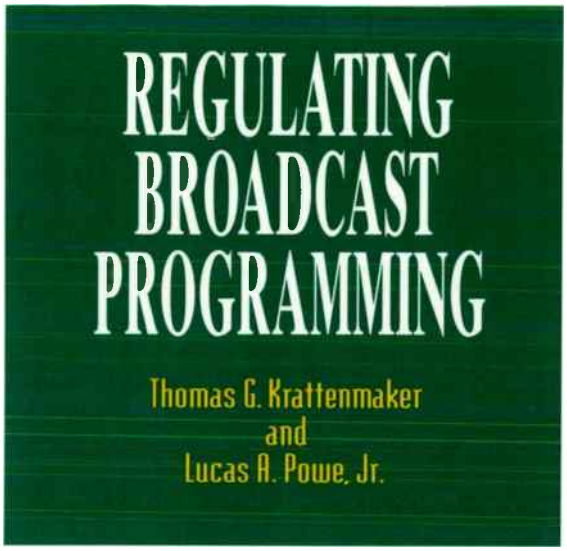
REGULATING BROADCAST PROGRAMMING

Thomas G. Krattenmaker
and
Lucas A. Powe, Jr.

AEI Studies in Telecommunications Deregulation



"Broadcast content regulation has failed miserably, and will continue to fail." So say the authors of *Regulating Broadcast Programming* in their comprehensive review of past and present efforts to regulate the content of radio and television. Thomas G. Krattenmaker and Lucas A. Powe, Jr., argue that such regulation should be based on the same principles used for print media, where control of editorial content lies in private hands instead of in the government.

Krattenmaker and Powe look at the wide variety of constitutional, historical, economic, and common-sense issues that content control generates. They begin by explaining the origins of broadcast regulation and show how normative economic theory might portray the appropriate role of government regulation of a public good. The authors then review the principal content regulations and the statutory and constitutional standards under which broadcast licensees operate. After critically analyzing such regulation, they outline a radically different set of legal and regulatory policies and principles for regulating the content of broadcast. These are the rules that govern all other mass media in the United States.

Thomas G. Krattenmaker is Dean and Professor of Law at the Marshall-Wythe School of Law, College of William and Mary.

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The American Enterprise Institute's Studies in Telecommunications Deregulation present new research on telecommunications policy, with particular emphasis on reforms of federal and state regulatory policies that will advance rather than inhibit innovation and consumer welfare.

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The monographs are written and edited to be immediately useful to legislators, jurists, and public officials at all levels of government—as well as to business executives and consumers, who must live with these policies. As such, the monographs will also find a place in courses on regulated industries and communications policy in economics and communications departments and in business, law, and public policy schools.

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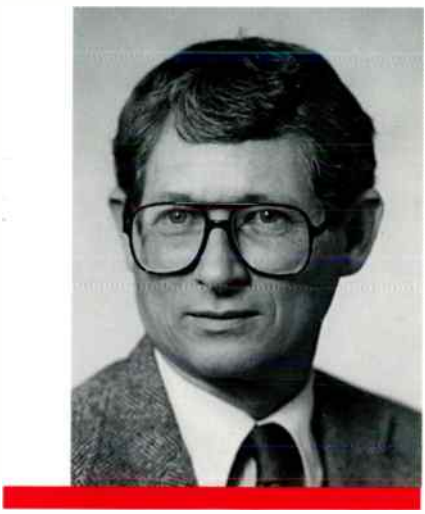

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As teachers, we believe teachers can be important to their students.

This book is dedicated to some teachers who were especially important to us when we were privileged to be their students:

William Kenneth Jones, Columbia University

Howard R. Lamar, Yale University

K.B. Mears, Douglas S. Freeman High School

Arval A. Morris, University of Washington

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Clair Wilcox, Swarthmore College

Contents

Foreword

DRAMATIC ADVANCES IN COMMUNICATIONS and information technologies are imposing severe strains on a government regulatory apparatus devised in the pioneer days of radio and are raising policy questions with large implications for American economic performance and social welfare. Is federal telecommunications regulation impeding competition and innovation, and has this indeed become its principal if unstated function? Is regulation inhibiting the dissemination of ideas and information through electronic media? Does the licensing regime for the electromagnetic spectrum allocate that resource to its most productive uses? If telecommunications regulation is producing any of these ill effects, what are the costs and offsetting benefits and what should be done?

Thomas G. Krattenmaker and Lucas A. Powe, Jr.'s study, which documents and critiques the persistent efforts of the federal government to regulate broadcast programming, is one of a series of research volumes addressing these questions commissioned by the American Enterprise Institute's Telecommunications Deregulation Project. The AEI project is intended to produce new empirical research on the entire range of telecommunications policy issues, with particular emphasis on identifying reforms to federal and state regulatory policies that will advance rather than inhibit innovation and consumer welfare. We hope this research will be useful to legislators and public officials at all levels of government, and to the business executives and, most of all, the consumers who must live with their policies. The volumes have been written and edited to be accessible to readers with no specialized knowledge of communications technologies or economics; we hope they will find a place in courses on regulated industries and communications policy in economics and communications departments and in business, law, and public policy schools.

Each volume in the Telecommunications Deregulation Project has been discussed and criticized in draft form at an AEI seminar involving federal and state regulators, jurists, business executives, professionals, and academic experts with a wide range of interests and viewpoints,

and has been reviewed and favorably reported by anonymous academic referees selected by the MIT Press. I wish to thank all of them for their contributions, noting, however, that the final exposition and conclusions are entirely the responsibility of the author of each volume.

I am particularly grateful to Paul W. MacAvoy, Williams Brothers Professor of Management Studies at the Yale School of Management, and J. Gregory Sidak, Resident Scholar at AEI, for conceiving and overseeing the project's research and seminars, and to Frank Urbanowski, Terry Vaughn, and Ann Sochi of the MIT Press, for their support and steady counsel in seeing the research through to publication.

CHRISTOPHER C. DEMUTH
President, American Enterprise Institute
for Public Policy Research

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A number of truly gifted colleagues* also gave us lots of help. Jack Balkin and Douglas Laycock read and commented extensively on the entire manuscript, as did three anonymous reviewers selected by MIT Press. Richard Markovits, Steve Salop, and Mark Seidman gave us detailed feedback on specific chapters and arguments. Some very able members of the communications bar—especially Eric Bernthal, Gary Epstein, and Mark Fowler—encouraged us to write this book, while withholding judgment on the specific views we express.

Five student assistants contributed materially to this book. Gina Bozajian (Georgetown University, Class of 1994), Stuart Leviton (University of Texas, Class of 1993), and Sandra L. White (University of Texas, Class of 1994) provided very able research and editing assistance. Sharon Albright (Georgetown University, Class of 1995) gave us extensive help with the organization and presentation of the book by working at an unusual level of professional competence and doing so under circumstances that would have overwhelmed almost anyone else. Salimé Samii (University of Texas, Class of 1994) rescued a manuscript that achieved our expectations substantively, but was also, we confess, ragged in form and transformed it into a polished and presentable book. We worked hard on this book ourselves, but are frank to acknowledge that we do not know whether we could have finished it in a reasonable time without Sharon and Salimé's contributions.

We received excellent assistance in preparing the manuscript from

* While most of this book was being written, Thomas G. Krattenmaker was Professor of Law at Georgetown University Law Center.

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THOMAS G. KRATTENMAKER
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Dean Krattenmaker is the coauthor of the two-volume study, *New Television Networks* (Federal Communications Commission 1980), which reports the central findings and conclusions of the Network Inquiry, and of a more general legal and economic analysis of FCC network regulation, *Misregulating Television* (University of Chicago Press 1984). He has also published books on antitrust merger law and the Supreme Court. He has published numerous articles on antitrust law, telecommunications regulation, and constitutional law.

Dean Krattenmaker received his B.A. from Swarthmore College in 1965 and his J.D. from Columbia University in 1968. During the 1970 Term, he served as law clerk to Supreme Court Justice John Marshall Harlan.

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Professor Powe received his B.A. from Yale in 1965 and his J.D. from the University of Washington in 1968. During the 1970 Term, he served as law clerk to Supreme Court Justice William O. Douglas.

Regulating Broadcast Programming

1

Introduction

DIRECT GOVERNMENT CONTROL over program content has always been the centerpiece of federal regulation of the broadcast industry. Congress and its regulatory agent, the Federal Communications Commission (FCC), have consistently tried to impose their notions of proper programming on radio and television. Congress established the Federal Radio Commission (FRC), the predecessor of the FCC, in 1927, and the FRC almost immediately set about removing "propaganda" stations from the air. In its *First Annual Report*, the FRC agonized over how it would "measure the conflicting claims of grand opera and religious services, of market reports and direct advertising, of jazz orchestras and lectures on the diseases of hogs."[1]

Broadcast content controls are not relics of the past; the FCC's efforts to police the airwaves remain vigorous and produce troublesome and controversial results.[2] The FCC has recently levied fines of hundreds of thousands of dollars nationwide upon stations for broadcasting popular but "indecent" programs, is considering reimposing controls on the amount of advertising stations may broadcast, and enforces a panoply of regulations concerning access to the airwaves for candidates for elective office. Congress has told the Commission to see to it that television licensees offer more children's programming (with

1. FEDERAL RADIO COMMISSION, FIRST ANN. REP. 6 (1927).

2. The efforts remain so vigorous that it is inevitable that some of our discussions of Commission, congressional, or judicial actions will be superseded by events.

fewer commercials), and stations now are airing the so-called FCC-friendly programs. Congress appears to be on the verge of enacting a Fairness Doctrine that the FCC scrapped a few years ago and is seriously considering mandating controls on the amount and type of broadcasts depicting violence. As in the beginning, broadcast licenses are still awarded, in part, on the basis of government judgments as to which competing applicant is likely to offer the most desirable programming.

The modern FCC is driven by fears similar to those that moved the old FRC. A little over a decade ago, after a massive tornado swept through Wichita Falls, Texas, Commissioner Abbott Washburn rejoiced that "[y]oung people listening to a rock station in Wichita Falls" received warnings that they might not have had "if we didn't require the licensee to provide a minimum of news."[3] Without a federal watchdog, broadcast regulation presupposes that listeners and viewers would not get the proper mix of grand opera, lectures on the diseases of hogs, and tornado warnings; without the FCC, broadcasting would be all sex, drugs, and rock-and-roll.

