The Applicability of State Action Doctrine to Private Broadcasters

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I

Introduction

Current proposals to lift federal content controls from the broadcasting industry are of particular concern to those interested in citizen access to the channels of mass communication. Among the key targets of broadcast deregulation proponents are those content controls that provide at least limited access rights for ideas and individuals. Media access, although no longer the movement it was in the late 1960's and early 1970's, remains an

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The fairness doctrine and sections 315 and 312 often have been cited as guarantees of citizen access to broadcasting. It should be recognized, however, that these access provisions are extremely limited in their application. The fairness doctrine was designed to provide access for issues and points of view, not individuals. See Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C.2d 283 (1970); Obligations of Broadcast Licensees Under the Fairness Doctrine, 23 F.C.C.2d 27, 30-31 (1970). Furthermore, FCC and court interpretations and applications of the doctrine have made it relatively ineffective as a device for providing access for issues and viewpoints. See S. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA (1978). The personal attack and political editorial rules, 47 C.F.R. §§ 73.1920, 73.1930 (1984), promulgated to augment the basic fairness doctrine, do guarantee personal access to certain individuals and groups, but the access rights are contingent and available only to a very few. Likewise, section 315 provides only contingent access rights for political candidates, with the licensee retaining the power to deny access to all candidates by denying access to one. Only candidates for federal office can claim broad
issue and often a demand today. If statutory and administrative access rights are eliminated, persons seeking access to broadcast channels for themselves, their ideas and their causes are likely to turn more frequently to the United States Constitution as an access tool.

Claims of a first amendment right of access to the broadcast media are not new. For forty years the federal courts have heard the argument that the first amendment precludes broadcast licensees from denying citizens access to the channels they control. Growing concern over increased concentration of control over the media in the late 1960's made a constitutional right of access a salient issue. Now, as ownership concentration remains a concern and the removal of content controls becomes a real possibility, the first amendment as a source of access rights is again a topic in need of exploration.

The key barrier to judicial recognition of a constitutional right of access is the government action requirement of the first amendment. Unless a broadcaster's denial of access can be deemed government action, access rights to broadcast media, thanks to enactment of section 312(a)(7) in 1972. See CBS v. FCC, 453 U.S. 367 (1981).  

2. A 1967 article by Jerome Barron generally is credited as providing the impetus for the so-called access movement. Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967). Barron's seminal article was followed by a raft of others, see infra note 4, as well as lawsuits against the media in which individuals and groups called upon the courts to recognize rights of access to the mass media. See, e.g., Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Resident Participation of Denver, Inc. v. Love, 322 F. Supp. 1100 (D. Colo. 1971); Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co., 307 F. Supp. 422 (N.D. Ill. 1969), aff'd, 435 F.2d 470 (7th Cir. 1970), cert. denied, 402 U.S. 973 (1971). Despite judicial refusal to recognize any broad constitutional right of access to either print or broadcast media, individuals who are stymied in their attempts to get media owners and managers voluntarily to grant them access continue to bring suit.

3. McIntire v. William Penn Broadcasting Co. of Philadelphia, 151 F.2d 597 (3d Cir. 1945), cert. denied, 327 U.S. 779 (1946), was the first recorded case in which citizens sought a constitutional right of access to a broadcast channel.

ernment action, the first amendment is simply inapplicable. In an effort to determine whether the Constitution may be used to fill the access gap that would be left by elimination of such policies as the fairness doctrine, 5 personal attack and political editorial rules, 6 and sections 312 and 315 of the Communications Act, 7 this article explores the judiciary's responses to claims that broadcasters are engaged in government action, and analyzes the applicability of state action doctrine to commercial radio and television. 8 Section II presents an overview of state action doctrine and definitions of the various types of state action courts have identified. 9 The earliest government action claims against broadcasters are reviewed briefly in section III. Judicial responses to later state action claims and the applicability of each of the major threads of state action doctrine are addressed in sections IV-VI.

II

State Action

One approach to creating a constitutional right of access, espoused especially by the access movement's leading prophet, Professor Jerome Barron, called for an affirmative interpretation of the first amendment, an interpretation that would assign government an obligation to promote and provide opportunities for expression by guaranteeing and protecting the individual's right to at least some limited form of access to newspapers and broadcast me-

8. This study is concerned solely with privately owned broadcast outlets. Courts have been called on to decide cases involving constitutional challenges to programming decisions by government-owned and operated stations. In such cases, however, state action generally is not an issue, since the parties and courts agree that the stations are government instrumentalities subject to constitutional requirements. See, e.g., Muir v. Alabama Educ. Television Comm'n, 656 F.2d 1012 (5th Cir. 1981), aff'd on reheg, 688 F.2d 1033 (5th Cir. 1982) (en banc), cert. denied, 460 U.S. 1022 (1983); Barnstone v. University of Houston, 514 F. Supp. 670 (S.D. Tex. 1980), rev'd, 660 F.2d 137 (5th Cir. 1981), aff'd on rehearing, 688 F.2d 1033 (5th Cir. 1982) (en banc), cert. denied, 460 U.S. 1023 (1983); Kelley v. WMUL-TV, 7 Media L. Rep. (BNA) 1095 (S.D. Va. 1980).
9. The treatment of state action doctrine that follows is, of necessity, incomplete, since the focus of this article is the doctrine's applicability to only one sphere of private activity—broadcasting. For a more comprehensive overview of state action doctrine, see, e.g., G. Gunther, CONSTITUTIONAL LAW 978-1028 (1980); W. Lockhart, Y. Kamisar & J. Choper, CONSTITUTIONAL LAW 1511-73 (1980); L. Tribe, AMERICAN CONSTITUTIONAL LAW §§ 18-1 to -7 (1978); Choper, Thoughts on State Action: The "Government Function" and "Power Theory" Approaches, 1979 WASH. U.L.Q. 757; Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 COLUM. L. REV. 656 (1974).
The United States Supreme Court's opinion in *Red Lion Broadcasting Co. v. FCC*\(^\text{11}\), upholding the constitutionality of the fairness doctrine, was seen by some as judicial acceptance of this affirmative interpretation approach.\(^\text{12}\) In general, though, the Court has been unresponsive to the affirmative interpretation argument, maintaining that the first amendment places restraints on government action but does not require affirmative government action to promote free expression.\(^\text{13}\)

The Supreme Court's refusal to interpret the first amendment as requiring affirmative legislative or administrative steps to guarantee citizen access to broadcasting means that an approach working within the traditional prohibitory interpretation of the first amendment is needed to support a constitutional access right. Under this approach, access seekers must argue that media owners and managers are guilty of abridging the first amendment when they deny individuals the opportunity to disseminate their messages to the public via mass media. The major stumbling block to this second approach is the so-called state action or government action doctrine.

It is a fundamental principle of constitutional law that the first amendment, as well as most constitutional provisions, applies only to the actions of government.\(^\text{14}\) Restraints on expression imposed by private individuals and entities are outside the scope of the first amendment. Federal District Court Judge Warren Ferguson stated that basic constitutional ground rule: "The state action concept stands for the principle that individuals, in the absence of valid government regulation, are free to be ornery in their private lives."\(^\text{15}\) Thus, the state action doctrine is perhaps most accurately described as the state action limitation. During the past forty

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\(^{10}\) J. BARRON, *supra* note 4, at 73-74; Barron, *supra* note 2, at 1641-69.


\(^{12}\) Access supporters especially relied on the Court's statement that the rights of viewers and listeners were paramount to the rights of broadcasters, *id.* at 390, a statement that prompted Professor Barron to say that the Court had "revolutionalized First Amendment thinking" and recognized the "primacy of the audience." J. BARRON, *supra* note 4, at 144-45.


\(^{15}\) *Writers Guild of Am. West, Inc. v. FCC*, 423 F. Supp. 1064, 1130 (C.D. Cal. 1975), vacated and remanded, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980). The Civil Rights Cases, 109 U.S. 3 (1883), are generally cited as the first enunciation of the state action requirement, although earlier cases laid the groundwork for the Civil Rights Cases ruling. See *United States v. Harris*, 106 U.S. 629, 639 (1882); *Ex parte Virginia*, 100 U.S. 339,
years, however, courts have expanded the state action concept to allow some seemingly private actions to be subject to constitutional scrutiny. As the term is frequently used today, the state action doctrine has come to refer to the criteria courts use to determine whether apparently private action is sufficiently governmental in character or so entwined with government action that it ceases to be "private" and becomes, for constitutional purposes, government action. The state action doctrine, then, has enabled courts to continue observing the basic constitutional ground rule while applying constitutional standards to conduct that, at one time, would have been considered private.

During the mid-1900's, state action doctrine was primarily a tool for judicially combating racial discrimination through application of the fourteenth amendment to ostensibly private actions. In the 1950's and 1960's, an expansive interpretation of state action, coupled with the fourteenth amendment's equal protection clause, enabled federal courts to do what Congress could not or would not.

346 (1879); Virginia v. Rives, 100 U.S. 313, 318 (1879); United States v. Cruikshank, 92 U.S. 542, 553-55 (1875).

16. Marsh v. Alabama, 326 U.S. 501 (1946), generally is recognized as the first case in which the Supreme Court applied the first amendment to the actions of an apparently private entity, in this case, a privately owned company town. Other state action cases applying the first amendment to private entities include Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (shopping center); Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952) (transit company); In re Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967) (railroad station).


17. State action doctrine developed, and still is primarily applied, in cases involving alleged violations of the fourteenth amendment. In such cases, the issue is whether constitutional provisions specifically directed to state governments can be applied to private actions. However, courts have also been called on to decide cases involving the alleged involvement of the federal government with private actions, that is, federal action. In these cases, the issue is the applicability of constitutional provisions addressed to the federal government, such as the first and fifth amendments. Courts use the same approaches, principles, and indicia of government involvement in analyzing claims of both federal and state action. "The standards used for determining the existence of federal government action under the fifth amendment are identical to those used for finding state action under the fourteenth amendment." Gerena v. Puerto Rico Legal Servs., 697 F.2d 447, 449 (1st Cir. 1983). Therefore, no distinction is made between federal and state action, and the terms state action and government action are used interchangeably.


do to eliminate discrimination. Once Congress began enacting civil rights legislation, the need for resort to the self-executing aspects of the fourteenth amendment diminished. The state action doctrine legacy remained, however, and litigants began using a tool designed to eradicate racism for a host of other purposes. State action doctrine was invoked in creditor-debtor controversies; dismissed employees sought to prove their employers were engaged in state action; private security forces were accused of violating constitutional search and seizure provisions; attempts were made to apply constitutional requirements to private hospitals, nursing homes, and schools; and persons seeking access to the communications media contended state action was present in

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20. The fourteenth amendment, added to the Constitution in the wake of the Civil War, contains five sections. Section one defines federal and state citizenship and contains the privileges and immunities, due process, and equal protection clauses. Section two permitted all blacks to be counted for representation in Congress, providing they were granted the same voting rights as white citizens. Section three prohibited Southern political and governmental leaders from holding federal or state office, and section four declared the U.S. public debt inviolable, but declared debts incurred by the Confederacy and claims for the loss or emancipation of slaves illegal and void. The final section states that Congress shall have the power to enforce the provisions of the fourteenth amendment through legislation. Sections two, three, and four soon became little more than historical footnotes, while sections one and five developed into major tools for the judiciary and Congress. Immediately after enactment of the amendment and again during the second half of the twentieth century, Congress utilized the power granted it by the fifth section of the amendment. During the intervening years, however, the Supreme Court interpreted the due process and equal protection clauses as self-executing provisions, guaranteeing individual rights even in the absence of enforcing legislation. See G. Gunther, supra note 9, at 973; Glennon & Nowak, A Functional Analysis of the Fourteenth Amendment "State Action" Requirement, 1976 SUP. CT. REV. 221, 222-24.


