The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation

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INTRODUCTION

Congress created the first system of regulation of radio and television with its enactment of the Radio Act of 1927.[1] Although considered a drastic measure at that time,[2] today, some forty years after its creation, comprehensive regulation of radio and television communications has for the most part become an accepted phenomenon. Although regulatory policy has yet to mature completely, the essential features of the policy have been outlined. With this coming of age, it seems appropriate to reflect on an aspect of radio regulation which has been of critical importance from the earliest time: the first amendment implications of the various facets of radio and television regulation.

Virtually everyone accepts the proposition that the first amendment does apply to radio and television. Whatever doubts might once have existed about the applicability of the first amendment to mass communications media were dispelled in *United States v. Paramount Pictures*[3] where the Supreme Court stated that it had "no doubt" that radio, newspapers, and moving pictures were covered by the first amendment. Even the Federal Communications Commission, which has never shown itself to be keenly aware of the finer points of constitutional limitations, has recognized the applicability of the first amendment as at least some kind of general curb on its regulatory actions which are intended to limit or to aid free speech.[4]

Despite this agreement on its general applicability, there continues to be very considerable doubt on the part of many, including the FCC, whether the first amendment really has the same scope in the field of radio and television as it does in the

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1. 47 U.S.C. §§ 81-83 (1964).

2. *See* J. HERRING & G. GROSS, TELECOMMUNICATIONS, ECONOMICS AND REGULATION 226 (1936).

3. 334 U.S. 131, 166 (1948). *See also* American Broadcasting Co. v. United States, 110 F. Supp. 374, 389 (S.D.N.Y. 1953), *aff'd*, 347 U.S. 284 (1954).

4. *E.g.*, *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 20 P & F RADIO REG. 1902, 1907 (1960).

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case of other communications media. This doubt is founded on the persistent and widely held, but almost never critically analyzed, assumption that broadcasting is somehow different or unique.

For example, one of the assumed unique characteristics of radio and television is the fact that for technical and economic reasons access to these communications media is limited. Since only a few thousand persons can use the airwaves, it follows that some form of regulation is essential. Many assume that this regulation must include some form of regulation of programming in order to compensate for the supposed monopoly power given to the fortunate few who obtain licenses to use the airwaves. When viewed in this light, there are relatively few outside the industry who are very much concerned about FCC regulation of program operations, even where it represents an intrusion which would be bitterly attacked outside the field of radio and television. So long as the broadcast licensee is regarded as a monopolist who, were it not for regulation, would be able to run free, it is he who is portrayed as the censor and not the Commission. Indeed, the Commission can pass itself off as the champion of free speech, dedicated to ensuring that the licensee gives the fullest expression to all possible viewpoints and addresses itself to all possible tastes. There is no doubt that the Commission is aided in playing this role by dissatisfaction with the average quality of programming, particularly among intellectuals who would be most likely to express concern about infringements on free speech. The Commission's repeated exhortations to broadcasters to upgrade the quality of programming and its efforts to encourage, cajole, or even coerce broadcasters to present better programming "in the public interest," add to the pattern. When the Commission is joined by the newspapers and the irrepressible complaints of the public, it is not surprising that the broadcaster attracts little sympathy.

There is more than a little discrimination and a very noticeable absence of critical judgment in this treatment of broadcasting. Most of those who rail against the poor quality of television programming fare have never given a second thought to the equally poor quality of the newspapers, magazines, and books which flood the newsstands and bookstalls. Those who are disturbed that there are only three television stations in their city, or only three television networks, are not generally as disturbed over the fact that there are only one, or perhaps two, daily newspapers in the same city, and at most a handful of

weekly news magazines. These same people are probably not at all disturbed that there are only two major political parties.

But despite first appearances this Article is not intended as an apology for the cause of broadcasters. It is, rather, an attempt to discuss comprehensively the constitutional limits on governmental regulation of radio and television under the first amendment. It is important to emphasize at the outset that the primary concern of this Article is not with the entire scope of the first amendment with regard to mass communications media of all kinds. The principal aims here are to focus on those restraints on radio and television which are clearly extraordinary, to point out those restraints which, though they may appear to be of great moment, clearly are not extraordinary or are not, in any event, unique to radio and television, and to evaluate the first amendment implications of such restraints.

I. REGULATION OF ENTRY AND CONTROL OF ECONOMIC CONCENTRATION

A. The Allocations and Licensing Scheme

It is impossible to present a full history and description of the complex system of allocations and licensing as it has been developed for radio and television. However, a brief outline of the scheme will suffice to set the framework for analyzing the first amendment problems of Commission regulation.

The Radio Act of 1927 and its successor, the Communications Act of 1934, both of which gave the Commission broad licensing and regulatory powers over radio communications, were the outgrowth of a breakdown of the law during the early 1920's[5] which had permitted the emerging commercial radio industry to develop in chaos. Because of the lack of effective regulation prior to 1927, radio stations were free to begin operation when and where

5. The Radio Act of 1912, 37 Stat. 302, granted to the Secretary of Commerce authority to deal with regulatory problems presented by the private use of radio channels for broadcasting including authority to license radio broadcast stations. However, the Secretary's authority to regulate under the Act was virtually destroyed by subsequent judicial interpretation. In Hoover v. Intercity Radio Co., 286 F. 1003 (D.C. Cir. 1923), *appeal dismissed per stipulation*, 266 U.S. 636 (1924), the court held that the Secretary lacked discretion to refuse to renew a license on the grounds of interference. Subsequently in United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926), a district court held that licensees were not bound by non-statutory regulations and could operate on any frequency despite the Secretary's regulations to the contrary. Following *Zenith* the Secretary abandoned all efforts to regulate and urged, in vain, self-regulation.

they chose. The new stations used any frequency they desired, changed frequencies, and increased power without regard to interference caused to others. The result was a great waste of radio frequencies because "with everybody on the air, nobody could be heard."[6] The primary purposes of the 1927 Act were to ensure adequate technical service to the public by establishing regulations designed to eliminate objectionable interference and to promote optimum utilization of the radio spectrum through fair, efficient, and equitable distribution of facilities.[7]

To accomplish these objectives, the Commission has allocated different portions of the radio spectrum to different kinds of uses, such as radio and television broadcast, citizens radio, and safety and special services. Secondly, it has allocated the available broadcasting channels on a geographic basis in an attempt to achieve optimum utilization with minimal electrical interference and a fair and equitable distribution of the frequencies.[8]

The most flexible system of allocation is the allocation and distribution of AM frequencies and stations. Standard broadcast (AM) stations are broken down into four major classes.[9] Each class of stations is given its own normally protected contour within which its signal is intended to be free of objectionable interference from co-channel and adjacent channel stations.[10] Although some effort has been made to develop a reasonably equitable distribution of the AM facilities to all parts of the

6. NBC v. United States, 319 U.S. 190, 212 (1943). For a more extensive history of this early period, the failure of regulation under the Radio Act of 1912, and enactment of the Acts of 1927 and 1934, see L. WHITE, THE AMERICAN RADIO 126-54 (1947); OFFICE OF NETWORK STUDY, FCC, SECOND INTERIM REPORT ON TELEVISION NETWORK PROCUREMENT pt. II, 59-69 (1965).

7. See NBC v. United States, 319 U.S. 190 (1943); W. JONES, REPORT TO THE ADMINISTRATIVE CONFERENCE, LICENSING OF MAJOR BROADCAST FACILITIES BY THE FEDERAL COMMUNICATIONS COMMISSION 3-6 (1962).

8. For a useful summary of these two types of allocation of the radio spectrum and of the principal components of the economic structure of the broadcasting industry, see W. JONES, CASES AND MATERIALS ON REGULATED INDUSTRIES 1032-63 (1967).

9. 47 C.F.R. § 73.21 (1967).

10. The normally protected contour concept is far too technical and complex for discussion here. It is sufficient to note that the concept of normally protected contour involves a relationship between (a) a signal by the protected station of specified strength (for most AM stations, the 0.5 millivolt/meter ground wave signal is protected during the day) and (b) the interfering signal of another station which exceeds a specified strength (which varies depending on whether the signal is co-channel or adjacent channel) such that the desired station's service in those areas which it is designed to serve is free of objectionable interference from the undesired station.

country, no fixed assignment scheme, such as has been adopted for FM or television, has ever been established for AM radio.

The FM allocation system was originally the same as that for AM stations. Recently, however, the Commission abandoned the flexible AM approach and, in lieu of the normally protected contour approach, established a system of allocation based on minimum mileage separation between facilities and on specific assignments of FM frequencies to specific communities.[11] The current FM allocation system is patterned on the allocation scheme for television. At the time when the Commission came to consider allocation of frequencies for television use, it had the benefit of some twenty years experience with its AM broadcast allocations scheme, a system which, due to excessive flexibility, had permitted the spectrum to become overcrowded and, as a result, had failed in its primary purpose of preventing objectionable interference. To guard against overcrowding and the resultant erosion of service because of objectionable interference, the Commission in its *Sixth Report and Order* in 1952[12] set forth a comprehensive scheme for allocating all television channels on a fixed basis across the country.[13] The heart of the allocations scheme is a table of assignments which assigns all television channels to specific communities. The table is based on a system of minimum mileage separations between stations, designed to eliminate in advance the possibility of objectionable interference in the service areas of existing and potential television stations.

Although the table of assignments is fixed, it is not rigid. Changes in allocations have been made on a selective basis. Although the Commission has generally adhered to the minimum mileage separation requirements and refused to authorize short-spaced assignments,[14] since 1952 it has granted numerous peti-

11. 47 C.F.R. §§ 73.202-03 (1967). *See Revision of FM Broadcast Rules*, 23 P & F RADIO REG. 1859 (1963).

12. *Sixth Report on Television Allocations*, 1 P & F RADIO REG. pt. 3, at 91:601 (1952).

13. 47 C.F.R. §§ 73.606-07 (1967).

14. The Commission in *Interim Policy on VHF-TV Channel Assignments*, 21 P & F RADIO REG. 1695 (1961), undertook consideration of short-spaced VHF assignments in certain specified markets in which only two VHF stations then operated, but refused to adopt a policy under which it would authorize further short-spaced VHF assignments in markets having "serious shortages" of channels. Subsequently, in *VHF Drop-ins*, 25 P & F RADIO REG. 1687 (1963), the Commission rejected most of the limited drop-in proposals which had been held for consideration under its prior *Report and Order* in 21 P & F RADIO REG. 1695 (1961).

tions to amend the table and has reassigned channels to different locations.[15]

Within this general allocations framework, the Commission controls entry into broadcasting by a system of licenses renewable every three years.[16] Leaving aside those cases involving comparative choice between two or more mutually exclusive applications, licenses for available frequencies are granted subject to a showing by the applicant that it has complied with the Commission's technical regulations and standards, that it possesses the necessary character,[17] financial,[18] and legal[19] qualifications, and that its program operations will serve the public interest.[20]

15. *E.g., VHF Channel Assignments in Nevada*, 7 P & F RADIO REG. 2d 1589 (1966); *Channel Assignment in Rhinelander, Wisc.*, 3 P & F RADIO REG. 2d 1683 (1964). The FM table of assignments possesses the same flexibility and reassignments can be made on petition of interested party or on the Commission's motion. *E.g., FM Channel Assignments*, 1 P & F RADIO REG. 2d 1545 (1963).

16. 48 Stat. 1081 (1934), 47 U.S.C. § 301 (1964). Although in the field of radio and television the Commission's authority to regulate entry was originally considered to be limited to radio and television *broadcast* stations, the Commission has now extended its authority to limit and control entry into the nonbroadcast radio and television area of community antenna television, discussed below. However, the Commission's "regulation" of entry into the field of community antenna television is limited and is incidental to its licensing of radio and television broadcast stations.

17. This is a negative qualification and the applicant need not affirmatively allege good character. Typically a finding of "bad" character relates to willful refusal to disclose or misrepresentations to the Commission. *See, e.g.*, WMOZ, Inc., 1 P & F RADIO REG. 2d 801 (1964). But it may involve virtually any activity which bears on character, *e.g.*, violation of the Communications Act, FCC regulations, or other laws. *See, e.g.*, General Electric Co., 2 P & F RADIO REG. 2d 1038 (1964) (violation of antitrust laws considered). *See generally* Brown, *Character and Candor Requirements for FCC Licensees*, 22 LAW & CONTEMP. PROB. 644 (1957).

18. Traditionally, applicants were required to show financial resources sufficient to build the station and operate it for three months without advertising revenue. Recently, however, the Commission has established a requirement that all stations demonstrate financial ability to construct and meet fixed and operating costs for one year without revenue or to establish convincingly that such revenue will be forthcoming in an amount sufficient to continue operation. Ultravision Broadcasting Co., 5 P & F RADIO REG. 2d 343 (1965).

19. Legal qualifications relate chiefly to § 310(a) of the Act, forbidding licenses to aliens, *e.g.*, United Artists Broadcasting, Inc., 7 P & F RADIO REG. 2d 7 (1966), and to compliance with the Commission's multiple ownership rules. See the discussion of multiple ownership rules in text accompanying notes 26-27 *infra*.

20. For a discussion of program regulation, see Part II *infra*.

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B. GENERAL OUTLINE OF ECONOMIC REGULATION

Unlike most other federal regulatory schemes, the Communications Act does not contemplate a system of economic regulation and, accordingly, does not authorize the Commission either to fix the rates charged by the licensed stations or to engage in other general economic regulation.[21] Notwithstanding this supposed limitation on its authority, the Commission has, in fact, exercised its regulatory powers to control certain economic aspects of radio and television to a considerable degree.

1. Monopoly, Diversification, and Chain Broadcasting

Although the Commission does not have power to enforce the antitrust laws as such,[22] it has long undertaken economic regulation along essentially antitrust lines, relying on its general authority to protect the public interest. The Commission's multiple ownership rules, its regulation of certain network practices, and its policy of favoring diversification of control in the mass communications media all reflect economic policy substantially similar to the policies of the federal antitrust laws.

The genesis of the Commission's regulation of economic concentration is its *Report on Chain Broadcasting*,[23] released in 1941 after some three years of intensive study of problems posed principally by the networks. The present scope of the rules and policies which grew out of this original study[24] can be summarized very generally. The rules prohibit or limit various types of exclusive dealing practices between networks and affiliated stations and network ownership of stations under circumstances where it would restrain competition.[25] In addition, mul-

21. *E.g.*, FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). For a brief discussion of the similarities and differences as to the economic characteristics of broadcasting and public utility fields where there is extensive economic regulation, see Levin, *Federal Control of Entry in the Broadcast Industry*, 5 J. LAW & ECON. 49, 52-56 (1962).

22. United States v. RCA, 358 U.S. 334, 343 (1959).

23. FCC, REPORT ON CHAIN BROADCASTING (1941).

24. The fullest treatment of the problem of economic concentration in radio and television, although now considerably out of date, is the so-called *Barrow Report*, HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, REPORT ON NETWORK BROADCASTING, H.R. REP. No. 1297, 85th Cong., 1st Sess. (1958) [hereinafter cited NETWORK BROADCASTING]. *See also* Hale & Hale, *Competition or Control II: Radio and Television Broadcasting*, 107 U. PA. L. REV. 585 (1959).

25. These rules, generally referred to as the "chain broadcasting rules," are substantially identical for radio and television. *See* 47 C.F.R. §§ 73.131-.138 (AM), .231-.238 (FM), .658 (TV) (1967).

For a comprehensive history of the rules up to 1958, see NETWORK

tiple ownership rules limit the total number of stations which can be held under common ownership or under common control[26] and prohibit "duopoly," the common ownership or control of two or more stations of the same class in the same area.[27]

The Commission's original chain broadcasting regulations were upheld in *National Broadcasting Company v. United States*,[28] against a challenge that they were beyond the Commission's statutory powers. The Commission's multiple ownership rules were subsequently upheld against a rather feeble attack

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BROADCASTING. The principal changes in the rules since 1958 have been the prohibition of television option time, *see Television Option Time*, 25 P & F RADIO REG. 1051 (1963), and the prohibition of network's representation of affiliated stations in selling national spot sales, *see Network Spot Sales Representation*, 19 P & F RADIO REG. 1501 (1960), *aff'd sub nom.* Metropolitan Television Co. v. FCC, 289 F.2d 874 (D.C. Cir. 1961).

26. Again the rules are substantially identical for radio and television. *See* 47 C.F.R. §§ 73.35 (AM), .240 (FM), .636 (TV) (1967). With respect to AM and FM stations, the rules place an upper limit on common ownership, interest in, or control of seven stations. With respect to television stations, the upper limit is again seven stations, no more than five of which may be VHF stations. For a brief outline of the history of these rules, see NETWORK BROADCASTING 84.

In 1965 the Commission proposed a further amendment to the multiple ownership rule to limit common ownership of television stations in the "top 50" markets to a total of one UHF and two VHF stations. *Television Multiple Ownership Rules*, 5 P & F RADIO REG. 2d 1609 (1965). Pending such amendment, it adopted an "interim policy" under which it would, in the absence of a compelling showing, designate for hearing any application to acquire a VHF station in the top 50 television markets by a party already having one or more such stations or by a new party to acquire more than one such station. Although this interim policy was undoubtedly intended to have some restraining effect in itself, this effect was almost certainly weakened by the Commission's subsequent refusal to order a hearing on an application by a Chicago station licensee to take over and operate a station in Denver, one of the top 50 markets. Channel 2 Corp., 6 P & F RADIO REG. 2d 885 (1966).

27. The "duopoly" rules formerly prohibited common ownership, interest in or control of another station in the same class where both would serve "substantially the same area." Under this approach a number of different factors were considered in determining whether two stations would serve substantially the same area. *See, e.g.*, Sheffield Broadcasting Co., 21 P & F RADIO REG. 514j (1962). The current rules, however, have established fixed boundaries to this "area" by proscribing common ownership, interest in, or control of two or more stations where there would result any overlap of specified contours of the respective stations. In AM and FM, any overlap of the respective 1 mv/m contours is proscribed; in television, overlap of Grade B contours is proscribed. 47 C.F.R. §§ 73.35 (AM), .240 (FM), .636 (TV) (1967).

28. 319 U.S. 190 (1943). The *NBC* case also considered and rejected a first amendment challenge to the regulations, discussed at note 73 *infra*.

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Apart from the chain broadcasting and multiple ownership rules, the Commission has long purported to follow a general licensing policy of promoting diversification of ownership of all mass communications media[30] in evaluating the respective merits of competing applicants in a comparative hearing.[31] This policy has never been crystallized into written regulations, and, like most of the factors assessed in comparative hearings, it has not been vigorously or consistently applied.[32]

2. *Economic Injury Through Competition*

Ignoring dicta in several early circuit court opinions,[33] the the Commission persistently refused, until recent years, to consider competitive economic injury to existing licensees as a basis for refusing to license new stations. This policy was approved in *FCC v. Sanders Brothers Radio Station*,[34] where the Supreme Court held that the Commission was not bound to consider economic injury as such in determining whether or not to grant an application for a new station. However, the Court did

29. 351 U.S. 192 (1956).

30. The other media interests generally involved besides radio and television are newspaper interests. However, while ownership, interest in, or control of a newspaper is a comparative "demerit" against an applicant in theory, the fact remains that common ownership of newspapers and broadcast stations is so prevalent as to indicate that newspaper ownership is not a serious liability. *See, e.g.*, the comprehensive list of broadcast stations identified with newspaper and magazine ownership in 1966 BROADCASTING YEARBOOK, at A-92-99.

31. In noncomparative cases the Commission has only rarely considered an applicant's ownership or control of other communications media where the applicant meets the multiple ownership rules. *See* NETWORK BROADCASTING 112-13. A rare exception is Laurence W. Harry, 13 F.C.C. 23 (1948), *aff'd sub nom.* Mansfield Journal Co. v. FCC, 180 F.2d 28 (D.C. Cir. 1950).

32. As to newspapers, see note 30 *supra*, and Heckman, *Diversification of Control of the Media of Mass Communication—Policy or Fallacy?*, 42 GEO. L.J. 378 (1954) (which argues, however, that the diversification policy should not be pursued except to prevent monopoly). For a general criticism of the policy as applied both with respect to newspaper and other radio ownership, see NETWORK BROADCASTING 121-24; Note, *Diversification and the Public Interest: Administrative Responsibility of the FCC*, 66 YALE L.J. 365 (1957).

The Commission's new *Policy Statement on Comparative Broadcast Hearings*, 5 P & F RADIO REG. 2d 1901 (1965) suggests a somewhat greater stress on the factor of diversification than has been stressed in the past cases. To what extent this stress in a general policy statement will carry over to actual decision, however, is anyone's guess.

33. *E.g.*, WOKO, Inc. v. FCC, 109 F.2d 665, 666-68 (D.C. Cir. 1939); Tri-State Broadcasting Co. v. FCC, 107 F.2d 956, 957-58 (D.C. Cir. 1939).

34. 309 U.S. 470 (1940).

indicate that under some circumstances economic injury could be taken into account where it might have an important bearing on the ability of the new station or the existing station to render adequate service.[35] Following *Sanders*, the Commission continued to disclaim any power to refuse licenses on the grounds of competitive injury, or that, if it had such power, it would be in the public interest to exercise it.[36]

In 1958, the policy of refusing to consider competitive injury even where the competitive injury might lead to disruption of service was sharply reversed in *Carroll Broadcasting Company v. FCC*.[37] The court held that the Commission had misread the *Sanders* case and that, while the Commission could not consider competitive, economic injury merely for the purpose of protecting the revenue of an existing station, it could and must take it into account where it threatens the ability of the existing station to provide adequate service to the public. Although the primary concern of the court in *Carroll* seems to have been with competitive injury which would so drastically curtail an existing station's revenues as to cause it to leave the air, it seems clear that the decision was not intended to be limited to such extreme situations. Thus, for example, economic injury which might lead to curtailment of high-cost, local live programming would justify refusal to license a new station.

The Commission's refusal to consider competitive injury in the licensing of new stations prior to the *Carroll* case was motivated principally by a fear of being deluged by similar protests against every new applicant. The Commission was unwilling to undertake the difficult task of sorting out the valid protests. The Commission explained its refusal to consider economic injury by disclaiming the power to make any such economic determinations, but this seems to have been more of a rationalization than a reason, since the Commission has long rendered economic judgments in converse situations involving economic concentration. The most notable example of the Commission's willingness to consider economic injury on a broad, general plane in which it could choose the time and place to apply economic judgment and policy is its deintermixture proceedings during the 1950's,

35. *Id.* at 476.

36. *See* Voice of Cullman, 14 F.C.C. 770 (1950); Southeastern Enterprises, 13 P & F RADIO REG. 139 (1957). For a vigorous criticism of the latter case and the Commission's policy of refusing to consider competitive injury, see Note, *Economic Injury in FCC Licensing: The Public Interest Ignored*, 67 YALE L.J. 135 (1957).

37. 258 F.2d 440 (D.C. Cir. 1958).

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in which it decided to reallocate VHF and UHF channels to different television markets because of the inability of UHF stations to compete effectively with VHF stations in the same market.[38] Although the Commission has now declared a moratorium on its deintermixture policy because of the enactment of

38. VHF and UHF channels were intermixed in the same markets in *Sixth Report on Television Allocation*, 1 P & F RADIO REG. pt. 3, at 91:601 (1952). It was not long after the lifting of the television "freeze" that it became apparent that UHF stations suffered a very substantial competitive disadvantage in comparison to VHF, due mainly to (a) inferior propagation characteristics of UHF and a very restricted service area in the case of UHF stations as compared with VHF stations and (b) the manufacture of VHF-only receivers by television set manufacturers.

To correct the situation, the Commission instituted five rulemaking cases looking towards the deintermixture of five specific communities. On further study of the problem, the Commission determined that the problem was too widespread to be materially affected by deintermixture in only five markets and terminated the earlier proposals, *First Report on Deintermixture*, 13 P & F RADIO REG. 1511 (1955). Subsequently, the Commission instituted rulemaking looking toward solution of the problem on a broad, nationwide basis, as a result of which it concluded that the most promising solution to the problem would be to transfer all television stations to UHF frequencies, *Second Report on Deintermixture*, 13 P & F RADIO REG. 1571, 1577 (1956). As an "interim" measure, it instituted proceedings looking toward deintermixture in certain specified communities. *Id.* at 1581, 1583-84. Following the release of its *Second Report*, the Commission deintermixed a number of communities, *e.g.*, Elmira Deintermixture Case, 15 P & F RADIO REG. 1515 (1957); Fresno Deintermixture Case, 15 P & F RADIO REG. 1586i (1957), *modified*, 18 P & F RADIO REG. 1733 (1959), *modified further*, 19 P & F RADIO REG. 1598a (1960).

The Commission's proposal to transfer all television stations to UHF announced in 1956 failed to jell. In April, 1959, the Commission reported to Congress, in substance, that it was still "studying" the problem. It reported its conclusion that deintermixture either on a selective community or area basis was ineffective but that, as an "interim policy," it had decided to add VHF channels to some large population centers. The VHF additions were short-spaced drop-ins which were supposed to alleviate the shortage of service in those areas by adding a third VHF station—obviously on the assumption that UHF in those areas could not be made to work. *See Hearings on Television Allocations Before the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 4585-611 (1960) (Statement of FCC Chairman Doerfer).

The 1959 report to Congress notwithstanding, the Commission subsequently proposed deintermixture on a selective basis in eight specified communities, *Expanded Use of UHF Channels*, 21 P & F RADIO REG. 1711, 1714 (1961). However, the deintermixture proposals were met by fierce opposition from the strongest elements in the industry. At the same time that it released its interim policy in 1961, the Commission proposed to Congress that it enact all-channel receiver legislation which would require all receivers shipped in interstate commerce to be capable of receiving both VHF and UHF channels. At that time it seems evident that the Commission viewed all-channel receiver legislation as a means for paving the way to an eventual shift of all VHF

the all-channel receiver legislation,[39] this does not represent an abandonment of the type of economic regulation represented by its deintermixture efforts, but simply the choice of a different remedy: legislation requiring television receivers to be compatible with both UHF and VHF reception.

