunities to engage in journalism as well as to make a profit would probably be involved. Thus, in most circumstances reliance could rest on the mixed motives of the system operator, the required balance of the over-the-air programs carried, and the availability of access via common carrier channels. Yet extreme situations could develop, as they have in the present scheme of broadcasting.¹¹² These could be met by applying a diluted fairness doctrine. Since there are alternate, albeit imperfect, electronic sources of information, the doctrine should be applied only in the more extreme circumstances. The doctrine might be refashioned to require that cable system broadcasters provide dissenting views when the original presentation is clearly unfair and concerns a controversial issue of great public importance.¹¹³ It should not be applied unless substantial abuses which threaten the public interest by creating major distortions develop. Additionally, replies under the personal attack rule,¹¹⁴ the editorial rule,¹¹⁵ the Zapple doctrine,¹¹⁶ and, by extension, section 315 of the Communications Act,¹¹⁷ should be required.

Finally, the common carrier access channels present their own problems. At the outset, the hypothesis advanced in *Democratic National Committee*, that wealthy purchasers of time might monopolize access time, must be met. In that case, the Court addressed rules suggested by the District of

111. *Brandywine-Main Line Radio, Inc.*, 24 F.C.C.2d 18 (1970), *aff'd*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). The FCC grounded its decision upon both the fairness doctrine and misrepresentation grounds. Although discussing the fairness problem in detail, the Court of Appeals based its affirmance on the misrepresentation issue. Unlike *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), the FCC in *Brandywine* looked to the fairness issue without judicial urging.

112. See notes 108 & 111 and accompanying text *supra*.

113. See 47 C.F.R. § 76.209(a) (1975) (applying the fairness doctrine to cable); Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

114. 47 C.F.R. § 76.209(b) (1975).

115. *Id.* § 76.209(c).

116. See note 11 *supra*.

117. 47 U.S.C. § 315 (1970).

Columbia Court of Appeals and by a member of the FCC which would have permitted some limited periods of access.¹¹⁸ In a cable common carrier system, the time available would not be functionally limited if a reasonable number of technically available channels were developed.¹¹⁹ If the rule structure required this, it would generally eliminate the spectre of the very wealthy dominating all the time available. While moneyed causes might gain an advantage, that advantage can be counterbalanced if the opposite viewpoints are supported by committed individuals.

However, in a handful of situations involving issues of overriding public interest, a serious financial imbalance may occur and thereby engender unfairness. This problem has been central to the fairness doctrine since *Banzhaf v. FCC*,¹²⁰ in which the United States Court of Appeals for the District of Columbia Circuit found that the public interest in health brought cigarette advertising within the ambit of the fairness doctrine. Subsequently, *Banzhaf's* original limitation to cigarettes has been expanded to include pollution¹²¹ and several other areas.¹²² The appropriate remedy is elusive. While cigarette advertising might be banned, as in broadcasting,¹²³ the entire problem cannot be handled in this way. Consider the importance of discussion of the interrelationship of pollution abatement, the energy problem and inflation. It is conceivable that only the view of the corporate giants might be presented fully if the fairness doctrine were not applicable. While the environmental and other groups would have some funds to broadcast their views, their treasuries are limited.

118. 412 U.S. at 123-24.

119. Presently, systems of 20 or more channels are operating. Like all resources, however, cable channels at some point have a finite limit. Unlike over-the-air broadcasting, this limit probably exceeds actual demand. Thus, there exists no real scarcity.

120. 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). The court found that because of the seriousness of the problem, it was "not an abuse of discretion for the Commission to attempt to insure not only that the negative view be heard, but that it be heard repeatedly." *Id.* at 1099.

121. See *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971).

122. See, e.g., *Retail Store Employees Local 880 v. FCC*, 436 F.2d 248 (D.C. Cir. 1970) (labor dispute); *Green v. FCC*, 447 F.2d 323 (D.C. Cir. 1971) (military recruitment). The success has been limited, however. The cause was remanded in *Retail Store Employees* and the FCC's rejection of a fairness problem in *Green* was affirmed. Nevertheless, the cases demonstrate the scope of potential controversy over the doctrine. The issue of energy-related advertising has also caused concern in the broadcast industry since it is the type of area to which the fairness doctrine may apply. See, e.g., *Brown, Networks Reject Mobil Equal Ad Plan*, N.Y. Times, Mar. 16, 1974, at 1, col. 2 (city ed.).

123. 15 U.S.C. § 1335 (Supp. III, 1973). The constitutionality of the ban was upheld in *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972).