the activities of newspaper owners and broadcasters.\textsuperscript{25}

Several judicial definitions of, and so-called tests for, state action have evolved over the years.\textsuperscript{26} State action doctrine was developed in the 1940's and 1950's by the Supreme Court under Chief Justice Vinson,\textsuperscript{27} and during the 1960's the concept entered a period of rapid growth in the hands of the Warren Court.\textsuperscript{28} Both the Vinson and Warren Courts utilized fact-oriented, nondoctrinal analyses, which enabled them to keep state action doctrine flexible and fluid.\textsuperscript{29} By the mid-1960's, some commentators were suggesting that the reach of state action doctrine was virtually limitless since government was involved in all private activity, if only by permitting or failing to prohibit certain conduct.\textsuperscript{30} In the 1970's, though, the Burger Court began restricting, or at least refusing to expand, the applicability of the state action concept.\textsuperscript{31} To

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  \item 26. It may be more appropriate and desirable to treat state action tests as an analytical tool or framework for making what is essentially a factual determination. Thus, the question would be not whether the "facts and circumstances of a particular case" pass or fail a particular state action test, but whether those facts, appraised in the light of an analytical framework, indicate that the private conduct can be attributed to the state. Gerena v. Puerto Rico Legal Services, Inc., 697 F.2d 447, 449 (1st Cir. 1983). See also Cobb, State Action Under the Fifth and Fourteenth Amendments: A Brief Review of Recent Developments, 17 Clearinghouse Rev. 533, 536-37 (1983). In its recent trilogy of state action cases, however, the Supreme Court continued to treat the various state action indicia seriatim as separate "tests" for determining the presence of state action. See Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982). Since the focus of this article requires identification of what "is" in the area of state action, rather than what "should be," the test approach to state action will be utilized.
  \item 29. The Supreme Court, 1977 Term, Due Process, Creditor's Self-Help and State Action, 92 Harv. L. Rev. 120, 125 (1978). See also Black, supra note 19.
accomplish this, the Court developed a more doctrinal, less fact-oriented approach to state action and began identifying different types of state action according to various conceptual definitions.32

Courts and commentators generally recognize two broad categories of state action—private performance of a government or public function and government involvement/participation with private actors.33 The latter category can be manifested either through a symbiotic relationship between government and a private party, a relationship of interdependence that converts all acts of the private party into state action,34 or through the existence of an affirmative nexus or connection between government and the specific challenged conduct.35 Thus, three threads of state action doctrine—government function, symbiosis, and nexus—are generally identified. In light of the Supreme Court's recent trilogy of state action decisions, Rendell-Baker v. Kohn,36 Lugar v. Edmonson Oil Co.,37 and Blum v. Yaretsky,38 it appears that all three types of state action continue to retain vitality. In each of the decisions handed down June 25, 1982, the majority opinion was authored by a different member of the Court, and each employed a

32. The Supreme Court, 1977 Term, supra note 29, at 125.
35. Blum v. Yaretsky, 457 U.S. at 1004; Jackson v. Metropolitan Edison Co., 419 U.S. at 351; Community Medical Center v. Emergency Medical Servs., 712 F.2d at 880; Comment, supra note 34, at 898-902.
somewhat different analytical and rhetorical approach. Despite the differences among the three opinions, taken together they indicate that none of the traditional tests for state action has been discarded by the Supreme Court. Subsequent lower court applications of state action doctrine, as well as scholarly comment, support this conclusion. In Community Medical Center v. Emergency Medical Services, the Third Circuit provided this assessment of the status of the symbiotic relationship, nexus, and public function tests:

The relationship of these various tests to one another remains unclear, since the Supreme Court has not sought to reconcile apparent inconsistencies between the tests; nor has it overruled earlier precedents that seem unlikely to survive any of the tests that have been propounded more recently. Indeed, both Blum and Rendell-Baker, the two most current discussions of state action by the Supreme Court, treat all three forms of analysis as via-

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39. The majority opinion in Rendell-Baker v. Kohn, 457 U.S. 830 (1982), written by Chief Justice Burger, was the most traditional in its approach to state action analysis. Plaintiffs framed their state action claim in the context of the three traditional state action tests, and the Chief Justice addressed the claim in that manner. In Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), Justice White, writing for the majority, suggested an umbrella analytical framework to cover existing state action tests and to provide a uniform focus for state action analysis, regardless of specific facts or circumstances. White characterized the state action issue as a question of whether "the deprivation of a federal right [was] fairly attributable to the State." Id. at 937. In order to meet the "fair attribution" test, White said, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and "the party charged with the deprivation must be a person who may fairly be said to be a state actor." Id. White characterized the different state action tests used by the Court in different contexts—public function, state compulsion, nexus, and joint action—as means of identifying when a private party has become a state actor. Id. at 939. In Blum v. Yaretsky, 457 U.S. 991 (1982), Justice Rehnquist's opinion for the majority emphasized that the state had to be found "responsible for the specific conduct of which the plaintiff complains" for state action to be present. Id. at 1004 (emphasis in original). Justice Rehnquist focused primarily on whether a nexus existed between the state and the challenged conduct, id. at 1004-10, but also addressed plaintiffs' symbiosis and government function arguments. Id. at 1010-12.


42. 712 F.2d 878 (3d Cir. 1983).
ble. However, as Judge Garth noted in dissent in *Braden v. University of Pittsburgh*, 552 F.2d at 971-973, the recent authorities, while not repudiating the *Burton* [symbiotic relationship] and public function tests, have severely limited their applicability. Nonetheless, all three remain valid, and we shall thus address in turn their application to each argument advanced by CMC.43

In the following paragraphs, conceptual and empirical definitions of government function, symbiosis, and nexus will be discussed. The definitions presented are the ones most recently enunciated and utilized by the Supreme Court and those currently applied by lower courts in state action litigation. They are the definitions that later will be applied to broadcasting. It is important to recognize, however, that when many of the broadcasting cases discussed below were decided, these definitions had not yet evolved.

A. Government Function

State action is present under the government or public function theory when a private entity performs a function "traditionally exclusively reserved to the State."44 An alternative conceptualization is the private performance of a function that is "traditionally the exclusive prerogative of the state"45 or "traditionally associated with sovereignty."46 The exclusivity requirement, rather than tradition, must be considered the key element in the definition in light of recent Supreme Court opinions.47

43. *Id.* at 880.
47. In *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978), the Court disavowed reliance on history or tradition in determining what constitutes a governmental function. "To rely upon the historical antecedents of a particular practice would result in the constitutional condemnation in one State of a remedy found perfectly permissible in another." *Id.* at 162-63.

"[W]e are disinclined to decide the issue of state involvement on the basis of whether a particular class of creditor did or did not enjoy the same freedom to act in Elizabethan or Georgian England." *Id.* at 163 n.13 (quoting *Davis v. Richmond*, 512 F.2d 201, 203 (1st Cir. 1975)). See also *Rendell-Baker*, in which the Court drew attention to the word "exclusive" by italicizing it, and went on to state that, despite a Massachusetts law providing public funding for education programs for "maladjusted high school students," the law did not make such services "the exclusive province of the State." 457 U.S. at 842.

Furthermore, in *Flagg Bros.* the Court employed a two-pronged approach to the exclusivity requirement. First, the Court considered whether the function was one uniquely sovereign or administered with a great degree of exclusivity by the state. Second, the Court inquired into the existence of alternative methods of performing the function and alterna-
Empirically, the Supreme Court has found only the conduct of elections and the operation of a company town to fall squarely within the current definition of a public function. Conversely, the Court has found that resolving private disputes, providing utility services, serving as counsel to a criminal defendant (even though the attorney was a government-employed public defender), and operating shopping centers, nursing homes, and schools for problem high school students are not exclusively governmental functions. In *Flagg Brothers v. Brooks*, the Court listed education, fire and police protection, and tax collection as examples of functions that have been administered by the state.
with "a greater degree of exclusivity" than dispute resolution. The decision in Rendell-Baker v. Kohn, though, places the status of education as a state function in question. The Rendell-Baker Court held that a privately owned school for problem students did not perform a government function, despite a Massachusetts law requiring the state to identify and provide programs for students with special needs. The Court was careful, however, to confine the public function discussion to "the education of maladjusted high school students" and "students who could not be served by traditional public schools." Most lower courts that have considered the issue, though, have held that private schools, as well as private health care institutions, do not perform governmental functions. Lower courts have found fire protection, poll watching, involuntary commitment and confinement of the mentally ill, and care of neglected children to be state functions. In all of those cases, however, statutes recognizing some degree of state responsibility for the functions influenced the state action holdings.

B. Symbiosis

While the government function theory analyzes and categorizes the nature of the function performed by the private party, government involvement/participation theory focuses on the relation-
ship between government and the private entity. Government involvement sufficient for a state action finding may take the form of either a symbiotic relationship between government and the private entity or a nexus between the specific challenged act and government. Under the current definition of symbiosis, state action is present when government and a private party are involved in an overall relationship of interdependence in which government becomes a partner or joint participant with the private party. As conceptualized by the Supreme Court, symbiosis involves three essential elements: a lessor-lessee relationship between government and a private party, the operation of a facility open to the public, and the conferral of mutual benefits. Symbiosis analysis is essentially additive. It entails identification of the factual indicators of government entanglement, the sum of which must be present before state action will be found. If a symbiotic relationship is present, there is no need to prove that government directly participated in the specific activity being challenged. The government is considered a partner of the private party and, therefore, jointly responsible for all of the private acts.

The Supreme Court has found a symbiotic relationship between government and a private entity in only one case. The case was Burton v. Wilmington Parking Authority, in which William Burton, a black, charged the fourteenth amendment's equal protection clause was violated by the Eagle Coffee Shoppe's refusal to serve him. The restaurant was located in leased space in a publicly owned parking facility. The arrangement was financially beneficial to both the restaurant owner and the government.


69. Jackson, 419 U.S. at 357; Moose Lodge No. 107, 407 U.S. at 175; Burton, 365 U.S. at 723-24.

70. In Burton, Justice Clark noted the additive nature of symbiosis. 365 U.S. at 724. "Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public . . . service" led to the state action finding. Id. See also Jackson, 419 U.S. at 360-63 (Douglas, J., dissenting).

71. 365 U.S. 715 (1961). The Court did not use the term "symbiotic relationship" in Burton. Eleven years later, in Moose Lodge No. 107, the Court first used that term to describe the Burton holding. 407 U.S. at 175.

72. 365 U.S. at 723-24. Arguably, Evans v. Newton, 382 U.S. 296 (1966), also involved a symbiotic relationship. See supra note 55. In Newton, the 100-acre park in Macon, Georgia was created by a trust in Senator Augustus O. Bacon's will, which provided that the city act as trustee for the facility that was open only to whites. The Supreme Court found that, after control was transferred to private trustees, there had been "no change in municipal maintenance and concern over this facility." Id. at 301. Although the Newton Court cited
The Court has declared emphatically that extensive government regulation, government-granted monopoly status, and significant government funding are insufficient to prove symbiosis.\footnote{73}

Lower courts have seldom found sufficient evidence of symbiosis to warrant a state action finding, except where ostensibly private entities were actually arms or agencies of government, with government officials involved in management or control. For example, in \textit{Chalfant v. Wilmington Institute},\footnote{74} the court declared that an ostensibly private library was an "instrumentality of state and local government."\footnote{75} The library received ninety percent of its funds from taxes, enjoyed tax-exempt status, had government officials on its board, was located on city-owned property under a rent-free lease, and was subject to state law that defined the level of library service and mandated the structure, organization, and management of the board.\footnote{76} In \textit{Downs v. Sautelle},\footnote{77} a symbiotic relationship was identified between a municipality and a hospital. Town officials selected the hospital's board of directors; if the hospital were to close, all assets would revert to the town; hospital profits were turned over to the town; the hospital was subject to significant regulation; and thirty percent of the hospital's budget came from Medicare funds.\footnote{78} A few lower court symbiosis holdings have been based largely on extensive government funding

\textit{Burton} to support its holding, the state action analysis lacked the specificity, the mustering of detail found in \textit{Burton}. Rather than as an example of a symbiotic relationship, it seems more appropriate to categorize \textit{Newton} as a case of government attempting to mask its own unconstitutional activity behind a nominal board of "private" trustees. That, perhaps, was what Justice Rehnquist meant when he referred to \textit{Newton} as a case of "ordinary state action under extraordinary circumstances." Flagg Bros. v. Brooks, 436 U.S. at 159 n.8. \textit{See also} Rendell-Baker v. Kohn, 457 U.S. at 842 n.7 (citing \textit{Newton} and referring to "a sham arrangement" whereby a state attempts to avoid its constitutional duties).