3. *Regulation of Community Antenna Television*

Without question the most extensive economic regulation yet undertaken by the Commission is its controversial regulation of community antenna television (CATV).[40] Because of its rela-

stations to the UHF spectrum. *See id.* at 1714-15. The all-channel receiver legislation proved to be a promising way out of the deintermixture controversy for both the Commission and the industry. The industry opponents of deintermixture agreed to support the all-channel receiver legislation but insisted that Congress exact from the Commission a commitment that its interim policy on deintermixture and its intention to pursue an all-UHF system would be abandoned for at least a sufficient period of time to permit the all-channel receiver legislation to cure the competitive imbalance between UHF and VHF, which it was thought that the all-channel receiver legislation could do. On the representation by the Commission that it would terminate its deintermixture efforts, the all-channel receiver legislation was enacted in 1962 as § 303(s) of the Communications Act. *See* H.R. REP. No. 1559, 87th Cong., 2d Sess. 18-26 (1962); S. REP. No. 1526, 86th Cong., 2d Sess. 13-19 (1962). As a result, the Commission declared a moratorium on its deintermixture proposals. Deintermixture Cases, 23 P & F RADIO REG. 1645 (1962).

39. See note 38 *supra*.

40. Reduced to its basic elements, a CATV system consists of two basic components: (a) a "head-end" system consisting of receiving antennae and related equipment (*e.g.*, amplifiers), usually of high gain capability and generally situated in a location best suited for receiving usable signals from broadcast stations; and (b) a distribution system consisting of coaxial cable, which transmits the signal from the head-end system to the subscriber, and amplifiers to compensate for signal attenuation through the cable. Although the CATV system itself *transmits* entirely by wire, most larger systems today make use of microwave relay facilities which permit a signal to be picked up by a receiving antenna near its point of origin, converted to microwave frequencies and transmitted virtually any distance to another receiving antenna from which it is converted back to video-audio frequencies and transmitted by cable to the subscriber. For a brief description, see *Hearings on Regulation of Community Antenna Television Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 1st Sess., ser. 89-16, 4-5 (1965) [hereinafter cited as *1965 Hearings on CATV Regulation*].

For general surveys of the CATV regulation problem, see Note, *The Wire Mire: The FCC and CATV*, 79 HARV. L. REV. 366 (1965); Note, *Community Antenna Television: Survey of a Regulatory Problem*, 52 GEO. L.J. 136 (1963). An economic analysis of the CATV industry, commissioned by the FCC, is M. SEIDEN, AN ECONOMIC ANALYSIS OF COMMUNITY ANTENNA TELEVISION SYSTEMS AND THE TELEVISION BROADCAST INDUSTRY (1965) [hereinafter cited as SEIDEN REPORT]. Al-

tive newness and far-reaching importance, and because it serves as an ideal vehicle for considering what limitations, if any, the first amendment places on economic regulation by the Commission the Commission's regulatory efforts to control CATV warrant somewhat greater attention than other areas of FCC economic regulation.

Begun as relatively crude facilities designed to bring television broadcast signals into topographic pockets and other geographical areas where an adequate number of satisfactory signals could not be received, CATV has now become a major rival of the broadcast industry.[41] In the six year period between 1959, when the Commission first considered CATV regulation,[42] and 1965, when it first adopted comprehensive regulations governing CATV operations,[43] the number of CATV systems more than trebled.[44] Instead of the old "Mom and Pop" type of community facility, bringing in perhaps three to five nearby signals, CATV systems now boast of twenty or more channels and, with the aid of microwave, can take the signals virtually any distance and into any size or type of community.[45] With this extraordinary development and growth it was inevitable that there would be a confrontation between CATV owners and broadcasters, for although CATV does not generally compete with broadcast stations for advertising revenues,[46] it does compete for the audience on which their advertising revenue depends.[47]

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though the SEIDEN REPORT contains a number of dubious conclusions, resulting partly from now out-of-date statistics, it provides a useful general description of the industry and its structure as of that time.

41. On the growth of CATV, see authorities cited note 40 *supra*.

42. *CATV Systems and Auxiliary Television Services*, 18 P & F RADIO REG. 1573 (1959).

43. *First Report on CATV Regulation*, 4 P & F RADIO REG. 2d 1725 (1965) [hereinafter cited as *First Report*].

44. *Second Report on CATV Regulation*, 6 P & F RADIO REG. 2d 1717, 1772-79 (1966) [hereinafter cited as *Second Report*].

45. *Id.*

46. Some CATV systems have carried local advertising but not to the degree that it has become a serious competitor for advertising revenues. The Commission's new rules prohibit deletion of advertising of the station whose signal is carried. *Id.* at 1757. However, they apparently do not prohibit carriage of advertising by CATV in addition to the station's advertising.

47. The existence or probable existence *vel non* of economic injury is really at the heart of the entire controversy between CATV, broadcasters, and the Commission. CATV interests have persistently denied that there has been (or that there is sufficient evidence that there will be) any serious impairment to broadcast revenues resulting from CATV competition. *See, e.g., 1965 Hearings on CATV Regulation* 132-33, 213-15 (statements of President of NCTA and President of Jerrold Corp.). The broadcast opponents of CATV on the other hand have

The history of CATV regulation began with the Commission's termination of an inquiry into the economic impact of CATV systems and other auxiliary facilities such as translators on broadcast stations.[48] The Commission in 1959 found insufficient economic impact by CATV systems at that stage of their development to justify taking jurisdiction over these all-wire facilities.[49] However, it was not long before it became apparent

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contended essentially that the past impact has been understated but, in any event, the *past* experience with CATV, based on its operations as a small service, is an inadequate guide to the future and that current trends show demonstrable tendencies towards economic impact. *See, e.g., id.* at 357-59, 389-94; *Appendix to Reply Comments of NAB*, in FCC Dkt. Nos. 14895 and 15233, Oct. 26, 1964 (the "Fisher Report"). The Commission, wavering somewhat at first, has now sided with the latter view that CATV would, absent regulation, have strong economic impact on all broadcast stations. *Second Report* 1772-80.

48. *CATV Systems and Auxiliary Television Services*, 18 P & F RADIO REG. 1573 (1959). Translators are low power, auxiliary *broadcast* stations designed, as CATV systems were originally designed, to fill in topographic "pockets" and sparsely settled areas where adequate off-the-air service cannot be received from regular broadcast stations. For a brief description of their history and use, see SEIDEN REPORT 18-22. Historically, translator operations have been severely restricted by Commission regulation, primarily to avoid a very troublesome problem of interference which it has been thought would result from too free licensing of such facilities. However, the Commission has in recent years taken some steps to liberalize translator licensing and has under consideration other proposals. *See Second Report* 1757-61. Without questioi., considerable impetus for this liberalization policy stems from the desire to provide an auxiliary *broadcast* facility as a competitive substitute for CATV.

49. *CATV Systems and Auxiliary Television Services*, 18 P & F RADIO REG. 1573, 1595-97, 1602 (1959). Although the Commission did not pass directly on its statutory power to control CATV in the event it were shown that CATV had a marked economic impact on broadcasting, it did reject other bases of jurisdiction. It held that it had no power to assert jurisdiction over CATV systems as common carriers under part II of the Act, following its prior decision in Frontier Broadcasting v. Collier, 16 P & F RADIO REG. 1005 (1958). 18 P & F RADIO REG. at 1599. It further held that it had no statutory power to *license* CATV systems under § 301 of the Act because CATV did not come within the definition of "radio station" or "broadcasting" to which § 301 applies. *Id.* at 1600-01. The Commission stated that it had no plenary authority to regulate CATV simply because it was related to or affected broadcasting, which was within its jurisdiction. *Id.* at 1600. Finally, it held that it had no power to regulate CATV indirectly through its admitted jurisdiction over microwave facilities which serve CATV. *Id.* at 1603-05. On this latter position, the Commission subsequently changed its mind and was upheld on appeal in Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

Although the Commission reserved judgment on its authority to regulate CATV where it could be shown to impair its regulatory scheme for broadcasting, it seems evident that the Commission did not

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that CATV was a rapidly growing phenomenon which, unless regulated before it grew too large, might escape regulation until after it had had a severe economic impact on broadcast stations. In 1962 the Commission, in *Carter Mountain Transmission Corporation*,[50] denied a microwave carrier's application for a license to improve service to CATV customers because of probable economic injury to a local station in competition with CATV. However, the carrier was given leave to reapply on a showing that the CATV system would carry the local station on its cable and that it would not carry programs of stations which duplicated the local station's programs. This type of protection is generally referred to as "non-duplication" or, more euphemistically, "exclusivity." Later in 1962 the Commission instituted rulemaking proceedings to consider adopting the *Carter Mountain* type of conditions of carriage and nonduplication as permanent rules for all common carrier licensees. The proposal was extended a year later to noncommon carrier licensees as well.[51] These proposals culminated in the Commission's *First Report on CATV Regulation*[52] in 1965, adopting rules requiring mandatory carriage and nonduplication for all microwave-served CATV systems.[53]

The carriage and nonduplication rules implemented by the Commission's *First Report* followed the regulatory mode of *Carter Mountain*. No jurisdiction was asserted directly over the CATV systems themselves, but only over those served by microwave facilities. While this disposed of virtually all of the larger systems and those capable of having the greatest economic impact on broadcast stations, the mode of regulation could hardly be considered completely effective from the point of view of the Com-

believe there was any basis for asserting jurisdiction even if economic injury were substantiated.

50. 22 P & F RADIO REG. 193 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

51. *See* 1965 FCC ANN. REP. 82-83.

52. Note 43 *supra*.

53. The most controversial aspect of the nonduplication rules was, and has continued to be, the question of the duration of the nonduplication protection. Over the bitter opposition of CATV interests, who wanted no more than simultaneous or at least no more than "same-day" nonduplication protection, the Commission adopted a period of 30 days protection, 15 days before broadcast and 15 days after. *See e.g., 1965 Hearings on CATV Regulation* 133-53 (testimony of President of NCTA). The extra period was thought essential to protect delayed network broadcasts and, to a degree, syndicated film broadcasts by local stations. *First Report* 1768-71. However, the Commission subsequently reduced the protection period down to "same-day" protection. *Second Report* 1747-51.

mission, or very evenhanded from the point of view of those regulated. Moreover, the carriage and nonduplication rules, originally the ultimate goal of CATV regulation, had become merely a stopgap measure in the view of the broadcast opponents of CATV and the Commission. At best they helped correct an unfair competitive advantage which CATV was considered to have[54] and alleviated some of its economic impact. These rules did not, however, correct the basic economic problem which was posed by CATV, *i.e.*, simple dilution of audience as a result of an increased number of available signals.

Believing that this problem could not be met without more comprehensive control exercised directly over CATV systems, and not merely over microwave carriers, the Commission simultaneously issued in its *First Report*, a notice of further inquiry[55] which proposed, in addition to carriage and nonduplication requirements, broad scale restrictions on CATV operations. In 1966 the Commission released its *Second Report on CATV Regulation*[56] in which it asserted jurisdiction and regulatory authority over CATV systems directly, irrespective of whether they used microwave facilities, extended carriage and nonduplication rules to all CATV systems, and issued comprehensive regulations controlling CATV entry which were aimed principally at distant carriage of signals by CATV into markets far removed from those served by the stations whose signals were carried.[57] The Commission asserted its jurisdiction over all CATV systems on the grounds that its authority under the Act is not confined to regulation of common carriers and licensing of radio stations, but

54. One of the chief grounds relied on by the Commission in its *First Report* was that the CATV system has an unfair competitive edge because: (a) in those homes in which it is hooked up, it can effectively preclude reception of competitive off-the-air signals, a problem which was overcome by requiring carriage on the cable; and (b) unlike the broadcast station, CATV does not pay for the programs which it takes from broadcast stations and sells in competition with such stations. This latter problem was alleviated in part by the nonduplication rules and the carriage rules. *See First Report* 1747-52.

55. *Notice of Inquiry and Notice of Proposed Rule-Making*, 4 P & F RADIO REG. 2d 1680 (1965).

56. Note 44 *supra*.

57. The principal purpose served by this type of "distant carriage" restriction, as opposed to other forms of restriction, is that it enables the Commission to conform CATV operations to its basic geographical scheme of allocations for television broadcast stations; and it effectively limits the attractiveness and, hence, growth potential of CATV systems since, except as permitted within the strict geographical limits, the CATV system cannot bring in much more than subscribers already have.

extends beyond these areas to activities in interstate commerce[58] which are an integral part of the radio and television system and which have an immediate and substantial disruptive effect on the scheme of regulation adopted by the Commission and approved by Congress and the courts.[59]

The ultimate effect of the Commission's regulation of CATV is still uncertain despite the adoption of its *Second Report*. As may be expected of any undertaking of this magnitude, it will be many years before the scope of the rules is fully developed, and not until this occurs can their true effects be known. Although plainly more far-reaching insofar as a greater number of persons are involved, the CATV rules are not unique in their ultimate purpose or effect. The basic theory behind them is essentially that underlying the *Carroll* case:[60] Unrestrained competition can severely curtail the economic support of radio and television stations causing injured stations to cut back more expensive programming (which by a somewhat dubious hypotheses is deemed "better" programming) to leave the air permanently, resulting in a loss of broadcast service to the public.

4. *Proposed Authorization and Regulation of Subscription TV*

Whether to authorize subscription television (STV) on a permanent basis has been one of the enduring problems of the Commission since the earliest days of television. In 1955 the Commission instituted proposed rulemaking to inquire into its power under the Communications Act to authorize subscription television and to determine whether such authorization would be in the public interest.[61] After prolonged delay, experimental operations were licensed in Hartford, Connecticut.[62] At the ter-

58. Although the question whether CATV systems which operate in the confines of one state operate in interstate commerce was the subject of considerable dispute by CATV interests, this seems the least troublesome aspect of the problem. *See* Idaho Microwave, Inc. v. FCC, 352 F.2d 729 (D.C. Cir. 1965); Ward v. Northern Ohio Tel. Co., 300 F.2d 816 (6th Cir.), *cert. denied*, 371 U.S. 820 (1962).

59. *See Second Report* 1725-32; *Notice of Inquiry and Notice of Proposed Rule-Making, Regulation of CATV*, 4 P & F RADIO REG. 2d 1680, 1707-12 (1965). On congressional and judicial approval, *see* H.R. REP. No. 1559, 87th Cong., 2d Sess. 3 (1962) (approving the system of service through diverse local stations); Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (D.C. Cir. 1954) (upholding the Commission's *Sixth Report and Order*).

60. 258 F.2d 440 (D.C. Cir. 1958).

61. 20 Fed. Reg. 988 (1955).

62. Hartford Phonevision Co., 20 P & F RADIO REG. 754 (1961), *aff'd*, Connecticut Comm. Against Pay TV v. FCC, 301 F.2d 835 (D.C. Cir.), *cert. denied*, 371 U.S. 816 (1962).

mination of the trial period in Hartford, further proceedings were commenced to study the question anew in light of the results of this test.[63]

To make an initial investigation and prepare a report on the question, three commissioners were appointed as a Subscription Television Committee. After some two years of further rule-making proceedings, the STV Committee has recently submitted its report in which it proposes for adoption by the full Commission permanent authorization of STV, but with numerous restrictions and limitations.[64] The full Commission, apparently still undecided, has declined to act without still further comment and argument from the industry and other interested parties.[65] Accordingly, the matter is still pending and, after twelve years in limbo, the fate of STV is still undecided.

The central issue on which regulatory policy has been and is being debated is analogous to the issue raised by the sudden rapid growth of CATV: the problem of economic impact on free television broadcasting. The manner of economic impact is, however, distinct. Although there would be direct diversion of audience from free television to pay television, the principal impact of STV, according to its opponents, is the possible diversion or siphoning of programs and talent from free television. This siphoning argument is based on the conclusion that STV could outbid conventional television's advertising sponsors for program talent. Of principal concern is the supposed ability of STV to outbid free television for movies and major sports events. With this type of programming lost to STV, free television would be unable to generate sufficient advertising revenues to compete for an audience and would eventually lose out to STV. At that point, according to the STV opponents, all television would become pay television.[66]

The primary concerns of the STV Committee with regard to the economic impact of STV are two: the possible preemption of broadcast time by STV operations, particularly in prime-time viewing hours;[67] and the siphoning of programs and program talent from free television to STV.[68] As protection against these

63. *Further Notice of Proposed Rule Making and Notice of Inquiry*, 7 P & F RADIO REG. 2d 1501 (1966).
64. *Report of the Subscription Television Committee to the FCC*, 10 P & F RADIO REG. 2d 1617 (1967) [hereinafter cited as *STV Report*].
65. 10 P & F RADIO REG. 2d 1617 (1967). FCC 67-819 (July 14, 1967).
66. *See STV Report* 1654-57.
67. *Id.* at 1660-61, 1668-79.
68. *Id.* at 1661.

dangers to free television, the Committee has proposed that a number of restrictions be placed on STV market entry and STV operations. In order to ensure that at least three network services and one independent service could be received in such markets and to minimize the number of hours of free television which would be preempted, the Committee would first restrict STV operations to markets receiving Grade A commercial service from five stations, of which the STV station may be one.[69] Further, it would permit only one STV operation in any market.[70] To protect against program and talent siphoning, the STV Committee has proposed regulations which have greater constitutional implications insofar as they are aimed directly at the kind of programming STV may present. The Committee has proposed prohibiting STV from presenting feature films older than two years from the time of first release to theatres on the rationale that movies newer than two years are not generally available to free television. In addition, it has proposed prohibiting STV from carrying current sports events which were regularly carried live on free television in the community in which the STV operates, and prohibiting STV from presenting continuing series programs which are a mainstay of free television. Finally, it proposes limiting the total percentage of time which STV may devote to feature films and sports to no more than ninety per cent of a station's STV programming annually and no more than ninety-five per cent monthly.[71]

As in the case of the restrictions on CATV market entry and operations, the central policy of the above regulations is to restrict competition to the extent deemed necessary to preserve the continuation of free television broadcast service. Essentially, it is a reflection of the principles of the *Carroll* case. It is in these terms that the constitutional implications of the Commission's regulation of CATV and pay television and its economic regulation in general must be considered.

C. First Amendment Implications of Economic Regulation

The foregoing discussion of the general regulatory framework within which the Commission operates is not intended to suggest that the entire regulatory scheme under the Communications Act has serious first amendment implications. All aspects of Commission regulation, whether they be technical, so-

69. *Id.* at 1668-73; proposed rules, § 73.642, *id.* at 1738.
70. *Id.* at 1678-79; proposed rules, § 73.642, *id.* at 1738.
71. *Id.* at 1702-14; proposed rules, § 73.643, *id.* at 1740, app. D.

cial, or economic, have some measure of impact on free speech. However, no one would seriously contend today that the Commission is without constitutional power to license the use of radio frequencies, and, as part of such a licensing scheme, to impose such technical restraints and limitations as are necessary to ensure a fair, equitable, and efficient distribution and use of such frequencies. Minimum restraints through licensing are necessary in order that there be any effective radio communication, a fact made clear by the experience of the 1920's. To this extent the cliché that Commission regulation makes possible the exercise of free speech in radio communications is fair and accurate.

Moreover, beyond the very narrow engineering aspects of allocation of frequencies, it must be accepted that the Commission may set a very broad limit on the type of use to which frequencies may be put. Thus, it seems clearly appropriate to require licensees in the Aviation Radio Service to restrict their communications to those having some relationship to aviation. Nor does it do violence to the first amendment to restrict their use still further and to prohibit private chit-chat.[72]

However, to concede all this sheds little light on the problem, for what is at issue here is not whether the Commission should have and does have the constitutional power to act as a traffic cop of the airways. The question here is to what extent the Commission may constitutionally restrain free speech on radio and television by regulating economic conditions in the industry.

The *NBC* case[73] is generally regarded as the touchstone for measuring the constitutionality of Commission regulation. Indeed, in the field of economic and program regulation of radio and television, the *NBC* opinion affirming the Commission's power to regulate chain broadcasting has become the *vade mecum* of the Commission in exercising regulatory powers in nontechnical areas. One can scarcely pick up a single case in which the Commission's regulatory authority is in question where some portion of Justice Frankfurter's opinion is not quoted as a talisman to dispel all doubts about the Commission's statutory and constitutional power.[74]

72. *See* Lafayette Radio Electronics Corp. v. United States, 345 F.2d 278, 281 (2d Cir. 1965) (Friendly, J.), upholding against first amendment challenge Commission regulations prohibiting the use of radio facilities in the Citizens Radio Service as a "hobby" or a "diversion."

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

74. The Commission is not alone in so regarding *NBC*. *See, e.g.,*

The importance of the *NBC* case lies not in the nature of the specific regulation upheld but in Justice Frankfurter's sweeping pronouncements on the comprehensive powers[75] with which Congress endowed the Commission and his almost equally broad pronouncements on the constitutionality of Commission exercise of such powers. Of primary importance, of course, is the scope of the latter. Rejecting a challenge to the regulations based on the first amendment, Justice Frankfurter concluded for the majority:

> The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. . . . The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the 'public interest, convenience, or necessity.' Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.[76]

Accepting this opinion at face value, it is difficult to find any significant first amendment limitations on the authority of the Commission to regulate radio and television broadcasting, at least in the area of economic regulation,[77] so long as it can be

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Barron, *The Federal Communications Commission's Fairness Doctrine: An Evaluation*, 30 GEO. WASH. L. REV. 1, 2 n.6 (1961): "The [*NBC*] opinion . . . is generally regarded as having sounded the death knell for the argument that government regulation of broadcasting violated the licensee's right of free expression guaranteed by the First Amendment." Although this statement of the effect of *NBC* in silencing first amendment objections to broadcast regulation is plain hyperbole, it is nevertheless indicative of a widespread, if wholly uncritical, acceptance of *NBC* as dispositive of constitutional issues in broadcast regulation.

75. 319 U.S. at 217.

76. *Id.* at 226-27.

77. However, *NBC* is read as broadly permissive in the case of program regulation as well as economic regulation. This is discussed in Parts II & III *infra*.

found that the standard of public interest, convenience, or necessity is satisfied. At the same time, however, Justice Frankfurter's opinion seems fundamentally wrong insofar as it suggests an unacceptably broad license for Commission regulation, particularly in the field of programming. At the heart of Frankfurter's reasoning is the classic cliche: "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."[78]

This argument, which has been assiduously trotted out on every appropriate occasion, has several major defects.[78a] First, contrary to common assumption, the radio broadcast spectrum is not now, and may never be, saturated. While the technical limitations on entry into broadcasting are real enough, the economic limitations are probably more restrictive. The economic barriers to entry into radio broadcasting are, however, far less restrictive than in the case of media such as newspapers, which lie essentially beyond public control. Second, there are more competitive outlets for expression in radio and television than there are in the newspaper media—or probably in all major publications media combined. This disparity between the number of different radio and television outlets and the number of newsprint media is increasing. Third, the mere fact that there are barriers to entry into the communications media, be it newspapers or radio and television, does not in itself resolve the problem of the kinds of control that are permissible and how narrow the focus on restraint of free speech may be.

The defect of Justice Frankfurter's approach to the constitutional issue is illustrated by the Commission's regulation of community antenna television. The CATV regulations prohibiting duplication of the programs of local broadcast stations by programs carried on CATV systems have been twice upheld against constitutional challenge. In the *Carter Mountain* case[79] the court rejected the argument that the Commission's nonduplication protection for local television stations contravened the first amendment. Essentially the court reasoned that since some restraint on complete freedom is inherent in all licensing regulation of radio communications,

> it may be assumed that any denial of a license to transmit radio or television programs keeps off the air, and hence de-

78. 319 U.S. at 226.

78a. *See generally* Part III *infra*.

79. Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

> prives the public of, the material which the applicant desires to communicate. But that does not mean that the Commission must grant every license which is requested. Nor does it mean that the whole statutory system of regulation is invalid. Quite the contrary is true: a denial of a station license, validly made because the standard of 'public interest, convenience, or necessity' has not been met, is not a denial of free speech.[80]

On the same reasoning, the court again upheld the nonduplication rules against first amendment challenge in *Idaho Microwave, Inc. v. FCC*.[81]

Neither decision deals with the constitutional issue in a satisfactory way. To be sure, licensing of radio communications involves a degree of restraint. The mere fact that some restraint may be inherent in legitimate licensing does not in itself, however, justify this particular form of regulation nor, indeed, does it bestow a constitutional carte blanche on all forms and all degrees of regulation.[82] Not even the FCC would contend, for example, that the licensing power includes the power to direct every aspect of the licensee's operations, including the particular programs presented. Moreover the reasoning is inapposite in the case of direct regulation of CATV where there is no prevailing scheme of licensing to which regulation can be said to be an incidental restraint.

While the constitutional issue was inadequately analyzed in *Carter Mountain* and *Idaho Microwave*, it was almost ignored in *Buckeye Cablevision, Inc. v. FCC*.[83] In *Buckeye* the court upheld the CATV regulations restricting carriage by the system of distant signals. Unlike *Carter Mountain* and *Idaho Microwave* the rules here were directed against CATV systems themselves and were not confined to regulating microwave carriers within the licensing jurisdiction of the Commission. The two principal challenges to the rules were that the Commission was without statutory jurisdiction to regulate CATV and, more fundamentally, that the rules violated the first amendment insofar as they precluded the system from carrying signals originating beyond a specified distance from the CATV station. Affirming the Commission's jurisdiction to regulate CATV systems directly, the court gave little more than the back of its hand to the first amendment challenge, stating that "the restraint imposed by the rules is no more than is reasonably required to effectuate the

80. *Id.* at 364.
81. 352 F.2d 729 (D.C. Cir. 1965).
82. *Cf.* Sherbert v. Verner, 374 U.S. 398 (1963).
83. 10 P & F RADIO REG. 2d 2029 (D.C. Cir. 1967).

public interest requirements of the Act."[84] The court then cited *NBC* and *Carter Mountain* for support.

