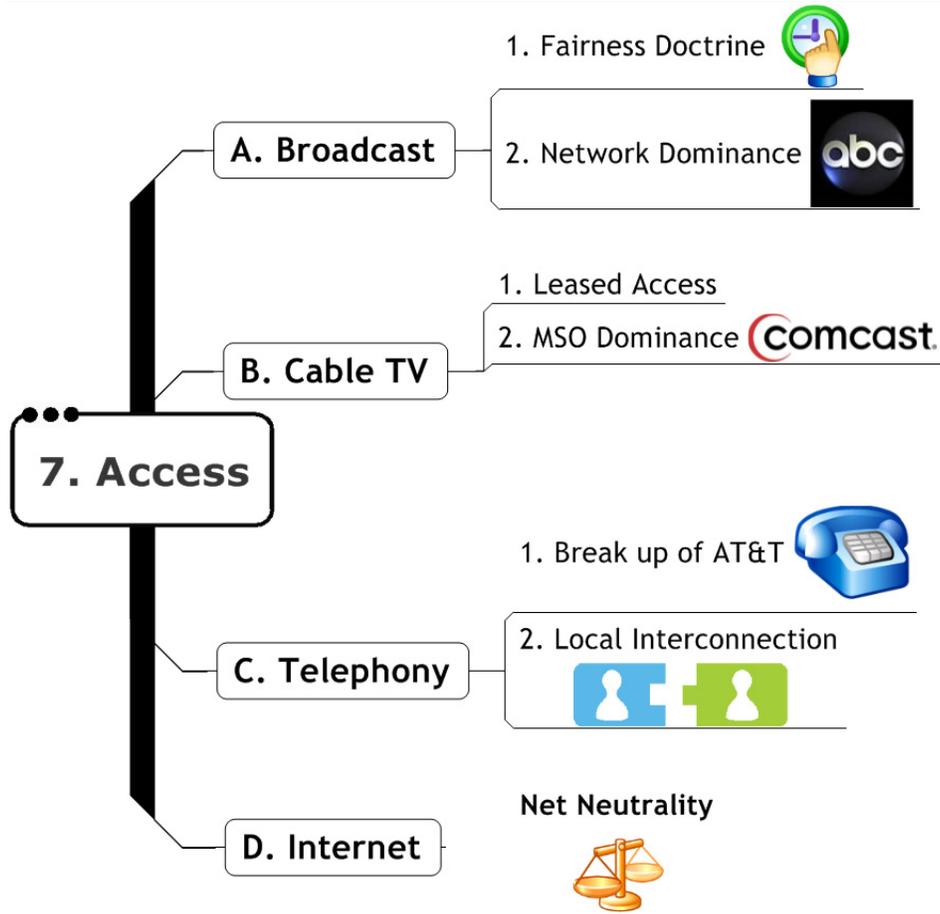


# Access



Recall the basic model of communication introduced in CHAPTER 1: POWER. A sender encodes a message onto a signal, which is transmitted across a channel and then decoded back into the message by the receiver. All communication technologies enable this process. What happens, however, when a player essential to some communicative process refuses to participate? For example, what if you, the sender, would like to telephone your partner but I, the local telephone company that serves your partner, refuse to interconnect with your

telephone company? One response could be “tough luck.” The owners and operators of these various communication platforms are sovereign over their property, and if they do not want to cooperate, so be it: If you don’t like it, go build your own network. Another response could be that certain players in certain circumstances must participate whether they like it or not. In other words, *access* will be forced upon them. Under what circumstances should such access be required?

## A. Broadcast

---

### 1. Fairness Doctrine

---

Suppose that you are the leader of a small libertarian reading group called “Books for Freedom.” One day, while you are watching broadcast television, you hear a news commentator mock “Books for Freedom,” calling you a bunch of right wing lunatics. You are deeply insulted, and you think that your group and its maverick mission have been badly mischaracterized. You call up the broadcast station and complain vigorously. You ask for time to tell the audience what the real truth is. Oozing elitist contempt, the broadcast station manager says “Buzz off!” You think to yourself that the broadcast spectrum is a public resource. Why should this one station be able to monopolize that resource and broadcast nasty opinions about your organization with no chance for rebuttal? Isn’t it only fair that you be given access to the broadcast station, in some reasonable and limited manner, to reply?

---

---

**NOTE: FAIRNESS DOCTRINE**

---

*The doctrine.* We were briefly introduced to the fairness doctrine back in CHAPTER 2: ENTRY, *supra* p.56, when we examined the justifications for regulating broadcast entry and studied *Red Lion*.<sup>\*</sup> Originally adopted in 1949, the doctrine comprised two separate requirements. First, broadcasters were required to cover important and controversial issues, especially if they were relevant to the community they served. Second, broadcasters were required to provide reasonable opportunities for contrasting and dissenting views on the controversial topics covered.<sup>†</sup> The first requirement was hardly an issue: Covering controversy was something broadcasters naturally did, and the FCC rarely complained. By

---

<sup>\*</sup> See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

<sup>†</sup> See *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949).

contrast, the second requirement led to specific access (or right of reply) claims that generated complex litigation, as in *Red Lion*.

