CONSTITUTIONAL LAW—PUBLIC TRANSIT DISTRICT MUST ACCEPT CONTROVERSIAL ADVERTISING; OPENING OF "PUBLIC FORUM" REQUIRES STATE AGENCY TO GIVE EQUAL ACCESS TO MEANS OF EXPRESSION. *Wirta v. Alameda-Contra Costa Transit District* (Cal. 1967).

Intending to display posters attacking the war in Vietnam, an organization known as "Women for Peace" attempted to purchase advertising space in buses operated by a public transit authority. Space for these posters was refused because of the transit authority's established policy[1] of accepting for display only commercial advertising or political messages concerning current ballot issues. The officers of "Women for Peace" sought an injunction to compel the transit district to accept their advertising. The injunction was granted by the trial court on grounds that refusal to accept the advertising constituted a denial of the first amendment freedom of speech.

On appeal to the California Supreme Court, *held*, affirmed: A state instrumentality which opens its facilities for use in the expression of ideas cannot refuse to give access to those facilities for the expression of ideas protected by the first amendment. *Wirta v. Alameda-Contra Costa Transit District*, 68 Adv. Cal. 46, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).

Wirta joins an emerging body of law dealing with the right of access to communication media; this right is sometimes called freedom of the "forum."[2] The law involved has been formulated in the varied contexts of civil rights demonstrations,[3] labor movements,[4] Jehovah's Witnesses' solicitations,[5] and political party memberships.[6] The basic issue involved in all these cases is: Does a person wishing

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[1] This policy was first established in 1961 to the effect that "[p]olitical advertisements and advertisements on local or national controversial subjects are not acceptable unless approved by District." This was supplemented on July 26, 1962, to read that political advertising on current ballot issues could be accepted on an equal space opportunity basis. Wirta v. Alameda-Contra Costa Transit District, 253 Adv. Cal. App. 507, 509-10, 61 Cal. Rptr. 419, 420-21 (1967).

[2] Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

[3] Edwards v. South Carolina, 372 U.S. 229 (1963) (right to use statehouse grounds for protest assembly).

[4] AFL v. Swing, 312 U.S. 321 (1941) (right to use streets for union protest without requirement of employment relation with abutting property owner).

[5] Lovell v. Griffin, 303 U.S. 444 (1938) (right to use public sidewalks for dissemination of leaflets).

[6] De Jonge v. Oregon, 299 U.S. 353 (1937) (right to participate in public meeting).

to espouse views publically have a right to use communication facilities which he neither owns nor personally controls?[7]

Broadly speaking, freedom of the "forum" consists of: (1) first amendment rights to freedom of speech and of the press (sometimes referred to as the freedom of expression); and (2) the fourteenth amendment right to equal protection under the law.[8]

The first amendment rights were intended by the framers of the Constitution to subdue governmental censorship.[9] Because of the social and economic conditions at that time, effectuation of this intent increased the ability of a person to publically present his views.[10] Subsequent judicial constructions were primarily concerned with defining the limits of this right.[11] Through the application of the fourteenth amendment, state governments became subject to the same restrictions.[12] At the same time, freedom of expression was recognized as one of the fundamental liberties which could not be denied without due process.[13]

The degree to which the principle of equal protection has become involved in the states' relation to first amendment rights is illustrated by the 1946 California case of *Danskin v. San Diego Unified School District*,[14] upon which Justice Mosk, speaking for the majority in *Wirta*, places his principal reliance. *Danskin* involved a request by the American Civil Liberties Union for permisson to use a public school auditorium. The court held[15] that while there is no obligation

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7 *See generally* Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Gorlick, *Right to a Forum*, 71 DICK. L. REV. 273 (1967).

8 Kalven, *supra* note 2, at 29.

9 1 T. EMERSON, D. HABER AND N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 31 (3rd ed. 1967) [hereinafter cited as EMERSON]; Meiklejohn, *What Does the First Amendment Mean?* 20 U. CHI. L. REV. 461 (1953). Some interesting cases on this point are Grosjean v. American Press Co., 297 U.S. 233, 245 (1936); Near v. Minnesota, 283 U.S. 697, 713-16 (1931); and Patterson v. Colorado, 205 U.S. 454, 462 (1907).