Taken at face value, this rather offhand statement suggests the preposterous conclusion that the Constitution is circumscribed by an act of Congress and that, so long as the Commission's actions are within the scope of its legislative mandate, there are no first amendment restrictions. Undoubtedly the court did not intend such a sweeping abdication to Congress of the judicial power to determine the scope of the first amendment. However, its refusal to go beyond the question of the legislatively created public interest standard to resolve the constitutional issue suggests just such an abdication.

The court's failure to deal with the first amendment issue is not corrected by its reliance on the *Carter Mountain* and *NBC* cases. As previously noted, the reasoning of *Carter Mountain* is entirely inadequate since the validity of some types and degrees of restraint does not justify all types and all degrees of restraint. Nor is the issue resolved by citing *NBC*. Even if the technical barriers to entry and the fact that radio is inherently not available to all justify Commission regulation of radio and television broadcasting, this clearly does not support regulation of CATV. Unlike broadcasting, CATV transmits its signals entirely by wire, and except to a negligible degree[85] transmission by wire does not interfere with other stations. From a technical viewpoint, CATV is available to all. If, therefore, Justice Frankfurter's scarcity argument is relied on as the constitutional basis for regulating radio and television, it follows that CATV is no more constitutionally subject to regulation of entry than newspapers, magazines, or other communications media. The *NBC* case, far from providing support for Commission regulation, as concluded by the Commission,[86] really supports the opposite re-

84. *Id.* at 2034. *Buckeye* conflicts with an earlier decision in the Ninth Circuit, Southwestern Cable Co. v. United States, 378 F.2d 118 (9th Cir. 1967), *petition for cert. filed*, 36 U.S.L.W. 3068 (U.S. July 13, 1967), holding that the commission had no statutory jurisdiction over non-microwave CATV.

85. Even radio transmissions by wire emit some degree of spurious radiation which may interfere with radio broadcast signals. These spurious emissions are not of major significance, however, and can be practically eliminated by use of heavy cable. The Commission's regulations have long provided for control of such spurious emissions long before CATV itself was regulated. *See* 47 C.F.R. § 15.1 (1967).

86. *See Notice of Inquiry and Notice of Proposed Rule-Making, Regulation of CATV*, 4 P & F RADIO REG. 2d 1679, 1709-10 (1965); *see also CATV Regulation (Petition for Reconsideration of Second Report)*, 8 P & F RADIO REG. 2d 1677, 1681-82 (1967) (rejecting argument that

sult. Following Justice Frankfurter's scarcity argument to its logical conclusion, it must be seen that abandonment of CATV regulation and the supplanting of broadcasting with CATV and other forms of wire communication would do away with the entire problem of spectrum scarcity and with it the entire ostensible basis for the regulatory scheme established by the Communications Act of 1934.

Notwithstanding what seem to be obvious fallacies in the reasoning underlying the *NBC*, *Carter Mountain*, and *Buckeye* cases, it does not necessarily follow that the economic regulation sustained in those decisions is unconstitutional. The problem is not that these decisions have reached the wrong result but that they have traveled the wrong path. On grounds other than those advanced in the decisions, the Commission's economic regulation and its proposed subscription television regulations seem defensible even under the strictest application of the first amendment.

Radio, television, newspaper publication, and theatre are, within limits, subject to general economic restraints and regulations. For example, no one doubts any longer that communications media, whether or not their facilities are inherently available to all, are subject to the antitrust laws. In *Associated Press v. United States* [87] the Court, per Justice Black, held that the antitrust laws prohibited the Associated Press from restricting member newspapers from furnishing news to nonmember newspapers. The Court rejected the contention that this application of the antitrust laws to a news media was in violation of the first amendment.

> It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from pub-

regulation unconstitutionally restrains free speech, relying in part on *NBC*).

87. 326 U.S. 1 (1945).

> lishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.[88]

It may be argued that the *AP* antitrust case disposes of the constitutional challenge to regulations against monopoly but not of the converse, *i.e.*, regulations which have the effect of *furthering* economic concentration, and economic regulation of the kind reflected in *Carroll*, CATV regulation, and the proposed regulation of STV operations is directly contrary to regulation of the type upheld in the *AP* case since the effect really is a measure of protection of economic concentration.

One critic of the policy of imposing barriers to entry on economic grounds has contended that this latter type of economic regulation, in contrast to antimonopoly regulation, is unconstitutional.[89] He concludes that the chain broadcasting rules upheld in *NBC* flow logically from the Court's recognition of the scarcity of available frequencies,[90] but economic regulation of entry does not. But this distinction between regulatory limits on entry and regulatory limits on monopoly simply reflects a bias in favor of strong competition at all costs. However sound this view may be as a matter of economic or social policy, it seems rather farfetched to give it constitutional stature.

While it is true that economic regulation of the type considered in the *Carroll* case, the Commission's CATV regulation or its proposed regulation of STV may in a very real sense be economic protectionism,[91] it is nevertheless a protectionism undertaken to effect the purpose the antitrust laws were supposed

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88. *Id.* at 20 (footnote omitted). The Court also relied in part on its decision in Associated Press v. NLRB, 301 U.S. 103 (1937), in which it upheld against first amendment challenge the application of the National Labor Relations Act to AP. *See* note 272 *infra* and accompanying text. It also relied on its prior decision in Indiana Farmer's Guide Co. v. Prairie Farmer Co., 293 U.S. 268 (1934), involving the application of the antitrust laws to a newspaper. However, in *Prairie Farmer* the first amendment issue was not raised or discussed.

89. Givens, *Refusal of Radio and Television Licenses on Economic Grounds*, 46 VA. L. REV. 1391, 1400-03 (1960). *Cf.* Weaver v. Jordan, 64 Cal. 2d 235, 49 Cal. Rptr. 537, 411 P.2d 289 (1966), which invalidated a state statute banning subscription television (by wire) and distinguished *NBC* on grounds that the rules there were designed to eliminate monopoly whereas the statute here fostered monopoly.

90. Givens, *supra* note 89, at 1401-02.

91. *See* Cole, *Community Antenna Television, The Broadcaster Establishment, and the Federal Regulator*, 14 AM. U.L. REV. 124-25, 142-45 (1965).

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by the Court in the *AP* case to serve—diversity of opinion. The rationale expressed by the Commission for its regulation of CATV is that CATV, left to itself, may seriously curtail if not destroy many of the local broadcast outlets whose continued existence is necessary to maintain diversified sources of free speech and opinion.

More fundamentally, the constitutionality of general economic regulation does not necessarily turn on whether the regulation has the purpose or effect of benefiting free speech itself. This is clearly the necessary conclusion to be drawn from *Associated Press v. NLRB*[92] which upheld the constitutionality of the National Labor Relations Act as applied to the press. Here the NLRB had entered a cease and desist order against AP under section 7 of the Act ordering it, among other things, to reinstate a member of its editorial staff whom it had discharged. AP argued that the Act, as applied to it in this manner, violated the first amendment. AP contended that in hiring and firing

> it must have absolute and unrestricted freedom to employ and to discharge those who, like Watson, [the discharged employee] edit the news . . . and that the Associated Press cannot be free to furnish unbiased and impartial news reports unless it is equally free to determine for itself the partiality or bias of editorial employees. . . . [A]ny regulation protective of union activities, or the right collectively to bargain on the part of such employees, is necessarily an invalid invasion of the freedom of the press.[93]

The Court rejected the contention as irrelevant since no bias on the part of the employee had been shown. The contention was also rejected as an unsound generalization, the Court noting

> [t]he business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws.[94]

92. 301 U.S. 103 (1937).

93. *Id.* at 131.

94. *Id.* at 132. For an extended treatment of "general legislation" to which the "press," including radio, is subject, see 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 500-678 (Comm'n on Freedom of the Press ed. 1953). Chafee identifies five types of "general burdens" in this regard: (1) taxation, (2) laws against unfair competition, (3) rationing of paper (not, of course, applicable to radio), (4) labor laws, and (5) antitrust laws. *Id.* at 501. Of all of these general burdens, Chafee regards the application of the antitrust laws to communications industries as the most troublesome in its potential for interference with freedom of the press. *Id.* at 666-74. Chafee's concern in this respect seems unjustified. As he himself recognizes, the antitrust laws have not been applied to communications industries in such a manner as to raise any imminent threat to freedom of speech and the press. Nor is there anything which suggests that such an application is likely in the future.

Unlike the *AP* antitrust case discussed above, the *AP* labor case does not in any respect turn on a presumed, ultimate benefit to the goal of free speech. It cannot be said, for example, that application of the labor laws, unlike the antitrust laws, has the effect of fostering diversity. The rationale of the *AP* labor case is, very simply, that communications media as commercial enterprises are no less subject to general social regulation merely because they are in the business of dissemination of news and opinion.

The same rationale, which seems quite obviously sound as a principle of constitutional law, applies to radio and television as well as to newspapers. It applies regardless of whether radio and television is distributed through a spectrum which is inherently not available to all or by means of wire which is.[95]

It is important to stress that acceptance of this rationale in support of the constitutionality of the Commission's regulations is not necessarily an acceptance of the Commission's statutory power. It is particularly necessary to distinguish statutory from constitutional authority in the CATV area.[96] Moreover, in order to accept this rationale, one need not accept the necessity or the wisdom of the Commission's regulatory policy in all respects. In the case of CATV regulation one might take the view that the Commission's regulation goes too far. One can even take the extreme view that the Commission's regulatory policies in this area are the handiwork of the economically and politi-

95. *But see* Weaver v. Jordan, 64 Cal. 2d 235, 49 Cal. Rptr. 537, 411 P.2d 289 (1966), holding unconstitutional under the state constitution and the first amendment a statute banning subscription television. The result seems dubious. Even though the statute seemed ill-advised, it does not seem unconstitutional to proscribe certain methods of communications on general economic or other grounds not going to the content of the speech. *See* cases discussed in text above; *cf.* Kovacs v. Cooper, 336 U.S. 77 (1949). The court conceded the validity of general regulatory restraints of the type upheld in *Kovacs* or in the *AP* cases, but struck down the statute here because it went beyond regulation and banned subscription television entirely. But the distinction seems thin. The Act did not ban all television communications but only the business of charging directly for television. Query whether the extent of the restraint on such an incident of communications and not directed to the content of the communications goes any further than the restraint upheld in *Kovacs* or restraints imposed in applying general economic regulation of the type sustained in the *AP* cases.

96. That is, statutory authority in the *jurisdictional* sense. Of course, since § 326 of the Act, 47 U.S.C. § 326 (1964), is in substance an incorporation of the first amendment's prohibition of "censorship," anything which unconstitutionally interferes with free speech also violates § 326.

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cally influential members of the industry.[97] Similarly one might conclude that the proposed restrictions on STV operations, such as limiting STV to markets having five or more commercial services, are unnecessary and overly protectionistic. But an unwise or unnecessary policy does not become transformed into an unconstitutional policy merely because free expression is in some way involved. If this were the case, there are many antitrust, labor, social, and economic measures in effect today which might well be unconstitutional as applied to any form of communications media.

While it might be granted that the Commission could limit or proscribe altogether a CATV system's competition with broadcast stations in certain markets where this is deemed necessary to the public interest, it is arguable that the Commission cannot achieve this same result by proscribing certain types of CATV programming and that it therefore cannot impose restrictions simply because the CATV programs duplicate local programming or because they originate in a "distant market." In the abstract, the argument has a certain persuasiveness. Certainly the power to achieve a given economic result such as protection from "disruptive" competition does not include the power to achieve it by any and all means. Assuming the power of the Commission to preclude CATV entry into certain markets entirely,[98] it clearly cannot impose unconstitutional restrictions or conditions on entry.[99] Plainly the Commission could not tell a CATV system that it could operate in a given locale, but only on the condition that it carry such particular programs as the Commission approved as suitable for the residents of that locale.

similarly newspapers?

? compare FCC rules.

However, the mere fact that a particular program classification is used to implement the regulatory objective does not necessarily indicate that the Commission is engaged in censorship. The Commission's CATV program nonduplication rules which, in general, preclude a CATV system from carring television programs which duplicate the programs carried on the same day by local broadcast stations, illustrate the problem. Although the effect might be to proscribe a particular classification of programming, the classification is a neutral one, based not on program content or quality but simply on the timing and manner of presentation. The

97. *See* Cole, *supra* note 91.
98. *But see* Weaver v. Jordan, 64 Cal. 2d 235, 49 Cal. Rptr. 537, 411 P.2d 289 (1966).
99. *E.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Hannegan v. Esquire, Inc., 327 U.S. 146, 156 (1946); Terral v. Burke Constr. Co., 257 U.S. 529 (1922).

effect is not to keep such programming from being presented but to restrict the number of entirely duplicative presentations at substantially the same time. Thus, what is really involved here is not a true classification of programs but a classification of signals. If it is accepted that economic regulation in general is constitutional, then given a justifiable economic objective such as the elimination of duplicate programming, such restraints as the CATV nonduplication rule seem constitutional.[100]

An analogous albeit somewhat more troublesome problem is presented by the new subscription television regulations proposed by the Commission's STV Committee. The proposal to prohibit broadcast of feature films which are more than two years old, current sports events regularly carried live on local conventional stations, series-type programs, and combined feature film and sports totaling more than ninety per cent of a station's annual STV programming would appear to go beyond the kind of CATV nonduplication protection previously discussed. Here certain types of programs, not merely the manner of their presentation, are singled out and forbidden to be carried on STV. Such predetermination of allowable program types would seem clearly unconstitutional if imposed as a flat restraint against presentation on television altogether.

However, such a conclusion is not dispositive here. By prohibiting STV from carrying movies which are more than two years old, the Commission would not be attempting to make a program judgment about the relative quality or acceptability *vel non* of older movies. It would instead be acting on the economic prediction that presentation of older films by STV would siphon such programming away from free television thereby impairing the vitality of the latter.[101] The same economic judgment underlies the proposed regulation which would prohibit STV from carrying current sports events, regularly carried live on free television,[102] and from carrying series-type programs,[103] which, along with movies, have been a mainstay of free televi-

100. The same reasoning would hold true of the CATV rules restricting carriage of "distant" signals, i.e., signals originating beyond a certain distance from the community served by the CATV system. Here regulation is again drawn on a classification of program signals, a differentiation between local and distant signals. Like nonduplication, the classification is not based on a judgment of program quality or desirability but on the purely neutral factor of distance (which again is used as a means of achieving a measure of economic protection).

101. *See STV Report* 1705-07.

102. *See id.* at 1707-13.

103. *See id.* at 1714.

sion. As in the case of CATV nonduplication regulation, the aim of these rules is not to render judgment on particular types of programs but rather to achieve certain economic goals based on classifications which relate to programming types. As the STV Committee Report points out, such a structuring of the channels of distribution seems entirely consistent with the first amendment, even though it necessarily places some limitation on the dissemination of speech.[104]

The foregoing does not mean, of course, that the Commission has a constitutionally free rein to do as it pleases in the field of economic regulation. More particularly, it does not mean that, under the guise of economic or social regulation fostering diversity of speech, it can control the speech itself to ensure that the dissemination of ideas is sufficiently diverse according to its judgment. In this respect, the STV Committee's proposal to restrict a station's annual STV programming to not more than ninety per cent feature film and sports programs clearly seems to go beyond any general economic regulation. The sole basis for such a rule is to force STV to present cultural programming.[105] Such a rule is based squarely on a judgment as to the type of programming deemed to be desirable, a judgment which goes beyond general economic regulation and enters, subtly but surely, into the area of program regulation, where the Commission's regulatory policies and actions seem to be of far more doubtful constitutional validity.

But isn't that just what the FCC is doing & being asked to do? — preserving mass-audience television, favoring advertiser-supported television for direct interchange of ideas?

II. REGULATION AND CONTROL OF PROGRAMMING

While the first amendment implications of the Commission's activity in the field of economic regulation have received relatively little attention, the Commission's regulatory efforts in the field of programming have provoked considerable comment. This is understandable in view of the far more doubtful constitutionality of many of its activities and policies in program regulation. The analysis of the constitutional implications of the Commission's regulation of programming has, however, tended to be undiscriminating. Little attention has been given to the different regulatory measures which control or influence programming and to the distinct effects of and the different constitutional problems raised by such measures.

104. *Id.* at 1705. Accepting this argument, however, I do not, for reasons previously set forth at length, subscribe to the Committee's reliance on the sweeping pronouncements laid down in the *NBC* case as support for its proposed regulation. *See id.* at 1704-05.

105. *See id.* at 1712-13.

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A. DIRECT RESTRAINTS AGAINST ILLEGAL, HARMFUL, OR OFFENSIVE PROGRAMMING

1. *Commission Actions From Dr. Brinkley to Pacifica*

To date the Commission has instituted direct action against a station for broadcast of particular programs in only a few cases. These include defamatory programs,[106] programs involving improper and harmful medical advice[107] or medical advertising,[108] broadcasts relating to illegal lotteries,[109] broadcasts of certain horseracing information,[110] broadcasts of fraudulent contests,[111] and "offensive" programming.[112] In several such cases, however, although the Commission instituted action by issuing a show cause order or by instituting a hearing on license revocation or renewal, it has taken no final action either because it was persuaded that the programming was in fact satisfactory[113] or because it was satisfied that the licensee's "bad" performance would not be repeated.[114]

The earliest case involving direct restraint in the regulation of programming is the *Dr. Brinkley* case.[115] While much has been made of this famous case, more attention has been given to the atrocious opinion by the court of appeals in affirming the Radio Commission's action than to the facts which led the Commission to refuse to renew Dr. Brinkley's license for a radio station. Dr. Brinkley controlled a radio station, a pharmaceutical associa-

106. Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1932).
107. KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931).
108. *See* WSBC, Inc., 2 F.C.C. 293 (1936).
109. WRBL Radio Station, Inc., 2 F.C.C. 687 (1936).
110. Community Broadcasting Serv., Inc., 13 P & F RADIO REG. 179 (1955).
111. KWK Radio, Inc., 25 P & F. RADIO REG. 577 (1963); *cf.* Melody Music, Inc., 6 P & F. RADIO REG. 2d 973 (1966) (involvement in fixed quiz show not involving station considered as bearing on "character" of renewal applicant); Eleven Ten Broadcasting, 22 P & F RADIO REG. 699 (1962) (also involving other matters, however, such as program log falsification).
112. Mile High Stations, Inc., 20 P & F RADIO REG. 345 (1960); Pacifica Foundation, 1 P & F RADIO REG. 2d 747 (1964) (licensee exonerated); *cf.* Palmetto Broadcasting Co., 23 P & F RADIO REG. 483 (1961), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964) (also involved, however, misrepresentations to Commission).
113. *See* Pacifica Foundation, 1 P & F RADIO REG. 2d 747 (1964).
114. *See* Mile High Stations, 20 P & F RADIO REG. 345 (1960).
115. KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931).

tion, and a hospital which he operated in a common interest. The hospital was advertised over the station and paid a substantial amount to the station each month for this advertising. The pharmaceutical association was composed of druggists who dispensed medical preparations prepared according to Brinkley's formulas. Each member of the association paid a nominal fee to the station for use of the formulas. For three and one-half hours *daily*, Brinkley personally broadcast a program over the station devoted to diagnosing and prescribing treatment for cases from symptoms given in letters addressed to Brinkley or the station. Predictably, the good doctor's treatment was in almost all cases to prescribe one of his prepared tonics.

It was against this background that the Radio Commission denied Brinkley's application for renewal. On appeal the decision was affirmed by the court of appeals on the grounds that: (a) the operations of KFKB were being used for the purely private purpose of furthering Dr. Brinkley's other business and professional interests with no regard for the public interest; and (b) that use of the station for diagnosing the problems of and prescribing treatment for patients whom Brinkley had never even seen was inimical to the public health and safety and, therefore, was not in the public interest.

In 1936 the Commission set down for hearing a renewal application by a licensee which had carried advertisements of two medical preparations. One of these was prepared and sponsored by a person convicted of practicing medicine without a license, while the other was prepared and sponsored by a person convicted of violating the Food and Drug Act and of fraudulent use of the mails in promoting the advertised preparations. However, because the licensee had previously cancelled the advertisements, apparently after learning of these facts regarding the sponsors, and had an otherwise good record, the license was renewed.[116]

Shortly after the Radio Commission had refused to permit Dr. Brinkley to continue to use radio frequencies to further his "organized charlatanism," it was confronted with the Reverend Doctor Shuler, another "doctor," of similarly doubtful character.[117] The Radio Commission refused to renew Shuler's broadcast license based on findings that he was using his licensed frequency for defamatory broadcasts and for obstructing the orderly

116. WSBC, Inc., 2 F.C.C. 293 (1936).

117. Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir.), *cert. denied*, 288 U.S. 599 (1932).

Maybe the joint legislative-judicial fix is the root of the problem here.

administration of public justice. As in the *Brinkley* case, the Commission's action seems clearly justified on the facts. Shuler's defamatory broadcasts evidently consisted of more than an occasional lapse of caution and judgment in criticizing individuals. In reviewing the evidence on which the Commission made its finding, the court of appeals noted that Shuler

> not satisfied with attacking the judges of the courts in cases then pending before them, attacked the bar association for its activities in recommending judges, charging it with ulterior and sinister purposes. With no more justification, he charged particular judges with sundry immoral acts. He made defamatory statements against the board of health. He charged that the labor temple in Los Angeles was a bootlegging and gambling joint. . . . On one occasion he announced over the radio that he had certain damaging information against a prominent unnamed man which, unless a contribution (presumably to the church) of a hundred dollars was forthcoming, he would disclose . . . . He alluded slightingly to the Jews as a race, and made frequent and bitter attacks on the Roman Catholic religion and its relations to government.[118]

On these findings the court of appeals, not surprisingly, held that the Commission's refusal to renew Shuler's license was not a violation of the first amendment.

Pursuant to section 1304 of the United States Criminal Code,[119] the Commission has long scrutinized broadcasts of information about prize-giving schemes and taken action against those found to be lotteries. The Commission's power, indeed, its duty to enforce the mandate of section 1304 and to implement it by means of general rule or individual decisions was expressly affirmed in *FCC v. American Broadcasting Company*.[120]

The Commission has also proscribed the broadcast of horse-racing information in a manner and under such circumstances that it is evident that the information is being used by bookmakers and others for illegal gambling purposes.[121]

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118. 62 F.2d at 852.

119. 18 U.S.C. § 1304 (1964), *formerly* § 316 of the Communications Act of 1934:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both. Each day's broadcasting shall constitute a separate offense.

120. 347 U.S. 284, 289 (1954). The Court held, however, that the rules there adopted by the Commission were too broad.

121. *See* Community Broadcasting Serv., Inc., 13 P & F RADIO REG.

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An extension of its action in the *Brinkley* case and its action in lottery and horseracing cases is the action taken by the Commission against programs involving some form of fraudulent contest. In *Eleven Ten Broadcasting Corp.*[122] the Commission denied the renewal of a station's license on findings that the licensee had, among other things, conducted "fraudulent" contests over its station. Although the Commission evidently considered the fraudulent contest alone sufficient to support denial of the license, it relied on other grounds, including deliberate falsification of the station's program logs and other misrepresentations to support its action. Subsequently, in *KWK Radio, Inc.*,[123] the Commission was confronted with a similar fraudulent contest, except that the "fraudulent" program itself was the only matter before it. The Commission revoked the station's license on the basis of findings that it had conducted fraudulent contests which, the Commission found, resulted in deception to the public, inconvenience, "public disorder," and in some instances actual property damage.[124]

Related to the *KWK* case is the Commission's more recent action in making a short-term renewal grant in *Melody Music, Inc.*,[125] which grew out of the famous quiz show scandal of 1959 in which some contestants on a popular quiz program were given the answers to the questions beforehand. There, however, the matter was considered in a context somewhat different from that in *KWK*. In *Melody Music* the station itself had not been held responsible for the deceptive quiz program. One of the two principals of the station had, however, been involved in the rigged contest. As a result the Commission set the renewal application down for a hearing on the character qualifications of the two principals. In its first opinion[126] the Commission denied the renewal application of the station on these grounds. On appeal, the court of appeals for the District of Columbia reversed,[127] stating that the Commission had treated the licensee differently

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179 (1955) (also discussing other cases). A brief statement of Commission policy guidelines as to the types of horseracing broadcasts which are considered questionable by the Commission was subsequently issued in *Broadcast of Horse Racing Information*, 22 P & F RADIO REG. 417 (1961), *reaff'd*, *Broadcast of Horse Racing Information*, 2 P & F RADIO REG. 2d 1609 (1964).

122. 22 P & F RADIO REG. 699 (1962).
123. 25 P & F RADIO REG. 577 (1963).
124. *Id.* at 581-82.
125. 6 P & F RADIO REG. 2d 973 (1966).
126. 2 P & F RADIO REG. 2d 571 (1964).
127. 345 F.2d 730 (D.C. Cir. 1965).

here than it had in *NBC*,[128] where the Commission had renewed NBC's license notwithstanding the fact that its parent corporation (RCA) had violated the antitrust laws. The evident discrimination was made even more patent by the fact that in *Melody*, unlike *NBC* where a violation of law was involved, the rigging of quiz shows was not *at that time* a violation of law.[129] On remand the Commission was able to avoid the impossible task of distinguishing the case from other cases in which it renewed the licenses of applicants convicted of violating the antitrust laws. The principals had applied to assign the license to other, presumably untainted, persons. Seizing this opportunity to rescue itself from a bad position, the Commission granted a short-term renewal on condition that the present licensee divest itself of its broadcast interest.