\footnote{574} F.2d 739 (3d Cir. 1978).

\footnote{76} Id. at 745.

\footnote{75} Id.

\footnote{77} Id.

\footnote{78} 574 F.2d 1 (1st Cir.), \textit{cert. denied}, 439 U.S. 910 (1978).

\footnote{74} 574 F.2d at 7. \textit{See also} McVarish v. Mid-Nebraska Community Mental Health Center, 696 F.2d 69 (8th Cir. 1982); Benner v. Oswald, 592 F.2d 174 (3d Cir.), \textit{cert. denied}, 444 U.S. 832 (1979); Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977); Braden v. University of Pittsburgh, 552 F.2d 948 (3d Cir. 1977); O'Neill v. Grayson County War Memorial Hosp., 472 F.2d 1140 (6th Cir. 1973). \textit{But cf.} Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1978), \textit{cert. denied}, 430 U.S. 982 (1977) (no state action found when a student editor of a state university newspaper refused to accept an ad where the editor was elected by the students and no university officials participated in the challenged action).
and regulation. The Supreme Court’s decision in *Rendell-Baker v. Kohn*, however, calls into question the rationale behind those holdings. In *Rendell-Baker*, the Court held that a private school, which received “virtually all [its] income . . . from government funding,” was not involved in a symbiotic relationship with the state.

C. Nexus

The nexus test provides that state action is present when “a sufficiently close nexus” or connection exists between government and the specific activity being challenged. A general relationship between government and the private entity need not be shown; a strong, clear link between government and the challenged conduct is sufficient. The nexus requirement has been described as government placing its “imprimatur” on, or “its own weight on the side of,” the challenged conduct. The Supreme Court has found a nexus present where there is government compulsion, encouragement, express approval, and enforcement of private actions or the actual participation of government officials with private parties. It is unclear whether all these forms of a sufficient nexus have survived the Court’s 1982 state action rulings. In *Lugar v. Edmonson Oil Co.* the Court held that joint action by a government official and a private party is sufficient to convert the private actor into a state actor. In addition, the *Lugar* Court recognized “the ‘state compulsion’ test.” In *Blum v. Yaretsky* the Court said that “normally” a nexus would be

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79. See, e.g., Hollenbaugh v. Carnegie Free Library, 545 F.2d 382 (3d Cir. 1976); Ginn v. Mathews, 533 F.2d 477 (9th Cir. 1976); McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971).
81. Id. at 840, 843. See also Weise v. Syracuse Univ., 553 F. Supp. 675, 681-82 (N.D.N.Y. 1982).
84. Jackson v. Metropolitan Edison Co., 419 U.S. at 357.
91. Id. at 941.
92. Id. at 939.
present "only when [the state] has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." The definition in Blum was repeated with approval in Rendell-Baker v. Kohn. In Rendell-Baker the Court also acknowledged that state and federal regulations at issue in Blum "encouraged" the private parties to perform the challenged acts. Apparently, though, that government encouragement was not significant enough to meet the nexus requirement. The Court also has said that "[m]ere approval of or acquiescence in the initiatives of a private party," government authorization of private choice, and failure to disapprove (or pro forma approval) of private practices are not sufficient evidence of a nexus. The message of the Supreme Court's recent state action cases seems to be that usually a nexus will be found only when the initiative or impetus for the challenged action comes from government or when government officials participate in the challenged activity. Nevertheless, despite some effort to distinguish earlier cases, the Court has neither overruled, nor directly attacked on their merits, the more liberal involvement/participation holdings of the Vinson and Warren Courts. Therefore, for purposes of this analysis, it will be assumed that while government pressure or actual participation is most likely to result in a nexus finding, other manifestations of government involvement, as illustrated by earlier cases, may still be offered as proof of state action.

Empirically speaking, the Supreme Court has found the nexus requirement met by: state laws and regulations requiring or encouraging racial discrimination; statements of public officials directing private individuals to engage in segregation; judicial

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94. Id. at 1004.
95. 457 U.S. at 839-40.
96. Id. at 841.
enforcement of privately devised restrictive covenants;\textsuperscript{103} a police officer and private party conspiring to have a white woman arrested for attempting to eat at a lunch counter with black students;\textsuperscript{104} express government approval, following hearings and investigation, of a transit company's decision to pipe radio programs into buses;\textsuperscript{105} and government officials participating in the execution of an ex parte prejudgment attachment of a debtor's property.\textsuperscript{106} It should be emphasized, however, that in all but two of those cases,\textsuperscript{107} racial discrimination was the impetus for the challenged private activity. Although the Supreme Court has never indicated that state action standards should be applied differently depending on the right being asserted, courts have historically been more willing to apply constitutional provisions to private racial discrimination than to claims of lack of procedural due process or violations of free speech and press rights.\textsuperscript{108} The Supreme Court has failed to find its nexus definition met by: a state law permitting private choice in debtor-creditor controversies;\textsuperscript{109} government failure to disapprove of a utility's termination policy,\textsuperscript{110} or broadcasters' policies on editorial advertising;\textsuperscript{111} judicial application of neutral property laws that permitted establishment of racially discriminatory trusts;\textsuperscript{112} government policies encouraging transfer of nursing home patients to lower-cost, lesser-care facilities;\textsuperscript{113} and state regulation of a private school that neither compelled nor influenced the challenged personnel decisions.\textsuperscript{114} Lower courts most frequently have found a nexus when government officials have cooperated or participated with private individuals in the performance of a particular act or in the making

\textsuperscript{103} See Shelley v. Kraemer, 334 U.S. 1 (1948).
\textsuperscript{113} See Blum v. Yaretsky, 457 U.S. 991 (1982).
of a decision.\textsuperscript{115}

The government or state action question is a threshold issue. Because first amendment prohibitions apply only to government, before determining whether the challenged action constitutes an abridgement of free expression, a court must first examine whether the constitutional provision invoked applies to the defendant.\textsuperscript{116} This threshold question of state action has been the nemesis of most litigants seeking to convince courts that broadcaster censorship or access denials violate the first amendment.\textsuperscript{117}

Over the years, litigants have invoked all three major state action theories in broadcasting cases. Government function theory has been the least used, and no court has ever accepted the argument that broadcasters perform a governmental function. In only a few cases have courts found evidence of sufficient extraordinary


\textsuperscript{116} See, e.g., CBS v. Democratic Nat'l Comm., 412 U.S. 94, 121 (1973) (the Court's inability to agree on the state action question forced Chief Justice Burger, writing for the majority, to determine "whether, assuming governmental action," the broadcasters' actions violated the first amendment). The Chief Justice's opinion in \textit{CBS} consisted of four parts, but only Parts I, II and IV constituted the opinion of the Court. Part I stressed that first amendment questions relating to broadcasting should be evaluated within the framework of the broadcast regulatory scheme. Part II concluded that the Communications Act of 1934 was designed to allow journalistic discretion. In Part III, the Chief Justice found government action lacking, but only Justices Stewart and Rehnquist concurred in that portion of the opinion. Since a majority of the Court refused to dismiss the constitutional claims against the broadcasters on the ground that there was no state action, Part IV of the opinion went on to declare that even assuming government action, the first amendment did not require broadcasters to accept editorial ads. See also Belluso v. Turner Communications Corp., 633 F.2d 393 (5th Cir. 1980); Kuczo v. Western Conn. Broadcasting Co., 566 F.2d 384 (2d Cir. 1977); Central N.Y. Right to Life Fed'n v. Radio Station WIBX, 479 F. Supp. 8 (N.D.N.Y. 1979); Moro v. Telemundo, Inc., 387 F. Supp. 920 (D.P.R. 1974) (the courts in these cases failed to find government action and, therefore, never went on to address the merits of the first amendment claims against the broadcasters).

government involvement with broadcasters to support a finding of state action through the government involvement/participation concept. The key word is extraordinary. In general, courts have held that government licensing and regulation alone are insufficient to meet the symbiosis test. Instead, courts have demanded evidence of explicit government approval of or pressure to perform the challenged conduct—in other words, the existence of a nexus between government and the challenged broadcaster actions. The remainder of this article will be devoted to exploring the applicability of the state action definitions to broadcasting. First, the two earliest claims of first amendment violations by broadcasters will be described briefly. Then, the government function, symbiosis, and nexus theories will be discussed in turn. Within the discussion of each theory, some of the government action arguments of plaintiffs who have brought constitutional claims against broadcasters and the courts' responses to those arguments will be reviewed. Finally, the applicability of existing state action definitions and criteria to broadcasters will be analyzed.

III

The Earliest Cases

In 1973 Lange noted that courts generally have approached constitutional claims against broadcasters with "a rather firm presumption against a finding of state action." Perhaps one reason for this "firm presumption" is that disgruntled access-seekers were too visionary, or too premature, in their initial approaches to the federal judiciary, leading to the establishment of a no-state-action precedent in broadcasting before the Supreme Court had begun development of state action doctrine. The first case involv-


121. Lange, supra note 4, at 28.
ing a state action claim against a broadcaster\(^\text{122}\) predated the two Supreme Court cases generally considered to be the leading sources of the involvement/participation and public function theories of state action.\(^\text{123}\)

In *McIntire v. William Penn Broadcasting Co.*,\(^\text{124}\) clergymen and religious organizations contended that a radio station's refusal to continue to sell them time violated their first amendment rights. In 1948, this was apparently a novel and somewhat incomprehensible argument for the Third Circuit Court of Appeals, which flatly declared that Penn was a private corporation, not a government agency, and, therefore, not subject to first amendment prohibitions.\(^\text{125}\) The court did not discuss the nature of the function performed by radio, government involvement through licensing regulation, or the FCC's participation or lack of participation in the broadcaster's decision. Thirty years later, *McIntire* was still being cited to support no-state-action decisions in broadcasting cases, despite the development of state action doctrine in the intervening years.\(^\text{126}\)

*Massachusetts Universalist Convention v. Hildreth & Rogers Co.*\(^\text{127}\) was the next government action case involving a broadcaster. By the time it was decided in 1949, the Supreme Court had enunciated and applied both the public function and government involvement theories of state action to declare private actions unconstitutional. However, in a decision later affirmed and reprinted verbatim by the First Circuit Court of Appeals, the Massachusetts Federal District Court disposed of plaintiff's first amendment claim in one sentence: "But this Amendment limits only the action of Congress or of agencies of the federal government and not private corporations such as defendant here."\(^\text{128}\) Like *McIntire*, *Massachusetts Universalist Convention* also resulted from a controversy over religious programming. The convention had a contract with station WLAB, Lawrence, Kansas, to broadcast a series of sermons. The contract provided, however, that all broadcasts were "subject to the approval of the station


\(^{124}\) 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946).

\(^{125}\) 151 F.2d at 601.

\(^{126}\) See, e.g., Kuczo v. Western Conn. Broadcasting Co., 566 F.2d at 387; Moro v. Telemundo, Inc. 387 F. Supp. at 924.


\(^{128}\) Id. at 825.
both as to artists and broadcast content.\textsuperscript{129} The Universalists apparently did not accept the resurrection of Jesus Christ as fact but as a story of "purely metaphorical or spiritual significance."\textsuperscript{130} On Easter 1949, the convention wanted to broadcast a sermon expressing those views, but WLAW refused because the sermon would "be shocking to general public sensibility."\textsuperscript{131} The courts failed to find the first amendment applicable to the broadcaster's decision.