10 Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

11 *See* EMERSON, *supra* note 9, at 29-55.

12 KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION 127 (1962).

13 The applicability of first amendment freedoms to the states as a part of due process was first assumed for the sake of argument in Gitlow v. New York, 268 U.S. 652 (1925), then maintained in a concurring opinion by Justice Brandeis in Whitney v. California, 274 U.S. 357, 373 (1927), and finally adopted by the Court in Stromberg v. California, 283 U.S. 359 (1931).

14 28 Cal. 2d 536, 171 P.2d 885 (1946).

15 Support for this holding was found primarily in the case of Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938), which has subsequently been cited for its statement of equal protection theories in regard to civil liberties in education. *E.g.*, 21 S. CAL. L. REV. 397 (1948); 37 MICH. L. REV. 649 (1939).

to allow general public use of school buildings, once such buildings have been made available, the state cannot arbitrarily withhold their use or impose conditions upon such use if abridgement of rights guaranteed by the first amendment would result.[16]

Although freedom of expression is a right which cannot be abridged without due process, and which must be afforded without unconstitutional distinctions between persons, a state may limit exercise of this right to promote the health, safety, morals, and general welfare of its people.[17] Further, it may—without exceeding the authority given by the equal protection clause—regulate, in a consistent fashion, the time, place, extent and duration of the use of its facilities.[18]

The extent of these powers has been clarified by the recent Third Circuit Court of Appeals case of *Avins v. Rutgers*,[19] which arose from the rejection by a law review editor in a state supported law school of an article submitted for publication. Remarking that the acceptance or rejection of submitted materials involves the exercise of editorial judgment, the court held that the writer had not established any right to have his work included in the law review.[20] Because of the unique characteristics of a law review as a means of communication, the editors are vested with broad discretion in the selection of materials appropriate to that medium.

Avins illustrates the idea that the actions of a state in regulating the exercise of first amendment rights within the limits of the equal protection clause are analogous to editorial discretion. This discretion, arising from the manner in which the medium is held out to the speaking and listening public,[21] can be exercised to refuse access. When wielded within its proper scope, the exercise of this discretion does not result in the abridgement of any constitutional rights.

Turning to an examination of possible extentions of the *Wirta*

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16 28 Cal. 2d at 545, 171 P.2d at 891.

17 Times Film Corp. v. Chicago, 365 U.S. 43 (1961); Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Wirin v. Ostly, 191 Cal. App. 2d 710, 13 Cal. Rptr. 31 (1961).

18 Cox v. Louisiana, 379 U.S. 536 (1965).

19 385 F.2d 151 (3rd Cir. 1967).

20 *Id.* at 153.

21 *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (concurring opinion of Justice Jackson).

> The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself.

See generally Barron, *supra* note 7, at 1651.

decision to other media, it will be assumed in each instance that the copy which is offered for inclusion in the medium is appropriately within the scope of the relevant editorial discretion, without which the refusal of access could be justified. The essential consideration in these extensions is the presence of "state action," or an acceptable substitute sufficient to make the fourteenth amendment operative. Unless the first amendment freedom of expression is directly invoked because of federal involvement,[22] the *Wirta* rule must operate through the fourteenth amendment.

The requirement of "state action," originally enunciated in the *Civil Rights Cases*,[23] stems from the seemingly clear language of section 1 of the fourteenth amendment. The full and exact meaning of the term has, however, been the frequent subject of litigation.

The underlying principle indicating a finding of "state action" has been viewed as a requirement that the action be sufficiently connected with state power.[24] This does not mean that the action must be compelled by force of statutory enactment, or even constitute part of the authorized activities of the responsible agency.[25] State action is easily found if state authority has placed a person in a position from which he can deny the constitutional rights of others.[26]

The medium of outdoor advertising was recently the subject of a case in the New York Court of Appeals[27] and provides an example of a way in which *Wirta* might be extended. In that case the court held that a municipality can, for aesthetic or other reasons, regulate or prohibit outdoor advertising,[28] without violating the federal or state constitutions.[29] The continued presence of outdoor advertising,

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22 No explicit constitutional requirement of affording equal protection is placed on the federal government. The implication of such a requirement as part of the fifth amendment has been discussed in several cases, most particularly in Bolling v. Sharpe, 347 U.S. 497 (1954), and to some extent in Schneider v. Rusk, 377 U.S. 163 (1964). See Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963) and Henderson v. United States, 231 F. Supp. 177 (N.D. Cal. 1964) for lower court views.