The foregoing cases all dealt with programs which were fraudulent, illegal, or at least patently harmful. Several recent cases focus on a more difficult problem: control of programming deemed to be improper, indecent, or offensive. At the present time, there remains some uncertainty whether the Commission will attempt any direct restraint on programming which it deems merely offensive and, if it does, what circumstances might prompt it to take direct action against such programming.

In *Mile High Stations, Inc.*,[130] the Commission issued an order to show cause why an AM license should not be revoked where the station's announcer had made a number of offcolor remarks over a period of several months. Although the Commission regarded the remarks as sufficiently offensive to warrant license revocation, it declined to take such action and instead simply issued a cease and desist order against further broadcast announcements of this kind.

The problem of what action could be taken against such programming was posed again in *Palmetto Broadcasting Company*.[131] The Commission, in response to complaints received concerning programs which were allegedly vulgar and suggestive, requested from the licensee a statement concerning the complaints. In response to the request, the licensee stated that he was unaware

128. 345 F.2d at 732; *see also* General Electric Co., 2 P & F RADIO REG. 2d 1038 (1964); Westinghouse Broadcasting Co., 22 P & F RADIO REG. 1023 (1962).

129. Rigged quiz shows are now proscribed by 47 U.S.C. § 509 (1964).

130. 20 P & F RADIO REG. 345 (1960).

131. 23 P & F RADIO REG. 483 (1962), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964).

at the time that such offensive statements were made. Subsequently, the Commission designated the licensee's application for renewal of its license and for construction of an antenna system for a hearing on the issues, among others, of whether the licensee had misrepresented facts to the Commission or was otherwise lacking in candor, whether the programming was "coarse, vulgar, suggestive and susceptible of indecent, double meaning," whether the licensee had permitted such program material, and whether, in light of those facts determined on these issues, the applications should be permitted. The hearing examiner found against the licensee on all of these issues and concluded that it had not, therefore, served the interests of the community. He proposed that the applications be denied. The Commission affirmed the examiner's findings but modified his conclusions of law, holding that the licensee's misrepresentations and false statements, *in and of themselves,* constituted grounds for denial of the applications. On appeal, the court of appeals affirmed on the narrow grounds that because of the licensee's concealment of material facts, the Commission was justified in its conclusion that the licensee did not possess the requisite character qualifications and was, therefore, justified in refusing to renew the license.

Subsequently, in *Pacifica Foundation,*[132] the Commission was again confronted at renewal time with complaints directed at several programs which were said to be of questionable taste. This time the Commission refused to take any action, holding that even if the programs were of questionable taste, they were isolated instances spread out over a four year period and did not demonstrate any persistent lapse of taste, and that the programs were not so egregiously offensive as to warrant Commission action.

2. *First Amendment Implications*

In the relatively few cases in which the Commission has singled out for review or taken direct action against particular programs, the constitutional implications of the Commission's actions are largely self-evident. Because the restraint exercised in these cases is directed at particular program content, some form of censorship is necessarily involved. The issue then becomes simply whether or not, on the particular facts, such censorship is constitutional.

132. 1 P & F RADIO REG. 2d 747 (1964).

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While it is not difficult to envision circumstances in which action of the type reflected in the previously discussed cases might well be unconstitutional, it is difficult to find any unconstitutionality in the few cases decided to date, although several recent Commission cases give rise to some concern. Consider first, for example, the Commission's refusal to renew Dr. Brinkley's broadcast license. On the facts of that case, this action can scarcely be considered extraordinary or patently unreasonable. The Commission imposed no greater restraint than could constitutionally have been imposed by other, even more direct means wholly without regard to Brinkley's use of a radio station. Surely a law which outlawed unethical medical practice and which was enforced by means of revocation of a license to practice could not be considered an unconstitutional abridgment of free speech.[133] The refusal to renew Brinkley's broadcast license seems no more unconstitutional than the action taken by the state of Kansas in suspending his medical license for unethical conduct.[134] Surely the Commission's refusal of a license to Brinkley because of his fraudulent practices is no more unconstitutional than the actions of the Food and Drug Administration or the Federal Trade Commission in enforcing provisions of the Food, Drug and Cosmetic Act, the Federal Trade Commission Act, and other acts which regulate labeling and other representations of drugs and medical preparations which are of doubtful safety or efficacy. So far as is known, no one has ever seriously suggested that these acts constitute an unconstitutional abridgment of free speech.

But it is different to have that law enforced by an agency controlling the channels of commerce rather than a regular court

Unfortunately, in discussions about the *Brinkley* case today, attention is focused less on the extraordinary facts which underlie the Commission's actions than on some sweeping and foolish language in the opinion of the court of appeals in affirming. Despite defensible grounds for affirming the Radio Commission's actions, the court of appeals reasoned that there was no censorship and no first amendment violation because there had been no attempt at a prior restraint.

> In considering the question whether the public interest, convenience or necessity will be served by renewal of . . . [this]

133. This is not to say, of course, that there may not be constitutional requirements for adherence to certain procedures, *e.g.*, an adjudicatory hearing to be followed in revoking a license.

134. At the time of the proceedings before the Radio Commission, Brinkley was also before the Kansas State Medical Examination Board in a proceeding to revoke his medical license for "having acted according to the ethical standards of an imposter" and for "organized charlatanism." Brinkley v. Hassig, 130 Kan. 874, 289 P. 64 (affirming denial of an injunction against medical board proceedings), *appeal dismissed*, 282 U.S. 800 (1930).

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> license, the commission has merely exercised its undoubted right to take note of . . . past conduct, which is not censorship.[135]

It scarcely needs pointing out that this reasoning would give the Commission a constitutional carte blanche to take virtually any action it chose against station practices, particular types of programming, or particular programs which it deemed not in the public interest. Fortunately, it is unnecessary to pursue the parade of evils which might ensue from the court of appeals' opinion in the *Brinkley* case since its reasoning was clearly rejected by the Supreme Court's opinion in *Near v. Minnesota*,[136] handed down only a few months after the *Brinkley* case, which made it clear that the reach of the first amendment was not confined to restraints imposed prior to the exercise of speech. Thus, the court of appeals' opinion is of doubtful significance today. Nevertheless, on its special facts, the *Brinkley* case should be and is good law today. The mere fact that the court affirmed on unacceptable grounds should not obscure the fact that this was an extraordinary case which warranted the drastic action taken.

Essentially the same considerations which justified the Commission's actions against Brinkley hold true of the *Shuler* case, although perhaps to a less compelling degree. The restraint imposed by the Commission in this latter case seems not materially different in kind or effect from restraints imposed by courts in actions for defamation or for contempt of court. With few exceptions, these latter restraints have been generally accepted as constitutionally permissible. For example, a civil action for an injunction or damages against Shuler for his defamatory utterances would probably have been constitutional at the time when the Commission refused renewal of his license, although some of his remarks against public officials would probably now be protected under the *Sullivan* case doctrine.[137]

One critic of the decision has concluded that the essential facts of the *Shuler* case are indistinguishable from those of *Near v. Minnesota* and that the decision is irreconcilable with *Near*.[138] However, it seems extreme to say that the cases are irreconcilable. *Near* does not proscribe all attempts to curb defamatory utterances. It did not say that it could never be constitutional to refuse to permit a person to operate a communications medium

135. 47 F.2d at 672 (D.C. Cir. 1931).
136. 283 U.S. 697 (1931).
137. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
138. Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 GEO. WASH. L. REV. 719, 758 (1964).

which had repeatedly engaged in defaming persons and obstructing justice. The primary evil of the statute struck down in *Near* was its broad and vague scope. It applied not merely to defamatory utterances but to publication of scandalous matter. Moreover, the statute in effect placed the burden of proof on the newspaper, since it was not necessary to prove the falsity of the defamatory utterances before a court could enjoin them. While the facts as reported in the *Shuler* case do not permit a detailed comparison of all of the facts and circumstances, these evils do not appear to have been present in that case. This is not to say, of course, that Commission actions in this area are not subject to the same constitutional scrutiny as applied in *Near*.

The constitutional implications of the Commission's actions in restraining the use of broadcast facilities for broadcasting lottery and other illegal gambling information are in substance no different from those raised by the Commission's actions in the *Brinkley* case. Once again the action of the Commission is not essentially different from that of other agencies such as the Post Office or the Justice departments. So far as is known, no one has seriously challenged those provisions of the United States Criminal Code which proscribe the dissemination of lottery information or other information which aids and abets gambling[139] as being unconstitutional. The Supreme Court in the *American Broadcasting* case gave no indication that antilottery laws, reasonably construed, pose any serious first amendment problems. The same basic considerations apply to restraints against the broadcast of fraudulent contests such as that involved in the *KWK* case.[140] In restraining fraudulent or deceptive practices, the Commission is doing very little more than is done, for example, by the FTC[141] or the Post Office Department[142] or, in a more restricted area, the SEC[143] or the FDA,[144] and the constitutionality of these

139. In 1961 Congress made it a crime to use wire communications facilities for the transmission of wagering information by persons engaged in the business of betting or wagering. *See* 18 U.S.C. § 1084 (1964).

140. 25 P & F Radio Reg. 577 (1963); *see also* Eleven Ten Broadcasting Corp., 22 P & F Radio Reg. 699 (1962).

141. 15 U.S.C. §§ 52, 53a, 54a (1964); *see, e.g.*, Koch v. FTC, 206 F.2d 311 (6th Cir. 1953).

142. 39 U.S.C. § 4005 (1964); *see, e.g.*, Donaldson v. Read Magazine, Inc., 333 U.S. 178 (1948).

143. *See* § 17 of the Securities Act of 1933, 48 Stat. 84 (1933), *as amended*, 15 U.S.C. § 77q (1964); § 15 of the Securities Exchange Act of 1934, 48 Stat. 895 (1934), *as amended*, 15 U.S.C. § 780 (1964); SEC Rule 10b-5, 7 C.F.R. § 240.10b-5; 3 L. Loss, Securities Regulation 1423-30 (2d ed. 1961).

"antifraud" measures can scarcely be seriously questioned.[145] This is not, however, to suggest that there are *no* first amendment problems here. There are surely some outer constitutional limits on what the Commission can restrain in the name of "fraud." These limits are suggested by the rigged quiz show scandal where relatively harmless deception, done for the chief purpose of enhancing entertainment value, was equated with fraud by both the Commission[146] and Congress.[147] This particular problem in defining fraud is unique to Commission regulation since, outside the field of Commission regulation, civil, criminal, and regulatory actions against fraud and misrepresentation are confined to cases which have long been accepted as actionable at common law or at least those in which it is likely to cause ascertainable public harm. The Commission, however, does not need to look to the traditional definitions of or limitations on actions for fraud. It can, in its view, always proceed under the all-encompassing cloak of "public interest."[148] It is here that the real problem lies.

More troublesome than the potentially broad exercise of power to proscribe "fraud" which is not really fraud is the exercise of power by the Commission to proscribe "offensive" programming. The Commission's action in *Mile High Stations*,[149] although the result was favorable to the licensee, indicates the need for concern over the exercise of sweeping powers to proscribe programming which the Commission finds offensive or improper. *Mile High Stations* did not attract particularly wide attention, probably because the licensee did not contest the constitutional issue but simply pleaded ignorance of the station announcer's offensive remarks. Since the Commission forgave the licensee this one trespass and terminated the show cause proceed-

144. 21 U.S.C. §§ 321(k), (m) (1964); *see, e.g.*, Kordel v. United States, 335 U.S. 345 (1948).

145. *See* Donaldson v. Read Magazine, Inc., 333 U.S. 178, 189-92 (1948), where the Court affirmed the power of Congress to control fraudulent practices (here under the postal fraud statutes): "[T]he constitutional guarantees of freedom of speech and freedom of the press [do not] include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes." *Id.* at 191.

146. *See* Melody Music, Inc., 6 P & F RADIO REG. 2d 973 (1966).

147. *See* 47 U.S.C. § 509 (1964).

148. It may be that in the narrow area of quiz programs the Commission would be limited by the statutory requirements of § 509 of the Act. However, § 509 would presumably not be interpreted as a limitation on the Commission's power under the Act to take action in the "public interest" against other types of "fraud."

149. 20 P & F RADIO REG. 345 (1960).

ing with a warning, apparently few were concerned with the action of the Commission which raises a serious question of whether restraint of the speech in that case was constitutional.

The Commission's subsequent action in the *Palmetto*[150] case has attracted wider attention. In one sense, however, the action in *Palmetto* is less troublesome than the action in *Mile High Stations*. The Commission's actions in *Palmetto* have been criticized as being, in substance, direct censorship of program content notwithstanding the Commission's unwillingness to rest its decision on the grounds that the program content was vulgar, indecent, and offensive.[151] While this may be, it is important to note that on its facts *Palmetto* is somewhat of an exceptional case in that there were misrepresentations of material fact which could be said to bear on the character of the licensee. Clearly the Commission has some latitude in passing on the character of licensees even though the Commission's findings as to character qualifications may in some instances be connected with or related to program issues.

This is not to say that the Commission would be constitutionally justified in using character qualifications as a dodge to evade the constitutional issues which are confronted when particular programming is called into question.[152] For example, it would clearly be improper and unconstitutional for the Commission to examine a particular program or type of program, decide for itself that the program is bad, and then take action against the licensee, not on the basis of the particular program, but on the basis of the licensee's lack of character qualifications as indicated by the bad programming. *Palmetto* itself, however, does not necessarily indicate that the Commission is disposed to proceed in such a manner, since in *Palmetto* there were misrepresentations to the Commission as to circumstances surrounding the programming.

The fears raised by the Commission's action in *Palmetto* have been at least partly allayed by its subsequent decision in the *Pacifica* case.[153] Perhaps most significant is the reason given by the Commission for refusing to take action against the licensee for broadcasts which had occasioned many public complaints.

150. 23 P & F Radio Reg. 483 (1961), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964).

151. Note, *Regulation of Program Content by the FCC*, 77 Harv. L. Rev. 701, 712-14 (1964).

152. *See* Brown, *The Candor Requirements for FCC Licensees*, 22 Law & Contemp. Prob. 644, 654-55 (1957).

153. 1 P & F Radio Reg. 2d 747 (1964).

> We recognize that, as shown by the complaints here, such provocative programming as here involved may offend some listeners. But this does not mean that those offended have the right, through the Commission's licensing power, to rule such programming off the airway. Were this the case, only the wholly inoffensive, the bland, could gain access to the radio microphone or TV camera. No such drastic curtailment can be countenanced under the Constitution, the Communications Act, or the Commission's policy. . . .[154]

Even if *Pacifica* does not entirely set to rest all fears raised by *Palmetto* and *Mile High Stations*, it does suggest that the Commission intends to proceed cautiously in this area.

While the Commission's authority to impose direct restraints on obscene, defamatory, or other socially harmful programming poses significant first amendment problems, the actions of the Commission to date probably do not warrant grave concern since they have been fairly circumscribed within the ambit of restraints constitutionally justifiable and permitted for nonregulated communications media.

3. *Control of Advertising: A Note in Passing*

Until its recent "fairness doctrine" ruling that stations advertising cigarettes must devote time to expression of the view that smoking is a health hazard,[154a] the Commission's attempts to "regulate" the advertising practices, as such, of broadcast stations had been minimal, limited, and largely ineffectual. Leaving direct supervision and control of deceptive advertising practices to the Federal Trade Commission,[155] the FCC has traditionally confined its concern almost exclusively to excessive advertising, with an occasional foray into advertising of certain products[156]

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154. *Id.* at 750.

154a. Letter to WCBS-TV, 9 P & F RADIO REG. 2d 1423, *petition for reconsideration denied*, 11 P & F RADIO REG. 2d 1901 (1967). See text accompanying notes 259-63 *infra*.

155. The Commission has established a "liaison" with the FTC whereby the latter advises the FCC of "questionable advertising" broadcast over radio and television stations. Any determination of deceptive advertising—or perhaps even "questionable" advertising—is taken into account by the FCC in weighing whether the licensee is operating "in the public interest." *Liaison Between FCC and FTC Relating to False and Misleading Radio and TV Advertising*, P & F RADIO REG., Current Service vol. 1, at 11:201 (1957); *see generally Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1019-27, 1063-1101 (1967).

156. Knickerbocker Broadcasting Co., 2 F.C.C. 76 (1935) (advertising of birth control product). In the case of liquor, the Commission has confined its activities to approval of the self-regulation standards of the NAB codes which prohibit advertising hard liquor, NAB, THE TELEVISION CODE 14 (§ IX, ¶ 5) (11th ed. 1966), and impose other re-

or overly loud commercials.[157] With respect to excessive advertising, although the Commission did at one time propose to adopt fixed rules imposing time limitations similar to those of the NAB Codes, the proposal was abandoned principally as a result of a strong congressional opposition.[158] As a result, the Commission's efforts in this area have been made largely through "scrutiny" at renewal time[159] and the usual panoply of techniques incident to renewal, including admonitory letters to offending licensees[160] and short-term renewals.[161]

It is difficult to know how to assess, from a first amendment viewpoint, the Commission's efforts in the field of advertising controls, since it is doubtful that commercial advertising is "speech" protected by the first amendment.[162] While this reflects a rather circumscribed view of the first amendment, which deserves to receive more critical analysis than it has thus far received, it is beyond the scope of the present article. Even if commercial advertising were within first amendment protection, it is doubtful whether those of the Commission's regulatory ac-

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strictions on advertising methods, *see Developments in the Law*, *supra* note 155, at 1155.

157. *See Objectionable Loudness of Commercials*, 5 P & F RADIO REG. 2d 1621-22 (1965), making certain revisions in regulations to control loudness and adopting a "Statement of Policy" concerning loud commercials proscribing certain practices in commercial announcements.

158. *Commercial Advertising Standards*, 1 P & F RADIO REG. 2d 1606 (1964); *see also Commercial Practices of Broadcast Licensees*, 2 P & F RADIO REG. 2d 885 (1964) (dissent of Chairman Henry). Congressional opposition was manifested, among other ways, in a bill introduced at the time to strip the Commission of its power to prescribe rules governing the length and frequency of advertisements. *See id.* at 890. Although the Commission in 1964 declined to adopt fixed standards along the lines of those set by the NAB, it recently did announce a policy of requiring licensees to justify a failure to observe NAB Code limits on commercial time (18 minutes per hour for radio, 16 minutes per hour for television). *See* BROADCASTING MAGAZINE, March 6, 1967, at 36-37.

159. Overcommercialization has on relatively rare occasions occurred in the context of initial applications. *See, e.g.*, Michigan Broadcasting Co., 20 P & F RADIO REG. 667 (1960) (designation for hearing on issues relating to number and length of commercials); Sheffield Broadcasting Co., 21 P & F RADIO REG. 507 (1961) (comparative demerit for overcommercialization); Travelers Broadcasting Serv. Corp., 6 F.C.C. 456 (1938) (application for assignment of license denied).

160. *See* BROADCASTING MAGAZINE, March 6, 1967, at 36-37.

161. Gordon County Broadcasting Co., 24 P & F RADIO REG. 315 (1962); Mississippi Arkansas Broadcasting Co., 22 P & F RADIO REG. 305 (1961).

162. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942). For an excellent treatment of the constitutional question, see *Developments in the Law*, *supra* note 155, at 1027-38.

tions which impose *direct* restraints on advertising practices involve any serious encroachment on such first amendment protection as is accorded to advertising. Curbs on overcommercialization and on certain techniques of advertising such as overloudness seem generally justifiable in the context of radio and television to the same extent they are in comparable situations outside the field of radio and television.[163] And, of course, curbs on false or fraudulent advertising are clearly constitutional under established authority.[164] The constitutional implications of the *indirect* restraints on cigarette advertising imposed by the Commission's recent fairness doctrine decision will be discussed below.

B. General Program Regulation Through the Licensing Process

1. *General Program Standards*

The Commission's regulation of programming is, of course, by no means confined to direct proscription of undesirable programs. More often the nature of the FCC's action is indirect, tending to influence the broadcast of certain programming by imposition of general standards or through informal oversight of the licensee's programming policies. While the Commission's actions in the area of direct restraint have been relatively circumspect to date, its indirect influence on program policies evidences a greater control of program choice and this poses far greater constitutional problems.

Typically, the Commission attempts to achieve what it euphemistically refers to as "program balance" and "programming in the public interest." The first comprehensive statement of Commission policy on programming balance and on the responsibility of broadcasters to program in the public interest was the Commission's famous *Blue Book*:

> In issuing and in renewing the licenses of broadcast stations the Commission proposes to give particular consideration to four program service factors relevant to the public interest. . . . (1) the carrying of sustaining programs, including network sustaining programs, with particular reference to the retention by licensees of a proper discretion and responsibility for maintaining a well-balanced program structure; (2) the carrying of local live programs; (3) the carrying of programs devoted to the discussion of public issues; and (4) the elimination of advertising excesses.[165]

163. *Cf.* Kovacs v. Cooper, 336 U.S. 77 (1949).

164. Donaldson v. Read Magazine, Inc., 333 U.S. 178 (1948); Regina Corp. v. FTC, 322 F.2d 765, 770 (3d Cir. 1963).

165. FCC, Public Service Responsibility of Broadcast Licensees 55 (1946). For an excellent discussion of the background of the *Blue*

Although its policies were invoked in several cases to question renewal applications not meeting the announced standards,[166] the *Blue Book*, as such, never assumed the permanent substantial importance that it was undoubtedly intended to have. Today it is all but forgotten as anything more than an historical source of Commission policy, and is never directly relied on.

However, the basic policies outlined in the *Blue Book* have not been abandoned. The same "program service factors" continue to occupy the Commission's attention although the Commission, learning from its experience with the *Blue Book*, has attempted to avoid stating its standards in terms of absolute demands. Basically the same emphasis on "balanced programming," but with somewhat less emphasis on "sustaining" versus "commercial" programs and the same emphasis on public service programming are inherent in the Commission's "modern" policy statement,[167] and in its current practices. Neither its concern for "local live" programming[168] nor its concern over excessive advertising[169] has in any way abated.

Book, see L. WHITE, THE AMERICAN RADIO 182-99 (Comm'n on Freedom of the Press ed. 1947); *see also* 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 689-94 (Comm'n on Freedom of the Press ed. 1947). The *Blue Book* evoked strong condemnation from the broadcast industry. Illustrative is the statement of the Chairman of CBS who denounced it as "government program-censorship" and "the most direct threat yet made by government to interfere with programming." Paley, "Radio and Its Critics," Address to NAB, October 22, 1946, *quoted in* 2 Z. CHAFEE, *supra* at 636.

Strong criticism was also voiced from outside the industry, both on grounds of regulatory wisdom as well as doubtful constitutionality. *See* L. WHITE, *supra* at 193-99, 229-30. Without getting into the question of wisdom, Chafee did not view the *Blue Book* as posing a serious first amendment problem. 2 Z. CHAFEE, *supra* at 637-38.

166. The Community Broadcasting Co., 12 F.C.C. 85 (1947); Howard W. Davis, 12 F.C.C. 91 (1947); Eugene Roth, 12 F.C.C. 102 (1947).

167. *Statement of Policy on Programming*, 20 P & F RADIO REG. 1901 (1960). On program balance and service, the following oft-quoted statement is generally the point of departure for the Commission:

> The major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission, have included: (1) Opportunity for Local Self-Expression, (2) The Development and Use of Local Talent, (3) Programs for Children, (4) Religious Programs, (5) Educational Programs, (6) Public Affairs Programs, (7) Editorializing by Licensees, (8) Political Broadcasts, (9) Agricultural Programs, (10) News Programs, (11) Weather and Market Reports, (12) Sports Programs, (13) Service to Minority Groups, (14) Entertainment Programming.

Id. at 1913.

168. *See* note 175 *infra* and accompanying text.

169. *See* notes 155-161 *supra* and accompanying text.

Program balance and programming in the public interest are determined by the Commission principally on the basis of an analysis of past or proposed programming in terms of categories established by the Commission as representative of all of the major different types, and on the basis of an assessment of whether the programs meet the needs, tastes, and interests of the station's service area. Of critical significance in the latter regard is the applicant's efforts to ascertain those needs, tastes, or interests.

Part IV, "Statement of Program Service," of the broadcast applications required for new stations, major changes in facilities, transfer of control, and assignment or renewal of license, is the heart of the Commission's direct regulatory oversight of programming. A detailed statement as to the amount and percentage of *proposed* programming is required and, in cases of renewal or assignment and transfer, a detailed statement supported by station program logs showing the *past* programming in each of the specified program categories is mandatory.[170]

The particular classifications used by the Commission have long been widely criticized in the industry as being arbitrary, vague, meaningless, needlessly detailed, and burdensome to the station. Each station is required (a) to maintain detailed logs in which each of the programs is carefully recorded in one of the categories, and (b) to analyze the logs at renewal time to obtain the information required in the renewal application. Even the Commission has recognized the validity of the criticism directed at the arbitrariness and vagueness of the categories. In 1965 it revised the AM-FM program classifications, and in 1966 it adopted similar changes for television.[171] The validity of the other criticisms has not been recognized. Indeed, the new forms are, if anything, more detailed and more burdensome. The Commission's expanding concern with the nature of the program service presented and its apparent use of program classification as a means of influencing stations to provide programming of a

170. The Commission's recently revised programming forms for AM, FM, and television prescribe the following primary categories of programming: agricultural, entertainment, news, public affairs, religious, instructional, sports, and others. Three secondary categories are established: editorials, political programs, and educational institution programs. Under this revised procedure, a station maintains logs classifying each program into the above categories but is required to show overall amounts of programming only in the following: news, public affairs and all other programs exclusive of entertainment and sports.