We believe that broadcast content regulation has failed miserably and will continue to fail. This book provides a comprehensive description and critique of past and present federal efforts to police radio and television broadcast program content. We examine program rules as exercises of regulatory policy and ask how history, economics, and theories of public regulation suggest that these rules should be assessed. Although we devote considerable attention to the constitutional issues concerning freedom of speech and the press that program regulation efforts present, this is not a constitutional law book, and constitutional analysis does not predominate. Nor is this a "newly emerging technologies" book. Although we discuss the significance of alternative technologies, we do not think the advent of cable or satellites is the key to understanding the regulatory failures we identify. This is a book about the problem of legislative and administrative control over the content of the most heavily utilized of our mass media

3. Lionel Van Deerlin, *The Regulators and Broadcast News, in* BROADCAST JOURNALISM 204, 206 (Marvin Barrett ed., Everest House 1982).

and about the wide variety of constitutional, historical, economic, and common-sense issues that content control generates.

To provide a comprehensive examination of broadcast program regulation requires a book of some length and intricacy. We have attempted to lighten the reader's task by making the text readable and providing cross-references throughout. The chapters are arranged to present an unfolding analysis. Chapter 2 explains the origins of federal regulation of the American broadcast industry—from 1912, when the federal government seized the airwaves, to 1934, when Congress passed the Communications Act and established the FCC, to the early 1940s and the initial regulatory decisions of the Supreme Court. The chapter describes the regulatory strategies that were available during those years and explains why some were adopted and others discarded. Chapter 3 provides a different kind of introductory background, explaining how normative economic theory might portray the appropriate role for governmental regulation of program content. The chapter describes the basic scientific features of broadcasting and its use of the electromagnetic spectrum and explores the policy implications of the fact that broadcast programs are a peculiar type of product—what economists call a "public good."

The next four chapters review the principal content regulations and the legal regime under which broadcast licensees operate. Chapter 4 addresses "diversity," regulations designed to expand program choices. Chapter 5 covers "conformity," regulations designed to expel certain programs or types of programs from the air.

Chapters 6 and 7 review efforts by federal courts to define (without seriously limiting) the permissible statutory and constitutional standards by which regulators may supervise program content. Chapter 6 reports early judicial efforts to give legal meaning to the open-ended statutory "public interest" criterion that Congress set forth to guide the Commission. The chapter then describes the judiciary's subsequent abandonment of the "public interest" language and its replacement with the notion that broadcasters owe the public certain duties because licensees are "public trustees." Chapter 7 discusses the First Amendment's prohibition of laws that abridge the rights of freedom of speech or the press. We review all key Supreme Court cases concerning broadcasting and the First Amendment and explain how and why the

Court has consistently (indeed, almost uniformly) rebuffed efforts to protect broadcast programming under the First Amendment. We argue that these decisions are traceable not so much to peculiar concerns about broadcasting, as is often assumed, but rather to more general ideological and jurisprudential confusions over free speech law.

The final four chapters constitute an extensive and detailed analytical critique of broadcast content regulation. Chapter 8 argues that the Supreme Court's various rationales for treating broadcasting differently from print are faulty and that the Court's failure to accord full First Amendment protection to broadcast speech is unjustified. Chapter 9 presents a thorough analysis of the Fairness Doctrine, which is the sine qua non of the broadcaster's public trustee obligations.[4] We conclude that, constitutional objections aside, the Fairness Doctrine reflected lousy regulatory policy and, in its application, necessarily produced an incoherent and insupportable set of rules and outcomes which, ironically, operated to thwart its admittedly admirable goals. Chapter 10 takes our detailed investigation of the Fairness Doctrine as a model and extends the analysis to all content regulation. We there conclude that, as a matter of regulatory policy, directly regulating program content is (virtually) always inferior to relying on markets, competition, and technological innovation.

Finally, Chapter 11 argues that, in light of the preceding conclusions, we need to reinvent the goals and methods of government efforts to improve broadcast programming. We first explore the specific complaints that critics levy against broadcast programming and try to sort the wishful thinking from the plausibly attainable. We then go beyond criticism and propose an alternative legal regime and regulatory policy to govern the broadcast media—one that permits effective regulation of broadcasting no matter what technological developments are forthcoming, but does not continue the current dogma that some media are more equal than others.

4. The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Fairness Report, Dkt. No. 19260, 48 F.C.C.2d 1, 10 ¶ 24 (1974).

2

The Regulatory Scheme Created

WHEN THE *TITANIC* SANK, the United States government seized control of the airwaves. The causal link between the two events was the emerging importance of Marconi's "wireless telegraph," which used the "ether" (as the electromagnetic spectrum was then called) to transmit and receive messages. Just two years earlier, in response to a collision between the luxury liner *Republic* and the immigrant-carrying *Florida* off Nantucket Island,[1] Congress had mandated that passenger ships carry wireless sets.[2] Now Congress would clear the air so that distress messages could be heard.

THE RADIO ACT OF 1912

Investigation into the disaster revealed that the *Titanic*'s distress calls had been received by the Marconi station in Newfoundland. As the news broke, however, amateur radio operators along the East Coast filled the air with questions, rumors, and, most of all, interference. Consequently, as the Marconi Company complained, its operators

1. With the *Republic* sinking, both crews began to transfer passengers to the smaller *Florida*. Meanwhile, the *Republic*'s wireless operator sent out the CQD! CQD! distress call. Two weeks later, the outgoing President, Theodore Roosevelt, called for legislation requiring passenger ships in American waters to carry wireless. SUSAN J. DOUGLAS, INVENTING AMERICAN RADIO 1899–1922, at 200–02, 219–20 (Johns Hopkins University Press 1987).

2. Wireless Ship Act, 36 Stat. 629 (1910).

encountered interference by "outside unrecognized stations."[3] These outside unrecognized stations, the forerunners of today's broadcast stations, were already in the Navy's doghouse. More than one ship had received false sailing orders by radio, and numerous military messages had been drowned out by simultaneous amateur transmissions. After the *Titanic* incident, the Navy was able to move its agenda, obtaining military—preferably Naval—control of the air, one step closer to fruition.

The Radio Act of 1912[4] established several key legal and regulatory principles that continue to undergird broadcast regulation more than three quarters of a century later. First, the federal government would control broadcasting. No one could broadcast without a license from the Secretary of Commerce and Labor.[5] Second, the spectrum would be allocated among uses and users. Thus, the military obtained excellent wavelengths. Ships were given their own block. And amateurs, those unrecognized stations, were relegated to oblivion.[6] They could listen anywhere along the spectrum, but could transmit only on the thus far technologically unusable short waves.[7] Third, some communication was more important than others, and the government would determine which was which. Distress calls took precedence. Then came the Navy; operators near a military installation had to reduce transmitting power to just one kilowatt.[8] If war came, there was no doubt about military paramountcy.[9] After the military, commercial was next; amateur was last. The "commercial" category was for uses for which a direct charge was levied, such as the over-the-air ("wireless") telegraphy provided by the Marconi Company. The

3. This statement is quoted in DOUGLAS, *supra* note 1, at 229.

4. 37 Stat. 302 (1912).

5. Within a year the Department would be split, with licensing staying at Commerce.

6. DOUGLAS, *supra* note 1, at 234.

7. *See* 37 Stat. 302 § 15. Section 15 was entitled "General Restrictions on Private Stations" and read: "No private or commercial station not engaged in the transaction of bona fide commercial business by radio communication or in experimentation in connection with the development and manufacture of radio apparatus for commercial purposes shall use a transmitting wave length exceeding two hundred meters . . . ."

8. *Id.* § 10. Furthermore, section 18 forbade stations from operating within fifteen miles of six named bases. Existing stations were grandfathered.

9. Section 2 authorized seizure of any radio apparatus in time of war.

"amateur" category covered communications put out for anyone to receive; this is the use that evolved into today's broadcasting.

The Navy's official *History of Communications—Electronics in the United States Navy* refers to 1914-18 as "The Golden Age."[10] No wonder. During World War I, the Navy was able to gain control of all radio stations in the United States except those operated by the Army.[11]

The Navy's bid for continued control of radio during peacetime, however, was not to be realized.[12] Instead, those pesky amateurs had learned that there was leeway in how (and whether) the Radio Act was enforced. They could wander as high as a wavelength of 400 meters despite what the Act said.[13] Once the wartime restrictions on transmission were lifted in September 1919, the amateur broadcasters were back in force, and because so many had served in the war, they were familiar with the latest technological advances.[14]

Herbert Hoover and the Early Growth of Radio

Those advances made possible the airing of the 1920 presidential results by Westinghouse's station KDKA and the *Detroit News*'s WWJ. Their broadcasts made the medium famous. Yet, despite these successes, there were only five new applications for station licenses during the next year.[15] Then, following the broadcast of the 1921 World Series between the Yankees and the Giants on WJZ, broadcasting as we know it took off.

One important reason for the early growth of commercial radio broadcasting was that it found a sympathetic champion in its licensor, Secretary of Commerce Herbert Hoover. Hoover remolded the Radio Act from its origins and emphasis on wireless point-to-point telegraphy to one that fostered a wider use of the newly emerging technology. As

10. Erik Barnouw, A Tower in Babel 52 (Oxford University Press 1966).
11. Douglas, *supra* note 1, at 276.
12. Annual Report of the Secretary of the Navy 22 (1918).
13. Clinton B. De Soto, Two Hundred Meters and Down: The Story of Amateur Radio 34 (American Radio Relay League 1936).
14. Douglas, *supra* note 1, at 298–99.
15. Lucas A. Powe, Jr., American Broadcasting and the First Amendment 52–54 (University of California Press 1987).

noted above, the Radio Act had created a division among military, commercial—meaning for-profit uses similar to those of the telegraphy provided by the Marconi Company—and amateur uses. Hoover subdivided the commercial category, to create a separate grouping called "broadcasting" that would satisfy the needs of the thousands of Americans purchasing receiving sets.[16] True amateurs were forced back under 200 meters, but the "more powerful and sophisticated amateur stations" were relicensed as commercial under this new category and were authorized to use 360 meters (833.3 kilocycles).[17] Broadcasting—propagating a signal for all to receive—thus became a permissible commercial venture, just as telegraphy—transmitting personal messages from point to point—had been for some time.

