No Moderator Needed:

A Liberty Tradition Right to Broadcast Advertorials

By DANIEL MATHESON

Broadcasting executives routinely prevent political speech from reaching the American people, as the nation re-discovered in 2004. In January, a left-leaning political group sought to broadcast an advertorial[1] critical of President Bush, and in November, the United Church of Christ attempted to extend an "extravagant welcome" to all persons, "regardless of ability, age, race, economic circumstances, and sexual orientation."[2] Despite each organization's willingness to pay the required rate, their submissions were rejected by CBS, a "public trustee" exercising control over the publicly owned electromagnetic spectrum. CBS apparently determined that the public convenience, interest, and necessity[3] is served better by inundating viewers with sophomoric plugs for assorted brands of beer than by allowing citizens to debate social and political controversies. So much for the lofty dream that citizens' active and egalitarian discourse about issues of public importance will lead to democratically legitimate policy outcomes and the revelation of political truth.

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1. This term was coined by Harvard Law Review, *Constitutional Law—Freedom of Expression—Violation of First Amendment for Radio and Television Stations to Deny Completely Rroadcasting Time to Editorial Advertisers When Time is Sold To Commercial Advertisers*, 85 HARV. L. REV. 689 (1972).

2. J. Bennett Guess, *CBS, NBC Refuse to Air Church's Television Advertisement*, UNITED CHURCH NEWS, Nov. 30, 2004, http://www.ucc.org/news/u113004a.htm; Jonathan Darman, *Censored at the Super Bowl*, NEWSWEEK, Jan. 30, 2004, http://www.msnbc.com/id/4114703.

3. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 377, 379, 394 (1969) (discussing Communications Act mandate that the FCC issue licenses to broadcasters to serve "the public convenience, interest, and necessity.").

Perhaps to the surprise of those who believe that speech directly relevant to a national election occupies a more elevated place in the hierarchy of communicative activities than the solicitations of beverage producers,[4] CBS's action was far from unique in the annals of broadcasting.[5] Various social activists have long been aware that not even money can buy access to the airwaves if broadcasters disagree with ones' viewpoint.[6] This Article argues that such viewpoint-based refusals to broadcast political speech represent a constitutional violation, based on four propositions that find solid support in modern First Amendment doctrine:

1. *CBS v. DNC*[7] is no longer persuasive due to changes in the regulatory regime, specifically the abrogation of the fairness doctrine;
2. The transmission of an advertisement does not represent the "speech" of a broadcaster because advertisements are not socially understood to associate the broadcaster with the message;
3. When political speech and commercial speech have identical effects on a public forum, speech cannot be excluded due solely to its political nature, and *Lehman v. City of Shaker Heights*[8] has been misinterpreted to the extent it has been used to suggest otherwise;
4. Recent cases construing *Marsh v. Alabama*[9] establish that private actors who manage public property operate "public fora," and the First Amendment restricts the manner in which they may discriminate between speakers.

I. Introduction

"Civic republicans" have already articulated an approach to

4. Countless editorials condemned the action and seemed unaware that similar refusals to air editorial advertisements are common. *See, e.g.*, Editorial, *Let Them Play*, SAN FRANCISCO CHRONICLE, Jan. 29, 2004, at A22. *See also*, Statement of Senator Richard Durbin, (Jan. 27, 2004), http://moveon.org/cbs//durbin.html; Letter from Sen. Wyden to CBS Television President Mr. Leslie Moonves (Jan. 24, 2004) (on file with author).

5. It wasn't even unique in the 2004 Super Bowl. People for the Ethical Treatment of Animals also sought to broadcast ads, but following their rejection they were less successful than Moveon.org in obtaining publicity.

6. An interesting example is provided by a charmingly radical group known as "Adbusters." Adbusters has long sought to purchase television advertising time to lampoon consumption they see as wasteful and consumers they view as brainwashed by television. So far, however, Adbusters' submissions have been rejected by all the major United States broadcasting networks. http://www.mediacarta.org/thebattle1.html.

7. 412 U.S. 94 (1973).

8. 418 U.S. 298 (1974).

9. 326 U.S. 501 (1946).

broadcasting regulation designed to preserve the pre-conditions for participatory democracy. Appealing as their conclusions may be, I believe that current First Amendment doctrine will not support a constitutional challenge to the broadcasting system based on the role that broadcasting *should* play in the public communicative sphere.[10] Two developments—one technological, one jurisprudential—highlight the need for an alternative approach to broadcasting regulation if the Constitution is to prevent a handful of voices from dominating public discourse.[11]

Technologically, the explosion in alternative means of mass communication has undermined the "scarcity" rationale, which justified government regulation of broadcasters because "there are substantially more individuals who want to broadcast than there are frequencies to allocate."[12] The empirical validity of the doctrine is now so weak that the Court may have to abandon altogether the use of spectrum scarcity to justify pervasive state involvement in broadcasting.[13] The erosion of support for the scarcity doctrine has led some to suggest that broadcasting's singular pervasiveness and "the unique role that television plays in the public discourse" provides an alternative justification for extensive regulation.[14] This pervasiveness rationale may currently provide ammunition for those of the civic republican persuasion, but it is far from analytically unassailable, and a theory of First Amendment rights based on networks' share of the audience may be rendered unpersuasive by even modest technological or behavioral change.

More fundamentally, arguments rooted in communitarian

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10. *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 22 (1995) ("Sociologists have defined this sphere as a shared 'universe of discourse' . . . ." (quoting Carroll D. Clark, *Concept of the Public*, 13 SW. SOC. SCI. Q. 311, 313 (1933))).

11. The best definition of the "public discourse" that comprises the primary end of the First Amendment seems to me to be Professor Post's: "those forms of communication that are deemed necessary to ensure that a democratic state remains responsive to the views of its citizens." *Id.* at 4.

12. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969). The scarcity doctrine has also been attacked on the basis of its inherent circularity. Professor Yoo persuasively argues that "relying on scarcity effectively allows regulation to serve as the constitutional justification for additional regulation . . . . [creating] a theory that allows the overriding culture of regulation to become self-enforcing." Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 253 (2003).

13. *See* Yoo, *supra* note 12. *See also*, *On the Same Wavelength*, ECONOMIST, Aug. 14, 2004, at 62; *Bandwidth from Thin Air*, ECONOMIST, Nov. 6, 1999.

14. *See* Yoo, *supra* note 12, at 252.

concerns will necessarily have a limited impact on doctrine because the judiciary has adopted individual liberty as the lodestar of First Amendment doctrine. Our broadcasting regime was originally structured with the intent of facilitating the public's exposure to at least some types of political speech, and it advanced civic republicans' cause reasonably well under a regime of pervasive regulation that limited broadcasters' discretion. However, aggressive administrative oversight of broadcasters has largely come to an end, at least in part because First Amendment doctrine now emphasizes the rights of individuals (and corporations) to be free from restraint. A focus on the autonomy of individuals provides a poor basis for active government regulation of the public communicative sphere, even when the government's intention is to promote the overall quantity and quality of informative discourse. Unfortunately, the system of broadcasting regulation produced by a retreat from communitarian concerns and an increased emphasis on individuals' rights has not only failed to address civic republicans' objections, it has proven woefully inadequate to preserve individuals' ability to actively participate in public discourse. This Article attempts to address both of these concerns, but not by referencing communitarian values. I approach the regulation of broadcasting from an individualist perspective and conclude that broadcasters' viewpoint-based refusal to sell advertising time is unconstitutional because the First Amendment can and should be interpreted to restrict the manner in which the manager of public property designed for discourse can regulate speech.

The political tradition's goal of using the First Amendment to promote public discourse can be served without a "New Deal" for speech.[15] Viewpoint diversity in public discourse and individual access to the public communicative sphere can be achieved through a principled reliance on public forum doctrine coupled with an understanding that private actors may not manage public property in a manner that thwarts core First Amendment guarantees. A focus on

15. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 53-91 (1995). Professor Sunstein describes "market failures" endemic in the modern broadcasting environment, and suggests that these failures undermine the "Madisonian conception of free speech," which "place[s] a high premium on political. . .equality and on the deliberative function of politics." *Id.* at xvii. He then enumerates regulations that might advance these goals, suggesting that a "free speech New Deal" is possible based on the understanding that "what seems to be government regulation of speech might, in some circumstances, promote free speech as understood through the democratic conception associated with both Madison and Brandeis." *Id.* at 35.

individuals' rights provides the strongest basis for inferring a constitutional right of access to the airwaves not only because such an approach is consistent modern First Amendment doctrine, but because it directly references the constitutional prohibition on laws abridging individuals' freedom of speech—thus allowing federal courts to take action without fatal deference to legislative and administrative definitions of "the public interest."

Part II frames the tension between two venerable philosophies of the First Amendment and sets forth my reasons for adopting an approach centered on individual autonomy to address our current broadcasting regime's spectacular failure to respond to the concerns of either individualists or communitarians. Part III demonstrates that *CBS v. DNC* is inapposite to modern broadcasting due to the abandonment of the fairness doctrine[16] upon which the opinion relied, but argues that *CBS v. DNC* has enduring importance because it accepted two propositions central to the current debate: the right of individuals to speak and not merely to listen must be given some weight in broadcasting regulation, and the sale of time to third parties does not implicate the editorial discretion of broadcasters.

Part IV demonstrates that under current doctrine a time segment offered for sale to a third party constitutes a doctrinally cognizable public forum distinct from the programming that brackets it and that advertisements do not represent the "speech" of broadcasters. Part IV then argues that a broadcaster's refusal to accept noncommercial speech is an unreasonable prior restraint, and that cases including *Lehman v. City of Shaker Heights*[17] firmly establish that the discrimination should be labeled viewpoint-based rather than content-based.

Part V applies *Marsh v. Alabama*[18] to the broadcast-access debate based on an interpretation that has become increasingly compelling due to recent cases relying on and clarifying *Marsh*; property owners and forum managers cannot discretionarily exclude speakers when the property has been held out to the public as a forum appropriate for discourse.

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16. The fairness doctrine "require[d] a station which present[ed] one side of a controversial issue of public importance to afford reasonable opportunity for the presentation of significant contrasting viewpoints on the issue in its overall programming . . . ." *In re* Complaint by Business Executives Move for Vietnam Peace, 25 F.C.C. 2d 242, 244 (1970). See *infra*, Part III.A.

17. 418 U.S. 298 (1974).

18. 326 U.S. 501 (1946).

II. The Liberty Tradition and the Political Tradition

Sophisticated commentators have already argued for increased government regulation of the broadcast media to improve the public's access to information, the quality of programming, or the diversity of viewpoints presented to the public at large. Professor Sunstein has articulately made the case for active government management (a "New Deal For Speech") to promote the "Madisonian goal" of unmasking political truth through the democratic deliberation of politically equal citizens,[19] while others including Professor Bork have questioned the modern mass media's tendency to erode traditional social mores and generally degrade the quality of public discourse.[20] This latter theme runs throughout both the popular and academic literature, even if most choose to focus on the absence of depth and erudition in public debate rather than take Professor Bork's overtly values-based approach to the issue. The case has already been made that broadcasters expose children to excessive amounts of violence, misinform the public by focusing on political scandals and sensationalism rather than substantive policy, portray women as generally subordinate to men, and so on.[21] It is popular to cite the woeful state of public discourse en route to an argument that First Amendment values are best served by active state management of the medium in which so much public debate occurs.

I sympathize with the goals of this camp, but decline to rely on the arguments they have so ably put forward because whether or not the First Amendment *should* allow for more extensive regulation of program content, the Court's modern cases suggest that a minor jurisprudential revolution would be required if state actors are to control program content. As a general matter, the Court has adopted a philosophy of the First Amendment that focuses on the individual's right to participate in debate and be free from restraint, rather than a civic republican approach focusing primarily on the communitarian or democratic values advanced by public discourse.[22] The "liberty

19. SUNSTEIN, *supra* note 15, at xvii.

20. ROBERT H. BORK, SLOUCHING TOWARDS GEMORRAH 123-53 (1996).

21. *See, e.g.*, NEIL POSTMAN, AMUSING OURSELVES TO DEATH (1985); SUNSTEIN, *supra* note 15, at 66-67.

22. Professor Post, for instance, suggests that Cantwell v. Connecticut, 310 U.S. 296, 309-310 (1940) (protecting from a breach of peace conviction an individual's right to play in public an anti-Catholic recording deemed offensive by two listeners), illustrates the primacy of individual autonomy in our First Amendment doctrine. *Cantwell* elevates individual freedom over communitarian concerns such as maintaining social harmony and ensuring that debate actually serves to inform the public:

tradition" of First Amendment interpretation "which sees the constitutional protection of free speech in broader terms as a basic individual right recognized by a political society committed to liberty"[23] has for the most part prevailed over the "political tradition," whose position can be characterized (perhaps simplistically) as "only speech that is required for the exercise of self-government qualifies for protection under the First Amendment."[24] The judiciary's sensitivity to the dangers of speech regulation, even when the speech is concededly offensive and threatens to undercut legitimate policy aims, presents a practically insurmountable obstacle to a government attempt to dictate the content of programming—even when the state possesses the laudable goal of ensuring a better-informed public more capable of engaging in intelligent democracy.

A. The Political Tradition, Broadcasting Regulation, and the Decline of Scarcity

The liberty tradition has not invariably triumphed in the broadcasting context; the federal government has historically

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> The individual is the locus of value for *Cantwell*. . . . In interpreting the Constitution in light of the values and assumptions of individualism, *Cantwell* speaks for what unquestionably has become the great tradition of First Amendment thought. Of course there have been dissenting voices in that tradition, but it is fair to characterize [them] as ripples on the surface of a deeper and more powerful current of individualist decisions.

ROBERT C. POST, CONSTITUTIONAL DOMAINS 105 (1995). Professor Post here contrasts Cantwellian individualism to the competing approaches of "pluralism" and "assimilationism," not the political tradition with the liberty tradition. However, the Court's acceptance of the individual as the central focus of the First Amendment to some extent necessitates the rejection of a political tradition approach allowing active governmental direction of public discourse, as Professor Post demonstrates in his discussion of laws punishing group libel. *See id.* at 11.

23. Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 GEO. L.J. 373, 373 (1993).

24. *Id.* This characterization is consistent with other pithy analyses of the tradition, such as Professor Fiss's: "We allow people to speak so others can vote." OWEN M. FISS, LIBERALISM DIVIDED 13 (1996). However, it may unfairly represent some great writers of the political tradition as insensitive to the values of the liberty tradition because it ignores the social and historical context in which this strain's most celebrated proponents wrote. Professor Meiklejohn offered a philosophically persuasive argument in favor of a robust First Amendment in the face of Red Scare-era restrictions that threatened to leave core political speech unprotected. Professor Sunstein developed an approach to the First Amendment that encouraged a multiplicity of viewpoints in the face of Reagan-era broadcasting deregulation that threatened—and in fact has accomplished—the transfer of control over public discourse to a powerful few while denying a broader class of citizens the opportunity to either participate in the debate or effectively digest a broad spectrum of information.

exercised substantially more control over broadcast speech than speech utilizing other media, and such restrictions have been upheld based on the political tradition's rationales,[25] most importantly in *Red Lion*.[26] When the Court has accepted active state involvement to promote the political tradition's goals, however, it has done so on the basis of technological circumstances that are increasingly irrelevant to modern broadcasting. Even the staunchest communitarians have conceded that *Red Lion* is aberrational,[27] and given the aggressive academic assault[28] on the scarcity rationale, it appears as if the *Red Lion* Court may have elevated the public's interest in receiving information over broadcasters' interest in unfettered speech during a 'Meiklejohnian moment' that has passed.[29]

The Court invited a fresh challenge to the scarcity doctrine as early as 1984, suggesting the Justices would "reconsider our longstanding approach" if they received "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[30] The federal courts received the requested signals from the FCC in 1985[31] and 1987[32], but when squarely faced with the issue

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25. *Compare* NBC v. United States, 319 U.S. 190, 215 (1943) *and* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) *with* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

26. 395 U.S. at 390. Based primarily on spectrum scarcity, the *Red Lion* Court rejected a strictly individualistic view of First Amendment freedoms and upheld the fairness doctrine's restrictions on broadcasters' speech, pronouncing "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.*

27. OWEN M. FISS, THE IRONY OF FREE SPEECH 72 (1996) (noting that *Red Lion*'s basis in the scarcity doctrine renders it a "formal vestige of another era, soon to be overtaken by technological advances").

28. *See, e.g.*, Yoo, *supra* note 12. *See also* Charles W. Logan, *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CALIF. L. REV. 1687 (1997); R. Randall Rainey, *The Public's Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269, 299 (1993).

29. Conversation with Professor Don Herzog, University of Michigan Law School, (March 18, 2004).

30. FCC v. League of Women Voters, 468 U.S. 364, 376 n.11 (1984).

31. Fed. Commc'ns Comm'n, In the Matter of Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 145, 204-17 (Aug. 23, 1985) (detailing increase in number of stations and the emergence of cable television, and suggesting that the proliferation in outlets had undermined the basis for spectrum scarcity).

32. *In re* Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York, 2 F.C.C.R. 5043 (1987).

in *Metro Broadcasting*,[33] the Supreme Court declined the FCC's invitation to reconsider the "application of diminished First Amendment protection to the electronic media" in light of "the dramatic transformation in the telecommunications marketplace."[34] *Metro Broadcasting* "can hardly be regarded as a ringing endorsement of *Red Lion*,"[35] however, because it had little to do with broadcasters' First Amendment rights; the central issue was the appropriate level of scrutiny applied to federal programs encouraging minority ownership of broadcasting stations. The scarcity doctrine was not cited as a basis for controlling the content of broadcasters' speech, it merely provided a reason that the government might be more concerned about minority ownership of broadcasting stations than other media outlets.[36]

Since 1990, the Justices have neither unreservedly reaffirmed nor explicitly rejected scarcity as a basis for broadcasting regulation. The Court has noted its reliance on the scarcity doctrine in dicta,[37] but according to Professor Yoo, "a close reading of subsequent decisions reveals that the Court has severely limited [the scarcity doctrine's] scope."[38] The Court's recent broadcasting jurisprudence indicates a marked reluctance to allow the FCC to interfere with editorial discretion in the absence of a compelling state interest unless the speech at issue "lies at the periphery of First Amendment concern."[39] In *FCC v. Pacifica Foundation*, the Court allowed a broadcaster to be sanctioned for airing an "indecent" George Carlin monologue, but took care to "emphasize the narrowness of [its] holding"[40] and significantly, failed to cite the scarcity rationale as the cornerstone of broadcasting regulation. The Court instead focused on broadcast

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33. Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990).

34. *In re Complaint of Syracuse Peace Council*, 2 F.C.C.R. at 5058.

35. Yoo, *supra* note 12, at 287.

36. Analysts interested in the Court's decision-making process might also note that the Court was forced to sanction the scarcity doctrine in order to achieve its desired equal protection outcome because Justice White "made a reaffirmation of *Red Lion* the price of his vote in *Metro Broadcasting*." *Id.* (citing Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, 56-AUT LAW & CONTEMP. PROBS. 145, 179 (1993)).

37. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994) ("The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium. As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum.").

38. Yoo, *supra* note 12, at 253, 288-92.

39. FCC v. Pacifica Found., 438 U.S. 726, 743 (1978).

40. *Id.* at 750.

programs' accessibility to children,[41] and the monologue's indecency.[42] Even these non-scarcity based rationales are less than compelling. The Court has long cautioned that the state may not "reduce the adult population . . . to reading only what is fit for children,"[43] and has generally instructed those who might be offended to avert their eyes.[44] These principles have recently been reaffirmed with respect to cable television programs, which may be no less invasive of the home and no less accessible to children than programs broadcast over the publicly owned airwaves.[45]

Under current doctrine the FCC has rather limited powers. It is able to demand that broadcasters provide more of a certain type of programming (for example, children's programming[46]), or that broadcasters carry certain types of third-party speech (for example, political candidates' ads[47]). However, sanctions may not be imposed for anything other than patently offensive content; content restrictions are subject to strict scrutiny,[48] and prior restraints may not be imposed. Although the Court has yet to explicitly abandon the scarcity doctrine, the increasing weight granted to broadcasters' editorial discretion indicates that, even in the broadcasting context, the First Amendment now primarily operates to guarantee the individual autonomy prized by the liberty tradition, rather than to

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41. *Id.* at 749.

42. *Id.* at 739-42. *See also* Yoo, *supra* note 12, at 249 ("Had the Court failed to recognize these two grounds for upholding more intrusive regulation of broadcasting, it is almost certain that the principal features of the broadcasting model would not have withstood constitutional scrutiny.").

43. Butler v. Mich., 352 U.S. 380, 383 (1957). *See also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001) (holding that state may not broadly suppress speech—outdoor tobacco advertising—directed to adults in order to protect children); Reno v. ACLU, 512 U.S. 844, 874-75 (1997) (holding that non-obscene sexual material is protected speech that adults have a First Amendment right to access on the internet).

44. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (citing Cohen v. California, 403 U.S. 15, 21 (1971)).

45. *Id.*

46. 47 U.S.C. §303b(a)(2) (2000) (FCC Regulations promulgated under the Children's Television Act require that all analog channels provide at least three hours of children's programming per week. 47 C.F.R. § 73.671(d) (2006). Subsection (e), which would have extended this requirement to digital stations was stayed effective Feb 1, 2006.