Nearly two decades elapsed before another case involving alleged constitutional violations by a broadcaster was reported by a federal court. By the late 1960's, a significant body of state action precedent had been established. Plaintiffs and their attorneys drew on these precedents and began demonstrating remarkable ingenuity in building state action arguments. Judges began engaging in detailed analyses of such claims and applying state action definitions and criteria developed in other contexts to privately owned radio and television.

\section*{IV

Broadcasters and Government Function Theory}

Unlike the involvement/participation theories that were developed in the context of private racial discrimination, the government function concept of state action has a first amendment history. In the classic case of \textit{Marsh v. Alabama},\textsuperscript{132} the Supreme Court held that a company town's refusal to allow Grace Marsh to distribute religious literature on the town's sidewalks violated the constitutional guarantees of freedom of press and religion. Cited continually for both its holding and expansive language, \textit{Marsh} declared that because the private property of the company town served a public function, its operation was subject to constitutional restraints.\textsuperscript{133}

\textit{Marsh} and its broad public function language played a pivotal role in later first amendment cases resulting from the attempts of privately owned shopping centers to restrict picketing and leafletting on their property. In a series of three shopping center cases spanning eight years, however, the Supreme Court moved from an expansive interpretation of \textit{Marsh} to a much more restricted defi-

\begin{itemize}
\item \textsuperscript{129} Id. at 823.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} 326 U.S. 501 (1946).
\item \textsuperscript{133} Id. at 506-08.
\end{itemize}
nition of government function.\(^{134}\) In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,\(^{135}\) the Warren Court found the shopping center "clearly the functional equivalent of the business district . . . in *Marsh.*"\(^{136}\) The shopping center's refusal to allow peaceful union picketing violated the first amendment. In *Lloyd Corp. v. Tanner*,\(^{137}\) involving anti-Vietnam War leafleters, the Warren Court said *Logan Valley* was inapplicable because the "message sought to be conveyed by respondents was directed to all members of the public, not solely to patrons of Lloyd Center or of any of its operations"\(^{138}\) and the leafleters had access to "alternative avenues of communication."\(^{139}\) Finally, in *Hudgens v. NLRB*,\(^{140}\) another case involving union picketing at a shopping center, the Court expressly overruled *Logan Valley*.\(^{141}\)

A. The Cases

Despite its early history of helping communicators gain access to audiences, government function theory seldomly has been used or useful in broadcast access cases. In a 1971 case, *Post v. Payton*,\(^{142}\) plaintiffs, members of the staff and listening audience of two radio stations operated by Long Island University, tried an imaginative, but unsuccessful, approach. The suit resulted from the closing of the stations and the firing of director Steven Post due to the alleged broadcast of obscenities. Plaintiffs contended that FCC licensing of broadcasters was analogous to United States Post Office licensing of private parties to deliver mail.\(^{143}\) Plaintiffs apparently argued that mail delivery and broadcasting were "functionally equivalent" methods of disseminating information, an approach most likely based on the Supreme Court's language in *Logan Valley*.\(^{144}\) The district court, however, refused to consider broadcasting a government function without some indication that


\(^{136}\) Id. at 318.

\(^{137}\) 407 U.S. 551 (1972).

\(^{138}\) Id. at 564.

\(^{139}\) Id. at 566-67.

\(^{140}\) 424 U.S. 507 (1976).

\(^{141}\) Id. at 518.


\(^{143}\) Id. at 803-04.

\(^{144}\) 391 U.S. at 318.
Congress intended or mandated federal performance of that function.145

When Tom and Dick Smothers sued CBS in 1972, charging that the network violated their constitutional rights by censoring and deleting material from their Smothers Brothers Show, they based their state action argument primarily on the symbiotic relationship theory.146 The court, however, seemed to read a public function requirement into the symbiosis theory, declaring that no matter how close or comprehensive the relationship between the FCC and CBS, it was nonetheless insufficient to "overcome the requirement that the private party must be performing functions that normally would be performed by the government or state."147 This commingling of two distinct threads of state action theory was an unusual approach. Indeed, in Burton v. Wilmington Parking Authority, the only Supreme Court case in which state action was found because of a symbiotic relationship, the private defendant was engaged in operating a restaurant, hardly a function that is traditionally performed exclusively by government.

B. Applicability of Government Function Theory to Broadcasters

It is not surprising that government function theory has played such a limited role in state action cases involving broadcasters. In the United States, broadcasting simply is not a function that is traditionally and exclusively reserved to the federal government.149 Historically, broadcasting has been primarily a private enterprise. For example, in 1926, immediately prior to enactment of the first

147. Id. at 626 n.6.
149. In most other nations, of course, broadcasting is a function performed by the government. See generally MASS COMMUNICATIONS: A WORLD VIEW (A. Wells ed. 1974). In CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973), the Supreme Court acknowledged this fact but treated it as irrelevant in light of the private broadcasting system expressly authorized by Congress.

[With the advent of radio a half century ago, Congress was faced with a fundamental choice between total Government ownership and control of the new medium—the choice of most other countries—or some other alternative. Long before the impact and potential of the medium was realized, Congress opted for a system of private broadcasters licensed and regulated by Government. The legislative history suggests that this choice was influenced not only by traditional attitudes toward private enterprise, but by a desire to maintain for licensees, so far as consistent with necessary regulation, a traditional journalistic role.

Id. at 116.
comprehensive radio regulation, the majority of radio stations were owned by private, profit-making entities, such as stores, manufacturers, and publishers.

Moreover, broadcasting cannot be considered a government function by virtue of legislation. At times, courts have found the government function test met by legislation through which government assumed exclusive control over a particular function. However, the legislative history of broadcast regulation provides no evidence that Congress intended to declare broadcasting as a whole the exclusive prerogative of government. Instead, legislative records make it clear that Congress envisioned a system of largely private broadcasters subject to federal regulation. The stated purposes of the Communications Act of 1934 are, "among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission, and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time." Of course, one possible interpretation of the maintenance-of-control language is that Congress assumed for itself the power to use all broadcast

151. Fifty-seven percent of the 379 stations reporting were owned by private, profit-making entities: stores, 124 stations (33%); publishers, 35 stations (9%); manufacturers, 30 stations (8%); banks and insurance companies, 15 stations (4%); and hotels, 12 stations (3%). Schools and colleges, some of which were private, owned 94 stations (25%), while the remaining stations were owned by churches, societies, municipalities, counties, and states. Radio Control: Hearings on S. 1 and S. 1754 Before the Senate Comm. on Interstate Commerce, 69th Cong., 1st Sess. 20 (1926) (statement of Stephen B. Davis, Commerce Dep't Solicitor).
155. Id. § 301.
frequencies in the United States. Under this interpretation, operating a broadcast station is, by legislation, the exclusive prerogative of the federal government, but a prerogative Congress chose to delegate to private parties. Such a situation would be analogous to that of \textit{Ruffler v. Phelps Memorial Hospital},\textsuperscript{156} in which the court found commitment and treatment of the mentally ill was, by statute, an exclusive state function, but one that New York had delegated to private mental institutions.

Yet, both the legislative history of broadcast legislation and its application and interpretation for more than fifty years indicate that the maintenance-of-control language was designed primarily to establish and justify federal power to regulate, not operate, broadcast stations. According to Senator Clarence C. Dill, a primary author of the Radio Act of 1927,\textsuperscript{157} "The real point in this bill is the right and power to \textit{control} the apparatus that sends out the frequencies and makes what is known as radio."\textsuperscript{158} Senator Dill did not use the word "operate." Indeed, much of the debate over the Radio Act centered on a justification for federal regulation, with some arguing that Congress should declare "the ether within the United States \ldots the inalienable possession of the people thereof."\textsuperscript{159} Dill contended the justification for radio regulation stemmed from Congress's constitutional power to regulate interstate commerce.\textsuperscript{160} In the end, the stated purposes of the Radio Act were:

\begin{quote}
to \textit{regulate} all forms of interstate and foreign radio transmissions and communications within the United States, its Territories and possessions; to \textit{maintain the control} of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by \textit{individuals, firms, or corporations}, for limited periods of time.\textsuperscript{161}
\end{quote}

Not only did the final version of the Act explicitly declare regulation to be Congress's intent, it also referred to the use of channels by "individuals, firms, or corporations," a clear indication that...

\textsuperscript{156} 453 F. Supp. 1062 (S.D.N.Y. 1978).
\textsuperscript{157} Ch. 169, 44 Stat. 1162 (1927).
\textsuperscript{158} 68 CONG. REC. 2873 (1927) (statement of Senator Dill) (emphasis added).
\textsuperscript{159} The language is found in S. 1754, 69th Cong., 1st Sess. § 1 (1926), \textit{Radio Control}, \textit{supra} note 151, at 1. \textit{See also} S. 1, 69th Cong., 1st Sess. § 1 (1936), and H.R. 5589, 69th Cong., 1st Sess. § 1 (1926); \textit{To Regulate Radio Communication}, \textit{supra} note 153, at 1. For discussion of the ownership of the airwaves concept, \textit{see To Regulate Radio Communication}, \textit{supra} note 153, at 21-23, 89-91; 68 \textit{CONG. REC.} 2869-81 (1927); 67 \textit{CONG. REC.} 5487 (1926).
\textsuperscript{160} 68 \textit{CONG. REC.} 3119 (1927); 67 \textit{CONG. REC.} 5502 (1926).
\textsuperscript{161} Ch. 169, § 1, 44 Stat. 1162 (1927) (emphasis added).
Congress envisioned private performance of the broadcasting function. In the Communications Act of 1934, the clause on regulatory purpose was altered to include regulation of wire communication and became an introduction to the entire Act.\textsuperscript{162} The clauses on maintenance of federal control and use, but not ownership, by private parties were altered slightly and became the introduction to the broadcast regulation portions of the Act.\textsuperscript{163}

While broadcasting traditionally has been a private activity, the content and legislative history of the Communications Act, as discussed above, as well as the interpretation and application of the Act, make it clear that broadcast regulation is an exclusive function of the federal government.\textsuperscript{164} Presumably then, the private exercise of this regulatory function could raise constitutional implications. This was one of the issues in a complex 1976 case, \textit{Writers Guild of America West, Inc. v. FCC},\textsuperscript{165} which arose when a group of television writers, actors, directors, and producers sued the FCC, the major commercial networks, and the National Association of Broadcasters, challenging the so-called family viewing policy on statutory and constitutional grounds. The policy, adopted by the networks and the NAB after significant pressure by the FCC, provided that during the first hour of prime time network programming and the immediately preceding hour, only programs appropriate for a general audience should be shown. Plaintiffs urged application of government function theory, contending that network-NAB domination of broadcasting resulted in broadcast regulation by private parties. By permitting and encouraging rulemaking and enforcement by the networks and the NAB, plaintiffs argued, the FCC implicitly delegated a function exclusively reserved to itself.\textsuperscript{166} While recognizing plaintiffs' public function contentions, the district court nonetheless chose to base its state action finding on the nexus theory, replete as the case was with evidence of the government having exerted signifi-

\begin{itemize}
\item 162. 47 U.S.C. § 151 (1982).
\item 163. Id. § 301.
\item 166. 423 F. Supp. at 1144.
\end{itemize}
The contention that the NAB assumed governmental powers through adoption of its Radio and Television Codes\textsuperscript{168} was not new, nor did it end with Writers Guild.\textsuperscript{169} However, because Writers Guild did not thoroughly analyze plaintiffs' government function arguments, it failed to address the most basic question relative to the applicability of government function theory to the private assumption of broadcast regulatory functions: what activities can be classified as regulatory functions or powers exclusively reserved to the federal government? Clearly, such activities as channel allocation, license conferral, renewal and denial, and the imposition of penalties, including forfeitures, suspensions, and revocations, are regulatory functions specifically delegated to the FCC by law.\textsuperscript{170} But most cases involving constitutional challenges to broadcaster action stem from programming decisions not easily recognized as regulatory activities. The Communications Act does not give the FCC power to make specific programming decisions for individual stations. Whatever programming power the FCC possesses is general in nature and stems from provisions such as: the Communications Act's public interest standard;\textsuperscript{171} sections 315 and 312;\textsuperscript{172} and prohibitions on the broadcasting of lottery information,\textsuperscript{173} fraudulent material,\textsuperscript{174} and obscene or indecent language.\textsuperscript{175} The Commission has exercised its general authority

\textsuperscript{167} Id. at 1145. Writers Guild was vacated and remanded by the Ninth Circuit Court of Appeals, largely on the ground that the FCC had primary jurisdiction over the claims against itself and individual commissioners. However, the appeals court also questioned the district court's state action finding. 609 F.2d 355, 361.

