The First Amendment Invalidity of FCC Content Regulations

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I. INTRODUCTION

Since 1927, the federal government has imposed a wide variety of content and structural regulations on the broadcast media that would be unconstitutional were they applied to the print media. Although the Court invokes strict scrutiny to assess the constitutionality of print media regulations, it employs only intermediate scrutiny to judge the constitutionality of broadcast media regulations. The Court predicates lessened First Amendment protection for the broadcast media on a number of highly suspect rationales.

The broadcast media is said to be more technologically and economically scarce than the print media such that without government regulation of who may speak and what may be said, the broadcast media would come to be owned by a select few who would air their views to the exclusion of all others.

3. Compare Tornillo, 418 U.S. 241 and Mills v. Alabama, 384 U.S. 214 (1966) with League of Women Voters, 468 U.S. at 380 (restrictions on broadcast press content are upheld if they are "narrowly tailored to further a substantial governmental interest") and Red Lion, 395 U.S. at 388 ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish.").
4. This view is a mainstay of Supreme Court jurisprudence in this area. See, e.g., Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3010 (1990); Red Lion, 395 U.S. at 390 ("Because of the scarcity of [electromagnetic] frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."); League of Women Voters, 468 U.S. at 377 ("Congress may . . . seek to assure that the public receives through this medium a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations."); CBS v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973); NBC v. United States, 319 U.S. 190, 226 (1943) ("unlike other modes of expression radio inherently is not available to
The broadcast media is said to have a "pervasive presence in the lives of all Americans" and to thereby pose a threat to an unsuspecting public that is not presented by the print media.\(^5\) The broadcast media is said to be technologically different from the print media, and this physical difference in the mode of communication is said to justify a legal difference in the constitutional protection afforded the message.\(^6\) Finally, the government is said to have an "important" interest in ensuring maximum ownership and viewpoint diversity in the broadcast media, even in the absence of any alleged antitrust violations,\(^7\) although the government is precluded from having any such role in the print media, except upon proof of antitrust violations.\(^8\)

This article demonstrates that the motivations that led to the current licensing regime and the rationales that support it are antithetical to the First Amendment's core values. Broadcast press licensing is the by-product of a monopoly rent/content control *quid pro quo* between the broadcast industry and the government. This trade is part of a recurrent historical pattern begun in 1530, when Henry VIII licensed the print press. It has recurred thereafter as each new technology for mass communication comes to the fore.\(^9\)

The rationales for content regulation are shown to be derived from false historical and factual premises and to posit double standards. This article advocates application of the print model standard to all modes of mass communication. The failure to apply the print model standard universally has caused our First Amendment to become increasingly anachronistic.

\(^5\) See FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (Regulations of "indecent" programming are said to be justified because "prior warnings cannot completely protect the listener or viewer from unexpected program content.").

\(^6\) Red Lion, 395 U.S. at 386 ("[D]ifferences in the characteristics of news media justify differences in the First Amendment standards applied to them.").


\(^8\) Compare Tornillo, 418 U.S. at 254-58 with NBC, 319 U.S. at 223-24.

\(^9\) For further elaboration on this theme, see JONATHAN W. EMORD, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT (1991) [hereinafter EMORD].
At a time when the public overwhelmingly prefers the electronic media as their source of news, information, and opinion, it is essential that this media be able to check government maladministration, probe into controversy, offer opinionated solutions to problems, and challenge orthodoxies as fully and effectively as the print media. If existing content regulations are not constitutionally checked and eliminated, the idea marketplace of tomorrow will likely become epitomized not by strident editorialization, potent criticism of government officials and laws, and truth-seeking but by bland programming fare, views calculated not to offend, and truth-seeking limited to the non-political realm.

It is not enough to lay a precedential foundation for the protection of the print media when those media are the least populous press forms. The courts must do more if they are to ensure the free flow of political and commercial ideas and information upon which our society so greatly depends. They must apply the First Amendment to the "press" whatever form it takes. There must be freedom for the message regardless of the medium.

Only when granted full First Amendment and property rights protection will the electronic press come to enjoy the same degree of independence from government that the print media has known—an independence essential if the modern media are to be free from government oppression and intimidation.

This article concludes by advocating a property rights alternative to replace electronic media regulation. It shows that such a system existed before the advent of comprehensive

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10. Today, the electronic media are the media of choice for the vast majority of Americans. See The Broadcasting Yearbook A-3 (1991) (according to The Roper Organization, 65% of Americans consider broadcast television to be their primary source of news and 49% consider it the most believable news source).

11. See Emord, supra note 9, at 5-9 (arguing that government suppression of speech, rather than private limitations on speech opportunities, poses the greatest threat to freedom of speech and press). Private limitations on speech are merely acts of editorial discretion, the quintessence of a free press. See Tornillo, 418 U.S. at 258:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.
broadcasting regulation and that such a system can be implemented again today.

II. BROADCAST LICENSING IS AN HISTORICAL ANOMALY

There are two competing theories on the origins of broadcast regulation, a market failure thesis and an industry capture thesis.12 The traditional view explains broadcast regulation as unavoidable. In short, the laissez-faire model was tried and failed, necessitating government regulation. The revisionist view explains broadcast regulation as the by-product of more sinister motives, a bargain between broadcast industry leaders and government officials in which the former abandoned their claims to property rights in the spectrum and relinquished a degree of editorial discretion to the state in exchange for statutory limits on the number of broadcast licenses (thereby ensuring themselves above market rates of return). According to the revisionist view, a workable system of private rights in the spectrum was known to exist before comprehensive regulation of radio but was consciously rejected in favor of government control. This revisionist view best explains the history preceding Congress's adoption of the Radio Act of 1927.

A. The Traditional View: The Market Failure Thesis

In National Broadcasting Co. v. U.S.,13 Justice Felix Frankfurter articulated the history of broadcast press licensing that has been followed by most commentators and the federal courts ever since. According to Frankfurter, between 1921 and 1925 the nascent broadcast industry developed at a phenomenal rate, yet did so in a helter skelter manner.14 By 1926, fol-

14. On November 2, 1920, Westinghouse Electric Company first used radio for commercial broadcasting (via station KDKA, Pittsburgh, Pennsylvania). By March 1, 1922, sixty broadcast stations were operating nationwide. Just eight months later, 564 stations were operating. One year later, in March of 1923, there were 588. In October of 1924, the number decreased to 550. See Lawrence F. Schmeckebier, The Federal Radio
ollowing two court set-backs that stripped Secretary of Commerce Herbert Hoover of the limited regulatory powers he then wielded, the signals of several hundred stations began to collide replacing intelligible reception with unintelligible cacophony.15 Broadcasters, seeking interference-free operation, roamed the frequency band, altering their power at will.16 This collapse of orderly market processes made federal intervention imperative.17

Advocates of the traditional view believe the private radio marketplace incapable of sorting out property rights because, unlike other commodities, the spectrum is an unknown entity, intangible and invisible. They argue that "etheric bedlam"18 can not be stopped without regulatory restraints. According to

COMMISSION: ITS HISTORY, ACTIVITIES AND ORGANIZATION 4-7 (1932) [hereinafter SCHMECKEBIER]. In 1925, the number of stations had increased to approximately 600, and from July 1926 to February 1927, the number of stations increased by about 200 more. See NBC, 319 U.S. 190, 211-12; see also Hazlett, supra note 12, at 139-41.

15. From September of 1921 (when the first broadcasting license was issued by the Secretary of Commerce under the Radio Communications Act of Aug. 13, 1912, Pub. L. No. 62-264, 37 Stat. 302 (1912)) until March of 1923, Hoover licensed the use of only two wave lengths for broadcasting, 360 and 400 meters (i.e., 833 kc and 750 kc). See LAWRENCE W. LICHTY & MALACHI C. TOPPING, AMERICAN BROADCASTING 536 (1975) [hereinafter LICHTY & TOPPING]. At the second national radio conference in March of 1923, Hoover agreed with the broadcast industry to enlarge the number of available frequencies to those within the range of 222 meters (i.e., 1350 kc) to 545 meters (i.e., 550 kc). See CLARENCE CLEVELAND DILL, RADIO LAW: PRACTICE AND PROCEDURE 70-71 (1938) [hereinafter DILL].

16. Several colorful accounts of radio interference can be found in the conventional history but none more colorful than the following: "[C]haos rode the air waves, pandemonium filled every loud-speaker and the twentieth century Tower of Babel was made in the image of the antenna towers of some thousand broadcasters who, like the Kilkenny cats, were about to eat each other up." FRANCIS S. CHASE, SOUND AND FURY 21 (1942).


18. In a letter dated March 30, 1910 from the Department of the Navy to the Senate Committee on Commerce, the Navy used the term "etheric bedlam" to describe interference to its ship to ship and ship to shore communications caused by private radio operators before the advent of commercial broadcasting: "Calls of distress from vessels in peril on the sea go unheeded or are drowned out in the etheric bedlam produced by numerous stations all trying to communicate at once. . . . It is not putting the case too strongly to state that the situation is intolerable, and is growing worse." S. REP. No. 659, 61st Cong., 2d Sess. 4 (1910).

Justice Frankfurter described a similar situation befalling the broadcast industry in 1926 and 1927: "These new stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of
the traditional view, by 1926 Congress had but three alternatives: spectral anarchy (i.e., the status quo), outright government ownership of the means of broadcast communication, or public ownership of the airwaves and private operation on them pursuant to a utility-based system of regulation.¹⁹

From 1922 to 1925, Secretary of Commerce Herbert Hoover held four national radio conferences at which he informally regulated radio with the consent of the broadcast industry. Broadcasters agreed to operate within certain parameters and thereby avoided interference problems.²⁰ Hoover developed, with the industry's blessing, cognizable rights to the use of the spectrum. He did so by refusing to license more than one operator to broadcast on a single frequency at a set power at a single time. He protected existing licensees in accordance with a first in time, first in right preference principle. The Secretary also restricted the number of available broadcast frequencies, transmitter locations, and wavelength assignments, and he withheld action on a number of license applications to protect existing operators from potential interference.²¹

According to the traditional view, this system worked reasonably well until the Secretary was forced by the courts to operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard.” NBC, 319 U.S. at 212.

The traditional view ascribes this situation to a supposed inability on the part of broadcasters to function without destructive interference during a period of self-regulation. See Sterling & Kittross, supra note 12, at 88 (“The cacophony on the air after mid-1926 was ample proof that broadcasters could not cooperate sufficiently to function without outside regulatory force.”); Red Lion, 395 U.S. at 375 (“Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos.”); Nicholas Johnson, Towers of Babel: The Chaos in Radio Spectrum Utilization and Allocation, 34 Law & Contemp. Probs. 505 (1969).

19. According to the traditional view, a property rights system was never seriously considered by Congress or anyone else for that matter. See Hazlett, supra note 12, at 141-43 (listing the works of numerous economic and legal commentators who record either that regulators were not aware of a property rights alternative or that such an alternative was considered but found unworkable).


21. See Hazlett, supra note 12, at 139-41, 145 (“It is clear that such chaos as potentially could exist was explicitly remedied by federal establishment of property rights, followed by market trading to assign such rights to their highest valued employments.”).
abandon all attempts at regulation. Following court decisions holding that he lacked authority to deny an application for a radio license\textsuperscript{22} and lacked authority to require licensees to operate on any single frequency,\textsuperscript{23} a so-called "breakdown in the law" occurred.

Secretary Hoover did not appeal \textit{Zenith}. Instead, he sought an opinion from the Acting Attorney General, William J. Donovan, about the extent of his authority under the Radio Act of 1912. Donovan confirmed that the Act did not delegate to Hoover authority to regulate the operating parameters of licensed broadcast stations, except to prohibit them from using the wave lengths between 600 and 1600 meters (which were reserved for government use by the Act).\textsuperscript{24}

Following his receipt of the Acting Attorney General's opinion, the Secretary began granting radio licenses to all who had applied for them.\textsuperscript{25} He granted some 210 applications between July 1, 1926 and February 1, 1927, bringing the number of licenses issued to about 716.\textsuperscript{26} This led to the interference that drowned out intelligible reception in many parts of the country.\textsuperscript{27}

According to the traditional view, the market was to blame for the audible clatter on the airwaves that followed the Secretary's loss of regulatory power.\textsuperscript{28} In short, without regulation chaos reigned.

\textsuperscript{22} See Hoover \textit{v.} Intercity Radio, 286 F. 1003, dismissed, 266 U.S. 636 (1923).
\textsuperscript{23} See United States \textit{v.} Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926).
\textsuperscript{24} See 35 Op. Att'y Gen. 126 (1926).
\textsuperscript{25} See 68 CONG. REC. 3031 (1927) (the statements of Clarence C. Dill).
\textsuperscript{26} See Lichty & Topping, \textit{supra} note 15, at 554; Sydney W. Head, \textit{Broadcasting in America: A Survey of Television and Radio} 129 (1956) [hereinafter Head]; Ronald Coase, \textit{The Federal Communications Commission, 2 J.L. \& Econ.} 1, 5 (1959) [hereinafter Coase].
\textsuperscript{27} In December of 1926, President Calvin Coolidge remarked:
Due to the decisions of the courts, the authority of the department [of Commerce] under the law of 1912 has broken down; many more stations have been operating than can be accommodated within the limited number of wave-lengths available; further stations are in [the] course of construction; many stations have departed from the scheme of allocation set down by the department; and the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value.
Quoted in Frank J. Kahn, \textit{Documents of American Broadcasting} 33-34 (1973) [hereinafter Kahn].
\textsuperscript{28} See, e.g., \textit{Study, Commission on Interstate and Foreign Commerce, 85th Cong., 2d Sess.}, \textit{reprinted in Regulation of Broadcasting:}
Recently, the traditional view has been critically examined and found wanting. In particular, Thomas W. Hazlett has refocused attention on the period from 1920 to 1927 and has found government regulation not an inevitable but a rational choice not among three, but among four alternatives: the then existing system of zero-priced entry and no protection for rights to use of the spectrum, a system of outright government ownership and control of the means of communication, a system of government regulation through licensure of the broadcast press, and a system of governmentally protected property rights in the spectrum. 29

B. The Revisionist View: The Industry Capture Thesis

For some time, those who have closely examined broadcast regulation in the United States have found government advocates of broadcast regulation motivated to a considerable degree by a desire to gain control over the structure and content of that medium. Radio was the first medium of instantaneous mass communication and was viewed with alarm by incumbent politicians who thought regulation necessary to prevent radio from falling into the "uncontrolled hands" of industry leaders. They feared private editorial discretion because it could deny them access to the media, force them to suffer criticism for their political agendas without an opportunity to rebut attacks, or even cause them to lose re-election. 30 Of course, it would have been possible for members of Congress to limit government's role in regulating the broadcast media to policing for interference, but this would not have provided the degree of editorial control that Congress desired. Consequently, Congress defined no such limited role for itself or for its regulatory agencies, the Federal Radio Commission (FRC) and the Federal Communications Commission (FCC), the FRC's successor.

29. See Hazlett, supra note 12, at 142 (explaining that no serious effort was undertaken by the government to create a federal system of protected property rights in the spectrum during the debates preceding passage of the Radio Act of 1927); see also Spitzer, supra note 12, at 1043-48; Emord, supra note 9, at 137-65.

30. In this context, the term "uncontrolled hands" was first used by Secretary Hoover, who warned at the First National Radio Conference in 1922 that there was a "necessity to so establish [a] public right over the ether roads that there may be no national regret that we have parted with a great national asset into uncontrolled hands." Quoted in Lichty & Topping, supra note 15, at 534.
Before Congress enacted laws for the comprehensive regulation of radio, various government departments vied for control over the medium. Beginning in the early 1920s, the Department of the Navy, the United States Post Office, and the Department of Commerce beseeched Congress to permit their respective departments to gain control over the medium. The most successful political operator among the department heads was Hoover. Early in the inter-departmental struggle, Hoover forged alliances with industry leaders and members of Congress that other department officials were either unable or unwilling to forge. He did this through championing the position of the broadcast industry in its struggle for more spectrum space against the amateur radio operators, by advocating regulations that favored broadcast industry leaders over new market entrants but that also gave Congress the degree of control over radio content it desired, and by assuming extralegal

31. The most detailed account of the political struggle among these federal departments is contained in Rosen, supra note 20, at 29-33. See also Lichty & Topping, supra note 15, at 536 (quoting Edward F. Sarno, Jr.): Fifteen official delegates attended the [First National Radio] Conference; 10 representing governmental interests and five non-governmental interests, particularly in the fields of science and engineering. . . . Large commercial concerns such as AT&T, General Electric, Westinghouse and RCA wanted the Commerce Department to control broadcasting and were decidedly against control by either the Navy or the Army. Navy representatives still claimed a vested interest in radio, due to their control of the medium during World War I, and the War and Agriculture departments also were anxious to expand their operations. Besides this, the Post Office department felt that since radio was a form of communication, it fell within its area of control much as did the mails, although Congress had rejected this contention a few years earlier. See also Emord, supra note 9, at 140-42.

32. See Rosen, supra note 20, at 33 (“What appeared to be a groundswell of opinion urging the Commerce Department to intervene had in reality, of course, been carefully orchestrated by Secretary Hoover. Against a background of interdepartmental strife and the ‘take-off’ of commercial broadcasting, the Commerce Department stepped forward to assume control.”).

33. See id. at 36.

34. See id. at 72 (“Secretary Hoover supported the policies implemented by the large corporations because he recognized that these innovations would benefit both the industry and the public.”); see also Hazlett, supra note 12, at 152 n.60 (explaining that Hoover “advanced both the incumbent broadcasters’ agenda and a regulators’ agenda—interests that most often intersected in Hoover’s policy recommendations. He therefore played a large role in advancing [both] group[s]’ interests. . . .”); id. at 152-54; Spitzer, supra note 12, at 1047: Herbert Hoover wanted federal controls over private radio broadcasting: “state-corporate alliances were the hallmark of
powers to resolve interference disputes among broadcasters until comprehensive regulation was attained.\textsuperscript{35}

1. The Monopoly Rent/Content Control Quid Pro Quo

Considerable evidence exists that the Radio Act of 1927 was the by-product of a monopoly rent/content control quid pro quo between the broadcast industry and the government.\textsuperscript{36} Through this exchange, broadcast industry leaders were assured that competition would be artificially limited by licensure so that they could reap above-market rates of return.\textsuperscript{37} Politicians were assured mandatory rights of access to the broadcast press to overcome "private censorship," i.e., the exercise of a broadcaster's editorial discretion in a manner contrary to official preferences.\textsuperscript{38}

At the four Commerce Department sponsored national radio conferences, Secretary Hoover proposed resolutions for interference disputes, thereby gaining the allegiance of broadcast industry leaders.\textsuperscript{39} Hoover convinced industry leaders to

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\textsuperscript{35} Hoover became widely admired by broadcasters because of the extralegal measures he took to resolve interference complaints and to create voluntary guidelines to guard against interference. \textit{Rosen}, \textit{supra} note 20, at 38-39.

\textsuperscript{36} See \textit{Spitzer}, \textit{supra} note 12, at 1047-48; \textit{Hazlett}, \textit{supra} note 12, at 152-71; \textit{Emord}, \textit{supra} note 9, at 146-57.

\textsuperscript{37} See \textit{Hazlett}, \textit{supra} note 12, at 154-55; \textit{Spitzer}, \textit{supra} note 12, at 1047; \textit{Emord}, \textit{supra} note 9, at 149.

\textsuperscript{38} \textit{Emord}, \textit{supra} note 9, at 146-57.

\textsuperscript{39} See \textit{Rosen}, \textit{supra} note 20, at 61:

Secretary Hoover used the renewed chaos and disorder caused by the lack of legislation [for comprehensive radio regulation] to strengthen an alliance between businessmen and his department in the hope of promoting his own endeavors. But the relationship did not disintegrate into a government dictatorship. On the contrary, Hoover's attempts to implement the extralegal arrangement, by which he aimed to secure protracted control, required a secure identification between his agency and the business community. In the process of establishing this felicitous proximity, Hoover became increasingly dependent upon the industry, thereby relinquishing part of his own command of the situation.
adhere to restraints on the use of their facilities and to support his legislative agenda for radio regulation. In return for their support, Hoover promised that the new law would place restrictions on the number of available licenses.\textsuperscript{40}

In each of the radio conferences, the government's representatives repeatedly described radio as imbued with a "public" character.\textsuperscript{41} They insisted that broadcasting had to be controlled by the government for the "public good."\textsuperscript{42} For

\textsuperscript{40} Emord, supra note 9, at 146-57.

\textsuperscript{41} In each of the four national radio conferences, Secretary Hoover emphasized that the "public interest" had to govern broadcasting and indicated that service in the public interest meant service in fulfillment of government policy objectives. At the first national radio conference, Hoover emphasized that the "ether" was a "public" medium. See Emord, supra note 9, at 152. By 1925, Hoover had developed an elaborate "public interest" theory. At the Fourth National Radio Conference, he stated:

The ether is a public medium, and its use must be for public benefit.
The use of a radio channel is justified only if there is public benefit.
The dominant element for consideration in the radio field is, and always will be, the great body of the listening public, millions in number, countrywide in distribution. There is no proper line of conflict between the broadcaster and the listener, nor would I attempt to array the one against the other. Their interests are mutual, for without the one the other could not exist.

Id. At that same conference, Hoover also articulated the view, later rendered the law by the Supreme Court in Red Lion, that the interests of the listeners, and not those of individual speakers, were paramount in the field of broadcasting:

We hear a great deal about the freedom of the air; but there are two parties to freedom of the air, and to freedom of speech, for that matter. There [are] the speechmaker and the listener. Certainly in radio I believe in freedom for the listener. He has much less option upon what he can reject, for the other fellow is occupying his receiving set. The listener's only option is to abandon his right to use his receiver. Freedom cannot mean a license to every person or corporation who wishes to broadcast his name or his wares, and thus monopolize the listener's set.

Quoted in Emord, supra note 9, at 153.

\textsuperscript{42} Repeatedly in their public statements, federal government officials and elected representatives demanded that government be given some control over what was broadcast. Hoover believed it the government's duty "to see that . . . [radio] is devoted to real service and to develop the material that is transmitted into that which is really worthwhile." Quoted in Emord, supra note 9, at 152. In 1921, during the First National Radio Conference, Hoover asked a Mr. Sherley, counsel for the Association of Manufacturers of Electronic Supplies, the following question: "Suppose we get into the period where there is [an] insufficient number of wave lengths and you find a given town where the program is not as high grade as another town; would you advocate the Government taking any supervision over the programs? Had you given any thought to that?" Congressman Wallace H. White also examined Sherley on this point.
their part, industry leaders expressed few opinions on the public weal but repeatedly argued that the quality of broadcasting was inversely related to the number of licenses issued. They argued that the number of licenses had to be severely restricted in order to ensure the maintenance of the highest quality radio programming nationwide.\textsuperscript{43} In the end, the two sides agreed

\begin{quote}
MR. WHITE: There are classes of service. Broadcasting is a class of service. Can you subdivide that class, for instance, can you say that crop reports shall have priority over baseball reports?

MR. SHERLEY: Yes.

MR. WHITE: If you admit that, where are you going to draw the line? How are you going to establish broadcasting if you don't go pretty close to censorship?

MR. SHERLEY: You might give priority to sermons as against sporting news without giving any class the right to pass upon the character of service of either class.

MR. WHITE: That goes back to the question, would we give priority to a sermon over a prize fight?

Quoted in \textit{id.} at 148-49.

The advocates of regulation insisted that radio, "a public medium," should not be used for private benefit. Rather, they argued that it should only be used for that ever amorphous "public good." \textit{See Hazlett, supra} note 12, at 152 (quoting Hoover: "We can surely agree that no one can raise a cry of deprivation of free speech if he is compelled to prove that there is something more than naked commercial selfishness in his purpose.").

43. \textit{See EMORD, supra} note 9, at 149-51. L. R. Krumm, representing the Westinghouse Electric and Manufacturing Company submitted that only the established industry leaders could present quality programming to the public and that the number of licenses had to be restricted in order to attain that objective.

MR. L. R. KRUMM: There is a limitation to the number of broadcasting stations that can operate successfully and if you are going to get the desired results there must be some regulation and possibly limitation of the number of these stations. We can stand pat on our stations—operating them to the best of our ability—we hope to continue them and possibly extend them, but we want to know what the future holds for us in that regard.

Quoted in \textit{id.} at 150.

Krumm did not think the industry's leaders should be limited in their expansion, just new entrants. Krumm stated:

\begin{quote}
I do not want to pledge myself, but I see no reason why they [AT&T] cannot operate their stations without interfering with ours. We are not troubled by that Company as badly as a whole lot of stations—as we are by stations that do not represent any time, thought, or money.
\end{quote}

\textit{Id.}

Krumm thought the whole country would best be served by about a dozen of the "high quality" stations. In response to a question from Secretary Hoover about what number of stations would be necessary to give the nation "a complete service," Krumm responded that he believed "twelve good stations, certainly a maximum of fifteen, would supply most of the needs of this country."
to legislation that would accomplish both parties' objectives: giving government control over broadcast industry structure and content and reducing the number of licensed stations operating across the country.\textsuperscript{44}

By seeking to regulate radio under a virtually limitless "public interest" standard, Hoover was, in effect, asking for redistribution of speech and press power from the private realm of editorial discretion to the public realm of censorship. Private preferences would no longer dictate radio content. Now the government would determine whether the content broadcast served the "public interest." Licensees would have to account for their "stewardship" of the airwaves at license renewal time.

\textit{Id.}

Even representatives of the smaller licensees favored barriers to new entry. H. F. Breckel of the Precision Equipment Company of Cincinnati, Ohio, advocated a one city/one station limitation:

\begin{quote}
With reference to the number of broadcasting stations which should be permitted to operate, we believe that they should be limited to a number sufficient to provide adequate entertainment and safeguard the interests of the general public who have invested in receiving equipment and further, [we] . . . feel that it would be inadvisable to allocate more than one broadcasting station to a city.
\end{quote}

\textit{Id.}

\textsuperscript{44} At the fourth and final National Radio Conference, the conference committee announced its intention to restrict the number of broadcast licenses by encouraging certain broadcasters to leave the broadcasting business. The committee report reads:

\begin{quote}
The committee considered the question, Is it essential to limit the number of broadcasting stations in order to prevent further congestion? The committee was unanimous in their views that the number of broadcasting stations should be limited, as there was ample evidence already at hand to show that serious congestion was taking place due to the large number of stations not having sufficient frequency separation or repeating frequencies to prevent interference. The committee felt that this was so much in evidence that little time need be spent on the question. They concluded that discussion by adopting the following resolution:

\textit{Resolved}, That it is the sense of this conference that the bands of frequencies now assigned to broadcasting [are] overcrowded, causing serious interference. Therefore, the committee recommends, in the interest of public service, that no new stations be licensed until through discontinuance the number of stations is reduced and until it shall be in the interest of public service to add new stations.
\end{quote}

\textit{Id} at 151 (emphasis added).

Hoover did not wait for Congress to act before implementing the licensing restrictions. On November 13, 1925, one day after the conference ended, Hoover declared that the Commerce Department would not accept any new license applications. See \textit{Rosen}, \textit{supra} note 20, at 80.
2. From Whence Came the "Breakdown in the Law:" The Market or Hoover?

Between 1921 and 1927, over fifty bills were introduced in Congress to regulate radio comprehensively.\(^4^5\) None of these bills became law. Prior to 1927, not enough support existed in Congress, in the broadcast industry, or among members of the public to secure passage of the new legislation that Hoover and the broadcast industry leaders wanted. From 1921 to 1926, in the absence of comprehensive regulation, radio broadcasting flourished due to industry self-regulation.\(^4^6\)

Hence, for those like Hoover and Congressman Wallace H. White, who earnestly wanted regulation and had tried unsuccessfully for years to get it, it must have been apparent by 1926 that only a radical change in the environment could stir Congress from its lethargy and bring about the desired legislative consensus. According to the revisionist view, Hoover's failure to appeal the Zenith decision and his departure from informal regulation of radio were actions calculated to provoke Congress, the broadcast industry, and the public into favoring regulation.\(^4^7\)

Hoover hoped the reactions engendered would cause Congress to enact the bill he favored most, that authored by Congressman White.\(^4^8\) The White bill would give the Department

\(^{45}\) Twenty bills were introduced in the 67th Congress between 1921 and 1923; thirteen bills were introduced in the 68th Congress between 1923 and 1925; and eighteen bills were introduced in the 69th Congress between 1925 and 1927. \textit{See} LICHTY & TOPPING, \textit{supra} note 15, at 545.