47. Broadcasters *must* allow legally qualified candidates for federal office "reasonable access to [the use of a broadcasting station] or . . . permit purchase of reasonable amounts of time." 47 U.S.C. §312(a)(7) (2000). They may refuse to carry advertisements by candidates for state and local offices, but if they carry any ads, they must do so on a nondiscriminatory basis. 47 U.S.C. § 315(a) (2000).

48. *See, e.g.*, United States v. Evergreen Media Corp., 832 F. Supp. 1183, 1184 (N.D. Ill. 1983).

promote the intelligent and constructive discourse that is the aspiration of the political tradition.

B. The Advantages of Applying the Liberty Tradition to the Broadcasting Access Debate

It is possible to conceive of the competing claims to the broadcast spectrum in two ways: the conflict could be between the broadcasters and those other parties who are not granted control over the spectrum, or it could be a conflict between non-broadcasters (advertisers) allowed access and non-broadcasters denied access.[49]

1. Broadcasters Against Advertisers

Broadcasters' speech rights conflict with individuals' claims of access if broadcasters' First Amendment freedoms are implicated by the images they transmit for third parties. If the debate is framed in this way, the liberty tradition is singularly unhelpful in constructing a right of access, but at least it is clear. *Cantwell* and its progeny[50] instruct us that freedom of speech shall not be abridged absent a government interest as compelling as that found in traditionally recognized narrow exceptions.[51] 'Balancing' individuals' First Amendment rights against other concerns, such as the public's right to hear competing viewpoints, is anathema to the liberty tradition.[52]

The political tradition appears more helpful because it allows the claims of broadcasters to be weighed against the claims of those seeking access in order to determine where access rights should be located to promote public discourse. Unfortunately, discoverable standards about how to balance these competing claims are noticeably absent. Even if this decision is to be made, it is not clear that the judiciary is in the best position to make it—how does the First Amendment instruct the Court (rather than Congress) to go about making a determination about who should be empowered to

49. Current doctrine compels the latter interpretation of the competing claims, as Part III.D.4 and Part IV.D. reveal.

50. *See* POST, *supra* note 22, at 105.

51. Widely recognized examples include falsely shouting fire in a crowded theatre and causing a panic, publishing troop movements during time of war, and threats on the life of the president.

52. It can be argued that a balancing determination must be made in the liberty tradition's terms, since the emphasis the modern Supreme Court places on preserving "editorial discretion" surely arises from a Cantwellian sensitivity rather than communitarian concerns. As Part IV will make clear, however, advertising time does not fall within the ambit of editorial discretion.

say what in order to make sure that Madisonian values or Jeffersonian democracy are most effectively advanced?[53] Although courts often mention the importance of public debate or the value of an informed public, the First Amendment consistently has been interpreted as imposing restraints rather than affirmative duties on state actors. The judiciary lacks a principled basis on which to interfere with procedurally legitimate decisions unless government action violates the core guarantee of the First Amendment that Congress shall not *abridge* the freedom of speech.

2. Advertisers Against Advertisers

Alternatively, the parties asserting conflicting rights to the electromagnetic spectrum can be viewed, not as the broadcasters and excluded individuals, but as non-broadcasters allowed access and non-broadcasters denied access. On this view, the broadcaster makes the decision about who to include and who to exclude, but the broadcaster does not have a First Amendment interest at stake. If the broadcaster is a state actor and the advertising slot at issue represents a forum of some sort, the liberty tradition provides an easy answer: the broadcaster can base the decision to exclude only on a content or viewpoint-neutral basis (depending on the nature of the forum). The political tradition, on the other hand, accepts that someone may make content-based or viewpoint-based judgments to further egalitarian democratic deliberation, so the political tradition would be forced to provide a reason that broadcasters are a particularly bad entity to exercise this discretion (as opposed to, say, an administrative body that may be subject to political pressures).

The invocation of the liberty tradition thus offers an obvious advantage in constructing a right of access because it obviates the need to worry about such questions of institutional capacity. However, the absolutist liberty tradition approach of this Article is not adopted merely out of convenience, nor because of dogmatic libertarianism. Rather, the liberty tradition provides a more

53. Perhaps I have overstated the case that the political tradition always requires balancing competing claims—certainly political tradition luminaries such as Alexander Meiklejohn and Justice Black believed in First Amendment absolutes. *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 248 (1961) (quoting Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 882, 874-75 (1960)). But the problem with attempting to apply the political tradition in this particular context is that the broadcast-access debate does not present a situation in which a restriction results in a net reduction of potentially socially valuable speech, it involves an attempt to resolve the competing claims of different speakers.

appropriate framework because I advocate judicial rather than administrative action to remedy the viewpoint-based discrimination endemic in our current broadcasting regime, and the judiciary can locate constitutional imperatives and institutional capacity more readily from within the framework of the liberty tradition.

III. Haven't We Been Through This Before?—Why *CBS v. DNC* Requires Reconsideration

In 1973, the Burger Court held that the First Amendment permitted radio and television broadcasters to refuse to carry advertorials dealing with controversial issues of public importance.[54] So, it might reasonably be asked, hasn't the existence of a constitutional right to access the broadcast medium already been settled? The answer is no, for several reasons.

First, and least disputably, the Court's decision rested in large part on the existence of the fairness doctrine, which the FCC repudiated in 1987.[55] Second, the FCC's *Cullman* doctrine (also abandoned)[56] distorted the question before the *CBS* Court because it forced broadcasters to risk sacrificing control over the content of their own programming if they accepted advertorials. Third, the Court accepted that in the broadcasting context it was appropriate to defer to congressional and administrative interpretations of the First Amendment's guarantees. Perhaps such a conclusion was justified in 1973 because, at that time, the FCC at least attempted to actively supervise broadcasters to ensure that the First Amendment goals envisioned by the Communications Act were realized, but broadcasters now operate with far less oversight. The Court's earlier deference today would be an unforgivable abdication of the judicial responsibility to afford a more limited "presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments."[57]

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54. CBS v. DNC, 412 U.S. 94 (1973).

55. *In re* Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York, 2 F.C.C.R. 5043 (1987). The fairness doctrine "require[d] a station which present[ed] one side of a controversial issue of public importance to afford reasonable opportunity for the presentation of significant contrasting viewpoints on the issue in its overall programming." *In re* Complaint by Business Executives Move for Vietnam Peace, 25 F.C.C. 2d 242, 244 (1970).

56. The *Cullman* doctrine extended the fairness doctrine to paid-for advertorials. *See infra*, notes 64-65 and accompanying text.

57. United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938).

The purpose of this Section is to not to demonstrate that the Court would be forced to sustain an identical challenge brought today.[58] Rather, this Section has three limited aims: to highlight the influence of the political tradition on the outcome of the litigation; to establish that *CBS v. DNC* is no longer persuasive due to changes in the regulatory regime; and to suggest that two points of importance survive despite the collapse of the fairness doctrine.

A. Broadcasters as Public Trustees

In 1970, the FCC regarded "the licensing of private entities under the public interest standard" as the "heart of the system of broadcasting."[59] The fundamental assumption was that broadcasters were "public trustees," who possessed the twofold obligation "to devote a reasonable amount of time to public issues and to do so fairly."[60] Broadcasters possessed a substantial amount of discretion over the arrangement of their programming, but individuals could bring suits based on the fairness doctrine or the *Cullman* doctrine alleging violations of a broadcaster's duty to cover public issues in a balanced manner.

The fairness doctrine "require[d] a station which present[ed] one side of a controversial issue of public importance to afford reasonable opportunity for the presentation of significant contrasting viewpoints on the issue in its overall programming."[61] If a broadcaster's coverage of an issue was found to violate the fairness doctrine, the station could be required to provide airtime free of charge to an advocate of the viewpoint that had been discriminated against. Because of this potentially stiff penalty, the FCC granted each broadcaster considerable leeway and required them only to exercise "reasonable,

58. At least two important questions have been reserved. The state action question will be addressed in Section V; if an individual right to broadcast advertorials can be found, *CBS v. DNC* must be proven unpersuasive before broaching the issue of state action. Broadcasters were treated as if they were state actors at all three phases of *CBS v. DNC* litigation. (The Supreme Court majority avoided deciding the issue but assumed state action was present for the purposes of argument.) Furthermore, throughout the litigation the ban on controversial advertisements was viewed as a viewpoint-neutral ban on issue ads that were unrelated to messages being sent by other advertisers rather than as a viewpoint-discriminatory prior restraint. The failure of the Court and the FCC to recognize that viewpoints on an issue can be presented by speech that deals with the issue only tangentially will be addressed in Section IV.

59. *In re* DNC, 25 F.C.C. 2d 216, 221 (1970).

60. *Id.* at 222 (citing *Red Lion*, 395 U.S. at 394).

61. *In re* Complaint by Business Executives Move for Vietnam Peace, 25 F.C.C. 2d 242, 244 (1970).

good faith judgment in applying the fairness doctrine to a particular issue or issues."[62] The FCC's reluctance to engage in detailed fairness doctrine inquiries and thereby "substitute its judgment for that of the licensee"[63] was understandable, but was only implicated in the complaints at issue in *CBS v. DNC* because the FCC's *Letter to Cullman Broadcasting Co.* extended the fairness doctrine to paid-for advertorials.[64] Under the *Cullman* doctrine, if a broadcaster's overall programming did not present viewpoints opposing the viewpoint of a paid-for advertorial, the station might have to offer free airtime to a speaker who opposed the advertorial's viewpoint.[65]

The validity and propriety of the *Cullman* doctrine were automatically accepted during consideration of the cases involved in *CBS v. DNC.* This, in part, explains the ultimate outcome of the cases. The *Cullman* doctrine made some sense given the underlying rationale of the fairness doctrine—broadcasters were public trustees whose editorial discretion only encompassed the power to determine *how* (not *if*) relevant viewpoints would be presented to the public. And given the *Cullman* doctrine, the holding in *CBS v. DNC* also makes sense. If a broadcaster were forced to rebut the views of any advertorial it accepted, the broadcaster would face a difficult choice; either rebut the advertorial during its own programming (which would interfere with the editorial discretion of a broadcaster to determine how viewpoints were to be presented and how much time would be devoted to each issue) or sacrifice advertising revenue by offering free airtime to an opponent of an advertorial.

B. DNC and BEM Before the Federal Communications Commission

CBS v. DNC found its way to the Supreme Court as a result of two opinions issued by the FCC on August 5, 1970. *In re DNC* arose when the Democratic National Committee (DNC) sought a declaratory ruling that "a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues."[66] *In re BEM*

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62. *Id.* at 245.

63. *Id.* (quoting Letter to Mrs. Madalyn Murray, 40 F.C.C. 647 (1965)).

64. *See In re DNC*, 25 F.C.C. 2d at 225.

65. *Id.* The broadcaster could avoid this if an opponent of the advertorial would pay for the privilege of rebutting, but the moral hazard problem was clearly immense; who would pay for airtime they could get free by simply asserting that they were unwilling to pay for it?

66. *In re DNC*, 25 F.C.C.2d at 216.

represented an as-applied challenge: Business Executives' Move for Vietnam Peace (BEM) sought to purchase one-minute segments of radio airtime on WTOP-AM to advocate "immediate withdrawal of American forces from Vietnam and from other overseas military installations."[67] When their requests were refused by WTOP due to the station's "long established policy of refusing to sell spot announcement time to individuals or groups to set forth views on controversial issues,"[68] BEM filed a complaint with the FCC alleging (1) WTOP had violated the fairness doctrine, (2) WTOP had violated the First Amendment, and (3) the FCC's refusal to force WTOP to carry its advertorial constituted a First Amendment violation.

1. *In re DNC*

DNC challenged their exclusion based on "constitutional, statutory, and public policy grounds."[69] The FCC's opinion rendered the attempt to mount three distinct challenges futile, however, because "[many of] the policies embodied by Congress in the 'public interest' standard of the Act...were drawn from the First Amendment itself; [therefore the statutorily imposed] 'public interest' standard necessarily invites reference to First Amendment principles."[70] Furthermore, the FCC was legally unable to make a determination of the Communications Act's constitutionality because "it is beyond the power of an administrative agency to declare its governing statute to be unconstitutional."[71] Thus, the three-pronged challenged collapsed into a single inquiry: was the ability of networks to exclude controversial advertorials "in the public interest" from the point of view of the then-ascendant political tradition?[72]

The FCC's opinion is thus horrifying to the liberty tradition. Take, for example, DNC's pyrrhic victory: the FCC was saved from making a binding declaration on the solicitation prong of DNC's request by the concessions of NBC,[73] CBS,[74] and ABC[75], which each

67. *In re BEM*, 25 F.C.C. 2d at 242.

68. *Id.*

69. *In re DNC*, 25 F.C.C.2d at 217.

70. *CBS*, 412 U.S. at 122.

71. *In re DNC*, 25 F.C.C.2d at 227.

72. *Red Lion* controlled the First Amendment inquiry, and it was therefore accepted that the "right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, [was] the foundation stone of the American system of broadcasting." *Id.* at 223.

73. NBC never had a "policy against the sale of time to a *major national political*

took the opportunity to promulgate policies that explicitly discriminated against potential speakers based on identify. The networks retained their policies against selling time for comment on controversial issues, but made exceptions for major national political parties. The FCC majority approved "that treatment,"[76] despite the fact that such a policy can hardly pass the most cursory First Amendment scrutiny. As the Supreme Court subsequently queried, what was the "principled means under the First Amendment of favoring access by organized political parties over other groups and individuals"?[77] Even more anathema to the liberty tradition was the posture of DNC's request for time to comment on public issues. DNC conceded that "under the Red Lion standard reasonable restrictions by broadcasters are permissible—e.g., limitation of use of broadcast facilities to responsible spokesmen and protection against use of facilities for libelous presentations or those in bad 'taste'."[78] If any criterion allows more leeway for the formation of opinion than the determination of who represents a "responsible spokesman" for a particular viewpoint, it can only be the inherently subjective standard of "taste." Perhaps unsurprisingly, this is exactly what a well-established and mainstream group such as DNC wanted, but the concession that only some groups should be allowed to speak on only some issues conceded the legitimacy of licensee-imposed prior restraints. DNC's challenge was doomed from the start.

A challenge brought from within the framework of the political tradition was destined to fail given the FCC's assumption that the fairness doctrine prevented the exclusion of relevant alternative

party to be used for the solicitation of funds for the party." *Id.* at 228 (emphasis added).

74. CBS initially rejected DNC's request because it "occurred outside an election campaign," but revised its policy to "permit the purchase during any period *by a political party* of spot announcements (not to exceed one minute in length) *designed to solicit funds* for the party." *Id.* (emphasis added).

75. ABC retained its general policy against selling time for "comment on controversial issues or for solicitation of funds," but made a concession to DNC: "Because the strength and viability of the major political parties are vitally important, ABC would . . . accept such orders for time *from major political parties* as can be accommodated on a reasonable basis." *Id.* at 228-29 (emphasis added).

76. *Id.* at 229. The FCC majority reasoned that "[it] requires no discussion to establish that political parties are an integral part of our democratic process and that it serves the public interest to promote the widest possible support by citizens of the party of their choice."

77. CBS v. DNC, 412 U.S. 94, 127 n.21 (1973).

78. *In re DNC*, 25 F.C.C. 2d at 217.

viewpoints from the airwaves.[79] Commissioner Johnson's impassioned dissent, attempting to introduce public forum precedents, was therefore rejected because of the "public duty adhering to the acceptance of a license to give adequate coverage to public issues which reflects opposing viewpoints, if necessary at the broadcaster's own expense."[80] Broadcasters' affirmative obligations to present all viewpoints were thus used to dismiss the application of fundamental public forum principles forbidding prior restraints based on speaker identity or message content.[81] This was considered an outcome in the public interest because it limited the impact of money on the public's receipt of information: if broadcasters were forced to accept advertorials dealing with controversial issues and then give proportional coverage to the opposing view, one interested bloc with sufficient funding could dictate the subject to which a broadcaster would have to devote practically all of its time.[82]

DNC's challenge was made from within the confines of the public trustee paradigm, implicitly accepted licensee discretion over the allocation of advertising time, and succeeded only in generating disagreement between the FCC and the Court of Appeals about who should decide when the optimal level of content discrimination had been reached (the FCC left the decision to the licensee—the Court of Appeals wanted the FCC to supervise[83]). BEM's challenge, on the other hand, alleged that the particular issues about which they wished to speak were treated in a biased manner. *In re BEM* raised a more basic challenge to the system: the implication of BEM's claim was that only the speaker holding a viewpoint can adequately inform the public about the viewpoint's importance and nuances, and that

79. *See id.* at 227 ("As Red Lion makes clear, the licensee is a fiduciary with obligations to present views and voices which are representative of his community.").

80. *Id.* (internal citations omitted).

81. *Id.* The majority reasoned that "the operator of a public park or transit system has no such obligation; if the analogy offered by the dissent were valid, a broadcaster would be free to present only one side of every public issue so long as he did not reject any one who chose to speak. There would be no obligation to present the other side, let alone the obligation imposed by [the *Cullman* doctrine] to put on an opposing view without charge. It is clear, therefore, that the analogy to other types of facilities that carry speech to the public, or furnish a place for speech, is fatally faulty." *Id.*

82. *Id.* at 225. Indeed, it was regarded as so important to stop the affluent from dictating public debate that the FCC had a hard time believing that DNC would ever suggest (which it didn't) that *all* discretionary prior restraints based on speaker identity or viewpoint would be impermissible: "Presumably, the licensee would not have to turn over all of its time on a first come, first served basis, for this would mean that the issues discussed and the persons speaking would be governed entirely by money." *Id.* at 228.

83. *See infra*, Part III C.

licensees were constitutionally barred from exercising complete control over how viewpoints were to be exposed to the public and from determining by fiat how much exposure each viewpoint merited.

2. *In re BEM*

BEM conceded that WTOP had given significant treatment to the issue of the Vietnam War, but charged, "although WTOP has regularly presented the views of government officials and others supporting the Administration's position, it has not devoted a significant amount of time to contrasting views."[84] And to the extent WTOP had provided opponents of the war a forum, "BEM advocates views in contrast to those already broadcast . . . only by permitting BEM to air its views can WTOP comply with the legislative policy that it 'afford reasonable opportunity for the discussion of conflicting views on issues of public importance.'"[85]

The FCC first held that BEM failed to make a prima facie showing that WTOP's coverage of the war exhibited bias. The FCC then rejected BEM's distinct argument that the fairness doctrine had been violated because WTOP refused to broadcast advertorials regarding the war while allowing others to purchase time to broadcast announcements "on such controversial subjects of public importance as religion, the environment, the national economy, armed forces recruiting and smoking."[86] The FCC reaffirmed its rule that the sale of time to discuss some controversial topics but not others was permissible because of the licensee's discretion "to determine the format for presentation of controversial issues."[87]

The FCC's determination that the fairness doctrine had been satisfied essentially ended the inquiry: because the fairness doctrine served to unify the statutory, public policy, and First Amendment inquiries,[88] a licensee's discharge of its statutorily imposed obligation to serve the public interest was accepted as furthering the only relevant First Amendment interest (the public's right to receive information). Thus, in response to the contention that the FCC itself had committed a First Amendment violation (through inaction or through policies infringing BEM's right to speak), the Commission

84. *In re BEM*, 25 F.C.C. 2d 242, 243 (1970).

85. *Id.* at 244 (citing 47 U.S.C. § 315 (2006)).

86. *Id.* at 246.

87. *In re BEM*, 25 F.C.C. 2d. at 247.

88. *See infra* notes 125-28 and accompanying text.

simply repeated its interpretation of *Red Lion*:[89] as long as a broadcaster complied with the fairness doctrine, the public interest had been served, and therefore both the broadcaster and the government were absolved from any further First Amendment responsibilities.

The Commission nevertheless proceeded to address BEM's claim that WTOP had violated the First Amendment "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences" because it "frustrated the public's right to hear the views of BEM."[90] This claim, rooted in the liberty tradition, was rejected because since WTOP was not shown to have violated the fairness doctrine, it had by definition "provided suitable access to the public on the ideas which BEM wishes to express."[91] A licensee possessed final discretion to decide "whether a subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view."[92] All war opponents were deemed to express the same viewpoint, and "because of the multiplicity of spokesmen available to express views on the Vietnam war, it is obvious that a licensee must exercise its judgment in choosing appropriate spokesmen to insure [sic] an orderly and effective presentation of the many conflicting views."[93] It is clear that this position was tenable only as long as the fairness doctrine was enforced. The majorities in *In re DNC* and *In re BEM* were able to reject Commissioner Johnson's attempt to apply public forum precedents only because of the affirmative obligations of broadcasters to air different points of view pertaining to controversial issues. It can hardly be disputed that this argument is no longer apposite due to the demise of the fairness doctrine.

C. Johnson's *BEM* Dissent and *DNC* before the Court of Appeals

Commissioner Johnson's vigorous dissent from *In re BEM* argued the First Amendment applied to the actions of licensees because they operated a forum for the expression of ideas.[94]

89. *In re BEM*, 25 F.C.C. 2d at 247.

90. *Id.* (quoting Red Lion Broad. Co, Inc. v. FCC, 395 U.S. 367, 390 (1969)).

91. *Id.*

92. *Id.* at 244, 245.

93. *Id.* at 244.