171. *AM-FM Program Forms*, 5 P & F RADIO REG. 2d 1773 (1965); *Television Program Forms*, 8 P & F RADIO REG. 2d 1512 (1966).

certain type have, however, raised even more troublesome questions.

While the effort of a broadcast station applicant to seek out community interests has long been one of the criteria taken into account in comparative hearings,[172] it did not play a major role in the Commission's consideration of individual applicants until the 1961 *Suburban Broadcasters* decision.[173] Since that time, however, the Commission has given increased attention to the efforts made by an applicant or licensee to become familiar with and to demonstrate how its programming will serve the service area's tastes, needs, and interests.[174] This policy, while theoretically applicable to all programming, has in recent years been reflected principally as a concern for increased local live programming, especially during "prime time" hours.[175]

2. Licensing New Facilities: Single Applicant

Despite constant protests by the Commission that it is not concerned with the content of particular programs or that it does not require a station to broadcast a certain amount of any type of programming, its actions belie these disclaimers. This is most clearly indicated in the Commission's practice of pressing all applicants onto the procrustean bed of "acceptable" program categories.

A seeming exception to this attitude might be seen in the fact that the Commission has been willing to allow AM and FM stations to engage in specialized programming in one or a few of the standard program categories, on a showing that overall pro-

172. Under the so-called "planning and preparation" criteria. *E.g.*, WHDH, Inc., 13 P & F RADIO REG. 507, 555-59, 576-77 (1957), *remanded on other grounds sub nom.* Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55 (D.C. Cir. 1958).

173. 20 P & F RADIO REG. 951 (1961), *aff'd sub nom.* Henry v. FCC, 302 F.2d 191 (D.C. Cir.), *cert. denied*, 371 U.S. 821 (1962). The decision was purportedly based on the comprehensive program policy announced a year earlier in its *Statement of Policy on Programming*, 20 P & F RADIO REG. 1901 (1960), which emphasized the preeminent importance of a "diligent, positive and continuing effort [by the licensee] to discover and fulfill the tastes, needs and desires of the service area."

174. *E.g.*, Washington Broadcasting Co., 5 P & F RADIO REG. 2d 653 (1965) (assignment of license); Chapman Radio & Television Co., 4 P & F RADIO REG. 2d 532 (1965) (application for new facilities); WCSC, Inc., 1 P & F RADIO REG. 2d 619 (1964) (dissent to renewal without hearing).

175. *See, e.g.*, Address by Commissioner Ford, Virginia Association of Broadcasters, June 20, 1963, reprinted in FCC Release No. 37,118; *Omaha Local Television Programming Inquiry*, 1 P & F RADIO REG. 2d 1901 (1963); WCSC, Inc., 1 P & F RADIO REG. 2d 619 (1964) (dissent).

gram balance is provided by complementary program schedules.[176] However, the exception only proves the rule. Absent very special circumstances, the broadcaster who fails to provide a respectable percentage of programming in the categories which the Commission has selected as representative of balanced programming in the public interest does so, or, what is substantially the same, reasonably believes that he does so, at his peril.

The Commission's decision in *Lee Roy McCourry*[177] illustrates this. In *McCourry* the applicant applied for a license for a new UHF television station, proposing a specialized programming format comprised of seventy per cent entertainment and thirty per cent educational programs. Based principally[178] on the applicant's failure to offer any special justification for not providing for religious, agricultural, news, discussion, or similar programming,[179] the Commission set the application down for hearing on the issues, *inter alia*, of whether the applicant had investigated community needs and whether the applicant's specialized format would meet these needs. The immediate effect of the Commission's action was simply to require McCourry to justify his programming. However, as noted by the dissent, this was virtually tantamount to denial of the application in this case or was, in any event, a heavy sanction for failing to conform to the Commission's idea of a proper pattern of programming.[180]

The *McCourry* case is certainly no *cause celebre*. Despite a strong dissent, the case probably cannot be regarded as a significant departure from the Commission's longstanding insistence on the ascertainment of community needs and on basic conformity to a balanced program format in the context of comparative hearings and renewal proceedings.

3. *Licensing New Facilities: The Comparative Hearing*

The Commission's procedure for determining which of two

176. *See, e.g.*, Herbert Muschel, 23 P & F RADIO REG. 1059 (1962). At least a theoretical distinction should be drawn between specialized programming in this sense and programming oriented towards the special needs of a minority group in the station's service area which may still be accomplished by adherence to a "balanced" program schedule with programs in each of the various categories. The Commission has also approved this type of "special audience" programming. *See* Voice of Charlotte Broadcasting, 6 P & F RADIO REG. 2d 355 (1965).

177. 2 P & F RADIO REG. 895 (1964).

178. In addition to the programming issue, issues as to adequacy of staffing, financial qualifications, and main studio location were involved. *Id.* at 897.

179. *Id.* at 896.

180. *Id.* at 901-02.

or more applicants for the same facility[181] is by comparison more deserving of a broadcast permit has long been held up by critics as a classic example of the administrative process at its worst.[182] Inadequately guided by Commission procedures and standards, the prodigious efforts by the parties to compile a complete and comparatively superior record produce little more than staggering records.[183]

It is not the purpose of this Article, however, to criticize the comparative hearing process or the comparative criteria. The concern here is only with those aspects of the comparative hearing process which relate to program regulation and its constitutional implications.

The Commission's focus on an applicant's proposed programming in a comparative hearing is not essentially different from its examination of the program proposals of a noncomparative single applicant. The Commission typically evaluates comparative applicants on the basis of their efforts to survey and ascertain community needs and interests and on the basis of a quanti-

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181. The term "comparative hearing" is often used, inaccurately, to designate all hearings on mutually inconsistent applications. There are significant differences, however, between the scope of a true comparative hearing involving two or more applicants for the *same* frequency in the *same* location and a hearing on mutually inconsistent applications for stations in different communities which propose the mutually incompatible use of co-channel or adjacent channel frequencies —generally referred to as a "307(b) hearing." The comparative hearing is focused on the so-called "standard comparative issue," a broad issue encompassing comparisons between *applicants* on numerous criteria. *See* note 187 *infra*. However, the more limited 307(b) hearing is focused on a comparison of the service needs of the respective communities and considerations of relative efficiency in the utilization of frequencies. *See, e.g.*, Bible Institute of Los Angeles, Inc., 24 P & F RADIO REG. 205 (1962). Thus, the 307(b) hearing does not contemplate a comparison of the respective proposed programming or program-related operations (such as staffing, etc.), although under certain circumstances programming issues may be added. *See, e.g.*, Saul M. Miller, 24 P & F RADIO REG. 550 (1962); Granite City Broadcasting Co., 18 P & F RADIO REG. 852 (1959).

182. *E.g.*, W. JONES, LICENSING OF MAJOR BROADCAST FACILITIES BY THE FEDERAL COMMUNICATIONS COMMISSION, REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, COMMITTEE ON LICENSES AND AUTHORIZATIONS 198-204 (1962); Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards*, 75 HARV. L. REV. 1055, 1065-72 (1962); Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655 (1959).

183. WHDH, Inc., FCC 66 D- [illegible] 284 (1966). Some idea of the magnitude of the hearing in WH[illegible] from the reopening of a decision based on earlier hearin[illegible] 1954-1955!) may be gleaned from the size of the examiner's o[illegible]s of which are devoted to findings of fact alone.

tative evaluation of each applicant's program balance based on the respective percentages of time to be devoted the various program types defined by the Commission.[184] Where the applicants each show respectable balance in the various categories,[185] the Commission is quick to deny any judgment of *qualitative* difference between particular programs.[186]

It is true, however, that the comparative hearing has a somewhat different impact on program discretion than does the hearing in a noncomparative situation. Unlike the *McCourry* type of situation, for example, there is no occasion here for setting an application for hearing on the basis of insufficient balance or other assumed defects in proposed programming, since mutually inconsistent applications must go to hearing anyway. Every application set for a comparative hearing is set for a hearing on the standard comparative issue.[187]

184. *See, e.g.*, Central Coast Television, 1 P & F RADIO REG. 2d 237, 247 (1963); Jefferson Standard Broadcasting Co., 24 P & F RADIO REG. 319, 331-32 (1962); Florida Gulfcoast Broadcasters, Inc., 23 P & F RADIO REG. 1, 8 (1962).

185. *E.g.*, *Policy Statement on Comparative Broadcast Hearings*, 5 P & F RADIO REG. 2d 1901 (1965); Sunbeam Television Corp., 5 P & F RADIO REG. 2d 85, 87 (1965); Florida Gulfcoast Broadcasters, 23 P & F RADIO REG. 1, 8 (1962).

186. *E.g.*, Jefferson Standard Broadcasting Co., 24 P & F RADIO REG. 319, 332 (1962). The Commission's eschewing of "qualitative" comparisons is criticized in Irion, *FCC Criteria for Evaluating Competing Applicants*, 43 MINN. L. REV. 479, 492-94 (1959). It is perhaps significant that Irion, one of the most highly regarded FCC hearing examiners, evidently sees no major first amendment problem involved in the evaluation of the quality of particular programming and program proposals.

187. The "standard comparative issue" is an exceedingly broad statement of the key issue in *comparative* hearings (not in "307(b) hearings"). The formulation of the standard comparative issue is as follows:

> To determine on a comparative basis which of the operations proposed in the above-entitled applications would best serve the public interest, convenience, and necessity in light of the record made with respect to the significant differences between the applicants as to:
>
> (a) The background and experience of each of the above-named applicants having a bearing on its ability to own and operate the proposed television station.
>
> (b) The proposals of each of the above-named applicants with respect to the management and operation of the proposed station.
>
> (c) The programming service proposed in each of the above-entitled applications.

Cowell, Inc., 13 P & F RADIO REG. 507, 515 (1957).

Within this broad formulation, criteria have crystallized which are deemed to be relevant in deciding among applicants (although many of these criteria are petty and not conceivably important and several are mutually contradictory). Prior to the Commission's 1965 *Policy*

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On the other hand, the Commission may add other issues directed to specific questionable aspects of a party's application.[188] An applicant proposing what the Commission regards as questionable program policies may have the application set for a hearing on the so-called "Suburban issue," theoretically designed to investigate what efforts the applicant has made to determine and satisfy the needs and interests of its proposed service area. Although the standard comparative issue substantially includes this investigation, the significance of the additional "Suburban issue" is that it is a potentially disqualifying issue unrelated to the *comparative* merits of the applicants. If one applicant buys out or merges with competing applicants, the standard comparative issue becomes moot, but the disqualifying issue does not.[189] In such a case, the Commission will insist on investigating whether the remaining applicant has met its burden on the disqualifying issues.

4. Renewal of License: In Terrorem Control

The discussion above focused on the method by which the Commission controls programming by setting standards to which a broadcast applicant must conform if he is to succeed in obtaining a license. The process of license renewal every three years adds a new dimension to this control. The renewal process is the primary tool used by the Commission to enforce continuing compliance with the demands initially made on an applicant. Without this instrument it would be difficult if not impossible to effect any real control of programming operations. If a licensee fails to adhere to the standards of its promised perform-

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Statement on Comparative Broadcast Hearings, the accepted criteria were: (1) local residence; (2) civic participation; (3) diversification of occupations of principals; (4) experience; (5) integration of ownership with management; (6) past broadcast record; (7) planning and preparation; (8) program policies; (9) program proposals; (10) studio and equipment; (11) staff; (12) diversification of ownership of mass communications media. WHDH, Inc., *supra* at 566-85. *See generally*, Irion, *FCC Criteria for Evaluating Competing Applicants*, 43 MINN. L. REV. 479 (1959). The 1965 *Policy Statement* retains most of these criteria but purports to establish some degree of priority among them and explain their proper implementation. Whether the 1965 *Policy Statement* has really clarified or resolved the contradictions and erased any of the nonsense that has characterized the interpretation and implementation of these criteria remains to be seen.

188. These may be added on the Commission's own motion or by motion of the parties to enlarge issues. *See, e.g.*, Springfield Telecasting Co., 3 P & F RADIO REG. 2d 727 (1964).

189. *See, e.g.*, Tri-Cities Broadcasting Co., 6 P & F RADIO REG. 2d 1, 2 (1965).

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ance, the Commission may, of course, revoke the license. Such a procedure is, however, too cumbersome to be practical. A license revocation proceeding entails initiation by the Commission of a formal hearing in which the Commission must bear the burden of proof of noncompliance with the law or unsatisfactory performance by the licensee.[190] The procedural burdens of a revocation proceeding would impede and deter Commission enforcement, and would eliminate any real *in terrorem* effect from the threat of revocation.

The effectiveness of the renewal process in influencing a licensee's operations, including his program operations, arises from two facts. First, the *licensee* has the burden of coming forth, in a formal application, to show compliance with Commission standards and fulfillment of prior promises;[191] second, this process is routine and relatively frequent, thereby eliminating any doubt that the Commission will scrutinize the actual performance of the station in relation to the performance promised.

The manner in which the renewal process is carried out by the Commission makes it far more than merely a periodic inspection. Rather the renewal process has become the primary method through which the Commission exercises day-by-day control over virtually all broadcast operations, and particularly over program practices and program operations. Thus, the fact that the licensee must go through the trial and prove himself every three years is in a very real sense a "Sword of Damocles" over the broadcaster's head. If the sword does not often fall, neither is it ever lifted and the *in terrorem* effect of the sword's presence enables the Commission to exercise far-reaching powers of control over the licensee's operations.

It is this *in terrorem* aspect of periodic renewal which one former FCC Commissioner labeled "regulation by the lifted eyebrow,"[192] a label which has since gained considerable currency in the field of administrative regulation. A letter to the station from the Commission or even a telephone call to the station's Washington attorney from the Commission's staff indicating the Commission's "concern" over a particular practice of the licensee and asking for the licensee's justification will generally be all

190. *See* 48 Stat. 1086 (1934), *as amended*, 47 U.S.C. § 312(c) (1964).

191. In the event the application is set down for hearing, the licensee has the burden of proof. *E.g.*, Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

192. Commissioner Doerfer dissenting in Miami Broadcasting Co. (WQAM), 14 P & F RADIO REG. 125, 128 (1956).

that is necessary to bring the licensee around to the Commission's way of thinking. If not cultivated, the technique is at least used to great advantage by the Commission, which almost invariably makes a point of informing the licensee that its inquiry and the licensee's response will be associated with the licensee's file and given "due consideration" upon his next application for renewal.

If a Commission inquiry or expression of concern over a licensee's practices can be expected to have an influential effect on the licensee, the effect is even greater when the Commission makes such inquiry at renewal time or notifies the licensee that it is deferring action on pending renewal applications until it has received answers to its questions. An example is the Commission's action in *Local Live Programming of Television Stations*[193] where the Commission sent letters to five stations deferring renewal applications because of an inadequate showing of local live programming in prime time and requesting information as to local live programming presentations and plans and efforts to ascertain community needs. In spite of the Commission's request for further information, it is extremely doubtful whether the Commission really expected to receive any information which would add meaningfully to what the licensee had already reported. What the Commission seeks in such cases is not information but assurance that future operations will conform to Commission standards; and it would be incredible if the experienced broadcaster or his Washington counsel would mistake the Commission's handwriting on the wall.[194]

For the more recalcitrant, there are stronger methods short of revocation. One is the frequently employed short-term re-

193. 25 P & F RADIO REG. 482 (1963).

194. *Cf.* Pierson, *The Need for Modification of Section 326*, 18 FED. COM. B.J. 15, 19-20 (1963):

> The lawyer [advising his client as to type of program] has a number of guides. First, in his day-to-day dealings with the Commission and its staff, he learns of their attitudes toward various kinds of proposals. He knows that certain program proposals are accepted and favorably processed with alacrity. Other program proposals create problems not only of getting expeditious action but of getting favorable action. On occasion his client is almost directly threatened with costly litigation unless program proposals are changed. In addition, Commission decisions, statements of policy and the public statements of its members afford insight into Commission attitudes toward various types of programming. With these as guides, the lawyer can quite unerringly outline to his client the programs that the Commission favors and disfavors . . . . To deny that this constraint exists is to indulge pure myth. To say that . . . an applicant proposes or 'promises' programs on the basis of his independent judgment of the needs and wants of his area compounds the myth.

renewal (generally for one year) during which time the licensee is made aware that he is "on probation."[195]

The practice of informal control over or influence on individual licensee practices is also followed on an industry-wide basis through statements of Commission concern over particular practices or announcements of proposed action.[196] This is enhanced by speeches of individual commissioners. Former Chairman Minow's famous "Wasteland Speech" is a classic example.[197] However, less sweeping and dramatic speeches in which some comment is made on program policies have become almost a matter of routine. While some of these speeches are inconsequential, there can be no doubt that many are valuable as a source of at least one commissioner's thinking on a given subject.

5. *First Amendment Implications*

The Commission's insistence on the licensee's presenting "balanced" programming, although done in the name of promoting diversity, has had largely the opposite effect. Notwithstanding repeated criticism by various commissioners of the undeniable sameness of programming among broadcasters, the Commission's own policies do little to encourage diversity or originality either in the style or content of individual programs or in the overall format of a station's program operations. Indeed, its policies have, if anything, added to the inherent tendency of broadcasters to conform to safe, established patterns of operation and programming.

Insistence by the Commission that the licensee maintain respectable percentages of its total programming in the various program categories is one example of such a policy. Adherence to these categories by the licensee does not necessarily fix the content of specific programs within each category. The un-

195. *See, e.g.*, Lamar Life Broadcasting Co., 5 P & F RADIO REG. 2d 205 (1965) (one year renewal because of questionable "fairness" in presenting views on controversial public issues); Loyola Univ., 24 P & F RADIO REG. 766 (1962) (one year renewal because of significant deviations from previous program promises).

196. *See, e.g.*, 6 TELEVISION DIGEST 2-3 (1966) (press report that staff "reportedly" urges Commission to send letters to ten AM stations inquiring as to their failure to carry political broadcasts); 6 TELEVISION DIGEST 2 (1966) (report of staff proposing to send letters to nineteen AM stations which proposed to devote less than 5% of their time to "public affairs" and "other," i.e., agricultural, religious, and similar nonentertainment categories programming).

197. Address to the 39th Annual Convention of the National Association of Broadcasters, May 9, 1961.

mistakable result of prescribing categories in which all licensees are expected to present some programming is, however, sameness of program formats among licensees. Following the Commission's guidelines, for example, *each* station will generally present a religious discussion program or coverage of a church service at least one Sunday a month; a regularly scheduled farm news or discussion program, no matter how urban the area; and, to satisfy the ambiguous category of "talks," a "homemaker" show at least once a week. There emerges a pattern of sameness in conformity with safe and acceptable standards bearing the FCC seal of approval. While the licensee may decide the particular content of programs within each accepted category, he must maintain a balance among the accepted categories. He deviates at his peril as is illustrated by the *McCourry*[198] case where the applicant was required to justify, in a formal hearing, his deviation from the Commission's standard of "balance" because of his failure to conform to the pattern of programming in each of the accepted categories.

Commissioner Cox, one of the most vigorous and articulate defenders of the Commission's programming policy, has attempted to justify the Commission's action in *McCourry* on the ground that the Commission has the responsibility to ensure that licensees ascertain and serve the needs and interests of their service areas, and the failure of the applicant in *McCourry* to justify its failure to show "balanced" programming fully warranted and indeed required the Commission to hold a hearing to determine whether the applicant would serve the public interest.[199] This simply begs the question.

Even under the most expansive interpretation of the first amendment, the Commission is not forbidden to insist that an applicant show that it has made an effort to ascertain the general needs and interests of the community to be served and that its operations will serve those needs and interests. Moreover, it does not seem either unconstitutional or unreasonable for the Commission to require that, in attempting to ascertain and serve the needs of the community, the *licensee* must apply his own judgment, not that of the network or some other program supplier. *Simmons v. FCC*[200] illustrates this problem. There the Commission denied an application on the ground that a proposal

198. 2 P & F RADIO REG. 2d 895 (1964).
199. Cox, *The FCC, the Constitution and Religious Broadcast Programming*, 34 GEO. WASH. L. REV. 196, 207 (1965).
200. 169 F.2d 670 (D.C. Cir. 1948); *cf.* Churchill Tabernacle v. FCC, 160 F.2d 244 (D.C. Cir. 1947).

broadcast the complete, unaltered CBS network schedule would be an abdication of licensee responsibility and would not serve the public interest. In affirming, the court held that there was no censorship involved.[201]

But it is one thing to require an applicant or licensee to demonstrate that it has made, by *itself*, a good faith, reasonable effort to ascertain and serve the needs of the public; it is quite another for the Commission to set forth a catalogue of the types of programs which it considers the public interest to require, and then to require that an applicant or licensee conform its programming to these standards unless it can offer compelling reasons for a varying format. Notwithstanding the fact that this action was purported to be merely an inquiry into whether McCourry had really investigated the needs of his prospective service area and whether his programming would serve those needs, no one familiar with FCC practice could doubt that the action was intended to influence McCourry—and other future applicants who could be counted on to take due note of the Commission's actions—to modify the program format to conform with the Commission's concept of balanced programming.

That the threat of an agency hearing is in itself, regardless of potential outcome, an effective method of imposing program standards is even more persuasively demonstrated in cases involving applications for renewal of existing licenses. The threat of a hearing on renewal is virtually certain to induce the licensee to conform to the established standards of balanced programming, except in those cases where, for good cause shown, the Commission has approved specialized programming.

The conformity principle can also be seen at work in the comparative hearing process. Here, however, the effect of an evaluation of the applicants' respective program proposals is not immediately apparent. Although the program proposals, formats, and policies of the applicants are among the criteria for choosing between them, the Commission never gives express decisional importance to the superiority of one applicant's program proposals, even in "quantitative" terms. Indeed, it is unusual to find a decision in which the Commission even awards a preference to one applicant in the area of programming. Generally, any preferences granted in the area of programming are expressed as preferences for a superior showing as to an applicant's efforts to survey and ascertain community needs. On the basis

201. 169 F.2d at 672.

of the Commission's decisions, then, it might appear that there is no problem of restraint, since the Commission purports to give so little attention to a comparative evaluation of programming proposals. But appearances are deceptive, as are the Commission's published decisions.

In many, if not most cases, no preference could be granted on the basis of program proposals since there is no discernible difference of substance between them. This sameness is largely attributable to similar network program fare, particularly where both propose an affiliation with the same network. To some extent, sameness of programming is also attributable to the fact that radio and television stations, like other commercial enterprises, generally strive to meet the widest possible market. To a significant degree, however, the sameness is also attributable to the Commission's own efforts to supervise programming operations. The trend to conformity and sameness is inherent in the Commission's insistence on adherence to "balance," defined as devoting respectable percentages of program time to each of the categories prescribed by the Commission. The trend to conformity and sameness is particularly encouraged by the comparative hearing process itself.[202]

It takes relatively little imagination on the part of an applicant competing for a license to realize that he must develop a format of balanced programming which will pass muster under the Commission's examination. It takes even less imagination, talent, or creativity to put such a format into effect. It is small wonder then that most applicants, with the help of Washington counsel, develop program proposals which will pass the balance test and which will compare, neither more nor less favorably, with any other applicant's balanced proposals.[203] The Commission encourages this practice. If some applicant gets carried away with the idea of something special in the way of programming, the Commission is likely to discount his proposals as impractical and unlikely to be effectuated.[204]

In defense of the Commission's use of program types, Commissioner Cox has suggested that the program categories are not the Commission's creation but that they reflect the basic program interests of the public, as reported by broadcasters be-

202. *See* Pierson, *The Need for Modification of Section 326*, 18 FED. COM. B.J. 15, 19-21 (1963).

203. *Id.*

204. *See, e.g.*, Veterans Broadcasting Co., 4 P & F RADIO REG. 2d 375 (1965).

fore the time when such categories were established. According to this argument, the categories were developed simply for convenience to broadcasters in reporting the programming which they presented and for ease of processing applications by the Commission.[205] The thrust of this argument is that the use of specified program categories is simply a convenient method of getting information.

It may be that the mere requirement that a licensee report his programming in the various categories, as an incident to recordkeeping activities by the Commission does not raise any significant first amendment problem. But Commissioner Cox's suggestion that the licensee's report of programming is purely a recordkeeping exercise seems to be less than a candid explanation of the purpose of the report and the use to which it is put, and as the Supreme Court has on more than one occasion emphasized, the fact that an inquiry can be justified as merely routine cannot be accepted as a cloak which shields such activity from constitutional objection if the character of the inquiry, or the manner and circumstances in which it is done, accomplish a restraint on free speech.[206]

Perhaps more basically troublesome than the encouragement of conformity is the fact that it is impossible to tell whether the Commission is in fact making value judgments about programming while its published opinions deny that it is doing so. One can scarcely accept the gratuitous and self-serving statements made by the Commission in its opinions that it has not recognized or given any decisive significance to any difference between program proposals. Since the Commission is not wholly oblivious to the constitutional implications of the close supervision of programming, it is not surprising that the opinions, written to be as "appeal-proof" as possible, attempt to show an abundance of caution and restraint in this area.