23 109 U.S. 3 (1883).

24 Lewis, *The Meaning of State Action*, 60 COL. L. REV. 1083 (1960).

25 United States v. Raines, 362 U.S. 17 (1960).

26 Crews v. United States, 160 F.2d 746 (5th Cir. 1947). *See generally* Monroe v. Pape, 365 U.S. 167 (1961).

27 Matter of Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967).

28 The regulation in *Cromwell* prohibited signs not relating to activities conducted on the lot in which the sign was placed. Aesthetic consideration was elimination of advertisements on vacant land.

29 32 ALBANY L. REV. 224 (1967).

in light of this zoning authority,[30] is at the will or under the license of the municipality, and could bring the medium within "state action."

The activities of private individuals in their discharge of a public franchise,[31] the continuous use of public property,[32] or the use of property purchased from a public agency,[33] have been instances for a finding of "state action."[34] It seems clear that what is considered essential in these situations for the creation of state responsibility is the ability of the state to control the activities involved.[35] The broad controlling power vested in municipalities over outdoor advertising as a result of that New York case would seem to correspond quite closely to this requirement.

Radio and television are also media of expression which have been placed in private hands through governmental license.[36] The licensing authority is granted to the federal government by the commerce clause.[37] In one of the leading cases[38] dealing with the authority of the federal government to regulate these media, Justice Frankfurter stated that the "right of free speech does not include . . . the right to use the facilities of radio without a license."[39]

The federal licensing agency, the FCC, is specifically prohibited from conducting censorship,[40] which has been held to preempt the field as to state censorship.[41]

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30 *See generally* Berman v. Parker, 348 U.S. 26 (1954), involving a unanimous decision with regard to the District of Columbia urban renewal project, where the Court said "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy," and further stated that once the public purpose had been established the choice of means to accomplish that purpose lay with the legislature. *Cf.* Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1965).

31 Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960). The dissenting opinion may be found at 292 F.2d 4.

32 Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

33 Hampton v. Jacksonville, 304 F.2d 320 (5th Cir. 1962).

34 *See generally* Jones v. Alfred H. Mayer Co., 379 F.2d 33 (8th Cir. 1967) (*cases collected* at 40-41).

35 304 F.2d at 322.

36 Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON 15 (1967).

37 Pulitzer Publishing Co. v. FCC, 94 F.2d 249 (D.C. Cir. 1937); KFKB Broadcasting Ass'n, Inc. v. Federal Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931).

38 National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

39 *Id.* at 227.

40 47 U.S.C. § 326 (1962).

41 Allen B. Dumont Laboratories v. Carroll, 184 F.2d 153, *cert. denied*, 340 U.S. 929 (1950). A slight modification of this position to allow state regulation for purely local problems was begun by Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963).

Congress, recognizing at an early stage that the complete freedom to determine program content, unrestrained by either federal or state agencies, might lead to undesirable private restriction of public access to information, authorized the FCC to require a policy of "equal time" for discussion of political issues.[42] The doctrine has been often litigated,[43] expanded somewhat in scope, and renamed the "fairness" doctrine.[44]

The "equal time" or "fairness" doctrines are to be distinguished from *Wirta* by the manner in which they can be invoked. Established federal policies require the broadcaster to give access to the medium only when he has previously chosen to give access to persons espousing a contrary position. According to *Wirta*, any person, subject to the editorial discretion associated with the particular medium, has a right of access, regardless of the existence of a previously voiced contrary position. The licensing of radio and television by the federal government, as well as the public nature of the medium, would seem to make these means of communication suitable soil into which a *Wirta* extension might take root. Having placed private individuals in control of this public asset,[45] constitutional sanction should be available for violations of the first amendment by "governmental representatives."