\textsuperscript{168} National Association of Broadcasters, NAB Television Code, NAB Radio Code (22d ed. 1981), in Broadcasting Yearbook 1982, at D-15 to -22. In January 1983, the NAB voted to repeal officially both the Television and Radio Codes and dissolve its code boards as a result of both the Writers Guild action and an antitrust action challenging portions of the Television Code. In 1979, the Justice Department filed an antitrust suit against the NAB, charging certain advertising provisions of the Television Code were anti-competitive. In 1982, the NAB signed a consent agreement with the Justice Department, agreeing not to maintain, publish, distribute, or enforce certain advertising provisions. See United States v. National Ass'n of Broadcasters, 536 F. Supp. 149 (D.D.C.), final judgement entered, 553 F. Supp. 621 (D.D.C. 1982); NAB Codes gone but not forgotten, Broadcasting, Jan. 19, 1983, at 37.

\textsuperscript{169} See Mark v. FCC, 468 F.2d 266 (1st Cir. 1972); Gemini Enters. v. WFMY Television Corp., 470 F. Supp. 559 (M.D.N.C. 1979); Note, The Limits of Broadcast Self-Regulation Under the First Amendment, 27 STAN. L. REV. 1527, 1550-53 (1975).


\textsuperscript{171} Id. §§ 303, 307(a).

\textsuperscript{172} Id. §§ 315, 312.


over programming through such mechanisms as the fairness doctrine,\textsuperscript{176} the prime time access rule,\textsuperscript{177} and general policy statements on programming.\textsuperscript{178} The Communications Act, however, specifically denies the FCC power to censor the "radio communications or signals transmitted by any radio station."\textsuperscript{179} Thus, in the area of programming, the Commission's regulatory powers and functions include formulation of general rules, policies, and guidelines designed to meet the requirements of the Communications Act. Individual programming decisions and censorship, however, clearly are not regulatory functions.

At first glance, then, it might appear that the Writers Guild plaintiffs' public function argument had some merit because the family hour constituted a general programming policy, rather than an individual programming decision. Yet, a key aspect of the FCC's exclusive regulatory power is the ability to command adherence to rules and policies and to impose sanctions, ranging from chastisement to license revocation for violations. NAB membership, however, is voluntary. While membership may carry significant benefits, it is not required to maintain a broadcast license. It would appear, then, that the adoption of rules or policies by voluntary associations, such as the NAB, would not constitute the assumption of a traditionally exclusive function of the FCC since, unlike the FCC, the NAB cannot make maintenance of a broadcast license contingent upon adherence to its rules.\textsuperscript{180} Thus, unless the FCC were to assign its responsibility for licensing or sanctioning errant broadcasters to the NAB or some other private entity, government function theory is no more applicable to broadcast self-regulation than it would be to a church that binds its members under pain of excommunication to obey church rules that cover areas within the legitimate police power of the state.

In addition, the Supreme Court's use of a two-pronged exclusiv-

\begin{footnotes}
\item[176.] 47 C.F.R. § 1910 (1983). See also The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1 (1974); Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance (Fairness Primer), 40 F.C.C. 598 (1964); Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).
\item[177.] 47 C.F.R. § 73.658(k) (1983).
\item[178.] E.g., En Banc Programming Inquiry, 44 F.C.C. 2303 (1960); Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949); Public Service Responsibility of Broadcast Licensees (Blue Book) (1946).
\item[180.] Much of the debate and controversy over alleged NAB assumption of governmental functions and power has dissipated, of course, as a result of the repeal of the NAB Radio and Television Codes. See supra note 168.
\end{footnotes}
ity test in Flagg Brothers v. Brooks further erodes the argument that private efforts to control or affect the content of broadcast programming constitute regulation and, therefore, government action. In Flagg Brothers, the Court considered not only whether the function was an exclusively sovereign one, but also whether alternative methods of performing the function existed. The FCC's oft-noted "raised eyebrow" approach to regulation indicates the Commission historically has viewed self-regulation by broadcasters as a feasible, and at times, preferable, alternative to government regulation. The FCC's 1974 Children's Television, Report and Policy Statement, for example, explicitly utilized this approach, noting with approval industry efforts to limit commercials in children's programming, and lauding self-regulation as a more effective control than government regulation.

The Writers Guild litigation, of course, resulted from the FCC's efforts to convince broadcasters to self-regulate with regard to sex and violence in programming.

Now the FCC espouses another alternative to government regulation—marketplace control. The termination of the children's television proceeding and the effective rescission of the 1974 Children's Television Policy Statement is but one recent example of the FCC's current emphasis on control through marketplace forces. Others include radio deregulation, deregulation of television, removal of many structural and programming require-

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181. See supra note 47.
184. See, e.g., Licensee Responsibility to Review Records Before Their Broadcast, 28 F.C.C.2d 409, reconsid., 31 F.C.C.2d 377 (1971), a classic example of the "raised eyebrow" approach, in which the FCC, responding to concerns over the broadcast of records with drug-related lyrics, reminded broadcasters of their responsibility to know the content of material they broadcast. Although some broadcasters viewed the statement as an FCC attempt at illegal censorship, the D.C. Court of Appeals did not. See Yale Broadcasting Co. v. FCC, 478 F.2d 594 (D.C. Cir.), cert. denied, 414 U.S. 914 (1973).
186. 50 F.C.C.2d at 12-18.
190. See Deregulation comes to television, Broadcasting, July 2, 1984, at 31.
ments on over-the-air subscription television, refusal to impose special programming requirements on Direct Broadcast Satellites or Low Power Television, and FCC proposals to eliminate the fairness doctrine and access requirements for political candidates. The FCC's continuing support of, and, at times, active search for, alternatives to government regulation of content, coupled with the inability of private entities to coerce broadcaster adherence to programming policies, indicate privately devised programming codes or policies do not meet the Flagg Brothers government function criteria.

V

Broadcasters and Symbiosis

Of the three types of state action, the symbiotic relationship theory has had the greatest facial appeal for persons seeking or supporting a constitutional right of access to broadcast channels. If an overall relationship of interdependence and joint participation exists between the federal government and broadcasters, then all actions taken by broadcasters can be deemed state action, without searching for a direct link between government and the challenged action. The public ownership of the airwaves concept, designation of broadcast licensees as fiduciaries or proxies of the public, and government licensing and regulation, prompted several commentators in the 1970's, including an FCC commissioner, to argue that symbiosis was present in the relationship between the federal government and broadcasters.

Early Supreme Court state action decisions, coupled with the Court's expansive dicta in Red Lion Broadcasting Co. v. FCC upholding the constitutionality of the fairness doctrine, lent support to that position. In Public Utilities Commission v. Pollak, two citizens alleged that the District of Columbia's Capital Transit Co. violated their first and fifth amendment rights by piping radio programs into buses and streetcars. In finding state action present

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194. See supra note 1.
in the conduct of that privately owned transit company, the Court noted that Capital Transit operated a public utility under the authority of Congress, enjoyed a federally authorized monopoly over mass transit, and was subject to the regulatory supervision of the Public Utilities Commission.\(^{198}\) In *Burton v. Wilmington Parking Authority*,\(^ {199}\) the Court held unconstitutional a privately operated restaurant’s refusal to serve blacks. *Burton*, which became the cornerstone for many state action claims during the next twenty years, involved a restaurant located in a government owned and operated parking facility. The Court emphasized the private use of public property, the financial benefits accruing to both the restaurant and parking facility from the arrangement, and the failure of the governmental body to prohibit the challenged conduct.\(^ {200}\) The early state action cases, read in conjunction with Red Lion’s emphasis on the scarcity rationale and resulting monopoly status of licensees, audience rights, fiduciary responsibilities of broadcasters, and the FCC’s power to compel licensees to share their frequencies with the public,\(^ {201}\) seemed to support a symbiosis finding.

Those supporting state action via the symbiosis theory failed to reckon with two extremely significant factors: the judiciary’s strong concern with the protection of journalistic discretion and broadcaster independence, and the evolutionary nature of state action doctrine. In the only broadcasting state action case the Supreme Court has considered, Chief Justice Burger stated that the key distinction between *Pollak* and cases involving broadcasters is that broadcasters, unlike transit companies, are guaranteed journalistic discretion and protection by the Communications Act and the first amendment.\(^ {202}\) Furthermore, by the 1970’s, the Burger Court was reinterpreting earlier state action cases in line with its general emphasis on the development of conceptual definitions of the various forms of state action. The symbiosis aspects of *Pollak*, which also involved Public Utilities Commission approval of the piped-in music, were discounted, and instead *Pollack* was viewed as a nexus case.\(^ {203}\) *Burton* was interpreted as containing three critical elements in support of the symbiosis finding: the lessor-lessee relationship, the conferral of mutual benefits, and the

\(^{198}\) Id. at 462.
\(^{200}\) Id. at 723-24.
\(^{201}\) 395 U.S. at 386-400.
public nature of both the restaurant and the building in which it was housed. In 1974, the Supreme Court clearly declared that even "extensive and detailed" regulation and government-granted monopoly status were not sufficient to prove state action.

**A. The Cases**

Despite the questionable applicability of symbiosis theory to broadcasting today, most suits against broadcasters involving constitutional issues have raised the symbiosis argument. Only once, however, has a federal court indicated any willingness to accept the overall relationship between government and broadcasters as being adequate to clear the state action hurdle. More commonly, courts either have rejected the applicability of symbiosis theory or have acknowledged its possible relevance but based their decisions on the nexus concept.

In *Ackerman v. CBS* a psychiatrist and a psychologist sued the three commercial television networks for allegedly failing to provide 1968 presidential candidate Dick Gregory with broadcast time comparable to that given Richard Nixon, Hubert Humphrey, and George Wallace. *Ackerman* was the first case in which a federal court demonstrated receptiveness to a government action claim against a broadcaster. Federal District Court Judge Weinfeld said he would assume the conduct of the three networks "partakes of 'public action' by virtue of their status as entities regulated by a federal administrative body, as associations of federally licensed broadcasters and as grantees of a federal proprietary interest held in trust for the public."* Ackerman, however, preceded Burger Court redefinitions of state action and, most importantly, involved only an assumption of government action, not a finding. The *Ackerman* plaintiffs brought suit under a federal statute granting district courts original jurisdiction in cases involving alleged deprivations of constitutional rights performed under color of state law, a requirement equivalent to state action. As Judge Weinfeld noted, even assuming government action, the

207. Id. at 632.
209. In *Rendell-Baker v. Kohn*, the Supreme Court said the "under color of state law" requirement of federal civil rights legislation "is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the state?'" 457 U.S. at 838 (quoting Lugar v. Edmonson Oil Co., 457 U.S. 922,
conduct was of a federal, not a state, nature. Plaintiffs had chosen the wrong grounds for their suit, and the action was dismissed.