It is sometimes suggested that, whatever the constitutional limits on direct program regulation or even on indirect program influence, the Commission has full constitutional authority to consider and pass judgment on the programming of two or more applicants in a comparative hearing, as a basis for choosing between them. Such a distinction between comparative program

205. Cox, *supra* note 199, at 199-201.

206. *See, e.g.*, Talley v. California, 362 U.S. 60 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); *cf.* Brown, *Character and Candor Requirements for FCC Licensees*, 22 LAW & CONTEMP. PROB. 644, 654-55 (1957).

evaluation and other forms of program regulation is suggested by two of the leading cases on FCC regulatory authority in the field of programming, *Bay State Beacon, Inc. v. FCC*[207] and *Johnston Broadcasting Company v. FCC*.[208] In *Bay State* the court held it was not a violation of the first amendment or section 326[209] for the Commission to consider, as a factor in selecting one comparative applicant over another, a quantitative analysis of the amount of time to be devoted by the respective applicants to commercial vis-a-vis noncommercial programs. The court reasoned that the program analysis merely indicated how the applicant would perform in the public interest and that, if the Commission could not make such an inquiry as to programming it would be unable to perform its duty to ensure that the public interest, convenience, and necessity were being served. The court went on to state that if denial of a license to the unsuccessful applicant on the basis of inferior program proposals violated the first amendment, "then every unsuccessful applicant would have the right of free speech throttled and abridged."[210] In *Johnston* the court again approved the Commission's preference for one comparative applicant over another on the basis of program proposals. The court reasoned

> It is true that the Commission cannot choose on the basis of political, economic or social views of an applicant. But in a comparative consideration, it is well recognized that comparative service to the listening public, is the vital element and programs are the essence of that service. So, while the Commission cannot prescribe any type of program (except for prohibition against obscenity, profanity, etc.), it can make a comparison on the basis of public interest and, therefore, of public service.[211]

Insofar as the courts in *Bay State* and *Johnston* intended to distinguish between evaluation of programming in the context of comparative hearings and other forms of direct or indirect program supervision by the Commission, the reasoning is something less than clear. Implicit in the suggested distinction is the assumption that because there must be *some* basis for selection between applicants it is proper, indeed necessary, to weigh the comparative merits of the applicant's respective program proposals.

As to any supposed *necessity* for choosing between applicants on the basis of program proposals, it is sufficient first to

207. 171 F.2d 826 (D.C. Cir. 1948).
208. 175 F.2d 351 (D.C. Cir. 1949).
209. 47 U.S.C. § 326 (1948).
210. 171 F.2d 826, 827 (D.C. Cir. 1948).
211. 175 F.2d 351, 359 (D.C. Cir. 1949).

note the numerous other bases for comparative evaluation which in no way involve judgments as to programming. There is scarcely any inherent necessity in basing a selection on an evaluation of program proposals. Second, the convenience or even necessity of evaluating program proposals to fulfill the *statutory* mandate of effecting the public interest, convenience, and necessity can scarcely warrant an intrusion into constitutionally prohibited areas. In the final analysis there is no basis whatsoever for singling out the comparative hearing process as some special justification for control of program choice. The Commission's program regulation policies are just as questionable in this area as in a noncomparative hearing context.

The ultimate ostensible aim of the Commission's emphasis on program balance and its general insistence on programming in all of the key program categories is the advancement of diversity of viewpoints, ideas, and entertainment. This same general aim is the underlying rationale for regulation of more direct impact and more far-reaching implications: regulation of the broadcasting of political and controversial public issues. It is here that the constitutional problems of the Commission's program regulation are brought most sharply into focus.

C. Regulation of Political Broadcasts and Controversial Public Issues Programming

Few areas of broadcast regulation have been as controversial as the regulation of political broadcasts and controversial public issues programming. Acting under the equal time requirements of section 315 of the Communications Act of 1934 and pursuant to its so-called "fairness doctrine," the Commission has come under increasingly heavy criticism from the industry, Congress, and even some of its own members because of its interference with broadcasters' discretion and responsibility in this area of programming.[212] Although political broadcasts and controversial public issues programming may appear in many respects to pose but a single regulatory problem, they in fact pose two distinct, though related, problems with distinct, and somewhat different, constitutional implications.

212. *See, e.g., Hearings on Equal Time Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 88th Cong., 1st Sess., ser. 29 (1963); *Hearings on Political Broadcasting before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. (1959); *see also* Dean, *Political Broadcasting: The Communications Act of 1934 Reviewed*, 20 Fed. Com. B.J. 16, 38-43 (1966).

1. *Equal Time*

Section 315 of the Communications Act of 1934 provides:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . . .
>
> (b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.
>
> (c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.[213]

An exception from the equal time requirement is provided for appearances by candidates on bona fide news, interview, or documentary programs, so long as the licensee continues "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[214]

The concept of equal time in itself is essentially a simple one, and in most cases its requirements are relatively clear and direct.[215] The Commission's key rulings on the principal problems of scope and interpretation are summarized in its *Equal Time Primer*[216] and have been quite fully explored by others.[217] It is, therefore, sufficient here merely to sketch the outline of the equal time requirements. The equal time requirements are much more limited than is popularly supposed. First of all, the duty to provide equal opportunity arises only when a legally qualified,[218] bona fide candidate *himself*[219] makes an appearance on the station either live or on tape for any purpose[220] except

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213. 48 Stat. 1088 (1934), *as amended*, 47 U.S.C. § 315 (1964).

214. 48 Stat. 1088 (1934), *as amended*, 47 U.S.C. § 315(a)(4) (1964).

215. Those problems of construction which have been raised in the application of equal time can be generally summarized under the following questions: (1) who are legally qualified candidates?; (2) what constitutes "equal" opportunity?; (3) what constitutes a "use" by a political candidate?; and (4) what is a bona fide "newscast," "news interview," "news documentary," or "news events"?

216. *Political Broadcasts*, 24 P & F RADIO REG. 1901 (1962) (incorporating earlier summaries).

217. *E.g.*, Friedenthal & Medalie, *The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Communications Act*, 72 HARV. L. REV. 445 (1959); Comment, 30 GEO. WASH. L. REV. 63 (1961).

218. *See Political Broadcasts*, 24 P & F RADIO REG. 1901, 1913-15 (1962).

219. Equal time is not required where another person appears on behalf of the candidate. Felix v. Westinghouse Radio, 186 F.2d 1 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951).

220. The Commission has ruled in [illegible] instances that a candi-

an appearance in connection with a news program or interview.[221] There is no specific obligation on the station to carry political broadcasts in the first instance, although a refusal to carry any political broadcasting may be considered against the licensee at renewal time when the Commission decides whether the station has been operated in the public interest.[222] In addition, the station is not required to seek out the opposing candidates. The initiative is on the opposing candidate to request equal time[223] within one week of the broadcast.[224]

Enforcement of section 315 generally arises on complaint[225] to the Commission by a candidate who has been denied equal time. The licensee is notified of the complaint and given time to reply. Once an order is issued, the order can be enforced through the usual means of fines, cease and desist orders, and even denial of license renewal or license revocation for willful and repeated violations.[226] However, the issuance of a ruling that a candidate is entitled to equal time has apparently sufficed in all or virtually all cases. No case has been found in which any formal sanctions were invoked. The reason for this is obvious since compliance, or attempted compliance in good faith with a prior ruling is all that is required. Since judicial review can be had from the informal ruling,[227] a refusal to comply in order to test the correctness or the constitutionality of the ruling is unnecessary. In any event, the sanctions risked by noncom-

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date who appears for any purpose or in any capacity, even in that of a station announcer, is a use by the candidate requiring equal time. *See Political Broadcasts*, 24 P & F RADIO REG. 1901, 1908-12 (1962). *But see* Brigham v. FCC, 276 F.2d 828 (5th Cir. 1960), where the Fifth Circuit held that a station weatherman's appearance on a program to present the weather report was not a use although the weatherman was also a candidate. This may be rationalized, however, on the exemption for bona fide news broadcasts rather than any exemption for candidates who make appearances for nonpolitical purposes.

221. 47 U.S.C. § 315 (1964); *see Political Broadcasts*, 24 P & F RADIO REG. 1901, 1908-13 (1962).

222. *Licensee's Obligation to Carry Political Broadcasts*, 25 P & F RADIO REG. 1731 (1963).

223. "Equivalent" time means equivalent in terms of rates charged (in absence of rates), length of time, desirability of the time spot offered, and any other conditions of use. *See Political Broadcasts*, 24 P & F RADIO REG. 1901, 1919-21 (1962).

224. 47 C.F.R. § 13.657(e) (Supp. 1966).

225. The Commission does, when asked, also render declaratory decisions without any complaint. *E.g.*, Columbia Broadcasting Sys., 31 P & F RADIO REG. 2d 623 (1964).

226. *See* 47 U.S.C. §§ 307(d), 312(a) & (b), 504(b) (1964).

227. *See* Felix v. Westinghouse Radio, 186 F.2d 1 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951).

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pliance are quite evidently regarded as more important to the broadcaster than his right not to accord equal time.

Notwithstanding the fact that section 315 is quite limited, not only as to the period in which it is operative but also as to the scope of the obligation imposed, the equal time requirements have been the subject of unrelenting criticism over the years, and a number of attempts have been made to modify or repeal section 315.[228] Probably the most severe attacks have been aimed at the Commission's interpretation of section 315, which has generally tended to expand the scope of the section. The classic example is the Commission's *Lar Daly*[229] decision, holding that the appearance of an incumbent political candidate on a newscast and a separate announcement on behalf of the March of Dimes constituted a "use" entitling all other candidates to equal time. This remarkably obtuse decision called forth a flood of criticism which was quickly followed by congressional reversal of the decision, and the present exemptions for bona fide news events.

Despite this swift reversal the Commission has continued to adhere to an extremely broad interpretation of the word "use." Thus it insists that any appearance by a candidate for any purpose whatsoever, other than in connection with a bona fide news program, constitutes a use irrespective of whether the appearance has any bearing on his political candidacy.[230] This interpretation is based on the rather tenuous theory that any exposure of a candidate over radio or television ultimately accrues to the candidate's benefit or that, in any event, the licensee should not be permitted to judge whether the candidate has benefited from the appearance.[231] Consistent with their expansive reading of section 315, the Commission has also placed some rather narrow interpretations on the news exemption established by Congress in 1959 with respect to such appearances as press conferences

228. *See, e.g.*, S. 1010, 89th Cong., 1st Sess. (1965); S. 1696, 88th Cong., 1st Sess. (1963). For criticism before Congress of § 315, see *Hearings on Equal Time before the Subcomm. on Communications of the Senate Comm. on Commerce*, 88th Cong., 1st Sess., ser. 29 (1963). The critics of § 315 include at least one former Commissioner. *See Hearings on Political Broadcasting before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 81 (1959) (testimony of Commissioner Ford).

229. CBS, Inc., 18 P & F RADIO REG. 701 (1959). For industry criticisms of the *Lar Daly* case, see *Hearings on Political Broadcasting Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. (1959).

230. *See* note 219 *supra*.

231. *See* WMCA, Inc., 7 P & F RADIO REG. 1132 (1952).

and reports from Congressmen.[232] These limited interpretations have justifiably invoked criticism from members of the Commission as well as the industry.[233]

While the Commission has been severely criticized on many occasions for its interpretation of section 315, probably as much criticism has been levied at the statutory requirements themselves. This criticism has centered chiefly on the problem of giving equal time to minority candidates. Although Congress suspended section 315 for presidential and vice-presidential candidates in 1960,[234] every attempt thus far to modify or repeal section 315 permanently[235] has failed. An attempt to suspend section 315 again for presidential and vice-presidential candidates in the 1964 election campaign failed despite some strong support for following the 1960 pattern.

2. *The Fairness Doctrine*

Closely akin to, but distinct from the equal time requirements is the Commission's so-called "fairness doctrine." Stated most generally, the fairness doctrine is an obligation imposed on the broadcaster to present contrasting responsible points of view on controversial issues of public importance.[236]

The history of the fairness doctrine is rather uncertain since it depends on how one defines what now passes for a doctrine. The Commission maintains that the fairness doctrine has, in essence, been in effect from the first days of regulation by the Federal Radio Commission.[237] A statement in the 1929 *Annual*

232. *See, e.g.*, Columbia Broadcasting Sys., 3 P & F RADIO REG. 2d 623 (1964); Letter to Congressman Thompson, 23 P & F RADIO REG. 178 (1962).

233. *See, e.g.*, dissenting opinions of Commissioners Ford and Loevinger in Columbia Broadcasting Sys., 3 P & F RADIO REG. 2d 623, 630-31 (1964).

234. Act of Aug. 24, 1960, Pub. L. No. 86-677, 74 Stat. 554.

235. *See, e.g.*, S. 252; S. 1696; *Hearings on Equal Time Before the Communications Subcomm. of the Senate Comm. on Commerce*, 88th Cong., 1st Sess., ser. 29 (1963).

236. *Fairness Doctrine*, 2 P & F RADIO REG. 2d 1901, 1904 (1964). For extensive comments on the fairness doctrine reflecting different attitudes toward it, see Barron, *The Federal Communications Commission's Fairness Doctrine: An Evaluation*, 30 GEO. WASH. L. REV. 1 (1961); Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 GEO. WASH. L. REV. 719 (1964).

237. *See Fairness Doctrine*, 2 P & F RADIO REG. 2d 1901, 1903 (1964). The Commission also interprets § 315, as amended in 1959, to give statutory sanction for the doctrine. *See id.* But this seems a somewhat dubious interpretation of congressional intent. *See* text accompanying notes 250-51 *infra*.

Report of the Federal Radio Commission does suggest an early origin of the doctrine:

> It would not be fair, indeed, it would not be good service to the public, to allow a one-sided presentation of political issues of a campaign. Insofar as the program consists of discussion of public questions, public interest requires ample play for the fair and free competition of opposing views, and the Commission believes that the principle applies not only to addresses of political candidates but to discussion of issues of importance to the public.[238]

While a general obligation to be fair in presenting opposing viewpoints on controversial issues may be inherent in the broadcaster's duty to serve the public interest, there is an important difference between a general moral responsibility—enforceable, if at all, only by self-regulation—and a specific legal requirement enforceable by Commission sanction.[239] Despite the Commission's early insistence that the broadcaster is obligated to present all sides of a controversial issue, it was really not until the Commission's opinion in *Mayflower Broadcasting Company*[240] in 1940, which imposed a ban on broadcast editorializing as inherently unfair, that the Commission articulated something like the fairness doctrine, enforceable by direct sanction or specific admonishment, as it is now understood.[241] The *Mayflower* decision represents a crude first attempt on the part of the Commission to enforce fairness in the treatment of controversial issues by broadcasters. The case did not, however, lay down any specific requirements other than the negative commandment: thou shalt not be an advocate. Apart from condemning editor-

238. 1929 FRC ANN. REP. 33.
239. Sullivan, *supra* note 236, at 728.
240. 8 F.C.C. 333 (1940).
241. In Red Lion Broadcasting Co. v. FCC, 10 P & F RADIO REG. 2d 2001, 2011 (D.C. Cir. 1967), the court attempts to give an earlier genesis for the fairness doctrine by finding it in such cases as *Shuler* and *Brinkley*. Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933); KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931). However, the denial of licenses in these cases was based on a far more flagrant conduct than simple failure to present both sides of a public controversy and neither was grounded on any articulated fairness doctrine as that term is understood today. So also the Commission's refusal to license the applicant in Young People's Ass'n for the Propogation of the Gospel, 6 F.C.C. 178 (1938), which announced its intention to pursue a flat, general policy of not permitting use of its facilities for presenting *any* view differing from that of the applicant, bears but slight resemblance to the fairness doctrine today but is more akin to the *Brinkley* and *Shuler* cases and the principle that a licensee cannot operate the station in its purely private interests to the exclusion of any public interest.

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ializing, it spoke only in very sweeping and general terms:

> Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in a public domain, the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias.[242]

The scope of the licensee's obligation to ensure the fair presentation of all sides of controversial issues and the manner in which the Commission intended to enforce that obligation remained as vague as the broadcaster's duty to serve the public interest. Few stations were hurt by the ban on editorializing, since the practice was not widespread in the industry and was generally frowned upon.[243] Thus, the *Mayflower* opinion did not evoke as overwhelming a protest from the industry as might have been expected.

Apart from the flat ban on editorializing, little effort was made by the Commission to clarify the scope of the licensee's obligation to be fair or to set forth any guidelines as to what would be deemed controversial or what was required in order to be fair. In fact, the Commission quite evidently did not really know what fairness meant. Thus, in 1946 it decided not to require a station to give an atheist opportunity to "give the other side" of views reflected in the station's religious programs, while at the same time instructing the station to be fair in presenting religious issues even though this would require the station to permit expression of highly unpopular minority views including those of atheists.[244] The confusingly vague scope of the fairness obligation was compounded by the fact that the Commission had, in 1945, issued a statement of policy to the effect that stations could not avoid the problem by refusing to carry programs dealing with controversial public issues.[245]

In 1947 the Commission, prompted by the evident need to clarify the fairness obligation with respect to controversial public issues generally, instituted hearings on the relationships between editorializing and a broadcaster's obligations under the Act. These culminated in the Commission's *Report on Editorializing by Broadcast Licensees*,[246] released in 1949, in which the Commission reversed *Mayflower* and reestablished the right of the broadcaster to editorialize. In addition, this report dealt

242. 8 F.C.C. 333, 340 (1940).
243. Sullivan, *supra* note 236, at 730-32.
244. Robert Harold Scott, 3 P & F Radio Reg. 259 (1946).
245. United Broadcasting Co., 10 F.C.C. 515 (1945).
246. 1 P & F Radio Reg. 91:201 (1949).

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generally with the licensee's overall duty of fairness in treating controversial issues. It set forth the licensee's twofold obligation: first, to speak out on controversial public issues, although not necessarily in the format of station editorials; and, second, an affirmative obligation to ascertain and seek out all responsible viewpoints on controversial issues and to afford the opportunity for such contrasting viewpoints to be heard.[247] It is this twofold obligation which constitutes the modern fairness doctrine.

The 1949 *Editorializing Report* remains the basic expression of policy for the fairness doctrine. Congress recognized the fairness doctrine in its 1959 amendments to section 315. Amended section 315, after establishing the exemption for bona fide news broadcasts, provides:

> 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.[248]

Although the Commission has read the above provision as a ratification of the fairness doctrine, it seems doubtful that Congress, in amending section 315, actually intended to give specific statutory sanction to the Commission's fairness doctrine. More probably, Congress intended neither approval nor disapproval of it, but merely intended to ensure that section 315 would not interfere with it. There was no other consideration of the fairness doctrine as such and no consideration was given to the statutory authority for the doctrine as then applied.[249]

In recent years the Commission has attempted to furnish some more specific guidance in its *Fairness Primer*, a collection of ad hoc rulings implementing the fairness doctrine.[250] The Commission's ad hoc rulings are at best an uncertain guideline. In order to set forth the basic theory of the fairness doctrine and to distinguish it from section 315, a few generalizations may be made.

Unlike section 315, the fairness doctrine does not necessarily require a station to grant *equal* time to all opposing viewpoints. A ten-minute commentary by the station on one side of a con-

247. *Id.* at 91:206.
248. 48 Stat. 1088 (1934), *as amended*, 47 U.S.C. § 315(a)4 (1964).
249. For a brief discussion of the question see Dean, *Political Broadcasting: The Communications Act of 1934 Reviewed*, 20 FED. COMM. B.J. 16, 29-31 (1966).
250. *Fairness Doctrine*, 2 P & F RADIO REG. 2d 1901 (1964).

versial school bond issue, for example, does not necessarily ...are that the station grant ten minutes to all other sides. ... flows from the fact that the obligation is to ensure *fair* ...ment, not necessarily precisely equal time, to the various ...s. Moreover, unlike section 315, the fairness doctrine does ...t necessarily require the station to offer time to any outside ...son, group, or agency. If the station's programming is such ...t fairness is accorded to all sides *over a reasonable period of* ...e, then the station's obligations are at least theoretically met.

An exception to the above is the so-called "personal attack" ...le which requires that, where a station makes a personal at...k on a specific individual or group, it must provide the indi...dual attacked with a script or tape of the broadcast prior to ...r at the time of the broadcast and with a specific offer of time to reply.[251] This rule has now been codified into specific regu...lations which have extended it not only to require opportunity to reply to personal attacks but also to require the station to offer rebuttal time in the case of editorial endorsements of or opposition to qualified political candidates.[252] These rules reflect an evolving crystallization, if not rigidification, of the fairness doctrine from a general obligation of responsibility into fixed regulations prescribing specific licensee duties. The wisdom of such regulatory policy is certainly open to question.

The Commission's enforcement of the fairness doctrine is substantially similar to its enforcement of section 315, except that it is possibly even more informal. Upon complaint that a licensee has not accorded fair coverage to a controversial public issue, the Commission forwards the complaint to the licensee and demands a reply. If the reply does not satisfy the Commission, it informs the station of the error of its ways, indicating perhaps that the matter may be considered at renewal time.[253] In addition, it may demand from the licensee a statement of how it will comply with the fairness doctrine in the future.[254]

A notification to the applicant that the matter will be con-

251. Billings Broadcasting Co., 23 P & F RADIO REG. 951 (1962); Clayton W. Mapoles, 23 P & F RADIO REG. 586 (1962); Times-Mirror Broadcasting Co., 24 P & F RADIO REG. 404, 407 (1962).

252. *Fairness Doctrine Rules*, 10 P & F RADIO REG. 2d 1901, 1903 (1967). Appeals challenging the rules have been taken in the Second and Seventh Circuit Courts of Appeals. BROADCASTING MAGAZINE, July 31, 1967, at 23-24.

253. See 1965 FCC ANN. REP. 89-92.

254. E.g., Letters to Taft Broadcasting Co. and WBRE-TV, Public Notice-G No. 73,787 (Sept. 24, 1965); New Broadcasting Co. (WLIB), 6 P & F RADIO REG. 258 (1950).

sidered at renewal time is precisely the kind of "lifted eyebrow" technique which the Commission has successfully employed in other aspects of broadcast regulation. Generally, it is not so much the possible loss of its license as the possibility of being forced through the ordeal of a hearing which makes the informal letter-telegram procedure effective. To reinforce this informal procedure, the Commission has in one recent case issued a one-year renewal where a station's presentation of controversial public issues had been of questionable fairness.[255] Finally, if the fairness doctrine has been incorporated into section 315, then enforcement methods such as cease and desist orders and fines should be at least theoretically available. The Commission has not as yet resorted to these methods although it may well do so in the future, particularly in enforcing its new personal attack regulations.[256]

2. *First Amendment Implications*

The operation of the equal time rule imposes a significant restraint on broadcasters' discretion and responsibility in choice of programming. Its effects are to compel the licensee to offer time for political programs which, if left to his own discretion, he might not otherwise broadcast, and to compel the licensee to refuse to present programs which he would otherwise broadcast in order to avoid the burden of complying or the risk of not complying with this requirement. The latter restraint is probably the more significant because it is here that the requirement for equal time to all candidates, including minority and fringe candidates, has its most immediate impact upon political broadcasting. CBS President Frank Stanton, one of the most persistent and vocal critics of section 315, has contended that

> The inescapable conclusion is that Section 315 does far more harm than good, and that its result is neither to increase diversity of opinion nor expand free speech but rather as a practical matter of practical necessity is compelled suppression and blackout. This compulsion is as simple as it is obvious: Time and time again radio and television have been unable to present candidates to the American people because broadcasters have known that under Section 315 a half hour to a Democratic or

255. Lamar Life Broadcasting Co., 5 P & F RADIO REG. 2d 205 (1965).

256. A major purpose for the Commission's recent codification of the "personal attack" rule is to crystallize its policy sufficiently that it can be enforced by specific sanction such as fine. *See Fairness Doctrine Rules*, 10 P & F RADIO REG. 2d 1901, 1904 (1967).

But so long as licenses are given by an arm of Congress, there is a danger -- esp if Congress is consistently dom. by one party.

> Republican candidate can mean a total of 4, 8 or 16 half hours to obscure and unknown opponents. So when a half hour has had to be multiplied to 8 hours, we have had to forego the half hour, the result has been less, not more, broadcasting in the public interest.[257]

Congress recognized the significant restraint imposed on broadcasters by the equal time requirements in 1960 when it suspended section 315 for presidential and vice-presidential candidates.[258]

As in the case of the equal time requirements of section 315, it seems undeniable that the fairness doctrine acts as a significant restraint on the broadcaster's choice of programming and represents a substantial intrusion by the Commission into the area of program selection. While the nature of the restraints imposed is basically similar for both the equal time requirements and the fairness doctrine, there are important substantive differences.

First, the equal time requirement focuses on personalities rather than directly on program content, though it may indirectly affect program content to some extent. There is no requirement, for example, that the Commission examine the content of a particular broadcast to determine whether its standards are met in the case of equal time. On the other hand, the fairness doctrine is predicated on just such an examination, evaluation, and judgment by the Commission of specific program content. The fairness doctrine cannot be applied without the Commission making a determination that the content of the program is of such nature as in its judgment requires opportunity for presentation of opposing views. This aspect of the fairness doctrine is crucial from a first amendment viewpoint since the restraint on free speech grows directly out of an examination and judgment by the Commission of program content.

Second, unlike the equal time requirement, which has a narrow scope and correspondingly imposes only a limited degree of restraint, the scope of the general fairness doctrine is sweepingly broad. While equal time is limited to a relatively short period prior to elections, the fairness doctrine is always applicable. While equal time affects only programs involving a legally qualified candidate for public office, the fairness doctrine

257. *Hearings on Political Broadcasting Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 97 (1959) (statement of Frank Stanton, President of CBS).

258. Pub. L. No. 86-677, 74 Stat. 554 (1960).

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affects all programming which involves controversial public issues. Thus the effect upon program choice is infinitely greater in the case of the fairness doctrine. A broadcaster, faced with the possibility that he may have to give time to candidates *B*, *C*, and *D* if he makes time available to candidate *A* may well forego giving time to *A*. The program choice foreclosed is limited. Compare, however, the alternatives faced by a broadcaster who is considering a public discussion program, a commentary series, or editorials. He is met at the outset with the possibility that if he touches on any significant public issue, even if *he* does not judge it to be controversial, it may give rise to an obligation to provide time to opposing viewpoints. The problem will not arise just once or twice, but may arise on hundreds of occasions. Virtually every topic which might be worth discussing or commenting upon is likely to be considered by the Commission to be a controversial issue of public importance which obligates him to seek out and provide an opportunity for the expression of opposing viewpoints. The most conscientious broadcaster may well have very substantial qualms about presenting controversial public issues when he is required to be fair by someone else's standards, particularly if the someone else happens to be the government.