Hoover attempted to achieve both consensus and legislation, by calling, in late February 1922, what would be the first of four National Radio Conferences. Hoover keynoted the Conference and actively participated in its deliberations, which emphasized the public good that came from this new service.

Hoover thought broadcasting used "a great national asset" (that is, the spectrum) and believed "it becomes of primary public interest to say who is to do the broadcasting, under what circumstances, and with what type of material."[18] Although subsequent observers located the origins of the public interest standard elsewhere,[19] Hoover articulated it first and at the inception.

Hoover opened the Conference by noting that "this is one of the few instances where the country is unanimous in its desire for more

16. BARNOUW, *supra* note 10, at 91.

17. DOUGLAS, *supra* note 1, at 301.

18. Herbert Hoover, Speech to the first National Radio Conference (Feb. 27, 1922) (transcript available as Doc. No. 209, Hoover Collection, Stanford University), *quoted in* Daniel E. Garvey, *Secretary Hoover and the Quest for Broadcast Regulation*, 3 JOURNALISM HIST., no. 3, at 66, 67 (1976).

19. Thus, a very old Clarence Dill, Senate father of the Radio Act, told President John Kennedy's FCC Chairman, Newton Minow, that drafters had reached an impasse on the regulatory standard when a young lawyer on loan from the Interstate Commerce Commission suggested using "public interest, convenience or necessity" because that was the standard in other federal statutes. NEWTON MINOW, EQUAL TIME 8–9 (Atheneum 1964). Perhaps. But in view of Hoover's use of public interest language five years earlier, it is doubtful that it just popped up out of the blue in the drafting of the Radio Act.

regulation."[20] At its end, the conferees—broadcasters, manufacturers, and a handful of other important players—unanimously resolved: "[I]t is the sense of the Conference that Radio Communication is a public utility and as such should be regulated and controlled by the Federal Government in the public interest."[21]

In the absence of regulation, Hoover issued a skyrocketing number of broadcast licenses in the spring and summer of 1922: seventy-seven in March, followed by seventy-six in April, ninety-seven in May, seventy-two in June, and seventy-six in July. By the end of the year, 576 stations were on the air, and the airwaves were full. Hoover, as both the champion of the new industry and the official in charge of licensing, now faced a problem that plagued him and the industry for the next five years: signal interference. By October and November *Radio Broadcast* would be editorializing about the crowding of the air with its "resulting interference of signals between the several stations, which made listening no pleasure."[22]

When Congress did not act by the end of the year, Hoover took action on his own. In December 1922 he expanded the frequencies available for commercial broadcasting from enough to support two stations per city to three and reassigned broadcasters to them.[23] To prevent further congestion resulting from added applications in the growing industry, he would either deny a later application or require some form of time-sharing between broadcasters. Hoover's policies, however, were undermined two months after they were announced. In *Hoover* v. *Intercity Radio Co., Inc.*,[24] the U.S. Court of Appeals for the District of Columbia Circuit held that Hoover had the discretion under the Radio Act to select a frequency and set the hours of use, but he lacked discretion to deny any application for a license.

With chaos looming again, Hoover called a second National Radio Conference. When the Conference convened in late March 1923,

20. GLEASON T. ARCHER, HISTORY OF RADIO TO 1926, at 249 (American Historical Society 1938).

21. *To Amend the Radio Act of 1912: Hearings on H.R. 11964 Before the House Comm. on the Merchant Marine and Fisheries*, 67th Cong., 4th Sess. 32 (1926).

22. *Quoted in* POWE, *supra* note 15, at 54–55.

23. PHILLIP T. ROSEN, THE MODERN STENTORS 54 (Greenwood Press 1980).

24. 286 F. 1003 (D.C. Cir. 1923).

Hoover had its recommendations already prepared.[25] They included invading areas reserved for the government, moving maritime uses to a lower frequency than the Radio Act prescribed, and creating three different power levels for stations. The Conference declared, as Hoover had planned, that he had full authority "to regulate hours and wavelengths of operation of stations when such action is necessary to prevent interference detrimental to the public good."[26]

After the Conference, Hoover once again reallocated broadcasters, this time squarely contrary to the express language of the Radio Act. Thus, he moved commercial users into the spectrum reserved for government. The Navy was also ousted from its statutory spectrum space, but voiced no objections because the move necessitated purchasing new and better equipment.[27] Broadcasters were placed at frequencies between 550 and 1365 kilocycles. In an article entitled "Secretary Hoover Acts," *Radio Broadcast* noted that the broadcast interference problem had been "suddenly remedied" without passage of any legislation.[28]

The expanded band, combined with a downturn in radio revenues, allowed Hoover to give licenses to all who asked.[29] Half of the outlets were associated with either manufacturers or retailers of electrical appliances.[30] Sales of radio sets mushroomed, and some 10 percent of the population owned a set by the end of 1924.

The Rise and Fall of Hoover's Policies

By the end of 1925, with 578 stations broadcasting, the band was full again.[31] Furthermore, as the industry matured, stations began to broadcast for longer hours and with increased power, which again led to widespread interference. Hoover first addressed that problem by urging stations to work out time-sharing agreements or to agree to have one station buy the other's license. Often those measures worked;

25. Rosen, *supra* note 23, at 56.
26. Barnouw, *supra* note 10, at 121.
27. Rosen, *supra* note 23, at 58.
28. *Quoted in* Powe, *supra* note 15, at 57.
29. Powe, *supra* note 15, at 57.
30. Rosen, *supra* note 23, at 62.
31. Powe, *supra* note 15, at 58.

sometimes they did not. In Cincinnati, two stations on the same frequency could not find a satisfactory solution and simply broadcast simultaneously for weeks.[32] When private parties could not agree, Hoover again stepped in. Sometimes he ordered time-sharing. Sometimes he demonstrated how excruciatingly slow the application process could be.[33] Eventually, after the fourth National Radio Conference in November 1925, Hoover announced that no more applications (including those for increased power) would be granted.[34]

Hoover's radio policy began by ignoring the Radio Act; it then proceeded to ignore the *Intercity Radio Co., Inc.* opinion. He apparently had completed an administrative tour de force by creating a working policy directly contrary to the one enshrined in law.

Hoover's outlaw edifice, however, came tumbling down when Zenith Corporation jumped from 930 kHz to 910 kHz in December 1925. Hoover had assigned Zenith 930 kHz for its Chicago broadcasts. This was the same frequency that General Electric had previously obtained in Denver. Therefore, Hoover limited Zenith to Thursdays between 10:00 P.M. and midnight, but only if GE chose not to broadcast then. Finding the limitations unacceptable, Zenith bolted for clearer air—910 kHz, a Canadian frequency ceded by treaty.[35] When Hoover, now without options, moved against Zenith, his whole regulatory house of cards collapsed. The federal district judge concluded that Hoover's only discretion under the Radio Act was to select applicable frequencies. Thereafter, his duty was to license, not to impose restrictions.[36] He could encourage time-sharing; but imposing it was beyond his power.

Hoover did not appeal; instead he arranged for the acting Attorney General to state that the *Zenith* opinion was correct.[37] The next day, Hoover ran up the white flag and announced that he was out of the business of regulation.[38] The well-known result of his capitulation,

32. *Id.* at 59.

33. Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 146 (1990).

34. ROSEN, *supra* note 23, at 79–80.

35. POWE, *supra* note 15, at 59.

36. United States *v.* Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926).

37. 35 OP. ATT'Y GEN. 126 (1926).

38. Or, as the Supreme Court worded it: "The next day the Secretary of Commerce

which Hoover knew was inevitable, was chaos. Louis Caldwell, the first general counsel of the Federal Radio Commission, described the six months following *Zenith*: "Nearly 200 new broadcasting stations crowded into channels already congested with about 550 stations. Existing stations 'jumped' their waves and increased their power at will; reception was practically ruined for the listening public, and anarchy reigned in the realm of radio."[39] As the Supreme Court subsequently noted, "the result was confusion and chaos. With everybody on the air, nobody could be heard."[40]

THE RADIO ACT OF 1927

The setup dispute between Zenith's president, Eugene McDonald, and Hoover produced what both[41] wanted: action by a Congress heretofore unwilling to act. The Radio Act of 1927[42] enacted ideas that had been in the legislative hopper since the first National Radio Conference. It replaced the statute enacted after the *Titanic* disaster and gave the nation a legal regime focused on the newly emerged commercial radio broadcasting industry.

Basic Outlines

The new Radio Act put first things first. Although the 1912 Act had required a license to use the air, it had been silent on the issue of ownership of the airwaves. The 1927 Act was not. It bluntly declared that there could be no private ownership of the airwaves; they were public and use could occur only with the government's permission.[43] That permission, in the form of a license, would be granted without charge, but for no more than three years.[44]

issued a statement abandoning all his efforts to regulate radio." National Broadcasting Co. *v.* United States, 319 U.S. 190, 212 (1943) [hereinafter *NBC*].

39. Louis Caldwell, *Clearing the Ether's Traffic Jam*, NATION'S BUSINESS, Nov. 1929, at 34–35.

40. *NBC*, 319 U.S. at 212.

41. ROSEN, *supra* note 23, at 93–95.

42. 44 Stat. 1162 (1927).

43. *Id.* § 1.

44. *Id.* § 9.

Congress knew that those licenses could not be granted to all comers. Thus, unlike the old Radio Act, the 1927 Act had to give the licensor guidance on which applications should prevail. Any number of standards were possible: for example, first come, first served; a lottery; or an auction. Congress, however, had determined that the license should be free; therefore, the use of an auction was out. Adopting the idea that Hoover had articulated at the first National Radio Conference, Congress required licensees to render public service in exchange for the privilege of using the now publicly owned spectrum. Licenses would be granted according to the needs of the "public interest, convenience, or necessity"[45]—a standard already in use in the public utilities and transportation areas.