A rationale for finding state action involving the method of enforcing a refusal of access is suggested by the case of *Shelley v. Kraemer*.[46] Previous to *Shelley* it had been established[47] that state action may originate from the judicial as well as from the executive and legislative branches of state government. *Shelley* held that even though private individuals may practice discrimination without subjecting themselves to constitutional sanctions, a resort by these individuals to judicial assistance escalates their actions into violations of the equal protection provisions of the Constitution.[48]

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42 Originally enacted as section 18 of the Radio Act of 1927, 44 Stat. 1162, it was carried forward substantially unchanged as section 315 of the Communications Act of 1934, now 47 U.S.C. § 315. *See generally* 2 U.S. CODE CONG. & AD. NEWS, 86TH CONG., FIRST SESS. (1959), at 2564.

43 *E.g.*, Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967) for cases collected and discussed therein.

44 *See* FCC Public Notice of July 1, 1964, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10416.

45 Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, 37 U. COL. L. REV. 31, 44-45 (1964). *See also* 13 VILL. L. REV. 393 (1968).

46 334 U.S. 1 (1948).

47 Ex parte Virginia, 100 U.S. 339 (1879) (discrimination by judge in selection of jury panel).

48 334 U.S. at 13.

To see how this theory of state action through the judicial process might be applied to possible extensions of *Wirta*, suppose that a private transit company, having an advertising policy identical to the one described in *Wirta*, had refused access to the advertising offered by "Women for Peace." If an injunction sought by the peace organization were refused, *Shelley* might arguably compel a finding of state action as a result of that denial.[49] The action of the trial judge would be state authority resulting in a denial of equal protection, or at least in the active sanction of discriminatory practices.

The search for acceptable standards for limiting the application of *Shelley* has produced no definite results, although it seems generally agreed that the fact of judicial intervention does not ipso facto produce a denial of equal protection. One of the better articulated formulations of a rule limiting *Shelley*, concludes that judicial power cannot be used to sustain discrimination which the state itself would be unable to commit or require.[50]

The *Shelley* rationale for "state action" would make possible a substantial extension of *Wirta* and provide a reasonable course for courts to follow. *Wirta* would be applicable to those media legitimately termed public functions, but only under circumstances where private individuals have opened a public forum.

Recent Supreme Court decisions have indicated that the search for state action may become unnecessary to make fourteenth amendment rights available.[51] In *United States v. Guest*[52] the court considered the question of whether the federal government can legislate against

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[49] Some commentators have considered the possibility of extending the *Shelley* rule in this fashion, and to some extent they advise caution for fear greater harm than benefit will follow. Henkin, *Shelley v. Kraemer: Notes For a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Comment, 21 LA. L. REV. 433 (1961). *See* Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORN. L.Q. 375, 408-12 (1958); Hellerstein, *The Benign Quota, Equal Protection, and "The Rule in Shelley's Case,"* 17 RUTG. L. REV. 531, 536-41 (1963); Lewis, *The Meaning of State Action*, 60 COL. L. REV. 1083, 1108-20 (1960); Comment, 50 CORN. L.Q. 473, 476-80 (1965). *Cf.* St. Antoine, *Color Blindness But Not Myopia: A New Look At State Action, Equal Protection and "Private" Racial Discrimination*, 59 MICH. L. REV. 993, 1000-02 (1961); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 44-49 (1961).

[50] Henkin, *supra*, note 49, at 490.

[51] Frantz, *Federal Power to Protect Civil Rights: The Price and Guest cases*, 4 L. IN TRANS. Q. 63 (1966); Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COL. L. REV. 855 (1966).

[52] 383 U.S. 745 (1966).

individual action under the authority of section 5 of the fourteenth amendment.[53] The *Guest* case dealt with a conviction under section 241 of the Federal Criminal Code[54] which prohibits conspiracies to deprive persons of their civil rights.

From a composite reading of the majority and concurring opinions it has been suggested[55] that *Guest* "eliminates state action as a condition precedent to the application of enforcement legislation enacted under the fourteenth amendment."[56] The elimination of the state action requirement for enforcement of fourteenth amendment rights[57] —even as against private individual action—has significance for a possible extension of *Wirta* on the strength of two theories.