94. 25 F.C.C. 2d at 269 (Johnson's *In re DNC* dissent provided mostly rhetorical

Therefore advertorials could not be excluded absent "evidence that acceptance of the advertisement would interfere with [the licensee's] normal function of presenting advertising space to sponsors and entertainment programming to listeners."[95] He concluded that the petitions of both BEM and DNC should be granted because "the principles and policies of the First Amendment. . .[dictate] that licensees must accept some non-commercial advertising, and that the amount accepted must be reasonable."[96] The Court of Appeals adopted this limited conclusion, instructing the FCC to promulgate regulations to ensure that licensees provided reasonable access to individuals wishing to broadcast political speech. A brief exploration of the Court of Appeals' liberty tradition reasoning illuminates the incompatibility of broadcasters' restraints with current First Amendment doctrine.[97]

The Court of Appeals not only granted DNC's request for a declaratory judgment regarding the right to public comment,[98] they essentially adopted the liberty tradition's reasoning upon which BEM's challenge rested; even if a licensee scrupulously fulfilled its obligations under the fairness doctrine,[99] a policy excluding advertorials was impermissible because it was inconsistent with individuals' First Amendment right of self-expression.

The Court of Appeals looked to *Red Lion*, which they believed constituted a "clarion call for a new public concern and activism regarding the broadcast media" because it subordinated the First Amendment interests of individual broadcasters to the "constitutional rights of the general public."[100] The Court refused to adopt the FCC's premise that the public's only interest was "as

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flourish, relying on and explicitly citing his *In re BEM* dissent for the reasoning and precedents in support of his position).

95. *Id.*

96. *Id.* at 274.

97. The Court relied exclusively and explicitly First Amendment considerations, concluding that "the constitutional question must be faced and is, indeed, essence of these cases. Whether our decision is styled as a 'First Amendment decision' or as a decision interpreting the fairness and public interest requirements 'in light of the First Amendment' matters little." Bus. Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 649 (D.C. Cir. 1971).

98. DNC's request for a declaratory judgment regarding he right to solicit funds was not appealed due to the networks' concessions discussed above.

99. The FCC's conclusion that WTOP had not violated the fairness doctrine was not appealed.

100. 450 F.2d at 650.

viewers and listeners—not as speakers."[101] They admonished the FCC for reading "the *Red Lion* Court's mention of 'the right of the public to receive suitable access to. . .ideas and experiences'" "to set forth not only *an* interest of the public, but the *only* interest of the public."[102] In no other context had the Supreme Court made "the goal of an informed public the exclusive First Amendment interest constraining broadcasters."[103] The First Amendment's "concern extends beyond the mere fostering of speech whose content will properly inform the public," in part because of the "interest of individuals and groups in effective self expression . . . [w]e all have an interest in speaking up ourselves as well as in hearing others."[104]

The liberty tradition momentarily triumphed. The public interest was best served by advertorials because "the individual or group holding the viewpoint" was in the best position to convey the nuances of a viewpoint and to judge its importance.[105] Nor was the liberty tradition's victory marred by interference with broadcasters' rights. Since the only contest was over "time relinquished by broadcasters to others. . .*[t]heir* speech is not at issue; rather, all that is at issue is their decision as to which other parties will be given an opportunity to speak."[106]

The Court declared discrimination between "commercial" and "controversial" speech impermissible based on a brief litany of cases now frequently cited as the early public forum canon.[107] The Court's conclusion anticipated doctrine not made explicit until 1992's

101. *Id.* at 654.

102. *Id.* (emphasis in original).

103. *Bus. Executives' Move for Vietnam Peace*, 450 F.2d at 655.

104. *Id.* at 656.

105. *Id.* ("[A] paid advertisement is basically controlled and edited by the advertiser. He is allowed to present his views in a fashion chosen by himself. . .when an individual or group buys time to say its piece, the crucial controls are in its own hands. Editorial advertising is thus a special and separate mode of expression, not simply a duplication of other expression on the same medium.").

106. *Id.* at 650 (emphasis in original). The Court noted that the decision had no impact on broadcasters who accepted no advertisements at all, it only impacted those who had offered blocks of time for purchase by the public and then excluded some members of the public based on the content of their speech. "For the issue in these cases is the permissibility of discrimination, within a given block of advertising time, against 'controversial' speech and in favor of commercial and 'noncontroversial' speech." *Id.* at 659.

107. *Id.* at 659-62 (citing, *inter alia*, Schneider v. State, 308 U.S. 147 (1939); Hague v. C.I.O., 307 U.S. 496 (1939); Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951); Cox v. Louisiana, 379 U.S. 536 (1965); Adderley v. Florida, 385 U.S. 39 (1966)).

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> By opening up a forum for some paid presentations, independently edited and controlled by members of the public, the broadcasters have waived any argument that advertising is inherently disruptive of the proper function of their stations. The exclusion of only one sort of advertising . . . is then highly suspect, a *prima facie* constitutional violation. To justify the exclusion, there must be a substantial factor distinguishing the disruptive effect of editorial advertising from that of commercial advertising.[108]

This is the high-water mark of the opinion. In stirring tones the Court established that even a content-neutral ban on "controversial" advertisements was unjustifiable,[109] poor policy,[110] and opened the door to viewpoint-based discrimination among controversial ideas.[111] Unfortunately, the Court quickly lost touch with the liberty tradition, and the force of their arguments dissipated in a scattered attempt to compromise with the FCC's desire to moderate the social debate.

The Court instructed the FCC to develop a scheme of reasonable regulation to enforce their holding that "editorial advertisements should at least be considered and that some should be aired."[112] This narrow holding doubtless appeared attractive because it mandated only "a modest reform" that did not "substantially undermine broadcasters' editorial control over their frequencies."[113] But the "reasonable" regulations suggested by the Court demonstrate their failure to follow their liberty tradition leanings. If individuals had a First Amendment right to purchase advertising time, how could an individual be turned away simply because someone else with a similar viewpoint had already been granted time? *Cantwell* tells us that First

108. *Bus. Executives' Move for Vietnam Peace*, 450 F.2d at 660.

109. *Id.* ("The content of the idea which the excluded speakers seek to promote is—emphatically—*not* permitted as a distinguishing factor in itself.") (emphasis in original).

110. *Id.* at 661 ("No doubt a discrimination against all controversial speech . . . is somewhat less 'odious' than a discrimination among different controversial viewpoints on particular issues. But it is a form of censorship all the same. It is a favoritism toward the status quo and public apathy and, in these cases, a favoritism toward bland commercialism.").

111. *Id.*

112. *Id.* at 663.

113. *Id.*

Amendment rights inhere in individuals, not in cohorts of people who share political sympathies or any other characteristic.[114] In addition, the financial burdens broadcasters would face due to the *Cullman* doctrine were cited by the Court to support a limit on the total amount of controversial advertising. This, despite the Court's conclusion that discrimination between commercial advertising and noncommercial 'controversial' advertising was impermissible absent a demonstrated difference in impact on the forum. If the Court really believed that advertising time represented a public forum rather than broadcasters' speech, why didn't they declare the *Cullman* doctrine unconstitutional because of the constraints it indirectly placed on individuals' ability to access the forum?

Perhaps the Court of Appeals followed the same (largely unarticulated) reasoning that can be detected in the Supreme Court's opinion in *CBS v. DNC*. Since the FCC was affirmatively acting to ensure that at least some set of First Amendment values were being served by the broadcasters, the FCC was free to balance the competing First Amendment claims at stake. This compromise is not incoherent given the Appellate Court's view of *Red Lion*; that it merely required *some* weight to be given to individuals' interest in self-expression—on this view there is no reason the public's right to receive information could not be 'balanced' against it.

Ultimately the Court of Appeals' holding is of little relevance because it was reversed by the Supreme Court, but it illustrates how the presence of regulatory controls provided the basis for the political tradition's ascendancy at that period of time. Furthermore, the invocation of the liberty tradition illuminates the most striking of the inadequacies that pervade *CBS v. DNC*—the Supreme Court's failure to adopt a clear position on the importance of the individual right to voice one's views. The Supreme Court placed the right of the public to be informed atop the hierarchy of constitutional values (in part because of inappropriate deference to the FCC made possible by the then-current regulatory regime), but never unequivocally elucidated the position in that hierarchy allotted to the individual's right to speak.

D. The Irrelevance of *CBS v. DNC*: The Fairness Doctrine Justifies Suppressing the Speech of Some to Enhance the Relative Voice of Others

The Supreme Court reversed the Court of Appeals, driven by two conclusions. Most importantly, because of the fairness doctrine,

114. *See* POST, CONSTITUTIONAL DOMAINS, *supra* note 22.

broadcasters were not obligated to treat commercial and noncommercial advertisements in a content-neutral manner. Five Justices[115] rejected the Court of Appeals' attempt to introduce public forum cases; these cases[116] were inapplicable to broadcasting because "in none of those cases did the forum sought for expression have an affirmative and independent statutory obligation to provide full and fair coverage of public issues."[117] In the view of the Court, the existence (and assumed enforcement) of the fairness doctrine meant that no discrimination against controversial speech was possible in broadcasting, "[t]he question here is not *whether* there is to be discussion of controversial issues of public importance on the broadcast media, but rather who shall determine what issues are to be discussed by whom, and when."[118] Only the political tradition treats as acceptable the idea that the state may act as the parliamentarian at a town meeting—determining the issues on the public agenda, how they will be discussed, and who shall have a say. The Supreme Court's opinion, however, does not resolve whether they meant this rejection of the liberty tradition to be significant, or whether this result was an incidental byproduct of another fundamental choice; their implicit decision that the regulatory regime then in place allowed them to defer to legislative and administrative interpretations of the First Amendment.

1. The Fractured CBS v. DNC Opinion

Chief Justice Burger wrote for six justices[119] in Parts I and II, discussing the Communications Act[120] and the fairness doctrine, and setting the tone of the opinion by declaring that a First Amendment

115. This conclusion was reached in part IV of the Court's opinion, and was therefore accepted by Burger, Rehnquist, White, Blackmun, and Powell. *See infra*, Section D.1 (discussing the fractured opinion).

116. CBS v. DNC, 412 U.S. 94, 129 (1973) (The Supreme Court added to the litany offered by the Court of Appeals Grayned v. City of Rockford, 408 U.S. 104 (1972) and Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972)).

117. *Id.*

118. *Id.* at 130 (emphasis added).

119. Justices White, Powell, Blackmun, Rehnquist, and Stewart joined parts I and II.

120. Part II emphasized § 3(h), which provided that radio broadcasters would not be deemed common carriers. The Court unfortunately failed to note, as Commissioner Johnson did, that a literal interpretation of §3(h) would be inconsistent with the implicitly accepted equal time provisions of § 3(a). *See* Commissioner Johnson's *In re BEM* dissent, 25 F.C.C.2d 242, 251-52. *See also*, 15 U.S.C. § 315(a) (2004) ("If any licensee shall permit any person who is a legally qualified candidate for public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office.").

review could only occur "within the framework of the regulatory scheme developed over the past half century," and that "great weight" should be afforded "to the decision of Congress and the experience of the Commission."[121] He wrote the heart of the opinion—Part IV—for himself and four other Justices, concluding that assuming government action existed, the First Amendment had not been violated.[122]

Despite the protest of the dissenters (who saliently noted that no majority had decided whether or not state action was present[123]), Part IV represents the only point of majority agreement on an actual holding, and therefore only from Part IV can be gleaned whatever meaning *CBS v. DNC* has today. Part IV's reliance on the since-abrogated fairness doctrine has already been noted. (Justice White's concurrence emphasized that the only question the Court decided was that "broadcaster freedom and discretion. . .*to choose their*

121. *CBS,* 412 U.S. at 102.

122. He was joined in this conclusion by White, Powell, Blackmun, and Rehnquist (note the absence of Justice Stewart). Since they concurred in this portion of the opinion, White, Powell, and Blackmun all declined to reach the question of whether government action was present. *CBS*, 412 U.S. at 147 (White, J., concurring); *id.* at 148 (Blackmun, J. for himself and Powell, J., concurring). Stewart did not join Part IV because he joined Rehnquist and Burger in Part III of Burger's opinion, which concluded no state action was present because "the Commission has not fostered the licensee policy challenged here," the government was not a "partner" of the licensee, and the government was not engaged in a "symbiotic relationship" with the licensee that allowed the State to profit from a private actor's discrimination. *Id.* at 118-20 (Burger, C.J. for himself and Rehnquist, J., concurring). These three Justices thus rejected the Court of Appeals' grounds for finding state action and distinguished *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1972) (holding that government action was present when a D.C. bus company installed radio receivers in public buses because "Congress had expressly authorized the agency to undertake plenary intervention into the affairs of the carrier and it was pursuant to that authorization that the agency investigated the challenged policy and approved it on public interest standards."). *See CBS*, 412 U.S. at 119; *Pollak* 343 U.S. at 462; Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (holding that the racial discrimination of a private diner located within a public parking garage was impermissible state action because the State profited from the diner's invidious discrimination).

Justice Douglas also refused to find state action; he failed to join Part III, but believed no state action could be possibly be present because of his absolutist position that "[t]he Fairness Doctrine has no place in our First Amendment regime." *CBS*, 412 U.S. at 154 (Douglas, J., concurring in judgment). Douglas disagreed with *Red Lion*'s approval of the fairness doctrine (he did not participate in the consideration of *Red Lion*) and believed that the FCC had no authority to regulate broadcasters because "TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines." *Id.* at 148. Justice Stewart's separate concurrence noted that although he joined part III of the Burger Opinion, his "views closely approach those expressed by Mr. Justice Douglas." *Id.* at 132 (Stewart, J., concurring).

123. *Id.* at 172.

method of compliance with the Fairness Doctrine is consistent with the First Amendment."[124]) Section D 2 attempts to bring the importance of the fairness doctrine into sharper relief by arguing that in its absence the Court's deference to the FCC is indefensible. However, Part IV of the Court's opinion contains two important conclusions that survive the demise of the fairness doctrine. Section D 3 argues that *CBS v. DNC* recognized that individual rights have some place in the hierarchy of First Amendment values at issue in the broadcasting context, and Section D 4 makes the case that *CBS v. DNC* established that broadcasters' editorial discretion is not implicated by the airing of paid-for advertorials.

2. The Court's Failure to Independently Construe the First Amendment

The Court adopted a muddled approach to the intertwining statutory-public policy-constitutional considerations, declining to imitate the Court of Appeals and reach for the First Amendment to find extrinsic guidance. They instead sought "compelling indications of error" on the part of the FCC by examining whether the Commission's conclusions served the public interest as envisioned by Congress.[125] The decision to assess administrative action based on compatibility with Congressional policies rather than consistency with the Court's own view of the First Amendment constituted monumental judicial deference considering "those [Congressional] policies ... were drawn from the First Amendment itself."[126] Regardless of the propriety of the Court's deference to *Congress*' interpretation of the First Amendment interests at stake, their reluctance to overturn the *Commission* is striking considering that Congress had chosen to balance various groups' interests in access by leaving "such questions with the Commission."[127]

Thus Congress was given latitude in crafting policies consistent with the First Amendment's guarantees—even when the sole command of Congress was that the FCC should make a decision. In this roundabout manner the Supreme Court adopted the FCC majority's interpretation of the constitutional interests at stake.[128]

124. *Id.* at 147 (White, J., concurring).

125. *CBS*, 412 U.S. at 122 ("by a careful evaluation of the Commission's reasoning in light of the policies embodied by Congress in the 'public interest' standard of the Act.").

126. *Id.*

127. *Id.*

128. *Id.* at 103 (The Court's deferential standard of review ("compelling indications of error on the part of the Commission") belied their protest: "That is not to say that we

The Court believed that Congressional inaction indicated that "First Amendment principles" did not call for an individual right to purchase advertising time—Congress had "time and again rejected various legislative attempts that would have mandated a variety of forms of individual access."[129] But if the Commission had decided to grant an individual right of access, that would have been fine too: "Congress' rejection of such proposals [for private access] must [not] be taken to mean that Congress is opposed to private rights of access under all circumstances. Rather, the point is that Congress has chosen to leave such questions with the Commission."[130]

Such an approach could be construed as justified deference to an administrative agency granted "the flexibility to experiment with new ideas as changing conditions require."[131] But the Court's acceptance of the priorities set by the legislature and the FCC resulted in a failure to examine whether the laws underlying the broadcasting system abridged freedom of speech—a staggering abdication of the Court's responsibility to say what the Constitution means and whether Congress has exceeded the limits imposed upon it by the First Amendment.[132] While some deference to the FCC was perhaps appropriate because the fairness doctrine at least gave the FCC the mission and the power to prevent wholesale viewpoint discrimination, the discretion given to the FCC is remarkable considering the constitutional gravity of the issues on which the Supreme Court determined that the "Court of Appeals failed to give due weight to the Commission's judgment."[133]

The Supreme Court rebuked the Court of Appeals for its failure to recognize that Congress and the Commission were better able than the judiciary to decide in what manner to ensure that "debate on public issues should be 'robust and wide-open'"—whether the nation "should exchange 'public trustee' broadcasting, with all its limitations, for a system of self-appointed editorial commentators."[134] Furthermore, the Commission was "also entitled to take into account

'defer' to the judgment of the Congress and the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression.").

129. *Id.* at 122.

130. *Id.*

131. *Id.*

132. *See, e.g.*, United States v. Carolene Prods., 304 U.S. 144, 152, n.4 (1938).

133. *CBS*, 412 U.S. at 123.

134. *Id.* at 125 (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

that . . . listeners and viewers constitute a 'captive audience.'"[135] The Court's assertion that the Commission was best able to consider the First Amendment implications of the "captivity" of television viewers is somewhat incongruous, considering the sole support was provided by two easily distinguishable cases (*Public Utilities Comm'n v. Pollak*[136] and *Kovacs v. Cooper*[137]), one of which explicitly noted that distinct First Amendment standards must be developed for each medium of communication—presumably *by the judiciary*.[138] The *Pacifica* rationales of accessibility to children and pervasiveness might provide related grounds to support concern for captive audiences today, but the doctrinal strength of the FCC's concern is beside the point. Allowing the FCC rather than the judiciary to determine how best to regulate a medium to provide appropriate protection for free expression allowed the FCC to make a fundamental First Amendment choice regarding whether or not "because we tolerate pervasive commercial advertisements we can also live with its political counterparts [sic]."[139]

Finally, the Court criticized the "constitutionally commanded and Government supervised right-of-access system. . .mandated by the Court of Appeals" because "the Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct."[140] And if the fairness doctrine and the *Cullman* doctrine "were suspended to alleviate these problems, as [DNC and BEM suggested] might be appropriate, the question arises whether we would have abandoned more than we have gained."[141] Apparently the Commission was in the better position to answer that question, and the Court of Appeals should have deferred to the FCC on so weighty a matter as the level of government oversight demanded to resolve competing First Amendment claims. This particular conclusion has

135. *Id.* at 127. Captive audiences have always received greater solicitude. *See infra*, notes 198-200.

136. 343 U.S. 451 (1972) (dealing with radio receivers in public buses).

137. 336 U.S. 77 (1949) (dealing with sound trucks in residential areas).

138. *Id.* at 97 (Jackson, J., concurring) ("I do not agree that, if we sustain regulations or prohibitions of sound trucks, they must therefore be valid if applied to other methods of 'communication of ideas.' The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself, and all we are dealing with now is the sound truck.").

139. *CBS*, 412 U.S. at 128. *See also*, *In re BEM*, 25 F.C.C. 2d 242 (concurring opinion of Commissioner Cox).

140. *CBS*, 412 U.S. at 126-27.

141. *Id.* at 124.

intuitive appeal to civil libertarians because the Court demanded less state involvement, but the implication is troubling. Allowing an administrative agency to determine how much power it must possess to carry out its mandate is inconsistent with the idea that our government has limited powers and is constrained by the constitutional rights of individuals. The impropriety of allowing an agency to determine the scope of its own mandate is particularly apparent when the agency's function is to ensure freedom of expression.

This remarkable deference to an administrative agency's interpretation of a fundamental constitutional mandate rested on the existence of the fairness doctrine, and the Court cannot abstain from making such fundamental choices about the structure of the public communicative sphere in its absence. The political tradition approach was deemed appealing in 1973, but today the FCC simply lacks the tools to moderate the "town meeting."

3. The Rights of Individuals Have Some Place in the Inquiry

On the other hand, it is possible that the Court actually did not defer to the FCC, but merely approved the FCC's interpretation of the First Amendment interest at stake because it was identical to the Court's. This interpretation is difficult to defend, however, because although the Court avoided explicitly resolving the conflict between the FCC's interpretation[142] of *Red Lion* and that offered by the Court of Appeals,[143] the Court both explicitly and implicitly indicated that the Court of Appeals was correct that individuals' right to access the broadcasting frequency must be taken into account. The Court framed the question presented as:

> Whether the various interests in free expression of the public, the broadcaster, *and the individuals* require broadcasters to sell commercial time to persons wishing to discuss controversial issues. In resolving that issue it must constantly be kept in mind that the interest of the public is our foremost concern. With broadcasting, where the available means of communication are limited in both space and time, the admonition of Professor Alexander Meiklejohn that

142. The public's only interest was in the passive receipt of information.

143. The public's interest in suitable access to ideas was an interest to be considered, but not the sole First Amendment concern involved.