The House of Representatives wanted to leave licensing power with the Secretary of Commerce. The Senate did not, preferring instead an independent regulatory commission. The Act reflected a compromise between the two. For one year, a geographically balanced five-member commission was to exercise the government's licensing function;[46] then that function would revert to the Secretary of Commerce.[47] Senator Clarence Dill of Washington, the Senate's expert on radio and a key figure in drafting the Act, liked the compromise because, understanding both Congress and bureaucracy, he believed that "if we ever got a Commission we would never get rid of it."[48] He was right. Congress ultimately abandoned the provision to return powers to the Commerce Department, and instead the Federal Communications Commission, the successor to the "one-year agency," remains with us.

Finally, Congress understood that it did not want to create a National Board of Censors. Thus, section 29 of the Act made it plain that the licensing power did not include the power of censorship and could not "interfere with the right of free speech by means of radio communications."[49] How the mandate in section 29 would mesh with the equally strong mandate to award licenses in the public interest was

45. *Id.*
46. *Id.* § 3.
47. *Id.* § 5.
48. *Quoted in* BARNOUW, *supra* note 10, at 199.
49. 44 Stat. at 1172, § 29.

omitted. By default, that issue was left for future resolution by the Commission and the courts.

Spectrum Ownership and Licensing

The two key aspects of the Radio Act of 1927 are the declaration that there could be no private ownership in the entire spectrum and the related decision that users of the spectrum would be licensed under the public interest standard. As demonstrated by the events of the 1920s, not everyone who wanted to use the airwaves could do so. In that sense, spectrum was scarce. The government's response to this "scarcity" was to determine that government would decide who could use the airwaves, but would levy no charge for that use.

Beginning with Nobel laureate Ronald Coase, keen observers have noted the anomaly of this scheme.[50] Although it is necessary to recognize rights in the spectrum to prevent interference from disrupting broadcasting, it does not necessarily follow that those rights must be allocated by administrative fiat, without charge, and for a limited duration. Thus, Ithiel de Sola Pool noted:

> The government initially gives away licenses for free; these are then sold in a second-hand market. What is excluded from market allocation is only the initial grant of a frequency by the government to its first "owner". . . . Under existing practice, the original licensees make a windfall profit by selling the license to someone else.[51]

Professor Thomas Hazlett trenchantly summed up the situation:

> The interference problem is widely recognized as one of defining separate frequency "properties," [but] it is logically unconnected to the issue of who is to harvest those frequencies. To confuse the definition of spectrum rights with the

50. Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959).

51. ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 139–40 (Harvard University Press 1983).

> assignment of spectrum rights is to believe that, to keep intruders out of (private) backyards, the government must own (or allocate) all housing. It is a public policy *non sequitur*.[52]

As Hazlett notes, the non sequitur nevertheless makes sense from another perspective, because it intentionally granted to Congress (and the Commission) special powers over those chosen to broadcast.[53]

A Property Rights Alternative?

In Hazlett's seminal article on the development of the Radio Act of 1927, he argues that the licensing scheme was far from an accidental policy blunder. Rather, key congressmen knew that a property scheme was viable for the ether and rushed to enact the new Radio Act to prevent the ether from being acquired privately. In this endeavor, legislators were encouraged by broadcasters who feared that further entry would lead Congress or Hoover to expand the broadcast band or to force more incumbents into limiting time-sharing agreements.

Judge Stephen Davis, Solicitor General of the Commerce Department, testified to Senator Burton Wheeler that broadcasters sold wavelengths and their licenses to others. Davis also described the private bargaining that went on between licensees assigned to the same frequency.[54] To be sure, radio was a new and seemingly bewildering technology, but at least some senators knew that licenses were capable of being treated like other private property and in fact were being so treated.

But without the adoption of some positive law, how could a property rights regime develop? Hazlett observes that "in the fall of 1926 a . . . state court decision . . . established legally the priority to an established wavelength."[55] That decision was *Tribune Co.* v. *Oak Leaves Broadcasting Station*.[56] The *Chicago Tribune* sued on behalf

52. Hazlett, *supra* note 33, at 138 (emphasis deleted).

53. Thomas W. Hazlett, The Political Economy of Radio Spectrum Auctions (1993) (on file with Institute for Governmental Affairs, University of California, Davis).

54. *Radio Control: Hearings Before the Senate Comm. on Interstate Commerce*, 69th Cong., 1st Sess. 118–19 (1926).

55. Hazlett, *supra* note 33, at 148.

56. Circuit Court of Cook County (Nov. 17, 1926) (unreported case), *reproduced in*

of its radio station WGN (World's Greatest Newspaper). The complaint alleged that WGN had been broadcasting daily for two years, had expended substantial money on equipment, had a large and regular audience, and that the defendant, Oak Leaves, after jumping frequencies twice, had landed within 40 kilocycles of WGN's 990. WGN complained that Oak Leaves had moved in so close because it was an unpopular station and was hoping that part of WGN's audience would accidently start listening to Oak Leaves. The 40-kilocycle separation was, according to the complaint, inadequate between two stations in the same area. Oak Leaves essentially argued that the separation was ample and, therefore, that it had not harmed WGN.

It is obvious from the opinion that the "thousands of affidavits"[57] filed by the parties allowed the trial judge to learn a considerable amount about a new and complex industry. He noted the local mores whereby all the Chicago stations went silent on a specific night so that their listeners could tune in distant stations. The public, he concluded, had become educated in the uses of radio and knew how to obtain the type of programming desired. This would prove difficult, however, unless at least a 50-kilocycle separation was maintained within a hundred-mile radius.

As with any other genuine case of first impression,[58] the court looked for analogies. It found them in the law of unfair competition and water rights[59] and concluded that by reason of use and expenditure of money and effort, the plaintiff had acquired something "generally recognized as the property of such person."[60] The judge did not analogize to "homesteading," as Hazlett does in his article, but the concept accurately describes the basis of his decision.

Hazlett believes that similar actions by other judges using the common law method could have (and would have) produced the necessary property rights regime. Even granting Hazlett's implicit assumption that all common law judges would respond sensibly, as the

68 CONG. REC. 216 (1926).

57. *Id.* at 218.

58. The judge referred to the case as a "situation new and novel in a court of equity." *Id.* at 217.

59. Both the judge and Hazlett used riparian rights, but in fact each of the discussions, Hazlett's especially, is premised on the Western principle of prior appropriation.

60. 68 CONG. REC. at 219.

Oak Leaves judge did, and find a homesteading right of prior use, the homesteading regime would have been difficult to implement for two reasons. First, state courts almost certainly would have been inadequate to define and enforce those rights. Broadcasting, except at very low power, will invariably cause interference across state lines. Just as interstate water rights are determined under federal law, so, too, would broadcast interference conflicts have to be decided by federal law.

Second, that federal law would have to apportion the ether not only between states, but among technologies. For example, once FM radio and television emerged, courts creating a common law property solution would be sorely tested in their abilities to determine what uses justify what amount of spectrum. This is not to say that federal common law could not accomplish the task, but it is to suggest that a federal legislative solution probably would be perceived by all as appropriate. Indeed, Hazlett's homesteading analogy had its basis in several statutes culminating in the Homestead Act of 1862.

Principal Features of the 1927 Radio Act

The key feature of the 1927 Radio Act, then, is not that Congress substituted legislative for judicial, or federal for state, control over the uses of the ether. These were almost certain to occur, sooner or later.

Rather, this background reveals that the central feature of the 1927 Radio Act was its deliberate choice to preclude private ownership of spectrum rights while licensing those rights for brief periods to private users free of charge. Nothing in the nature of broadcasting or the electromagnetic spectrum made that choice inevitable, but in fact no other alternatives were seriously considered. Senator Dill stated that "the one principle regarding radio that must always be adhered to, as basic and fundamental, is that government must always retain complete and absolute control of the right to use the air."[61] A contemporaneous analysis in the *Yale Law Journal* stated that "the idea that the 'government owns the ether'. . . was an *idée fixe* in the debates of Congress."[62]

61. Clarence Dill, *A Traffic Cop for the Air*, 75 REV. OF REV. 181, 184 (1927).
62. Note, *Federal Control of Radio Broadcasting*, 39 YALE L.J. 244, 250 (1929).

Enacting this idea meant that administrators would parcel out, among competing technologies, permitted uses of the spectrum. These administrators also would select, among competing applicants, those who could engage in such uses. It was as though Congress, having realized that paper is scarce and that "interference" occurs when two or more people write simultaneously on the same sheet of paper, had declared that government owned all the paper in the United States. A Federal Paper Commission would then be necessary to decide how much paper would be available for (say) books and how much for (say) wallpaper. The Commission would further choose who was permitted to engage in book publishing.

In short, by adopting public ownership of the spectrum and administrative control over its uses, Congress chose a legal regime for broadcasting that differs radically from the law that governs every other mass communications medium in the United States. Congress thus put its imprimatur on the twin myths that scarcity and interference are phenomena unique to broadcasting and that scarcity and interference necessitate administrative control of the quality of broadcasts.[63]

Hazlett observed that "the policy debate [in Congress] was led by men who understood—and articulated—that interference was not the issue, interference was the opportunity."[64] Forbidding private ownership meant government control. The real issue would then become setting the standards for exercising that control. The standard might be quite specific as with the "equal opportunities" provision of section 18 (the future section 315 of the Communications Act).[65] But few issues were as clear to Congress as their own electoral needs. So Congress, choosing the public interest standard as a codification of whatever standards would be applied to broadcasters, left most issues to the future and reserved for itself the right to specify further regulation as it might be deemed necessary.

63. These myths are fully explained and analyzed in Chapters 3 and 8.

64. Hazlett, *supra* note 33, at 162.

65. Section 18 mandated that, if a station granted air time to one legally qualified candidate, it must grant the same amount (on the same terms) to that candidate's opponents. We discuss the "equal opportunities" doctrine in Chapter 4 (Minimum Diversity Levels).

Hoover had always understood there would be a governmentally defined quid pro quo for licensing: "[I]t becomes of primary public interest to say who is to do the broadcasting, under what circumstances, and with what type of material."[66] Thus, Hoover understood from the outset that the "public interest," for broadcasting, unlike that for transportation or utilities, would be defined to include not only the issues of the need for service and who could provide it, but also the novel issue of what the service would be.