\(^{46}\) \textit{See} ROSEN, \textit{supra} note 20, at 49 ("Hoover had stated that the voluntary system of government-industry cooperation had been working well, the lawmakers assumed there was little need for immediate action."); \textit{see also} \textit{id.} at 61 ("Hoover's policies had been so effective that Americans seemed to many to be preoccupied with nothing but crystal sets and programs.").

\(^{47}\) \textit{See} Spitzer, \textit{supra} note 12, at 1046:

Hoover... failed to appeal the Zenith decision because he wanted chaos to reign. He had been asking Congress for legislation granting the Commerce Department greater power over broadcasting for several years, but was always rebuffed because the system seemed to be working so well. Hoover issued licenses to all applicants so as to cause unhappiness in the industry and Congress... making his proposals more attractive.

Hoover promoted publicity of Acting Attorney General Donovan's opinion that Hoover lacked regulatory powers. The generation of this publicity seems aimed at preparing the public for the Secretary's abandonment of all attempts at regulation and at producing a pro-regulatory response from the public and broadcasters that would assist Hoover in his effort to secure comprehensive radio regulation. \textit{See} ROSEN, \textit{supra} note 20, at 101.

\(^{48}\) \textit{See} H.R. 9971, 69th Cong., 2d Sess. (1926). From 1921 to 1927,
of Commerce (and thus Hoover) primary control over radio, relying on a commission only as an appellate body with limited jurisdiction. A competing bill, opposed by Hoover, was introduced by Senator Clarence C. Dill. That bill would have vested control over radio in a commission independent of the Secretary of Commerce.49

The Zenith decision was handed down while Congress was debating the White and Dill bills.50 Hoover's abandonment of any efforts at regulation thus came at a critical juncture, and did elicit a prompt reaction from the broadcast industry and the public. In the midst of the interference wars caused in part by Hoover's refusal to intervene,51 Congress reached a consensus in favor of regulation. Congress also reached a compromise between the White and Dill bills. The Radio Act of 1927 was enacted on February 23 of that year.52

3. Congress's Fears of Radio Power Over Politics

In the congressional debates preceding the adoption of the Radio Act of 1927, two central themes arose: one is that radio,

Hoover and Congressman White lobbed to secure passage of their favored radio legislation. Rosen records that White "relied heavily" on the Commerce Department for assistance in drafting the legislation. The White bill was first introduced in June of 1921 in the House (House Resolution 11964) and in the Senate by Senator Frank Kellogg (Senate Resolution 3691). It was reintroduced thereafter in both houses, but did not gain significant congressional support in both the House and Senate until 1927. See Rosen, supra note 20, at 48-49, 73-75, 80, 81-82.

49. See S. 4057, 69th Cong., 2d Sess. (1926); see also Lichty & Topping, supra note 15, at 546-47. Eugene McDonald, President of Zenith, wanted the secretary of commerce removed from what he termed a position of "supreme czar" over radio. He implored that any law to control radio vest authority in a commission independent of Hoover, whom he regarded as a rapacious bureaucrat. See Rosen, supra note 20, at 94. Hoover fought for the White bill "to assure implementation of his own legislative plan." Id. Senator Dill relied heavily on McDonald's ideas in drafting a bill that would cut Hoover out of the picture by awarding control of radio to an independent commission. See id. at 95; see also Dill, supra note 15, at 76.

50. See Coase, supra note 26, at 5 (explaining that the Zenith decision "added very considerably to the pressure for new legislation"); Rosen, supra note 20, at 96-103 (describing in detail the competition among the divergent political factions supporting the Hoover-backed White bill and the McDonald-backed Dill bill); see also Lichty & Topping, supra note 15, at 546.

51. Senator Dill recalled: "As soon as it became definitely known that the Secretary of Commerce had no regulatory power over radio broadcasting under the Act of 1912, several radio station owners changed wave lengths. Some others used increased power and operated at whatever hours they desired." Dill, supra note 15, at 78.

52. See Lichty & Topping, supra note 15, at 546-47.
in its nascent, unregulated state, was either a monopoly or was fast becoming one; the other is that radio, if left unregulated, would place great persuasive power in the hands of a select few who might oppose the election wishes or policy preferences of members of Congress. Some members of Congress con-

53. On January 15, 1923, the House Committee on the Merchant Marine and Fisheries adopted a report that identified "certain companies and interests" as seeking to establish "a monopoly in wireless communication through control of the manufacture and sale of radio instruments, through contractual arrangements giving exclusive privileges in the transmission and exchange of messages or through other means." The Committee called for an investigation of these matters by the Federal Trade Commission.

The FTC conducted its investigation, filed a complaint against General Electric Company, American Telephone and Telegraph Company, Western Electric Company, Westinghouse Electric and Manufacturing Company, International Radio Telegraph Company, and Radio Corporation of America, alleging that the companies had engaged in "unfair methods of competition" and had tried to create "monopolies in the manufacture, purchase, and sale, in interstate commerce, of radio devices and apparatus, and other electrical devices and apparatus, and in domestic and transoceanic radio communication and broadcasting." Following initial discovery, the FTC chose not to prosecute and dismissed its complaint on December 19, 1929. See William A. Lovett, The Antitrust Provisions of the Radio Act, 2 J. Radio L. 5-6 (1932); see also Erik Barnouw, A Tower in Babel 60 (1966).

54. A few examples of the reactions in Congress will suffice to prove the point. These are quoted in Emord, supra note 9, at 169-71. Senator Robert B. Howell opined:

[T]o perpetuate in the hands of a comparatively few interests the opportunity of reaching the public by radio and allowing them alone to determine what the public shall and shall not hear is a tremendously dangerous course for Congress to pursue. Only recently a public official called my attention to the fact that he was invited to utilize a radio station of one of the great broadcasting companies; that when he appeared to speak they insisted on censoring his remarks and blue-penciled certain portions criticizing "Pittsburgh plus." They said, "You cannot talk about that." Are we to consent to the building up of a great publicity vehicle and allow it to be controlled by a few men, and empower those few men to determine what the public shall hear?...

If any public question is to be discussed over the radio, if the affirmative is to be offered, the negative should be allowed upon request also, or neither the affirmative nor the negative should be presented.

Howell also submitted that "the larger portion of the radio audience is the youth of the country. Give me control of the character of the matter that goes out over our broadcasting stations and I will mold the views of the next generation." Id.

Congressman Ewin L. Davis and Thomas Lindsay Blanton concurred with these sentiments. Blanton explained that unless radio was brought under governmental control, "one candidate might be able to pay $1,000 for one night's service over the radio, and another candidate might not be able to put up anything, and the radio could shut that man out and let the other in."
demned what they termed a private monopoly and "private censorship," preferring a public monopoly and public censorship.55

Despite the many complaints of monopoly control and private censorship that appear in the Congressional Record from the Sixty-Ninth Congress, little actual basis existed to support either charge. The radio industry had been extremely competitive from the start and the content of what was broadcast varied widely.56 Despite the weak factual basis for the monopoly charges, those who favored comprehensive regulation found the arguments politically potent. These arguments helped engender public support for control of radio by government rather than the private sector.57

He demanded to know: "What are you going to do about this question? The night before election some fellow who might be favored by the Radio Corporation could get up in a Congressman's district and, with favored access to the radio, ruin any man running for Congress."

Congressman William R. Johnson also feared the power of a free press and demanded that it be tamed. He warned:
If the strong arm of the law does not prevent monopoly ownership and make discrimination by such stations illegal, American thought and American politics will be largely at the mercy of those who operate these stations. For publicity is the most powerful weapon that can be wielded in a Republic, and when such a weapon is placed in the hands of one, or a single selfish group is permitted to either tacitly or otherwise acquire ownership and dominate those who dare to differ with them, it will be impossible to compete with them in reaching the ears of the American people.

55. Congressman White thought "individual and corporate censorship" to be far worse than "government censorship." Likewise, Congressman Davis said that he was "even more opposed to private censorship" than government censorship. Quoted in EMORD, supra note 9, at 168, 175 n.9.

56. See ROSEN, supra note 20, at 62-63 (explaining that "the industry was characterized not by monopoly but by its opposite"); see also EMORD, supra note 9, at 171 n.1 (quoting testimony given in 1926 by Department of Commerce Solicitor Stephen B. Davis, Jr. to the Senate Committee on Interstate Commerce in which he informed the committee of the diffuse nature of media ownership—stores that sold radio supplies operated 124 broadcast stations, schools and colleges operated 94, churches operated 43, newspapers and magazines operated 35, manufacturers of various kinds operated 15, insurance companies and similar businesses operated 15, hotels operated 12, societies of various kinds operated 11; and miscellaneous other entities operated 22.).

57. According to Rosen, Hoover "felt that the charge of monopoly was bogus" but recognized the "vast political ramifications" of the charge and "therefore voiced loud opposition to any restraint of trade." ROSEN, supra note 20, at 73.
4. Congress’s Rejection of the Property Rights Alternative

Under the traditional view, Congress was left with no choice but to regulate radio to end interference. However, from 1921 to 1926, the industry successfully relied on self-regulation. Even during the period of widespread interference following Hoover’s abandonment of regulation and of efforts at encouraging industry self-regulation, property rights theories surfaced in the courts as solutions to the interference problem.

In the fall of 1926, following the *Zenith* decision, but before Congress enacted the Radio Act of 1927, a Cook County, Illinois court decided *Tribune Co. v. Oak Leaves Broadcasting*. The Chicago Tribune Company’s station, WGN, brought suit to enjoin an interloper from operating on a wavelength adjacent to WGN’s. The presiding judge, Chancellor Francis S. Wilson, resorted to common law property rights principles in deciding the case. He found that WGN’s investment and development of a broadcast station established a priority in time that created a superiority in right. Therefore, the presiding judge issued the requested injunction and ended the interference. Other stations in a position similar to WGN were quick to file property rights claims in other courts arguing that their priority in time created a superiority in right.

The popularity of the *Tribune* decision among broadcasters prompted Congress to act. In July of 1926, Congress passed a joint resolution designed to prevent broadcast licensees from obtaining any vested rights in the spectrum. The resolution...
was signed into law on December 8, 1926.\(^\text{62}\) Although the common law property rights approach used in Tribune offered an equitable way to resolve interference disputes, it vested plenary authority over broadcasting in private hands.\(^\text{63}\) Many members of Congress could not tolerate this. Therefore, Congress disallowed private rights, paving the way for public control.\(^\text{64}\)

5. Government Fulfills Its Promise to Broadcasters

With the passage of the Radio Act of 1927 and the creation of the FRC, the time had come for government to fulfill its promise to the broadcast industry by reducing the number of licenses available and thereby decreasing the amount of competition facing the broadcast industry's leaders. What had started as a decidedly political affair between Hoover and industry leaders continued in that vein.\(^\text{65}\) Indeed, the FRC quickly became known as an agency susceptible to influence peddling and Congressional interference with its quasi-judicial functions.\(^\text{66}\)

\(^{62}\) Senate Joint Resolution 125 reads as follows:
That until otherwise provided by law, no original license for the operation of any radio broadcasting station and no renewal of a license of an existing broadcasting station, shall be granted for longer periods than ninety days and no original license for the operation of any other class of radio station and no renewal of the license for an existing station of any other class than a broadcasting station, shall be granted for longer periods than two years; and that no original radio license or the renewal of an existing license shall be granted after the date of the passage of this resolution unless the applicant therefor shall execute in writing a waiver of any right or of any claim to any right, as against the United States, to any wave length or to the use of the ether in radio transmission because of previous license to use the same or because of the use thereof.

Act of Dec. 8, 1926, ch. 1, 44 Stat. 917 (1926), quoted in Kahn, supra note 27, at 35 (emphasis in original); see also Coase, supra note 26, at 5; Spitzer, supra note 12, at 1046; Hazlett, supra note 12, at 160.

\(^{63}\) Spitzer observes: "Key congressmen well understood that state property rights would give broadcasters a foundation that could not be controlled by the federal government." Spitzer, supra note 12, at 1046.

\(^{64}\) Hazlett remarks: "Should those common-law principles apportion the spectrum to private users, the 'breakdown of the law' would be remedied, but the federal government's ability to control or even influence broadcasting would vanish." Hazlett, supra note 12, at 161.

\(^{65}\) See Rosen, supra note 20, at 131-44 (wherein Rosen documents Federal Radio Commission members' actions to promote the interests of broadcast industry leaders at the expense of smaller broadcast operators through its allocation, programming, and channel assignment policies).

\(^{66}\) See Schmeckebier, supra note 14, at 54-55 ("[P]robably no quasi-judicial body was ever subject to so much congressional pressure as the
Between 1927 and 1934, the FRC endeavored to reduce the number of broadcasters. The commissioners believed their duty to Congress lay in achieving that objective. Rosen writes of the methods used by the FRC to lessen the number of licensees. Believing the Radio Act to prevent them from revoking licenses at will, the FRC relied on changes in the law to effect the same result. Through manipulation of the Davis Amendment, that required geographic equality in the allocation of service, the FRC reallocated frequencies in such a way as to create particularly disadvantageous assignments for small commercial and noncommercial operators. By discriminating against these operators, the FRC was able to drive them out of broadcasting, making continued operation futile in light of reception difficulties. This approach reduced the number of stations without offending the leading broadcast interests.

Federal Radio Commission. Much of this, moreover, came at a time when a majority of the Commission had not been confirmed.”; see also Hazlett, supra note 12, at 168-69:

Broadcast licensing became, hence, an inordinately political affair. FRC General Counsel Louis G. Caldwell noted the “political pressure constantly exercised . . . in all manner of cases,” and the 1927 Act’s creator, Senator Dill, pointedly rejected a later suggestion that congressional members treat the commission like a court of law and refrain from attempting to influence assignments. . . . [P]ure influence peddling in the procurement of licenses could yield both legal and extralegal benefits for incumbent Congressmen.

67. See Rosen, supra note 20, at 134.
69. Rosen, supra note 20, at 140. Rosen describes the process by which industry leaders were spared while smaller broadcasters were driven out of the business.

[T]he allocation plan represented Machiavellian manipulation. The commissioners maintained their belief that high-powered transmitters used the spectrum most efficiently. Furthermore, by improving reception they hoped to enlarge the audience further. They expected that the clear channel stations would limit the market for expensive receivers. Obviously programs transmitted on high power could be picked up on the inexpensive sets more easily afforded by most listeners. Using the strategy of packing small operators closely together, while limiting their range and operations, the FRC aimed to eliminate roughly two hundred of them. It hoped to reclaim these wavelengths “rendering minimal public service” after their holders failed within a year or two.

Id. at 136.

70. See Rosen, supra note 20, at 134-36. Rosen writes:
While it was polling its constituency for suggestions, the FRC began to pressure small operators to surrender their licenses voluntarily. Immediately after passage of the 1928 radio control bill, the bureau
Between 1927 and 1932, the number of licensees went from 700 to 604, and the number of those with authority to operate at night dwindled to from 565 to 397. Between 1921 and 1936, 202 stations were licensed for educational use. Of these, fully 164 gave up their licenses. The FRC thus made good on Commerce Department and congressional assurances that, through licensing, the number of broadcasters would be reduced, and it did so in a way that was not readily susceptible to court challenge.

III. BROADCAST CONTENT REGULATION: A DETAILED HISTORY

Section III of this article provides a detailed chronological history of the rise and decline of broadcast content regulation between 1927 and the present. It is a primer for those unfamiliar with the scope and longevity of FRC and FCC content regulations. Those already aware of this history should turn to Section IV for a refutation of the rationales used to support these regulations.

A. The Rise of Broadcast Content Regulation

The FRC did not waste time in putting Hoover's theory of "public interest" regulation into practice. The Radio Act gave closed thirteen portable stations with the argument that the Davis Amendment authorized fixed facilities only. On 25 May 1928, the FRC promulgated General Order Number 32, which required 164 small broadcasters to justify their continued operation. While comparatively few owners suffered under this edict, it nonetheless warned of more changes to come.

Id. at 135.

71. See id. at 140-41; see also Head, supra note 26, at 132 ("From 1927 to 1932 the total number of broadcast authorizations was reduced . . . from 681 to 604. However, the number of stations authorized to operate at night (when sky wave interference becomes a factor) was reduced from 565 to 397.").

72. The number and variety of FCC regulations that affect broadcast media content are so great that an article designed to present a general overview of the subject must be somewhat selective in order to avoid a brief assessment of subjects that seem to require extensive treatment. Accordingly, this history does not examine the financial interest/syndication rules, although these rules appear to violate the speech and press freedoms of networks by preventing them from relying on in-house entertainment programming productions to fill their prime-time schedules and by denying them an unencumbered right to disseminate their programming through domestic syndication. See also Evaluation of the Syndication and Financial Interest Rules, 6 F.C.C.R. 3094, 3213 (1991) (Commissioner James H. Quello, dissenting). The Seventh Circuit now has these rules under review; the network petitioners argue, inter alia, that the rules violate their First
the FRC broad discretion in evaluating the nature of licensee service. 73 Under Section 18 of the Act, broadcasting stations were required to afford equal opportunities for the use of a station by candidates for public office. 74 As in the case of granting new broadcast licenses, the Commission could only grant a license modification or renewal if it found that the "public interest, convenience, or necessity" would be served by doing so. 75 The Act also required Commission approval in advance

Amendment rights. See Schurz Communications, Inc. v. FCC, No. 91-2350 (7th Cir. filed June 14, 1991).

This history also excludes FCC indecency and obscenity regulations, the agency's prime time access rule, and its content regulations of the cable media. These subjects require more detailed analysis than is appropriate for a single article and are therefore left for another day.

73. Section 4(b) of the Act permitted the Commission "as public convenience, interest, or necessity requires" to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class." Radio Act of 1927, ch. 169 § 46, 44 Stat. 1164 (1927), reprinted in Rad. Reg. 2d (P & F) ¶ 20:4. Section 10 of the Act specifically required applicants for license authority to identify "the purposes for which the station is to be used." Id. at § 10, 44 Stat. at 1166.

74. Section 18 of the Radio Act reads:
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, and the licensing authority shall make rules and regulations to carry this provision into effect; provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this paragraph. No obligation is hereby imposed upon any licensee to allow use of its station by any such candidate.

Id. at 1170.

75. See id. at 1167.

The "public interest" standard proved to be an extremely facile one, capable of condoning a wide array of censorial regulations. By merely stating that it was acting on behalf of the interest of an inherently undefinable "listening public," the Commission could impose (and did impose) all manner of regulatory restraints on what could be broadcast. See, e.g., Edward C. Caldwell, Censorship of Radio Programs, 1 J. RADIO L. 441, 467 (1931) (quoting the SECOND ANNUAL REPORT OF THE FEDERAL RADIO COMMISSION 160).

In his report to Secretary of Commerce Hoover for the year 1924, the Commissioner of Navigation for the Department frankly admitted, "the broadcast listener is an unknown quantity. . . . An accurate expression of its views is unobtainable." Selection from Annual Report of the Commissioner of Navigation to the Secretary of Commerce for the Fiscal Year Ended June 30, 1924, in 1 DOCUMENTS IN AMERICAN TELECOMMUNICATIONS POLICY 22 (J. Kittross ed., 1977). In fact, the "public interest" is whatever the agency wants it to be, provided it can articulate a rational basis for its conception. See, e.g., Pinellas Broadcasting Co. v. FCC, 230 F.2d 204, 206 (D.C. Cir.), cert. denied, 350 U.S. 1007 (1956), wherein Judge E. Barrett Prettyman wrote:
of any voluntary or involuntary transfer of control over the licensee or assignment of license, again under the same all-encompassing public interest standard.\textsuperscript{76}

In two places, the Act denied licensees any property right in the spectrum.\textsuperscript{77} Broadcasting licenses were expressly limited to three year terms, thus ensuring that licensees would remain mindful of the fact that they were authorized to broadcast only at the pleasure of the FRC.\textsuperscript{78} The Act did prohibit "censorship" but immediately followed that prohibition with a denial of a right to broadcast anything "obscene, indecent, or profane."\textsuperscript{79}

\[\text{T}h\text{e Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes. Two diametrically opposite schools of thought in respect to the public welfare may both be rational; e.g., both free trade and protective tariff are rational positions.}\]

230 F.2d at 206.

Surveying the history of broadcast regulation, Ronald Coase found the "public interest" standard to "lack any definite meaning." See Coase, supra note 26, at 8. More recently, in a 1991 speech before the Washington Journalism Center, Bill Monroe, Executive Producer and Moderator of NBC's "Meet the Press" and Editor of the Washington Journalism Review, described the "public interest" standard as "the second-to-the last refuge of a scoundrel." In contrast, the Court has reasoned, with admitted difficulty, that the standard is "as concrete as the complicated factors for judgment in such a field of delegated authority permit." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

76. \textit{See} Section 12 of the Radio Act of 1927, \textit{supra} note 73, at 1167.
77. Section 5(H) of the Radio Act of 1927 reads in pertinent part:
No station license shall be granted by the commission or the Secretary of Commerce until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.
Radio Act of 1927, \textit{supra} note 73, at 1165.

Section 11(A) of the Act required the station license to contain the following condition:
The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein.
\textit{Id.} at 1165.
78. \textit{Id.} at 1166.
79. Section 29 of the Radio Act of 1927 reads:
Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the
The anti-censorship provision was, to a large extent, a dead letter, for it did not prevent the FRC from imposing its editorial strictures on broadcasters. Both the constitutional law of the time and the vast majority of members of Congress did not recognize broadcasting as the equivalent of newspaper or book publishing. Rather, to them it was more like a carnival spectacle than "the press." As of 1927, the broader implications of censorship had not been addressed by the Supreme Court. The First Amendment continued to be interpreted consistent with the Eighteenth Century Blackstonian conception of free speech and press; as a consequence, the anti-censorship provision of the Act was of little use. From 1798 until 1930, the state and federal courts adhered to the view that although prior restraints were prohibited, punishments for material once published were permissible. The Supreme Court did not begin to alter this reading of the amendment until 1930 in Stromberg v. California, when at last the marketplace of ideas and search for truth rationales for denying government authority over speech and press gained suasion with a majority of the Court.

Therefore, as long as the FRC refrained from proscribing content with prior restraints, it could attain the same result lawfully through the imposition of after the fact regulation. In particular, it relied upon the threat of non-renewal as a means to

licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

Id. at 1172-73.

80. See, e.g., Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230, 244 (1915) (wherein the Court found motion pictures not to constitute the "publication of ideas" or to be a "part of the press of the country.").

81. According to Blackstone, the liberty of the press . . . consists in laying no previous restraints upon publications, and not in the freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.

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82. 283 U.S. 359 (1930).

83. For three outstanding studies on the Court's remarkable lack of a developed First Amendment theory during this period, see David Rabban, The First Amendment in its Forgotten Years, 90 YALE L.J. 513 (1981). See also Michael Gibson, The Supreme Court and Freedom of Expression from 1791 to 1917, 55 FORDHAM L. REV. 263 (1986); Howard Hunter, Problems in Search of Principles: The First Amendment in the Supreme Court from 1791-1930, 35 EMORY L.J. 59 (1986).
cajole licensees into broadcasting content "in the public interest." 84 Of course, after the fact regulation could silence speech just as effectively as prior restraint. 85 Indeed, the FRC commissioners did not hesitate to use post-publication censorship to effect changes in content, as the following quote from FRC Commissioner Orestes H. Caldwell makes clear:

>[E]ach station occupying a desirable channel should be kept on its toes to produce and present the best programs possible and, if any station slips from that high standard, another station which is putting on programs of a better standard should have the right to contest the first station's position and after hearing the full testimony, to replace it.

The public interest standard was defined by reference to Hoover’s conception of public service. Hoover viewed radio as a utility, whose product, programming, had to be monitored by government with a paternalistic regard for the “best interests” of the listening public. 86 As Hoover put it in 1924:

Radio has passed from the field of an adventure to that of a public utility. Nor among the utilities is there one whose activities may yet come more closely to the life of each . . . of our citizens, nor which holds out greater possibilities of future influence, nor which is of more potential public concern. Here is an agency that has reached deep into the family life. We can protect the home by preventing the entry of printed matter destructive to its ideals, but we must double-guard the radio. 87

85. The necessity for denying the state power to ban speech (whether that power is exercised through prior restraint or after the fact regulation) was recognized early in our constitutional history. As James Madison put it, "to be effectual" the First Amendment "must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws." See Madison's Report on the Virginia Resolutions, quoted in IV The Debates in the Several State Conventions on the Adoption of the Federal Constitution 570 (J. Elliot ed., 1888).
86. Congress, too, regarded radio as a regulatable utility. Speaking in support of the Radio Act, Senator Dill equated the public interest standard with that used in public utility law: "In this proposed law, . . . we have laid down a basic principle—namely, the principle of public interest, convenience, and necessity—which is the general legal phrase used regarding all public utilities engaged in interstate commerce." 68 Cong. Rec. S3027 (1927).
87. See Proceedings of the Third National Radio Conference, at 2-3. The Federal Radio Commission later employed precisely this utility notion, in a very attenuated analogy, to justify program content regulations. The FRC wrote:

[T]he emphasis should be on the receiving of service and the
Hoover's "public interest" theory elevated the largely unknowable "interests of the listener" (i.e., the government's conception of acceptable programming fare) above the interests of the broadcaster (i.e., the broadcaster's editorial choices).\(^{88}\) Hoover believed broadcasting necessarily imbued with a "public" character because it makes use of a "national" resource, the airwaves. Moreover, he understood that everyone who wished to broadcast could not do so given the fact that the spectrum, like any resource of value, was not universally available;\(^{89}\) hence, someone would have to select who would be permitted to broadcast. For Hoover, those someones were government officials.\(^{90}\) Hoover, Congress, and the courts relied on the spectrum scarcity rationale as the legal justification for government selection.

Under this rationale, government (said to be protecting the public) could exert influence not only over broadcast industry structure,\(^{91}\) but also over broadcast content. Hence, when Hoover said that the listeners' interests were paramount, he was in fact saying that the government's view of what the listeners should hear was paramount. In short, the content of what was standard of public interest, convenience or necessity should be construed accordingly. This point of view does not take broadcasting stations out of the category of public utilities or relieve them of corresponding obligations; it simply assimilates them to a different group of public utilities, i.e., those engaged in purveying commodities to the general public, such, for example, as heat, water, light, and power companies, whose duties are to consumers, just as the duties of broadcasting stations are to listeners. The commodity may be intangible but so is electric light; the broadcast program has become a vital part of daily life. . . . The Government does not try to tell a public utility such as an electric-light company that it must obtain its materials such as coal or wire, from all comers on equal terms; it is not interested so long as the service rendered in the form of light is good. Similarly, the commission believes that the Government is interested mainly in seeing to it that the program service of broadcasting stations is good, i.e., in accordance with the standard of public interest, convenience, or necessity.

See Statement Made by the Commission on August 23, 1928, Relative to Public Interest, Convenience, or Necessity, 2 FRC Annual Report 166 (1928), reprinted in Kahn, supra note 27, at 127.

89. See NBC v. United States, 319 U.S. 190, 226 (1943).
90. Hoover was fond of government-industry partnerships. See Hazlett, supra note 12, at 158-59.
broadcast would have to be in accordance with what the government found fitting and proper.  

Under this theory, which has come to be known as the "public trusteeship" model of broadcast regulation, good broadcasters kowtow to the editorial desires of the Commission, thereby protecting their licenses from attack. Government uses administrative cajolery, affirmative programming requirements, and the threat of non-renewal to push and pull broadcasters into orthodox broadcasting.

The market failure thesis is an important part of the justification for government content regulation, for the trusteeship model rests on the assumption that broadcasters, if left to their own devices, will not always program in a way that will satisfy the true needs and interests of listeners. Rather, the assumption is that government must intervene to remedy "market failures" by imploring that certain matters be broadcast that the public should hear but is not receiving. This latter, highly paternalistic aspect of broadcast regulation continues to epitomize government intervention into the idea marketplace. Government intervenes to alter broadcast content for the "good" of the listening public, whether the public actually desires a change in programming or not.

1. The FRC's Development of Policies to Second Guess the Editorial Judgments of Broadcasters

The FRC was quick to assert its power over radio programs. The agency held that radio programs were not entitled to full First Amendment protection from federal regulation, basing this decision on the spectrum scarcity rationale. In August of 1928, the agency warned licensees:

The Commission is unable to see that the guaranty of freedom of speech has anything to do with entertainment programs as such. Since there are only a limited number of channels and since an excessive number of stations desire to broadcast over these channels, the Commission believes it is entitled to consider the program service rendered by the various applicants, to compare them, and to

favor those which render the best service. If one station is broadcasting phonograph records in a large city where original programs are available and another station is broadcasting original programs, for which it is making a great financial outlay, the commission believes the second station should be favored and that the question of freedom of speech is not involved.94

Also in August of 1928, the FRC released a statement defining what kinds of programming it considered contrary to the public interest.95 Meant to guide broadcasters in their exercise of editorial discretion, this statement identified programming areas into which broadcasters could dare enter only at their peril.