In 1967, partly codifying and partly extending the fairness doctrine, the FCC adopted specific regulations pertaining to personal attacks and political editorials. The *personal attack rules* required that during the airing of controversial issues of public significance, if an “attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group,” the station must give timely notice to the attacked person or group and a reasonable opportunity to respond.\* The *political editorial rules* required that if a licensee endorses or opposes a legally qualified candidate in a televised editorial, then that candidate must receive timely notice and be given a reasonable opportunity to respond.†

In addition to these FCC policies and regulations, specific federal statutory provisions forced equal access requirements on broadcasters for qualifying political candidates. As a threshold matter, broadcasters must provide a *reasonable opportunity* for federal political candidates to purchase access.‡ In addition, Congress passed *equal access* provisions, codified at 47 U.S.C. § 315, which basically require a licensee to provide equal broadcast opportunities to all candidates for a political office if any one candidate has been allowed to use the station.§ Finally, political candidates are given some price protections and must be charged the “*lowest unit charge*” for a comparable broadcast spot within a recent time period.\*\* These three statutory provisions are sometimes called the political broadcasting requirements.

In *Red Lion*, the Supreme Court—emphasizing spectrum scarcity and the public ownership of the airwaves—upheld the constitutionality of the fairness doctrine, as well as the personal attack and political editorial rules. In its analysis, the court also spoke approvingly of the statutory equal access provisions, whose constitutionality was upheld a decade earlier.††

*Its demise.* In 1985, a deregulatory FCC renounced the fairness doctrine.‡‡ As a matter of policy, the FCC argued that the fairness doctrine was no longer necessary to further the public interest. The marketplace alone would generate

---

\* See 47 C.F.R. § 73.1920 (repealed).

† See 47 C.F.R. § 73.1930 (repealed).

‡ See 47 U.S.C. § 312(a)(7). This section authorizes the FCC to revoke the license of any station “for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.” See also 47 C.F.R. § 73.1944 (“reasonable access” implementing regulations).

§ See § 315(a). See also 47 C.F.R. § 73.1941 (“equal opportunities” implementing regulations).

\*\* See § 315(b). See also 47 C.F.R. § 73.1942 (“candidate rates” implementing regulations).

†† See *Farmers Educ. & Coop. Union v. WDAY*, 360 U.S. 525 (1959).

‡‡ See *In re Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985).

sufficient viewpoint diversity, and intrusion by the government unnecessarily restricted the journalistic freedom of broadcasters. The FCC also questioned the continuing validity of the spectrum scarcity justification, which undergirded the *Red Lion* opinion. If scarcity no longer existed, then the fairness doctrine could not be justified under the First Amendment. The Commission concluded, “were the balance ours alone to strike, the fairness doctrine would thus fall short of promoting those interests necessary to uphold its constitutionality.”\*

The FCC did not, however, repeal the fairness doctrine in its 1985 Report. One reason was confusion as to whether the doctrine was *statutorily* required after a 1959 congressional amendment to § 315.<sup>†</sup> Another reason was that substantial legislative debate was taking place on the future of the fairness doctrine and the FCC. Accordingly, the FCC stated that it would continue enforcing the doctrine notwithstanding its conclusions that the fairness doctrine disserved the public interest and had likely become unconstitutional.

This conflicted stance could not be sustained for long. In 1986, the D.C. Circuit Court of Appeals made clear that the fairness doctrine was not statutorily required. Rather, it was simply an administrative construction crafted by the FCC pursuant to its power to regulate broadcast in the “public interest.”<sup>‡</sup> When Congress subsequently passed a bill doing what the D.C. Circuit said Congress had not been done, the bill was vetoed by President Ronald Reagan. At this point, in 1987, the FCC buried the fairness doctrine.<sup>§</sup> In its view, the fairness doctrine was unconstitutional and thus against the public interest.

### NOTES & QUESTIONS

1. *Constitutional requirement or policy judgment?* In its explanation, the FCC concluded that the fairness doctrine was unconstitutional on First Amendment grounds. However, when that order was affirmed by the D.C. Circuit, the court affirmed the Commission’s actions on “public interest” grounds, not constitutional grounds.<sup>\*\*</sup> In the rest of this chapter, we will see different sorts of “access” regula-

---

\* *Id.* at 156.

† The amendment made clear that “bona fide newscasts, bona fide news interviews, bona fide news documentaries, and on-the-spot coverage of bona fide news events” would not trigger an equal access requirement. In making the changes, however, Congress added the following language to § 315(a): “Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.” Arguably, this new text codified the fairness doctrine.

‡ *See Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986).

§ *See Syracuse Peace Council, MO&O 2 FCC Rcd 5043* (1987).

\*\* *See Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989) (affirming on “public interest,” not constitutional grounds).