An exchange in the House debates in 1923 reveals that others saw it, too. One congressman had just stated that transmission of agricultural market reports was essential. Then he added, "[F]or instance, a radio station might be transmitting some song-and-dance performance going on at a vaudeville show, and thereby interfere with the transmission of necessary information."[67]

The broadcast establishment, which accurately assumed that regulation would prefer its interests to those of the marginal stations and potential entrants, fully concurred in a public interest regulatory scheme. Each National Radio Conference endorsed Hoover's program. When Hoover, in 1925, stated that "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,"[68] the National Association of Broadcasters agreed that "[t]he test of the broadcasting privilege [must] be based on the needs of the public."[69]

House sponsor Wallace White of Maine echoed the point after House passage of the Act. Under the Radio Act of 1912, an individual could "demand a license whether he will render service to the public thereunder or not." No longer. One of the "great advantages" of the 1927 Act was the requirement of service to the public.[70] As his Senate

66. Speech to the first National Radio Conference, *quoted in* Garvey, *supra* note 18, at 67.

67. 64 CONG. REC. pt.4, at 2337 (1923) (statement of Rep. John McKenzie).

68. Opening Address to the fourth National Radio Conference, *reprinted in Radio Control: Hearings Before the Sen. Comm. on Interstate Commerce,* 69th Cong., 1st Sess. 56 (1926).

69. Resolution of the National Association of Broadcasters, presented at the fourth National Radio Conference, *quoted in id.* at 59.

70. Wallace H. White, *Unscrambling the Ether*, LITERARY DIGEST, Mar. 5, 1927, at

counterpart, Dill, so vigorously put it: "Of one thing I am absolutely certain. Uncle Sam should not only police this 'new beat'; he should see to it that no one uses it who does not promise to be good and well-behaved."[71]

THE FEDERAL RADIO COMMISSION

What did the public interest mean? That would be left to the Federal Radio Commission. The charm of the public interest standard, Dill noted, was its vagueness and breadth: "It covers just about everything."[72]

The FRC, with but one confirmed member, no staff, and no appropriation, got off to a shaky start. But its *First Annual Report* defined the task ahead in a manner that set the regulatory agenda for decades: Section 29 prohibits censorship, but "the physical facts of radio transmission compel what is, in effect, a censorship of the most extraordinary kind . . . . There is a definite limit, and a very low one, to the number of broadcasting stations which can operate simultaneously." Consequently, some applicants must be told "there is no room for you." In making these determinations, "how shall we measure the conflicting claims of grand opera and religious services, of market reports and direct advertising, of jazz orchestras and lectures on the diseases of hogs?"[73]

What unfolded over the next three years was a two-step process. In its first step, the FRC reclassified and reordered broadcast stations while refusing to expand the broadcast band. The outcome continued

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71. Dill, *supra* note 61, at 181.

72. *Quoted in* POWE, *supra* note 15, at 61. William T. Mayton, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 EMORY L.J. 715 (1989), presents a contrary argument, suggesting that the Communications Act (which was based on the Radio Act) did not intend to give the FCC anything more than the powers of a traffic cop. This interpretation neglects the significance of the National Radio Conferences as well as the statements of Dill and White about control. The Commission may well have reached for even more power than that granted, and perhaps compliant courts, especially the Supreme Court, too readily rubber-stamped the Commission. But the FRC understood that it would have to look at programming and that there was ample legislative support for just such a view.

73. FEDERAL RADIO COMMISSION, FIRST ANN. REP. 6 (1927).

Hoover's policy of favoring larger established commercial broadcasters. The second step was acknowledging that programming counted and weeding out those stations that aired the less-favored types. The first step slayed the weak; the second banished the different.

Structuring the Broadcast Industry

The initial task facing the Commission was deciding how many stations to allow on the air, where they would be located, and under what conditions they would be operated. This task was made more complex by a 1928 amendment to the Radio Act that mandated an equalization of stations across five geographical zones.[74] Offered by Congressman E.L. Davis of Tennessee, it sought to replace stations in the more populous East with newcomers in the South and West. Toward the end of the summer of 1928, the FRC issued General Order Number 40, which enunciated the general principles to govern the allocations of frequencies and power nationwide. Possibly the most important decision made at this time was not to follow the European example and increase the broadcast band.[75] Then, in November, the Commission changed the assignments of 94 percent of all broadcasting stations. One of the Commissioners later reflected: "We had to make some moves in a rather high-handed way . . . . We took a lot of hearsay and I fear we did a lot of injustices."[76]

In the injustices there was continuity. The National Radio Conferences had called for ending new allocations and stopping time-sharing. A conference called by the FRC for the summer of 1927 took the same position. The Commission

> must on no account widen the broadcasting band; it must maintain a separation of at least 10 kilocycles between adjacent channels; it must keep stations in the same community 50 kilocycles apart; it must not require too much division of time; it must not prohibit the use of high power; it must not

74. 45 Stat. 373 (1928).
75. Hazlett, *supra* note 33, at 155.
76. *Quoted in* BARNOUW, *supra* note 10, at 219.

> put more than a very limited number of stations on the same frequency.[77]

Implementing those views, the Commission favored applications with superior technical equipment, adequate finances, experienced personnel, and the ability to operate without interruption. These were Hoover's policies, and they favored established commercial broadcasters.[78]

The Commission knew that there would be a reaction to all the redistributions, and it "launched an educational and public relations campaign to counteract this threat. Its press releases explained that the familiar broadcasting band originally established by Secretary Hoover had been retained in order to reduce inconvenience to listeners."[79] That is, listeners would not be troubled by having to choose between retaining their old sets limited to the stations already available on them or purchasing newer ones that could receive added stations (made available by broadening the band).[80]

With the implementation of General Order Number 40, the Commission finished its dealings with the traditional aspect of the public interest: determining whether a service shall be offered and quantitatively what it shall be. Next it turned to the new question: qualitatively, what shall the service be?

Defining Permissible Broadcasting

By the summer of 1928, the Commission believed that whatever section 29 might say about censorship, the Commission had to evaluate programming:

> Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the Commission must determine from among the applicants before it which of them will, if licensed, best

77. N.Y. TIMES, Sept. 18, 1927, at 10.
78. ROSEN, *supra* note 23, at 133.
79. *Id.* at 135.
80. Hazlett, *supra* note 33, at 155–56.

> serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster.[81]

The Commission then admonished those stations playing phonograph records because such a station would not give the public anything it could not receive elsewhere in the community.[82]

Over the next year, the Commission turned on what it called "propaganda stations (a term which is here used for the sake of convenience and not in a derogatory sense)."[83] A year earlier it had warned a New York Socialist station, WEVD (for the Socialist leader Eugene Victor Debs), to "operate with due regard for the opinions of others."[84] The Commission, mindful of scarcity, believed stations should aim their programs at everyone. There was

> not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting stations, its mouth-piece in the ether. If franchises are extended to some, it gives them an unfair advantage over others, and results in a corresponding cutting down of general public service stations.[85]

Thus, when the Chicago Federation of Labor applied for an increase in power and hours for its station, WCFL, arguing that it broadcast programs of particular interest to organized labor and that there were sufficient listeners to justify the increase, the Commission responded that "there is no place for a station catering to any group . . . . All

81. Statement of the Commission, Aug. 23, 1928, *reproduced in* FEDERAL RADIO COMMISSION, SECOND ANN. REP. 166, 170 (1928) (App. F).

82. *Id.* at 168.

83. FEDERAL RADIO COMMISSION, THIRD ANN. REP. 34 (1929) (reporting *Great Lakes Broadcasting*).

84. FEDERAL RADIO COMMISSION, SECOND ANN. REP. 156 (1928) (reporting decisions of Aug. 22, 1928).

85. FEDERAL RADIO COMMISSION, THIRD ANN. REP. at 32.

stations should cater to the general public and serve public interest against group or class interest."[86]

The Commission campaigned against what it feared would be a Balkanizing of the dial. "If, therefore, all the programs transmitted are intended for, and interesting or valuable to, only a small portion of that public, the rest of the listeners are being discriminated against."[87] The broadcasters should strive for "a well rounded program" where the needs of all potential listeners are met.[88] It did not matter whether there were several stations in the area. Each station was required to serve all potential listeners.

It was also not relevant whether the station was popular. If the station was not meeting the needs of its community, then it could be closed down, even if it was highly popular. Commission actions against the Reverend Bob ("Fighting Bob") Shuler[89] and the famous "goat-gland doctor," John R. Brinkley,[90] illustrate this principle. Further, each case generated appellate litigation that fully vindicated the FRC and set a judicial pattern of deference that continued over the decades.

The Shuler Case. In 1926 a wealthy widow from Berkeley, impressed by one of Shuler's indignant sermons, gave him $25,000 to purchase KGEF in Los Angeles, a one-kilowatt station broadcasting twenty-three hours a week on a shared frequency. Shuler broadcast his sermons each Sunday and took two additional weekday hours for himself. On Tuesdays he hosted the "Bob Shuler Question Hour," and on Thursdays he gave "Bob Shuler's Civic Talk."[91]

As a rigid moralist with an intense dislike for prostitution and alcohol, Shuler found an incredible array of targets in Prohibition-era Los Angeles. During his two evening hours, he railed against local corruption. Over the years Shuler built such a following that commercial stations were unable to sell advertising time opposite those two programs. His was the fourth most popular show in the market, and

86. *Id.* at 36 (reporting *Chicago Federation of Labor*).
87. *Id.* at 34.
88. *Id.*
89. All the facts about Shuler are taken from POWE, *supra* note 15, at 13–18.
90. All the facts about Brinkley are taken from *id.* at 23–27.
91. *Id.* at 13–14.

audience surveys showed that "Fighting Bob" reached an audience of about 600,000 as he lashed out at an imperfect world.[92]

Shuler's application for renewal in 1930 stated that KGEF had "thrown the pitiless spotlight of publicity on corrupt public officials and on agencies of immorality, thereby gladly gaining their enmity and open threats to 'get' this station's license."[93] No lie. The FRC hit Shuler with a hearing that heard charges that he had used his station irresponsibly in attacking virtually all aspects of Los Angeles city government. The hearing lasted sixteen days, and at its end the hearing examiner ruled for Shuler.