First, it would make current anti-discrimination legislation[58] applicable to individual requests for access to the "forum," even though prior cases limited federal jurisdiction to occasions of deprivation of rights through state action.[59]

Second, the language of the first amendment seems to place an affirmative obligation on Congress to protect freedom of expression from abridgement. Hence, even in the absence of positive restatement of congressional intent that individuals have access to communication media, the necessary mandate could be implied[60] from the Constitution as part of the freedom of expression.[61] In other words, through the authority of section 5 of the fourteenth amendment, the fundamental freedom of expression as a preferred right under our federal system would be made obligatory upon private individuals, by considering the first amendment as "appropriate legislation" required by

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[53] United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963), held that this clause is a grant of power equivilent to that granted by the necessary and proper clause.

[54] 18 U.S.C. § 241 (1950).

[55] Comment, 55 CAL. L. REV. 293 (1967). *See also* Anno. 16 L. Ed. 2d 243 (1967).

[56] Comment, 55 CAL. L. REV. at 298.

[57] Silard, *supra* note 51, at 872.

[58] *E.g.*, 42 U.S.C. § 1983 (1964), creates civil action for deprivation of civil rights. *Cf.* Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966), for construction of this statute in terms of a denial of equal protection in a free speech context.

[59] Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964).

[60] United States v. Josephson, 165 F.2d 82, 92 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948). Rejecting a challenge to House Un-American Activities Committee investigation, the court stated that "the courts are to presume, until the contrary appears, that Congress will fulfill its obligation to defend and preserve the Constitution."

[61] *See* Busey v. District of Columbia, 138 F.2d 592, 595 (1943), where court stated that the burden of facts justifying interference with freedom of speech is on person who denies invasion of constitutional right.

section 5. Congress should be deemed to make a constant reaffirmation[62] of this right to means of exchanging ideas.

Several obstacles remain in the way of completely eliminating state action as a part of the fourteenth amendment. First, the majority opinion in *Guest* reaffirms the Court's approval of the state action doctrine;[63] however the concurring opinions indicate that in the future it should not be considered.[64]

Second, the tradition of state action leads the Court to speak in terms of the right of equal access to state facilities,[65] rather than to those privately owned.

To avoid these obstacles, some commentators have expressed[66] the view that the *Guest* case indicates a return to the position taken by a case[67] which had fallen into disrepute decided only a few years after the enactment of the fourteenth amendment. That case held that the federal government could properly act, on the basis of section 5 of the fourteenth amendment, to protect the rights of individuals in the face of state inaction as opposed to private action. Federal action would be justified on the states' affirmative duty to provide due process and equal protection. Federal intervention forms the only remedy for a breach of this duty.

In terms of *Wirta* this position would indicate that in the absence of a state guarantee of access to a public forum, the federal government could assure the free exercise of this vital right. A recalcitrant publisher might then find the shadow of the federal government cast across his doorstep.

Thus it is apparent that the possibilities for extension of *Wirta* are many, embracing a variety of other communication media. Whether

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62 *See* DESCHLER, RULES OF THE HOUSE OF REPRESENTATIVES, (1957 ed.) § 229, which notes the Congressional Oath of Office in the following form:

> I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

63 383 U.S. at 755, where the leading cases are cited, *e.g.*, Evans v. Newton, 382 U.S. 296 (1966); United States v. Williams, 341 U.S. 58 (1951); United States v. Harris, 106 U.S. 629 (1882); and United States v. Cruikshank, 92 U.S. 542 (1875).

64 383 U.S. at 762 (Justice Clark) and at 777 (Justice Brennan).

65 *Id.* at 775 (concurring opinion of Justice Brennan).

66 Comment, 5 DUQ. U.L. REV. 197 (1966); Comment, 13 HOW. L.J. 189 (1967); Comment, 14 U.C.L.A.L. REV. 553 (1967).

67 United States v. Hall, Fed. Case. No. 15,282 (1871).

this extension is accomplished under a theory of state action in the form of the medium, state action in the manner of enforcing exclusion, or direct action from federal guarantees, a growing need in our society to express dissatisfaction will require extending *Wirta*.[68]

IRWIN L. SCHROEDER

[68] Pollitt, *Free Speech For Mustangs and Mavericks*, 46 N.C.L. REV. 39 (1967).