Two years later, in Post v. Payton, a New York federal court declared that the decision of a broadcaster to close two radio stations and fire the stations' director involved neither state nor federal action. The stations were licensed to the C.W. Post Center, a division of Long Island University, a private school. Citing Burton, the court said there was no indication that "the State is in any way involved in the affairs of C.W. Post Center, much less that the State has so insinuated itself into a position of interdependence with the Center that the actions of the trustees thereof become 'state action.'" McIntire v. William Penn Broadcasting Co. and Massachusetts Universalist Convention v. Hildreth & Rogers Co., the two earliest cases considering constitutional claims against broadcasters, were used to reject the claim of federal action. Ackerman was dismissed in a footnote as merely assuming, arguendo, "that such conduct partook of 'public action.'" The court also said plaintiffs' reliance on Red Lion dicta was "misplaced," since Red Lion "did not hold that the licensee's actions were governmental action."

By far the most extensive discussion of the applicability of symbiosis theory to broadcasting occurred in the 1971 case of Business Executives' Move for Vietnam Peace v. FCC, reversed by the Supreme Court two years later under the title CBS v. Democratic National Committee. The case resulted from the refusal of several broadcasters to sell time for editorial advertisements to two organizations. Business Executives' Move and the Democratic National Committee filed complaints with the FCC alleging that broadcasters' flat bans on the sale of time for editorial ads violated both the Communications Act and the first amendment. The FCC

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937 (1982)). In Lugar, the Court stated that a finding of state action satisfies the "under color of state law" requirement, but the reverse is not necessarily true. 457 U.S. at 935 n.18.
212. 323 F. Supp. at 803.
213. 151 F.2d 597 (3d Cir. 1945), cert. denied, 327 U.S. 779 (1946).
216. Id. n.3.
217. Id. at 803.
rejected the complaints, but in *Business Executives' Move for Vietnam Peace v. FCC*, the United States Court of Appeals for the District of Columbia reversed, finding that a ban on all editorial ads was unconstitutional. An integral element of the appeals court ruling was the finding that the actions of the broadcasters constituted government action. In overturning the appellate court decision, the Supreme Court agreed with the FCC that neither the Communications Act nor the Constitution required broadcasters to sell time for the discussion of controversial issues. However, the Supreme Court was unable to agree on the state action question. Part III of Chief Justice Burger's opinion for the Court rejected the state action contention. Only two other Justices, Stewart and Rehnquist, concurred in that portion of the opinion. The Court's failure to agree on the state action issue forced the Chief Justice in the final portion of the decision to determine "whether assuming governmental action," the broadcasters' denials of access violated the first amendment. He concluded that they did not.

Judge Wright's symbiosis analysis in *Business Executives' Move for Vietnam Peace v. FCC* followed the traditional approach used by courts in other contexts, which entails the identification of factual indicators of government entanglement with the private party. Despite the strong symbiosis case he developed, Judge Wright then proceeded to apply nexus theory, which he also found applicable in *Business Executives' Move*. The court concluded that the overall relationship between broadcasters and the FCC, and FCC approval of the broadcasters' policy, "taken together," fulfilled the government action requirement. The court did not discuss the adequacy of either factor taken separately, except for the statement that the specific nexus was "an even more important factor" than the general relationship of interdependence and joint participation.

221. 412 U.S. at 114-21.
222. Id. at 121.
223. Wright characterized the relationship between the federal government and broadcasters as an "extraordinary" one, marked by "interdependence" and "joint participation." Broadcasters, he said, were recipients of the preferred use of a part of the public domain and lessees of federal property. Finally, "automatic, continuing and pervasive" regulation by the FCC and the broadcasters' role as "proxies" or "fiduciaries" of the public supported a symbiosis finding. 450 F.2d at 651-52.
224. Id. at 652-53.
225. Id. at 651-52.
Wright's hesitancy to base his state action finding on a theory that could subject all broadcaster actions to constitutional scrutiny has been reflected in other judicial opinions as well. Justice Brennan's dissent in *CBS v. Democratic National Committee* identified four factors supporting a government action determination: "the public nature of the airwaves, the governmentally created preferred status of broadcast licensees, the pervasive federal regulation of broadcast programming, and the Commission's specific approval of the challenged broadcaster policy." Like Wright, Brennan did not indicate whether any individual indicator of governmental involvement was itself sufficient or whether the composite was needed. Brennan, however, also noted that government involvement with the specific policy under scrutiny was the most important element.

Chief Justice Burger's treatment of the state action issue clearly hinged on his belief that different considerations affected the decision in *CBS* than in other contexts. Journalistic independence and discretion provided the cornerstone of his analysis. The Chief Justice gave only cursory attention to traditional symbiosis criteria and definitions. According to Burger, government was not engaged in a "'symbiotic relationship' with the licensee, profiting from the invidious discrimination of its proxy," as in *Burton*. The use of public property and government regulation arguments was acknowledged and dismissed in a footnote as "superficially appealing but . . . 'not entirely satisfactory.'" The regulatory scheme in *Pollak*, Burger contended, was more pervasive than broadcast regulation. But, above all, broadcasters, unlike the transit company, were entitled to journalistic independence, a concept, Burger said, that "could not co-exist with a reading of the challenged conduct of the licensee as governmental action." Burger's refusal to give the applicability of symbiosis theory detailed consideration, coupled with Wright's and Brennan's reluctance to base their views on that all-encompassing form of state action, seems to have sealed the judicial fate of the symbiotic relationship thread of state action in broadcasting cases. In the first

226. 412 U.S. at 173.
227. Id. at 177.
228. Id. at 116-18.
229. Id. at 119.
230. Id. at 115 n.14 (quoting Jaffee, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 HARV. L. REV. 768, 783 (1972)).
231. 412 U.S. at 120-21.
232. At least one federal court saw *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), as
case to arise after CBS, the Puerto Rico Federal District Court disposed of the plaintiff's symbiosis claims by declaring that the act of licensing did not convert broadcasters into federal agents.\textsuperscript{233} In subsequent cases, which provided more thorough and thoughtful analyses of state action claims, decisions were based on the nexus theory after the courts noted that the question of whether a symbiotic relationship existed between the federal government and broadcasters was one that was "left open" by the CBS litigation.\textsuperscript{234}

By the late 1970's, courts began interpreting the "open" question of symbiosis as one closed by Wright's, Brennan's, and other judges' emphasis on the importance of a nexus between government and the challenged conduct.\textsuperscript{235} In 1980, District Court Judge Duffy summarized the current judicial attitude toward broadcasting and state action:

Thus, it would appear that before governmental action will be found in the context of a broadcaster's conduct, it must be demonstrated that the FCC, as a government instrumentality, has either expressly approved or campaigned for the challenged conduct of the broadcaster. Absent such circumstances, no First Amendment claim will lie.\textsuperscript{236}

Unable to reconcile the journalistic role and rights of broadcasters with a theory that would subject journalistic decisions to constitutional scrutiny and restraints, the judiciary has rejected applicability of the state action theory, which fifteen years ago appeared to be ideally suited to describing the relationship between

\begin{footnotes}
\item[236] Levitch v. CBS, 495 F. Supp. at 658.
\end{footnotes}
the federal government and broadcasters. To accomplish this, Chief Justice Burger and others have used what might be termed a negative approach to symbiosis analysis. In essence, that approach says that state action is not present because it should not be present. The desirability of broadcaster autonomy, liberty, and independence precludes a finding of symbiosis. This approach to state action analysis can be found in other contexts as well, especially those involving challenges to the actions of private institutions, such as hospitals and universities, that have not stemmed from racial discrimination. As in the area of broadcasting, the negative state action approach in such cases results from concerns over individual autonomy, liberty, and freedom of choice, but it ignores the Supreme Court's earlier admonition that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." 

B. Applicability of Symbiosis Theory to Broadcasters

While at least for the present the federal judiciary has rejected the applicability of the symbiotic relationship theory to broadcasting, the question remains whether application of the traditional, additive approach to this form of state action analysis would yield a different result. Therefore, the factors currently being used by courts to establish the existence of a symbiotic relationship will be analyzed briefly to ascertain their applicability to broadcasting. The factors include the three criteria cited by the Supreme Court—a lessor-lessee relationship between government and a private party, operation of a facility open to the public, and mutual benefits.

Lessor-Lessee Relationship. Many commentators who have argued that broadcaster action is government action have relied heavily on licensee use of publicly owned airwaves. Johnson

237. This negative approach to state action analysis is somewhat akin to Professor Tribe's "anti-doctrine." The solution to state action problems, Tribe wrote, lies in determining "what we do not want particular constitutional provisions to control . . . what the Constitution is not about." L. Tribe, supra note 9, §§ 18-1, 18-7, at 1174.


and Westen, for example, contended that broadcasters were private lessees of public property, akin to the restaurateur in *Burton*.[241] If the analogy were accurate, at least the first criterion of symbiosis would be present in the relationship between broadcasters and the federal government.

For the federal government and broadcasters to be involved in a lessor-lessee relationship, two conditions must be met. First, the electromagnetic spectrum must be property capable of definition and allocation. Second, the spectrum must be property owned by the federal government and leased to licensees. Both propositions have been subject to significant disagreement since the inception of broadcast regulation.

Early versions of the Radio Act of 1927[242] declared the airways or “ether” the “inalienable possession of the people” of the United States.[243] After much debate, though, the ownership language was deleted and instead United States control over radio channels was asserted, and private ownership of spectrum space was prohibited.[244] A key reason for that decision was disagreement over whether the spectrum was property capable of being possessed by anyone. While a few members of Congress argued strongly that the airways were federal property, others contended the concept was meaningless and without basis in fact.[245]

The debate over whether the electromagnetic spectrum could be termed property continued decades after the first broadcast regulation was enacted. In 1967, former FCC member Glen O. 

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244. Ch. 169, § 1, 44 Stat. 1162 (1927).

Senator Dill, whose first version of the radio bill contained ownership language, later defended its exclusion: “This talk about air channels, this talk about owning the ether, has no real basis except as considered in terms of regulating the apparatus that sends its impulses out through the ether and air and through everything on this earth . . . . That language is to a large extent verbiage.” 68 CONG. REC. 2873 (1927).

Supporters of the ownership language appeared motivated primarily by fears that, without such a provision, broadcasters would seek and obtain judicial recognition of personal property rights to frequencies. See, e.g., 68 CONG. REC. 2573-77, 2874-75, 4109 (1927). They suggested several theories to support their views. Representative Tom D. McKeown said federal ownership could be based on “the common law of air space,” which he said held that the air above property belongs to the property owner. *To Regulate Radio Communication*, *supra* note 153, at 91. Senator Robert Howell said the people of the United States owned the ether, just as states owned the waters within their boundaries. 68 CONG. REC. 3874-75 (1927).
Robinson agreed with the members of the Sixty-Ninth Congress who declared that ownership of the ether was nonsense. On the other hand, Professor Donald Malone has argued that the spectrum constitutes definable property, a natural resource under congressional control, portions of which are allocated to private parties for specific uses.

The FCC also has indicated that it views the spectrum as property capable of being leased, if Congress would enact appropriate legislation. In its 1978 Notice of Inquiry on broadcast license fees, the FCC stated: "In the past the radio frequency spectrum has not been treated as a natural resource to be rented or leased. However, consideration should be given to treating it that way in the future." The Commission likened the spectrum to federal lands, which can be leased to private individuals "who wish to drill for oil and gas, mine coal, or graze cattle or sheep."

Whether the spectrum constitutes property in the usual sense of the word, susceptible to ownership and occupancy, is a question that defies a definitive answer. Even assuming that the airways are property, the legislative history of the Radio Act indicates that Congress made a clear decision not to declare that property a federal possession to be leased to licensees. Elimination of the ownership language from the Radio Act was purposeful, not a mere oversight. Thus, it would appear that by congressional decision the electromagnetic spectrum is not federal property, but rather a unique natural resource. Through the Radio Act, and later the Communications Act, Congress declared that the federal government had the power to control and regulate this resource, and that no individual, group, or corporation could assert ownership rights to any part of it. This conclusion is bolstered by the FCC's statement on spectrum fees, recognizing that congressional action would be needed to convert the spectrum into federal rental property.