The FRC had a low opinion of stations that broadcast phonograph records, preferring the more costly live performances sponsored by the major radio concerns. The FRC determined that "[a] station which devotes the main portion of its hours of operation to broadcasting . . . phonograph records is not giving the public anything which it can not readily have without such a station."96 In addition, the Commission did not like program length commercials and the quoting of price information in commercials. It found advertising tolerable only when ancillary to a program it deemed suitable.97

The FRC also preoccupied itself with fulfilling its obligation to Congress that House and Senate members be afforded access to the airwaves during election season. Indeed, Section 18 of the Radio Act of 1927 required the FRC to take this action. The agency adopted an expanded view of licensee responsibilities under Section 18. The second prong of what later became known as the "Fairness Doctrine" was first articulated in the FRC's 1928 statement, which read in pertinent part:

94. FRC Second Annual Report 160, quoted in Edward C. Caldwell, Censorship of Radio Programs, 1 J. RADIO L. 441, 467 (1931).
95. See FRC Second Annual Report, reprinted in KAHN, supra note 27, at 127.
96. KAHN, supra note 27, at 130-31.
97. The Commission stated:
Where the station is used for the broadcasting of a considerable amount of what is called "direct advertising," including the quoting of merchandise prices, the advertising is usually offensive to the listening public. Advertising should be only incidental to some real service rendered to the public, and not the main object of a program.

Id. at 131.
It would not be fair, indeed it would not be good service to the public to allow a one-sided presentation of the political issues of a campaign. In so far as a program consists of discussion of public questions, [the] public interest requires ample play for the free and fair competition of opposing views, and the commission believes that principle applies not only to addresses by political candidates but to all discussions of issues of importance to the public.98

The FRC also explained that programming of general utility to those in a broadcaster's community of license was to be preferred over programming of concern only to a small segment of the audience (this is an early articulation of the concept of localism that, although modified somewhat over time, is still very much in vogue at the FCC). In addition, what later would become known as "balanced" programming fare was considered a public interest imperative. The FRC admonished licensees:

[In the opinion of the commission . . . the tastes, needs and desires of all substantial groups among the listening public should be met, in some fair proportion, by a well-rounded program, in which entertainment, consisting of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family find a place.]99

As if licensees had any doubt about the dangers they faced if they did not follow the FRC's advice on programming, the FRC expressed in writing that all of the programming factors referenced in its statement would be taken into account in a

98. Id. at 136. The Commission added to this the warning that stations dominated by partisan editorialization to the exclusion of others of certain "doctrines, creeds, and beliefs" could be in danger of losing their licenses because "a well-founded complaint will receive the careful consideration of the Commission in its future action with reference to the station." Id. at 136-37.

It is significant in light of Congress's obsession with protecting the right of incumbents to get their views across that "fairness" is first described in the statement as balanced campaign programming. This early version of the Fairness Doctrine lacked the affirmative requirement that a broadcaster present controversial material. It only required that if a broadcaster did present one side of a controversial issue of public importance, it would have to present the other side or sides. See generally Steven J. Simmons, Fairness Doctrine: The Early History, 29 Fed. Comm. B.J. 207 (1976).

review of a licensee's "past performances" at renewal time. A determination would then be made about whether the licen-
see's overall programming service had been in "the public
interest."

This ad hoc approach to enforcement, largely limited to
times when the agency passed upon license modification or
renewal applications, attained the desired chilling effect by
causing licensees to engage in self-censorship rather than risk
the broadcast of programming that might be viewed as inimical
to the public interest. Licensees began to realize that to stay
in the business of broadcasting they would have to second
guess the editorial judgments of their professional employees.
They would have to remain cognizant of any federal or state
law that might cause an area of programming to be perceived
by the FRC as contrary to the "public interest." Of course,
they also had to keep abreast of all Commission policy
announcements and adjust their programming accordingly.

100. Id. at 138-39. In this regard, as early as 1927 renewal application
forms included the following questions:
(11) Attach printed program for the last week.
(12) [Explain why] the operation of the station [is] in the public
convenience, interest and necessity [List the]
(a) Average amount of time weekly devoted to the following
services (1) entertainment (2) religious (3) commercial (4)
educational (5) agricultural (6) fraternal
(b) Is direct advertising conducted in the interest of the
applicant or others?

Quoted in FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES
(1946), reprinted in KAHN, supra note 27, at 168.

101. The FRC defined a licensee as a public "fiduciary," in a position of
trust to serve the general weal. The agency relied upon high brow notions of
"trusteeship" and "stewardship" to encourage licensees to follow the
government's conception of good programming service. It also relied heavily
on the inducement of monopoly rent protection the license afforded and the
threat of nonrenewal to persuade broadcasters to follow the course preferred
by the government. See generally Comment, Radio Program Controls: A Network
of Inadequacy, 57 YALE L.J. 275, 286-89 (1947).

102. See Andrew G. Haley, The Law on Radio Programs, 5 GEO. WASH. L.
REV. 157, 168 (1937) ("As it is, the licensee must take his chance, and after the
objectionable material is broadcast, the Commission may step in, hold a
hearing, determine that the action of the station was not in the public interest
and possibly delete the station.").

103. See id. at 168-69:
The licensee . . . may seek enlightenment from other sources
concerning the bona fides of advertising. He may obtain
information from the Post Office Department, the Food and Drug
Administration, the Federal Trade Commission, local state and city
agencies, such as the state board of medical examiners, the securities
and insurance regulatory bodies, etc., and a multitude of private
Between 1927 and 1932, the FRC issued "General Orders" that established rules for the governance of broadcasting. From 1932 forward, the FRC's rules were formally codified. In 1928, the FRC released General Order No. 31 which implemented Section 18 of the Radio Act of 1927 (the requirement that stations provide equal opportunities to candidates for public office to air their views) and General Order Nos. 52 and 78 (replacing previous orders 16 and 49) that discouraged licensees from using phonograph records in lieu of live performances by requiring that logs be kept documenting when such records were aired and that an announcement be made before the broadcast of any such record that clearly identified it as a recording. The Commission offered the following announcements as examples of statements in compliance with its policy: "This is a talking machine recording," "This is a phonograph record," or "This is a graphophone record."  

2. The FRC's Punishments for Expositors of Unorthodox Views

In Great Lakes Broadcasting Co. v. FRC, Chicago Federation of Labor v. FRC, and W.O. Ansley, Jr. v. FRC, the D.C. Circuit Court upheld a number of FRC decisions that denied applications in whole or part on the basis of adverse content determinations.

In Great Lakes Broadcasting Co., station WCBD failed to receive FRC approval for a facilities modification based in part on the FRC's dissatisfaction with the station's religious format.

agencies, such as better business bureaus. He may refer to the decisions of the Commission on the subject of program content. If due care were always exercised by the licensees it is doubtful whether any questionable program need ever be unwittingly broadcast.

104. See Sterling & Kittross, supra note 12, at 131.

105. That Order reads:
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, and the licensing authority shall make rules and regulations to carry this provision into effect: PROVIDED, That such licensee shall have no power of censorship over the material broadcast under the provisions of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

106. See FRC General Order Nos. 52 and 78.


108. 41 F.2d 422 (D.C. Cir. 1930).

109. 46 F.2d 600 (D.C. Cir. 1930).
WCBD's broadcasts were said to concern "the religious exercise in the Zion Temple and [to] include the sermons of the leader of the sect." The court affirmed the Commission's decision, accepting the agency's argument that the religious programming presented by WCDB was of less public interest merit than the more varied programming of WCDB's competitors.

Likewise in Chicago Federation of Labor, the FRC denied the facilities improvement application of the Federation's station WCFL. It did so based on a finding that the station had broadcast advertisements concerning fraudulent securities and patent medicine. In upholding this decision, the court noted that "[t]he past record of station WCFL has not been above criticism," again revealing a bias against the station's repertory.

In W.O. Ansley, Jr., the court affirmed the FRC's denial of an application for a new AM station. In passing, the court noted that evidence in the case revealed that another station in the market broadcast "much objectionable matter," confirming by example that a focus on content was not improper.

Each of these decisions made it clear to the commissioners that the court would not oppose the FRC if it chose to punish licensees for broadcasting programming that the FRC deemed inappropriate. It was not until 1931 that the court buttressed its largely tacit approval of FRC content review with a more direct and developed statement of reasons why such review was constitutionally permissible.

In KFKB Broadcasting Association v. FRC, the court upheld the FRC's denial of the Brinkley-Jones Hospital Association's application for license renewal. Following an assessment of the licensee's programming performance, the FRC held that a license renewal would disserve the public interest.

Station KFKB functioned as the mouthpiece for Dr. J. R. Brinkley's hospital and pharmacy. Brinkley broadcast a controversial program entitled the "Medical Question Box." During the program, Brinkley read aloud letters sent to him from listeners who suffered from various ailments, diagnosed the ill-

110. Great Lakes, 37 F.2d at 994.
111. Id. at 995 (The court explained: "This conclusion is based upon the comparatively limited public service rendered by the station, and the fact that its present assignment is not unreasonable."). For an additional decision where the FRC denied licenses to parties that espoused particular religious views, see Evangelical Lutheran Synod v. FRC, 105 F.2d 793 (D.C. Cir. 1939).
112. 41 F.2d at 423.
113. 46 F.2d at 600.
114. 47 F.2d at 670.
nesses described, and then prescribed treatments from his collection of "tonics." 115

The court's affirmance of the FRC's decision against renewing KFKB's license was a ringing endorsement of the agency's right to exercise plenary power over station programming. It also affirmed the agency's spectrum scarcity rationale for regulation.

It is apparent . . . that the business [of broadcasting] is impressed with a public interest and that, because the number of available broadcasting frequencies is limited, the Commission is necessarily called upon to consider the character and quality of the service to be rendered. In considering an application for a renewal of license, an important consideration is the past conduct of the applicant, for "by their fruits, ye shall know them." Matt. 7:20. 116

The court rejected the argument that post-publication punishment for speech amounted to a violation of Section 29 of the Radio Act of 1927 (the provision that disallowed censorship), upholding the FRC's position that the section only prohibited prior restraints:

Appellant contends that the attitude of the commission amounts to a censorship of the station contrary to the provisions of section 29 of the Radio Act of 1927. . . . This contention is without merit. There has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question of whether the public interest, convenience, or necessity will be served by a renewal of appellant's license, the commission has merely

115. The court quoted from two of the broadcasts:
Here's one from Tillie. She says she had an operation, had some trouble 10 years ago. I think the operation was unnecessary, and it isn't very good sense to have an ovary removed with the expectation of motherhood resulting therefrom. My advice to you is to use Women's Tonic No. 50, 67, and 61. This combination will do for you what you desire if any combination will, after three months persistent use.

Sunflower state, from Dresden Kans. Probably he has gall stones. No, I don't mean that, I mean kidney stones. My advice to you is to put him on Prescription No. 80 and 50 for men, also 64. I think that he will be a whole lot better. Also drink a lot of water.

KFKB Broadcasting Ass'n, 47 F.2d at 671.

116. Id. at 672.
exercised its undoubted right to take note of appellant’s past conduct, which is not censorship.\textsuperscript{117}

The FRC’s aversion to certain content led it on additional occasions to deny license renewal applications. The application of Norman Baker for renewal of station KTNT was denied because Baker had broadcast personal attacks on “individuals, companies, and associations, especially certain medical associations and doctors.”\textsuperscript{118} These attacks offended the sensibilities of the commissioners. Rather than limit the scope of their decision to a simple statement that the programming failed to serve the public interest, the commissioners took the occasion to extend their power over programming. They did so, in the advent of favorable court decisions, by announcing their disapproval of the moral tone of what was broadcast, hoping to promote “a standard of refinement fitting our day and generation.” They wrote:

This Commission holds no brief for the Medical Associations and other parties whom Mr. Baker does not like. Their alleged sins may be at times of public importance, to be called to the attention of the public over the air in the right way. But this record discloses that Mr. Baker does not do so in any high-minded way. It shows that he continually and erratically over the air rides a personal hobby, his cancer cure ideas and his likes and dislikes of certain persons and things. Surely his infliction of all this on the listeners is not the proper use of a broadcasting license. Many of his utterances are not uplifting or entertaining.

Though we may not censor, it is our duty to see that broadcasting licenses do not afford mere personal organs, and also to see that a standard of refinement fitting our day and generation is maintained.\textsuperscript{119}

By 1931, the FRC had become a great sanitizer of broadcast subjects through its license revocation power. It had succeeded in declaring certain categories of content off limits for broadcasters. It had effectively informed licensees that the ultimate editor for their stations did not work in station news rooms but in the FRC’s Washington, D.C. offices. With the D.C. Circuit’s imprimatur of support coming in the form of KFKB, the FRC now viewed itself as free to expand its content regulatory regime into new areas. It issued statements identify-

\textsuperscript{117} Id.
\textsuperscript{118} See Caldwell, supra note 75, at 473.
\textsuperscript{119} See id.
invalidity of FCC content regulations

ing what kind of programming did not comport with the public interest, expecting such statements to induce self-censorship by licensees. The Commission issued one such statement in May of 1931:

Upon frequent occasions there has [sic] been brought to the attention of the commission complaints against radio stations broadcasting fortune telling, lotteries, games of chance, gift enterprises, or similar schemes offering prizes dependent in whole or in part upon lot or chance. On that subject the commission has this to say: There exists doubt that such broadcasts are in the public interest. Complaints from a substantial number of listeners against any broadcasting station presenting such programs will result in the station’s application for renewal of license being set for a hearing. . . .

In Trinity Methodist Church v. FRC, the court again affirmed the FRC’s use of its renewal authority to punish a licensee who broadcast the unorthodox. The FRC denied the license renewal of station KGEF, whose owner, Dr. Bob Shuler, a self-proclaimed “scraper for God,” aired vitriolic attacks on Catholics, Jews, and government officials. Shuler challenged the FRC’s decision on First Amendment grounds but, predictably, lost.

In affirming the agency’s decision, the court also defended the FRC’s role as sanitizer of broadcast content.

If it be considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use those facilities, reaching out, as they do, from one corner of the country to the other, to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality, and be answerable for slander only at the instance of the one offended, then this great science, instead of a boon, will become a scourge, and the nation a theater for the display of individual passions and the collision of personal interests. . . . Appellant . . . may not, as we think, demand, of right, the continued use of an instrumentality of commerce for such purposes.

120. Id. at 472.

121. 62 F.2d 850 (D.C. Cir. 1932), cert. denied, 288 U.S. 599 (1933).

122. Id. at 852.
In its first few years, the FRC had established its authority to control broadcast content through after the fact regulation. Indeed, it had received support for its exercise of broad content regulatory powers, not only from the Court of Appeals for the District of Columbia Circuit, but also from the Supreme Court in *FRC v. Nelson Bros. Bond & Mortgage Co.* Made confident by the courts’ legal backing, the Federal Communications Commission, the FRC’s successor, commenced an even more ambitious, aggressive, and intrusive campaign to effect changes in broadcast media content.

3. The FCC’s Expansion of FRC Content Controls

In 1934, Congress enacted the Communications Act, increasing the membership of the FRC, bringing telephone and telegraph communications within the jurisdictional compass of the agency, and changing the agency’s name to the Federal Communications Commission (FCC). Although the statutory authority of the FCC over broadcasting did not differ fundamentally from that of the FRC, the FCC was far more powerful than its predecessor, having gained full congressional support for its permanent existence and a grant of authority over all means of interstate communication. With this new power, the FCC undertook as its first mission the expansion of content controls.

123. 289 U.S. 266, 279, 285 (1933) (accepting the FRC’s spectrum scarcity rationale and holding that the “public interest” standard encompasses regulation of programming).


125. See *Sterling & Kittross*, supra note 12, at 189 (“The first FCC regulatory project was a concern of the old FRC—changing substandard program and advertising policies in broadcasting.”).
excessive record playing; (8) direct solicitations; (9) program length commercials or unusually high amounts of commercial advertising; (10) advertising interruptions during concerts or other artistic programs; (11) false or misleading advertising; and (12) biased editorialization on controversial subjects.126

The cases of Scroggin & Company Bank,127 Bremer Broadcasting Company,128 and Ben S. McGlashan129 present somewhat typical instances of content review by the FCC in its early years. In each case, the FCC held hearings following public complaints about station programming. The hearings served as fora for the agency to inspect in detail all programming decisions made by the licensees during their previous license terms and to cross-examine the licensees' principals about their programming choices. The hearings were (and still are) an expensive proposition for licensees.130

In Scroggin & Company Bank, the applicant's license was renewed, but only after the agency forced it to undergo a hearing and admonished it to avoid the broadcast of astrology, fortune-telling, and misleading advertisements.131 Scroggin & Company Bank's station, KFEQ, broadcast what the Commission termed "matter obviously designed primarily to exploit the public."132 In two programs, one by a Dr. Richards, "astrologer and psychologist," and another by a Dr. Price, "spiritual psychologist," listeners were given advice on such matters as "business, domestic affairs, health, finance and

126. See id. (referencing an FCC Memo released in 1939 that identified each of these kinds of programs as well as defamation as contrary to the public interest); see also ROBERT JOHN LANDRY, WHO, WHAT, WHY IS RADIO? 52 (1942), making reference to a statement by FCC Chairman Anning S. Prall that these kinds of programs were not in the public interest.

127. 1 F.C.C. 194 (1935).
128. 2 F.C.C. 79 (1935).
129. 2 F.C.C. 145 (1935).

130. See Timothy B. Dyk, Full First Amendment Freedom for Broadcasters: The Industry as Eliza on the Ice and Congress as the Friendly Overseer, 5 YALE J. ON REG. 299, 308 n.51 (1988) ("Even if a broadcaster were certain of ultimate success, it would often be reluctant to take actions that would increase the risk of challenge because the defense of a comparative proceeding may run into millions of dollars . . . ").

131. What has become known as the "raised eyebrow" approach is the typical manner by which the FCC cautions licensees into behaving in the manner it desires. It usually holds its license revocation power in reserve to punish reactivists. See Comment, Radio Program Controls: A Network of Inadequacy, 57 YALE L.J. 275 (1947) ("Far more frequently than it revokes licenses or denies renewal, the Commission merely warns. Thus, between 1934 and 1942, two licenses were revoked and 13 applications for renewal denied . . . ").

132. 1 F.C.C. 194; 195 (1935).
investments, love, marriage, . . . delicate family matters, [and] vocational guidance . . . ." The commissioners greatly disapproved of these broadcasts, particularly because they included some material "bordering on indelicacy and scandalousness." The FCC also condemned the airing of what it thought to be a fraudulent commercial.

Nevertheless, on the basis of the licensee's entire programming record and because the station's other programs appeared "to be generally satisfactory and interesting to residents within the range of the station," the FCC found the public interest best served by issuance of a license renewal.

In Bremer Broadcasting Company, station WAAT broadcast a "health discussion" program and horse race results in code. These broadcasts were condemned by the FCC following a thorough hearing on station programming.

The medical discussion program was accompanied by advertisements from a Dr. Coll. The program gave medical advice on such maladies as hernias, varicose veins, ulcers, and hemorrhoids. In the advertisements, listeners were encouraged to seek consultation and a painless cure from the doctor. The FCC found the advertisements false and misleading and noted that the treatments, far from being painless, actually caused the death of two individuals. The FCC found the station "guilty of improper conduct through its dissemination to a credulous public of certain medical programs far removed from those reasonably calculated to be in the public interest."

The horse racing program employed a code system intelligible only to those who had subscribed to a "scratch sheet" containing definitions of the terms. The FCC found that this program also disserved the public interest, but noted that the station had discontinued both programs and had agreed not to run them in the future.

133. Id. at 195-96.
134. Id. at 196.
135. Id. at 196-97.
136. Id. at 197-98. For additional FCC rulings from the period that condemn the broadcast of astrology, see T. Yount, d/b/a Universal Advertising Agency, 2 F.C.C. 200 (1935). See also Nellie H. & W. C. Morris, 2 F.C.C. 269 (1935); Farmers and Bankers Life Ins. Co., 2 F.C.C. 455 (1935); Adelaide Lillian Carrell, 7 F.C.C. 219 (1939).
137. 2 F.C.C. 79, 81 (1936).
138. Id. at 82.
139. Id. at 81.
140. Id. at 83.
141. Id.
Upon a review of the station’s entire programming record, the FCC determined that “for the most part” the station “served its listening area in a creditable manner, giving time to educational, civic, charitable, and governmental agencies” and did provide “interesting entertainment programs.” The agency warned that if it found a basis in the record for concluding that the licensee would continue the objectionable programs, it would have refused to renew the applicant’s license.

In *Ben S. McGlashan*, the FCC evaluated five applicants for renewal of license: Ben S. McGlashan, licensee of KGFJ; Warner Brothers Broadcasting Company, licensee of KFWB; Beverly Hills Broadcasting Corporation, licensee of KMPC; Radio Broadcasters, Inc., licensee of KRKD; and Cannon System, Ltd., licensee of KIEV. It also evaluated three applicants seeking FCC consent to facilities improvements. Each of the licensee’s stations had broadcast commercials created by the Alhambra Electronic Institute (later called the California Electronic Institute), the alter ego of an entrepreneur named Fred Bezuzi and a chiropractor named Stephen T. Mayes.

These commercials described an incredible new invention, the “electronometer,” said to be capable of diagnosing all manner of ailments. Based on the expert testimony of an

142. *Id.*


144. 2 F.C.C. 145, 148 (1935).

145. The advertisement aired by station announcers read in pertinent part as follows:

You have heard about this new marvel instrument called the electronometer installed at the Alhambra Electronic Institute at 1811 West Main Street in Alhambra. It is an instrument that is causing a sensation before us in Southern California, for this reason, it shows you visually the underlying and basic cause of your ailment. Many of you have spent many dollars trying to regain your health and today you are at a loss to know what is causing your ailment. You say to yourself, “If I knew what was causing my sickness, I certainly would regain health.” All right you would, and here is your opportunity, that is for ten people, we are authorized to make appointments for ten people at this time for this examination. Now this examination usually costs $10.00, but for these ten people it is going to be given to them for just $1.00 and that is the total cost without any obligation.
engineer and physicist, the FCC found no basis to credit the claims made in Alhambra advertisements and concluded that the broadcast of them was "inimical to public welfare and therefore not in the public interest . . ."146

Upon evidence that each licensee had discontinued the objectionable advertisements, had pledged not to air them again, and had otherwise commendable service records, the FCC granted the various applications.147

From the early FCC cases, the Commission perfected three regulatory techniques used repeatedly, from that time forward, to coax and cajole broadcasters into airing programming preferred by the commissioners: (1) it barred certain kinds of applicants from receiving licenses; (2) it labeled certain kinds of programs inimical to the public interest; and (3) it mandated that broadcasters air certain classes of programs deemed beneficial for the public.148

In a triumphant reflection on the success of the early years of content control, FCC Chairman Anning S. Prall announced in a CBS radio interview on January 13, 1936:

And what else has happened in the program line during the last twelve months? High powered advertising announcements have been toned down; commercial continuities are in better form; the two major chains have adopted entirely new policies and have outlawed programs advertising internal medicines or bordering upon the improper. Their action has been quickly followed by practically all the responsible independent stations. Today the number of quack medicines, fortune-telling, lottery and other schemes broadcast with the end in view

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146. Id. at 149-50.

147. Id. at 151-52.

of fooling or defrauding a gullible public is at a minimum. The FCC will not stop until all of them are off the air.\textsuperscript{149}

From 1934 to 1940, with the courts' blessing, the FCC became more assertive in its enforcement of content regulations. Its role as moral policeman of content quality became an indispensable and defining one for the agency.\textsuperscript{150} In effect, the FCC had become the broadcasters' collective conscience. It caused them to avoid the iconoclastic and the heterodox. Conformity was the watch word of the day. The broadcasters' goal was to pass by FCC regulators without notice or public com-

\textsuperscript{149} Quoted in Andrew G. Haley, The Law on Radio Programs, 5 GEO. WASH. L. REV. 157, 167 n.40 (1937). In its Third Annual Report, the FCC explained that the majority of the investigations conducted with regard to complaints received concerning the program service of broadcast stations have resulted in informal adjustments. Other complaints involving possible violations of the act and rules and regulations of the Commission, including the broadcast of lotteries, medical programs, and fortune-telling programs . . . have been investigated, and appropriate actions have followed either by way of adjustment or by the designation of applications for renewal of licenses for hearing.


\textsuperscript{150} See Comment, Old Standards in New Context: A Comparative Analysis of FCC Regulation, 18 U. CHI. L. REV. 78, 83 (1950):

The Commission was beginning to use "public interest" in the layman's sense. Licenses were issued or denied not merely upon a comparison of the technical and financial abilities of the various applicants, but upon a determination of whether the services of this particular broadcaster would benefit the American people. The Commission had travelled far from its original role of airwaves traffic policeman. Control over radio had become more than regulation based on technological necessity; it had become regulation of conduct, and the basis was but emerging.

Recursively in their public statements, the FCC commissioners insisted that content regulation was a crucial power that they intended to wield. In 1937, before the National Conference on Educational Broadcasting, FCC commissioner George Henry Payne (a former Bull Mooser for Theodore Roosevelt) stated:

Program standards must be established corresponding to technical standards. The broadcaster should be required at regular intervals to account for his stewardship, and if he has not met the standards set, the frequency he enjoys should be thrown into the public domain and made available to those who can and will meet the program standards, for program standards are more important than technical standards.

\textit{Quoted in EMORD, supra note 9, at 186; see also Statement of FCC Chairman Eugene O. Sykes, quoted in Joel Rosenbloom, Authority of the Federal Communications Commission, in FREEDOM AND RESPONSIBILITY IN BROADCASTING 151-52 (John E. Coons ed., 1961).}
plaint and thereby safely attain license renewal. Bland, dispirited, antiseptic programming afforded that safe harbor of anonymity needed to assure a prompt renewal.

b. The FCC's Prohibition on Editorialization

In January, 1941, the FCC decided the Mayflower Broadcasting Corporation case. That case represents the culmination of the agency's movement toward ever greater control over the editorial discretion of broadcast journalists. In assessing the license renewal application of The Yankee Network, Inc., licensee of WAAB, Boston, Massachusetts, the FCC considered the propriety of station editorialization. WAAB broadcast editorials endorsing candidates for public office and taking sides on controversial issues. The Commission concluded that editorialization by broadcasters was contrary to the public interest. It based this decision on the spectrum scarcity rationale. Wrote the commissioners:

The material in the record has been carefully considered and compels the conclusion that this licensee during the period in question, has revealed a serious misconception of its duties and functions under the law. Under the American system of broadcasting it is clear that responsibility for the conduct of a broadcast station must rest initially with the broadcasters. It is equally clear that with the limitations in frequencies inherent in the nature of radio, the public interest can never be served by a dedication of any broadcast facility to the support of his own partisan ends. Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.

In response to an FCC inquiry concerning the station's editorialization, the licensee had voluntarily discontinued all of its editorial programs and pledged to refrain in the future from voicing an opinion. This was enough for the agency, and it renewed The Yankee Network, Inc.'s license, but cautioned, "[s]hould any future occasion arise to examine into the conduct

151. 8 F.C.C. 333 (1940).
152. Id. at 339-40.
of this licensee, . . . the Commission will consider the facts developed in this record in its review of the activities as a whole."