> "what is essential is not that everyone shall speak, but that everything worth saying shall be said" is peculiarly appropriate.[144]

The FCC repeatedly emphasized that *Red Lion* established the right of the public to hear different points of view, rather than creating a "right of a particular spokesman to obtain access to the air,"[145] and the Court implicitly approved this interpretation of *Red Lion* by invoking Meiklejohn. But the Court also stated that individual rights had some place in the inquiry (even if not the place of foremost concern). What weight, then, was to be given to the individual right to participate in public debate, to speak for one's self and control one's own message?

The Court's opening salvo against the Court of Appeals is indicative of the many missed opportunities to explicitly answer this question. After noting that "the Commission has decided that on balance the undesirable effects of the right of access urged by respondents would outweigh the asserted benefits,"[146] the Supreme Court echoed the FCC's concern over the effect of wealth on public debate in the absence of broadcaster discretion to reject controversial advertisements. "The Commission was justified in concluding that the public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth."[147] So the public interest is served by 'providing access to the marketplace.' But what sort of access? Is the public interest served when the public is provided access to the marketplace solely for the purpose of consuming ideas? Or are individuals to be provided access to the marketplace so they can offer their ideas for consumption?

Possibly the meaning of "providing access to the marketplace" is left indeterminate merely due to the inadvertent appendage of the popular "marketplace of ideas" metaphor onto an unrelated quote, and the questions the phrase generates are meant to be answered by the Court's invocation of *Red Lion*'s famous admonition that the public has an interest in suitable access to *ideas* (not to a

144. *CBS*, 412 U.S. at 122 (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 26 (1948)) (emphasis added).

145. *In re BEM*, 25 F.C.C. 2d at 247. *See also Red Lion*, 395 U.S. at 390, 394 (1969).

146. *CBS*, 412 U.S. at 122.

147. *Id.* at 123.

marketplace) for the purpose of *receiving* the ideas. But the Court apparently believed something quite different; they argued that the Court of Appeals' solution was a bad one because impecunious individuals would not have a sufficient opportunity to *speak* in the marketplace if the system were dominated by wealth. "Thus, the very premise of the Court of Appeals' holding—that a right of access is necessary to allow individuals and groups the opportunity for self-initiated speech—would have very little meaning to those who could not afford to purchase time in the first instance."[148] Does that mean that if the individual right the Court of Appeals sought to further had very *much* meaning to everyone, the Commission would have been *unjustified* in deciding that the undesirable effects of a right of access 'outweighed' the asserted benefits? Probably not, given the broad latitude the Court granted to the FCC, but the Court's discussion of individuals' ability to speak in the marketplace demonstrates that an appropriate consideration of broadcasting regulations must include the impact that regulations would have on the relative ability of less affluent individuals to "access the marketplace" of ideas offer their ideas for consumption. Thus, the Court's reference to 'access to the *marketplace*' was intentional, and the Court of Appeals was correct in refusing to view the public's access to *ideas* as the sole aim of the First Amendment in the broadcasting context.

The Supreme Court therefore accepted the Court of Appeals' argument that the interest of the individual in offering ideas into the marketplace at least should be considered, but concluded that it was subordinate to the right of the public to be informed in part because the wealthy might use their wealth to engage in controversial political speech. Thus the Court explicitly approved a regulatory regime on the now-indefensible grounds that it served the public interest to "restrict the speech of some elements of our society in order to enhance the relative voice of others."[149] It can be argued that the voice of some was not restricted for the purpose of enhancing the voice of others, but to ensure that some voices did not have excessive influence on the public, but this is clearly disingenuous: by preventing some voices from having an 'excessive influence', the relative voices of others are necessarily enhanced. In any event, surely the political tradition bears the heavy burden of justifying the suppression of the

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148. *Id.*

149. Buckley v. Valeo, 424 U.S. 1 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.").

speech of some individuals merely because they are wealthier than others who hold a competing 'controversial' view.

4. The Scope of Broadcasters' Discretion Does Not Reach Time Sold for Advertisements

The Supreme Court failed to explicitly address the Court of Appeals' conclusion that broadcasters' editorial discretion was not implicated in the allocation of advertising time. A close reading of the opinion, however, demonstrates that the majority accepted the Court of Appeals' intuitively appealing argument. The Supreme Court lacked the Court of Appeals' implicit faith in the FCC's ability to promulgate reasonable regulations that would prevent real financial damage to broadcasters: the *Cullman* doctrine clearly would have forced broadcasters to grant at least some free advertising time, and the Supreme Court feared that in order to "minimize financial hardship and to comply fully with its public responsibilities a broadcaster might well be forced to make regular programming time available to those holding a view different from that expressed in an editorial advertisements."[150] Thus, the *Cullman* doctrine could lead to "a further erosion of the journalistic discretion of broadcasters in the treatment of public issues."[151] It is significant that this is the only situation in which the Supreme Court mentioned the impact of the Court of Appeals' holding on the editorial discretion of broadcasters. The Supreme Court noticeably did not say that the act of broadcasting an unwanted advertisement (or providing free *advertising* time to an opponent of an advertorial) implicated a broadcasters' editorial discretion. It was only the provision of *regular* programming time that implicated editorial discretion. Unfortunately, the Supreme Court also used language that muddied the issue.

The Court rejected the contention that "every potential speaker is the best judge of what the listening public ought to hear. . .all journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material."[152] Given the juxtaposition of potential speakers' claims and 'selection and choice of material', at first blush this sounds as if 'editing' is what broadcasters do when they select between advertisements. But the Court never said this. There was no mention

150. *CBS*, 412 U.S. at 124.

151. *Id.*

152. *Id.*

that denying a broadcaster the freedom to select between advertorials in any sense implicated the broadcasters' First Amendment interests. The broadcasters' right to edit played a role in the Supreme Court's calculus, but only with respect to regular programming—and broadcasters' collective role as meta-editors was important primarily because it provided the best means of informing the public.

This is made more clear if the reason the Court made this famous statement is understood. "Editing is what editors are for" was a response to a portion of the Court of Appeals' opinion that attacked not broadcasters' decisions regarding the allotment of advertising time, but broadcasters' retention of control over what the public would hear. The Court of Appeals asserted that in order to inform the public, "supervised and ordained discussion is not enough."[153] The Supreme Court simply disagreed as to the best way to provide informative debate to the public.[154] Broadcasters were empowered to reject advertorials not because of any impact on broadcasters' editorial discretion, but only because the public's right to receive balanced information was superior to individuals' rights to offer their ideas for consumption, and a moderator or meta-editor was assumed to be required to enlighten the public. It is clear that the Supreme Court rejected the Court of Appeals' holding not due to concern over the editorial discretion of broadcasters (which was not even mentioned with respect to advertorials), but because an individual right to purchase advertorials might misinform the public because it "would serve to transfer a large share of responsibility for balanced broadcasting from an identifiable, regulated entity—the licensee—to unregulated speakers who could afford the cost."[155] The Court made this most explicit when they decried

> the risk of an enlargement of Government control over the content of broadcast discussion of public issues. This risk is inherent in the Court of Appeals' remand requiring regulations and procedures to sort out requests to be heard—*a process that involves the very editing that*

153. *Bus. Executives' Move for Vietnam Peace*, 450 F.2d at 656 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)). *Id.* at 657 ("Assuming that broadcasters are sometimes fallible, the goal of a fully informed public is best attained by [the] opening of outlets for members of the public to supplement the licensees' assessments of 'importance,' 'controversiality' and 'full' coverage.").

154. *CBS*, 412 U.S. at 125 ("To agree that debate on public issues should be robust and wide-open does not mean that we should exchange public trustee broadcasting, with all its limitations, for a system of self-appointed editorial commentators.").

155. *Id.* at 130.

licensees now perform as to regular programming.[156]

This is the key passage—editing is only performed by licensees as to regular programming. The state was not risking involvement with *broadcasters'* discussion of public issues—'broadcast' is an adjective here, it's not a possessive noun. Advertorials carried by a frequency constitute 'broadcast discussion of public issues.' But they are not *broadcasters'* discussion of public issues.

Three of the Court's arguments demonstrate that the Court concluded broadcasting an unwanted advertorial did not infringe on editorial discretion. First, the Court conceded that advertising time is a public forum of some sort; the public forum cases cited by the Court of Appeals were rejected not because the "forum" analogy was faulty, but because "in none of those cases did the forum sought for expression" operate within the confines of the fairness doctrine.[157] Second, the Court cited the possibility of "erosion of journalistic discretion" only in the sense that the *Cullman* doctrine might force broadcasters to "make regular programming time available to those holding a view different from that expressed in an editorial advertisements."[158] Third, the Court explicitly stated that broadcasters perform "editing with respect to regular programming," as opposed to the entirety of their frequency (which would include advertisements).[159]

It is important to note that the Court accepted the proposition that a broadcasters' editorial discretion is not implicated by the transmission of an advertorial because if broadcasters' First Amendment rights are not implicated, the application of the liberty tradition can proceed without an unseemly attempt to balance the interests of broadcasters and those seeking access. Unfortunately, the Court's treatment of the issue may not be sufficiently explicit to allow *CBS v. DNC* to provide compelling precedent. Section IV will assume that the question was not definitively answered in 1973, and will attempt to resolve the issue by exploring the manner in which physical fora have been subdivided, the scope given to editorial discretion in other communicative contexts, and the social meaning that provides the implicit basis on which the Court now resolves whether or not a message is properly viewed as the 'speech' of someone in particular.

156. *Id.* at 126 (emphasis added) (internal citations omitted).

157. *Id.* at 129.

158. *Id.* at 124.

159. *Id.* at 126.

IV. Speech Consistent With the Actual Use of a Forum Cannot be Excluded on the Basis of Viewpoint

Commissioner Johnson and the Court of Appeals reasoned that if some subsection of the broadcasting spectrum constituted a public forum, content-based exclusions from that portion of a frequency were impermissible. This Section will reveal that their conclusion is persuasive today, although somewhat different terminology is required due to the Court's refinement of public forum doctrine since 1973. The cases on which the Court of Appeals relied have been questioned and are no longer patently controlling, but they remain consistent with modern doctrine in one key respect; a discrete forum located on public property is subject to the First Amendment when it is conducive to a third party's speech, including advertising.

A. Speech on Public Property Can be Restricted Only to Preserve The Property's Use

Modern public forum doctrine analyzes restrictions on speech in various social settings based on the type of forum at issue and the purpose of the regulation.[160] Doctrine reveals three types of fora: traditional public fora, limited purpose public fora, and nonpublic fora. Parcels of property traditionally used by the public for First Amendment purposes (streets, parks, and sidewalks[161]), and locations expressly designated as appropriate for unfettered speech activity ("designated public fora"[162]), qualify as traditional public fora, and

160. Courts routinely rest their assessment of a restriction's constitutionality on the perceived legislative motive, notwithstanding the possibly disingenuous tendency of some Justices to invoke periodically the "familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive," United States v. O'Brien, 391 U.S. 367, 383 (1968), *quoted in* Turner Broad. Sys. v. FCC, 512 U.S. 622, 652 (1994) and Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986). *See, e.g.*, Madsen v. Women's Health Center, 512 U.S. 753, 763 (1994) ("We . . . look to the government's purpose as the threshold consideration. . . . [T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."); Arcara v. Cloud Books, 478 U.S. 697 (1986); Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000).

161. The property may be privately or publicly owned. The Court holds true to the *Hague* formulation that property may be a public forum, "[w]herever the title of streets and parks may rest... ." Hague v. C.I.O., 307 U.S. 496, 515 (1939) (Roberts, J., concurring). The ownership of a forum can determine the reasonableness of a restriction, however. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 481 (1988) ("The residential character of those streets may well inform the application of the relevant test. . ."); Carey v. Brown, 447 U.S. 455, 460-61 (1980).

162. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985); Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

speech cannot be restricted based on its content absent a compelling state interest.[163] A limited purpose public forum exists when the government expressly dedicates a location for speech but places restrictions on speaker identity[164] or permissible subject matter.[165] Public property not conducive to unfettered speech activity constitutes a nonpublic forum in which no speaker presumptively has a right to speak. The government may select between speakers, and may even exclude all speakers (declare the forum entirely inconsistent with speech activity), but even in a nonpublic forum the state cannot engage in viewpoint discrimination.[166] "The government can restrict access to a nonpublic forum 'as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'"[167] As Justice O'Connor's *ISKCON* opinion established in 1992 and as the Circuits have recognized, the intended purpose of the property determines whether it qualifies as a designated public forum, but the actual use of a property rather than its asserted purpose determines the reasonableness of speech restrictions in both designated and nonpublic fora.[168]

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163. Attempts to exclude a speaker from a traditional public forum are subject to strict scrutiny, and are permissible "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at 800. Some restrictions are termed "content-neutral" even when they select between speech based on content if the regulations were adopted for a legitimate reason other than objection to the content of the speech or the viewpoint of the speaker. *See infra*, notes 232-34 and accompanying text.

164. *See, e.g.,* Widmar v. Vincent, 454 U.S. 263 (1981).

165. *See, e.g.,* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

166. *See Cornelius*, 473 U.S. at 806 ("although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . , the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.").

167. *Forbes*, 523 U.S. at 667-68 (quoting *Cornelius*, 473 U.S. at 800).

168. Hawkins v. City & County of Denver, 170 F.3d 1281, 1289 (10th Cir. 1999) ("[In *ISKCON*] the Court also found the ban on leafleting unreasonable given the multipurpose nature of the airports and the evidence in the record. . . . In actuality, this constitutes only Justice O'Connor's view . . . but as the narrowest majority holding, we are bound by it.") (internal citations omitted); Chicago ACORN, SEIU Local No. 880 v. Metro. Pier & Exposition Auth., 150 F.3d 695, 702 (7th Cir., 1998) ("while holding that the airport was not a traditional public forum, the [*ISKCON*] Court also held that the Krishnas were entitled to hand out leaflets in the public areas of the airport. . . . Actually, this was only Justice O'Connor's view; but it is the lowest common denominator of the Court's fractured decisions . . . and is therefore the holding that binds us."); *see also* New England

1. Subdividing a Forum

Each commercial broadcasting frequency has been leased to a private actor empowered to exercise discretion over the content of *their* speech that is transmitted over that bandwidth, but a distinction can easily be made between a network's programming and time opened for advertisements based on precedent clearly holding that a forum can be subdivided into those portions that have been offered to the public and those that have remained nonpublic.

The rights of those seeking to exercise First Amendment freedoms depend on the characteristics of the discrete locus to which they seek access, rather than the characteristics of the surrounding property. This principle has been extended to advertising numerous times,[169] perhaps most illustratively by the Seventh Circuit in *Air Line Pilots Association, International v. City of Chicago*.[170] In *Air Line Pilots* the City excluded from advertising dioramas at O'Hare Airport a union's display critical of United Air Lines (the City objected to the display's "political" rather than commercial character). The Seventh Circuit reversed the District Court, which "defined the relevant forum as the O'Hare concourse itself. This was error because 'the forum should be defined in terms of the access sought by the

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Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 20 (1st Cir. 2002); East Timor Action Network v. City of New York, 71 F. Supp.2d 334, 347 (S.D.N.Y. 1999); Christ's Bride Ministries, Inc. v. SEPTA, 148 F.3d 242, 255 (3d Cir. 1998); Multimedia Publ'g Co. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154, 159, 162 (4th Cir. 1993); United Food & Commercial Workers Union v. Southwest Ohio Reg'l Transit Auth., 163 F.3d 341, 358 (6th Cir. 1998). The Second Circuit has paid lip service to Justice O'Connor's approach, but (according to the Ninth and Tenth Circuits) has sometimes misapplied her criteria by looking to the government's *intended* "primary purpose" of the property in assessing the reasonableness of a restriction, rather than the compatibility of expressive activities with a property's actual uses. *See* ACLU v. City of Las Vegas, 333 F.3d 1092, 1101 (9th Cir. 2003) (noting disagreement with Second Circuit). *Compare* Hotel Employees & Rest. Employees Union v. City of New York Dep't of Parks & Recreation, 311 F.3d 534 (2d Cir. 2002) (holding that speech activities in plaza outside Lincoln Center could be limited to those with artistic purposes) *with* First Unitarian Church v. Salt Lake City, 308 F.3d 1114 (10th Cir. 2002) (holding that restricting activities to limit uses to those consistent with intended use—'ecclesiastical park'—was unconstitutional because the actual use of the area was pedestrian thoroughfare).

169. *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (dissenting opinion); New York Magazine v. Metro. Transit Auth., 136 F.3d 123 (2nd Cir. 1998); Lebron v. Nat'l R.R. Passenger Corp., 69 F.3d 650 (2nd Cir. 1995); Planned Parenthood Ass'n v. Chicago Transit Auth., 767 F.2d 1225 (7th Cir. 1985); Aids Action Comm. of Massachusetts, Inc. v. Massachusetts Bay Transp. Auth., 849 F. Supp. 79 (D. Mass. 1993); Lebron v. Washington Metro. Transit Auth., 242 U.S. App. D.C. 215 (D.C. Cir. 1984); Hubbard Broad., Inc. v. Metro. Sports Facilities Comm'n, 797 F.2d 522 (8th Cir. 1985), *cert. denied*, 479 U.S. 96 (1986).

170. 45 F.3d 1144 (7th Cir. 1995).

speaker.'"[171] "If a speaker seeks ... limited access, then we must tailor our approach to ascertain 'the perimeters of a forum within the confines of government property.'"[172]

After limiting the forum in question to the diorama display case, the *Air Line Pilots* Court held that the status of the forum was determined not by the asserted use (commercial advertising),[173] but by "policy and practice of the government with respect to the underlying property" and "the nature of the property and its compatibility with expressive activity."[174] Justice O'Connor's *ISKCON* opinion controls the analysis; even if past practice reveals the forum is limited purpose or nonpublic in nature, a speech restriction would still be unreasonable unless the State could present a reason that the display would "actually interfere" with the use to which the forum historically has been put.[175]

Air Line Pilots reflects the approach to advertising that the Circuits have adopted in response to O'Connor's *ISKCON* opinion; viewpoint-based discriminations are impermissible in a nonpublic forum but content-based distinctions are permissible if they are reasonable in light of the actual use to which a forum historically has been put. If a forum's manager claims that an advertising venue is a forum in which a content-based distinction has historically been made between commercial and non-commercial advertisements, courts conduct a fact-intensive inquiry into past practice.[176] If all non-commercial advertisements have in fact always been excluded, then the continued exclusion of non-commercial advertisements is a content-based exclusion that may be reasonable—if the forum manager can present a plausible reason that noncommercial

171. *Id.* at 1151 (quoting *Cornelius*, 473 U.S. at 801).

172. *Id.*

173. *Id.* at 1152.

174. *Id. See also Cornelius*, 473 U.S. at 802-03.

175. *Id.* at 1159-60 (citing Multimedia Publ'g Co. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154, 159 (4th Cir. 1993)).

176. *Compare* Lebron v. Nat'l R.R. Passenger Corp., 69 F.3d 650 (2nd Cir. 1995) (limiting forum analysis to the one particular billboard to which the artist sought access—"The Spectacular"—and concluding that past practice revealed the exclusion of a political advertisement was reasonable and viewpoint neutral) *with* New York Magazine v. Metro. Transit Auth., 136 F.3d 123 (2nd Cir. 1998) (granting injunction in favor of advertiser who sought to post a commercial advertisement with political overtones because political speech had been allowed in the past in advertising space on Transit Authority buses, therefore the exclusion of an ad interpreted as insulting to Mayor Giuliani was an unconstitutional prior restraint).

advertising would interfere with the forum's actual use.[177]

It is certainly questionable to assert that the display of a "noncommercial" billboard will disrupt a forum in which "commercial" placards have historically been displayed. Judge Flaum's concurrence in *Air Line Pilots* may have presented the best of the argument: "when a space is open to advertising, to commercial speech, that fact indicates that the space is not only not disrupted by expressive activity but is conducive to such activity."[178] The resolution of this question is not necessary in order to construct a right of access to broadcast advertisements, however, because broadcasters frequently sell advertising time for noncommercial "public service" announcements and political messages. Furthermore, networks will sell time to large corporations who wish to transmit purportedly noncommercial messages—anyone who watched television in the aftermath of 9/11 can attest that the airwaves abounded with heartwarming messages that did not explicitly propose a commercial transaction: "'United We Stand,' sponsored by [buy] BigCorp, Inc." Thus, advertising slots are not exclusively reserved for the presentation of product solicitations, and mechanically applying the *Air Line Pilots* approach to broadcasting time produces the following result: the exclusion of an advertorial solely because it deals with a noncommercial topic is unconstitutional because it is unreasonable in light of the past practice of the forum administrator.

Such a limited approach is convenient, but it concedes that a content-based distinction can permissibly be made between "commercial" and "noncommercial" speech, and that there might sometimes exist a defensible basis on which to discriminate among the two in favor of commercial speech. Part B thus addresses another still-compelling insight of the D.C. Circuit in the early 1970s; a putatively content-based distinction between commercial and noncommercial speech is impermissible when the distinction is used to exclude noncommercial speech.

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177. *See Lebron*, 69 F.3d 650. The idea that noncommercial advertising can be inconsistent with a forum's use derives from *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (political advertisements could be excluded from advertising spaces inside public transportation buses because the city was "engaged in commerce" and reasonably believed allowing political ads would interfere with revenue). *Lehman* is in some senses an outlier, however, and in any event does not control situations in which audiences are not "captive." See infra, Part IV.B.1.

178. *Air Line Pilots*, 45 F.3d 1144, 1161 (7th Cir. 1995) (Flaum, J., concurring).