The almost infinite reach of the fairness doctrine is most graphically illustrated by the Commission's recent ruling that a station which presents cigarette advertising "has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health."[259] This is the first time the fairness doctrine has been held applicable to routine advertising. To say the least, such an application of the doctrine raises a question whether there is any kind of broadcast message

259. Letter to WCBS-TV, 9 P & F RADIO REG. 2d 1423, 1424, *petition for reconsideration denied*, 11 P & F RADIO REG. 2d 1921 (1967). The ruling was issued on complaint. An appeal has been filed by the NAB on behalf of the broadcasting industry (and, by reasonable assumption, on behalf of the cigarette industry) in the Fourth Circuit challenging the ruling on essentially the following grounds: (1) it conflicts with the Cigarette Labeling and Advertising Act of 1965, (2) it exceeds the Commission's statutory authority, (3) it violates the first and fifth amendments, and (4) it is procedurally defective. These are the same grounds urged before the Commission in seeking reconsideration. *See* BROADCASTING MAGAZINE, Sept. 18, 1967, at 34-38. Complainant, a lawyer in the vein of Ralph Nader, has also filed an appeal in the District of Columbia Circuit claiming that the ruling does not go far enough. *Id.* The latter appeal is an obvious race-to-the-courthouse attempt to get review in a sympathetic court.

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which, in any context, touches even tangentially on a controversial issue to which the fairness doctrine does not apply. For example, does the advertising of automobiles give rise to an obligation to permit Ralph Nader to present his views on automotive safety?[260] The Commission rejected such implications of its ruling as simply a "parade of horribles" and emphasized that here the decisive criteria were the "governmental and private reports and congressional action" stressing the danger of smoking and urging persons to cease.[261] But the distinction seems paper-thin, particularly since nothing in the way the fairness doctrine has been applied in other contexts suggests that the presence or absence of governmental action or concern is of decisive importance. And even if it is, the ruling still has potentially limitless ramifications considering the range of issues with which the government is concerned. For example, does the advertising of vitamin supplements require a station to give air time to Dr. Goddard to present the FDA's views[262] on the questionable need for such supplements?

Perhaps the most startling thing about the cigarette ruling is that it requires *continuing* presentations by the station of the viewpoint that smoking is a health hazard because cigarette commercials are presented on a continuing basis. The Commission made clear that the station must allocate sufficient time to the opposing viewpoint each week. Moreover, the obligation to present the opposing view extends to giving time on the air without charge if that is necessary to achieve the requisite fairness. Indeed, it is evident from the Commission's letter-opinion that it contemplated that the obligation would be met at least partially by public service announcements of the American Cancer Society or HEW in this field.[263] Thus the impact which can logically be expected from this ruling is a continuing one.

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However, notwithstanding the above objections, it is possible that on the present state of the law the ruling is immune from first amendment attack insofar as it involves advertising, although arguably this should make no difference here where the Commission is applying a rule applicable generally to the dissemination of ideas regardless of whether the particular ideas

260. *See* R. NADER, UNSAFE AT ANY SPEED (1965).
261. 11 P & F RADIO REG. 2d at 1929-30 (1967).
262. *See, e.g.*, "Health and the Consumer," Address by Goddard, Annual Meeting of the Food Industries of the Nutrition Foundation, June 8, 1967.
263. 9 P & F RADIO REG. 2d 1423 (June 2, 1967).

happen to be embodied in an advertising message.[263a] The restraining effect of the fairness doctrine is compounded for the broadcaster by its vague and indefinite standards. The vagueness and uncertainty are inherent first in the definition of what constitutes a controversial public issue giving rise to the obligation to be fair. The cigarette advertising ruling is an illustration of the potential sweeping inclusiveness of this element. There is also uncertainty as to what fairness requires the licensee to do in any particular circumstances. Uncertainty as to the elements of the doctrine and what it requires must inevitably cause a greater restraint on broadcaster discretion than would otherwise be the case. Thus the broadcaster may forego a wider range of programming in order to guard against the possibility that the fairness doctrine might apply, or he may broadcast programs expressing viewpoints opposing those of an original broadcast where it may not actually be necessary under a reasonable interpretation of the doctrine. The fairness doctrine is likely to have a particularly dampening effect on the quality of station advocacy such as editorializing. Advocacy by its nature seldom involves a complete and unbiased exposure of all contrasting views by the advocate. Were every advocate required to give such a full and unbiased treatment of all views, few would find advocacy and controversy worth the effort.

Under these circumstances, it is not surprising that many broadcasters forego controversial public issue programming, being content to play it safe with planned, noncontroversial subjects of the "mother-and-home" variety. But even this alternative may not avoid trouble since the Commission takes the position that the presentation of controversial public issues programming is an affirmative duty of every licensee.[264]

A distinction somewhat similar to that between equal time and the fairness doctrine can arguably be made between the fairness doctrine as it is applied to controversial public issues and the so-called personal attack principle,[265] which has developed out of the fairness doctrine. The personal attack principle represents a considerable extension of the fairness doctrine as traditionally applied insofar as it fixes an absolute duty to offer

263a. *See* note 162 and accompanying text *supra*. The Commission only noted in passing the question of whether advertising is protected speech, but did not rule that it is not protected. 11 P & F RADIO REG. 2d at 1008 n.4 (1967).

264. *Editorializing by Licensees*, 1 P & F RADIO REG. 91:201, 91:206 (1949).

265. *See* text accompanying notes 251-52 *supra*.

to the person attacked an opportunity to reply. It is in this respect basically similar to the equal time requirements of section 315, except that it is not confined to political candidates. While the personal attack principle is an extended application of the fairness doctrine, it does not represent quite the same constitutional problems. The vagaries and sweeping scope of the fairness doctrine are not inherent in the personal attack principle. Correspondingly, the compulsion to present ideas and speech which the broadcaster would otherwise not present is far less sweeping, and the inhibition on ideas and speech is far less broad where the broadcaster is required to afford the right to reply only to one who is personally attacked than where the broadcaster is required to give a fair presentation of controversial public issues. Moreover, a case can be made for the right to reply to a personal attack, at least where the attack is libelous, near-libelous, or arguably libelous. Professor Chafee persuasively argued that in such cases a legislative requirement imposing a duty to permit a reply to such statements is preferable to punishing or inhibiting defamation through libel and slander suits, and probably no more unconstitutional.[266] It should be emphasized, however, that this argument does not single out radio and television stations: it applies equally to newspapers and other mass communication media.[267] Indeed, one state has a statute imposing such a duty on newspapers.[268] However, even this limited right to reply to defamatory statements, whether applied to broadcasters or newspapers, seems to be of questionable wisdom and even more doubtful constitutionality. Moreover, even if its constitutionality were recognized, it would not justify either the fairness doctrine as it is generally applied or the rule which requires stations to afford an opportunity to reply to editorial endorsement of or opposition to political candidates. In the case of the personal attack principle, justification and constitutional sanction might be found in a long tradition of remedying defamation, antedating the first amendment. No such tradition affords a remedy in the case of one who merely takes a stand on controversial public issues. No such tradition compels one always to give all sides of the story.

266. 1 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS MEDIA 172, 184-90 (Comm'n on Freedom of the Press ed. 1947). Professor Chafee points out, however, that there are some very serious difficulties with and objections to a legislative command to afford a right of reply. *Id.* at 180-84.

267. *Id.* at 184-90.

268. NEV. REV. STAT. ch. 200.570 (1965).

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The basic rationalization for the Commission's fairness doctrine, as for its general standards for presenting "balanced" programming, is that the licensee, bound by statutory policy to serve the public interest, must fairly present balanced and diversified programming so as to meet the needs and interests of all of the public. This rationalization rests on the assumption that, because the licensee has something of a monopoly in regard to access to and use of broadcast facilities, it is necessary and justifiable to compensate for this monopoly by requiring that he present all types of programming and all points of view which, by hypothesis, would be presented if there were no technological barriers to entry into broadcasting.

On this assumption, the Commission generally refuses to acknowledge any of the significant first amendment implications posed by its regulation of programming. Perhaps the most succinct single statement of its view is set forth in its 1949 *Editorializing Report*:[269]

> We believe . . . that a requirement that broadcast licensees utilize their franchises in a manner in which the listening public may be assured of hearing varying opinions on the paramount issues facing the American people is within both the spirit and letter of the First Amendment. [T]he Supreme Court of the United States . . . pointed [this] out in the Associated Press monopoly case. (*Associated Press v. United States*, 326 U.S. 1, 20).
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> We fully recognize that freedom of the radio is included among the freedoms protected against governmental abridgment by the First Amendment. . . . But this does not mean that the freedom of the people as a whole to enjoy the maximum possible utilization of this medium of mass communication may be subordinated to the freedom of any single person to exploit the medium for his own private interest.

Despite this army of high-sounding words and phrases, the basic premise on which the Commission justifies its intrusion into the program field is simply too tenuous to sustain such potentially far-reaching powers. Notwithstanding the Commission's rationalization in terms of the right of the public to receive diversified and balanced presentation of public issues, it has refused to consider whether or not, on a given issue, the public has received such a balanced presentation from all the various public media taken as a whole. It has ruled that each licensee must present all sides of a public issue irrespective of what other media and other radio and television stations pre-

269. *Editorializing by Licensees*, 1 P & F RADIO REG. 91:201, 91:210-11 (1949).

sent.[270] If the right of the public to receive diverse and balanced viewpoints is the decisive desideratum, it is curious, to say the least, that the Commission purposely insists on ignoring the question of whether the public is in fact receiving diverse and balanced presentations from existing communications media as a whole.

Moreover, the Commission's concern over licensees' use of public facilities for private purposes at the expense of the public is something of a red herring. The real issue is not whether the licensee has a right to exploit his license or to abuse its privileges, for example, by using the station to broadcast his own private views or to promote his own biases or interests, ignoring all public interests and needs. Those who oppose the Commission's fairness doctrine are not arguing for the rights of the licensee to be unfair or to use licensed facilitiees for a purely personal cause or aim. The question is who should have the responsibility; whose concept of fairness should be applied? If it is "unfair" for an advocate to put forward his own views without giving full and unbiased exposure to other opposing views, one may wonder whether any true advocacy is or can ever be "fair."

Finally, the Commission's reliance on the *AP* antitrust case is misplaced. As previously discussed,[271] the first amendment does not proscribe general economic and social regulation of the type involved in the *AP* antitrust case and the *AP* labor law case.[272] There is, however, a marked difference between regulation of the economic structure of a communications industry which is designed to protect the basic minimum conditions in which free, diversified speech may develop and regulation which attempts directly to ensure such diversified speech by examining the speech itself to see if it meets the tests of balance, fairness, and diversity. It seems more than doubtful that Justice Black, who wrote the majority opinion in the *AP* antitrust case, or indeed any of the justices who joined him, supposed that by affirming the application of the Sherman Act to newspapers, he was affirming the power of the government to pass upon the balance, diversity, or fairness of newspapers, even those enjoying a natural monopoly position. The *NBC* case is no more dispositive than the *AP* case. Despite the Court's rather sweeping opinion which suggests sanction for all manner of Commission

270. *See* Jorgensen, Schwartz & Woods, *Programming Diversity in Proposals for New Broadcast Licenses*, 32 GEO. WASH. L. REV. 769 (1964).
271. *See* Part I *supra*.
272. Associated Press v. NLRB, 301 U.S. 103 (1937).

regulation in the public interest, the issue before the Court was the Commission's power to adopt essentially economic regulations similar in substance and purpose to the antitrust law sustained in the *AP* antitrust case. In both cases the difference between such broad socio-economic regulation and direct regulation of programming is obvious. To pass from the former to the latter without distinction is to pass beyond the elusive but nevertheless important line which separates speech in a free, open society from speech controlled by the government in the public interest—the earmark of a closed society.[273]

3. The Red Lion Case

Although a number of court decisions previously discussed[274] have upheld the constitutionality of various aspects of Commission program regulation, some in rather sweeping terms, the constitutionality of the Commission's fairness doctrine went unchallenged in the courts until the recent decision in *Red Lion Broadcasting Company v. FCC*[275] involving personal attacks by a licensee.

Following the 1964 presidential elections petitioner-licensee broadcast a program which included a discussion of the election and a book by a Mr. Cook about the Republican campaign. The personal attack consisted of a charge that Cook, a newspaperman, had been fired for having made a false charge against an unnamed New York City official. Contrary to the Commission's personal attack policy, the licensee failed to notify Cook of

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273. The phrases "open society" and "closed society" are borrowed from K. POPPER, THE OPEN SOCIETY AND ITS ENEMIES (4th ed. 1963).

To some the association of the Commission's regulation of radio and television programming with the attitude of the closed society will undoubtedly seem hyperbole. Some—those believing in the good intentions and motivations of the Commission in this concededly difficult and delicate area—will perhaps even treat this association with derision. There should not be any doubt that the Commission has acted on the highest of motivations and good intentions and it has not been altogether insensitive, at least as to some of the more obvious constitutional problems in this area. The fact remains, however, that the first amendment was designed to protect against well-intentioned, well-motivated interference with free speech as well as that which stems from a less well-intentioned social philosophy.

274. *See, e.g.*, Johnston Broadcasting Co. v. FCC, 175 F.2d 351 (D.C. Cir. 1949); Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933); KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931); text accompanying notes 115-18, 133-35, 208-11 *supra*.

275. 10 P & F RADIO REG. 2d 2001 (D.C. Cir.), *petition for cert. filed*, 36 U.S.L.W. 3100 (U.S. Sept. 11, 1967).

the attack or to furnish him with a transcript of the program and refused Cook's request for free time to respond to the attack. Following receipt of the complaint from Cook, the Commission issued a letter to the licensee ruling that it had violated the fairness doctrine and requested it to advise the Commission of its plans to comply with the 'fairness doctrine'."[276] In response to the licensee's request for a ruling, the Commission affirmed the constitutionality of the fairness doctrine as it was applied to this situation.

On appeal the licensee challenged the constitutionality of the fairness doctrine on four grounds: (1) section 315 of the Act, the chief statutory authority for the fairness doctrine, constitutes an unconstitutional delegation of legislative power; (2) the fairness doctrine is unconstitutionally vague; (3) the fairness doctrine infringes upon the ninth and tenth amendments insofar as it violates the licensee's right to engage in political activity and insofar as it infringes upon powers reserved to the people; and (4) the fairness doctrine violates the first amendment.[277] Each ground was rejected by the court.

As to the first ground, the question of delegation in itself adds virtually nothing to the arguments that the fairness doctrine is unconstitutionally vague and unconstitutionally restrictive of free speech. If the latter arguments can be satisfactorily resolved there seems no tenable basis for attacking the delegation itself and, of course, if either of the latter arguments is upheld, the delegation question loses any significance.[278] As to the argument based on the ninth and tenth amendments, it is

276. *Id.* at 2006-08.

277. *Id.* at 2004.

278. Setting aside the issue of free speech, or the issue of vagueness such as would offend due process, the question of the constitutionality of the delegation seems fully disposed of by a line of authority too long to recite in its entirety. The standards of § 315 which were challenged,—"reasonable opportunity," "sufficient time for discussion," "controversial issues of public importance," and others, at 2014—may indeed be broad and uncertain, but *considered under the issue of delegability* they are quite obviously no broader or more uncertain than standards which have been repeatedly upheld. *See, e.g.*, Lichter v. United States, 334 U.S. 742 (1948) (authorizing recovery of "excessive profits" under the Renegotiation Act); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933) (regulation of licenses under the standard of "public interest, convenience, and necessity" under the Radio Act of 1927); Yakus v. United States, 321 U.S. 414, 423-5 (1944) (administrator under Emergency Price Control Act of 1942 given power to fix prices which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act").

difficult to know what to make of the licensee's contentions. Reliance on the ninth and tenth amendments was evidently predicated on Justice Goldberg's concurring opinion in *Griswold v. Connecticut*,[279] and the theory that the ninth and tenth amendments constitute some kind of residuum of protected rights not elsewhere enumerated in the Constitution. The court's rejection of this argument in *Red Lion* seems undeniably correct. There is neither historical authority nor solid constitutional precedent for the proposition that the ninth and tenth amendments embody any specific constitutional rights. While, as Justice Goldberg pointed out, the ninth and tenth amendments indicate that the first eight amendments are not preclusive of other fundamental rights not enumerated, it is impossible to find in them any hint of what such other fundamental rights might be. Moreover, Justice Goldberg's use of the ninth and tenth amendments was dubious enough when applied in *Griswold* as a basis for "filling in" the interstices between specific constitutional guarantees. It would be even more dubious to apply the two amendments to the *Red Lion* situation where other *specific* constitutional provisions are directly in issue. Such an interpretation of the ninth and tenth amendments would cause the entire Bill of Rights to be all but swallowed up in these two virtually forgotten amendments.

The licensee's vagueness argument appears on its face to be somewhat more persuasive. Viewing the fairness doctrine in general, it can hardly be denied that it is vague and uncertain in its scope and application. However, the vagueness argument seems misdirected here.

In the sense in which it is most widely understood and applied, the void-for-vagueness doctrine is based on the need to give fair notice to the individual as to what is unlawful. The evils sought to be eliminated are twofold: the subjection of a person to threat of punishment when he cannot know that his conduct is unlawful,[280] and the restraint of a person from engaging in protected conduct because of the threat that the broad and vague reach of the statute may proscribe such conduct.[281] In addition to the notice aspect, the vagueness doctrine has been

279. 381 U.S. 479, 486 (1965).

280. *See, e.g.*, Lanzetta v. New Jersey, 306 U.S. 451 (1939); Connally v. General Constr. Co., 269 U.S. 385 (1926).

281. *See, e.g.*, Herndon v. Lowry, 301 U.S. 242 (1937). On the distinction between the two evils inherent in "fair notice" cases, see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 76 (1960).

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applied as a limitation on the discretionary powers which may be given to a lower court, an administrative agency, or official.[282] In this latter aspect the doctrine assumes a somewhat broader scope and limits grants of overly broad discretion to trial judges and agencies to impose restraints without clear standards by which the lawfulness of their decisions or possible intrusions into areas of protected conduct may be tested.[283]

The court's opinion in *Red Lion* does not analyze the differing applications of the vagueness doctrine. It appears to have regarded the issue as solely a question of fair notice to the individual.[284] But, despite this blurring of important distinctions, the court's rejection of the vagueness doctrine may be justified since none of the evils which the doctrine is intended to correct were present in this case. While absence of fair notice and the evil of overbroadness may well be present in the fairness doctrine generally, there is no problem of fair notice as to what constitutes a controversial public issue in the personal attack type of case. It would strain credulity for the licensee to assert that it could not determine with fair certainty whether it was engaged in a personal attack. Neither is the standard overbroad in that it gives too much discretion to the agency; the standard of "personal attack" is no more elusive or vague for the agency to apply than it is for the licensee to understand. The same is true of the particular obligations imposed on the licensee here. Unlike the case of the general fairness doctrine, as applied to controversial issues, the personal attack principle is quite definite in the obligations which it imposes on licensees and the standard to be enforced by the agency. Like the equal time requirement of section 315, the personal attack principle requires

282. *See* Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966). *See also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Hague v. C.I.O., 307 U.S. 496 (1939). For a persuasive and well-documented exposition of this and related aspects of the vagueness doctrine see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

283. Obviously at some point as the vagueness doctrine is applied to strike down broad authorizations by the legislatures to the courts or agencies, it becomes almost impossible to distinguish the vagueness doctrine from the substantive rights, such as free speech, which are ultimately being protected. However, to the extent the vagueness doctrine has any independent significance, such a distinction must be recognized. The court in *Red Lion* appears not to have done so since its opinion tends to fuse the vagueness problem with the free speech question itself.

284. The licensee relied on Connally v. General Constr. Co., 269 U.S. 385 (1926), a "notice case," and the court dealt with the argument essentially on that basis. 10 P & F RADIO REG. 2d at 2017-20 (1967).

in all cases a specific offer of rebuttal time. The licensee's duty and the court's mandate under this requirement seem sufficiently clear.

There remains, however, the first amendment issue, and here the court's opinion is clearly less satisfying. Predictably, the Commission in its argument pointed out the public nature of the frequencies, the broadcaster's fiduciary responsibility to present all viewpoints, its duty to serve the public interest and recited the usual cases. In substance the court approved these arguments in rejecting the first amendment challenge.[285]

However, the court did not rest its decision simply on the licensee's duties and public responsibilities, but went on to conclude that the application of the personal attack principle, or the fairness doctrine in general, did not in fact restrain the licensee's freedom of speech. At one place the court noted that

> petitioners are not prohibited from broadcasting any program which petitioners think suitable . . . . [they] are not furnished with a mandatory program format, nor does the Doctrine define which, if any, controversial issues are to be the subject of broadcasting.[286]

Elsewhere it stated:

> The petitioners are in no manner exposed to or subject to any prior censorship of their broadcasts. Their latitude in the selection of program material, program substance, program format, and identity of program format, and identity of program personnel is bounded only by their own determination of the public interest appeal of their end product.[287]

In response to the assertion that a fear of punishment may act as a restraint upon free speech the court stated:

> The remedial provisions of Title 47 U.S.C., the Administrative Procedure Act, and the accessibility of the courts guarantee petitioners full redress from illegal, arbitrary, or capricious conduct on the part of the Commission.[288]

This reasoning is a mixture of naiveté, incorrect facts, and faulty legal analysis. The court's assumption that the broadcaster has complete discretion in selection of programming is simply incorrect. Apart from the restrictions discussed in some detail previously,[289] there is the Commission's fairness doctrine itself, one command of which is that the licensee must present controversial public issues programming as part of its duty to

285. *Id.* at 2022-25; *see also* 2018-20.
286. *Id.* at 2018.
287. *Id.* at 2024.
288. *Id.* at 2025.
289. See discussion, *supra*, Part II: A, B, and C.

serve the public interest.[290] The court's evident conclusion that because there is no direct control and no prior restraint of programming, there is no restraint resulting from the Commission's fairness doctrine is unrealistic and legally erroneous. To the extent the free exercise of speech is conditioned upon the speaker's doing something which he would not otherwise do because of the threat of incurring some penalty, there is a clear restraint. The court's conclusion to the contrary and its apparent insistence on some form of prior restraint is directly contrary to the constitutional principles settled more than thirty-five years ago in *Near v. Minnesota*.[291] Finally, the court's conclusion that the alleged restraint resulting from Commission sanctions and from the fear of punishment is somehow dissolved by the availability of judicial review and adequate safeguards against arbitrary Commission action is naive. Although the availability of review and the applicability of standards may be relevant in deciding whether a restraint is a permissible one, the restraint is no less real by reason of its being reviewable, and no less substantial because it is not arbitrarily imposed. A court cannot avoid its responsibility of deciding whether the action of the agency, including agency sanctions or the threat of such sanctions, constitutes an impermissible restraint on speech merely because it can review the agency's actions. Obviously once the review is made, a decision must be made at least with respect to the agency's action in the case before it. Undoubtedly the court did not mean to suggest that there could never be an impermissible restraint merely because of the availability of judicial review. Yet it seems to have used the availability of review as an excuse for refusing to consider the permissible extent of the restraint imposed by the application of the Commission's fairness doctrine.

The *Red Lion* opinion is simply inadequate. One might argue that whether the general fairness doctrine is valid or not, the personal attack principle is sufficiently different in purpose, scope, and effect to be upheld.[292] Had the court confined itself to the personal attack rules and attempted to so limit the scope of its holding, its decision might be at least defensible, even if questionable. Unfortunately, the court recognized no distinction between the broad scope of the fairness doctrine and the more limited personal attack rule. On the contrary, the court couched

290. Editorializing by Licensees, 1 P & F RADIO REG. 91:201, 206 (1949).
291. 283 U.S. 697 (1931).
292. See text accompanying notes 265-68 *supra*.

its opinion in the broadest terms, reaching conclusions which are not merely unconvincing but plainly erroneous in their generality. The larger questions were passed over too easily with irrelevancies and facile reasoning.

Most notably the court's opinion makes no effort to penetrate the basic assumption on which the Commission's arguments and conclusions rest and which is central to the entire first amendment issue: the assumption that radio communication is unique and, being unique, is subject to interference with freedom of speech that the court would never tolerate if applied to other communications media.

III. TOWARDS A GENERAL RATIONALE FOR REGULATION: SENSE AND NONSENSE ABOUT THE NATURE OF RADIO AND TELEVISION

The Commission, as has been seen, has little if any well defined policy or philosophy of program regulation as such. Indeed, it has persistently refused to acknowledge that it "regulates" programming or that its actions are in any significant way a restraint of or an interference with free speech. About all one can say is that the Commission requires that: (a) a broadcaster must not permit his station to be used for broadcasting indecent, defamatory, or otherwise unlawful program material; (b) a broadcaster must at least take some steps to ascertain local programming interests and to meet such interests in a responsible manner; (c) a broadcaster must present "balanced" programming in accordance with certain general standards (set by the Commission); and (d) a broadcaster must be "fair" in presenting controversial issues or political broadcasts. These are standards which in themselves may seem difficult to oppose. Indeed, to take issue with them seems almost like attacking the Boy Scout Oath. But the issue here is not whether these standards are acceptable standards of conduct. The question is whether or not the FCC has any right to impose such standards.