Operation of a Facility Open to the Public. Broadcasters, of course, are required by law to serve the public convenience, interest, and necessity. That service to the public, however, consists

246. Terming the ownership concept "meaningless" and "fantasy," Robinson wrote, "In actuality, 'airways' is merely a convenient shorthand, an abstraction for a phenomenon created as a result of the use of privately owned transmission facilities. The 'spectrum' is a purely artificial construct of the Commission itself." Robinson, supra note 240, at 151-52.
247. Malone, supra note 4, at 241-42.
249. Id. at 768.
of providing programming. Constitutional claims against broadcasters, on the other hand, generally arise because of broadcasters' refusals to open up their facilities for public use, to allow the public access to their studios, cameras, microphones, and transmission equipment. The Communications Act explicitly declares that broadcasters are not common carriers who are obliged to provide nondiscriminatory service to all comers. Furthermore, most courts that have considered this issue have declared that radio and TV stations are not public forums open to all who have messages to convey. Nonetheless, access supporters have argued that broadcasters regularly open portions of the broadcasting day to the public. They contend that commercial entities interested in conveying messages about their products and services generally are allowed nondiscriminatory access to airtime, assuming they can pay the going rate. While program times do not constitute a facility regularly open to the public, perhaps advertising time is analogous to the public restaurant operating in a public building in Burton.

That argument, however, cannot withstand careful scrutiny. First, courts consistently have held that privately owned media can exert as much control over their advertising content as their editorial/entertainment content. In other words, the media are free to accept or reject advertising at will, assuming no violation of

251. Id. § 153(h).


Even in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), the Supreme Court's most expansive enunciation of the public's rights vis-à-vis broadcasting, the Court carefully confined its discussion to the public's right to receive information via the airwaves. Id. at 390. See also CBS v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973) ("the public's right to be informed"); Report on Editorializing by Broadcast Licensees, 15 F.C.C. 1246, 1249 (1949) ("[t]he 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").


contracts, antitrust laws, or other statutory provisions. Second, individual broadcasters and the industry as a whole have long rejected specific commercials and entire categories of commercial messages for a variety of reasons, ranging from offensiveness to the protection of children. Neither law nor reality supports the argument that airtime of a particular commercial broadcast station is a public facility. Thus, the broadcast station is more akin to the private club than the public restaurant, free to admit some members of the public to use its facilities to disseminate their messages while reserving the right to refuse service to others.

*Mutual Benefits.* When the FCC grants a broadcaster a license to use a portion of the spectrum, it confers an essential and highly valuable benefit. The FCC itself has compared the value of a license to a broadcaster to the value of insulin to a diabetic. Without the frequency allocation, the broadcast station could not exist. In addition, a broadcast license has economic value as a commodity. Economist Bruce Owen estimated that the market value of a licensed TV station in the early 1970's was approximately three times the original cost of the tangible property of the station.

The problem, though, in establishing the existence of a mutu-
ally beneficial relationship is the lack of reciprocity. While a license represents an extremely valuable government-granted benefit, broadcasters do not confer comparable economic benefits on the federal government. In *Burton*, the Supreme Court spoke of a private entity serving as a "physically and financially integral and, indeed, indispensable part" of a government operation. In addressing symbiosis claims, lower courts have continued to approach the mutual benefits factor in economic terms. Aside from minimal license fees, broadcasters have not paid the federal government for use of the electromagnetic spectrum, although several proposals to institute spectrum rents have been offered. At least at present, the reciprocity aspect of the mutual benefits requirements is lacking.

In determining whether a symbiotic relationship exists between government and a private entity, courts generally use an additive approach. In the case of broadcasters, the required sum of indicators is not met. Therefore, under the existing definition of symbiosis, state action is not present in the overall relationship between the FCC and broadcast licensees. Of course, changes in the regulatory scheme could alter the equation. For example, the assessment against broadcasters of spectrum rental fees could affect the analysis of both the lessor-lessee and mutual benefits criteria. The FCC's *Notice of Inquiry* on spectrum user fees clearly rested on the assumption that the airways could be deemed federal property.
to be leased. In addition, spectrum fee proposals generally envision fees generating substantial revenue for the federal government, which might satisfy the mutual benefits element of symbiosis.

VI
Broadcasters and the Nexus Test

Currently, the nexus test is the most viable state action theory, especially in cases involving broadcasters. Because the nexus test is incident-specific, it allows for a finding of state action in a particular factual context, while permitting broadcasters to remain free of constitutional restrictions in the remainder of their activities. Thus, the nexus theory has the greatest appeal for a judiciary concerned with protecting journalistic autonomy and the editorial discretion rights of broadcasters.

A. The Cases

In all broadcasting cases in which judges have found state action sufficient to invoke constitutional restraints, evidence of a nexus between government and the challenged conduct has been the decisive factor. In Business Executives' Move for Vietnam Peace v. FCC, Judge Wright distinguished the case from earlier broadcasting state action cases, which he said had involved purely private decisions by licensees.

In the cases before us now, however, the Commission has given its imprimatur to the flat ban on editorial advertising. It specifically considered and specifically authorized the flat ban. Thus we are called upon to review not simply a private decision, but a decision by a government agency, a decision which must inevitably provide guidance for future broadcaster action.

Citing Shelley v. Kraemer, in which judicial enforcement of a privately devised restrictive covenant was held to be state action,

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264. Id. at 770-74. H.R. 3333, supra note 262, § 414(d)(1), would have provided that fees go to the U.S. Treasury, while H.R. 13,015, supra note 258, § 413, would have created a "telecommunications fund" from broadcast fees to be used to support the regulatory system and to fund public broadcasting, minority ownership of stations, and rural telecommunication. See generally Fowler & Brenner, supra note 1, at 248-55; NAB-NRBA at odds over spectrum fee, BROADCASTING, July 5, 1982, at 60.
266. 450 F.2d at 652.
Wright declared that "specific governmental approval of or acquiescence in challenged action by a private organization indicates 'state action.'" 268

When *Business Executives' Move* was appealed to the Supreme Court, Justice Brennan’s dissent reiterated Wright’s emphasis on FCC specific consideration and authorization of the editorial ad ban. 269 Furthermore, Brennan found the nexus test met by general FCC policies. "There is, for example, an obvious nexus between the Commission’s Fairness Doctrine and the absolute refusal of broadcast licensees to sell any part of their air time to groups or individuals wishing to speak out on controversial issues of public importance." 270 In Justice Brennan’s view, the fairness doctrine and other policies emanating from the Communications Act were “inextricably linked to” and had influenced development of the editorial ad ban. 271

In his opinion, which failed to find state action, Chief Justice Burger defined FCC approval of the ad ban as a failure to command access, not a fostering of the challenged policy: “The First Amendment does not reach acts of private parties in every instance where Congress or the Commission has merely permitted or failed to prohibit such acts." 272 What Wright and Brennan saw as affirmative government support, Burger viewed as government “declin[ing] to command” the opposite. 273

Because the Supreme Court was so splintered in its state action opinion in *CBS v. Democratic National Committee*, lower courts faced with constitutional claims against broadcasters since 1973 have been forced to piece together a rationale for their decisions from the various opinions. Ironically, the dissenting opinion in *CBS*, coupled with Wright’s analysis in *Business Executives’ Move*, eventually proved to be most useful for lower courts. In addressing later state action claims, judges frequently turned to those opinions to justify the conclusion that, at a minimum, express FCC approval of, or participation in, the challenged activity is necessary to prove sufficient government involvement. 274

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268. 450 F.2d at 652.
269. 412 U.S. at 177-78.
270. Id. at 177.
271. Id. at 177-78.
272. Id. at 119.
273. Id. at 118.
Writers Guild of America West, Inc. v. FCC, in which the nexus finding was based on "backroom bludgeoning," government threats and coercion, and the usurpation of broadcaster autonomy, frequently was used to bolster that conclusion. In Writers Guild, plaintiffs challenged the networks' and the National Association of Broadcasters' family viewing policy on statutory and constitutional grounds. In his opinion, Judge Ferguson addressed a multitude of issues, the key one for this study being whether entanglement among the FCC, NAB, and networks was adequate to prove state action. The "Factual Findings" detailed manifestations of congressional and FCC concern over violence on TV, meetings and conversations between broadcasters and FCC staff and commissioners, public statements of former FCC Chairman Richard Wiley, and network development and adoption of the family hour. The court stated that the facts showed enactment of the viewing policy "was caused substantially by government pressure" and that "the networks served in a surrogate role in achieving implementation of government policy." Chairman Wiley, the court concluded, had "launched a campaign primarily designed to alter the content of" early evening programming, a campaign that included threats of regulatory action and "persistent, pronounced, and unmistakable" pressure. Were it not for FCC pressure, the family hour would not have been adopted. The court characterized FCC involvement as government compulsion or coercion and, therefore, sufficient to prove state action. In dicta, Ferguson opined that mere government encouragement to act, even if such encouragement had been the cause of broadcaster action, would not have been sufficient to prove state action. The Writers Guild facts, however, crossed the line between government encouragement and government coercion. Before and even after the Ninth Circuit's action vacating and remanding the Writers Guild decision, judges added the Writers Guild analysis to the various opinions in CBS and Business Executives' Move to support their conclusions that FCC approval of or

276. See supra text accompanying notes 165-67.
278. Id. at 1140.
279. Id. at 1104.
280. Id. at 1141.
281. Id. at 1136.
282. Id. at 1140-41.
283. 609 F.2d 355 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980).
involvement in the challenged conduct was necessary to support a state action finding.\textsuperscript{284}

B. Applicability of Nexus Theory to Broadcasting

As already noted, the nexus test for state action is incident-specific. It is the thread of state action doctrine in which "sifting facts and weighing circumstances"\textsuperscript{285} are necessary to reach a conclusion. Unlike the government function and symbiosis types of state action, generalizations about the overall applicability of the nexus test to broadcasting are impossible. The conclusion in each case must rest on the role government played in the broadcaster's decision to perform the challenged act or in the implementation of that decision. This section, therefore, focuses on the problems and issues that must be faced in applying nexus theory to government involvement with broadcasting.

The first problem is that recent Supreme Court decisions and the general trend that the Burger Court has followed in addressing state action claims have created uncertainty as to exactly what types of government involvement will meet the nexus test. The Court's 1982 trilogy of cases clearly states that joint participation of state officials with private actors\textsuperscript{286} and government coercion or compulsion\textsuperscript{287} meet the nexus requirement. The status of government encouragement as an indicator of state action, however, is less clear.

In both \textit{Rendell-Baker v. Kohn}\textsuperscript{288} and \textit{Blum v. Yaretsky},\textsuperscript{289} the Court held that state action would be found if there is "such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."\textsuperscript{290} In \textit{Rendell-Baker}, the Court found no evidence that the employee discharges were "compelled or even influenced by any state regulation."\textsuperscript{291} The Court, however, did acknowledge that in \textit{Blum}, "[b]oth state and federal regulations \textit{encouraged} the nursing homes to transfer
patients to less expensive facilities when appropriate." 292 Apparently, though, the government encouragement present in Blum did not rise to the level of "significant encouragement." In early cases involving private racial discrimination, the Warren Court found state action solely on the basis of government encouragement. 293 "[A] prohibited state involvement [can] be found 'even where the state can be charged with only encouraging,' rather than commanding discrimination." 294 The Warren Court encouragement cases have been neither overturned nor expressly reinterpreted, and, indeed, the Burger Court has referred to the absence of state encouragement as a factor in some of its no-state-action holdings. 295 But, in light of Rendell-Baker and Blum, it appears that government encouragement must approach government pressure to meet the nexus test. This interpretation is supported by the cases addressing state action claims against broadcasters. In Writers Guild of America West, Inc., v. FCC, 296 the trial court declared government encouragement was insufficient to meet the nexus test because of the editorial discretion rights of broadcasters. 297 Subsequent cases have referred to government pressure as a minimum requirement to support a state action finding. 298

Related to the question of the viability of the encouragement rationale is the issue of whether the nexus test requires proof that the private party's action was motivated by governmental directive or pressure. The Warren Court expressly refused to inquire into motivation in some early state action cases. 299 Responding to the city's contention that the private restaurant would have refused to serve blacks even in the absence of a segregation ordi-

292. Id. (emphasis added).
294. Reitman v. Mulkey, 387 U.S. at 375 (quoting Mulkey v. Reitman, 64 Cal. 2d 529, 540, 413 P.2d 825, 832, 50 Cal. Rptr. 881, 888 (1966)).
297. Id. at 1138.
nance, the Court in *Peterson v. City of Greenville*\(^{300}\) refused to consider the "mental urges of the discriminators."\(^{301}\) The mere existence of a law compelling segregation was sufficient to prove government coercion. In later decisions, though, the Burger Court indicated that in cases of alleged governmental directive or encouragement, the impetus for the challenged activity must come from government.\(^{302}\) This motivation theme also runs through the broadcasting decisions. In *Writers Guild*, the court said that the adoption of the family viewing policy "was caused substantially by government pressure"\(^{303}\) and "were it not for the pressure [Chairman Wiley] exerted, it would not have been adopted by any of the networks nor by the NAB."\(^{304}\) It appears, then, that not only must government engage in "significant encouragement" or pressure for the nexus test to be met, but also the challenged conduct must be caused or motivated by government's involvement.