The *Mayflower* decision provoked widespread criticism but, in light of Supreme Court decisions confirming the propriety of the agency's content regulations, did not cause the agency to change its position until 1947 when it scheduled FCC hearings on the subject.154

c. The Supreme Court Upholds FCC Content Controls

In 1940, the Supreme Court decided two cases following the reasoning set forth in *FRC v. Nelson Bros. Bond & Mortgage Co.*, one condoning the FCC's power to broadly regulate under the public interest standard155 and the other expressly endorsing it.156 It was not until 1943, however, that the Court declared unequivocally that the FCC's power to assay the "public interest" included not only the power to determine who could be in the broadcast business but also what could be broadcast. In *NBC v. United States*, the Court upheld the FCC's "chain broadcasting rules" that restricted the contract rights of the major radio networks purportedly to prevent the development of network monopolies, to promote community responsive programming, and to preclude licensees from abdicating control over programming to the networks.157 The Court rejected a First Amendment challenge to the rules, reasoning that spectrum scarcity justified lessened constitutional protection for the broadcast media158 and confirming that the FCC had power not only to determine who could enter the field of broadcasting but also to regulate the composite message communicated to the public. Wrote Justice Frankfurter:

[W]e are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of

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153. *Id.* at 341.
radio are not large enough to accommodate all who wish to use them. Methods must be developed for choosing among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.\textsuperscript{159}

\textit{NBC} inspired the Commission, leading to an expansion of its content control over broadcasting. Until \textit{NBC}, the agency had always alleged that it did not engage in censorship because it never dictated what a licensee could say. Rather, it only determined, after the fact, whether what a licensee did say was in the public interest. In the advent of \textit{NBC}, the FCC established affirmative programming obligations that licensees would have to satisfy if they wished to assure themselves license renewal.\textsuperscript{160}

d. \textbf{The FCC's Affirmative Programming Requirements}

On occasion, the FCC did more than just review the programming pledges of licensees in assaying the public interest. For example, in \textit{Canon System, Ltd.},\textsuperscript{161} the Commission reported its conclusions following an inspection of a station's programming on three randomly selected dates. The Commission had awarded Canon System, Ltd. a construction permit following that applicant's successful challenge of the license renewal of station KGIX, Las Vegas, Nevada. In its application, Canon pledged to donate free time to local civic groups to broadcast programs, to devote a substantial percent of its time to educational matters, agricultural features, and news, and to broadcast Spanish language programming. The FCC dispatched inspectors on December 15, 21, and 27, 1938 to record the station's broadcasts in an effort to ascertain whether the licensee kept its promises. The agency found that the licensee did not. Nevertheless, the FCC decided not to deny the licensee's renewal application in light of the licensee's \textit{post hoc} efforts to fulfill its original programming promises.\textsuperscript{162}

In 1945, the FCC decided \textit{United Broadcasting Co.}\textsuperscript{163} In that comparative renewal case the Commission had before it an agreement whereby a labor union and a renewal applicant settled their differences upon the licensee's pledge to permit all

\begin{itemize}
\item 159. \textit{Id.} at 215-16.
\item 160. \textit{See Comment, Radio Program Controls: A Network of Inadequacy, 57 Yale L.J.} 275, 289 (1947).
\item 161. 8 F.C.C. 207 (1940).
\item 162. \textit{Id.} at 209-10.
\item 163. 10 F.C.C. 515 (1945).
\end{itemize}
sides to air views on controversial issues on the station. In approving the settlement, the FCC announced a new policy. Henceforth, it would be the affirmative duty of licensees to broadcast programming "sensitive to the problems of concern in the community and ... make sufficient time available, on a nondiscriminatory basis, for full discussion thereof, without any type of censorship which would undertake to impose the views of the licensee upon the material to be broadcast."164

In April of that same year, the Chairman of the FCC announced a new "get tough" renewal review policy, informing broadcasters that the agency was about to intensify its "promise" versus "performance" appraisals at renewal time. Henceforth, a licensee's programming pledges made in license and license renewal applications would have to be effectuated during the license term to assure automatic renewal.165 The FCC instituted this new policy in April of 1945.166

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164. *Id.* at 517. With its 1928 Statement mandating balanced views in controversial programs, and the *United Broadcasting* requirement that matters of public concern be broadcast, the Commission had in place the two pronged requirement of the modern Fairness Doctrine. In Robert Harold Scott, 11 F.C.C. 372 (1946), the FCC framed its fairness requirement in language almost identical to that adopted for the Fairness Doctrine proper. The Commission defined the licensee's fairness duty to consist of making "time available for the presentation of opposing views on current controversial issues of public importance." *Id.* at 376.

165. Chairman Porter stated:

[A]n applicant seeks a construction permit for a new station and in his application makes the usual representations as to the type of service he proposes. These representations include specific pledges that time will be made available for civic, educational, agricultural and other public service programs. The station is constructed and begins operations. Subsequently the licensee asks for a three-year renewal and the record clearly shows that he has not fulfilled the promises made to the Commission when he received the original grant. The Commission in the past has, for a variety of reasons, including limitations of staff, automatically renewed these licenses even in cases where there is a vast disparity between promises and performance.

We have under consideration ... a procedure whereby promises will be compared with performance. I think the industry is entitled to know our concern in this matter and should be informed that there is pending before the Commission staff proposals which are designed to strengthen renewal procedures and give the Commission a more definite picture of the station's overall operation when licenses come up for renewal.

*Quoted in FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946), reprinted in KAHN, supra note 27, at 151-52.*

166. *Kahn, supra* note 27, at 152.
Then on March 7, 1946, the FCC released the most comprehensive series of programming guidelines it had ever assembled in one place, the so-called "Blue Book," so named because of the book's cover color.\textsuperscript{167}

The FCC construed \textit{NBC} to mandate the establishment of affirmative programming requirements for licensees, interpreting that case as placing the licensee "under an affirmative duty, in its public interest determinations, to give full consideration to program service."\textsuperscript{168}

The FCC would henceforth renew a license only after it compared the percentage of commercial programs of various types the licensee broadcast with the percentage pledged to be broadcast in the station's license or license renewal application. Discrepancies between the two, resulting from a failure to fulfill programming promises, could warrant a formal Commission inquiry.\textsuperscript{169} The purpose of this programming scrutiny was not only to increase the threat of non-renewal but also to ensure that licensees appreciated that their super-editor, the FCC, would be monitoring their performance not only at renewal times, but also throughout their license terms.

Under the "Blue Book" regime, which lasted from 1946 to 1961, the Commission pressured broadcasters into providing programming in each of a half dozen categories, service in every category being deemed essential to the maintenance of the "balanced programming fare" needed for renewal.\textsuperscript{170} As Ben C. Fisher explained, "[s]o long as stations maintained a

\begin{footnotes}
\item[167] \textit{Id.} at 172.
\item[168] \textit{Id.}
\item[169] \textit{See id.} at 197, 227-28. Wrote the Commission:
\textit{[T]he Commission proposes to continue substantially unchanged its present basic licensing procedures—namely, the requiring of a written application setting forth the proposed program service of the station, the consideration of that application on the merits, and subsequently the comparison of promise and performance when an application is received for a renewal of the station license.} \textit{Id.} at 227-28.
\item[170] The Commission informed broadcasters that it would give particular consideration to four program service factors relevant to the public interest. There are: (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. \textit{Id.} at 226.
\end{footnotes}
fair balance between the various categories, their renewals were automatic." 171 License applications were altered to permit heightened programming scrutiny. 172

In 1944, the Supreme Court determined that the First Amendment did not bar government from applying the anti-trust laws to the press. 173 The Court enunciated a new principle for regulating the media. Far from barring government from regulating media structure and content, the First Amendment was held to compel government intervention to assure viewpoint diversity. The Court wrote:

It would be strange indeed . . . 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 . . . . 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

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172. Application forms required that the licensee specify its proposed or actual programs in the following categories:
1. Entertainment (programs intended primarily as entertainment, such as music, drama, variety, comedy, quiz, breakfast, children's)
2. Religious (sermons, religious news, music and drama, etc.)
3. Agricultural (farm or market reports and other information addressed directly to the agricultural population)
4. Educational (programs prepared by or on behalf of educational organizations, exclusive of discussion programs)
5. News (including commentaries)
6. Discussion (including forum, panel, and round-table programs)
7. Talks (conversation programs not previously classified; includes sports)
8. Miscellaneous.

HEAD, supra note 26, at 336.

Licensees were also required to identify what percentages of these programs fell into the following categories:

<table>
<thead>
<tr>
<th></th>
<th>Network</th>
<th>Recorded</th>
<th>Wire</th>
<th>Live</th>
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<tbody>
<tr>
<td>Commercial</td>
<td>%</td>
<td>%</td>
<td>%</td>
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<tr>
<td>Sustaining</td>
<td>%</td>
<td>%</td>
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Id.

restraints upon that constitutionally guaranteed freedom. . . . 174

In 1949, the FCC seized upon NBC and Associated Press to buttress its case for the Fairness Doctrine and government control over broadcast programming content in general. It took the occasion to emphasize that, in the field of broadcasting, the "rights of the listener" were paramount to those of the speaker (taking its cue from Hoover) and to reiterate that the FCC, not individual broadcasters, would determine what kind of program service the listeners deserved. In its Report on Editorializing by Broadcast Licensees, the FCC reversed the ban on licensee editorialization that it had maintained for the eight years following Mayflower Broadcasting Corporation. It subsumed licensee editorials within the Fairness Doctrine requirements then operative, thereby requiring licensees to broadcast views in opposition to their own if they chose to broadcast any opinion at all. 175

e. The FCC's Quantitative Programming Requirements

Between 1950 and 1960, few Fairness Doctrine complaints were filed with the FCC. 176 Moreover, although the FCC required that certain categories of programming be broadcast by licensees, it did not quantify precisely how much programming within any particular category it expected licensees to present. Instead, in the first instance, the FCC made it the licensee's obligation to "determine what percentage of the limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues, rather than to the other legitimate services of broadcast." 177

This general affirmative programming obligation began to become more specific in 1960 when the FCC issued a Report and Statement of Policy Regarding Programming. 178 The FCC reiterated its understanding of the limited scope of press freedom in the field of broadcasting, explaining that the agency was not foreclosed from regulating programming by either the First Amendment or the anti-censorship provision of the Communi-

174. Id.
cations Act of 1934. It then imposed on licensees an obliga-
tion “to make a positive, diligent and continuing effort, in good
faith, to determine the tastes, needs and desires of the public in
[their communities] and to provide programming to meet
those [tastes,] needs and interests.” “Localism” had
become the agency’s paramount service objective.

The FCC defined the provision of programming in the fol-
lowing fourteen categories as “usually necessary to meet the
public interest, needs and desires of the community . . . ,” thus
indirectly forcing renewal conscious licensees to provide a fair
mix of such programming:

(1) Opportunity for Local Self-Expression, (2) The
Development and Use of Local Talent, (3) Programs for
Children, (4) Religious Programs, (5) Educational Pro-
grams, (6) Public Affairs Programs, (7) Editorialization by
Licensees, (8) Political Broadcasts, (9) Agricultural Pro-
grams, (10) News Programs, (11) Weather and Market
Reports, (12) Sports Programs, (13) Service to Minority
Groups, (14) Entertainment Programming.

Significantly, FCC application forms were revised to make
applicants specify the precise steps they had taken to apprise
themselves of community “tastes, needs, and desires” and to
elaborate on how programming would be tailored to satisfy
those tastes, needs, and desires. The FCC announced that it
would establish formal procedures to govern the manner by
which applicants would identify community interests. These
formal procedures came to be known as “ascertainment.”

179. Id. at 2307. The commissioners stated:
In view of the fact that a broadcaster is required to program his
station in the public interest, convenience and necessity, it follows
despite the limitations of the First Amendment and Section 326 of
the Act, that his freedom to program is not absolute. The
Commission does not conceive that it is barred by the Constitution
or by statute from exercising any responsibility with respect to
programming.

Id. at 2309.

180. Id. at 2314. Before 1960, the FCC had required licensees to
undertake efforts to discover community needs, but did not impose a formal
procedure on them to discover these needs. See, e.g., P.B. Huff, 11 F.C.C.
1211, 1218 (1947); Alexandria Broadcasting Corp., 13 F.C.C. 601, 614
(1949); Pilgrim Broadcasting Co., 14 F.C.C. 1308, 1348 (1950); Mid-Island
Radio, Inc., 15 F.C.C. 617, 640 (1951); Wayne M. Nelson, 44 F.C.C. 1132,
1136 (1957).

181. Programming Inquiry, 44 F.C.C. at 2314.

182. Id. at 2316.

183. Id. Wrote the commissioners:
What we propose is documented program submissions prepared as
The Commission's new ascertainment requirements were quickly put to the test. In *Suburban Broadcasters*,\(^\text{184}\) the FCC denied an application for new facilities on grounds that the

the result of assiduous planning and consultation covering two main areas: first, a canvass of the listening public who will receive the signal and who constitute a definite public interest figure; second, consultation with leaders in community life—public officials, educators, religious [leaders], the entertainment media, agriculture, business, labor—professional and eleemosynary organizations, and others who bespeak the interests which make up the community.

*Id.* FCC forms were not revised to incorporate the changes until 1965 (for radio) and 1966 (for television). See AM and FM Program Form, 1 F.C.C.2d 439 (1965); Television Program Form, 5 F.C.C.2d 175 (1966). Nevertheless, the ascertainment requirements were imposed from 1960 forward.

The forms created a four-step ascertainment procedure. Applicants were expected to fully brief the FCC on:

(a) the steps taken to become informed of the interests and needs of the area to be served;
(b) the suggestions received as to how the station could help meet those interests and needs;
(c) the applicant's evaluation of the suggestions; and
(d) the programming proposed to meet evaluated interests and needs.

*Id.* at 178.

The FCC's renewed focus on programming became a point of considerable public notice when in a 1961 address to the National Association of Broadcasters, FCC Chairman Newton N. Minow expressed disdain for the programming fare then on television and warned that unless drastic changes were made there would be repercussions for licensees at renewal time. His speech reads in pertinent part:

> When television is bad, nothing is worse. I invite you to sit down in front of your television set when your station goes on the air and stay there without a book, magazine, newspaper, profit and loss sheet or rating book to distract you—and keep your eyes glued to that set until the station signs off. I can assure you that you will observe a vast wasteland. You will see a procession of game shows, violence, audience participation shows, formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, western bad men, western good men, private eyes, gangsters, more violence, and cartoons. And endlessly, commercials—many screaming, cajoling, and offending. And most of all, boredom. Sure, you will see a few things you will enjoy. But they will be very, very few. And if you think I exaggerate; try it. . . .

> Gentlemen, your trust accounting with your beneficiaries is overdue. Never have so few owed so much to so many. . . .

> I understand that many people feel that in the past licenses were often renewed *pro forma*. I say to you now: renewal will not be *pro forma* in the future. There is nothing permanent or sacred about a broadcast license.

*Quoted in Erik Barnouw, The Image Empire 197 (1970).*

applicant had not conducted formal ascertainment. The District of Columbia Court of Appeals upheld the FCC's decision on statutory and constitutional grounds, relying heavily on NBC.

With the arrival of FCC forms specifying steps for formal ascertainment in 1965 (for AM and FM) and in 1966 (for television), the FCC held that programming surveys were no longer optional methods for ascertaining community needs; they had become mandatory. Applicants had difficulty complying with the FCC's ambiguous and evolving ascertainment requirements. Responding to the great number of complaints from broadcasters about these ambiguities, the FCC adopted a primer to guide them. The primer contained thirty-six routine questions and answers, going into considerable detail about how applicants were to obtain and analyze demographic information, conduct consultations with community residents and leaders, list community problems and needs, evaluate these problems and needs, and adopt programming responsive to

185. The FCC held:

[A]n applicant has the responsibility of ascertaining his community's needs and of programming to meet those needs. . . . The instant program proposals were drawn up on the basis of the principals' apparent belief—unsubstantiated by inquiry, insofar as the record shows—that Elizabeth's [i.e., Elizabeth, New Jersey's] needs duplicated those of Alameda, California and Berwyn, Ill., . . . . [T]he evidence admits no other conclusion than that the [applicant's] program proposals were not "designed" to serve the needs of Elizabeth. . . . [T]he applicant has made no showing as to Elizabeth's programming needs . . . . In essence, we are asked to grant an application prepared by individuals totally without knowledge of the area they seek to serve. We feel that the public deserves something more in the way of preparation for the responsibilities sought by [the] applicant than was demonstrated on this record.

Id. at 1022-23.

186. See Henry v. FCC, 302 F.2d 191, 193-94 (D.C. Cir.), cert. denied, 371 U.S. 821 (1962). The court thought it "clear that the Commission's action in the instant case reflects no greater interference with a broadcaster's alleged right to choose its programs free from Commission control than the interference involved in National Broadcasting Co." and thus affirmed the FCC's decision. Id. at 194


188. See, e.g., City of Camden, 18 F.C.C.2d 412 (1969) (denying an assignment application, including among its reasons the fact that the applicant appeared not to have surveyed a representative cross-section of the community in light of available demographic information).

these problems and needs.\(^{190}\) An applicant's failure to abide by the procedures set forth in the primer resulted in application denial.\(^{191}\)

The ascertainment procedures forced licensees to orient their programming more toward local matters and made it necessary for licensees to keep local community leaders satisfied with their performance. It also burdened them with new costs and extensive record-keeping requirements. The FCC let licensees know that the agency would judge their editorial choices to be sure that matter broadcast did satisfy ascertainment requirements.

In its 1971 primer, the FCC wrote: "[W]here the amount of broadcast matter proposed to meet community problems appears patently insufficient to meet significantly [sic] the community's problems disclosed by the applicant's consultations, he will be asked for an explanation by letter of inquiry from the Commission."\(^{192}\) The agency's 1976 renewal primer also warned that

\[\text{[w]here the licensee . . . has chosen a brief and unusually superficial manner of presentation, such as news and public service announcements, to the exclusion of all others, a question could be raised as to the reasonableness of the licensee's action. The licensee would then be required to clearly demonstrate that its single type of presentations would be the most effective method for its station to respond to the community's ascertained problems.}\] \(^{193}\)

\(^{190}\) Id. at 651-79. A Renewal Primer was also adopted. See Ascertainment of Community Problems by Renewal Applicants, 57 F.C.C.2d 418 (1975), recon. granted in part, 61 F.C.C.2d 1 (1976). The Renewal Primer made ascertainment a continuing obligation of licensees. It established a community leader "checklist," required a specific number of consultations to be conducted based on city of license size, made it necessary for licensees to place certain demographic information about their communities in their public inspection files, obliged licensees to place lists of up to ten community problems and needs in their public inspection files along with a list of programs responsive to the listed problems and needs, and required licensees to document their ascertainment efforts and place the documentation in their public files. See 47 C.F.R. § 73.3526(a)(11), (12) (1977). Noncommercial applicants were also required to abide by the ascertainment procedures. See Ascertainment of Community Problems by Noncommercial Applicants, 58 F.C.C.2d 526 (1976).


\(^{192}\) Ascertainment of Community Problems, 27 F.C.C.2d at 686.

\(^{193}\) Renewal Applicants, 57 F.C.C.2d at 445.
f. Prior Restraint in the Form of FCC "Policy Statements"

From its earliest days to the present, the FCC has transformed letter rulings in particular cases into general policy statements that have subsequently been codified. These statements have sometimes informed broadcasters that certain categories of programming are "off limits." By asserting its power to make statements of policy in lieu of general rules, the agency can avoid the rulemaking process, expand its power over programming, and attain more dramatic, though sometimes irrational, results. The following are representative examples of content-regulatory policy statements:

- In response to a letter from Senator Edwin C. Johnson, who inquired about the propriety of alcoholic beverage advertising, the FCC issued a program policy statement in 1949. The FCC determined that in states and localities where the sale or advertising of such beverages was prohibited, it would be contrary to the public interest for broadcasters to air such advertisements. It also determined that alcohol advertising was of limited public appeal and warned broadcasters that in its public interest assessment of a licensee's overall programming at renewal time, it would consider such advertising a negative factor.

- In 1961, the FCC issued a public notice adding to the general duty of licensees to police their programming for false or misleading material a particular duty to ascertain the reliability and reputation of each station advertiser. It explained that the Federal Trade Commission would regularly send notices to licensees concerning advertisers against which it had initiated proceedings. The FCC expected licensees to review the list and "exercise particular care in deciding whether to accept . . . for

194. See Broadcast of Programs Advertising Alcoholic Beverages, 43 F.C.C. 446 (1949) (comments of Senator Edwin C. Johnson).


In this regard, particular attention is directed to the fact that licensee responsibility is not limited merely to a review of the advertising copy submitted for broadcast, but that the licensee has the additional obligation to take reasonable steps to satisfy himself as to the reliability and reputation of every prospective advertiser and as to his ability to fulfill promises made to the public over the licensed facilities.

*Id.* (emphasis supplied).
broadcast advertisements from any advertiser under investigation by the FTC."  

- In 1966, the FCC issued a public notice entitled *Contests and Promotions Which Adversely Affect the Public Interest*.\(^{197}\) In the notice, the agency defined a number of contests as contrary to the public interest and, so, not fit for broadcast. These contests included "Treasure Hunts." The objectionable contests were thought disruptive of societal order or public safety and, therefore, contrary to the public interest.\(^{198}\) The FCC cited several illustrative examples:

A contest which resulted in a vast accumulation of scrap metal in a certain location, blocking access to nearby commercial establishments.

A contest which led listeners to choose names at random from the telephone directory and to call the persons listed at all hours of the day and night. . . .

Contests which, by requiring the participants to travel to a specified place in a very short time, have caused traffic violations and endangered life.

The broadcast of 'scare' announcements or headlines which either are untrue or are worded in such a way as to mislead and frighten the public; e.g., a sudden announcement delivered in a tone of excitement to the effect that 'amoebas' were invading a certain city, implying that amoebas were dangerous creatures.\(^{199}\)

In 1974, the FCC supplemented this statement with another,\(^{200}\) reiterating the terms of the first notice and identifying a few additional contests and promotions thought to be fraudulent in nature and, so, contrary to the public interest.\(^{201}\)

- In 1968, in response to an inquiry from Congressman John E. Moss, concerning broadcast stations' use of call-in polls, the agency held that licensees could not broadcast poll results without first stating the nature of the

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196. *Id.*
198. *Id.*
199. *Id.*
201. *Id.* at 1056-57. In 1976, the FCC adopted a regulation prohibiting contests that are fraudulent or that fail to disclose material terms. *See* 47 C.F.R. § 73.1216 (1990); Report and Order in the Matter of Amendment of Part 73 of the Commission's Rules Relating to Licensee-Conducted Contests, 60 F.C.C.2d 1072 (1976).
poll, and then stating whether the poll was conducted upon a scientific basis.\textsuperscript{202}

- In 1970, the agency issued a public notice effectively banning the use of sirens and "other alarming sound effects in commercials and other announcements."\textsuperscript{203} It did so following receipt of a number of complaints about such commercials and deducing from these complaints that such sound effects could confuse listeners into falsely suspecting the presence of an actual emergency.

- In that same year, the FCC acted on a complaint that a radio station had broadcast the name and phone number of an individual who was embroiled in a local controversy, thereby causing that individual to receive certain harassing and threatening phone calls. The FCC issued a statement that it was contrary to the public interest for a station to broadcast programming that it could expect would result in harassing and threatening phone calls.\textsuperscript{204} The FCC also addressed a complaint submitted by the New York Port Authority alleging that a New York City station encouraged listeners to protest to a Port Authority official for that official's failure to permit the station to move its transmitter site to the Authority-operated World Trade Center. The FCC declared it improper for licensees to use their facilities as organs "to promote [their] own private interests and annoy and harass others."\textsuperscript{205}

- In 1970 and again in 1975, the FCC warned licensees not to broadcast promotional announcements which might suggest that the station was a co-promoter of a concert, when it had no direct involvement or financial interest in the event or its promotion.\textsuperscript{206}

- In 1972, in response to a complaint by the author of a book on astrology that a station had refused to air information on that subject, the FCC issued a declaratory ruling affirming its traditional disapprobation for fortune-telling and astrology, explaining that these kinds of broadcasts were contrary to the public interest when

\textsuperscript{202} See Inquiry Into Use of "Call In" Television and Radio Polls, 13 F.C.C.2d 964 (1968) (comments of Congressman John E. Moss).

\textsuperscript{203} See In Re Use of Sirens and Other Alarming Sound Effects in Announcements, 26 F.C.C.2d 275 (1970).

\textsuperscript{204} See Dewey M. Duckett, Jr., 23 F.C.C.2d 872 (1970).

\textsuperscript{205} See In Re Complaint by Port of New York Authority, 33 F.C.C.2d 840, 841-42 (1972).

\textsuperscript{206} See Waterman Broadcasting Corp. of Texas, 28 F.C.C.2d 348 (1970); Doubleday Broadcasting Co., 55 F.C.C.2d 763 (1975).
"presented by broadcast so as to guarantee or promise monetary, health or other benefits."\textsuperscript{207}

- In 1973, in response to a request for clarification of its foreign language programming policies, the FCC disavowed any requirement that licensees hire independent, paid monitors for such programming. The FCC strongly encouraged that approach however, thereby effectively accomplishing the same result as a mandatory requirement.\textsuperscript{208}

- In 1973, the FCC issued a policy statement in response to a complaint that a radio station had repeatedly played a single rock and roll record for sixty-nine consecutive hours. The station had done so as a gimmick to inform as many people as possible that it had undergone a format change.\textsuperscript{209} The FCC found the redundant music offensive and therefore contrary to the public interest. The commissioners wrote:

The selection of records is a matter within the licensee’s discretion. But the constant repetition of any record so as to constitute the station’s entire entertainment format for a long period of time raises a question whether the licensee is making a good faith programming judgment to fulfill his public trustee role or whether he is subordinating that role for his private promotional purposes. The latter appears to be the case in the circumstances presented here and your actions appear to have been inconsistent with the public interest responsibilities of a licensee.\textsuperscript{210}

\textbf{g. The FCC’s Prohibition on Programming Duplication}

In 1964, the FCC adopted a rule that prohibited FM stations from duplicating more than 50% of their programming from a co-owned AM station in the same market.\textsuperscript{211}

The FCC permitted some program duplication to encourage the development of the fledgling FM service, but perceived this as an inefficient use of spectrum that would be tolerated only on a temporary basis. The prohibition on pro-

\textsuperscript{207} See Alexandra Mark, 34 F.C.C.2d 434, 437 (1972).
\textsuperscript{208} See Foreign Language Programs, 39 F.C.C.2d 1037 (1973).
\textsuperscript{210} Id. (emphasis in original).
gram duplication was designed to force FM to become an independent service and to encourage the use of the FM radio set.\textsuperscript{212} In 1976, the FCC expanded the scope of its prohibition on program duplication by co-owned same market AM and FM facilities, limiting such duplication to not more than 25%.\textsuperscript{213} The agency perceived this new restriction as a continuation of two of its original objectives: avoiding what it termed “wasteful” program redundancy and inefficient use of the spectrum and promoting the independent development of FM radio.\textsuperscript{214}

\textit{h. The Rise of the Fairness Doctrine}

Prior to 1959, the FCC made it a practice to merely hold Fairness Doctrine complaints in abeyance until the licensee’s renewal review.\textsuperscript{215} Subsequent to 1959, the agency began to dispose of Fairness Doctrine complaints at the time they were received by the agency.\textsuperscript{216} It did so following Congress’s 1959 amendment of Section 315 to the Communications Act.\textsuperscript{217} A portion of the amendment reiterated the essential Fairness Doctrine obligation of licensees:

\begin{quote}
Nothing in the [amendment] 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 Act to operate in the public interest and to afford reasonable opportunity for the
\end{quote}

\begin{flushright}
\textsuperscript{212} Id. at 1531.
\textsuperscript{213} See Report and Order: AM-FM Program Duplication, 59 F.C.C.2d 147, 156 (1976).
\textsuperscript{214} Id. at 148-49, 152.
\textsuperscript{216} See, e.g., Billings Broadcasting Co., 40 F.C.C. 518 (1962).
\textsuperscript{217} See 47 U.S.C. § 315(a) (1991), as amended by Pub. L. No. 86-274, 173 Stat. 557. This section of the act generally requires licensees who permit a candidate for public office to broadcast a message over their facilities to afford a reasonable opportunity for all other candidates for the same office to broadcast their messages.

In 1959, third party candidate Lar Daly asked a CBS affiliate in Chicago to afford him equal time to respond to a series of brief news reports that featured Republican and Democratic candidates for mayor. The affiliate refused and Daly asked the FCC to require the station to give him air time. The FCC decided the case in Daly’s favor. See Columbia Broadcasting Sys., Inc. (Lar Daly), 26 F.C.C. 715 (1959).