Shuler's opponents then went to the full Commission, which reversed and ordered KGEF off the air immediately. The Commission concluded that Shuler had used his station as a forum for outrageous and unfounded attacks on public officials

> which have not only been bitter and personal in their nature, but often times based upon ignorance of fact for which little effort has been made to ascertain the truth thereof . . . . [Shuler] has vigorously attacked by name . . . public officials and individuals whom he has conceived to be moral enemies of society or foes of the proper enforcement of the law. He has believed it his duty to denounce by name any enterprise, organization, or individual he personally thinks is dishonest or untrustworthy. Shuler testified that it was his purpose "to try and make it hard for the bad man to do wrong in the community."[94]

The finding was, in the Commission's words, that his broadcasts were "sensational rather than instructive."[95]

The Brinkley Case. The FRC believed that "Fighting Bob" Shuler had been operating KGEF as a personal outlet, a category that the

92. Charley Orbison, *"Fighting Bob" Shuler*, 21 J. BROAD. 459, 460 (1977).
93. *Id.* at 461–62.
94. Louis Caldwell, *Freedom of Speech and Radio Broadcasting*, 177 ANNALS AM. ACAD. POL. & SOC. SCI. 201 (1935).
95. Trinity Methodist Church *v.* FRC, 62 F.2d 850, 851 (D.C. Cir. 1932).

Commission had ranked even lower than propaganda stations. That spelled nothing but trouble for Brinkley, the "goat-gland doctor," whose KFKB was a personal outlet par excellence. Yet it was also the most popular station, not just in central Kansas, but in the entire United States, outpolling the runner-up by a four-to-one margin.[96] KFKB blanketed the area between the Rockies and the Mississippi and beyond, and Brinkley held his audience with an astute combination of fundamentalist theology and medical information. It was with the latter that Brinkley gained notoriety.

Brinkley's initial fame had come from his efforts to rejuvenate the male sex drive by implanting the gonads of a young Ozark goat in the patient's scrotum. A public-spirited man, he even sponsored a baseball team nicknamed the Brinkley Goats. Yet Brinkley understood that there was a limited future in goat-gland transplants, and by the late 1920s his medical business focused on the prostate. Using both the mails and KFKB, Brinkley attempted to reach "the prostate man" and convince him that he had a problem that Brinkley could solve. "It certainly behooves a man who has an enlarged prostate to consider it, and we are indeed glad to hear from such men for we are convinced we can render him a real, genuine and lasting service."[97]

On a typical day Brinkley took to the air twice (after lunch and dinner) to speak on medical problems. The evening program would be a gland lecture, explaining the male change of life. "Our bodies are not holding up as well as those of our forefathers did . . . . Enlargement of the prostate is on the increase."[98] His other program was his "Medical Question Box." This grew out of his enormous daily mail. Typically he would pick up some letters on the way to the microphone, leaf through them, and choose which to read on the air. He would then quickly give his diagnosis and prescribe the medicine required—by number: "Brinkley's 2, 16, and 17. If her druggist hasn't got them, she should write and order them from the Milford Drug Company, Milford, Kansas."[99] As this example indicates, Brinkley had expanded into the pharmaceutical business.

96. GERALD CARSON, THE ROGUISH WORLD OF DR. BRINKLEY 143 (Rinehart 1960).
97. *Id.* at 85.
98. *Id.* at 89.
99. *Id.* at 100–01.

Predictably, the "goat-gland doctor" drew the ire of organized medicine, which challenged both his right to broadcast and his right to practice medicine. On a single unlucky Friday the thirteenth, in June 1930, he lost both. The FRC found that Brinkley's "Medical Question Box" diagnosis "upon what symptoms may be recited by the patient in a letter addressed to him, is inimical to the public health and safety, and for that reason is not in the public interest."[100] Furthermore, it found that KFKB was a "mere" adjunct to his medical practice and insufficiently attuned to the needs of Kansas.

The Commission and the Courts

Both Shuler and Brinkley appealed to the D.C. Circuit. Both lost. These initial two decisions set a tone that would be adopted by the Supreme Court a decade later.

The court reviewing Brinkley's appeal agreed fully with the Commission that broadcasts should have a "public character. Obviously, there is no room in the broadcast band for every school of thought."[101] Broadcasting is "impressed with the public interest" and therefore the Commission "is necessarily called upon to consider the character and quality of the service to be rendered."[102] The court summarily dismissed Brinkley's argument that the Commission had engaged in forbidden censorship. Section 29 went exclusively to prior scrutiny. What the Commission did, by contrast, was exercise its "undoubted right" to look at past performance. This was an important consideration because, as Matthew 7:20 states, "by their fruits ye shall know them."[103]

The court treated Shuler's appeal similarly. There was no censorship or denial of free speech, "but merely the application of the

100. KFKB Broadcasting *v.* FRC, 47 F.2d 670, 671 (D.C. Cir. 1931). The Commission might have contrasted KFKB with a Gary, Indiana, station (which profited from the Davis Amendment), which prevailed over a Chicago station because its programs were "musical, educational and instructive in their nature and [stressed] loyalty to the community and the Nation." FRC *v.* Nelson Bros. Bond & Mortgage, 289 U.S. 266, 271 (1933).

101. *KFKB*, 47 F.2d at 672.

102. *Id.*

103. *Id.*

regulatory power of Congress in a field within the scope of its legislative power."[104] Shuler remained free to "inspire political distrust and civic discord"; he simply could not demand to use an instrumentality of interstate commerce "for such purposes."[105] The Commission was duty bound to look at Shuler's past broadcasts, and by concluding that the public interest would not be served by relicensing him, its decision was hardly arbitrary and capricious.[106]

In echoing the Commission's conclusion that it was duty bound "to consider the character and quality" of programming, the court acknowledged that the Commission enjoyed amazing discretion. Dill was charmed by the vagueness of the public interest standard, but intended that it would gain meaning by staffing the Commission with "men of big abilities and big vision."[107] Here Dill anticipated the influential work of James Landis, who, after a stint as Chairman of the Securities and Exchange Commission, had returned to the Harvard Law School as its dean. In the spring of 1938 Landis journeyed south to deliver Yale's Storrs Lectures. His topic: The Administrative Process.

Landis saw administrative agencies as the repositories of expertise necessary to deal with whatever problems were placed before them. He believed it was wrong to constrain the agencies in advance. Thus, Landis proudly revealed that

> one of the ablest administrators that it was my good fortune to know, I believe, never read, at least more than casually, the statutes that he translated into reality. He assumed that they gave him power to deal with the broad problems of an industry and, upon that understanding, he sought his own solutions.[108]

From Landis's perspective, phrases like "the public interest" were ideal: "To read them properly one must catch and feel the pace of the galvanic current that sweeps though the statute as a whole."[109]

104. *Trinity Methodist Church*, 62 F.2d at 851.
105. *Id.* at 853.
106. *Id.* at 852.
107. 67 CONG. REC. 12352 (1926).
108. JAMES LANDIS, THE ADMINISTRATIVE PROCESS 75 (Yale University Press 1938).
109. *Id.* at 67.

Two years after Landis's lectures, his former Harvard colleague and coauthor, Felix Frankfurter, wrote *Pottsville Broadcasting*,[110] the first of three seminal broadcast decisions he authored. This trio rid broadcast regulation of constitutional restraints and merged Landis's views of administrative expertise, the public interest, and the Communications Act of 1934.[111] For the era of the 1927 Radio Act and its successor, the 1934 Communications Act, a key legal question was whether the public interest standard could provide sufficient guidance to an agency such that it was not an unconstitutional delegation of legislative power. In a railroad acquisition case decided between the two acts, the Court had found that the public interest standard was not an unconstitutional delegation.[112] It was therefore, in that context, definite enough for fair enforcement.

Whether that conclusion also fit the Communications Act might have been a difficult question. To Frankfurter it was simple. In *Pottsville Broadcasting*, the Court brushed aside the constitutional challenge and gushed lavish praise on the public interest standard: "While this criterion is as concrete as the complicated factors for judgment . . . permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."[113] The issue in the case was whether, in response to a court remand based on an error of law, the Commission was free to reconsider the entire case comparatively with other applicants. The Court held that it was, concluding that the Communications Act expressed "a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission."[114]

Three years later, in *National Broadcasting Co.* v. *United States,*[115] the Court, in an opinion written by Justice Frankfurter, dealt with the networks' challenges to the Chain Broadcasting Rules' regulating relations between radio networks and their affiliated stations.

110. FCC *v.* Pottsville Broadcasting Co., 309 U.S. 134 (1940).
111. 48 Stat. 1093 (1934).
112. New York Central Securities Corp. *v.* United States, 287 U.S. 12 (1932).
113. *Pottsville Broadcasting*, 309 U.S. at 138.
114. *Id.*
115. 319 U.S. 190 (1943).

Strange as it seems, the networks' best argument was that the Communications Act of 1934 gave the FCC no power to regulate networks. The Act had carried over the provisions of the 1927 Radio Act, including its most glaring deficiencies: failure to anticipate both how vital a role the networks would play and just how commercial radio was to become. The 1934 Act contained a single acknowledgment of networks in section 303(i), which tersely stated that the Commission had "authority to make special regulations applicable to radio stations engaged in chain broadcasting."[116] The Commission had built on this slim foundation by drafting each of the Chain Broadcasting Rules as a prohibition on licensing any station affiliated with a network that engaged in any of eight specified activities the Commission found contrary to the public interest. The Commission intended to regulate the networks by threatening their affiliates. Form would control substance.

And control it did. The Court acknowledged that "true enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest."[117] This proved irrelevant. What mattered was that Congress nevertheless granted the Commission "expansive powers" that placed a gloss on the public interest standard and provided a "comprehensive mandate" to, in the language of section 303(g), "encourage the larger and more effective use of radio."[118] The Chain Broadcasting Rules, having the potential to accomplish this, were therefore not beyond the scope of the Commission's powers.

In the end it seems that the Commission prevailed largely because no specific statutory phrase forbade its actions. Frankfurter had referred to the generalities of the Communications Act with some of the reverence usually reserved for the Constitution's vaguer provisions. Congress did not wish to "frustrate the purposes" for which regulation was created. It did not "stereotype the powers of the Commission to

116. "Except as otherwise provided in this act, the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . (i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting." 47 U.S.C.§ 303(i).

117. *NBC*, 319 U.S. at 218–19.