It is also uncertain whether express and formal government approval of challenged conduct is adequate to meet the nexus test. In *Public Utilities Commission v. Pollak*,\(^{305}\) the Court "rel[ied] particularly" on the Commission's approval of the challenged practice after an investigation and formal public hearings.\(^{306}\) However, in none of the Court's 1982 state action cases was government approval listed as a means of meeting the nexus requirement. "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment."

When the nexus test is met by a private party's joint participation with state officials, the motivation of the private actor apparently is not a consideration. This seemed to be the dissenters' key point of disagreement with the five-member majority in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). "[R]espondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State does not make its action in doing so "state action" for purposes of the Fourteenth Amendment." Id. at 949-50 (Powell, J., dissenting) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974)) (emphasis added).

\(^{300}\) 373 U.S. 244 (1963).

\(^{301}\) Id. at 248.

\(^{302}\) Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) ("the question typically is whether the private motives which triggered the enforcement of those laws can fairly be attributed to the State"); Adickes v. S.H. Kress & Co., 398 U.S. 144, 174 (1970) (state action present if the discriminatory conduct "was motivated by" a state-enforced custom); Evans v. Abney, 396 U.S. 435, 445 (1970) (harm resulted from "a private party . . . injecting the racially discriminatory motivation").


\(^{304}\) Id. at 1094.

\(^{305}\) 343 U.S. 451 (1952).

\(^{306}\) Id. at 462.
Amendment," the Court said in Blum. This squares with the Court's emphasis on the motivation or impetus for the challenged conduct coming from government. Approval connotes after-the-fact government involvement; motivation entails pre-decision or pre-action involvement by government. While never formally discarding the express approval rationale of Pollak, the Court appears to have significantly limited the empirical definition of that rationale by distinguishing between government approval and mere acquiescence in, pro forma approval of, or failure to disapprove private choice. Although the recent broadcasting cases have referred to FCC approval as an acceptable proof of nexus, the Supreme Court's narrow empirical definition of approval indicates that this form of state action has lost its vitality.

The preceding discussion of the approval rationale points to another, and perhaps the most serious, difficulty in applying nexus theory to broadcasting: the need to apply such concepts as approval, coercion, and encouragement to actual situations. In Business Executives' Move for Vietnam Peace v. FCC and CBS v. Democratic National Committee, what was considered FCC approval by Judge Wright and Justice Brennan was seen as the FCC's failure to command the opposite by Chief Justice Burger. It is not easy to discern the distinction between Public Utilities Commission approval of the challenged practice in the Pollak case and FCC failure to disapprove private choice in CBS. Both cases involved governmental bodies receiving complaints, conducting investigations, and then issuing decisions. If express governmental approval is that difficult to define empirically, concepts such as coercion and encouragement presumably present even greater problems. In Writers Guild, the trial court had little difficulty identifying empirical manifestations of coercion in the words

312. See supra notes 265-69 and accompanying text.
313. See supra notes 269-71 and accompanying text.
314. See supra notes 272-73 and accompanying text.
and actions of FCC members. Nevertheless, the FCC's reliance on a "raised eyebrow" approach to regulation has been frequently noted. Because of the FCC's power to revoke and deny renewal of licenses, a word or look of disapproval can be as powerful a coercive technique as an overt threat of government regulation or disciplinary action. Consider, for example, Post v. Payton, in which two radio stations were closed and the stations' director fired because of the alleged broadcast of obscenities. The licensee stated that the obscenities posed a threat to its broadcast license. The United States Criminal Code prohibits broadcasting obscene, indecent or profane language, and beginning in the 1960's several broadcasters had problems with the FCC because of such language. The record does not indicate that plaintiffs raised the issue of defendant's stated fear of FCC reprisal as proof of state involvement. However, the licensee's actions certainly could be viewed as a response to FCC coercion, pressure, or, at least, encouragement. Or consider a hypothetical case resulting from a radio station's refusal to play certain records in the wake of the FCC's 1971 Notice reminding broadcasters of their responsibility to determine whether songs containing drug-oriented lyrics promote illegal drug use. Many broadcasters and observers regarded the notice as a thinly veiled threat that licenses would be in jeopardy if drug-oriented records were aired. When dealing with a government entity, such as the FCC, which has the power to put a party out of business completely, coercion or pressure can take on innumerable manifestations. As former White House Director of Telecommunications Policy Clay Whitehead has ob-

316. See supra notes 275-82 and accompanying text.
319. Id. at 800-01.

According to Commissioner Nicholas Johnson, the notice meant, "[G]et those drug lyrics off the air . . . or you may have trouble at license renewal time." 28 F.C.C.2d 409, 412 (1971) (Johnson, Comm'r, dissenting).
served, "The main value of the sword of Damocles is that it hangs, not that it drops." 324

The FCC's history of using the National Association of Broadcasters' self-regulation mechanisms as an alternative to government regulation raises many possibilities of FCC coercion, pressure, encouragement, or actual participation. 328 Writers Guild provides the prime example. Cases involving denials of access to proponents and practitioners of occult sciences have also raised the issue of whether the FCC can be held ultimately responsible for the ban on programming promoting belief in astrology and related subjects. 326 Indeed, some commentators have suggested that because of the basically reactionary nature of the NAB, many provisions of the former Radio and Television Codes could be traced to overt or subtle government ultimatums to either self-regulate or be regulated. 327

A final problem in applying nexus theory to broadcasters involves the consideration that should be given to the editorial or journalistic discretion rights of broadcasters in state action analysis. Writers Guild noted that because of broadcasters' interest in autonomy, "mere [government] encouragement even accompanied by causation" would be insufficient for a state action finding. 328 Chief Justice Burger also emphasized autonomy, liberty, and independence in his CBS opinion. 329 It is a crucial issue for broadcasters, who already see themselves as second-class citizens under the first amendment, subject to government-imposed content controls that would be unconstitutional if applied to print media. 330 Concerns over broadcaster autonomy and discretion, however, are ill-conceived if the basis for a nexus allegation is government coercion, pressure, or encouragement, concepts that suggest broadcaster autonomy has already been sacrificed. Nevertheless, when government approval is the ground for a state action claim, judi-

325. See supra notes 164-69 and accompanying text.
326. Mark v. FCC, 468 F.2d 266 (1st Cir. 1972); Gemini Enters. v. WFMY Television Corp., 470 F. Supp. 559 (M.D.N.C. 1979).
328. 423 F. Supp. at 1138.
329. 412 U.S. at 116-18.
cial concern over broadcaster discretion may be justified. The implications of allowing a broadcaster’s initially private decision to be converted into state action simply by the FCC declaring that the decision violates neither the Communications Act nor FCC rules and policies are serious. Such a route would allow complainants to control state action determinations merely by complaining to the FCC and obtaining an unfavorable agency ruling in advance of going to court. The danger to broadcaster autonomy presented by accepting FCC approval as a form of nexus, coupled with a desire to keep the approval category of state involvement alive in other contexts, may explain Chief Justice Burger’s skirting the issue in CBS by characterizing FCC action as failure to disapprove, rather than as approval.

VII

Conclusion

Of the three major threads of state action doctrine, neither government function nor symbiosis theory is applicable to broadcasting. Broadcasting is not a function traditionally and exclusively reserved to the federal government. While broadcast regulation is a government function, industry self-regulation cannot be viewed as state action because neither the NAB nor any other voluntary industry organization has government’s power to command adherence to its rules and policies and impose license-threatening sanctions. Furthermore, the FCC’s own reliance on alternatives to government regulation of content erodes the argument that controlling broadcast content is an exclusively governmental activity.

Symbiosis theory is likewise inapplicable because the FCC and broadcasters are not involved in an overall relationship of interdependence. The Supreme Court has made it clear that regulation alone is insufficient to prove state action. Even assuming that the electromagnetic spectrum can be characterized as public property that is leased to private licensees, the two remaining criteria for a symbiosis finding are lacking in the FCC-broadcaster relationship. Broadcast airtime does not constitute a facility open to the public, nor does a mutually beneficial economic relationship exist between the FCC and broadcasters. While broadcasters receive essential and highly valuable benefits from the FCC, namely their licenses, reciprocity is lacking in the relationship.

Only the nexus theory of state action, which is incident-specific and requires analysis of the particular challenged broadcaster ac-
tivity, is applicable to broadcasters. Courts that have considered the applicability of state action doctrine to broadcasters in the wake of *CBS v. Democratic National Committee* and *Writers Guild* have concluded that compelling FCC conduct in the form of express approval, coercion, significant pressure, or actual participation is necessary to convert broadcaster action into governmental action. These conceptual definitions of nexus coincide with the definitions of state involvement apparently still viable in non-broadcasting contexts, with the possible exception of express approval, the status of which is now uncertain.

In light of the FCC's traditional approach to regulation—frequent reliance on the "raised eyebrow" and the industry's self-regulation mechanisms—the government coercion, significant pressure, and actual participation forms of nexus appear to be the most appropriate theories of state involvement to apply to broadcaster action. They are appropriate because they allow courts to investigate and potentially to stop the most insidious forms of state involvement, that is, government coercion, pressure, or participation designed to compel private entities to do that which government itself cannot do within the bounds of constitutional, statutory, or public opinion limits. Furthermore, the coercion, pressure, and participation theories of nexus have merit because their application supports and enhances the broadcaster's ability to exercise journalistic discretion and autonomy. In contrast, the express approval form of nexus is ill-suited for application in broadcaster state action cases. The mere existence of the FCC invites complaints about and challenges to broadcaster actions. The FCC's support of an initially independent broadcaster decision cannot convert that decision into government action subject to constitutional scrutiny without seriously eroding licensee discretion and autonomy. Furthermore, defining FCC approval of a broadcaster's actions as state action undermines Judge Ferguson's basic constitutional ground rule: the state action concept stands for the principle that individuals—even those holding government-granted licenses—are free to be ornery in their private lives and business dealings. Finally, from a practical point of view, the adoption of current deregulation proposals may eliminate most of the FCC's opportunities for express approval of licensee actions. Repeal of the fairness doctrine and sections 315 and 312 of the Communications Act would remove key sources of citizen com-

331. See *supra* note 1.
plaints to the FCC and restrict the Commission's opportunities to place its imprimatur on independent broadcaster decisions. Simultaneously, elimination of federal content controls on broadcasting would strengthen the argument for application of the coercion, significant pressure, and actual participation forms of nexus theory. Enhancing broadcaster discretion and autonomy and granting broadcasters full first amendment rights are key goals enunciated by deregulation proponents. Thus, government coercion of, pressure on, or participation with, broadcasters as they make content decisions would be even more anomalous in a deregulated broadcasting environment than under the existing regulatory scheme.