Displeased with the FCC’s action, Congress amended Section 315 to exempt from its right of access provision bona fide newscasts, news interviews, news documentaries, and on-the-spot coverage of news events. See 47 U.S.C. § 315(a)(1)-(4) (1991).
discussion of conflicting views on issues of public importance.\textsuperscript{218}

In \textit{1964}, fifteen years after the formal promulgation of the Fairness Doctrine in the \textit{Report on Editorializing}, the FCC issued its first Fairness Doctrine primer, designed to clarify the Doctrine's purpose.\textsuperscript{219} During that fifteen year period, only twice did the agency take action against licensees for violating the Doctrine. It did so not by penalizing them, but by admonishing them to follow the Doctrine's balanced programming prong.\textsuperscript{220} In \textit{Cullman Broadcasting Co.}, a licensee that aired one side of a controversial issue of public importance was required to air a contrasting view either on its own or at another's behest free of charge if no paid sponsor could be found.\textsuperscript{221} If the licensee was unable to find a group or individual to present a contrasting view, it would have to present that view itself, regardless of its own editorial preferences.\textsuperscript{222}

In the \textit{Fairness Primer}, the FCC emphasized the need for compliance with the "personal attack" rule corollary to the Fairness Doctrine. It did so by reiterating an aspect of the Doctrine only touched on briefly in the agency's 1949 \textit{Report on Editorializing}—that a person whose honesty, character, integrity, or like personal characteristics were attacked during the discussion of a controversial issue of public importance must be afforded an opportunity to broadcast a reply.\textsuperscript{223}

In \textit{1967}, the FCC applied the Fairness Doctrine proper to cigarette advertising\textsuperscript{224} and, later, to all advertising concerning

\begin{itemize}
  \item \textsuperscript{218} 47 U.S.C. \textsection 315(a) (1991). Although the amendment refers to the obligation imposed "under this Act," the amendment was the first time the doctrine was mentioned in the act. Prior to 1959, the "obligation" was merely an agency interpretation of the general "public interest" standard provided for in the Act.
  \item \textsuperscript{219} See \textit{Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Pub. Importance, 40 F.C.C. 598 (1964)} [hereinafter \textit{Fairness Primer}].
  \item \textsuperscript{220} Although in the \textit{Report on Editorializing}, the agency added to the balanced presentation prong of the fairness doctrine an affirmative requirement to air controversial issues of importance, since 1949 the agency ignored the affirmative duty prong and focused exclusively on the balanced presentation requirement. \textit{See} Bill F. Chamberlain, \textit{The FCC and the First Principle of the Fairness Doctrine: A History of Neglect and Distortion}, 31 \textit{Fed. Comm. L.J.} 361, 372 (1979).
  \item \textsuperscript{221} 40 F.C.C. 576 (1963).
  \item \textsuperscript{222} \textit{See}, \textit{e.g.}, John J. Dempsey, 6 Rad. Reg. (P & F) 615 (1950); Metropolitan Broadcasting Corp., 19 Rad. Reg. (P & F) 602 (1960).
  \item \textsuperscript{223} \textit{See Fairness Primer, supra note 219}, at 610-14; \textit{see also} Times-Mirror Broadcasting Co., 24 Rad. Reg. (P & F) 404 (1962).
  \item \textsuperscript{224} \textit{See} Letter to Television Station WCBS-TV, 8 F.C.C.2d 381 (1967),
\end{itemize}
controversial issues of public importance—this at the insistence of the U.S. Court of Appeals for the D.C. Circuit. In 1970, the FCC held the Doctrine to apply to paid political advertisements by a candidate's supporters. However, it was the Red Lion Broadcasting Co. case that served as the greatest boon to the growth of the Fairness Doctrine and its corollaries.

The Reverend John M. Norris was the owner of Red Lion Broadcasting Company, licensee of WGCB-AM, Red Lion, Pennsylvania. On November 27, 1964, WGCB aired a fifteen minute program in which the Reverend Bill James Hargis criticized Fred J. Cook, author of Goldwater—Extremist on the Right, describing Cook as a writer for a "left-wing" publication, The Nation magazine. Hargis alleged that Cook was fired from his position at the New York World Telegram for making false charges against a New York City official. He also accused Cook of writing articles to absolve Alger Hiss and accused Cook of maligning J. Edgar Hoover, the F.B.I., and the C.I.A. Finally, Hargis stated that Cook wrote his book on Goldwater to "smear and destroy Barry . . . ."

Cook heard of the broadcast and contacted WGCB to demand an editorial reply. The station refused him that opportunity. Following a number of letters to the FCC, the agency found that the station did engage in a personal attack and ordered it to send Cook a tape, transcript, or summary of the broadcast and to afford him an opportunity to reply. The D.C. Circuit affirmed the FCC's decision on constitutional and statutory grounds and Red Lion Broadcasting Company appealed to the Supreme Court.


225. See Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971).
227. Hargis described The Nation as "one of the most scurrilous publications of the left which has championed many communist causes over many years," quoted in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 371 n.2 (1969).
230. See Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967). During the course of the Red Lion litigation, the FCC codified the
In a decision that has ever since served as the constitutional basis for FCC content regulation, the Supreme Court affirmed the D.C. Circuit and reversed the Seventh Circuit, upholding the FCC's most intrusive form of content-based regulation. The Court articulated all of the rationales for content regulation that have ever since been the basis for maintaining and expanding these regulations.\textsuperscript{231}


At the time the Supreme Court decided Red Lion, the rules were codified in 47 C.F.R. §§ 73.123, 73.300, 73.598, and 73.679. The pertinent parts read as follows:

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee) . . . . (c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: Provided, however, That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

The Radio Television News Directors Association challenged the personal attack rules on constitutional grounds. The rules were declared unconstitutional by the Seventh Circuit. See Radio Television News Directors v. United States, 400 F.2d 1002, 1012 (7th Cir. 1968). The RTNDA and Red Lion cases were consolidated before the Supreme Court in Red Lion.

231. One important justification for content regulation that did not serve as a basis for the decision is the impact rationale of FCC v. Pacifica Found., 438 U.S. 726 (1978), which upholds the FCC's authority to regulate
The Court first endorsed the varying standards rationale, explaining that the broadcast media deserved less First Amendment protection than the print media because "differences in the characteristics of the new media justify differences in the First Amendment standards applied to them." Next, the Court endorsed the spectrum scarcity rationale, finding that there could be no unbridgable First Amendment in broadcasting since, unlike newspaper publishing, broadcasting could only be conducted intelligibly through government licensing. The Court also endorsed the trusteeship model, finding it permissible for the state to require a licensee "to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." The Court held the right of the viewers and listeners to receive a broad array of views and information (the diversity rationale) superior to the right of broadcasters to present their own views, finding there to be "no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all.

In surveying its repeated affirmances of FCC content regulations, the Court reiterated unequivocally that the FCC had a constitutional and statutory right to base its licensing decisions on programming.

In 1973, the Court again visited the question of the constitutionality of Fairness Doctrine enforcement, this time in the

"indecent" speech. The impact rationale focuses on the pervasive presence and influential nature of the broadcast medium and suggests that this justifies regulation as a constitutional matter. For a powerful critique, see Matthew L. Spitzer, Seven Dirty Words and Six Other Stories 67-118 (1986).

233. Id. at 388-89, 390. As set forth supra this statement is false in light of the property rights alternative.
234. Id. at 389.
235. Id. at 390.
236. Id. at 392. The Court also wrote: "Congress need not stand idly by and permit those with licenses to ignore the problems which best the people or to exclude from the airwaves anything but their own views of fundamental questions." Id. at 394.
237. Reflecting on NBC, the Court held that it had already recognized "that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees." Id. at 395.
The Court reversed the D.C. Circuit and upheld the FCC's decision to permit broadcasters the freedom to reject paid editorial advertisements concerning controversial issues of public importance.

In 1974, the FCC concluded a comprehensive three year study of the Fairness Doctrine, determining the net effect of Doctrine enforcement to be enhancement of viewpoint diversity in the idea marketplace. It emphasized the importance of the first prong of the Doctrine, concerning the necessity of broadcasting "controversial issues of public importance," and gave that term of art greater definitional clarity by linking it to three elements: (1) the degree of media coverage an issue engendered, (2) the amount of attention the issue received from government officials and community leaders, and (3) "a subjective evaluation of the impact [likely] on the community at large." Bolstered by Red Lion and CBS, the agency now reiterated that "'strict adherence to the fairness doctrine'—including the affirmative obligation to provide coverage of issues of public importance—[was] 'the single most important requirement of operation in the public interest—the "sine qua non" for grant of a renewal of license.'"

i. The FCC's Focus on Children's Programming

In its 1960 Report and Statement of Policy Regarding Programming, the FCC for the first time defined "Programs for Children" as one of the fourteen "major elements usually necessary to meet the public interest, needs and desires of the community." Although the agency thereby forced all licensees to provide some programming designed for children (even if that was against the licensee's editorial desires), it did not define the kind or amount of children's programming that would be adequate.

In 1974, this relatively loose regulatory environment began to suffer some constriction with the adoption of the Chil-

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241. Id. at 10 (quoting Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C.2d 283, 292 (1970)).
243. Id. at 1913.
children's Television Report and Policy Statement. The Report and Policy Statement not only reiterated that it was the duty of licensees to provide programming designed for children, it further held that licensees would be expected (1) to reduce the level of commercialization present during the broadcast of children's programming, (2) to maintain a separation between programming and advertising, and (3) to avoid programming that might take advantage of the immaturity of children.

Although these broad directives were left undefined, in each area the FCC's Chairman had exerted pressure upon the broadcaster's principal lobbying organizations, the National Association of Broadcasters and the Association of Independent Television Stations, to supplement their codes for broadcasting with specific programming requirements. In effect, the Chairman forced these organizations to do the agency's bidding under a threat of future regulation if the process of self-regulation failed.

The FCC held that licensees had a "special obligation to serve children" and would be expected, "as trustees of a valuable public resource, to develop and present programs which will serve the unique needs of the child audience." In particular, the FCC favored "educational and cultural," rather than entertainment programming for children. Although it did not demand that any particular programs be broadcast, it

245. "During the course of this inquiry, we have found that a few stations present no programs at all for children. We trust that this Report will make it clear that such performance will not be acceptable for commercial television stations which are expected to provide diversified program service to their communities." Id. at 6.
246. Id. at 18.
249. Id. at 5 ("It seems to us that the use of television to further the educational and cultural development of America's children bears a direct relationship to the licensee's obligation under the Communications Act to operate in the 'public interest.'"); see also id. at 7.
clearly stated the subjects it preferred. It also emphasized that pre-school and school age children would have to be served with programming separately designed for each group. It expressed concern that children’s programming, although dominant on weekends, was largely missing in the weekday line-up of shows and counseled licensees that it would expect an “improvement in scheduling practices in the future.”

The commissioners complained vociferously about commercial advertising practices during children’s programming hours. Warning that “[b]roadcasters have a special responsibility to children,” the FCC explained that young children who lack mature reasoning could be misled into placing unquestioning faith in the claims of advertisers.

The agency also required licensees to maintain a distinct separation between commercial and program matter by either announcing that the children’s program was being interrupted for commercial messages, or by broadcasting some visual signal before and after a commercial to alert viewers of the change. The FCC condemned the practice of program hosts endorsing products, particularly when this was done in character.

The FCC fell short of imposing specific regulations, preferring a case by case enforcement approach at license renewal time. However, the agency revealed that its Chairman had “extensive discussions” with the NAB and the INTV and that these organizations had “voluntarily” agreed to reduce the amount of advertising during children’s programming through the adoption of advertising codes for their association members.

We believe that, in the future, stations’ license renewal applications should reflect a reasonable amount of programming which is designed to educate and inform—and not simply entertain. This does not mean that stations must run hours of dull “classroom” instruction. There are many imaginative and exciting ways in which the medium can be used to further a child’s understanding of a wide range of areas: history, science, literature, the environment, drama, music, fine arts, human relations, other cultures and languages, and basic skills such as reading and mathematics.

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250. Id. at 6-7:
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251. Id. at 7.
252. Id. at 8.
253. Id. at 11.
254. Id. at 15-16.
255. Id. at 16-18.
256. Id. at 12. See also id. at 13 n.12 which reads in pertinent part:
ing to heed the Chairman's warnings, but threatened that "[i]f it should appear that self-regulation is not effective in reducing the level of advertising, then *per se* rules may be required."²⁵⁷

The "voluntary" regulations were substantively no different from regulations passed pursuant to a rule making, for licensees were on notice that if they failed to abide by them they would not receive automatic renewals.²⁵⁸

Despite its insistence that the programming and advertising limitations were self-imposed by the industry at the mere urging of the agency, the FCC quickly admitted to the Court of Appeals that it held "concrete expectations for [the] broadcasters' self-regulatory efforts" and intended to monitor licensee performance "through 'private attorneys general' and through its data collection process."²⁵⁹

In 1975, the FCC released two orders²⁶⁰ that amended the language and the instructions in the agency's commercial television renewal form to permit detection of a licensee's failure to comply with the "voluntary" industry standards promulgated in response to FCC urgings. The revised form asked licensees to define which of their programs were designed "pri-

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²⁵⁷ Id. at 13.
²⁵⁸ Id. Wrote the FCC:
For the present, compliance with the advertising restrictions adopted by the industry and endorsed by the Commission will be sufficient to resolve in favor of the station any questions as to whether its commercial practices serve the public interest. Licensees who exceed these levels, however, should be prepared to justify their advertising policy. We recognize that there may be some independent VHF and UHF stations which cannot easily afford such a reduction in advertising practices. However, we anticipate accepting very few other justifications for overcommercialization in programs designed for children.

Id. at 14.
marily" for children; to describe those programs, supplying their source, the time of their broadcast, the day of their broadcast, the frequency of their presentation, and the programming type involved; to identify the frequency of their advertising during children's programming hours; and to detail how the licensee would limit advertising during children's programming time in the future.261

In 1978, the FCC reaffirmed its commitment to the guidelines it established in the 1974 *Children's Television Report and Policy Statement*. It did so following an assessment of data from, among others, the National Association of Broadcasters, on the extent of television station compliance with its "voluntary" guidelines.262

In 1979, the FCC re-evaluated its policies governing review of children's programming and found no reason to change them. It reaffirmed the 1974 *Children's Television Report and Policy Statement* and maintained the self-regulatory regime created under it.263

During the 1980's, the Commission continued to refrain from imposing any content restraints on children's programming emphasizing First Amendment concerns. On January 4, 1984, the FCC released a Report and Order in which it declined to adopt any mandatory programming obligations for the broadcast of children's programming.264 Despite protests about the general lack of "quality" in children's programming, the agency refrained from substituting its commissioners' views for those of individual licensees, believing there to exist "serious First Amendment concerns" with this approach. The agency reiterated that broadcasters would continue to have "a . . . duty, under the public interest standard . . . to examine the

264. See *TV Programming for Children*, 96 F.C.C.2d 634 (1984), aff'd Action for Children's Television v. FCC, 756 F.2d 899 (D.C. Cir. 1985); see also *Children's Advertising Detector Signal*, 57 Rad. Reg. (P & F) 935 (1985) (where the FCC refused to adopt an inaudible signal at the beginning and end of commercial messages designed for children that would, through the use of a detector device, permit viewers to delete the ad); *Children's Programming*, 100 F.C.C.2d 709 (1985) (where the FCC declined to adopt a rule prohibiting stations from sharing in profits from the sale of products bearing the name of a children's program, its characters, or its program devices in return for the airing of the program).
program needs of the child...and to be ready to demonstrate at renewal time its attention to those needs."

Congress forced a change in this non-regulatory environment in 1990. On October 17, 1990, the Children's Television Act of 1990 became law. The Act imposed on broadcasters a number of restraints that will now force the agency to scrutinize the content of children's television programming. The Act required the FCC to (1) limit the duration of commercials during children's programming to not more than 10.5 minutes per hour on weekends and not more than 12 minutes on week days, (2) require licensees to present programming responsive to the educational and informational needs of children and keep records of such programming, (3) consider in its renewal review the extent to which licensees complied with the commercial limitations and the programming requirements, and (4) define "program length commercials," which would be proscribed under the commercial time limits of the Act. On April 12, 1991, the FCC issued its Report and Order implementing the Act's provisions through revisions to its rules.

j: The FCC's Establishment of Minimum Percentages of "Public Interest" Programming

On April 18, 1973, the FCC ordered its Broadcast Bureau to establish minimum percentage guidelines for acceptable levels of non-entertainment programming. Any applicant, including any renewal applicant, that failed to present proof of programming within acceptable levels would have its application referred to the Commission for review and possible designation for hearing.

These minimum percentages were codified by the FCC. They required commercial AM stations to devote at least 8% of

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265. Id. at 656.
269. See 47 C.F.R. §§ 0.281, 0.283 (1979). In 1976, the FCC altered the television guidelines as they applied to renewal applications, requiring staff referral of the application to the full commission if the application reflected less than 5% local programming and 5% informational programming (defined as news and public affairs) or 10% total non-
their air-time to non-entertainment programming, commercial FM stations to devote at least 6% of their air-time to such programming, and commercial television stations to devote at least 10% to such programming.\textsuperscript{270} Non-entertainment programming was defined as news and public affairs programs.\textsuperscript{271} As the agency later explained in reflection on its practice under these rules:

What the guidelines mean is that applicants proposing to offer less than the guideline amounts of non-entertainment programming cannot have their application routinely processed by the Bureau under its delegation of authority from the Commission; rather, the application must be brought to the attention of the Commission itself. The guidelines do not mean that a station proposing to offer less non-entertainment programming is absolutely barred from, for instance, renewal of license. It does mean, however, that its application cannot be routinely processed, that it must be brought to the Commission's attention, and that it may be designated for hearing.\textsuperscript{272}

The FCC also established maximum limitations on the amount of acceptable advertising that would be permitted per broadcast hour.\textsuperscript{273} The Chief of the Broadcast Bureau would have to refer to the Commission commercial AM or FM applications in which advertising matter was to be broadcast in non-seasonal markets more than twenty minutes per hour during 10% or more of the station's total weekly hours of operation, and AM or FM applications in which commercial matter was to be broadcast in seasonal markets more than twenty minutes per hour or more than twenty minutes per hour during 10% or more of the station's total weekly hours of operation. Licensees that failed to abide by these limits were either issued short-term license renewals\textsuperscript{274} or were admonished to comply with the rules.\textsuperscript{275} The Chief of the Broadcast Bureau also had to refer to the Commission any commercial TV application in

\begin{itemize}
\item \textsuperscript{270} Deregulation of Radio, 84 F.C.C.2d 968, 975 (1981).
\item \textsuperscript{271} See, e.g., CBS, Inc., 41 Rad. Reg. 2d (P & F) 1350 (1977); Chattahoochie Broadcasting Company, 69 F.C.C.2d 1460 (1978).
\item \textsuperscript{272} Enid Radiotelephone Co., 67 F.C.C.2d 19 (1977).
\item \textsuperscript{273} Deregulation of Radio, 84 F.C.C.2d 968, 975 (1981).
\item \textsuperscript{274} See Amendment to Section 0.281 of the Commission's Rules: Delegations of Authority to the Chief, Broadcast Bureau, 59 F.C.C.2d 491, 493 (1976).
\item \textsuperscript{275} See, e.g., 47 C.F.R. §§ 0.281(a)(7), 0.283(a)(7) (1977).
\end{itemize}
which advertising matter was to be broadcast more than sixteen minutes per hour during 10% or more of the station’s total weekly hours of operation.\textsuperscript{276}

The guidelines remained the law from 1973 until 1981 (for commercial radio) and 1984 (for commercial television), when they were abolished.

\textit{k. The FCC’s Content Focus in Comparative Hearings}

Early in Commission history, the Supreme Court ordered the agency to hold a comparative hearing whenever two or more applicants sought the same channel.\textsuperscript{277} Because of the zero price associated with filing for a license, multiple applicants, mutually exclusive of one another, became commonplace at the FCC.\textsuperscript{278}

Before 1965, broadcast applicants were examined comparatively in ten areas developed in an ad hoc case by case manner: local ownership, participation in civic activity, integration of ownership and management, diversification of background of stockholders, broadcast experience, record of past broadcasting performance, proposed program policies, proposed programming, proposed staff and technical facilities, and diversification of media ownership.\textsuperscript{279} In addition to these standard areas of comparison, the agency inspected the character of each applicant’s principals to determine their propensity for truth-

\begin{itemize}
  \item \textsuperscript{276} See Amendment of Part 0 of the Commission’s Rules — Commission Organization — With Respect to Delegation of Authority to the Chief, Broadcast Bureau, 43 F.C.C.2d 638 (1973); Amendment to Section 0.281 of the Commission’s Rules: Delegations of Authority to the Chief, Broadcast Bureau, 59 F.C.C.2d 491 (1976).
  
  Nicholas Johnson and Kenneth A. Cox in recurrent dissents in renewal cases from May 1968 forward argued for minimum nonentertainment programming standards. Commissioner Cox explained:
  
  Our position is that further study should be made of any station which proposes to devote less than 5% of its time to news, less than 1% to public affairs, and/or less than 5% to public affairs and “other” programming.
  
  
  \textsuperscript{277} See Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).
  
  \textsuperscript{278} See generally \textsc{Douglas H. Ginsburg}, \textit{Regulation of Broadcasting: Law and Policy Towards Radio, Television and Cable Communications} 76 (1979).
  
fulness and reliability. These highly subjective criteria gave administrative law judges great discretion in selecting who would be permitted to broadcast from the pool of prospective broadcasters.

Through adduction of evidence in comparative hearings, the FCC's judges obtained information actually or presumptively indicative of the kinds of people who would be licensees and of the kinds of programming they proposed to broadcast. By selecting an applicant who best fulfilled the agency's policy preferences, the FCC could thus influence the composite message communicated to the public, or so the theory went.

The FCC thought local ownership important because "a broadcaster who resides in the community to be served "will be more familiar with the needs and interests of the community" and therefore more apt to present localized programming, responsive to community problems, needs, and interests. Likewise, involvement in civic activities within the area to be served was thought to suggest a heightened awareness of and sensitivity to community needs and, for this reason, was a beneficial characteristic.

The FCC preferred that licensee ownership and management be united because this would ensure that the licensee could be held directly "responsible for what [the] station puts on the air." "The significance of the integration factor," wrote the FCC, "is based on our belief that there is more assurance that a proposal will be effectuated if the day-to-day operation is in the hands of an owner of the station than if the station is run by employees . . . ." The integration factor was "given great respect."

The diversification of background factor proceeds from the premise that an applicant whose principals come from varied employment backgrounds will be more aware of diverse aspects within the community of license than one whose principals do not possess such a varied background. This factor rarely influenced decision making.

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280. Irion, supra note 279, at 481.
281. Id. at 483.
283. Irion, supra note 279, at 484.
284. Id.
286. Irion, supra note 279, at 485.
287. Id.
Broadcast experience was thought to indicate technical proficiency and was, therefore, deserving of credit. An applicant's broadcast record was examined to determine to what extent the applicant had fulfilled the agency's programming policy objectives. A past broadcast record was thought to be indicative of future performance. Hearing examiners dwelt upon such subjective matters as the quality of the programming presented in the past. H. Gifford Irion, a former FCC Hearing Examiner, wrote that:

In this area the Commission is mainly concerned with local live programming. It is to the applicant's advantage to show as many high quality shows as possible and to demonstrate his public service responsibility by showing an appreciable number of announcements on behalf of worthy causes. Naturally his opponents at the hearing will try to uncover a neglect of the public interest through excessive commercialization or some similar sin.

An applicant's proposed program policies would also be explored. This tended to be a comparison of boasts by applicants trying to outdo one another in their pledges of programming desired by the agency. As Irion explains:

If there is one aspect of a comparative case where evidence of a purely subjective and self-serving character is permitted, it is here. In framing a policy statement for future operations the applicant is of course free to make promises of the most idealistic kind. It is noteworthy, however, that a danger exists in making them too extravagant, because they will seem unrealistic and will be likely to suffer when matched against evidence of actual operations.

In the proposed programming category, applicants were compared based on their presentations of a sample week's programming schedule. The schedule would contain sufficient detail to permit comparative evaluation of the quality and nature of the proposals. When technical factors were equal,
judgments about the quality of proposed programming proved dispositive.293

Parties would be permitted to explain their plans for a superior physical plant and to present evidence of the talents of their proposed staff, but this information did not "hold much weight in the Commission's final decisions."294

The diversification of media ownership factor carried great weight. Irion explained that "the Commission . . . adhered with a rather high degree of consistency to [this factor]" on the theory that diversification of ownership "tends to keep the channels of communication open to as large a number of owners as possible and this prevent[s] restriction of news and information."295

In 1965, the FCC assembled its disparate policy preferences into a more orderly hierarchy in its Policy Statement on Comparative Broadcast Hearings.296 The agency defined two over arching policy objectives: "best practicable service to the public" (also referred to as "integration") and "maximum diffusion of control of media of mass communications" (also referred to

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We must look to the content of the over-all programming proposed. If an applicant's numerical superiority in the category in question is found to consist of programming of a worthwhile nature, a preference may then be accorded on the basis noted — that such an applicant can appropriately claim that it is more completely fulfilling its vital role as an outlet for local expression.

Id. See also id. at 97, 100:

In summary, we have found that the percentage differences as to local live programming . . . have been translated by Wichita TV into worthwhile, meritorious programs, and into superiority in several categories. Wichita TV's margin of superiority over KFH in this area is a slight one, stemming from the fact that its proposal has been found more completely to meet [sic] the educational needs of the area. Its superiority over KANS is clearer and more marked, and is found not only in the educational but in the discussion and agricultural categories. While Wichita TV is thus seen to be better proposing to fulfill its important role as an outlet for local expression, it should be kept in mind that its preference here—even over KANS—is not a major one, since all three programming schedules have been found to be essentially well-rounded, meritorious ones.


294. Irion, supra note 279, at 487.


296. 1 F.C.C.2d 393 (1965).
as "diversification"), with the latter factor being most important.\footnote{297}

Under the diversification criterion, the agency would assign a demerit to applicants possessing ownership interests in other media of mass communication. This demerit would increase in severity in proportion to the size of the interest, the proximity of the communications outlet to the area proposed to be served, and the size of the audience reached by the medium.\footnote{298}

Under the integration criterion, the FCC found it "desirable that legal responsibility and day-to-day performance be closely associated," reasoning that "there is a likelihood of greater sensitivity to an area's changing needs, and of programming designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station."\footnote{299} The agency would only give credit to integration proposals that were to be "adhered to on a permanent basis."\footnote{300} Maximum credit would go to proposals for full-time participation of owners in management.\footnote{301} The proposed management positions would be credited only if they constituted "important roles" involving "policy functions" such as "general manager, station manager, program director, business manager, director of news, sports, or public service broadcasting, and sales manager."\footnote{302} "[M]erely consultative positions" were to be given "no weight."\footnote{303}

Integration of ownership into management could be enhanced by certain other factors should owners of a station have these traits. Local residence, broadcast experience, and past participation in local civic activities would improve an applicant's chances of winning the permit.\footnote{304}

The Commission considered local residence beneficial because local residence "indicates a likelihood of continuing knowledge of changing local interests and needs."\footnote{305} The like-

\begin{footnotes}
\item[297] Id. at 394.
\item[298] Id. at 394-95.
\item[299] Id. at 395.
\item[300] Id.
\item[301] Id.
\item[302] Id.
\item[303] Id.
\item[304] Id. at 395-96.
\item[305] Id. at 396:
\end{footnotes}

[\textquoteleft]Residence in the principal community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area. Proposed future local residence (which is expected to accompany meaningful
lihood that a station would air programming responsive to local interests was thought to be enhanced by local residence.\textsuperscript{306} Past participation in civic activities was considered "a part of a[n] . . . owner's local residence background," further suggesting "a knowledge of and interest in the welfare of the Community."\textsuperscript{307}

The FCC rejected diversity of business backgrounds as a factor and determined that the broadcast experience factor would be "of minor significance" at best because "emphasis upon this element could discourage qualified newcomers to broadcasting" and because "experience generally confers only an initial advantage."\textsuperscript{308}

The agency reiterated the "importance of program service" and emphasized that an applicant had to conduct ascertainment of area needs and interests and "show that the program proposals are designed to meet the needs and interests of the public in that area."\textsuperscript{309} Failure to perform ascertainment properly was to be considered "a serious deficiency."\textsuperscript{310} The agency eliminated consideration of staffing proposals as a comparative factor "except where an inability to carry out [a proposal was] indicated."\textsuperscript{311} An "unusually good or unusually poor" record of past broadcasting experience would be considered and weighed for its comparative significance.\textsuperscript{312}

Engineering proposals would be considered to determine whether one proposed a more efficient use of the spectrum than another. This has come to mean greater service to populations and areas than a competitor's proposal.\textsuperscript{313}

Upon the designation of an appropriate issue, the character of an applicant's principals would be examined in detail. 

\begin{itemize}
\item participation) will also be accorded less weight than present residence of several years duration.
\item Id.
\item Id.
\item Id.
\item Id. at 397.
\item Id.
\item Id.
\item Id. at 398. The FCC held that it would:
\item consider past records to determine whether the record shows (i) unusual attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs, or (ii) either a failure to meet the public's needs and interests or a significant failure to carry out representations made to the Commission. . . .
\item Id.
\item Id. at 398-99.
\end{itemize}
Demerits would be assigned for character defects. Serious defects would result in an applicant’s disqualification.314

In the years since 1965, the comparative factors have been refined. Diversification remains the criterion of greatest significance followed by integration. Integration has been distinctly divided into “quantitative” and “qualitative” parts, the former producing a numerical percentage equal to the percent of station ownership that can be counted upon to work in station management, the latter resulting in “very slight,” “slight,” “moderate,” and “substantial” enhancement credits for the quantitative integration awarded.315

In 1973, the FCC added minority race to its qualitative enhancement criteria at the insistence of the D.C. Circuit.316 The court demanded that the agency presume that minority race would beget a programming difference and that this difference would add to programming diversity. In 1978, the FCC added female gender as an enhancing factor on the assumption that gender too would beget programming differences.