B. Excluding Speech Because it is "Noncommercial" is Viewpoint Based Discrimination

In *CBS v. DNC*, the Court of Appeals joined an "unbroken line of authority" holding that "once a forum, subject to First Amendment constraints, has been opened up for commercial and 'noncontroversial' advertising, a ban on 'controversial' editorial advertising is unconstitutional unless clearly justified by a clear and present danger."[179] The "clear and present danger" test has of course fallen out of favor; under current doctrine the restriction would be examined for viewpoint neutrality and reasonableness of purpose. Unfortunately other apparent inconsistencies with modern doctrine cannot be reconciled quite so easily.

The Court of Appeals relied on three federal and two state cases declaring unconstitutional the refusal of public transportation officials[180] and school newspaper editors[181] to carry controversial advertisements. These cases have received rough treatment in the intervening years; federal courts have refused to extend them to other publications in which the state is involved, such as law reviews,[182] school yearbooks,[183] and school newspapers.[184] The refusal to extend the cases on which the Court of Appeals relied rested on the absence of state action, but the underlying reasoning has been questioned by other cases that more directly undermine the Court of Appeals' position. The Supreme Court's plurality opinion in *Lehman v. City of Shaker Heights*, which upheld the exclusion of advertisements from state-owned property if they were political rather than commercial, initially appears most damaging because it seems to suggest that the

179. 450 F.2d 642, 659.

180. Kissinger v. New York City Transit Auth., 274 F. Supp. 438 (S.D.N.Y. 1967); Hillside Cmty. Church, Inc. v. City of Tacoma, 455 P.2d 350 (Wash. 1969); Wirta v. Alameda-Contra Costa Transit Dist., 434 P.2d 982 (Cal. 1967).

181. Lee v. Bd. of Regents of State Colleges, 306 F. Supp. 1097 (W.D. Wis. 1969); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969).

182. Avins v. Rutgers, State Univ. of New Jersey, 385 F.2d 151, 153-54 (3rd Cir. 1967).

183. Yeo v. Town of Lexington, 131 F.3d 241 (1st Cir. 1997) (en banc) (rejecting challenge to high school yearbook's exclusion of an ad encouraging abstinence because no state action was present).

184. Leeds v. Meltz, 85 F.3d 51 (2d Cir. 1996) (law school newspaper could reject an advertisement because no state action present); Sinn v. The Daily Nebraskan, 829 F.2d 662 (8th Cir. 1987) (no state action if school officials not actually involved in the rejection because student paper maintained its editorial independence); Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976) (no state action where school paper's editor was elected by the students and no school official controlled the acceptance or rejection of ads).

distinction can be made on the basis of content rather than viewpoint. However, as the following Section will show, *Lehman* allowed the discrimination based on concerns that are not relevant to broadcasting. Furthermore, *Lehman* has been limited in recent years by courts that have recognized the inconsistency of *Lehman* with *ISKCON* and the fundamental weakness of commercial vs. noncommercial distinctions.

Part 1 discusses the *Lehman* opinion, the extent to which it has been discredited by *ISKCON*, and the irrelevance of *Lehman* to the broadcast-access debate. Part 2 notes a line of D.C. Circuit cases holding that a commercial/noncommercial distinction is impossible to draw. The obvious implication of these cases is discussed in Part 3: even if Lehman's reasoning is accepted as persuasive, the *CBS v. DNC* Court of Appeals was correct in its belief that (absent a captive audience) a commercial/noncommercial distinction is based upon viewpoint and cannot be made to the detriment of noncommercial speech.

1. Lehman

Lehman v. City of Shaker Heights[185] involved the refusal of a private corporation, Metromedia, Inc., to rent advertising space within the city's railcars to Harry J. Lehman, a candidate for state representative. The basis for excluding Mr. Lehman's message that he was "Old Fashioned! About Honesty, Integrity, and Good Government"[186] was a contract between Shaker Heights and Metromedia forbidding the placement of "political advertising in or upon any of the [City's] cars."[187] The Supreme Court of Ohio refused to order the City to carry Lehman's message because "the constitutionally protected right of free speech with respect to forums for oral speech . . . does not extend to commercial or political advertising on rapid transit vehicles."[188] The conflict of this decision with the cases relied on by the *DNC* Court of Appeals led the Supreme Court to hear the case.

Professor BeVier's lucid analysis of *Lehman*'s effect on doctrine describes it as "the watershed case" that (at least temporarily and in retrospect)[189] resolved the doctrinal debate regarding the extent of the

185. 418 U.S. 298 (1974).

186. *Id.*

187. *Id.* at 299.

188. *Id.* at 301.

189. Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*,

public's right to access a public forum,[190] but *Lehman*'s current strength is questionable. The Supreme Court ruled against Mr. Lehman on limited grounds and under reasoning that is in some respects flatly inconsistent with post-*ISKCON* doctrine.

First, the Blackmun plurality made no attempt to separate restrictions on the advertising space from restrictions appropriate to other aspects of operating the commercial venture. The decision to dedicate the space exclusively to commercial speech was viewed as a decision incidental to the operation of the transit system as a whole, "little different from deciding to impose a 10-, 25-, or 35-cent fare, or from changing schedules or the location of bus stops."[191] This is clearly at odds with the modern inquiry, which focuses on whether a right of access for controversial speech will interfere with the operation of the advertising display qua display.[192]

Furthermore, whatever *Lehman* may have meant before 1992, Justice O'Connor's *ISKCON* concurrence requires a far more searching inquiry than the plurality's perfunctory search for potential justifications for the exclusion.[193] The *Lehman* plurality applied rational basis scrutiny to the forum manager's exclusion of political advertisements, requiring only that "the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious."[194] (Justice Douglas' concurrence was even more extreme: "a streetcar or bus is plainly not a park or sidewalk or other meeting place for discussion. . .[i]f a bus is a forum it is more akin to a newspaper than a park. Yet if a bus is treated as a newspaper. . .the owner cannot be forced to include in his offerings news or other items which outsiders may desire but which the owner abhors."[195]) The plurality viewed rational basis scrutiny as appropriate because they rejected "a guarantee of nondiscriminatory access to such publicly owned and controlled areas of communication

1992 SUP. CT. REV. 79, 88.

190. For a thorough account of pre-*ISKCON* public forum doctrine *see id.* at 81, n. 8 (citing Robert C. Post, *Between Governance and Management: the History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987)); *see also* ROBERT C. POST, CONSTITUTIONAL DOMAINS 199-266 (1995).

191. *Lehman*, 418 U.S. at 304.

192. Lebron v. Nat'l R.R. Passenger Corp., 69 F.3d 650 (2nd Cir. 1995); Lebron v. Washington Metro. Transit Auth., 749 F.2d 893 (D.C. Cir. 1984).

193. *See Lehman*, 418 U.S. at 303-4.

194. *Id.* at 303.

195. *Id.* at 306.

regardless of the primary purpose for which the area is dedicated."[196] This is consistent with current doctrine in that no public forum is presumed to be present unless the property is expressly dedicated to such use, but (forgivably) neglects to recognize that speakers may have rights to access limited purpose and nonpublic fora. Even though there is no "guarantee" that access will be granted, *ISKCON* requires "an explanation as to why such a restriction preserves the property for the several uses to which is has been put."[197]

The precise contours of the *Lehman* plurality's dictum are in any event irrelevant to the broadcasting-access debate, since the opinion was driven primarily by a concern for captive audiences. The Blackmun plurality and Justice Douglas both expressed solicitude for individuals unable to avoid speech: "viewers of billboards and streetcar signs [who] had no 'choice or volition' to observe such advertising and had the message 'thrust upon them by all the arts and devices that skill can produce. . .The radio can be turned off, but not so the billboard or street car placard.'"[198] Judges interpreting *Lehman* have noted that "in *Lehman*, the only position to command a majority was that the private advertisers who wished to place placards on buses had no right to subject a captive audience to their message."[199] One year after *Lehman*, the Supreme Court limited the holding (one can only presume intentionally) by citing the case as establishing one of the *exceptions* to the general prohibition on prior restraints.[200]

Lehman is thus appropriately (and frequently) invoked to allow the manager of advertising space on public property to draw distinctions between commercial and political speech due to the presence of captive audiences in various transportation facilities, but it is inapplicable to broadcasting, because "the radio can be turned off."[201] It appears important, however, to demonstrate that *Lehman* fails to suggest that commercial/noncommercial distinctions are based on content rather than viewpoint.

196. *Id.* at 301.

197. 505 U.S. 672, 692.

198. 418 U.S. at 302, 308 (quoting *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932)).

199. *Air Line Pilots*, 45 F.3d 1144, 1161 (Flaum, J., concurring).

200. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555-56 (1975) ("None of the circumstances qualifying as an established exception to the doctrine of prior restraint was present. . . .There was no captive audience. See *Lehman v. City of Shaker Heights*; *Public Utilities Comm'n v. Pollak* (Douglas, J., dissenting).").

201. *See supra* note 198. *See also* United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000) (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

2. Image Advertising and Viewpoints on Controversial Issues of Public Importance

In 1974 the FCC concluded that "standard product commercials" made "no meaningful contribution to informing the public on any side of any issue," and therefore broadcasters airing such spots could not be subject to challenge under the fairness doctrine.[202] Product advertisements were not deemed to implicate "the doctrine's central purpose, which [was] to facilitate 'the development of an informed public opinion,'"[203] and the fairness doctrine would apply "only to those 'commercials' which are devoted in an obvious and meaningful way to the discussion of public issues."[204] The declaration that product advertisements did not implicate the fairness doctrine "was made with a conscious awareness that it represented a marked shift from previous FCC policy."[205] The policy change was made necessary by a series of complaints (based on the *Cullman* doctrine) alleging that networks running various advertisements had violated the fairness doctrine. Some of the challenged spots were explicitly about controversial issues, such as the development of oil reserves in Alaska,[206] the desirability of joining the military during the Vietnam War,[207] and the propriety of granting a regulated energy company a rate increase.[208] Other challenged advertisements hawked products various activists found noxious, including cigarettes,[209] high-powered automobiles,[210] and snowmobiles.[211] These cases are worth noting because they cast light on the assumptions of the D.C. Circuit at the time of their *CBS v. DNC* decision, and offer one resolution of a question that plagues modern doctrine; is the distinction between

202. In the Matter of The Handling of Public Issues Under the Fairness Doctrine and The Public Interest Standards of the Communications Act, 48 F.C.C. 2d 1, 24 (1974) [hereinafter Fairness Report].

203. *Id.*

204. *Id.*

205. Nat'l Citizens Comm. for Broad., 567 F. 2d 1095, 1099 (D.C. Cir. 1977).

206. *See* In Re Complaint by Wilderness Soc'y, 30 F.C.C. 2d 642 (June 39, 1971). (this line of decisions is frequently referred to as the *Esso* decision).

207. Green v. FCC and G.I. Association v. FCC, 447 F.2d 323 (D.C. Cir., 1971) (this was a somewhat complicated decision that held the stations had not violated the fairness doctrine even if calls for voluntary enlistment implicated the precise issue of American involvement in Vietnam, because by no stretch of the Court's imagination could anyone be uninformed about either side of the controversy).

208. In re Complaint of Media Access Project, 44 F.C.C.2d 755 (1973).

209. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968).

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

211. Pub. Interest Research Group v. FCC, 522 F.2d 1060 (1st Cir. 1975).

commercial and noncommercial speech based on content or viewpoint?

The extension of the fairness doctrine to product advertisements began[212] in 1967 when John F. Banzhaf, III demanded that WCBS-TV provide him with time to propound an anti-smoking message in response to

> all cigarette advertisements which by their portrayals of youthful or virilelooking or sophisticated persons enjoying cigarettes in interesting and exciting situations deliberately seek to create the impression and present the point of view that smoking is socially acceptable and desirable, manly, and a necessary part of a rich full life.[213]

The Commission upheld Mr. Banzhaf's challenge (although they didn't grant him airtime to reply) stressing "that our holding is limited to this product—cigarettes."[214] A storm of controversy and requests for clarification erupted, and the D.C. Circuit ultimately upheld the application of the fairness doctrine to cigarette commercials. Chief Judge Bazelon, in a widely quoted passage, laid out the unique characteristics of broadcasting that provided the basis for intrusive government regulations:

> Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room,

212. Strictly speaking, there was precedent for holding that product advertisements could present points of view on controversial issues. In *Petition of Sam Morris*, 11 F.C.C. 197 (1946), the FCC suggested that "the advertising of alcoholic beverages can raise substantial issues of public importance," although it declined to deny an application for a renewal license by a radio station located in a "temperance belt" that accepted ads for alcohol and refused to accept anti-liquor ads. The fairness doctrine had not been articulated in 1946, however, and the case was not followed for 20 years before Mr. Banzhaf's petition. *Banzhaf*, 405 F.2d at 1092.

213. *Banzhaf*, 405 F. 2d at 1086.

214. *Id.* at 1086 (quoting Television Station WCBS-TV, 8 F.C.C. 2d 381 (1967)).

> changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.[215]

Banzhaf thus wrote into law two radical propositions: image advertising could present a viewpoint without ever explicitly addressing an issue, and the ubiquity and insidious power of broadcast advertisements imposed a duty on the FCC to provide opportunities for activists to rebut the messages sent. The obvious appeal of these theories for litigants doomed the *Banzhaf* doctrine to extension, and thus ultimately to abrogation.

In *Friends of the Earth*, the petitioners complained of "pitches for large-engine [cars] and high-test gasolines which are generally described as efficient, clean, socially responsible, and automotively necessary."[216] Just as in *Banzhaf*, however, the petitioners could point to no ads specifically stating any of the named propositions, but instead objected to a pattern of advertisements that favorably portrayed environmentally unfriendly cars.[217] The FCC refused to extend *Banzhaf*, arguing that if ads implying large engines were beneficial implicated the Fairness Doctrine, so would advertisements for "a host of other products or services—detergents (particularly with phosphates), gasoline (especially of a leaded nature), electric power, airplanes, disposable containers, etc."[218] The Court of Appeals, however, refused to allow the FCC to render *Banzhaf* sui generis, finding that "[c]ommercials which continue to insinuate that the human personality finds greater fulfillment in the large car with the quick getaway do, it seems to us, ventilate a point of view which not only has become controversial but involves an issue of public importance. . . .the parallel with cigarette advertising is exact and the

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215. *Id.* at 1100-110.

216. Friends of the Earth v. FCC, 449 F.2d 1164, 1165 (D.C. Cir. 1971).

217. *Id.* (The advertisements, apparently selected at random, were guilty of the following sins: "picturing [a Ford Mustang] on a lonely beach, and stressing its 'performance'", "stressing the great value of [a Chevrolet Impala's] size . . . including the standard 250-horsepower V-8 engine", "stressing [a Ford Mustang's] size . . . and advocating 'moving up' to a larger car", and "encouraging the use of high-test leaded gasoline for cold-weather starting.").

218. *Id.* at 1167.

relevance of *Banzhaf* inescapable."[219]

Extensions such as *Friends of the Earth* doomed the application of the fairness doctrine to product advertisements[220] due to administrative concerns. Consider the far-reaching implications of the D.C. Circuit's 1971 conclusion that "product advertising by a department store which was being boycotted as a result of a labor dispute implicitly raised the issue of whether or not the store should be patronized, which, given the union strike and boycott, was a controversial issue of public importance."[221] While the FCC justifiably feared a deluge of *Cullman* doctrine complaints, the agency never questioned the proposition that product advertisements can represent a viewpoint, or even that they can *influence* the public. The removal of product ads from the fairness doctrine was instead based on the proposition that standard product commercials "cannot be said to *inform* the public on a controversial issue of public importance."[222]

At this juncture it becomes clear how the application of a liberty tradition perspective advances a broadcast-access right. Focusing on the individual's right to express their personal point of view (rather than the speech's impact on the public's political consciousness), the federal courts are presented with the following situation: a viewpoint is being presented via a property owned by the public, and the managers of that property have the power to deny people the opportunity to rebut the view. Moreover, dissenters are being excluded solely on the basis of the viewpoint they seek to air. The First Amendment clearly cannot permit a viewpoint-discriminatory prior restraint on a parcel of public property that is actually used for communication (in the absence of a concern for captive audiences). To establish that viewpoint discrimination (rather than potentially permissible content-based discrimination) is in fact implicated, however, the suggestion that a commercial/noncommercial distinction represents a permissible content-based restraint must be addressed.

3. *Commercial/Political Distinctions are Viewpoint-Based According to Lehman*

Courts have often concluded that *Lehman* allows forum

219. *Id.* at 1169.

220. Cigarette advertisements remained off the airwaves, however, because they were made illegal by the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §1335 (2004).

221. Nati'l Citizens Comm. for Broad., 567 F. 2d 1095, 1101 n. 15 (summarizing Retail Store Employees Union, R.C.I.A. v. FCC, 436 F.2d 248 (D.C. Cir. 1970)).

222. Pub. Interest Research Group v. FCC, 522 F.2d 1060, 1063 (1st Cir. 1975).

managers to exclude noncommercial messages only when they enact "a blanket exclusion of an entire class of potentially controversial speech," but where a forum manager accepts "political and public-issue advertising. . .*Lehman* is not controlling."[223] The implication is that commercial advertising can somehow be differentiated from noncommercial advertising due to the innocuous impact of product solicitations. In fact, *Lehman* holds no such thing. Justice Douglas, the crucial vote in *Lehman*, actually wanted to prevent the city from placing either type of advertising on its cars because it interfered with passengers' rights to be let alone.[224] He noted that "[c]ommercial advertisements may be as offensive and intrusive to captive audiences as any political message," but "the validity of the commercial advertising program is not before us because we are not faced with one complaining of an invasion of privacy through forced exposure to commercial ads."[225] The important point for Justice Douglas was that "petitioner has [no] constitutional right to spread a message before this captive audience."[226] Thus, despite the fact that commercial and noncommercial messages could be equally provocative or offensive (quite possibly they could even offer opposing viewpoints on identical issues, as previous courts noted[227]), any speaker could be excluded because neither commercial nor noncommercial speakers had any right to be present. This may be an acceptable position if no forum of any sort is at issue (which was Justice Douglas' position), but under current doctrine advertising displays are unquestionably fora of one sort or another.

Thus Justice Douglas adopted a formulation of the classic "the greater power includes the lesser" argument—if the state can clearly prohibit the speech at issue, the argument goes, then First Amendment values suffer no harm if the state chooses to allow some other speech it might also have prohibited.[228] The strength of this approach is questionable at best.[229] While the Court has relied on it in

223. Planned Parenthood Assoc. v. Chicago Transit Auth., 767 F.2d 1225, 1233 (7th Cir. 1985). *See also* Lebron v. Washington Metro. Transit Auth., 749 F.2d 893, 896 (D.C. Cir. 1984) ("Unlike [Lehman], where the Supreme Court sustained a ban on all political advertising inside a city transit system, the Authority here, by accepting political advertising, has made its subway stations into public fora.").

224. 418 U.S. 298, 307 (Douglas, J., concurring in the judgment).

225. *Id.* at 308 (Douglas, J., concurring in the judgment).

226. *Id.*

227. *See supra* note 180.

228. *See, e.g.*, Commonwealth v. Davis, 162 Mass. 510 (Mass. 1895).

229. *See, e.g.*, 44 Liquormart v. Rhode Island, 517 U.S. 484, 512 (1996) ("As a matter of

some important cases,[230] Justice Douglas neglected to address the modern Court's concern with content-based underinclusiveness, particularly as embodied *R.A.V. v. City of St. Paul*.[231] *R.A.V.* allowed content-based distinctions between speech only in the absence of a "realistic possibility that suppression of ideas is afoot."[232] Content-based distinctions are permissible when the state differentiates between instances of unprotected speech only if the "basis for content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable."[233] This rationale would justify prohibiting "only that obscenity which is the most patently offensive *in its prurience*. . .[but not]. . . only that obscenity which includes offensive *political* messages."[234] Thus, Justice Douglas' tolerance of the discrimination between commercial and noncommercial speech is incoherent under current doctrine. He conceded that no independent basis existed on which to exclude noncommercial speech (both commercial and noncommercial speech could be intrusive or offensive), and thus under current doctrine he would be forced to

First Amendment doctrine, the [greater includes the lesser] syllogism is even less defensible.") (Stevens, J., plurality opinion).

230. Virginia v. Black, 123 S.Ct. 1536 (2003); Rust v. Sullivan, 500 U.S. 173 (1991).

231. *R.A.V.*'s underlying premise, that content-based discrimination is prohibited when it raises the possibility of viewpoint-based discrimination, is officially intact, despite my personal opinion that it was significantly undermined by *Virginia v. Black*. At issue in *R.A.V.* was an ordinance that prohibited placing on public or private property a symbol or object that the actor knew would cause offense based on race, color, creed, religion, or gender. The Court struck down the law because it did not prohibit structures that caused offense on the basis of other factors (such as political affiliation). 505 U.S. at 393. *Virginia v. Black* held that Virginia had the power to ban cross burning with the intent to intimidate, but that the conviction of Black impermissibly rested on a construction of the ordinance that treated the act of burning a cross as prima facie evidence that the actor had the intent to intimidate. 123 S.Ct. at 1550. In my view the Virginia statute constitutes viewpoint discrimination because it is a regulation aimed at an act associated with the KKK, a group whose viewpoint everyone implicitly understands. (Perhaps there are nuances in Klan doctrine of which I am unaware and of which the general public is equally ignorant, but I doubt that they are very interesting). *R.A.V.* survives *Black*, however, because cross burnings are not always aimed at minorities and do not cause fear based on any particular characteristic. 123 S.Ct. at 1549 ("Unlike the statute at issue in R.A.V., the Virginia statute does not single out for opprobrium only that speech directed toward one of the specified disfavored topics." (internal citation omitted)).