Ultimately, the justification advanced for the Commission's vaguely conceived and dimly illumined policies toward nontechnical regulation, particularly in the area of programming, centers around the basic assumption that, whatever may be the application of the first amendment to common forms of expression or to other mass communications media, the rules are different for radio and television because they are unique. There are varying explanations given by the courts, by the Commission, and by critical observers as to why radio and television are

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unique. The principal explanations can be fairly summarized into four basic arguments:[293] (1) unlike other communications media, private or public, the means of communications which radio and television use are publicly owned;[294] (2) radio and television communications are uniquely affected with the public interest, and the use of airways is a *privilege* to be granted to broadcasters only so long as they continue to serve the public;[295] (3) radio and television are uniquely influential and powerful as communications media;[296] and (4) unlike other communications media, private or public, there are physical and technical limitations imposed on access to and the use of the radio and television media.[297] Without question each of these notions contains some germ of the truth. The problem is that they have become more than just arguments to be analyzed and critically evaluated. They have become ideologies which have taken the place of thoughtful reasoning. Comment about the "unique" nature of broadcasting has become so far removed from practical considerations that it has become a kind of modern-day analogue to the medieval discourses on the number of angels that can stand on the head of a pin.

One of the most persistent of modern shibboleths used in support of virtually every form of FCC regulation has been the proposition that the airways and broadcast spectrum are owned by the public, that is, they are "public domain" administered in trust for the public by the FCC. According to this theory, the broadcast licensee is permitted to use this public domain only so long as it serves the public interest, as determined by the FCC.[298] Because of this public ownership, the Commission has a broad regulatory authority and even a duty to oversee all aspects of the licensee's use of such public property. According to

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293. For a good, brief discussion of the principal arguments, see Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 GEO. WASH. L. REV. 719, 757-66 (1964). *See also* Pierson, *The Need for Modification of Section 326*, 18 FED. COM. B.J. 15, 25-26 (1963); Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 713 (1964).

294. *See, e.g.*, H.R. REP. No. 281, 88th Cong., 1st Sess. 205-07 (1963).

295. *See* Television Corp. v. FCC, 294 F.2d 730, 733-34 (D.C. Cir. 1961); S. REP. No. 994, 87th Cong., 1st Sess., pt. 6, 1 (1962).

296. *See, e.g., Hearings on S. 1898 Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 18 (1960).

297. *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190, 215-16 (1943); KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670, 672 (D.C. Cir. 1931).

298. H.R. REP. No. 281, 88th Cong., 1st Sess. 205-07 (1963).

proponents of this argument, this necessarily includes overseeing the station's program operations.

As is true of so many of the concepts which have become encrusted on the law, there is a superficial appeal in the public domain idea which makes it hard to dispel, even in the minds of those whom one would not assume disposed to the type of constitutional intrusions which it is used to support.[299] Little effort has ever been made to look beneath the superficiality of the concept of public ownership of the broadcast spectrum to determine whether it has any practical logic or meaning. Logically the concept is meaningless. To say that the airways or spectrum can be owned by anyone is simply to indulge in fantasy. Surely no one seriously supposes that the airways are a thing of nature which can be possessed, occcupied, or used in any normal sense of the word. In actuality, "airways" is merely 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. To give this construct an independent nature and then attempt to justify the regulation itself in those terms is entirely circular. It is like saying that the Commission owns the frequencies because it has the power to regulate their use, and that it has the power to regulate their use because it owns them.

One may perhaps speak with some sense about public ownership of air rights or space through which electrical impulses are transmitted, but this is quite different. Moreover, even this concept will not support any claim for rightful regulation. All such air space is not publicly owned. And even if it were all publicly owned, this would not support regulation of broadcast communications or speech as distinguished from any other

299. Justice Douglas, whom few would accuse of being an apologist for regulation of free speech under any pretext, appears to have accepted the public domain theory in conjunction with the "spectrum scarcity" argument, as justifying different rules for radio and television:

> We have, of course, a system of licensing for radio and television stations. But the problem there is quite different. The channels all lie in the public domain, the air space above the earth being under the exclusive control of Congress. The channels are restricted in number. It is necessary to regulate all if interference is to be kept at a minimum and service is to be efficient. What the government owns or controls in the airways it can regulate as it sees fit.

W. DOUGLAS, RIGHT OF THE PEOPLE 76-77 (1958).

A more extreme statement of the case for plenary regulation by the FCC could scarcely have been made by the FCC itself. It should be emphasized, however, that the loose, even offhand, observations in a book are not the same as a carefully considered judicial decision.

l of communication or speech. If, for example, this hypo-tical public ownership of air space is a basis for regulating dcast speech, is it not also a basis for regulating virtually types of speech that similarly use air space—in short, all ms of oral communications from loudspeaker announcements backyard gossip? This is an absurd proposition, but how uld the distinguishing line between broadcasting and other ms of speech be drawn? Clearly reliance on the ownership ncept itself provides no basis for such a distinction.

In any event the public ownership concept is plainly insuffi-nt justification for government interference with free speech nder well-established constitutional doctrine. The Supreme Court has made it emphatically clear, for example, that public ownership of postal facilities does not justify censorship of the ontent of private correspondence or other printed matter sent through the mail.[300] Nor does public ownership of parks, treets, or other property justify otherwise unconstitutional re-straints on free speech.[301] Public ownership of the airways, whatever it may mean, is surely no exception.

In substance, the public ownership argument seems really to be a paraphrase of a widely held, seldom well-stated assump-tion that because broadcasting is an activity "affected with a public interest," restraints which would not otherwise be per-mitted in a purely private sector of society are warranted and even necessary.[302]

While few would dispute that broadcasting is affected with a public interest, this fact does not justify any intrusion on free speech which would not otherwise be permissible. It is, there-fore, neither controlling nor even particularly pertinent that Congress concluded that broadcasting is affected with a public interest, provided for periodic licensing of broadcast facilities, and stated that a license to broadcast is purely a privilege and not a right.[303] The Supreme Court has made it emphatically

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300. Hannegan v. Esquire, 327 U.S. 146 (1946).

301. *See, e.g.*, Kunz v. New York, 340 U.S. 290, 293-4 (1951); Saia v. New York, 334 U.S. 558 (1948) (by implication); Hague v. CIO, 307 U.S. 496, 515-16 (1939).

302. Television Corp. of Michigan, Inc. v. FCC, 294 F.2d 730 (D.C. Cir. 1961). It should be pointed out that the context in which this statement was made was not one involving any constitutional or even statutory question of Commission authority. Rather, it was a wholly gratuitous remark made in the course of admonishing the licensee and the FCC that broadcasting must serve the public.

303. S. Rep. No. 994, 87th Cong., 1st Sess., pt. 6, 1 (1962) (emphasis in last sentence added). For the concurring view of former FCC

clear that the right to license does not carry with it the right to place unconstitutional limitations or conditions on the license and particularly that it confers no authority to censor or interfere with free speech, whether or not the license be characterized as a mere privilege.[304] Indeed, far from expanding an agency's powers with respect to first amendment freedoms, the authority to license is a basis for even closer scrutiny of the agency's actions in this respect. Recognizing that a degree of censorship may be an inherent tendency in the exercise of administrative licensing powers, the Court has indicated it will scrutinize such licensing activities with particular care to ensure that they are not used to override first amendment guarantees.[305]

Implicit in many, if not most, of the arguments advanced for a greater governmental interference with broadcast speech than is permitted for other types of communications media is the usually unarticulated assumption that broadcasting is uniquely influential and powerful as a medium of communication.

There is perhaps a degree of truth in this belief, at least in the case of television.[306] First, there is the immediacy of a televised message as compared with the printed word. For example, few who watched the classic televised political campaign debates between Kennedy and Nixon in 1960 would seriously question that television had a far greater impact on each viewer than any verbatim newspaper coverage would have. This is not to say that news, editorials, and other public affairs information are necessarily more effectively covered by broadcasting. But item for item, a well-done television program is likely to have far greater impact on the average person than is a comparable newspaper article.[307] Second, the impact of radio and

Chairman Minow, see FREEDOM AND RESPONSIBILITY IN BROADCASTING 173 (Coons ed. 1961).

304. *E.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Hannegan v. Esquire, 327 U.S. 146, 156 (1946); Terral v. Burke Constr. Co., 257 U.S. 529 (1922); *see generally* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

305. *See* Saia v. New York, 334 U.S. 558 (1948); Hannegan v. Esquire, 327 U.S. 146, 156 (1946); Hague v. CIO, 307 U.S. 496 (1939).

306. I would be inclined to doubt that the impact of a radio message is anywhere near as strong as that of a well-written newspaper or magazine story.

307. See Fairly, *Can You Believe Your Eyes?*, IX HORIZON 24 (1967), for a persuasive commentary on the impact of television news programming. However, it must be admitted that the presumed impact of television can be and sometimes is highly exaggerated. To many people, television has, like radio, become largely a background of music, speech, or simply noise, a part of the din of civilization which many need to hear but not necessarily pay any attention to.

television in terms of the size of audience far exceeds that of any other mass communications medium. Consider, for example, a well known, regularly scheduled network news program, the "Huntley-Brinkley Report." Nielson audience ratings for January 1967 indicate that during this period each broadcast reached an average of nearly ten million homes.[308] This is more than three times the combined average daily circulation of the *New York Times*, the *Washington Post*, the *Chicago Tribune*, the *Los Angeles Times* and the *St. Louis Post Dispatch*,[309] five of the largest and most influential newspapers in the country. Obviously it cannot be denied that television is an influential and powerful communications medium.

It remains to be seen, however, whether adequate justification has been shown for greater government interference with speech in the case of broadcasting than in the case of less powerful media. Although television may have a great effect in terms of its immediacy and the extent of its audience, radio is not nearly so effective. Yet no one has suggested that radio and television might be regulated in differing degrees. In addition, the influence and importance of any single television station, which is the basic regulatory unit, has been misunderstood and exaggerated. The audience test mentioned above, for example, does not take into account that the audience reached by the program is not the result of a single, monolithic voice but actually the voices of more than 700 individual stations.[310] Even narrowing this number down to take into account those stations under common ownership, it is apparent that there are a substantial number of different entities responsible. It may be argued that since most local stations are merely outlets for the three major networks and a handful of program suppliers that it is the net effect of broadcasting as an industry which is the essential fact in determining to what extent the FCC should interfere with programming. But if this approach is accepted, one must alter the comparative picture since newspapers, too, have their networks. Like broadcast stations, newspapers often speak with one voice—that of the Associated Press, United Press

308. BROADCASTING MAGAZINE, February 13, 1967, at 68. An entertainment special covered by the same reporting period, "The Bob Hope Christmas Show," reached nearly 21 million homes. *Id.* at 66.

309. Based on the then current ABC circulation data, AYER & SONS, DIRECTORY OF NEWSPAPERS AND PERIODICALS 106, 189, 284, 600, 767 (1965), tabulates the combined average daily circulation of these newspapers to be 3,087,547.

310. 1966 FCC ANN. REP. 116-18 shows 721 television stations operating as of June 30, 1966.

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or other news service or, more accurately, that of the originating source. The relative impact of television would thus seem comparable not to one newspaper or even five, but more realistically, to all newspapers subscribing to a major news wire service.

Even if one unrealistically aggregates all of the television stations under four headings according to their affiliation with one of the three major networks or their independent status, and even if one considers this as a potential of four distinct and potentially different voices accounting for all broadcast programming, is this in itself grounds for government interference with programming? Is it constitutionally necessary, in short, to have at least a possibility of more than four distinct voices on all subjects? We have only two national political parties which, based on the same theory which leads us to believe that there are only four potentially distinct broadcast voices, give us only two political viewpoints. Does this warrant some form of government interference with political speech or perhaps government subsidization of a third party point of view? In all but a handful of American cities there are, at the most, two daily newspapers and thus, in theory, only two distinct and potentially different viewpoints from the daily press. Does this perhaps warrant government interference through subsidizing more local newspapers or controlling the content of those newspapers which do exist?

In the final anlaysis it is doubtful that the Supreme Court would ever hold that the application of the first amendment's protection of free speech depends on any subtle and tenuous evaluation of the influence of the speaker. Justice Douglas, concurring in *Superior Films v. Department of Education* stated:

> Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas. On occasion one may be more powerful or effective than another . . . . Which medium will give the most excitement and have the most enduring effect will vary with the theme and the actors. It is not for the censor to determine in any case.[311]

Although all of these various rationalizations concerning the uniqueness of radio and television have occupied an important place in the ideology of broadcast regulation, ultimately the rationale to which almost all return is that of "spectrum scarcity." As Justice Frankfurter stated in the *NBC*[312] case, "Un-

311. 346 U.S. 587, 589 (1954) (concurring opinion).

312. National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943). For an excellent critical analysis of *NBC* and the spectrum

it not the scarcity of stations; it the fact that you have to start a station to have a right to broadcast. No equivalent in TV or radio of the pamphlet or other supplement.

...r other modes of expression, radio inherently is not available ...ll . . . and that is why, unlike other modes of expression, it ...bject to governmental regulation."

The most obvious shortcoming of Justice Frankfurter's logic ... that, notwithstanding conceded physical limitations on fre... availability and the corresponding limitation on the num... of broadcast facilities which can be operated, the fact re... ains that radio and television stations are more numerous than ... of the other competing mass communications media. For ...ample, as of June 30, 1966, there were 5,881 radio and 721 tele... ...ion stations operating.[313] The number of radio and television ...tations is substantially greater than, for example, the number ... daily newspapers, of which there were 1,751 operating as of ...uary 1, 1966.[314] The disparity between the number of news... ...pers and the number of radio and television stations is most ...kingly evident when it is noted that only the largest cities ...an boast two or more daily newspapers not under common ...wnership.[315] By contrast virtually every city large enough to ...have a daily newspaper is served by at least two television sta... ...tions and several radio stations.[316] While the number of daily ...newspapers has slowly declined, the number of competing radio

...y argument, see Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 GEO. WASH. L. REV. 719, 757-66 (1964).

313. 1966 FCC ANN. REP. 116-18. This figure does not include television translators and boosters. As of that date, there were an additional 318 radio and 158 television stations (exclusive of translators and boosters) authorized but not operating. Most of these latter are stations which had received construction permits but had not then received licenses or "program test authority."

314. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 523 (87th ed. 1966).

315. *See* AYER & SONS, *supra* note 309, at 1250-71 (1965).

316. *See* 1967 TELEVISION FACTBOOK; 1967 BROADCASTING YEARBOOK. Although, except as the information is set forth throughout the above standard references, there is no single published source which clearly identifies the number of radio and television services which each city receives, a fair idea of the multiple television service available is given in a 1960 Nielson study, *Television '60*, which shows that some 94% of all television homes (94% of all homes in the United States, *see* 1967 BROADCASTING YEARBOOK 18) can receive at least three television stations and some 81% can receive at least four. No distinction is drawn here between a city to which a station is licensed and a city which receives service. Drawing such a distinction as a general proposition is unrealistic, at least so far as television is concerned. As a practical matter, a station need not be physically located in or technically assigned to a city in order to serve that city adequately, particularly where the cities are part of the same culturally and socially integrated metropolitan area.

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and television stations has rapidly increased and continues to increase.[317]

It is often said that the limitations on access to and use of the newspaper medium is an economic limitation, not a technical one. The distinction, however, is entirely specious. Contrary to common assumption, the spectrum is not nearly saturated. There are few, if any, areas of the country today where additional radio and television stations are not technically possible.[318] Moreover, it is at least doubtful whether, given the present structure of the industry, the spectrum will ever be competely saturated with radio and television stations.[319] Although there is currently a trend towards an increased number of stations, particularly UHF television stations, it seems unlikely that the trend will continue to the technical saturation point. In almost all radio and television markets, economic barriers to entry will come into play before the technical barriers. The economic limitations have already become the dispositive factor in the growth of radio and television stations in many, if not most, small and medium-sized markets. The barrier to entry to further stations in those areas is not the technical unavailability of frequencies, but rather the economic inability of the area to support an additional station and the unavailability of sources of programming different from that which is already being provided by the existing stations. This situation then is identical to

317. From 1950 to June 30, 1966, the number of radio stations on the air more than doubled from 2,897 to 5,881; and the number of television stations (exclusive of translators and boosters) increased seven times, from 104 to 721. 1966 FCC ANN. REP. 116-18. By contrast, from 1950 to January 1, 1966, the number of daily newspapers declined from 1,772 to 1,751. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 523 (87th ed. 1966).

318. On February 9, 1966, the Commission adopted its newly revised, computer-determined Table of Assignments for television channels. *Fifth Report, UHF Channel Assignments*, 6 P & F RADIO REG. 2d 1643 (1966). The revised Table at that date provided for 1,756 fixed VHF and UHF assignments (in 792 cities). *Id.* at 1667. However, the Table made only two assignments in the upper UHF frequency band, Channels 70-83, these channels proposed to be used for small "community" stations on an ad hoc basis. *Id.* at 1666. Thus, the 1,756 assignments (stations) do not include some 17% of the spectrum. Moreover, even as to channels below 70, the Table is not "saturated" and thus there is space for additional assignments over and above the 1,756 reflected in the Table. *Id.* at 1649, 1673-74. *See, e.g., UHF Channel Assignments in Palm Springs*, 8 P & F RADIO REG. 2d 1533 (1966) (adding another UHF channel to Palm Springs). In short, even with present technology, there is, at a *conservative* estimate, room for three or more times the 721 stations operating as of June 30, 1966. *See* note 318 *supra*.

319. *See Second Report* 1772.

the situation in all large mass communications media. It is impossible, therefore, to distinguish radio and television from newspapers, movie theaters, or magazine and book publishers on this basis. If barriers to entry and limitations on access to the use of mass communications media are to be relied on as a basis for imposing regulation of free speech which would not otherwise be justified, such regulation should not discriminate against radio and television but should extend to all communications media.

One commentator, recognizing that the natural barriers to entry into and the limitations on access to the newspaper industry are as great as those which surround broadcasting, has recently proposed that newspapers should also be subject to some kind of general editorial regulation, similar to the fairness doctrine, to ensure that a diversity of viewpoints is presented to the public.[320] According to this proposal, by Professor Barron, such regulation would not only be consistent with the first amendment but it would promote the essential spirit of the first amendment which, in his view, was not designed to protect the right to speak freely so much as to protect the right of the public to hear a diversity of viewpoints.[321] Since barriers to entry and limitations on access effectively limit the right of the public to receive such a diversity of views, newspapers and presumably all other mass media should be required to present all sides of an issue. Despite a certain superficial appeal, Professor Barron's proposition is unsupportable. His theory fits well with John Stuart Mill's utilitarian defense of free speech and with the traditional thinking which conceives of free speech as a surer way to the truth,[322] but it is inadequate as an exposition of the meaning and thrust of the first amendment and free speech today. One major justification for free speech is, of course, the

320. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

321. *Id.* at 1648-49.

322. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

J. S. MILL, ON LIBERTY, in UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 104 (Everyman Lib. 1951). *Compare* Justice Holmes' dissent in Abrams v. United States, 250 U.S. 616, 630 (1919).

benefit which the public at large derives from hearing a diversity of viewpoints and ideas. But if the sole or even the paramount aim of the first amendment is merely to ensure that the public is able to hear a Babel of voices, the first amendment is not the great libertarian principle it has been thought to be. Freedom of speech is a justifiable aim in itself insofar as it helps to create the individual freedom and security essential to a free society. It need not be buttressed by any apologies that it will assure the dissemination of a diversity of viewpoints, that it will ensure a free marketplace for ideas, or that it is a surer means of advancing truth.

It is suggested that if the government does not place some direct editorial control on mass communications media, it is in essence allowing them to be censors,[323] given the effective limits on entry into such media. According to Barron, this problem cannot be met by general legislation such as the antitrust laws, but must be dealt with by some kind of direct editorial control.[324] In short, we are told to replace the private censor with a government censor. The portrayal of the mass media as all-powerful private censors, subject to no one's influence but their own, is greatly exaggerated. Moreover, the supposed inability of the antitrust laws or, in the case of broadcasting, the various diversification policies and multiple ownership rules to increase competition is due more to the manner in which they are presently being applied than to any inherent deficiency in their approach.

Finally, if it is true that the barriers to entry and the limitations on access to the use of mass communications media give too much control to the mass media, this still does not resolve the problem. The question of what kinds of corrective regulation should be provided and how much government supervision should be permitted remain. What are we to conclude from the fact that there are, for example, not sufficient finances to provide every city of a quarter million population with more than three local television stations or two local newspapers? Do we infer from this fact that the government must take upon itself the responsibility of guiding, if not controlling, the program policies of these stations or the editorial policies of the newspapers? If so, does this extend equally to stations in communities which have ten stations and four newspapers? What kind or degree of control would be permitted on this basis? At what point is the line drawn between complete control and mere "influence" of

323. Barron, *supra* note 320, at 1648.
324. *Id.* at 1654.

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gram choice? What standard shall underlie the Commission's ...gment in acting on such matters? If, for example, audience ...veys show that eighty-five per cent of the population in a ...ven market prefers light entertainment, should the Commis...on be guided by this or must it take upon itself the role of a ...leader" in guiding popular choice by setting down more ele...ated, "enlightened" standards? I would agree with those who ...rongly protest the slavish attitudes with which most broad...asters follow the lowest common denominator of public taste, ...s represented by audience ratings. I emphatically agree with the idea, as expressed by one critic, that "the first task of the purveyors of entertainment and intelligence is to anticipate, ...amble on, whet, stimulate, elevate, and/or broaden the public ...aste."[325] But how can this responsibility be adequately enforced by a government agency without seriously compromising the first amendment?

Neither society as a whole, Congress, nor the FCC has ever formulated any principles which satisfactorily guide judgment on such matters consistent with the aims of an open society. There have developed, in a long Anglo-American tradition of legal and social thinking, various controls on the abuse of free speech, but nowhere in this tradition has there been any developed thinking going beyond sporadic and occasional restraints, such as prohibition of defamatory speech, obscenity, fraud, and ...erwise patently harmful or socially disrupting speech. There is no tradition of establishing, for example, standards of "fairness," "diversity," or "balance." These are judgments which, for better or for worse, have been left to the admittedly sometimes quixotic judgment of the public, unguided by their "enlightened" cultural, social, or political leaders.

There may be little reason to trust the judgment of broadcasters or the managers of other mass communications media, but is there any more reason to have an abiding faith in the judgment of the FCC or any other governmental agency? The probability of the mass media's being responsive to public needs is, I think, as great, if not greater than the probability that the FCC's judgment will adequately reflect those needs. And ultimately, the danger to a free society from a reliance on the judgment of private broadcasters is less than from a reliance on the judgment of the FCC. Barron has expressed a realistic concern over the tendency of the mass media to avoid the controversial,

expand this point.

325. L. WHITE, THE AMERICAN RADIO 221 (Comm'n on Freedom of the Press ed. 1947).

novel, and heretical ideas whose expression is so crucial to a vital growing society.[326] It is, however, naive in the extreme to suppose that government supervision, through the fairness doctrine or other means, would ultimately promote heterodoxy. As has been pointed out above, government intervention in broadcast programming has in fact been a major impetus toward conformity and orthodoxy.

Where does the foregoing evaluation, if correct, lead us? There are undoubtedly some who would conclude that these considerations must lead ineluctably to the conclusion that the Congress and the Commission should be allowed to regulate only the technological aspects of radio and television. This conclusion, however, seems as extreme in principle as it is naive. There is no constitutional principle which says that, merely because some forms of regulation of free speech are unconstitutional, all forms of regulation which might affect or in some manner restrain free speech are similarly unconstitutional. The first amendment does not forbid the Commission from going beyond its role as "traffic cop" of the airways. Radio and television are certainly not constitutionally exempt from general social and economic regulation merely because their business is the business of communication.

Thus radio and television, like newspapers, are subject to the general laws which bind all persons, institutions, and businesses, such as the antitrust laws, labor laws, and laws governing libel, slander, fraud, and other socially disruptive conduct and speech. Concededly there are first amendment limitations on the application of such laws, but the limitations are not unique to radio and television. They extend as well to newspapers, movie theaters, or soap box orators.

Moreover, it does not necessarily follow that because the Commission may not constitutionally impose its own standards of orthodox programming or its own standards of balance, fairness, and diversity that it may not in general insist that a licensee investigate and be responsive to demonstrated needs of his community. The first amendment does not require that a licensee must be permitted to operate a radio facility purely in his private and selfish interest with no concern for public needs and interests. The first amendment comes into play, however, when the Commission, in the name of reviewing a licensee's responsiveness, begins to concern itself with programming or pro-

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326. Barron, *supra* note 320, at 1645-47.

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operations to the point of establishing standards of acceptable and nonacceptable programming. It has already reached gone beyond this point.

Although some supporters of strong Commission regulation predict dire consequences in the event the Commission should relinquish any of its regulatory oversight of licensee program operations, it is doubtful that the Republic will falter should the Commission's thus far unfettered powers in this area be curtailed to conform to the first amendment as interpreted for and applied to other communications media. On the basis of the first forty years of regulation, it may be difficult to say that the cause of free speech has suffered egregiously at the hands of the FCC. But there is every indication that the problem is serious and becoming increasingly more so. The fairness doctrine which the Commission seems bent on applying and interpreting with increasing rigidity, cases such as *Palmetto*, and an increasing preoccupation with, if not fetish for, balanced programming are three very strong reasons for taking a less sanguine view of FCC regulation in the next forty years and for implementing more vigorous first amendment limitations on regulation in this field.

This leaves out (1) wisdom of FCC econ & tech reg which is often paternalistic, protectionist, & a drag on innovation & new ideas; a point esp sensitive in area of interchange of ideas (2) indirect impact of FCC econ & tech reg on FA; FA is being subordinated to 34 Act because FA is interp w/in confines of an industry the govt has shaped.