In the comparative renewal context (where an existing licensee is challenged at renewal time by a new applicant proposing mutually exclusive operating parameters), the FCC has tended to favor incumbents over newcomers. The same comparative criteria used to evaluate new applicants are applied to compare existing licensees with their challengers.317 However, in this later context, renewal applicants have always been afforded a weighted presumption in favor of renewal if they have abided by agency rules.

Several reasons were given for favoring incumbents: (1) “as a practical matter, an applicant’s past broadcast record was deemed a more reliable indicator of future service in the public interest than a new applicant’s untested proposal;” (2) “it was deemed desirable to reward incumbents for good public service with certainty of renewal;”318 (3) it would “encourage

314. Id. at 399.
315. See Emord, supra note 9, at 205-06.
317. Although the 1965 Policy Statement on Comparative Hearings states that it does not apply to renewal proceedings (see 1 F.C.C.2d 393, 398 n.12), the FCC subsequently held that it would govern the introduction of evidence in renewal hearing. See Seven (7) League Prod., Inc., 1 F.C.C.2d 1597, 1598 (1965).
licensees to invest and reinvest in their stations;" and (4) it would "prevent possible disruption of service to the public."

The agency has had difficulty creating a consistent standard to judge renewal applicants against newcomers. The courts have not helped matters. Nevertheless, the FCC has maintained a consistent focus on a licensee's past performance and, if in accordance with FCC programming preferences and rules generally, has awarded the licensee an almost irrebuttable presumption in favor of renewal. This presumption is called a "renewal expectancy."

4. Summary of the Era of Aggressive Content Regulation

The history of broadcast regulation from 1927 to 1979 is an unseemly one. It provides proof of persistent government efforts to manipulate broadcast content. It amounts to censorship carefully couched in popular, but often transparent, "public interest" language. Through the urgings of Congress, the exertions of commissioners, and the complicity of the courts, the federal agency charged with regulating the airwaves has

F.C.C. 1149, 1175-76 (1951); WOKO, Inc. v. FCC, 153 F.2d 623, 629-30 (D.C. Cir. 1946).


320. Id.


erected a complex array of restraints designed to serve the government's policy objectives. This content regulatory labyrinth has had a pervasive chilling effect on broadcasters' exercise of editorial discretion. Never capable of owning a property right to use their facilities, broadcasters have remained beholden to the state for their right to be in the opinion and information marketplace. Perpetually cautious so as not to offend their federal overseer, and required to hold an allegiance to the federal regulators by force of law, broadcasters have kowtowed to the Commission, substituting for their own editorial preferences those mandated in Washington. Moreover, leading broadcast interests have helped foster the unseemly alliance between government and the entity that was supposed to serve as the government's watch dog, the press.

Long protected from competition by the system of licensing, broadcasters were quite willing to part with a degree of editorial autonomy to attain above market rates of return.

In 1979, this indelicate system of state paternalism began to fall apart. Popular pressure for deregulation began to mount. A movement commenced to loosen the structural and content strictures that had for over fifty years stifled broadcast expression. The proliferation of broadcast technology and the dramatic rise in the number of licensed stations had reduced the above market rates of return made possible by licensing.

Over a decade since the deregulatory movement began, although some significant deregulation has taken place, the broadcast industry is still far from being as free as the print industry. The Oak Leaves property rights model remains a largely unexplored alternative, politically unattractive to those who have benefitted from years of content controls.

B. The Decline of Broadcast Content Regulation

In 1972, the FCC hinted for the first time that it would move in a deregulatory direction. In that year, the agency's chairman assembled a broadcast "reregulation" staff. This group examined all of the technical rules in an effort to cull from them those rendered obsolete by market changes.324 Between 1972 and 1981, the FCC enacted over 1,000 technical rule revisions and deletions.325 This fledgling movement to

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1. The FCC's Elimination of Ascertainment, Programming Logs, Quantitative Commercialization and Programming Guidelines, and Renewal Audits

On September 27, 1979, the FCC commenced a rulemaking proceeding, soliciting comments concerning and proposing elimination of its ascertainment, commercialization, and nonentertainment programming requirements.\(^{326}\) This action signaled the start of a series of dramatic deregulatory initiatives. The FCC announced that "in the future the emphasis of [its] regulatory effort [would be] shifted away . . . from content . . . and towards . . . structural [regulation]."\(^{327}\) The FCC began to view the "public interest" and the "workings of marketplace forces" as complimentary, rather than antagonistic.\(^{328}\) The agency pointed to an extraordinary profusion of new media outlets—from 583 AM stations and no FM stations in 1934 to 4,547 AM and 4,107 FM stations in 1979.\(^{329}\) In addition, the number of stations competing with one another in small, medium, and large markets had substantially increased.\(^{330}\) The agency began to question the central premise for broadcast regulation, the spectrum scarcity rationale, finding that "[d]evelopments since the 1920s render the scarcity theory overly simplified."\(^{331}\)

On February 24, 1981, the FCC released its decision the Deregulation of Radio proceeding.\(^{332}\) It eliminated its nonentertainment programming guidelines, retaining in their stead a "generalized obligation for commercial radio stations to offer programming responsive to public issues."\(^{333}\) It elimi-
nated its 1971 Ascertainment Primer and its Renewal Primer, simply requiring new applicants to file programming proposals and renewal applicants to address, using "any means" reasonable, issues facing their communities.\(^{334}\) It eliminated the commercial guidelines "leaving it to marketplace forces to determine the appropriate level of commercialization."\(^{335}\) It eliminated its program logging requirement, substituting a requirement that an annual listing of five to ten issues be maintained "together with examples of programming offered in response thereto."\(^{336}\) The FCC ordered that this listing be placed in the station's public file.\(^{337}\)

In eliminating its nonentertainment guidelines for commercial radio, the FCC did not repudiate its essential rationale. It did not conclude that it had erred and that the First Amendment forbade its review of licensee programming. Rather, it considered increased competition in local markets to justify a lessening of FCC scrutiny. It retained its requirement that licensees present programming responsive to community tastes, needs, and interests and left untouched the Fairness Doctrine and all of its corollaries.\(^{338}\)

In eliminating its ascertainment requirement, the FCC confirmed that it did not question the purpose of ascertainment ("to assure discovery of [local] problems, needs and issues and to generate some relevant programming responsive thereto"), only the prescribed method for implementing that objective.\(^{339}\)

In eliminating its commercial limitation guidelines, the FCC did not relinquish its power to set commercial limits. Instead, as in each previous case, it merely found market forces adequate to correct "advertising excesses."\(^{340}\)

\(^{334}\) Id.
\(^{335}\) Id.
\(^{336}\) Id.
\(^{337}\) Id.
\(^{338}\) Id. at 978-79.
\(^{339}\) Id. at 998.
\(^{340}\) Id. at 1000-05. Ironically, the traditional market failure thesis had been turned on its head. Instead of looking to the government for solutions to perceived failures in the free market, regulators looked to the free market for solutions to perceived failures in regulation.
In reducing its program logging requirement to an annual listing of five to ten issues of public concern and of programming responsive to those issues, the FCC in no way questioned its own authority to compel the keeping of program logs, it just found the burden of doing so unnecessary in light of market forces that naturally focused licensee attention on responsiveness.\textsuperscript{341}

In May of 1981, the FCC eliminated its random long form audit procedure for radio license renewals.\textsuperscript{342}

On August 17, 1983, the FCC commenced a rulemaking to deregulate commercial television.\textsuperscript{343} On August 21, 1984, the FCC rolled back some of its television regulations. Once again, although the agency eliminated its television programming guidelines, its promise versus performance standard in the uncontested renewal context, its ascertainment requirement, its commercial guidelines, its program log requirement, and its long form audit procedure, it left in place many of the essential bases for these regulations. However, with the arrival of Reagan appointees at the Commission, for the first time print model constitutional concerns made their way into the deregulatory framework. The new commissioners voiced concerns that the "current regulatory scheme . . . [may] unnecessarily [infringe] on the editorial discretion of broadcasters . . . ."\textsuperscript{344}

Without directly admitting that the old programming guidelines violated the First Amendment, the FCC stated that its new, deregulatory approach was "more consistent with underlying First Amendment values."\textsuperscript{345} As in the case of its radio deregulation, although the FCC deleted its programming guidelines, it retained the requirement that licensees provide programming responsive to local issues of public importance.

\textsuperscript{341} \textit{Id.} at 1008-10.


\textsuperscript{343} \textit{See} Notice of Proposed Rule Making, 94 F.C.C.2d 678 (1983).

\textsuperscript{344} Commercial Television Deregulation, 98 F.C.C.2d 1076, 1080 (1984). The Commission wrote:

For example, a licensee that is currently presenting levels of programming at the limits of the guidelines may desire to alter its mix of non-entertainment programming. In this particular situation, our guideline may infringe upon its editorial discretion by requiring it to present specified levels of non-entertainment programming that it would not otherwise air.

\textit{Id.} at 1089 n.45.

\textsuperscript{345} \textit{Id.} at 1090.
In short, it just removed the quantitative guidelines that aided it in policing licensee performance, but it did not reject the concept of localism from whence quantitative guidelines came.\textsuperscript{346}

As in the case of radio deregulation, television deregulation in each of these areas was based on the notion that continued constraints would be onerous because market incentives already existed that would produce the desired behavior.

The FCC found that its ascertainment procedures could be deleted in light of market forces that caused licensees “to be aware of the needs of their communities,” but continued to require community responsiveness, leaving it to the licensees to perform ascertainment “by whatever means they consider appropriate.”\textsuperscript{347}

Concerning its commercial guidelines, the FCC’s rationale for television differed slightly from the one it adopted for radio. In the radio context, the Commission had found that acceptable limits on advertising were occurring not as a result of regulation but as a consequence of competition. In the television context, the Commission seems to have equated natural market levels of advertising with “appropriate commercial levels,” indicating that the focus on commercialization itself was the problem.\textsuperscript{348} The FCC went one step further, eliminating its policy banning program length commercials.\textsuperscript{349} The agency also voiced First Amendment concerns, explaining that it believed a chilling effect was generated by the commercialization policies on commercial speech.\textsuperscript{350}

The Commission elected to replace its program logging requirement with the same quarterly issues/programs lists that it required of radio licensees, finding this documentation “suitable and adequate,” relieving an unnecessary burden on licensees.\textsuperscript{351} As it had in the radio context, the FCC also abolished its random-long-form renewal audit procedure in the television context.\textsuperscript{352}

\textsuperscript{346} Id. at 1091-93.
\textsuperscript{347} Id. at 1098-99.
\textsuperscript{348} Id. at 1102 (“The record in this proceeding provides convincing evidence that marketplace forces can better determine appropriate commercial levels than our rules.”).
\textsuperscript{349} Id.
\textsuperscript{350} Id. at 1104.
\textsuperscript{351} Id. at 1106-10.
\textsuperscript{352} Id. at 1111. In Television Deregulation, 104 F.C.C.2d 358 (1986), the FCC affirmed its decision in Commercial Television Deregulation, 98 F.C.C.2d 1076 (1984), but clarified it by indicating that the regime of self-regulation of children’s television was intended to be eliminated. On appeal,
2. The FCC’s Elimination of Several Programming Policy Statements

On August 2, 1983, the FCC released the first in a series of policy statements and orders designed to roll back certain content and structural regulations. Most of these statements and orders did not repudiate the rationales for regulation. Instead, consistent with the "marketplace approach" theme, they found extant "sufficient private remedies or market forces" that would deter the perceived harms without further need of government intervention.

In the first statement, the agency deleted its rule prohibiting ratings distortions and false representations about station coverage. This time it did so not only on the basis of a changed market and administrative efficiency, but also on the basis of First Amendment concerns. The agency found that its policies interfered with the editorial discretion of broadcast licensees yet failed to serve any compelling governmental interest. On October 21, 1983, the FCC deleted: (1) its prohibition on the broadcast of alcoholic beverage advertising in

the D.C. Circuit remanded this aspect of the decision, stating that the FCC had "failed to explain adequately the elimination of its long-standing children's television guidelines. . . ." Action for Children's Television v. FCC, 821 F.2d 741, 750 (D.C. Cir. 1987).


355. Id.

356. See Horse Racing Information, 56 Rad. Reg. 2d (P & F) 976 (1984); see also 47 C.F.R. §§ 73.4125, 73.4126, 73.4130 (1982).

357. Horse Racing Information, 56 Rad. Reg. 2d (P & F) at 977.

358. The Commission held:

[These rules] directly regulate program content by effectively prohibiting the broadcast of such material as live broadcasts of a full program of races, preface information of jockeys or post positions, off-times, race results before the next race, or information furnished publishers of scratch sheets, etc. Our authority to interfere with editorial judgments of licensees is, of course, carefully circumscribed by both the anti-censorship provisions of Section 326 of the Communications Act [47 U.S.C. § 326; footnote omitted] and the First Amendment unless justified by a clear and compelling showing that the public interest requires governmental intervention. Applying this standard to the subject policies, we must conclude that they unnecessarily restrict licensees' editorial discretion without the essential counterbalancing factors.

Id. at 983.

states or localities in which such advertising was prohibited,360 (2) its policy discouraging the broadcast of astrological information,361 (3) its policy encouraging the hiring of independent monitors to review the contents of foreign language programming,362 (4) its policies against broadcasts that could induce harassing phone calls or annoy or harass individuals for private gain,363 (5) its policy (never implemented in light of an FCC stay of its effective date) that would have restricted the scope of music format agreements,364 (6) its policy prohibiting repetitious musical broadcasts,365 (7) its policy requiring broadcast stations that air poll results to specify the nature of the poll and whether it was performed on a scientific basis,366 and (8) its policy discouraging the use of sound effects in promotional announcements.367

The FCC deleted these policies because of its fear that they unnecessarily trenched on the editorial freedom of broadcast licensees.368 It also found the regulations unnecessary due to the availability of civil remedies and other federal and state enforcement mechanisms. The FCC did reserve the power to consider any adverse determinations by other judicial and regulatory bodies in its assessment of a licensee's character.369

3. The FCC's Repudiation of the Fairness Doctrine

No single act did more to shake the foundations of broadcast regulatory law than the FCC's elimination of the Fairness Doctrine. In one fell swoop the agency abandoned the spectrum scarcity rationale, the constitutional predicate that had justified almost all of its content regulations. To this day, the agency and Congress, averse to replacing the licensing system with a property rights alternative, have clung to the spectrum scarcity rationale despite the fact that the FCC, during the mid-1980s, held it to be anachronistic in light of the extraordinary growth in media markets and the proliferation of broadcast media substitutes.

368. See Unnecessary Broadcast Regulation, 54 Rad. Reg. 2d (P & F) at 1048.
369. Id.
On May 14, 1984, the FCC sought public comment on the statutory, constitutional, and policy implications of the Fairness Doctrine. Based on the submissions it received, the FCC determined that the Doctrine no longer served the public interest, that extraordinary viewpoint diversity existed in the marketplace of ideas because of the multiplicity of media outlets, that enforcement of the Doctrine restricted "the journalistic freedom of broadcasters" and stymied presentation of controversial issues of public importance, and that the Doctrine violated the First Amendment.

Because it was uncertain whether the Fairness Doctrine was merely a creature of agency policy or mandated by statute, the FCC fell short of eliminating it, preferring to afford Congress an opportunity to reevaluate the Doctrine's efficacy in light of the FCC's findings. Congress took no action, but individual members demanded that the FCC continue enforcing the Doctrine.

Having said that the Doctrine contravened the First Amendment, the FCC nonetheless enforced it to satisfy these political demands. The agency held that Meredith Corporation, a Commission licensee, violated the Doctrine by airing three advertisements lauding the Nine Mile II nuclear power plant in New York, but declining to air opposing views.

While the Syracuse Peace Council decision was pending before the agency on reconsideration, Judge Robert Bork decided Telecommunications Research & Action Center v. FCC, in which he filled the political and legal vacuum the FCC created by issuing its 1985 Fairness Report. In short, although in the report the agency demurred to Congress on grounds that it did not know for certain whether it had authority to unilaterally eliminate the doctrine, in TRAC, Judge Bork held that the Fairness Doctrine was not codified by Section 315(a) of the Communications Act, but was a creature of the agency's own making. Hence, he sent a clear message to the FCC that it could proceed with the Doctrine's elimination and be protected.

371. Id. at 147, 225–26.
372. Id. at 225, 227.
375. 801 F.2d 501 (D.C. Cir. 1986) [hereinafter TRAC].
376. Id. at 509. Compare Branch v. FCC, 824 F.2d 37 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988) (wherein the D.C. Circuit upheld the equal time provisions of Section 315(a) of the Communications Act against a First Amendment challenge).
in that move by the D.C. Circuit. Moreover, Judge Bork strongly hinted that he did not regard spectrum scarcity as a legitimate rationale. In dicta, Bork indicated that the concept of spectrum scarcity was a bankrupt one, expressing the view that broadcast frequencies were no different from any other economic good (such as the paper, ink, and delivery trucks relied on by the print media). Thus, he did not think spectrum scarcity a legitimate distinguishing principle.\footnote{377}

On reconsideration, the FCC affirmed its decision that Meredith Corporation violated the Fairness Doctrine,\footnote{378} paving the way for a crucial contest in the D.C. Circuit. Viewing the 1985 \textit{Fairness Report} in tandem with Judge Bork's \textit{TRAC} decision, the court determined that the agency had acted arbitrarily by deeming the Doctrine unconstitutional, but enforcing it nonetheless. Therefore, the court remanded the case, imploring the agency to address the constitutional question.\footnote{379} Finally, the FCC did so, with sensational results.\footnote{380}

In July of 1984, the Supreme Court indicated a willingness to reconsider its spectrum scarcity rationale if Congress or the FCC found technological change to warrant revisiting \textit{Red Lion}.

\footnote{377. See TRAC, supra note 376, at 508.}
\footnote{378. Syracuse Peace Council, 59 Rad. Reg. 2d (P & F) 179 (1985).}
\footnote{379. Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987).}
\footnote{380. See Syracuse Peace Council, 2 F.C.C.R. 5043 (1987). Congress was quick to react. Many members' immediate reactions revealed the extent to which they felt betrayed by the agency which they had long relied upon to do their bidding with the mass media. At once, the spectrum scarcity rationale that they relied upon to ensure mandatory access for political programming, among other programming controls, seemed to have been obliterated with a constitutional mallet.

The reaction of Massachusetts Congressman Edward J. Markey, Chairman of the House Subcommittee on Telecommunications and Finance, which oversees the FCC, is a typical one. On the day the agency ended enforcement of the Doctrine, he wrote:

Over the past several months there have been consistent promises and commitments that the "Patrick Commission" would be less confrontational and more willing to work with the Congress than was the Fowler Commission. Well, the proof of the pudding is in the eating, and the rancid dish served up today is the same stale stuff that's been ladled out for the last six years.

With its decision today, the Commission attempted to flout the will of Congress. The Commission's action was unconscionable, but it will be short-lived. I am certain that the Congress will reaffirm its overwhelming support for the Fairness Doctrine by recodifying the Doctrine again [sic] at the earliest possible opportunity. . . .

The honeymoon between the Congress and the Patrick Commission is over.

\textit{Quoted in EMORD, supra note 9, at 242.}
In footnote 11 to *FCC v. League of Women Voters*, the Court stated:

The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including incumbent Chairman of the FCC [Mark Fowler], charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete . . . . We are not prepared, however, to reconsider our long-standing approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of broadcast regulation may be required.

In its 1987 decision on remand, the FCC explicitly gave the Court the sign it requested. In *Syracuse Peace Council*, the FCC wrote:

We further believe, as the Supreme Court indicated in *FCC v. League of Women Voters of California*, that the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media. Despite the physical differences between the electronic and print media, their roles in our society are identical, and we believe that the same First Amendment principles should be equally applicable to both.

By repudiating spectrum scarcity and embracing the notion that the broadcast press was entitled to full First Amendment protection, the FCC had, at least theoretically, called into question its very existence.

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383. Bush administration appointees to the Commission have largely ignored the mandate of *Syracuse Peace Council*, choosing to avoid significant deregulatory measures to maintain harmony with Congress. *But see Memorandum Opinion & Order, F.C.C. 91-434* (Jan. 6, 1992)(in which the FCC expanded the reach of *Syracuse Peace Council* by invalidating the ballot proposition corollary to the Fairness Doctrine). The Supreme Court has also ignored the message sent to it in *Syracuse Peace Council*. In *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990), the Court stepped beyond the bounds of merely addressing the Fifth Amendment question there in issue to reiterate its support for the spectrum scarcity rationale, ignoring the import of footnote 11 to its *League of Women Voters v. California* decision and of the agency's response to it in *Syracuse Peace Council*. *Id.* at 3010. Indeed, the Court endorsed the trusteeship model of broadcasting, reiterating that
sideration, the FCC was quick to narrow the effect of its holding, making it clear that it did not alter those “regulations designed to promote diversity” that stemmed from the Associated Press case. In response to congressional pressure, FCC Chairman Patrick in a letter to John D. Dingell, Chairman of the House Committee on Energy and Commerce, emphasized that the agency’s actions did not encompass the corollaries to the Fairness Doctrine, warning, however, that issues arising under these rules could “come within [the Fairness Doctrine repeal order’s] precedential scope.” He also stressed that the decision did not “affect any obligations codified by the Congress, such as the equal opportunity provisions under § 315 or the reasonable access provisions of § 312(a)(7).”

4. The FCC’s Abortive Attempt to End the Comparative Hearing Process

On November 5, 1981, the FCC released a Notice of Inquiry in which it questioned the efficacy of its 1965 Policy Statement on Comparative Hearings in the advent of congressional legislation authorizing the agency to use lotteries in lieu of comparative hearings in initial licensing matters. The agency also questioned whether the development of more specific standards to judge a licensee’s past programming performance would be consistent with the First Amendment. In addition, the agency sought to accommodate the D.C. Circuit Court’s concerns that FCC renewal review lacked a standard “susceptible of judicial review.” Eight months after the agency released its Notice, the D.C. Circuit again urged the

broadcasters were not to be viewed like other business men and women but were “fiduciaries for the public.” Id.

385. See id. at 2065 n.75 ("We need not—and do not—decide here what effect today’s ruling will have on every conceivable application of the fairness doctrine"). The political programming rules are contained in 47 C.F.R. § 73.1920 (1988) ("personal attack" rule) and 47 C.F.R. § 73.1930 (1988) ("political editorial" rule). These latter rules are still in effect. See also Letter from Dennis R. Patrick, Chairman, FCC, to John D. Dingell, Chairman, Comm. on Energy and Commerce, U.S. House of Representatives (Sept. 27, 1987).
agency to define its renewal review standards with greater specificity.\textsuperscript{389}

On March 10, 1989, the FCC acted on the lottery concept it raised in its 1981 notice by commencing a rulemaking in which it recommended that its comparative hearing process for new facilities be replaced with random selection by lot.\textsuperscript{390} The agency condemned the comparative hearing process, finding that it "frequently operate[s] to delay service . . . without providing substantial off-setting benefits in terms of selecting a 'better' applicant."\textsuperscript{391} It found its comparative hearing criteria bereft of value,\textsuperscript{392} and its decisions often based on such "fine gradations" as to produce distinctions without meaningful differences, leading to a circus environment of topsy-turvy litigation.\textsuperscript{393}

With the arrival of the Bush appointees to the Commission, the agency reversed course on the lottery proposal, electing to retain the comparative hearing process and to revitalize concepts such as localism and trusteeship that were held in disrepute by the Reagan appointees. On July 2, 1990, the new commission terminated the lottery proceeding and commenced a rule making designed to reform the comparative hearing process.\textsuperscript{394}

\begin{itemize}
\item \textsuperscript{389} See Central Fla. Enter., Inc. v. FCC, 683 F.2d 503 (D.C. Cir. 1982), cert. denied, 460 U.S. 1084 (1983).
\item \textsuperscript{390} See Notice of Proposed Rule Making, 4 F.C.C.R. 2256 (1989).
\item \textsuperscript{391} Id.
\item \textsuperscript{392} "Based on our years of experience in this area, we tentatively have concluded that, generally, the criteria do not lend themselves to consistent and easily predictable results and that the process often functions to produce only marginal benefits to the public." Id. at 2258.
\item \textsuperscript{393} Wrote the Commission:

\begin{quote}
The overall process is so complex because of the myriad of factors involved and the fine gradations of weight accorded to each of these factors that one level may reach one result, a second level a different result, and the third the same result as one of the other levels, but for substantially different reasons. The analyses may be based on minor distinctions having little, if any, impact on the quality of service to be provided. As a result, the process is viewed as lacking in overall consistency and predictability and as producing results that appear arbitrary in nature.
\end{quote}

Id. at 2259.
\item \textsuperscript{394} See Order, 5 F.C.C.R. 4002 (1990). The views of Commissioner Ervin S. Duggan epitomize the revival of the regulatory spirit. Wrote Duggan in a separate statement appended to the Order:

\begin{quote}
I will support every reasonable proposal to make the licensing process more efficient. But I cannot support proposals whose unspoken assumption is that a broadcast license is simply an income-producing asset like any other—like a widget factory or a
5. Fraud and Extortion in the Comparative Hearing Process

By the early 1980s, it became apparent to many of those practicing communications law that the licensing process had become rife with fraud and abuse. A number of agency actions coalesced to create an environment conducive to corruption.

In 1984, as a part of its relaxation of its ownership regulations, the FCC held that properly insulated limited partnership interests and non-voting stock interests would be non-cognizable under its ownership rules. The agency applied its ownership non-attribution policy in the comparative hearing context, exempting non-voting stockholders and limited partners from comparative consideration except in those instances where the presumption against non-attributability was rebutted by evidence that the putatively passive principals had in fact exercised control. Because the agency awarded enhancement credits for minority race, female gender, local residence, civic involvement, and broadcast experience, because of the relatively low expense associated with filing a broadcast application, and because applicants often settled cases (with the dismissing applicants receiving monetary awards in excess, and sometimes substantially in excess, of their expenses), the unscrupulous filed hundreds of fraudulent applications. Some filed fraudulent applications en masse, seeking not a station, but a chance to profit from settlement awards. Others filed single fraudulent applications that were structured for the sole purpose of looking formidable from a comparative standpoint in order to induce competitors to pay them profitable settlement awards. Still others structured their applications in a peanut farm. A broadcast license, to my mind, is a sacred trust and should be granted with exquisite care. So to the idea of lotteries, I say good riddance.

Id. at 4003.


The agency's policy, in the comparative hearing context, even before its 1984 attribution order, had been to ignore putatively passive, non-integrated limited partners when general partners appeared empowered to manage and control applicants. See Anax Broadcasting, Inc., 87 F.C.C.2d 483 (1981).


397. See, e.g., Abuses of the Commission's Processes by Broadcast Applicants (Section 403 Inquiry re Dr. Bernard Boozer), 3 F.C.C.R. 4740 (1988).