232. *R.A.V.*, 505 U.S. at 393. Scalia chooses as an example a regulation that affected only obscene movies featuring blue-eyed actresses. He also mentions as a separate category laws that reach unprotected speech only incidentally, such as Title VII regulations that may affect only sexually explicit fighting words rather than all fighting words, but for the purposes of this discussion I think the quote encompasses the Title VII example as well.

233. *Id.*

234. *Id.* at 388 (emphasis in original).

conclude that speech of one variety could not be excluded whilst the other was permitted.

This is the quite close to the position adopted by the four-Justice *Lehman* dissent, which rejected the position that "as long as the city limits its advertising space to innocuous and less controversial commercial and service oriented advertising, no First Amendment forum is created."[235] The dissent recognized that commercial speech, while perhaps less important for the pursuit of self-government than political speech, "is speech nonetheless, often communicating information and ideas found by many persons to be controversial."[236] It was unacceptable to the dissent (just as it was to the D.C. Circuit in the broadcasting context) that one side of an issue could be discussed, and not another: "a commercial advertisement peddling snowmobiles would be accepted, while a counter-advertisement calling upon the public to support legislation controlling the environmental destruction and noise pollution cause by snowmobiles would be rejected."[237] The fact that "the discrimination is among entire classes of ideas, rather than among points of view within a particular class, does not render it any less odious," because there was "no evidence in the record of this case indicating that political advertisements, as a class, are so disturbing when displayed that they are more likely than commercial or public service advertisements to impair the rapid transit system's primary function of transportation."[238]

So, far from overturning the cases on which Johnson and the Court of Appeals relied, five *Lehman* Justices offered a ringing endorsement of the position that "the line between ideological and nonideological speech is impossible to draw with accuracy."[239] Justice Douglas' quixotic stand that passengers' right to be let alone trumped individuals' right to access public property opened for speech does not obscure this aspect of the *Lehman* opinion. While a number of cases have suggested that a fictitious commercial/noncommercial distinction is not based on viewpoint and thus may be drawn to exclude political speech from billboards located on public property[240]—almost certainly to the detriment of public discourse—we

235. *Lehman*, 418 U.S. at 314 (Brennan, J., dissenting) (internal citation omitted).

236. *Id.* at 314.

237. *Id.* at 317.

238. *Id.* at 316, 319.

239. *Id.* at 319.

240. *See, e.g.*, Lebron v. Nat'l R.R. Passenger Corp., 69 F.3d 650 (2d Cir. 1995); Planned Parenthood Ass'n v. Chicago Transit Auth., 767 F.2d 1225 (7th Cir. 1985); Lebron

are not bound to perpetuate forever this mistake in the broadcasting context.

Justice Douglas, the *Lehman* dissenters, and the rarely cited but never questioned *Banzhaf* line of cases all accepted the proposition that a distinction between commercial and noncommercial speech is based on viewpoint rather than content. If broadcasters are state actors, this distinction cannot be drawn in a public forum—certainly not to the detriment of "noncommercial" speech. Before the state action issue is addressed, however, it appears important to demonstrate that the compelled transmission of an advertorial does not represent "forced speech" that would offend the liberty tradition.

C. Communicative Activity Contrasted With a Nonpublic Forum

The Court has made it clear that a non-physical forum (a "forum" unable to contain physical matter) can constitute a doctrinal public forum. A list of persons or groups can constitute an actual public forum to which access must be granted. In *Rosenberger v. Rectors of the University of Virginia*, the Court characterized a list of university-funded publications as a "metaphysical" public forum to which access could not be denied on the basis of viewpoint. This has been extended to prohibit the government from excluding groups from such fora on the basis of content and viewpoint,[241] but it is crucial to distinguish between a situation in which the government provides a forum for private speech but excludes some speakers from instances of actual speech by a state actor (in which case no forum analysis applies).[242]

State actors are free to express a viewpoint, even through private speakers[243] or by compiling and conveying the speech of third parties.

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v. Wash. Metro. Transit Auth., 242 U.S App. D.C. 215 (D.C. Cir. 1984).

241. *See, e.g.*, Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000). Not all "metaphysical" public fora are traditional, however, and not all exclusions are impermissible. *See, e.g.*, Texas v. Knights of the Ku Klux Klan, 58 F.3d 1075, 1078 (5th Cir. 1995) (Texas could exclude Klan from Adopt-A-Highway sign next to public housing project because potential for racial strife was permissible viewpoint-neutral basis for exclusion). *See also*, People for the Ethical Treatment of Animals v. Cowparade, LLC, 105 F. Supp.2d 294, 324 (S.D.N.Y. 2000).

242. Suggestions have been made that recent cases have opened up the possibility of a "government speech forum" with its own rules of access, but such a doctrinal stretch, while an interesting proposition, has not been recognized by the federal courts. *See* Randall P. Bezanson, *The Government Speech Forum: Forbes and Finley and Government Speech Selection Judgments*, 83 IOWA L. REV. 953 (1998).

243. Rosenberger v. Rectors of the Univ. of Va., 515 U.S. 819, 833 (1995) ("[W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.").

In *Cuffley v. Bennett*,[244] for example, a public radio station declined sponsorship from the KKK in order to avoid offering a fifteen-second on-air underwriting acknowledgment. This was permissible because "[a]lthough the logograms, slogans, and product summaries in these fifteen-second acknowledgements may in fact identify the underwriter, conveyance of this collateral information remains a communicative act of the government, even if it only involves a compilation of third-party speech."[245] The acknowledgements did not "fall within the conventional understandings of promotional advertising",[246] but rather were "related to the journalistic purposes of the station, in that the acknowledgements convey important, federally-mandated information to the public about the source of funding for particular broadcast material."[247] Since the announcement was an integral part of the program on which it would appear, it would be attributed to the government actor responsible for the program, and the decision to reject sponsorship thus fell within the broad ambit of "editorial" or "journalistic" discretion.

An entirely different situation is presented when the government transmits the speech of third parties without associating itself with the content of that speech. In *Arkansas Educational Television Commission v. Forbes*,[248] for example, a candidate debate aired on a public television station constituted a nonpublic forum rather than government speech because "[c]onsistent with the long tradition of candidate debates, the implicit representation of the broadcaster was that the views expressed were those of the candidates, not its own."[249] *Forbes* and *Bennett* illustrate the broadly applicable approach to editorial discretion and forced speech; retransmissions implicate the conduit's First Amendment rights only if there is a danger that transmitting a message will cause others to view the conduit as adopting the message.

1. Forced Speech

Individuals cannot be forced to engage in a speech-related action representing the affirmation of a belief because "the choice to speak

244. Cuffley v. Bennett, 203 F.3d 1085 (8th Cir. 2000).

245. *Id.* at 1094 n.9.

246. *Id.* at 1095.

247. *Id.* at 1096.

248. Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

249. *Id.* at 675.

includes within it the choice of what not to say."[250] Thus individuals cannot be compelled to display a state motto on their private property[251] or to salute the flag.[252] But not all acts represent the affirmation of belief or attitude. For instance, individuals cannot object to bearing currency with the "In God We Trust" slogan because it is not displayed to the public with the implication that the bearer endorses the message.[253] The social understanding is that the use of money has zero communicative significance. The social understanding of advertising is essentially the same. This cannot be said of programs. A program represents an attempt to communicate something; the social meaning attached to a broadcast program is that it is a product the broadcaster stands behind, a presentation the broadcaster feels is worth watching.[254]

The distinction between re-transmitting a message without adopting it as ones' own and associating oneself with the message was illustratively drawn in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, in which the Supreme Court held that a parade organizer could not be forced to include a group of homosexuals of Irish-American ancestry in Boston's St. Patrick's Day Parade because "this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[255] The parade

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250. Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1, 16 (1986) (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974)).

251. Wooley v. Maynard, 430 U.S. 705, 713 (1977).

252. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633-34 (1943).

253. *Wooley*, 430 U.S. at 717 n.15 (1977) ("That question is not before us today but we note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator .... The bearer of currency is thus not required to publicly advertise the national motto.").

254. In the early days of radio, Congress provided that no broadcaster was to be deemed a "common carrier" in part because of the fact that radio stations financed themselves by the sale of large blocs of time over which entire programs were broadcast. There are a few more recent parallels; for instance, Ford Motor Company famously sponsored NBC's unedited broadcast of the film *Schindler's List* in 1997. *See* H.R. Con. Res. 30, 105th Cong. (1997) (To commend the National Broadcast Company, and the Ford Motor Company, for broadcasting the film 'Schindler's List' in its original, unedited version and without commercial interruption). In that particular case, the decision to air the program had some core of communicative meaning—all the more effective because it represented a departure from usual practice. The more typical instance in which sponsored programming (commercial advertising) is aired, however, does not involve a broadcaster's evaluation of the value of the message, and does not carry a risk that the broadcaster will be associated with the viewpoint presented.

255. Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 573 (1995)

itself was an expressive act, and "[s]ince *every participating unit affects the message conveyed* by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade."[256]

2. The Compelled Transmission of an Advertorial Does Not Constitute Forced Speech

The risk of message distortion recognized in *Hurley* is not implicated by requiring broadcasters to sell time on a viewpoint-neutral basis. The Court has certainly recognized that when a broadcaster "exercises editorial discretion in the selection and presentation of *its* programming, it engages in speech activity,"[257] and that "a speaker need not 'generate, as an original matter, each item featured in the communication.'"[258] But it would be difficult for any broadcaster to argue that each advertisement broadcast constitutes a "participating unit" that "affects the message."[259]

In fact, not only has the Court invariably declined to hold that a broadcaster has an interest in freedom from forced speech during advertising time, they held precisely the opposite in *CBS v. FCC,* which approved a statutory scheme forcing broadcasters to carry unwanted messages regarding political candidates.[260] While it would be an egregious over-reading of *CBS v. FCC* to say that it recognized an individual right to access the airwaves,[261] the Court did assign the interests of the sponsors of noncommercial advertorials some weight in the constitutional scales,[262] echoing the *DNC* Court's assignment of some unspecified weight to the interests of advertorial sponsors. The *CBS v. FCC* Court went further, however: broadcasters' interests in

256. *Id.* at 572-73 (emphasis added).

257. *Forbes*, 523 U.S. 666, 674 (emphasis added).

258. *Id.* (quoting *Hurley*, 515 U.S. 557, 570).

259. This is consistent with the implication of *CBS v. DNC*, as well as more recent cases. In Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994), for example, the Court implied that a cable company's First Amendment interests in freedom from forced speech were at stake where they were dealing with units ("Through 'original programming or by exercising editorial control over which stations or programs to include in its repertoire,' cable programmers and operators see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.'") (quoting Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488 (1986)).

260. Columbia Broad. Sys. v. FCC, 453 U.S. 367 (1981).

261. Relying on *CBS v. DNC*, the Court explicitly renounced any intention to provide "a *general* right of access to the media." *Id.* at 396 (emphasis in original).

262. *Id.* ("The First Amendment interests of candidates and voters, as well as broadcasters, are implicated by [the statutory right of forced access].").

freedom of speech were not threatened by the forced transmission of advertorials because the statute "[did] not impair the discretion of broadcasters to present their views on any issue or to carry any particular type of programming."[263] Thus *CBS v. FCC* explicitly recognized what the Court tacitly admitted in *CBS v. DNC*—carrying an advertisement does not impair the ability of a broadcaster to propound its own views and does not implicate the liberty tradition's objection to forced speech.[264]

If the broadcaster faces little risk of being identified with a message, why then has the Court recognized a cognizable First Amendment interest in the transmission of advertisements for third parties?[265] One answer is that those paid to transmit an advertisement suffer at least a monetary harm when the person who wishes to place the advertisement cannot speak, and that a broadcaster, printer, etc. who wishes to accept the ad can be trusted to adequately represent the rights of the person denied a vehicle for communicating with the public. An answer that perhaps better illuminates the underlying issues involved is that personal autonomy does not form the basis for protecting the transmission of advertisements—advertisements are protected under the political tradition's rationales: "even if the broadcasters' interest in conveying [advertisements] is entirely pecuniary, the interests of, and benefit to, the audience may be broader."[266]

In *New York Times v. Sullivan*, for example, the extension of First Amendment protection to the contents of the advertisement had nothing to do with a concern for the Times' interest in liberty, it was motivated primarily by the political tradition's concern with the advertisement's effect on public debate.[267] The secondary First

263. *Id.* at 397.

264. Furthermore, explicit disclaimers are available to further separate the broadcaster from the message. In *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, (1980), the Court suggested the conditions under which a right of access to a privately managed forum is consistent the First Amendment: "The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. . . . Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand." *Id.* at 88.

265. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964); Greater New Orleans Broad. Assoc., Inc. v. United States, 527 U.S. 173 (1999); FCC v. Edge Broad. Co., 509 U.S. 418 (1993).

266. Greater New Orleans Broad. Assoc., 527 U.S. at 185.

267. *Sullivan*, 376 U.S. at 270.

Amendment interests were the liberty interests of the ad's *sponsors*; the Justices prohibited the imposition of damages based on the "libel" in the ad because "[a]ny other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press."[268] The Supreme Court has regrettably lost sight of this latter rationale, but subsequent opinions protecting the transmission of advertisements have focused on the ads' informational value rather than the First Amendment interests of the broadcaster of the advertisement.

Even before *Virginia Pharmacy Board* extended doctrinal protection to commercial speech on the basis that it provided information to the public,[269] the Court established in *Bigelow v. Virginia* that newspapers carrying commercial advertisements were protected due to the ads' informational function rather than the speech interest of the editor or the newspaper. Indeed, even when the argument was raised that due to the particular social circumstances (and the "underground" nature of the publication), the appearance of an advertisement for abortions in a newspaper was "an implicit editorial endorsement of its message,"[270] the Court declined to adopt or even address this rationale. The Court instead focused primarily on the public's interest in receiving truthful communications regarding lawful activity. The newspaper editor perhaps would not have prevailed had not his "First Amendment interests [in freedom of the press—not of speech] coincided with the constitutional interests of the general public."[271]

V. Public Forum Analysis When Private Actors are Involved

It is clear that if the First Amendment forbids anything, it bans governmental viewpoint discrimination in any forum. Unfortunately for the fate of public discourse, it is not at all clear that a broadcaster counts as a state actor. *CBS v. DNC* did not decide the issue,[272] but

268. *Id.* at 266.

269. Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748, 761 (1976).

270. Bigelow v. Virginia, 421 U.S. 809, 822 n.7 (1975) ("It was argued, too, that under the circumstances the appearance of the advertisement in the appellant's newspaper was 'an implicit editorial endorsement' of its message." (citing Brief for Appellant 29)).

271. *Id.* at 822.

272. *See supra* notes 58 and 122.

the Court has generally been reluctant to find constitutionally cognizable state action when the government does not compel private action, but merely tolerates it.[273] The Court has identified a number of circumstances in which private action can be fairly attributed to the State,[274] but the ultimate conclusion that the State bears responsibility for an ostensibly private act "is a matter of normative judgment, and the criteria lack rigid simplicity."[275] The licensing fees paid by broadcasters would probably not be found to constitute the type of symbiotic relationship between a discriminatory private actor and the State held impermissible in *Burton v. Wilmington Parking Authority*,[276] although an argument could be made to that effect.[277] It is equally unlikely that a litigant could convince the modern Court that a broadcaster's viewpoint discrimination is fairly attributable to the State under a "joint action" or "entwinement" theory.[278]

The First Amendment, however, does not entirely disappear when the government utilizes an agent to manage property. State

273. *See* Blum v. Yaretsky, 457 U.S. 991 (1982) (despite State involvement in the provision of medical services—significant Medicaid subsidies and some bureaucratic oversight—private nursing homes were not acting under the influence of the state to an extent that the private homes had to provide due process when reclassifying patients); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (heavily subsidized private school for troubled youth need not respect First Amendment rights of employees because no state compulsion, education not an exclusively state function, and insufficient entanglement); Jackson v. Metro. Edison, 419 U.S. 345 (1974).

274. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assoc., 531 U.S. 288, 296 (2001).

275. *Id.* at 295.

276. 365 U.S. 715 (1961).

277. Weaker arguments have carried the day. For instance, in *Citizens to End Animal Suffering and Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F.Supp. 65 (D. Mass. 1990), the Court found that among considerations pointing to state action "most important, the City derives an economic benefit from defendant's policy of restrictions, at least as direct as that found in Burton." *Id.* at 73. But the revitalization of a downtown area is probably not the sort of integrated private/public involvement in a single discrete venture that *Burton* had in mind: *Burton* noted that the restaurant at issue was an "indispensable part of the State's plan to operate its project *as a self-sustaining unit.*" 365 U.S. at 723-24 (emphasis added). Most state action cases focus on whether the private portion of an integrated private/public venture is necessary to the financial success of a discrete venture, not the overall financial health of the government. *See, e.g.,* Jatoi v. Hurst-Euless-Bedford Hosp. Auth., 807 F.2d 1214 (5th Cir. 1987) (characterizing private management company as a state actor where financial success of hospital depended on its services).

278. For a searching application of these state action theories to privately managed property, see *Sw. Cmty. Res., Inc. v. Simon Prop. Group*, 108 F. Supp.2d 1239 (D. N.M. 2000) (holding manager of shopping mall was not a state actor despite presence of government offices in mall, significant contacts between mall security and city police, and publicly owned transportation system's integration with mall).

action has been found in public forum cases involving private actors using a line of analysis deriving from *Marsh v. Alabama*[279]: if a private actor is managing a public forum located on public property, then it is performing a traditional public function and speech restrictions are treated as state action.[280] Alternatively stated, if publicly owned property is deliberately opened to the public for communicative purposes, the government cannot invest a private actor with management rights that infringe the public's First Amendment rights.

Marsh is infrequently relied on to find state action under a public function rationale,[281] and generally receives a narrow interpretation.[282] The Supreme Court has understandably been loath to grant *Marsh* an expansive interpretation, in large part because the increasing privatization of 'public' functions would be hindered if the actions of private subcontractors were subjected to constitutional scrutiny.[283] The Fourth Circuit has gone so far as to assert that "[t]he Supreme Court has held that state action can only be found under the authority of Marsh where 'a private enterprise [assumes] all of the attributes of a state-created municipality' and performs 'the full spectrum of municipal powers.'"[284] This is misleading, and if not downright false it flatly contradicts the approach of other Circuits.[285] The Court's cases analyzing *Marsh* within the First Amendment context neither give *Marsh* such a narrow reading nor mandate that *Marsh* be extended to

279. 326 U.S. 501 (1946).

280. *See Faneuil Hall*, 745 F.Supp. 65 (D. Mass. 1990), holding in the alternative that Faneuil Hall Marketplace, Inc. was managing a public forum, providing a doctrinally defensible reason for holding that petitioners' First Amendment rights had been violated. *See also* Lee v. Katz, 276 F.3d 550 (9th Cir. 2001) (holding the Oregon Arena Corporation was a state actor for First Amendment purposes because it controlled a traditional public forum).

281. Marsh's application has been limited because the Court has held firmly to history in determining what constitutes a "traditional" public forum and has narrowly construed what counts as an "exclusively" governmental function. "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158 (1978) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 356 (1974)).

282. *See, e.g., Flagg Bros.*, 436 U.S. at 159-164 (declining "to extend the sovereign-function doctrine outside of its present carefully confined bounds").

283. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003) ("Private entities provide a vast array of social services for the government; administer core aspects of government programs; and perform tasks that appear quintessentially governmental.").

284. United Auto Workers v. Gaston Festivals, Inc., 43 F.3d 902, 909 (4th Cir. 1995) (quoting Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507, 519 (1976)) (alterations in original).

285. *See infra*, Part V.C.

realms of constitutional law divorced from the First Amendment.

This Section argues that *Marsh* means the First Amendment can be violated when private parties manage property into which the public has been invited for expressive activity. Part A examines *Marsh* and subsequent cases that limited it. Part B argues that, properly understood, *Marsh* focuses on the character of the invitation extended to the public, and not whether the property at issue is a "traditional public forum." Part C notes recent cases that have accepted *Marsh*'s implicit proposition that private actors are restricted by the First Amendment when they control a distinct portion of property held out to the public as a forum open for discourse. Part D notes potential objections to the approach advocated, and concludes that when this rationale is understood as applying solely to First Amendment activities on publicly-owned but privately managed property, the implications of this approach do not threaten settled doctrine.

A. Speech in a Privately Managed Forum

At issue in *Marsh* was the trespassing conviction of a Jehovah's Witness who distributed literature without a permit in the business district of a classic company town. The Gulf Shipbuilding Corporation owned the residential buildings, the sewers and the sewage disposal plant, the streets and sidewalks, and the "business block" which was used by the public as their regular shopping center.[286] Each business displayed a sign proclaiming the area private property and prohibiting solicitation without a permit. Ms. Marsh was arrested for her refusal to stop distributing religious literature after she "was warned that she could not distribute the literature without a permit and told that no permit would be issued to her."[287]

The Supreme Court reversed her trespassing conviction because the Corporation's restriction on speech would be impermissible if enacted by a municipality, and "[w]hether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."[288] It is important to note that the First Amendment had been violated not because the courts of Alabama convicted Marsh and therefore violated Marsh's rights, but because of an impermissible delegation of

286. *Marsh*, 326 U.S. at 502-3.