Thus Mobil Oil, which undertook an intensive print media campaign explaining its view of the energy crisis in early 1974, offered to pay not only for advertisements for its own position but also for responses on television.¹²⁴ The purpose of this offer was to relieve the broadcaster of any financial burden under the Cullman doctrine.¹²⁵ The networks refused the offer, presumably to avoid any dilution of their editorial control of presentations. This rationale would not be viable in a first come, first served common carrier situation. The result here might be to so skew the public's first amendment right to information,¹²⁶ particularly given the importance of television as a source of information and its substantial impact, as to make the application of a diluted fairness doctrine to common carrier access cable channels the better solution for extremely important issues. Additionally, precisely the same situation exists in the theoretically abundant print media,¹²⁷ where newspapers either accept all editorial advertisements which meet their established criteria or pick and choose as they wish.¹²⁸ In this form of programming arrangement, the ancillary service rationale would disappear. The government obligation would be fulfilled by providing a viable common carrier system, as is the case with other common carrier communication systems. The impact of television, while remaining a source of concern, would hopefully be resolved by market forces within the first come, first served arrangement, and would be subject to continuing scrutiny of actual performance. Accordingly, for most issues the fairness doctrine would not be applicable to the access channels, unless actual experience demonstrated a need for its application.

Two special problems would remain, however. First, the problem of personal attack exists.¹²⁹ Assuming that the person attacked will ordinarily be a public figure, recovery under the *New York Times Co. v. Sullivan*¹³⁰

124. See Brown, *supra* note 122.

125. See note 7 *supra*.

126. See notes 24-37 and accompanying text *supra*.

127. There are actually fewer newspapers than television stations in most markets today. The limit, however, is economic, not technological.

128. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

129. See note 114 *supra*.

130. 376 U.S. 254 (1964). In *Sullivan*, the Court overturned an Alabama Supreme Court affirmation of a conviction for libel. The Court held that the first and fourteenth amendments prohibit

a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-80.

doctrine will be difficult. Because of the individual's own first amendment interest in responding to an attack, the balance should be struck for the individual.¹³¹ An opportunity for response would in fact promote the robust debate and sharp interchange necessary to the proper function of the first amendment. Second, for political campaigns, the answer for access channels seems simple. Because of the vital nature of communications, and the first amendment rights of the candidate to be heard and of the electorate to hear, protection is needed. The impact of the media and the government involvement in franchising is so great that distortion, actual or perceived, might result. Yet the fullest possible presentation of the issues is essential to democracy.¹³² Applying the Zapple doctrine¹³³ and section 315 of the Communications Act,¹³⁴ once access is granted to one candidate an equal opportunity for access would be required for all candidates for the same office. In this one instance the first come, first served concept should be abandoned and replying candidates should be given first preference to the extent necessary to achieve equal treatment.

VII. CONCLUSION

As long as cable communication remains an ancillary or fully integrated part of the broadcast system, the fairness doctrine will apply. If the desired evolution of cable occurs, problems will arise. It is possible that a version of the fairness doctrine should remain. This depends on how the first amendment, the impact of television and the government action doctrine are viewed. The present philosophy of the courts would regulate the fairness doctrine to an unconstitutional status in a common carrier arrangement unless unusually great deference were shown a contrary statutory or FCC decision. However, the essential elements in determining the application of the fairness doctrine under changed circumstances are so open to debate that a shift in the courts' philosophical position or a strong FCC or legislative endorsement of the doctrine could impose it upon cable communication in

131. Reasonable limits must be established. The present personal attack rule requiring that the cable system within a reasonable time notify the person or group attacked of the time and substance of the attack, *see* 47 C.F.R. § 76.209(b) (1975), would have to give way to a requirement that an aggrieved party raise the issue in a timely manner, perhaps a week, and that the access channel be an appropriate forum of reply. *See* Jaffe, note 66 *supra*, at 552-53, criticizing the choice of forum.

132. *See* notes 24-37 and accompanying text *supra*.

133. *See* note 11 *supra*.

134. 47 U.S.C. § 315 (1970).

some form no matter what scheme of program carriage is adopted. Properly considered, the option of imposing the fairness doctrine ought to remain.¹³⁵

135. Events subsequent to the completion of this article suggest that the fairness doctrine is undergoing a substantial reappraisal by the Commission. On September 16, 1975, FCC Chairman Richard E. Wiley proposed an experiment in which the Commission would discontinue enforcement of the fairness doctrine in the larger radio markets. He reasoned that enforcement of the doctrine was unnecessary in such markets since the large numbers of commercial radio stations in those areas provided "an extensive range of viewpoint even with no governmental oversight." Address by Richard E. Wiley, before the International Radio and Television Society, Inc., Sept. 16, 1975.

Nine days later, the Commission voted five to two to exempt broadcast debates and on the spot news conferences held by political candidates from the equal time rule. See *Washington Post*, Sept. 26, 1975, at A2. Whether further changes will affect the doctrine and cable television remains to be seen.