398. See, e.g., Poughkeepsie Broadcasting Limited, 5 F.C.C.R. 3374
similarly fraudulent manner to increase the probability that they would win the permit, only to thereafter sell the facility as soon as it was licensed or force its transfer from the putative controlling principal or principals to the real controllers, the limited partners or non-voting stockholders.\textsuperscript{999}

Typically, white businessmen, anxious to own a new or an additional broadcast media property, would convince minority individuals, often females also possessing one or more of the FCC's other desired qualitative enhancements, to serve as nominal general partners or sole voting stockholders in applicants. These putative controllers were in fact nothing more than mere figureheads, lacking any genuine authority over and possessing no financial stake in the applicant. They often were poor people led to believe that by following the instructions given to them they would come to hold positions of importance at radio stations or would receive a part of settlement proceeds. An unseemly cottage industry came into existence, and it still exists. Many individuals have been induced to perjure themselves at trial by representing themselves to be in control when the evidence plainly indicates that they are not.\textsuperscript{400}

The problem of fraud on the Commission's processes caused the agency's law judges to react. For example, FCC Review Board member Norman Blumenthal remarked:

> Because of this recent outbreak of sham broadcast applications, \textit{bona fide} applicants and the Commission's [Administrative Law Judges] have been compelled to

\(\text{(Rev. Bd. 1990); Metroplex Communications, Inc., 4 F.C.C.R. 8149 (Rev. Bd. 1989).}\)

\textsuperscript{999}. Parties also filed petitions to deny pending applications in an effort to extort money from applicants in return for the withdrawal of such petitions. These petitions, particularly ones that raised bogus equal employment opportunity complaints, could cause an applicant to be exposed to reputational damage, to have its application languish at the FCC for a year or more, and to suffer significant legal expense in fending off the false charges. The agency commenced a rule making to explore these abuses (Notice of Proposed Rule Making, 2 F.C.C.R. 5563 (1987)), and adopted a Report and Order barring settlement payments to petitioners for any amount in excess of the legitimate and prudent expenses of the petitioner in filing its petition. \textit{See Report and Order, 5 F.C.C.R. 3911 (1990).}

\textsuperscript{400}. \textit{See} Jarad Broadcasting Co., 1 F.C.C.R. 181 (Rev. Bd. 1986); Pacific Television Ltd., 2 F.C.C.R. 1101 (Rev. Bd. 1987); Tulsa Broadcasting Group, 2 F.C.C.R. 5513 (Rev. Bd. 1987); Magdalene Gunden Partnership, 2 F.C.C.R. 5513 (Rev. Bd. 1987). The author can verify the existence of these circumstances, having litigated in this field before the FCC during the period from 1986 to 1991 and having cross-examined numerous individuals who, although putatively in control, seemed to be entirely beholden to their supposedly "passive" investors.
examine much more closely the alleged ownership structures and, more specifically, the purported "integration" designs of numerous competing applicants to determine whether their proposals reflect the [actual] composition of the particular applicant or whether that applicant is, in reality, an utterly artificial construct devised exclusively for the purpose of deceitfully exploiting the Commission's comparative system . . . . Unless sham applicants are stoutly rebuffed, the very fabric of the Commission's licensing process will be irreparably rent, and our broadcast license rolls reduced to a shabby sodality of frauds, mountebanks, and sundry speculators of the lowest echelon. 401

It was not the policy against attribution that created an environment hospitable to acts of fraud, it was the comparative system itself with its favoritism for characteristics having no necessary correlation with talent or ability to broadcast, such as race, gender, local residence, and civic participation, that invited abuse.

Indeed, fraudulent applicants did not always come in the form of limited partnerships or two-tiered corporations. Individuals also filed at the behest of undisclosed "real parties-in-interest" who would pay for their applications and induce them to claim sole proprietors status, cognizant of the fact that the individuals in question lacked the financial wherewithal to operate a station and would be beholden to them for finances. As in the context of the bogus limited partnerships and two-tiered corporations, the nominal sole proprietors often had those "winning" qualitative attributes desired by the agency, but lacked any inherent ability or financial wherewithal to effectuate their promises. 402

Fraudulent applications also appeared in the comparative renewal context where non bona fide entities were suspected of filing mutually exclusive applications against existing licensees in an effort to extort from these licensees payments in exchange for withdrawal of their competing applications. 403


402. Consider, for example, the interesting case of Linda L. Crook, 3 F.C.C.R. 1867 (Rev. Bd. 1988), where a local black female resident, previously awarded a construction permit, was suspected of engaging in acts of misrepresentation and of serving as a "front" for a previously undisclosed non-minority owner before the FCC's Review Board. See also Perry Television, Inc., 5 F.C.C.R. 1667 (Rev. Bd. 1990).

403. See Second Further Notice of Inquiry and Notice of Proposed Rule
6. The FCC Attempts to Curb Hearing Process Abuses

On August 16, 1988, the FCC commenced a rule making that expanded the scope of its 1981 Notice that questioned the efficacy of its 1965 Policy Statement on Comparative Hearings. As in the 1981 Notice, in the 1988 rulemaking, the FCC contemplated reforming its comparative renewal process. Moreover, the agency sought to curb abuses created by the filing of fraudulent renewal challenge applications and to prevent the filing of bogus petitions to deny. It also revealed a sensitivity to First Amendment concerns in the comparative process, asking commenters to “examine any alternative means that might be capable . . . of simplifying and clarifying the process and of minimizing, consistent with first amendment aims, the degree of governmental intrusiveness over broadcasters’ programming judgments.” The agency admitted that its evaluation of licensee programming performance under the existing system was “subjective” and erratic due to vacillating performance standards.

On May 16, 1989, the FCC released its decision on the abuse of process subject. The agency prohibited the payment of any consideration made to renewal applicants in competition with existing licensees prior to the Initial Decision stage of a comparative hearing and permitted the payment of only legitimate and prudent expenses to a withdrawing applicant at any time after the Initial Decision.

On July 2, 1990, the FCC commenced a rulemaking soliciting comments on a proposal to limit the amount of payments that could be given to settling parties in proceedings involving competing applications for new or modified facilities.

-Making, 3 F.C.C.R. 5179 (1988) ("[A]ssertions and criticisms have been voiced that unscrupulous parties may be using the renewal process for private gains unrelated to any public interest aims thereunder."). See also Metroplex Communications, Inc., 4 F.C.C.R. 8149 (1989).

405. Id.
406. Id.
407. Id. at 5180.
409. Id.
411. See Notice of Proposed Rule Making, 5 F.C.C.R. 3921 (1990). The FCC also commenced a rulemaking that set forth a broad number of recommended changes designed to reduce the amount of time it takes to prosecute an application through the agency. See Notice of Proposed Rule Making, 5 F.C.C.R. 4050 (1990).
On December 21, 1990, the FCC released a decision limiting settlement awards in comparative hearings for new facilities to legitimate and prudent expenses from the time of application filing until the first day of the hearing. From the first day of the hearing forward, the FCC prohibited settlement awards entirely. On reconsideration, the FCC eliminated the payment ban and made the legitimate and prudent expenses cap applicable from the time of application filing forward.

7. Summary of the Era of Partial Deregulation

The deregulatory initiatives of the FCC have not called into question the agency's essential power to second guess broadcasters' editorial judgments; its measures have more times than not merely invalidated particular extensions of power. The FCC has usually focused on changed market conditions to justify removal of content restraints.

Deregulation has not altered the agency's expansive authority to define and then regulate in "the public interest," nor could it, for that is a statutory requirement. With the exception of the Fairness Doctrine abolition order, deregulation has also not gone beyond merely removing regulations when it could have extensively addressed how the core values of the First Amendment bar the agency from regulating in a particular manner. Instead of taking this extra step, the FCC has often simply redefined the "public interest" to embrace, rather than encumber, free market processes. As a consequence, the regulatory machinery remains in place, although some of it is no longer in use.

At the behest of a new Commission or Congress, currently disfavored content regulation could be brought to bear upon licensees again without need to consult the Constitution or the agency's prior policy pronouncements in favor of a market approach. No more striking example of this point exists than the ease with which the agency's existing renewal apparatus could accommodate the content strictures imposed on licensees by the Children's Television Act of 1990. Consequently, from the deregulators' standpoint, the last decade has been only a partial success, in many respects a Pyrrhic victory.


With the exception of the repudiation of the Fairness Doctrine on First Amendment grounds, the FCC has never determined that any of its other most basic content regulatory policies violate the freedom of speech and press. For example, although the Fairness Doctrine has been eliminated, all of the Doctrine's corollaries, including the personal attack and political editorial rule remain. Although the quantitative programming and commercialization guidelines have been removed (with the exception of the new commercial limits for children's programming), licensees must still be prepared to account for their "stewardship" of the airwaves at renewal time by being able to prove that they have broadcast locally responsive programming. Indeed, licensees must now do more than they ever have in the past to provide cultural and educational programming for children and that programming will be scrutinized by the agency, replete with a renewal form category addressing that subject.

Although the agency has attempted to modify the comparative hearing process, it still employs a selection system that discriminates against one class of prospective speakers and favors another class, namely those whose characteristics fulfill the government's content-oriented policy objectives. The government presumes that blacks' views inherently differ from whites', that women's views inherently differ from men's, and that civically active, local residents will sponsor locally responsive programming. Relying on this counterintuitive series of racist, sexist, and parochial assumptions, the FCC prefers blacks over whites, women over men, and civically active local residents over non-local residents when licensing new facilities. It does so in an effort to influence, through its selection, the composite message communicated to the public.414

414. Some have argued that this system must be retained because it affords low-income individuals a chance to get into the business of broadcast ownership. They argue that an auction system would prevent low income earners from getting into the business. This argument proceeds from a false premise, namely that those who own and operate broadcast properties can do so without substantial financial resources.

In these proceedings, only one thing is achieved: a market dislocation. For several years, different applicants (some financially capable, others not) compete for the facility. If the case in question does not settle, the victor will embody the FCC's favored characteristics. Once awarded a construction permit, however, the permittee must construct and operate its facility at its own expense or with financing from a third-party source. To pay for construction and operation requires substantial financial resources, ranging from the low $200,000 range (for Class A FM stations) to the $1 million plus range for television facilities in certain markets. Permittees that lack these
Although in *Syracuse Peace Council*, the FCC announced that broadcasters were to be treated on a par with their print media counterparts and that the spectrum scarcity rationale had become obsolete, broadcasters still suffer from content restrictions that would be constitutionally impermissible were they imposed on the print media. Moreover, dicta in the Supreme Court's *Metro Broadcasting, Inc.* decision may give new life to the scarcity rationale.

Although the agency has been willing to lessen some geographic restraints on, for example, the location of a licensee's main studio, and to eliminate the local program origination requirement,\(^4\) it has not abandoned the concept of localism. In fact, the Bush appointed commissioners have assiduously adhered to the concept, demanding that licensees present at least some locally responsive programming.\(^5\)

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4. Resources usually sell their permits and obtain reimbursement of their expenses. Those who do construct, but do not have the financial wherewithal to operate the station beyond the first several months, usually sell (rather than go bankrupt) to the highest bidder.

Consequently, the FCC's licensing process, when it works as designed and when it additionally assists a person who lacks substantial financial resources, merely delays permitting those who can put the broadcast facilities to their best and highest use from doing so. The current system is not successful as a vehicle to redistribute speech power. In the past, it has sometimes been successful as a vehicle to redistribute wealth, for it has permitted those with fraudulent intentions to speculate and obtain large amounts of money that would not come to them were it not for the licensing system.

415. In 1950, the FCC made it a primary obligation of radio licensees to locate their main studios within their licensed communities and to "serve as a medium for local self expression" by providing "a reasonably accessible studio for the origination of local programs." See *Promulgation of Rules and Regulations Concerning the Origination Point of Programs*, 43 F.C.C. 570, 571 (1950). These same rules were applied to television. See *Television Main Studio Location*, 43 F.C.C. 888 (1952). The main studio and program origination rules, along with the FCC's rule requiring the maintenance of a local public inspection file, were most representative of the agency's commitment to community responsiveness. In 1987, the agency relaxed its main studio rule, permitting licensees to locate their studios outside their communities of license, provided the studio was within the station's primary service contour area and was accessible by a toll free call from community residents. The agency also eliminated its program origination requirement. See *Main Studio and Program Origination Rules*, 2 F.C.C.R. 3215 (1987), aff'd, 3 F.C.C.R. 5024 (1988).

416. See, e.g., Statement of Alfred C. Sikes, Chairman of the Federal Communications Commission, before the Subcommittee on Communications, Committee on Commerce, Science, and Transportation, United States Senate on the "Public Interest" Standard under the 1934 Communications Act, Thursday, June 20, 1991, where he emphasizes the importance of localism to the current FCC.
In sum, the essential theories that have justified government intrusion into the editorial judgments of broadcasters remain largely intact despite the deregulatory efforts of the last decade. Only the regulatory manifestations of these theories have changed. As a consequence, content re-regulation may continue to proceed apace without need for extensive development of new rationales to justify new actions.

IV. A Refutation of the Regulatory Rationales

At root, the FCC's regulations of broadcast media content depend for their constitutionality on four central rationales: the scarcity rationale, the impact rationale, the varying standards rationale, and the diversity rationale. These rationales are derived from false factual premises and posit indefensible double-standards.

The Scarcity Rationale. The electronic media is said to suffer from unique physical limitations (the fact that no more than one broadcast station can operate on a single frequency from a single location at a single time) and economic limitations (the fact that there are more people who would like to broadcast than there are frequencies available for use) that justify affording broadcasters less First Amendment protection than print media journalists.

Although it is currently true that no more than one broadcast station can operate on a single frequency from a single location at a single time, it is not true that the useable spectrum is finite. The technological history of broadcasting proves this. Technology has consistently expanded the amount of useable spectrum. For example, although in 1934 the useable spectrum was thought to be largely filled for commercial broadcasting with only 583 AM stations, today, through

417. See supra notes 4-8.
418. See Emord, supra note 9, at 277-95.
419. Even this once incontrovertible point is giving way as a result of digital compression technology which creates the possibility that existing radio spectrum occupied by one channel could be altered to split the single channel into as many as three new channels. This same compression technology can be applied to television to expand the number of channels. See generally Matt Stump, Compression Lights a Fire Under Cable Networks, Broadcasting July 29, 1991, at 26-29; Peter D. Lambert, Video Compression: Multiplying Satellite Capacity from the Ground in '90's, Broadcasting, July 29, 1991, at 34-41; Bill Carter, Brave New TV World: 300 Channels, N.Y. Times, May 13, 1991, at D1.
420. See Matthew L. Spitzer, Seven Dirty Words and Six Other Stories 13-14 (1986).
421. See Emord, supra note 9, at 283.
technological advancements that permit the available spectrum to be used more efficiently, there are 4,987 AM stations, 4,502 FM stations, 1,475 FM educational stations, 570 UHF commercial TV stations, 557 VHF commercial TV stations, 232 UHF educational TV stations, and 124 VHF educational TV stations licensed in America. In addition, there are 711 UHF Low Power TV stations and 214 VHF Low Power TV stations.

Moreover, there are numerous multi-channel electronic media substitutes for traditional radio and television including digital audio broadcasting, cable, multichannel multipoint distribution services, low power television, satellite

423. Id.
424. AM and FM radio broadcasting relies on analog transmission schemes, that is, "the information they carry (such as the fluctuating tones of music or voice) causes a continuous range of variation in the frequency (FM) or amplitude (AM) of the carrier wave." See Bringing Radio Up to Date, WASH. POST, June 3, 1990, at D3. However, digital audio broadcasting transmission systems encode sound "as a series of binary (0/1, on/off) digits, with the sequence corresponding to a certain pitch, volume, etc." Id. DAB is largely immune to multi-path interference that plagues traditional radio and can improve the sound of radio to equal compact disc quality. See EMORD, supra note 9, at 309-10.

DAB . . . [uses] far less power than conventional broadcasting stations to reach the same sized audience. AM and FM stations use high power to overcome problems of multipath interference. DAB uses digital technology to neutralize multi-path. Consequently, a DAB station operating on 2,500 watts of power can reach an audience equal to a typical FM station operating with 50,000 watts. Id. at 310.

Moreover, from one location, it is possible for three separate audio programs to be transmitted simultaneously using the same spectrum that is now relied on by an FM station to transmit just one program. Id.

425. In 1990, 91.2% of all television households were passed by cable, and 61.4% subscribed to basic cable service. See FCC OFFICE OF PLANS AND POLICY, BROADCAST TELEVISION IN A MULTICHANNEL MARKETPLACE 70 (Working Paper No. 26, 1991) [hereinafter OPP Study]. 98.2% of all households in America have television sets. Id. at 12. There are 95.7 million households.

426. MMDS is also known as "wireless cable." It relies on the use of microwave frequencies to transmit up to 32 programming channels that can be received by standard television receivers using a converter mechanism. With roughly 180,000 subscribers, MMDS reaches about .2% of television households. See OPP Study, supra note 425, at 109-10; EMORD, supra note 9, at 309.

427. Low power television relies on the use of regular UHF and VHF television channels but uses substantially reduced power levels. See EMORD, supra note 9, at 309. There are 925 UHF and VHF low power TV stations
master antenna television systems, home satellite dish systems, direct broadcast satellites, video cassette recorders, and compact disc players that can compete directly with the traditional broadcast media.

In addition, the fact that the broadcast media is less than a universally available good does not distinguish it from the print media, for access to the latter media is also encumbered by relative scarcity. Indeed, all economic goods are less than universally available, and, so, are plagued by degrees of scarcity. Consequently, scarcity can not serve as a distinguishing principle.

Furthermore, the holding in NBC had no precedential antecedents. Although the print media has always been less


SMATV systems operate like a cable system, but do not traverse public rights of way and usually provide service to a single multi-dwelling building, such as an apartment complex. See generally Omega Satellite Prod. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982).

In 1990, approximately 3% of all television households (or approximately 2.7 million homes) made use of home satellite dishes to obtain video programming. OPP Study, supra note 425, at 93.

Beginning in mid-1994, it is believed that a number of American Direct Broadcast Satellites will be launched into orbit. See USSB, Hughes Revive DBS in $100 Million + Deal, BROADCASTING, June 10, 1991, at 35. Eight DBS permits have been issued by the FCC. OPP Study, supra note 425, at 97. DBS uses a very high powered Ku-band satellite to transmit television programming across the continental United States from a geostationary satellite to homes located within the geographic "footprint" reached by the satellite. It is capable of offering 200 or more new television channels. Home reception is possible through the use of relatively inexpensive flat-plate antennas that may be placed on a window inside the home or office. EMORD, supra note 9, at 308.

Video cassette recorders are now in use in 76.6% of television households. See Mark Berman, VCR Penetration Climbs to 76.6%, VARIETY, May 13, 1991, at 45.

According to the Electronics Industry Association, an estimated 28% of the 95.7 million households in America have CD players.

According to Professor Coase:

[I]t is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor, and capital are all scarce, but this, of itself, does not call for government regulation. It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resource. But the way this is usually done in the American economic system is to employ the price mechanism, and this allocates resources to users without the need for government regulation.

Coase, supra note 26, at 14.
than universally available, this condition of scarcity never led the courts to conclude that newspapers should be provided less than full First Amendment protection.

Moreover, in today's media environment, the print media is far more scarce than the electronic media. There are far fewer newspapers in America than broadcast media outlets. The costs of entry into the newspaper business far exceed those of entering the broadcast business, and the costs of reaching an audience with a newspaper are far greater than those of reaching the same audience with a radio broadcast. 434

Consequently, as the FCC found in Syracuse Peace Council, spectrum scarcity is an anachronistic rationale. In an age of media abundance, where spectrum substitutes are bountiful, it is grossly counterintuitive to continue viewing broadcast spectrum as a uniquely scarce resource that must be allocated by the state rather than the market. The scarcity rationale should be abandoned.

The Impact Rationale. Justice John Paul Stevens articulated this rationale in FCC v. Pacifica Foundation, where he stated that

The broadcast media have established a uniquely pervasive presence in the lives of all Americans. . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. 435

This argument proceeds from a false premise: that the viewer of television or the listener of radio, unlike the reader of a newspaper, magazine, or book, is a captive audience and cannot help but receive unwanted media offerings. It also is premised on the assumption that government can and must perform the role of a parent, ensuring that majoritarian values protective of social norms are maintained even at the expense of individuals who seek to present dissenting views and of those who wish to receive them. The underlying assumption is


that less knowledge of certain matters is beneficial and that it is appropriate for government to define what those matters are. The danger of the exercise of official discretion over speech is not considered a barrier to state intervention.

This state paternalism is both unnecessary and in violation of core speech and press values. Viewers and listeners can tune out just as surely as they can tune in; without the aid of government, they already possess the wherewithal to block unwanted media offerings from reaching them or their family members. Justice Stevens’s assault metaphor is misplaced. The receipt of unwanted media offerings is not a physical offense, coming as it does from an inanimate box. It is harmless except for the indignation that it may inspire in some recipients. It is merely a challenge to their sensibilities, a challenge that is characteristic of life in a democracy. The unwanted speech could just as easily reach the listener when he or she strolls through a park or along the sidewalk and confronts a soapbox orator.

In our open society, the fear of being confronted with views unlike our own is not a justification for silencing them. The disenchanted or disgruntled can resort to counterspeech. Alternatively, in the case of the electronic media, they may avoid watching television or listening to the radio, or they may selectively partake of the media by subscribing to any one of a number of print media services that offer listings of available programs. Through the use of these listings, commonly found in newspapers and magazines like TV Guide, they may protect themselves and their family members from the unorthodox. However, those who desire access to unorthodox presentations should not be deprived of that opportunity in order to placate the wishes of others among us, even if (or perhaps especially if) those others represent a majority.

Furthermore, Justice Stevens writes as if the interaction between a broadcaster and a listener is a purely random occurrence. It is not. Success in the business of broadcasting depends upon the broadcaster’s ability to carve out a programming niche that can ensure viewer and listener loyalty. By and large, viewers and listeners know what kinds of programming they can expect by tuning in to any particular channel. This fact also undermines the captive audience thesis.

\[436. \text{See generally Emord, supra note 9, at 120-26.}\]

\[437. \text{See generally National Association of Broadcasters, Radio in Search of Excellence (1985).}\]
Justice Stevens errs by assuming that the broadcast media are fundamentally more intrusive than the print media. Just as an unsuspecting viewer may confront a viewpoint he finds offensive while watching the television or listening to the radio, so too can he upon reading the newspaper, a magazine, or a book. It is a risk one takes by reading, listening to, or viewing any medium. The adage, "you can't judge a book by its cover" is a reflection of the fact that sometimes one may discover that a publication that apparently presents a particular perspective in fact presents another, and that other may not be pleasing. Screening is often not possible, because one must first read the passage or passages in question before one comes to the realization that the view offends. However, here too, for the particularly squeamish among us, there are book and magazine reviews that could be consulted to determine whether the contents of a book or magazine are of a nature that could offend. In short, the broadcast media are not "uniquely pervasive" when compared to the print media.

Moreover, Justices Stevens's focus on the need for state protection against offensive speech creates a new, larger problem. This focus invites government to replace the private system of editorial selection and market demand with a state speech orthodoxy that reflects majoritarian values—precisely the condition that James Madison feared would happen unless basic rights, such as those to speech and press, were protected from the state.\footnote{438} It is precisely offensive speech that holds out the greatest promise of encouraging debate that may lead to the discovery of new truths about the human condition. Suppression of speech not only stifles the right of speakers to present their messages, it also suppresses knowledge itself, for it is only by being subjected to speech, even speech we find offensive, that we are best able to understand precisely what it is that we do not like and why it is that we do not like it.\footnote{439}

The Varying Standards Rationale. In assessing the First Amendment ramifications of communication by sound truck,

\footnote{438} In 1788, James Madison wrote to Thomas Jefferson:
Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.


\footnote{439} \textit{See EMORD, supra note 9, at 278-79.}
Justice Robert H. Jackson originated the concept that different modes of communication should be treated differently for First Amendment purposes. He wrote: "The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each in my view is a law unto itself, and all we are dealing with now is the sound truck." The Court relied upon this concept again in assessing the broadcast media, holding that "differences in the characteristics of news media justify differences in the First Amendment standards applied to them."

The Court has never explained in a developed fashion why it is that a difference in the mode of communication should justify a difference in the treatment of the content disseminated by that mode. On close inspection, the rationale breaks down, for the substantive commonalities of the media defy efforts to distinguish them. Written works can evoke the same emotions as visual works. Radio can have as profound an effect on a listener as television can have on a viewer. Some would argue, with good reason, that because written works create imagery with words and depend, to a degree, upon embellishment in the mind of the reader, these works can produce more profound and lasting impressions than aural or visual works. Whether by written word, verbal message, or video image, it is equally possible to engage the mind of the reader, listener, or viewer. These profound substantive commonalities render efforts to distinguish the freedom of speech and press afforded the various media, based upon technological differences, an exercise in the elevation of form over substance.

In addition, the technology of the various media are merging. Newspapers rely upon satellite, telecommunications, and computer technologies to receive and disseminate the news. Within the first decade of the twenty-first century, cable technology, particularly fiber optic cable, will likely enable consumers to retrieve written information, printed from a teletext unit connected to a video receiver, as a supplement to video programming. In time, interactive cable technology will permit a vast array of information to be presented in brief in video form and then supplemented with hard copy print-outs that provide greater detail. Ultimately, the computer-generated artificial
worlds of virtual reality will meld print, video, computer, and telephonic communication into one multifaceted speech environment accessible through an audio-video headset. These changes will make it increasingly difficult for the courts to characterize a medium as either "broadcast" or "cable" or "telephonic," for that matter.

The Diversity Rationale. In December of 1791, when the First Amendment became a part of the Constitution, there were only eight daily newspapers in America, seventy weeklies, ten semi-weeklies, and three tri-weeklies. Despite the relative scarcity of the print media and the fact that not everyone who desired to be in the business of printing could afford that luxury, the Framers of the First Amendment did not feel compelled to grant government an affirmative right to ensure access to the press in order to foster a politically preferred degree of diversity in media markets. Rather, it was irrelevant to the Framers whether there existed any speech in the idea marketplace. The end in view was simply to ensure that "no power whatever over the press" was lodged in government. The goal was not to redistribute speech property or speech rights, for these rights were viewed as personal and inalienable. It was merely to deny a power to interfere with private speech and editorial judgments.

The freedom of speech and press was a freedom from government, it was not an affirmative right to any particular means of communication. As a consequence of this historical legacy, although the print media are in far less abundance than the broadcast media, they are protected by the First Amendment from government intervention designed to foster diversity.

In Associated Press v. United States, the Supreme Court held that the Sherman Act could be applied to the electronic media without violating the First Amendment, reasoning that "it would be strange indeed . . . if the grave concern for freedom of speech which prompted adoption of the First Amendment should be read as a command that the government was without power to protect the freedom." The Court did not simply hold that the Sherman Act applied to the electronic press, it went further, determining that the government had an affirma-

445. See id. at 222.
447. See Emord, supra note 9, at 127-28.
448. 326 U.S. 1, 20 (1944).
tive role to play in ensuring a preferred level of diversity in the idea and information marketplace. \(^{449}\) The Court held that the First 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." \(^{450}\) It also held that "[f]reedom of the press from governmental interference under the first amendment does not sanction repression of that freedom by private interests." \(^{451}\) Ever since Associated Press, the courts and the FCC have used the diversity rationale as a justification for all manner of government intervention into the private communications sphere. Affirmative rights of access, whether based on the Fairness Doctrine, the Personal Attack Rule, the Political Editorial Rule, or the Equal Time provision in Section 315 of the Communications Act, are justified by the argument that they merely create more speech. More speech is said to be beneficial, regardless of the extant competitiveness of media markets, for it enhances media diversity. It is the government's right, under this scheme, to determine what kind and what level of diversity is appropriate at any given time. \(^{452}\) This power lodges in the state the authority to second guess editorial judgments and to supplant them with enforced rights of access ad nauseum until the marketplace of ideas, diverse though it may be, is anything but free.

This extension of Associated Press to justify a constant state presence in the idea and information marketplace turns the First Amendment on its head. Without any evidence of anti-

\(^{449}\) Even if the Court had merely held that the antitrust laws applied to the press and had expressly forbid the use of such laws as a pretext for content regulation, it would still not be possible to ensure that these laws would be applied in a non-discriminatory manner. Although in theory objective enforcement is possible, in practice these laws have been enforced in a subjective and prejudicial way. Government antitrust enforcement has been characterized by arbitrary suits predicated on patently political determinations. See, e.g., Lucas A. Scott Powe, Jr., American Broadcasting and the First Amendment 121-41 (1978); Emord, supra note 9, at 225-28. The danger of such prejudicial enforcement against the press for the purpose of silencing criticism raises insurmountable First Amendment concerns. Consequently, even if Associated Press were narrowly used, it could not help but invite those press abuses historically associated with the exercise of official discretion. To my mind, these dangers make prohibiting application of the antitrust laws to the press a constitutional imperative.

\(^{450}\) Associated Press, 326 U.S. at 20.

\(^{451}\) Id.