287. *Id.* at 503.

288. *Id.* at 507.

power by the State that resulted in the infringement of the rights of the residents of Chickasaw. The fact that "property rights to the premises where the deprivation of liberty... [occurred]...were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties."[289]

The Court relied on *Marsh* 22 years later for the proposition that "under some circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held."[290] The *Logan Valley* Court held that such a circumstance was provided when the owners of a privately owned shopping plaza obtained an injunction against labor picketing targeted at a store in the plaza. The Court struck down the injunction because the plaza had been opened to general public and the "State may not delegate the power...wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put."[291] The Court concluded that this was an impermissible prior restraint because the "prohibition against trespass on the mall operates to bar all speech within the shopping center to which [the owners] object."[292] Marshall, writing for the Court, inserted a prescient footnote noting that the picketing "was directed specifically at patrons" of a business "located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated."[293] He noted that the Court specifically reserved the question of whether a mall owner could "consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put."[294] The Court was called upon to decide this question four years later.

Lloyd Corporation. v. Tanner[295] involved five people forced to leave a privately owned shopping mall under threat of arrest for

289. *Id.* at 509.

290. Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308, 316 (1968).

291. *Id.* at 319-20.

292. *Id.* at 323.

293. *Id.* at 320 n.9.

294. *Id.*

295. 407 U.S. 551 (1972).

distributing leaflets. The mall prohibited the distribution of handbills because it "was considered likely to annoy customers, to create litter, potentially to create disorders, and generally to be incompatible with the purpose of the Center and the atmosphere sought to be preserved."[296] The Court held, over a stirring dissent by Marshall (joined by Douglas, Brennan, and Stewart), the ejection of the leafleters permissible because the protest was not directly related "to the use to which the shopping center property was being put" and because ample alternative opportunities were available for the speakers "to convey their message to their intended audience."[297]

Powell, writing for the Court, did not purport to overrule *Logan Valley*, but explicitly distinguished it because of the "scope of the invitation extended to the public. The invitation [in *Lloyd* was] to come to the Center to do business with the tenants."[298] Powell approvingly noted the nondiscriminatory (content-neutral) nature of the ban,[299] but primarily relied on the determination that, unlike in *Marsh* and *Logan Valley*, "there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights."[300] Strange, then, that four years later in *Hudgens v. National Labor Relations Board* the Court abrogated *Logan Valley* because of its perceived conflict with *Lloyd*.[301]

In *Hudgens*, the Court determined that the National Labor Relations Act controlled the ability of labor picketers to enter a private shopping center almost identical to the one at issue in *Lloyd*, and that the "constitutional guarantee of free expression" therefore had no part to play.[302] Justice Stewart, a *Lloyd* dissenter, delivered the Court's opinion, pleading *stare decisis*.[303] According to Stewart, "if the respondents in the Lloyd case did not have a First Amendment right to enter this shopping center to distribute handbills concerning

296. *Id.* at 555-56.

297. *Id.* at 563.

298. *Id.* at 564.

299. *Id.* at 567 ("[T]he First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used *nondiscriminatorily* for *private purposes only*." (emphasis added)).

300. *Id.* at 570.

301. Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507 (1976).

302. *Id.* at 521.

303. "It matters not that some Members of the Court may continue to believe that the Logan Valley case was rightly decided. Our institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to be." *Id.* at 518.

Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co."[304] Stewart went on to claim that the Court made "it clear now, if it was not clear before, that the rationale of Logan Valley did not survive the Court's decision in the Lloyd case."[305] He was joined in this statement by four Justices,[306] but his reasoning was accepted only by Blackmun and Rehnquist.

Justice White filed a concurring opinion noting that *Lloyd* "did not overrule Logan Valley, either expressly or implicitly."[307] He nevertheless concurred in the result because "the First Amendment protection established by *Logan Valley* was expressly limited to the picketing of a specific store for the purpose of conveying information with respect to the operation in the shopping center of that store."[308] *Hudgens* involved a picket by employees of Butler's warehouses who were unhappy about the company's actions in negotiating a labor dispute which had nothing to do with the retail operations of the store. White saw "no need belatedly to overrule Logan Valley, only to follow it as it is."[309]

Powell and Burger joined the Court's opinion in full, but stated (in a concurrence by Powell), that they agreed with White's view that *Lloyd* "did not overrule [Logan Valley], and that the present case can be distinguished narrowly from Logan Valley."[310] They joined the Court's opinion because they concluded that Justice Black had originally been correct when he argued that *Marsh* did not compel the *Logan Valley* result. Powell was concerned that the "law in this area. . .has been less than clear since Logan Valley analogized a shopping center to the 'company town' in [Marsh],"[311] and believed that the "Court's opinion today clarifies the confusion engendered by these cases by accepting Mr. Justice Black's reading of Marsh. . ."[312]

Hudgens remains good law,[313] and the clear majority of the Court

304. *Id.* at 520-21.

305. *Id.* at 518.

306. Rehnquist, Blackmun, Powell, and Burger joined his opinion.

307. *Id.* at 524 (White, J., concurring).

308. *Id.* at 524.

309. *Id.* at 525.

310. *Id.* at 523 (Powell, J., concurring).

311. *Id.*

312. *Id.* at 524.

313. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980); Denver Area

held not that *Lloyd* overturned *Logan Valley*, but that Justice Black's interpretation of *Marsh* (as revealed by the *Marsh* opinion itself as well as his *Logan Valley* dissent[314]) controls the doctrine. So what does *Marsh* mean, if it does not extend First Amendment protection to expressive conduct within a privately owned mall? Part B of this section demonstrates that *Marsh* stands for the proposition that the government may not invest a private agent with the power to exclude discretionarily speech from a forum into which the public is invited for expressive purposes. It is the character of the invitation and the nature of the property that controls the First Amendment inquiry.

B. Marsh's Meaning: The First Amendment Restricts Private Actors Who Regulate Fora Into Which the Public Are Invited for Expressive Purposes

Justice Black is sometimes portrayed as a free speech absolutist, but in fact he was quite sensitive to government's desire to regulate the times and places for speech activity.[315] His *Logan Valley* dissent reflects his solicitude for the activities disrupted and persons disturbed by unrestricted speech activity.[316] He was a champion of speech rights because he believed the facilitation of democracy was the central purpose of the First Amendment, and was willing to accept regulations of speech that did not interfere with the process of

Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 783 (1996).

314. Justice White joined Black in dissent in *Logan Valley*, echoing and clarifying Black's conclusion that "[i]n no sense are any parts of the shopping center dedicated to the public for general purposes." *Logan Valley*, 391 U.S. at 338 (White, J., dissenting).

315. *See, e.g.*, Brown v. Louisiana, 383 U.S. 131, 162 (1966) (Black, J., dissenting) ("It is high time to challenge the assumption in which too many people have too long acquiesced, that groups that think they have been mistreated or that have actually been mistreated have a constitutional right to use the public's streets, buildings, and property to protest whatever, wherever, whenever they want, without regard to whom such conduct may disturb."); Adderly v. Florida, 385 U.S. 39, 47-48 (1966) ("there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections. . .[s]uch an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in [Cox v. Louisiana]. We reject it again."); Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969) (Black, J., dissenting); Cohen v. California, 403 U.S. 15 (1971) (Black, J., dissenting).

316. *Logan Valley*, 391 U.S. at 329 (Black, J., dissenting) ("[P]etitioners cannot, under the guise of exercising First Amendment rights, trespass on respondent Weis' private property for the purpose of picketing. It would be just as sensible for this Court to allow the pickets to stand on the check-out counters, thus interfering with customers who wish to pay for their goods, as it is to approve picketing in the pickup zone which interferes with customers' loading of their cars.").

orderly democratic self-government. His *Marsh* opinion is clearly motivated by these political tradition concerns,

> Many people in the United States live in company-owned towns. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving *these people* of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.[317]

Black thus insists on First Amendment protection for Ms. Marsh's speech because denying it would infringe on the rights of the citizenry as a whole to receive essential information.[318] With Justice Black's concerns in mind, it becomes clear that his *Logan Valley* dissent was not due to a belief that *Marsh* represented a sui generis opinion. *Marsh* reaches all situations in which a private actor has regulatory authority over "facilities built and operated primarily to benefit the public."[319] The Court later made it a matter of doctrine that some facilities of this nature, such as the sidewalk at issue in *Marsh*, are intrinsically conducive to speech activity, and began to call this subset "traditional public fora."[320] Justice Black's desire to limit the extension of *Marsh* was rooted in the notion that only in a traditional public forum was the limitation of speech a threat to democracy.

Black extended First Amendment protection to streets in the company town by pointing to precedent establishing constitutional restrictions on "the owners of privately held bridges, ferries, turnpikes and railroads."[321] He reasoned that "since their operation is essentially a public function, it is subject to state regulation. . .such regulations may not result in an operation of these facilities, even by

317. *Marsh*, 326 U.S. at 508 (emphasis added).

318. "As we have stated before, the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men'. . . ." *Id.* at 509 (quoting Schneider v. State, 308 U.S. 147, 161 (1939)).

319. *Id.* at 506.

320. *See, e.g.*, Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

321. *Marsh*, 326 U.S. at 506.

privately owned companies, which unconstitutionally interferes with"[322] the exercise of First Amendment freedoms.[323] In Chickasaw, "the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except for the fact that title to the property belongs to a private corporation."[324] Therefore a private corporation had no more right than a municipality to "completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places or make the right to distribute dependent on a. . .permit to be issued by an official who could deny it at will."[325] Had he written *Marsh* after the Court adopted its current system of classification, Black surely would have substituted "public fora" for "streets, sidewalks and public places."

Black dissented from the extension of *Marsh* to the shopping center at issue in *Logan Valley* because two closely related considerations indicated that the Logan Valley Plaza was not a public forum: the incompatibility of the property at issue with expressive activity, and the lack of the vital component of an invitation to the public. Black analyzed the intended uses of a property and the property owner's intent to dedicate it to speech activity in order to determine whether the property was a public forum.[326] He therefore dissented in *Logan Valley* because, given the facts of the case, he could see no way that the area in which the speech occurred was dedicated to or conducive to speech activity.[327] He and Justice White

322. *Id.*

323. I cut off the *Marsh* quote mid-sentence because it actually reads "interferes with and discriminates against interstate commerce." Parsing this quote was necessary for clarity, however, because in 1946 the incorporation of the First Amendment against the states was not an automatically understood aspect of constitutional jurisprudence, and Black felt it necessary to note that "certainly the corporation can no more deprive people of freedom of press and religion than it can discriminate against commerce." *Id.* at 507 n.4. The footnote points out that this had been established a mere three years earlier in *Jones v. Opelika*, 319 U.S. 103, 104 (1943).

324. *Marsh*, 326 U.S. at 503.

325. *Id.* at 504.

326. *Adderly*, 385 U.S. 39, 41 (distinguishing an earlier case where the Court upheld a right of peaceful protest on government property, Black observed that "In Edwards, the demonstrators went to the South Carolina State Capitol grounds to protest. In this case they went to the jail. Traditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not." Black later noted that the protestors were "on that part of the jail grounds reserved for jail uses . . . the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* at 47).

327. *Logan Valley*, 391 U.S. at 328 (Black, J., dissenting).

agreed that no invitation to the public to use the property for speech purposes had been extended. In Black's view, this meant that a private actor was free to restrict speech activities within the property, just as a State actor could constitutionally do.

When the government is acting as a proprietor, "some public property is available for some uses and not for others; some public property is neither designed nor dedicated for use by pickets or for other communicative activities."[328] However, *Logan Valley* and *Marsh* provide an obvious corollary to this statement: sometimes putatively private property *is* dedicated to communicative activities, and sometimes those exercising control can be subject to the strictures of the First Amendment. The Supreme Court has not often relied explicitly on *Marsh* to develop its public forum doctrine, but it has also never cast doubt on *Marsh*'s proposition that if an invitation to the public at large to use property for *speech* purposes is extended, a private actor controlling the property is bound by the same principles as a government actor.

Marsh, *Logan Valley*, *Lloyd*, and *Hudgens* illustrate that no matter where official title lies, the sine qua non of a public forum (traditional, designated, or limited purpose) is an invitation to enter and speak. This principle runs through each case, and in each case the majority and dissent split not because of disagreement over this principle, but because of disagreement over whether a cognizable "invitation" was present. *Marsh* rests on the proposition that there is an implicit invitation to engage in First Amendment activity on streets and sidewalks, whether the property is formally private or public.[329] *Logan Valley* assumes that a private property owner extends an implicit invitation to enter and speak if two conditions are present: (1) the speech concerns matters that directly pertain to the operation of the property, and (2) there are no effective alternative channels of communication. *Lloyd* purportedly approved both of the *Logan Valley* conditions and simply decided they were not met on the facts, but the *Hudgens* Court later decided that the *Lloyd* majority adopted the dissenting views of Justices White and Black in *Logan Valley*: "The public is invited to the premises but only in order to do business with those who maintain establishments there . . .There is no general invitation to use the parking lot, the pickup zone, or the sidewalk except as an adjunct to shopping."[330] The lack of an

328. *Id.* at 338 (White, J., dissenting).

329. *See supra* note 161.

330. *Lloyd*, 407 U.S. at 565 (quoting *Logan Valley*, 391 U.S. at 338 (White, J.,

invitation to use the private facilities for public discourse meant that no public forum had been created.

The Court now examines the actual uses and intrinsic characteristics of property, both public and private,[331] to determine the extent to which the public has been invited to use the property (alternatively stated, whether property has been designated to public use) and the compatibility of the property with expressive activity. Part C will establish that recent cases have made it clear that when the government grants a private actor control over a forum in which expressive activity is appropriate, the First Amendment applies.[332]

C. Recent Cases: Private Actors Exercising Property Rights over a Public Forum

In *Venetian Casino v. Local Joint Executive Board*,[333] the Ninth Circuit rejected a private property owner's attempt to rely on *Lloyd* and *Hudgens*, ruling that the owner of a private sidewalk could not restrict speech activity due to "the dedication of the sidewalk to public use."[334] The controversy arose because county and city officials wished to widen Las Vegas Boulevard in order to deal with a projected increase in traffic caused by the construction of the new Venetian casino, but the new lane of traffic would leave no public right-of-way for a public sidewalk. Fortunately for the officials, the Venetian's developers needed a building permit, and thus an agreement was reached between the State Department of Transportation and the developers that Venetian would construct and maintain, on private property, a "private sidewalk connecting to public sidewalks on either side of its property."[335] After police refused to disperse a 1,300 person union demonstration on the private sidewalk, Venetian sought a declaratory judgment that the sidewalk was not a public forum. The District Court ruled against Venetian,

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dissenting)).

331. *See, e.g.*, Frisby v. Shultz, 487 U.S. 474 (1988); Venetian Casino v. Local Joint Executive Bd., 257 F.3d 937, 945 n.6 (9th Cir. 2001) (sidewalks need not be government owned to constitute public fora).

332. The cases discussed below were not the first to establish this proposition. *See, e.g.*, Freedom From Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 496 (7th Cir. 2000). ("Although the sale of the land . . . ended any direct government action that would constitute endorsement, the sale has given this sectarian message preferential access to . . . a public forum.").

333. *Venetian Casino*, 257 F.3d 937.

334. Id. at 947.

335. *Id.* at 940.

and the Ninth Circuit affirmed.

The Court looked to the history and physical characteristics of the sidewalk, rejecting Venetian's contention that "cases such as *Kokinda* that address whether a sidewalk or other space is a public forum are inapplicable to this case because they all presuppose that the property at issue is government owned."[336] The Court reasoned that since the sidewalk was not "intended solely to be used to facilitate the patronage" of the casino, the invitation extended to the public was of a more general character; pedestrians were invited to use the sidewalk to traverse downtown Las Vegas. Since "streets and sidewalks are the archetype of the public forum", "free speech is certainly incidental to pedestrian traffic."[337] Therefore the invitation extended by Venetian to the public to use the sidewalk for transportation purposes necessarily encompassed an implicit invitation to use to sidewalk for expressive purposes, whether or not the property owner recognized it at the time the agreement with the government was signed.

The Ninth Circuit unfortunately allowed one irrelevant consideration to enter an otherwise admirable opinion when they briefly considered the subjective intent of the parties.[338] It is not clear why this would be relevant, given the Supreme Court's admonition in *Forbes* that "traditional public fora are open for expressive activity regardless of the government intent,"[339] and the court did not proceed to adequately address the extent to which Venetian's subjective understanding might (or might not) be relevant, instead merely using the agreement between the State and the Venetian to suggest that the Venetian should have known what it was in for. Fortunately, the Tenth Circuit expanded on *Venetian Casino* in a particularly illuminating manner, demonstrating that expectations are irrelevant, whether the expectations are possessed by a private actor managing government property or a state actor granting property rights.

First Unitarian Church v. Salt Lake City involved a challenge by several groups to the prohibition of expressive activity on privately owned land encompassing a pedestrian easement.[340] Salt Lake City sold a public street to the Church of Jesus Christ of Latter-Day Saints

336. *Id.* at 946 (citing United States v. Kokinda, 497 U.S. 720 (1990)).

337. *Id.* at 943.

338. *Id.* ("The Venetian would have us believe that the parties did not intend the replacement sidewalk on the Venetian property to be a public forum.").

339. Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998).

340. 308 F.3d 1114 (10th Cir. 2002)

(LDS), with the condition that the City retained a perpetual pedestrian easement and that the property should be held in a manner that would "*maintain, encourage, and invite public use.*"[341] The Planning Commission originally suggested that in order to preserve the public's First Amendment rights, the terms of the easement should provide "that there be no restrictions on the use of this space that are more restrictive than is currently permitted at a public park," but this suggestion was rejected by the City Council.[342] The property was instead transferred to LDS with stipulation that nothing "shall be deemed to create or constitute a public forum, limited or otherwise, on the Property," and that LDS would have the right to deny access to the property to individuals engaged in a variety of activities implicating the First Amendment, including "loitering, assembling, partying, demonstrating, picketing, distributing literature, soliciting, begging. . ."[343] The District Court rejected the plaintiffs' facial challenge to the easement restrictions, and held that the restrictions were reasonable because the property would not otherwise have been sold and because "the prohibited [First Amendment] activities [were] incompatible with the property's new purpose, an ecclesiastical park."[344] The Tenth Circuit reversed.

The Tenth Circuit initially rejected LDS's argument that the First Amendment did not apply to the pedestrian easement due to the agreement's express exclusion of speech activities:[345]

> We agree that the reservation of easement on its face defines the easement to exclude expressive activities. However, a deed does not insulate government action from constitutional review. If government actions taken with respect to the easement violate the Constitution, this simply means that the easement terms themselves are unconstitutional and must be altered or eliminated.[346]

341. *Id.* at 1118 (emphasis in original).

342. *Id.*

343. *Id.* at 1119.

344. *Id.* at 1120. The District Court also held that the restrictions did "not constitute viewpoint discrimination because the LDS Church, as private owner of the plaza property, has greater rights on the easement than members of the public."

345. *Id.* at 1121.

346. *Id.* at 1122.

Perhaps in this part of the opinion the Court's language could be refined. There were no 'government actions taken with respect to the easement' for the Court to observe, there was merely purposeful government neglect—the refusal to maintain the public's First Amendment rights. The Court believed "the issue before us is whether it is constitutionally permissible for the City to retain a pedestrian easement but prohibit expressive conduct on that easement."[347] However, given the terms of the reservation, the question the Court really faced was whether the City could *allow* a *private actor* to prohibit expressive conduct on the easement. The question was (to echo *Marsh*): could the city transfer public forum property to a private party in a manner permitting a private actor "to govern a community of citizens so as to restrict their fundamental liberties" to engage in speech activity? Had the court adopted this formulation of the issue, however, the analysis and answer would have been the same.

The Tenth Circuit next determined that the government's lack of possessory interest in the land did not preclude forum analysis, citing *Marsh* for the proposition that "title to property [is] not necessarily determinative of public speech rights on property,"[348] and *Venetian Casino* for the proposition that "sidewalks need not be government owned to constitute public fora."[349]

The Court then found that the property constituted a traditional public forum, despite the City's "express intention not to create a public forum. The government cannot simply declare the First Amendment status of property regardless of its nature and its public use."[350] The Tenth Circuit adopted the approach dictated by Kennedy's *Kokinda* concurrence[351] (accepted as binding precedent by the 10th Circuit because Kennedy "provided the fifth vote on the narrowest grounds"[352]): objective factors rather than government

347. *First Unitarian Church*, 308 F.3d at 1123 n.4.

348. *Id.* at 1122 (citing *Marsh*, 326 U.S. at 505).

349. *Id.* (citing Venetian Casino v. Local Joint Executive Bd., 257 F.3d 937, 945 n.6 (9th Cir. 2001).

350. *Id.* at 1124.