118. *Id.* at 219.

specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding."[119]

The Court's view of Commission powers was no transitory rush of New Deal enthusiasm. In 1953 the Court, again through Frankfurter, described the beauties it beheld in the public interest standard. The "vagueish, penumbral bounds expressed by the standard of the 'public interest'"[120] "[leave] wide discretion and [call] for imaginative interpretation."[121] Thus, the Federal Communications Commission "brings the deposit of its experience, the disciplined feel of the expert, to bear" on its decisions implementing that standard.[122] Landis could not have said it better or with more meaning.

The Supreme Court thus not only turned aside challenges to the Commission's almost boundless grants of authority, but went on to clothe the FCC actions with legitimacy. The vagueness of the public interest standard, its charm for Dill, was necessary because Congress intended to grant "not niggardly but expansive powers"[123] to the Commission. Thus, the Commission could, and would, exercise "wide discretion and . . . imaginative interpretation."[124] In so doing it could act much like Landis's admired administrator, unaware of legal limitations on its ability to do right. Indeed, in the case of the FCC, the courts seemed agreed that there were no legal limitations of which anyone should be aware.

Only the Constitution could channel the interpretation of the public interest, and *NBC* had agreed with the earlier D.C. Circuit decisions in *Shuler* and *Brinkley* that the First Amendment was virtually irrelevant to this task.[125] Thus, the Commission was free to do good and was limited largely by its own shifting vision of the good.

How has the modern Federal Communications Commission, the successor to the Federal Radio Commission, exercised these powers to oversee or control the content of broadcast programming? By what standards have courts reviewed these agency actions? How should a

119. *Id.*
120. FCC *v.* RCA Communications, Inc., 346 U.S. 86, 91 (1953).
121. *Id.* at 90.
122. *Id.* at 91.
123. *NBC*, 319 U.S. at 219.
124. *RCA*, 346 U.S. at 90.
125. *See* Chapter 7.

disinterested person evaluate the costs and benefits of these regulations? These are the questions to which we now turn.

3

Market Failure

SUPPOSE ONE WANTED to give content to the FCC's "public interest" mandate by applying some dispassionate, rigorous analysis. How would one go about that task?

FRAMEWORK FOR DEFINING THE "PUBLIC INTEREST"

Sometime after passage of the Radio Act of 1927, Senate sponsor Clarence Dill met with the Chief Justice of the United States, William Howard Taft. The purpose of the meeting, according to Dill, was an ex parte attempt to dissuade the Supreme Court from hearing a case involving the new statute.[1] Dill found a sympathetic listener. Taft, too, wanted the Court to duck the issue, explaining, "[I]f I'm to write a decision on this thing called radio, I'll have to get in touch with the occult."[2] Ever since Marconi had invented the "wireless telegraph," there had been something mysterious about how it worked.

1. The event is recounted in ERIK BARNOUW, A TOWER IN BABEL 257–58 (Oxford University Press 1966), and is based on an interview with Dill in 1964, when Dill was eighty years old. Dill did not say what the name of the case was. *Id.* at 258 n.2. Whether or not the story is true, it makes a good point. If the story was true, the case was the famous Great Lakes Broadcasting *v.* FRC, 37 F.2d 993 (D.C. Cir. 1930), *cert. denied*, 281 U.S. 706 (1930). *Great Lakes Broadcasting* was decided by the D.C. Circuit on January 6, 1930, and a petition for rehearing was denied on February 8, 1930. Taft died on February 3, 1930. *Great Lakes Broadcasting* is discussed *infra* Chapter 4 (Minimum Diversity Levels) and Chapter 5 (Advertising).

2. BARNOUW, *supra* note 1, at 258.

Ordinary people—including judges—could not comprehend radio's operation. That was why an expert commission was thought necessary. Only experts could comprehend the technology and set it on a course for the future. Congress thus gave the Federal Radio Commission and its successor, the Federal Communications Commission, a blank check to determine the needs of broadcasting by reference to an undefined public interest. The Supreme Court, well after Taft's death, concurred. Because ordinary individuals could not foresee or understand the "dynamic aspects of radio transmission,"[3] regulation had to be entrusted to "the disciplined feel of the expert."[4]

Because the Communications Act provides no guidance, the FCC, along with its supporters and critics, must redefine every few years just what "public interest" regulation might mean in the context of the industry and the technology that exists at that specific time. For instance, should spectrum be allocated for direct broadcasts from satellite (DBS) to homes? If so, should spectrum be taken from an existing authorization or should unallocated spectrum be used? Should programming control be vested in one or several companies? Should that control be subject to certain minimum standards, such as the number of households offered service or the duty of the DBS programmer to avoid indecent or overly violent programs? Should marketplace forces be allowed to dictate the mix of program types offered or should special requirements be imposed to guarantee the broadcast of, say, programs for children or for persons for whom English is a second language? All of those questions must be answered by applying the "public interest" standard. Yet, neither the words nor the history of the standard provides a useful guide to its application.

Necessarily, then, the Commission has had to turn to theory, to some generalized view of what regulation is all about. Why did we impose regulation rather than allow the broadcast industry to evolve through the process of private interactions in open markets just as, say, the computer industry grew without industry-specific regulation? In the course of modern broadcast regulation, particularly that aspect concerned (as is this book) with program-content requirements, four

3. FCC *v.* Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).
4. FCC *v.* RCA Communications, Inc., 346 U.S. 86, 91 (1953).

basic theories have been suggested to explain why broadcast programming is regulated in the public interest by a commission rather than by competition. Each of those theories begins with a factual premise, explicit or implicit, about the broadcast industry or broadcast programs, and proceeds from that premise to weave a justification for regulation. (We discuss here only theories that rest on a premise that regulation can improve industry performance. Other theories for why we have regulation—such as because it protects incumbents from competition, especially new technologies—we treat in subsequent chapters.)

The four theories all assume or assert that broadcasting is special and that ordinary individuals applying ordinary concepts could not understand how broadcasting operates or control its consequences; only the expert commission can fathom the new technology or mold its performance to proper forms. In one way or another, these theories are so integral to broadcast regulation that they will continuously reappear throughout this book. In this chapter we deal summarily with two theories—monopoly and pervasiveness—and provide extended treatment of the theories that rest on spectrum utilization and the inability of normal markets to deal with broadcast issues.[5] Our purpose is simple. It is to demonstrate that one need neither contact the occult nor be a certified expert to comprehend how Marconi's invention works a hundred years later.

Potential Sources of Market Failure

We consider now the four assertions of market failure that have traditionally been applied to broadcasting. Those assertions seek to justify an unusual reliance on regulation rather than competition to control the content of broadcasts.

5. We fully analyze each of these assertions and apply them to past and present concrete controversies in the final four chapters.

Broadcasters as Monopolists?

The first assertion is that broadcasters are monopolists. Some regulations, as we shall see, rest in whole or part on the belief that each broadcaster owes a special duty to its audience because that audience has nowhere else to turn for news, information, and entertainment. The monopoly argument is typically time-specific. Such arguments seem to be voiced more frequently and more stridently when particular services are in their infancy, such as radio in the 1930s, television in the 1950s, and cable in the 1970s.[6]

One need not be an expert to know that the "broadcasters are monopolists" proposition is demonstrably false. There is room in the spectrum for additional radio and television broadcasters. Television viewers can turn to newspapers, magazines, books, and radio for news and information. Entertainment is readily available at clubs, sporting events, and the movies. So long as Americans can read, think, and walk, broadcasters cannot be monopolists. Broadcasters and cablecasters are instead firms that compete for audience attention with a very wide array of alternative sources of news, information, and entertainment.

A more subtle argument might be that some broadcasters sometimes exhibit some market power. That is, in some markets, for limited periods, certain stations may exercise such authority that some viewers and listeners think they have no real alternative. If this could be the case, and if all broadcasters owe a general duty to the public because they possess a valuable public gift (the license to broadcast), then perhaps all broadcasters might reasonably be subject to some regulations that seem to treat them as monopolists. The force of this contention depends upon both the validity of the claim that broadcasters owe a special duty and the alternative regulatory tools available to the Commission.

We consider such an argument at length in Chapter 10. At present, it is sufficient to note that such an argument does not seem to explain why we might need federal regulation of broadcast program content,

6. Thus, we would not be surprised if calls for content regulation of DBS are forthcoming in the 1990s, when only one or two DBS services are likely to be in operation.

but only why we might choose to tolerate it in limited cases and for limited periods of time.

The Pervasiveness of Broadcast Programs?

The second assertion is that broadcast programs have a uniquely pervasive presence in the homes of Americans and are uniquely accessible to unsupervised young children. This argument usually forms the centerpiece of claims that regulation in the public interest is necessary or desirable to prevent or temper the corrupting influence of broadcasting on the minds and morals of its audience, particularly the youngest members of that audience. It may explain why we need a federal commission to rid the airwaves of sex and violence or why we need it to foster educational and informative programming for children.

We consider this argument at greater length in Chapter 8. Whether it seems plausible or not, however, the argument has had force in a very limited range of cases. The reason for this is simple: the First Amendment guarantees freedom of speech and freedom of the press. Throughout the Commission's history, even when its regulatory zeal has reached its pinnacle, the FCC has been unable to reconcile itself to being the moral watchdog of adult society. To a large extent, therefore, the Commission has been unwilling directly to order broadcasters either to stop or to start airing a specific program or type of programming. The Commission has assumed that to be overly specific would invite judicial condemnation[7] because, at least since the dissents of Justices Oliver Wendell Holmes and Louis D. Brandeis seventy years ago,[8] it has been reasonably clear that freedom of thought and expression is the norm. Nevertheless, through a variety of means, from regulation by lifted eyebrow to license processing guidelines,[9] the Commission has had a direct regulatory influence on the content of broadcasting.

7. 1960 Programming Statement, 25 FED. REG. 7291, 7292-93 (1960).

8. Abrams *v.* United States, 250 U.S. 616, 624 (1919) (Holmes and Brandeis, JJ., dissenting); Gitlow *v.* New York, 268 U.S. 652, 672 (1925) (Holmes and Brandeis, JJ., dissenting); Whitney *v.* California, 274 U.S. 357, 376 (1927) (Brandeis and Holmes, JJ., concurring).

9. Discussed *infra* Chapter 4 (Diversifying Program Mix).

Insufficient Diversity?