\(^{452}\) See Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3010 (1990) ("Safeguarding the public's right to receive a diversity of views and information over the airwaves is . . . an integral component of the FCC's mission.").
trust violations, indeed in the presence of a highly competitive media environment, the government continues to relentlessly pursue diversity. It does so by restricting the speech of electronic media owners in order to enhance the speech of others, those preferred by the state. This is censorship. The government’s actions may create viewpoint diversity in some abstract sense, but that diversity comes at the expense of freedom, through a taking of part of a broadcast media owner’s speech property and through the suppression of that media owner’s speech freedom. The current regulatory scheme pits the rights to property against the freedom of speech, when the two were designedly compatible. Most importantly, this system permits the state to create a speech orthodoxy by confiscating the speech property and rights of some, to enhance the opportunities for expression of others preferred by the state.

This role of the state as super-editor violates the core values of the First Amendment, for it creates a pervasive chilling effect on speech. This degree of state power is too great to bear in a country that depends on a free and critical media to protect it from government abuses.\textsuperscript{453}

V. A Return to First Principles

Carefully scrutinized, none of the four rationales that the Congress, the courts, and the FCC have relied upon to justify lessened First Amendment protection for the broadcast media establish any meaningful basis for distinguishing that media form from the print media. The broadcast media are now the media of abundance, the print media are, by comparison, scarce. The broadcast media possess no greater ability to intrude into the home or offend the sensibilities of individuals than the print media. The broadcast media are substantively indistinguishable from the print media and remaining technological differences are vanishing. The broadcast media are exceedingly diverse and operate in highly competitive markets; by comparison the print media are not as diverse and often operate in one newspaper towns. The First Amendment does not bar the government from continuing to regulate entry into

\textsuperscript{453}. In addition to the four extant rationales for regulation, there are others not yet applied to broadcasting based on the nonpublic forum law of Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), and the public function theory first expressed by the Supreme Court in Marsh v. Alabama, 326 U.S. 501 (1946). I have addressed these rationales in EMORD, supra note 9, at 289-95. Because this article concerns the First Amendment invalidity of existing content regulations, I need not reiterate here my arguments concerning these rationales.
and the content of the broadcast media in a never ending quest for more diversity, yet it bars the government from regulating the print media in this manner.

Because each of the broadcast regulatory rationales depend for their validity on false factual premises and unjustifiable double-standards, continued reliance upon them is disingenuous and indefensible. Simply put, the government now lacks a legitimate reason for denying the broadcast media full First Amendment protection. Moreover, the existing rationales are protecting an unseemly system of censorial controls whereby an administrative agency coaxes and cajoles members of the press into serving the policy objectives of the government. This system has always been antithetical to the core values of the First Amendment.

Sound epistemological arguments exist for affording the broadcast media print model protection. Because the electronic media are now the media that the public looks to as its principal source of news and information, the functional benefits of the First Amendment will not exist for the vast majority of Americans unless the same First Amendment that has protected print media freedom is permitted to transcend the new electronic modes of communication.

It is not enough to appreciate the simple logic of this argument. To understand the reason why the print model must be embraced in the broadcast media context, one must come to appreciate the fundamental purpose of the First Amendment and the benefits that accrue as a result of its proper application.

A. The Natural Law Origins of Free Speech and Press

There is a very close nexus between freedom of speech and freedom generally.454 Throughout history, freedom has been associated with a freedom from governmental restraint, and it may well be that there is no greater freedom from government than the freedom to criticize those who govern.

In our constitutional tradition,455 the freedom to castigate those in power who abuse their authority has Lockean origins,

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454. As Thomas Gordon and John Trenchard put it in the early Eighteenth Century, "in those wretched Countries where a Man cannot call his Tongue his own, he can scarce call any Thing else his own." See 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS 96 (Leonard Levy gen. ed., 1971) (Letter No. 15, Of Freedom of Speech; That the Same is Inseparable from Publick Liberty, 1720).

455. For the sake of brevity, I will not reiterate why a historically based focus ensures principled First Amendment jurisprudence. See EMORD, supra note 9, at 11-23.
reflected in the Declaration of Independence. We are said to possess as birthrights certain pre-political rights that are inalienable, and we are, by virtue of these rights, said to be sovereign with the inherent authority to establish new governments if existing ones prove incapable of protecting our rights.

Rights in the American constitutional tradition are not bestowed by the state. Under the law, our freedoms may be deprived by or protected from government, but they start with us. Our freedoms originally stem from Locke's hypothetical pre-political state of nature: "a State of perfect Freedom to order [one's] Actions, and dispose of [one's] Possessions, and Persons as [one thinks] fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man." However, even this individual conception of freedom has its natural limits, defined by reason: a respect for the equal right of others to dispose of their possessions and persons, "[f]or who could be free, when every other Man's Humour might domineer over him?"

In nature, it is an arduous task to defend one's life, liberty, and property against the wrongful acts of others. We create civil government in order to relieve us of this burden and to secure our liberties. However, because governments can be just as arbitrary as individuals when it comes to violating rights, the only legitimate governments are those that arise from universal consent, where all individual rights can be secured equally.

Within the natural rights paradigm, man would have total freedom to communicate except that he would act contrary to right reason were he to use his speech as a means to deprive another of life, liberty, or property. By entering into society man does not abandon his natural rights to free speech, rather government is obliged to protect those rights to their natural limits.

The Anti-Federalists in American constitutional history were the principal proponents of this natural rights conception of speech and press from 1787 to 1791. It was in no small part due to their struggle that the Bill of Rights included an express protection against state involvement with speech and press. The amendment was designed to erect a static barrier that,

457. Id. at 306.
458. Id. at 278, 284.
459. See Emord, supra note 9, at 73-96.
through proper judicial interpretation, would bar government from encroaching upon a private communications sphere coexistent with the natural right to free speech and press.460

In the field of communication, this barrier has been breached in a manner akin to that method employed by Henry VIII over the print press—through a system of licensure. Licensing is by its very nature incompatible with the natural rights to speech and press for it makes the speaker beholden to the state for his right to speak. It presumes that the right to speak flows from the state, when it rightfully flows directly from the individual. Accordingly, to fully apply the First Amendment to the field of communication will require dismantling the licensing regime. It is only by uniting the private right to fee simple property ownership of a speech forum with the freedom to speak that the electronic media will be equal to the print media as a full participant in the private sphere of communication.

B. The Benefits of a Private Communication Sphere

The benefits of maintaining the private sphere of communication have long been appreciated by advocates of liberty.461

460. See id. at 83. Madison defined the essential purpose of a declaration of rights:

[W]hatever may be the form which the several States have adopted in making declarations in favor of particular rights, the great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode. They point these exceptions sometimes against the abuse of the executive power, sometimes against the legislative, and, in some cases, against the community itself; or, in other words, against the majority in favor of the minority.

Quoted in 5 The Roots of the Bill of Rights 1029 (Bernard Schwartz ed., 1980).

461. The conception that held sway with the American founding generation was that of “Cato” and the radical Whigs, the party in opposition to the Hanoverian Kings. Thomas Gordon and John Trenchard, two radical Whigs, wrote 138 letters on liberty published in The London Journal from 1720 to 1723 under the pseudonym “Cato.” Emord, supra note 9, at 30. In addressing the speech and press freedom, Gordon and Trenchard relied upon the essential Self-Government/Checking Value, Marketplace of Ideas/Search for Truth, and Personal Autonomy/Self-Fulfillment Models in support of an expansive conception of the freedom. See id at 29-45.

Detailed below, these benefits have been construed to be central values embodied within the First Amendment.

Freedom from governmental restraint on speech permits speakers to engage in ideological contest without fear of official punishment for ideas expressed. This free idea exchange tends to expose falsehoods and confirm truths, thereby causing political, economic, social, and scientific evolution to take place. Throughout western history great minds have lauded the benefits of this aspect of the protected private sphere of communication. The Supreme Court has embraced the concept, holding the benefits of free idea exchange indispensable means to discover and spread political truth.

Freedom from governmental restraint on speech also permits people to remain sovereign by enabling them to exercise a critical check on their governors' actions without fear of state retaliation. They can thereby expose the corrupt and condemn them, identify maladministration, and demand political change to rectify it. A central theme in *Cato's Letters* is the vital function of free speech and press as a means to check misguided governors and governments. In modern times, Alexander Meiklejohn and numerous other scholars have adhered to this theory as a foundation of free speech and press.

Finally, freedom from governmental restraint on speech enables individuals to develop their faculties. Cultivation of the intellect through expression is a basic free speech and press right, tied more closely to the individual than any other. Trenchard and Gordon understood freedom of speech to be

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464. 1 CATO'S LETTERS, supra note 454, at 96-97. (Letter No. 15, Of Freedom of Speech: That the Same is Inseparable from Publick Liberty (1720)).

crucial for the enhancement of wisdom.466 In our time C. Edwin Baker and Martin Redish have variously argued that "self-realization" and "self-fulfillment" are core free speech and press values.467

C. Why the First Amendment's Anti-State Focus Is Essential to the Preservation of First Principles

Reasoning from Associated Press, arguments have been made that government has a duty to ensure that the beneficial by-products of free speech and press are attained in the idea marketplace by mandating rights of access to particular individuals or groups whose views are "counter to the capitalistic goals of privately owned, for-profit media."468 According to this view, the exercise of editorial discretion is "private censorship" and is said to be as onerous as government censorship.469 "When a select few individuals have the ability to restrict access, freedom of expression is endangered just as surely as if the restriction had been imposed by the government," writes Dominic Caristi.470 The mass media are viewed as censorial power centers that deprive those with dissenting views from having access to the press in order to promote their own ideological agendas. Government is the source of countervailing power that can provide limited rights of access in order to eliminate the effects of private censorship and enhance viewpoint diversity. According to Barron, "[t]he mass media's development of an antipathy to ideas requires legal intervention if novel and unpopular

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466. 1 CATO'S LETTERS, supra note 454, at 96, 99.
469. See Associated Press v. United States, 326 U.S. 1, 20 (1944) (the Court reasoned that the "freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."); see also LEE C. BOLLINGER, IMAGES OF A FREE PRESS 110 (1991) [hereinafter BOLLINGER] ("[u]nrestrained private interests can, at times, hamper the free exchange of ideas as seriously as governmental censorship... ").
470. Caristi, supra note 468, at 110.
ideas are to be assured a forum — unorthodox points of view which have no claim on broadcast time and newspaper space as a matter of right are in a poor position to compete with those aired as a matter of grace."\textsuperscript{471} Owen Fiss recognizes that access regulations will sacrifice the "autonomy" of media owners, but thinks that a tolerable result in order to enrich public debate.\textsuperscript{472} In short, the access advocates do not fear supplanting the judgments of competing media with those of the monopoly of the state.

These arguments reverse the First Amendment's historical premise. From the founding forward (and continuing today in the print media context), the Amendment has served as a force against state control, a check on state censorship. The realm of private editorial discretion has been viewed as symptomatic of a properly functioning free press and so properly protected.\textsuperscript{473} Indeed, as the following discussion reveals, it is impossible to protect a fully functioning private realm of communication if the First Amendment does not serve as a virtually impenetrable barrier against state intervention into the idea and information marketplace.

Mandatory access arguments proceed from false factual assumptions. They presume that people with unorthodox views do not gain access to the media. No empirical evidence exists to support this charge. Of course, the exercise of editorial discretion does cause some viewpoints to be preferred over others; this is an economic reality given the fact that any one media entity cannot present every conceivable view expressed at any single time. It remains, however, in the economic interest of competing media to cover those subjects of interest to listeners and viewers that other media fail to cover, including the views of dissenters.

Moreover, and more importantly, access arguments misconceive the relationship between the First Amendment and speech and press freedom. The access advocates would supplant private editorial discretion with state selection without even offering checks on the exercise of official discretion, naively assuming that the mere provision of a substantial power to sift through and periodically suppress private journalistic judgments will not be manipulated to serve biased political ends. The history of broadcast regulation, however, demonstrates that discretionary powers such as these are an open invi-

\textsuperscript{471} Barron, supra note 468, at 1641.
\textsuperscript{472} Fiss, supra note 468, at 1415.
tation to partisan abuse and corruption and have periodically been used to promote the political or private economic agendas of those in power.\textsuperscript{474}

Moreover, each step in implementing rights of access entails the rendering of political judgments that cannot be made without severe censorial effects, including the suppression of disfavored speech and the chilling effect that is produced from each act of suppression. To implement mandatory rights of access, the government must (1) select particular views worthy of access, (2) select the particular media on which to impose mandatory rights of access, and (3) enforce a decree for a media owner to give up his speech forum for use by another in presenting a viewpoint.\textsuperscript{475} The access implementation system permits officials to impose an orthodoxy on the press. Officials will ineluctably do so by awarding access rights to groups that adhere to a political agenda they perceive to be underrepresented and by restricting the speech rights of those media owners whose views they oppose. Because there is no objective way of determining what constitutes an “underrepresented” viewpoint, officials can require the broadcast of almost any content they desire.

Thus, although removing the anti-state focus of the First Amendment and investing the state with power to determine speech outcomes could lead to greater viewpoint diversity in the short run, it can only accomplish that goal at the expense of individual freedom. It narrows the protective scope of the First Amendment, rendering it an amendment maximally protective of those whose views are politically preferred and minimally protective of those whose views are not. In this way, our First Amendment becomes an unequal freedom, fully protecting the exercise of speech by certain favored individuals who do not own media outlets at the expense of those who do. This grand scheme to redistribute rights protection is alien to the traditional First Amendment. Moreover, it will ineluctably lead to a general chilling effect, as the acts of state suppression form a pattern that reveals the state’s content biases.

In Images of a Free Press, Lee C. Bollinger presents a most peculiar argument in favor of “partial access regulation” that he believes adequately responds to many of the concerns raised against such regulation. Bollinger’s argument is unique among

\textsuperscript{474} See Lucas A. Powe, Jr., American Broadcasting and The First Amendment 121-41 (1987); Robert A. Caro, The Years of Lyndon Johnson: Means of Ascent 82-106 (1990); Emord, supra note 9, at 225-27.

\textsuperscript{475} See Emord, supra note 9, at 294.
academic theories. Bollinger not only lauds the societal benefits that Barron and Fiss have said flow from access regulation, he also admits that such regulations deprive the media of editorial discretion and threaten to create a speech orthodoxy. Nevertheless, he thinks that individual liberty may be sacrificed to some extent in order to achieve the social objectives of Barron and Fiss. He thinks that this is possible without much harm through selective enforcement of access regulations. In short, although unique among academic theories, Bollinger's viewpoint is nothing new; he favors the print/broadcast dichotomy that now exists. He just assumes that such regulation can be imposed without a general chilling effect on the unregulated media.

In light of the double-edged character of access regulation, and the special circumstances of the mass media, it may make sense to affirm congressional authority to implement a regulatory scheme, but only partially within the media. With this approach, with a major branch of the press remaining free of regulation, the costs and risks of regulation may be held at an acceptable level. Expressed another way, only under such a system can we afford to allow the degree of governmental regulation that is necessary to realize the objectives of public access.

Bollinger's partial access theory is flawed in at least five respects.

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476. Bollinger thinks society benefits from access regulations, because such regulations "neutralize the disparities that impede the proper functioning of the 'marketplace of ideas'" and "equalize opportunities within our society to command an audience and thereby to mobilize public opinion." Bollinger, supra note 469, at 110. These leveling effects help us "realize democratic ideals," according to Bollinger. Id.

477. Bollinger believes access regulations produce "three adverse consequences:" (1) deprivation of editorial discretion, (2) the creation of an official speech orthodoxy, and (3) the establishment of precedent conducive to the expansion of different forms of access regulation on media. Id. at 111-13.

478. Bollinger believes that access regulations promote certain "constitutional traditions" while disparaging others. Id. at 110. He describes such regulations as "both desirable and dangerous." Id. at 113. He advocates maintaining restrictions on the electronic press and all new modes of mass communication while retaining maximum press freedom in the print context. He thinks this the ideal way to accommodate both the democratic ideals of the access advocates and the personal autonomy concerns of the traditional First Amendment advocates. Id. at 113-15.

479. Id. at 114.

480. Id. at 113-14.
(1) Bollinger's theory violates the minority-protecting premise of the First Amendment and the Bill of Rights generally, yet provides no reasoned explanation why this violation should be countenanced. The First Amendment and the Bill of Rights have historically been understood to protect the rights of the minority against the freedom violative acts of the majority. In advocating partial access regulation Bollinger dispenses with this minority-protecting premise without remark. He writes: "The prospect that some regulated editors will forgo coverage of some political discussion because of reply requirements need not necessitate rejection of access regulation, for the benefits may still outweigh the costs." This statement is much too facile to effectively challenge a cardinal First Amendment principle.

State speech orthodoxies are verboten under the First Amendment. This is why the unorthodox speech of one, even a major media company's editor-in-chief, cannot be suppressed by the many consistent with the First Amendment, whether or not that editor's speech offends certain favored political or religious nostrums. Likewise, the amendment cannot be permitted to serve as an instrument to communicate the viewpoints Bollinger, Barron, and Fiss believe deserving of media access at the expense of the right to free speech and press of even one editor, regardless of that editor's political or social views. If the minority-protecting premise of the First Amendment is to have true meaning (and it must if each of us is to be protected should we ever choose to dissent from the accepted wisdom), it cannot be construed in a biased manner but must be construed in light of equal justice for all—the rich and the poor, the Republican and the Democrat, the media or-


482. BOLLINGER, supra note 469, at 112.

483. See, e.g., West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . .").
tor and the soap box orator alike. Access regulations, even partial ones, violate the minority-protecting premise by supplanting the free press editorial judgments of a single media editor with those preferred by government.

(2) Bollinger replaces the First Amendment’s most powerful weapon against state suppression of the press, its onus against state deprivation of private speech, with what is in fact a mere rational basis balancing formula. In *Images of a Free Press*, Bollinger never analyzes which standard should be applied to assess state action against private editorial judgments. Rather, he simply presumes that “competing social interests” should be balanced against “[t]he idea of journalistic autonomy” with the latter being circumscribed to accommodate the former—what appears to be a rational basis treatment. Bollinger has not succeeded in making a convincing case for lowering that barrier. He has not explained in any detail why state suppression of private editorial judgments through partial access regulations should not be strictly scrutinized to protect private editorial discretion against governmental action.

(3) Bollinger erroneously assumes that access regulations on the electronic media will not create a pervasive chilling effect destructive of the core values of the First Amendment. Bollinger seems to appreciate that if the electronic media (the ones chosen for his access regulatory regime) are the preferred and most populous media (which they are) his system of partial access regulation might have to be re-examined. Indeed, it should be. If implemented, Bollinger’s partial access regime would clearly have a pervasive chilling effect because the vast majority of Americans look to the electronic media as their primary source of news and opinion. Consequently, government violation of editorial autonomy and promotion of state orthodoxies in this media would seriously diminish the ability

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484. BOLLINGER, supra note 469, at 24.

485. He writes “One advantage of a partial regulatory system is that the unregulated sector provides an effective check against each of the costs of regulation. A partial scheme offers some assurance that information not disseminated by the regulated sector will nevertheless be published by the unregulated press.” *Id.* at 114.

486. He digresses: “[T]o the extent that the value of a partial regulation scheme depends upon it affecting the marketplace of ideas as a whole, we must determine how many people read or view only *unregulated* media or are otherwise untouched by the regulations.” *Id.* at 120.
of the press, as a whole, to exercise a critical check on maladministration, to explore to the widest limits the parameters of public debate, and to introduce those new, potentially challenging political ideas that might offend policy makers.

It is not enough that some, those in the print media not regulated under Bollinger's theory, could theoretically make up for the electronic media's deficiencies. Through Bollinger's partial access regime, the effective power of the most populous media is reduced, greatly increasing the likelihood that maladministration will go unchecked, that public debate will be less than robust, and that new, potentially challenging political ideas will be suppressed. Under Bollinger's preferred regime, only the least populous and least financially able media, the print media, could be counted on to perform the watchdog function of the press—an inadequate substitute for a truly free press.

(4) Bollinger thinks it best to limit his partial access regulatory regime to new media. He makes this statement without discussing its logical consequences. He ignores the fact that imposition of access regulations on the new electronic media economically burdens them and so inhibits their development, to the advantage of incumbents. When market driven in a competitive media environment, unencumbered by state restraints on the content of their broadcasts or cablecasts, new electronic media are best able to enter markets and satisfy the demands of viewers and listeners. When impediments, such as access regulations, exist, they must substitute for programming they have selected programming desired by the state, but not necessarily by their viewers and listeners. This substitution causes them to lose opportunities to retain precious viewers and listeners as well as advertisers. These viewers and listeners can easily change channels to other media that are not forced to present unwelcome press offerings. Moreover, complying with access regulations requires the payment of costly fees to lawyers who must be hired to help the regulated entity comprehend their rights and responsibilities under the regulatory regime and respond to legal inquiries made by the regulators. Hence each access regulation becomes a greater and greater economic burden for the regulated station, a burden that rises in proportion to the zeal with which the state enforces the regulations.

487. Bollinger professes that there are "special advantages to limiting regulation to new technologies," but never explains what he means by this. *Id.* at 120.
(5) Finally, Bollinger presents no reasoned explanation why the electronic media should be treated differently than the print media. He appears to assume that the two should be treated differently but given their profound commonalities, this presumption is entirely unjustified. Consequently, his argument lacks a proper foundation in reason.

Like Barron, Fiss, and Caristi, Bollinger entirely ignores the insurmountable First Amendment problems posed by implementing access regulations, by placing the government in the role of determining what constitutes an idea or group deserving of press access and which media should have its property expropriated to permit access. Neither Barron, Fiss, nor Caristi has explained how it is possible for the state to avoid censorship in selecting views worthy of access, in selecting media to impose rights of access, and in enforcing access decrees. Bollinger also fails to present this most basic and essential explanation.

None of the complete or partial access regulatory systems advocated by scholars escapes the grave dangers of censorship associated with elimination of the anti-state focus of the First Amendment.

D. The Preservationist Perspective

The benefits of the private communications sphere cannot co-exist with the re-orientation of First Amendment law away from an anti-state focus in favor of state intervention. However, this re-orientation has already occurred in modern broadcast law. Increasingly, under the mantle of diversity, the government enforces rights of access to the press for those whose views the government defines as underrepresented in the media. To avoid the dangers of censorship attendant to this approach and to ensure that the principal source of news and information in our society is cloaked with a maximum degree of free speech and press protection requires application of the print model standard to the broadcast press. To ensure that editors may freely engage in strident editorialization without fear of suffering from regulatory restraints imposed after the fact, the broadcast media must be set free.

A new constitutional doctrine is necessary: one that will ensure the unencumbered operation of speech and press in a protected private sphere. In Freedom, Technology, and the First Amendment, I offer the “Preservationist Perspective” as that new doctrine. The Preservationist Perspective has two components: (1) Static Barriers against government intervention and (2) Adap-
tive Definitions for the terms "speech" and "press." Under the first component, any effort by government to invade the private speech and press sphere and to reorder existing relationships there would directly implicate the First Amendment and would be presumptively invalid (subjected to strict judicial scrutiny). Under the second, the intended scope of the First Amendment would be preserved by causing print model protection to transcend all new modes of mass communication. Under this standard, government would be removed from the business of determining who may speak or what may be said in broadcasting.\textsuperscript{488}

As explained earlier, a system of licensing, by its very nature, is antithetical to the print model. It makes the press beholden to the government for its right to speak. Consequently, it always chills speech, for it is the natural reaction of a licensee who has invested significant amounts of money in the licensed business to avoid taking actions that may offend the preferences of the licensor and so risk a loss of license or, at a minimum, an increase in the cost of doing business with the licensor. Accordingly, the print media property rights environment must be replicated in the broadcast media context if broadcasters are to be free.

VI. THE DIRE NEED FOR A PROPERTY RIGHTS ALTERNATIVE

Over thirty years ago, Ronald Coase persuasively argued that a property rights system should replace the system of broadcast licensing.\textsuperscript{489} Since then, numerous other scholars have also argued in favor of a property rights alternative\textsuperscript{490} or have recognized that such an alternative is workable.\textsuperscript{491} As Coase understood, once property rights in broadcasting are defined and protected by government, there is no need for further regulation. The FCC becomes superfluous. Parties can freely trade spectrum rights without engendering intolerable interference.\textsuperscript{492} Reliance on market processes would be efficient, permitting those who would put the resource to its best and highest use to do so free of encumbrance from the state.

\textsuperscript{488} EMORD, supra note 9, at 128-29.
\textsuperscript{489} See Coase, supra note 26.
\textsuperscript{491} See, e.g., BOLLINGER, supra note 473, at 89.
\textsuperscript{492} See Coase, supra note 26, at 27.
A property based system could be phased into existence through a federal statute that would replace existing content and structural restrictions contained in Title III of the Communications Act of 1934.\footnote{See Emord, supra note 9, at 302-04.} In brief, this new system would grant existing licensees a fee simple property right to their currently licensed operating parameters. That right would be defined not merely by the frequency or channel used, but also by reference to all data that define a current licensee’s broadcasting parameters, including its tower height, its effective radiated power, and its coverage contour configuration. These parameters would be registered on a national database title registry that would serve as an up-to-date computer storehouse, listing information concerning all essential characteristics of each broadcaster’s technical facility. Under the new statute, a broadcast market entrant (or an existing operator who proposed to alter its registered parameters) could commence new broadcast operations (1) only after supplying registered broadcasters with a detailed notice of the proposed new operation, affording them a reasonable time for analysis and comment, and (2) only after filing with the national title registry an appropriate form detailing the precise nature of the proposed operation. These steps would enable broadcast property rights holders to protect their rights against trespassers and would ensure the integrity of the national title registry.

The new federal statute would define and prohibit objectionable levels of interference into an existing broadcaster’s service area, and it would specify heavy fines for such a trespass. Disputes would be decided in the federal courts, not by a federal agency. Procedures would be established for obtaining preliminary and permanent injunctions against broadcast trespassers. Such suits would lie immediately following commencement of the offending broadcast operation. The statute would set a receiver standard to judge interference in the various broadcast services. Common law “first in time, first in right” principles would govern the disputes. Proof of loss of audience reception within an existing broadcaster’s service area would be prima facie grounds for seeking an injunction against an offending use. Such injunctions would have to be narrowly tailored to merely stop the offending use without shutting down the new facility, if that is possible.

In most instances, notice of a potentially offending use would cause incumbent broadcasters to negotiate with those seeking new facilities before commencing a costly court battle.
Existing broadcasters would often enter into agreements whereby a newcomer would either buy the incumbent's operation or pay the incumbent rents for accepting a limited amount of interference or for modifying its technical parameters to avoid objectionable interference. Coase has explained how accommodations could be made between newcomers and incumbents:

The operator whose signals were interfered with, if he had the right to stop such interference, would be willing to forego this right if he were paid more than the amount by which the value of his service was decreased by this interference or the costs which he would have to incur to offset it. The other operator would be willing to pay, in order to be allowed to interfere, an amount up to the costs of suppressing the interference or the decrease in the value of the service he could provide if unable to use his transmitter in a way which resulted in interference. Or, alternatively, if this operator had the right to cause interference, he would be willing to desist if he were paid more than the costs of suppressing the interference or the decrease in the value of the service he could provide if interference were barred. And the operator whose signals were interfered with would be willing to pay to stop this interference an amount up to the decrease in the value of his service which it causes or the costs he has to incur to offset the interference.\textsuperscript{494}

The contemplated system would be entirely free of content restraints and would enable new technologies to be introduced by anyone with the financial wherewithal to implement them. The contemplated system would not differ in any other material technical respects from the existing system, which protects rights to use the spectrum in its licenses and has protected those rights with little difficulty in light of near universal respect for them among broadcasters.\textsuperscript{495}

For over sixty-four years, broadcast journalists have been second class citizens, subjected to content restrictions that legally cannot be imposed on their print media counterparts. Broadcasters have often kowtowed to the dictates of the FCC, and the FCC has often kowtowed to the dictates of Congress. Time and again political pressures have reinforced the essential

\textsuperscript{494} Coase, \textit{supra} note 26, at 28.  
\textsuperscript{495} The federal government's new role would be limited to affording legal recognition and protection to broadcast property rights and to ensuring that broadcasters honored U.S. treaties concerning spectrum use.
monopoly rent/content control quid pro quo that has historically defined the relationship between broadcasters and the government.

With the continuing proliferation of electronic modes of communication and the public's on-going movement away from print to these modes, we confront the spectre of a vanishing First Amendment. The First Amendment will only retain its full protective compass if it is permitted to transcend time and technology. The adoption of full First Amendment protection for broadcasting, the complete elimination of FCC content and structural regulations, and the implementation of a property rights alternative are essential first steps on the road back to a free press.