351. United States v. Kokinda, 497 U.S. 720, 737-39 (1990) (Kennedy, J., concurring).

352. *First Unitarian Church*, 308 F.3d at 1125 n.6. The Court, however, cited O'Connor's ISKCON concurrence as the controlling precedent, *Id.* at 1125 n.7, on how "to determine the easement's nature and purpose," and thus asked "whether expressive activity is compatible with the purposes and uses to which the government has lawfully dedicated the property, not whether the government has expressly designated speech as a purpose of the property." *Id.* at 1125. This may have been unwarranted, because

intent control an inquiry into whether a sidewalk should count as a public forum.[353] The Court determined that the actual purpose and use of the easement was a pedestrian walkway[354] and that the walkway was not limited to providing access to one building or a set of people going to one place (thus distinguishing *Kokinda*).[355] The Court then considered "whether speech activities are compatible with the purpose of the easement" in light of the fact that the easement was a traditional public forum, and unavoidably came away with an answer in the negative:[356] "expressive activities have historically been compatible with, if not virtually inherent in, spaces dedicated to general pedestrian passage."[357] Extended consideration of compatibility may indeed have been unnecessary, as the Ninth Circuit demonstrated in a subsequent case relying on *First Unitarian*.

ACLU v. City of Las Vegas dealt with a similar situation: the City turned several blocks of a downtown street into a pedestrian mall, contracting with "a private entity, the Fremont Street Experience, LLC ("FSELLC"), to transform frumpy Fremont Street into the glamorous Fremont Street Experience [FSE]."[358] The City ran into trouble with the ACLU and others due to a blanket prohibition on leafleting and soliciting and a prohibition on placing tables, chairs, or stands unless "authorized by the [FSELLC] for special events. . .or other commercial and entertainment activities."[359] The plaintiffs' challenge was clear: "The complaint alleged that FSELLC had adopted policies prohibiting traditional First Amendment activity on the Fremont Street Experience."[360] When the ACLU attempted to "set up a table in order to pass out literature and collect signatures. . .FSELLC security guards initially ordered the ACLU to

O'Connor's ISKCON concurrence was only the narrowest grounds on the inquiry into the compatibility of expressive activity with the nature and purpose of a *nonpublic* forum. The Court also quoted *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987), which also dealt with the reasonableness of restrictions in a nonpublic forum.

353. *First Unitarian Church*, 308 F.3d. at 1125.

354. *Id.* at 1126.

355. *Id.* at 1127-28.

356. It is not clear why the Court felt it necessary to engage in this inquiry, given their recognition that the "Supreme Court has made clear that once an 'archetype' of a public forum has been identified, it is not appropriate to examine whether special circumstances would support downgrading the property to a less protected form." *Id.* at 1129 n.11.

357. *Id.* at 1128.

358. 333 F.3d 1092, 1095 (9th Cir. 2003).

359. *Id.* at 1095 n.2.

360. *Id.* at 1096 (emphasis added, internal quotations omitted).

leave."[361] The District Court ruled that the FSE was a nonpublic forum, and granted summary judgment for the City on the solicitation and tabling prohibitions. The Ninth Circuit reversed, holding that the FSE was a traditional public forum, because it was "still a street," despite the establishment of a privately run pedestrian mall. "Thus, when a property is used for open public access or as a public thoroughfare, we need not expressly consider the compatibility of expressive activity because these uses are inherently compatible with such activity."[362]

Unfortunately, the positions adopted by the litigants in *ACLU v. Las Vegas* render the case only indirect support for an argument that the First Amendment restricts state actors' assignments of property rights over a public forum. Neither party contested "the premise that FSELLC is a state actor" due to its entanglement with the City and performance of an "exclusively and traditionally public function."[363] However, the case casts valuable light on the government's ability to grant private actors property rights because Ninth Circuit expressly agreed with *First Unitarian* that it is only with respect to opening *nontraditional* fora (designated fora) for discourse that government intent is relevant.

> If the government's intent were a factor in determining the existence of a traditional public forum, any new public area, even a new street or park, could be created as a nonpublic forum as long as the government's intent to do so were memorialized . . . this result would make a mockery of the protections of the First Amendment.[364]

While *ACLU* does not provide direct precedent, the reasoning of *Venetian Casino*, *First Unitarian*, and *ACLU* is still instructive: a private manager of public property performs a traditional government function any time a private actor exercises power that can infringe individuals' First Amendment freedoms on public property (not merely when a private actor performs a host of traditionally state functions). Furthermore, the State cannot declare the forum status of property by fiat: the intent of the state (the

361. *Id.* (emphasis added).

362. *Id.* at 1101.

363. *Id.* at 1098 n.5.

364. *Id.* at 1105.

'property right' it seeks to grant the private party) is irrelevant to evaluating the reasonableness of restrictions on speech activity. These cases reflect an O'Connor-informed application of *Marsh*: the character of the invitation extended to the public is determined by the characteristics and uses of the property itself, not by the asserted intent of either state or private actors.

The Sixth Circuit recently adopted this precise approach. In *United Church of Christ*,[365] the Court examined speech restrictions affecting the sidewalk and common areas surrounding the professional baseball and basketball stadiums in Cleveland, Ohio. The restrictions were imposed by a private entity managing private property. The Defendant argued that the "Gateway Sidewalk", as the Court termed it, was not a public forum because "the majority of the Gateway Sidewalk's pedestrians are traveling to and from [professional baseball] and [professional basketball] games."[366] The Court refused to accept that the private ownership or the primary use of the sidewalk removed it from public forum status, however, based on the sidewalk's integration into the downtown transportation grid and it's physical similarity to a publicly owned sidewalk.[367] Thus, just as the Ninth Circuit[368] and District Courts in the First[369] and Tenth[370] had explicitly held on previous occasions, "[b]ecause. . .Gateway Sidewalk constitutes a public forum, Gateway's operation therein serves as a public function." Thus, *Marsh v. Alabama* carried the day, and Gateway's speech restrictions had to comply with the First

365. United Church of Christ v. Gateway Econ. Dev. Corp., 383 F.3d 449 (6th Cir. 2004).

366. *Id.* at 452.

367. *Id.* at 453. The Court's opinion was somewhat unclear on whether they were relying on O'Connor's *ISKCON* concurrence, or merely (as the Second Circuit has been accused of doing) paying it lip service and falling back on the "intended" use of the property. *See supra* note 168 (noting cases highlighting a disagreement between the Second Circuit and Ninth and Tenth). However, the Court's refusal to accept the forum manager's version of the intended purpose of the forum and the Court's reliance on the actual past use of the sidewalk and the commons areas, the Sixth Circuit is probably best understood as in the O'Connor camp. *See id.* at 453-54.

368. Lee v. Katz, 276 F.3d 550, 555 (9th Cir. 2002).

369. Citizens to End Animal Suffering and Exploitation, Inc. v. Faneuil Hall Marketplace, Inc., 745 F. Supp. 65 (D. Mass. 1990).

370. The Sixth Circuit cited *Rouse v. City of Aurora*, 901 F. Supp. 1533, 1535-36 (D. Colo. 1995) as "evaluating plaintiffs' claim that the First Amendment applied to a privately owned shopping center sidewalk, and observing that 'the linchpin to this claim, and indeed, to plaintiffs' case theory underlying all claims in this action, is their allegation that the Granada Park Shopping Center is a public forum.'" *United Church of Christ*, 383 F. 3d at 455.

Amendment because they were a state actor when (and only when) they engaged in "regulating the public's access to the Gateway Sidewalk."[371]

D. The Limited Implications of Extending *Marsh* Beyond the Company Town

One problem with the approach of the Sixth, Ninth, and Tenth Circuits is that it produces an apparently circular inquiry. If an actor is subject to the constitution's restrictions when managing a property suitable for discourse, how many land owning private actors will remain? One could justifiably ask if property owners would be encouraged to permit no speech activity of any kind for fear that they will lose control over licensees' access and actions once their property is deemed "suitable for communication." This issue may be less intractable than it initially appears, however, and in any event is a point only marginally relevant to the broadcasting context—the broadcast spectrum is publicly owned, it is merely managed privately. The principle advocated is that *Marsh* should be viewed as restricting the government's ability to delegate authority over publicly owned property appropriate for speech activity; it is not necessary to extend *Marsh* beyond the First Amendment.[372]

Furthermore, when State assigns *temporarily* the right to use public property and exclude others, the actions of permit holders do not constitute state action.[373] It is only when a *long-term* right to use public land is granted that *Marsh*, *Venetian*, *First Unitarian*, and *ACLU* establish that the private actor cannot be granted a right to deny others their First Amendment freedoms.[374] This distinction is not as unfounded or arbitrary as it may at first appear; it follows from the fact that the *Marsh* approach is not applicable to fora dedicated to

371. *Id.*

372. The Sixth Circuit demonstrated this in *United Church of Christ*, noting that their decision had no implications for the "public" status of the Gateway Corporation outside the limited context of regulating access to a public forum: "our decision in today's case has no bearing, for instance, on whether, Gateway's employees would receive First Amendment protection for their workplace speech or whether Gateway would have to comply with the Due Process Clause when firing a subcontractor. Rather, our holding today means only that Gateway is a public actor when performing the public function of regulating the public's access to the Gateway Sidewalk." *Id.*

373. United Auto Workers v. Gaston Festivals, Inc., 43 F.3d 902 (4th Cir. 1995); Lansing v. Memphis in May Int'l Festival, Inc., 202 F.3d 821 (6th Cir. 2000).

374. *See* Lee v. Katz, 276 F.3d 550 (9th Cir. 2002) (4 year lease granting private actor right to exclude speech activity sufficient to cause private actor to fall within ambit of *Marsh*); *Faneuil Hall*, 745 F. Supp. 65.

activity inconsistent with expression, as the Court demonstrated in *Lloyd*. Perhaps a better way to express it within the jargon of current doctrine is to say that when the State temporarily assigns the right to use public property, a limited purpose or nonpublic forum is created. It is permissible to grant temporary permits to use public property and exclude others as long as the system for assigning the permits is content and viewpoint neutral.[375] Thus, the right to hold a parade or a festival can be assigned on a viewpoint-neutral basis, and the public streets on which the parade is held are legitimately closed to unwelcome interlopers because for a moment the property is actually being used in a manner incompatible with unsanctioned speech activity. When speech activity is indefinitely restricted on publicly owned property despite the fact that it is compatible with such activity, however, the First Amendment does not disappear because the manager of the property is a private corporation.

And certainly *Marsh* does not require that access be granted to privately owned property inconsistent with speech activity; the private owners of property equivalent to a designated or nonpublic fora—if indeed such equivalents can exist on private property—are not in danger of being forced to establish nondiscriminatory conditions for access. *Marsh* may have been limited to circumstances where the private property constituted a traditional public forum precisely to avoid consideration of this issue during a period when the Court's approach to "designated" public forum analysis was unclear. Pre-*ISKCON* public forum cases suggested that the forum status of public property depended in large part on the uses permitted and the degree of proprietary control exercised.[376] This would obviously raise the concern that any time a private actor relaxed control over private property and permitted speech activities, a forum could have been created, essentially by estoppel. The Court's clarity on this issue, however, has eliminated this concern: an express dedication by a non-state owner of property would be necessary to create a designated public forum, and an express dedication by a private actor motivated by profit would be nigh impossible. It is a rare parcel of privately owned land that carries with it an implicit invitation for the public to use it freely.

375. Thomas v. Chicago Park Dist., 534 U.S. 316 (2002) (a content-neutral system for assigning permits to use public land is acceptable if it contains adequate standards and provides effective judicial review).

376. *See generally* BeVier, *supra* note 189.

Perhaps the exception proves the rule; in *Evans v. Newton*,[377] the Court held that private trustees controlling a privately owned park were state actors who could not discriminate on the basis of race. The situation was essentially *sui generis*, however. It was motivated primarily by the Court's belief that the transfer of control from public to private hands had not been shown to have eliminated the actual involvement of the city in the daily maintenance and care of the park.

A nonpublic forum located on private property would technically be impossible. By definition, a nonpublic forum arises when government property is suitable for and opened for expressive purposes. Staying strictly within the terms of this definition would allow private actors to maintain control over almost all private venues, which should comfort those concerned by an overly broad reading of *Marsh*, but the consequences of extending O'Connor's reasonableness test to privately owned property would not be disastrous. The commercial character of property informs the reasonableness of restrictions.[378] If the extension of *Marsh* to privately owned non-traditional public fora forces the owners of the "private" properties (such as shopping malls and gated communities)that have supplanted the public square to provide viewpoint-neutral reasons for restrictions on speech activity, neither private rights nor public discourse will necessarily suffer.

VI. Summation

Broadcasters have opened discrete units of time to some members of the public who wish to engage in communicative activity, and have closed the airwaves to others. Those excluded seek access to discrete portions of public property that are a forum of some sort. The locations to which access is sought are not "traditional public fora" because the Court has clung to the historical understanding of that term, but nothing in the *Marsh* opinion or the line of cases interpreting it suggests that *Marsh* is only applicable to traditional public fora.

In the traditional public forum context courts refuse "to attribute legal significance to an historical absence of speech activities where that non-speech history was created by the very restrictions at issue in the case."[379] A similar approach is arguably appropriate in the

377. 382 U.S. 296 (1966).

378. *See supra* note 161.

379. First Unitarian Church v. Salt Lake City, 308 F.3d 1114, 1130 (10th Cir. 2002). *See also* Hobbs v. County of Westchester, 2003 U.S. Dist. LEXIS 13942, at 4 (S.D.N.Y. Aug.

broadcasting context; traditional public fora are by definition not dedicated to a use inconsistent with communicative activity, and the same can be said of portions of the electromagnetic spectrum reserved for commercials. A message broadcast over the electromagnetic spectrum is pure speech, incapable of physically interfering with a competing activity. It's even speech at perfectly controlled volume; anyone who wishes not to receive it can avoid it without significant effort.[380] True, it prevents the transmission of a different message during that same segment of time, but in any forum the First Amendment clearly demands that conflicting claims of competing speakers be resolved on some basis other than the forum manager's aversion to one of the messages. The Supreme Court has constructed an elaborate body of doctrine qualifying our society's baseline belief in freedom of expression only because speech activity generally occurs within an actual physical environment in which activity designed to communicate all too often produces undesirable consequences. Once frequencies have been assigned, physical constraints are sublimely irrelevant to broadcasting, as are doctrines that allow the manager of a publicly owned property to control speech activity to limit the negative repercussions speech activity produces. The reason that speech in a traditional public forum receives such robust protection (and probably the reason that the Circuits increasingly demonstrate a concern about the privatization of public fora) is that those locations are, by presumption, conducive to speech activity. On the publicly owned airwaves just as in a physical public forum, unless we are satisfied that the reason speech is excluded has nothing to do with the viewpoint of the speaker, the First Amendment does not permit the suppression of speech.

While consistency may thus militate for extending the traditional public forum approach to the broadcast-access debate, even if the airwaves are a nonpublic forum the exclusion of speech based upon viewpoint is impermissible. In the factual context of modern broadcasting it is irrelevant that current doctrine has not yet embraced the more speech-enhancing position, "when a space is open to advertising, to commercial speech, that fact indicates that the space is not only not disrupted by expressive activity but is conducive to

13, 2003) ("[T]here are significant areas outside the amusement area that have all the characteristics of a traditional public forum. That the County historically has not permitted their use in that manner is not relevant to this determination.").

380. *See supra* notes 198, 201 and accompanying text.

such activity."[381] First, there is the argument that product advertisements often implicitly present a viewpoint on controversial issues.[382] Second, even if this argument is rejected, broadcasters' transmission of some "public interest" speech and government speech,[383] as well as candidate and issue ads dealing with elections, demonstrates that they have waived their claim to exclude an entire class of speech from the forum because it is "noncommercial" or "controversial."

Broadcasters cannot claim a right to be free from "forced speech." A compelled right of access would be constitutionally suspect where it might have the direct result of distorting a message (as in *Hurley*) or the indirect result of discouraging or altering speech due to fear of response (as in *Miami Herald v. Tornillo*). Neither set of concerns is implicated by a right of access to broadcast advertising. When broadcasters transmit advertisements they serve as conduits, not speakers—the social understanding is that they are not associating themselves with the content of the message. The latter concern is not present in broadcasting absent the *Cullman* doctrine because, as the Court recognized in *CBS v. FCC*, the transmission of an advertorial "does not impair the discretion of broadcasters to present their views on any issue."[384]

VII. Conclusion

When the FCC accepted responsibility for supervising (through licensees) the balanced presentation of views on the public airwaves, they were permitted to reject the individualist conception of the First Amendment in the interest of promoting public debate based on two implicit assumptions: (1) speech serves only to inform the public about the existence of viewpoints, and (2) only the broad outlines of a position must be set forth if the public is to be "informed." These assumptions are highly suspect from the point of view of both the liberty tradition and the political tradition, and in the absence of active efforts at "balancing" through the fairness doctrine, their

381. Air Line Pilots Assoc., Int'l v. Dept. of Aviation, 45 F.3d 1144, 1161 (7th Cir. 1995) (Flaum, J., concurring).

382. *See supra* Part IV.B.2.

383. Press conferences, etc., probably do not count, because they are part of a broadcaster's actual programming, but surely anti-drug advertorials for which networks are paid count as government speech. *See, e.g.*, http://www.mediacampaign.org/mg/television.html.

384. 453 U.S. 367, 397 (1981).

weaknesses render viewpoint-based exclusions from public fora located on public property constitutionally unacceptable.

The first assumption offends the liberty tradition because it denies that free speech has an intrinsic value as a vehicle for individual self-actualization. Surely the right of an individual to be free from governmental restrictions on expression is valued "both as an end and as means" at least partly because it is in some sense necessary to achieve freedom of conscience, not merely because it is "indispensable to the discovery and spread of political truth."[385] To assert that the exclusive function of the First Amendment is to ensure an informed public is equivalent to conceding that the sole purpose of the Fifteenth,[386] Nineteenth,[387] and Twenty-Sixth[388] Amendments is to ensure that the government is accurately informed about the desires of citizens. Such a concession implicitly denies that the Constitution attaches any inherent importance to individuals' active participation in the business of citizenship—it denies that the Constitution envisages human aspirations not directly relevant to the process of making laws. Furthermore, the first assumption offends the political tradition because it denies that the First Amendment protects speech because of its potential for persuasion. For language to serve as an instrument of social change, surely the eloquent must be given the opportunity to do more than sketch the outlines of their views.

The second assumption is suspect because if (as the FCC once maintained) only a representative set of viewpoints need be aired on either side of an issue, there exists almost unlimited potential for abuse of the licensee's role as moderator. The offense to the liberty tradition is obvious, while the political tradition may be tempted to respond, "[c]alculated risks of abuse are taken in order to preserve higher values."[389] But in the absence of even an attempt at supervising the moderator, it is unclear what "higher values" we are attempting to preserve. It is inconsistent with the general prohibition

385. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

386. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

387. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX, § 1.

388. "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend. XXVI, § 1.

389. *CBS v. DNC*, 412 U.S. 94, 125 (1973).

on prior restraints[390] to allow any actor unreviewable discretion to deny others access to a public forum,[391] and broadcasters' recent efforts to silence dissident voices demonstrates the wisdom of this time-honored and visceral distrust of censorship.

This Article has repeatedly noted the limited nature of the doctrinal extensions necessary to construct a right of access to the broadcasting spectrum: *CBS v. DNC* need not be overruled because it provides no precedent in the absence of the fairness doctrine; *Lehman v. City of Shaker Heights* need not be abandoned or even fundamentally altered, it should simply be limited to situations in which captive audiences are present; *Marsh v. Alabama* need only be read to mean that private corporations can be state actors when First Amendment rights on publicly owned property are at issue, and even then only in cases where speech activity cannot interfere with other activities because the forum at issue is inherently conducive to speech. These "onlys" are not meant to suggest that access to the broadcasting spectrum is a minor issue or that judicial recognition of an individual right of access would represent an insignificant step in First Amendment jurisprudence. "On the contrary, the right to speak can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency. For in the absence of an effective means of communication, the right to speak would ring hollow indeed."[392]

The relative ease with which an individual right of access can be plucked from (or perhaps woven into) modern doctrine is instead emphasized because invitations for more sweeping re-interpretations of the First Amendment have not been accepted. Professor Meiklejohn's elegant argument for interpreting the First Amendment as the constitutionally unique cornerstone of deliberative self-government simply finds little direct support in federal judiciary's modern opinions; again and again free speech is treated as an individual right; sacred primarily because it preserves individual autonomy. The political tradition is de-emphasized not because

390. *See, e.g.*, Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) ("[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.") (emphasis added); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713-14, 718-20 (1931).

391. Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (any prior restraint begins with "a heavy presumption against its constitutional validity").

392. *CBS*, 412 U.S. at 193 (Brennan, J., dissenting).

public debate is unimportant, but rather because our First Amendment doctrine implicitly assumes that individuals, if free from restrictions imposed by the State, will fulfill the participatory role that citizens must play if democracy is to be successful. We assume that public discourse will remain vital if the judiciary simply wields the First Amendment in defense of individual liberty, and recent experience demonstrates that our faith in individuals is not unfounded; motivated dissidents have time and again demonstrated their willingness to contribute relevant viewpoints to public debate—if only we would permit them.

Individuals suffer a constitutionally cognizable harm when they are denied the ability to access portions of the broadcast spectrum on terms equal to those granted their ideological opponents, and public debate suffers as well. The federal judiciary has, thus far, neglected to invoke the liberty tradition to ensure that individuals are granted nondiscriminatory access, an abdication of responsibility that undermines the public's deliberative process, and thus threatens the aspirations of both the liberty tradition and the political tradition. If, when the rights of individuals are directly threatened, the liberty tradition proves unable to support the weighty aspirations of democratic self-government, perhaps our faith in individuals does not mandate a concomitant faith in individualism.