The third assertion is that competition in broadcasting does not fully satisfy the goals we should have for performance of this industry. In particular, the value of diverse programming—programming that appeals to the intense desires of discrete persons or groups in society—may well be underserved by an overly simplistic reliance on competition. Competition in computers may be expected to provide not only low prices and low costs, but also products responsive to the varied needs of a diverse public. Perhaps, however, broadcasting is different. Maybe competition in broadcasting will lead to a bland conformity or a diversity available only to those willing to pay premium prices. Accordingly, regulation—even content regulation—that increases the diversity of program fare available to the audience may well be in the public interest.

This argument, first formally and rigorously stated in 1952,[10] and recently reviewed by Judge Richard A. Posner,[11] does indeed pose at least a theoretical challenge to the ability of an unregulated broadcast industry to serve the public interest broadly and fairly. We review this problem in the following section of this chapter after noting another argument that deserves further elaboration.

Access to a Scarce Resource?

The fourth assertion is that broadcasters are fairly entrusted with wide public obligations because they enjoy access to a unique—and uniquely scarce—resource, the electromagnetic spectrum. This argument does not so much justify any particular regulation as it serves to explain why direct public control over the broadcast industry's output might be a fair or sensible response in many or most cases.

10. Peter O. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194 (1952). Steiner's work has been extended to produce models of the determinants of program choice that are far richer and more complicated than those Steiner designed. For a particularly extensive elaboration of Steiner's models and a detailed set of alternative models for explaining the dynamics of program choice, see Chapters 3 and 4 of BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS (Harvard University Press 1992).

11. Schurz Communications, Inc. *v.* FCC, 982 F.2d 1043 (7th Cir. 1992).

At its core, the argument seems to assert that because broadcasters get so much for free, they are necessarily and implicitly obligated to give "something" back in return. Furthermore, the argument goes, in determining the quantity and quality of that "something," we should place no value at all on the desire of the broadcasters to utter certain words or to express certain views, because their desires are more than amply accounted for during other times. Thus, content regulation may be treated as a species of the "no harm, no foul" rule. In Congressman Edward Markey's words: "It does not seem to me to be an outrageous idea that broadcasters—who are granted, at no cost, the exclusive use of a scarce public resource, the electromagnetic spectrum—be required to inform the public in a responsible manner. . . . We do not exact any monetary payment for the use of the spectrum, but we do ask broadcasters to serve in the public interest."[12]

This argument, too, deserves a more extended analysis. Like the claim that competition might not produce the programs people want, the claim that broadcasters are uniquely privileged can support a wide variety of regulatory interventions. Furthermore, the claim is not patently nonsense. Surely, in some sense, broadcasters do enjoy an immense privilege. Closer analysis will show, however, that this is not due to the nature of the resource they possess, but due to their obtaining it at very low cost.

The remainder of this chapter explores in greater detail the latter two arguments. First, we explain just how the peculiar nature of broadcast programs may undermine the ability of competitive, unregulated markets to satisfy consumers' demands efficiently. Second, we describe just what it is that broadcasters do when they broadcast and what it means to "use" or "occupy" the electromagnetic spectrum. From each analysis, we draw tentative conclusions about the extent to which the bases for regulating broadcasting imply that regulation in the public interest should encompass control over broadcast program content. We then more fully apply those conclusions in later chapters that analyze specific regulations.

12. Edward Markey, *The Fairness Doctrine, Congress and the FCC*, 6 COMM. L. 25, 26–27 (Summer 1988).

The Limits of Competition

In the United States, with very few exceptions, government does not produce or distribute broadcast programs. Rather, the production and distribution of radio and television shows—like the production and distribution of cameras, film, or stage lights—are left to the interactions of private firms offering their wares to a consuming (or listening or viewing) public.

Economists and other public policy analysts have developed criteria for evaluating the conditions under which the performance of a private industry selling in open markets best serves the public welfare. At the outset, consumers' tastes (demand for goods) and producers' technology (cost of producing goods) are taken as given. Then, analysts conclude, where a good (for example, a pencil) is sold in competitive markets at a price that equals the marginal cost of producing that good,[13] consumer welfare is maximized. Every consumer willing to pay the cost to society of making a pencil is able to obtain a pencil at that price. No lower price could be set that would still compensate producers for their manufacturing costs and therefore induce them to continue making that which consumers desire.

Those criteria are not precisely applicable in analyzing the performance of the broadcast industries. For this reason, it might be said that regulation of broadcasting in the "public interest" is necessary to correct errors that would arise from subjecting broadcast programming to the discipline of private markets alone. This could explain why regulation was imposed or why it has been retained.

A television (or radio) program is what economists call a "public good." That is, its consumption (viewing) by one person does not affect the consumption of another viewer. This is so because the marginal cost of a television program that is broadcast through the ether is zero. It costs nothing to produce that program for viewing by the last person within the signal's range to tune in. Accordingly, if a price is charged for the program, then that price will exclude those viewers who are willing to pay only the cost (zero) of being included in the viewing audience. But if every viewer pays zero for every

13. By marginal cost of production, we mean the incremental costs incurred in producing the last pencil. This is the cost to society of producing the pencil.

program, no programs will be produced. Since broadcast programs cannot be sold in open markets to viewers at their marginal cost, we cannot say that these markets will maximize consumer welfare.

This difficulty—excluding people who are willing to pay only the (zero) marginal cost of a program—may be cured by having advertisers pay for programs that broadcasters distribute to viewers for free.[14] That simply introduces another problem, however, a diminution (or distortion) in consumer sovereignty. The standard policy analysis assumes an open market in which consumers express the intensity of their preferences among various options by offering to pay more for that which they value more highly. This explains why few black-and-white television sets or AM radios are sold in the United States, even though they are cheaper to produce than color TVs or AM/FM radios,[15] or why few one-inch-long pencils are sold. With rare exceptions, however, advertisers do not care how much value viewers place on watching television programs, but only that they value them enough to watch. Thus, under an advertiser-supported system of program production, a program that twenty people each value at $1 may be offered in lieu of a program that nineteen people each value at $1,000. No one who respects consumer preferences can regard that situation as maximizing consumer welfare.

At least at the purely theoretical level, this dilemma is intractable. If viewers pay directly for programs, some inefficient exclusion of those who do not pay will result. But if viewers are not charged, then the programs broadcasters air may well not reflect true viewer preferences.[16] Therefore, at least in principle, it is almost always

14. Some do not regard advertiser-supported programs as "free." First, the costs to the advertiser must be recouped through some increase in consumer product prices, presumably products that viewers of the show are likely to purchase. Second, the time spent viewing commercials may be seen as a cost to viewers. Consider, for example, the attorney whose work is billed at $150 per hour and who has a choice between watching a two-hour movie by (a) renting a videocassette of the movie for $3, or (b) sitting through a two-and-a-half-hour "free" television broadcast of the movie interspersed with commercials. Other viewers, however, may find that television ads provide valuable information and so are worth watching.

15. This also illustrates that consumer welfare is not necessarily increased when prices are lower. If a reduction in quality accompanies the price drop, consumers may be worse off.

16. Public financing of program production and distribution, like advertiser support, avoids the problem of inefficient exclusion but also is likely to be insensitive to the

possible to argue that any change in the mix of broadcast programming (and, consequently, any change in telecommunications regulation that can affect the programming mix) is a change for the worse—or for the better!

Furthermore, if viewers are unable to express the intensity of their preferences by paying for broadcast programs, many of our preconceptions about the value of competitive market structures may be erroneous. For a simple example, assume that a market is served by three television stations and that the 10,000 viewers in that market cast their preferences among three program types, each of which costs $300 to produce and for which advertisers will pay $1 per viewer, in this manner: 7,500 viewers prefer program *A*; 2,000 viewers prefer program *B*; and 500 prefer program *C*.

All other things being equal, if the three television stations are operated competitively, each is likely to offer the same program type, program *A*. If each gains an average share of the market, it will attract 2,500 viewers and realize profits of $2,200 ($2,500 - $300). Each station makes more profit following this "copycat" strategy than by offering either program *B* (profit of $2,000 - $300 = $1,700) or program *C* (profit of $500 - $300 = $200).

Conversely, on these simple assumptions, a monopolist that controlled all three stations would maximize its profits by offering all three program types. As just noted, offering program *B* will generate profits of $1,700, and program *C* will bring in $200. Offering program *A* will generate another $7,200 ($7,500 - $300) in profits for a total of $9,100. No other combination of program types can produce such profits. For example, offering two of program *A* will lead to profits of ($3,750 - $300) + ($3,750 - $300) = $6,900. Putting program *B* on the third channel will bring another $1,700, making total profits $8,600 for this strategy, or $500 less than offering one of each type.

This is not to suggest, however, that monopoly will always outperform competition in producing diversity. For example, in the hypothetical just discussed, if the market contained five competing firms, one of them would choose to offer program *B*. It would thereby gain all of the

intensity of viewers' preferences. In the United States, publicly financed television does not even seek to be responsive to viewers' demand; instead, it tries (perhaps thankfully) to fill niches not occupied by commercial broadcasters.

2,000 viewers who prefer *B* rather than one-fifth (1,500) of the 7,500 who prefer *A*.

In sum, at least at the purely theoretical level, we cannot say with assurance that the diversity of programs offered will constantly increase with the number of firms in the market, although, once firms are rather numerous, we do expect this to happen. Nevertheless, it may be that, in some ranges, monopolists will offer more choices than a number of separately owned firms.

Philosophers may be immobilized by these dilemmas, but the FCC has to act, and it must attempt to ground its actions in the "public interest." Over the years, the Commission has developed three criteria by which it purports to measure the performance of the broadcast industries and to describe the goals of FCC regulations: competition, diversity, and localism.

A regulation might be said to further the goal of *competition* where it prevents monopolies and cartels or eradicates barriers to entry (or, somewhat more loosely, where it increases the number of competitors in a market). Competition may be valued because it respects consumer preferences in that broadcasters prosper to the extent that they compete successfully for listeners or viewers. Competition is also likely to keep prices down, whether those prices are charged to advertisers or to viewers. As noted above, since radio and television programs are public goods, even perfect competition in these industries cannot be said necessarily to maximize consumer welfare. But competition may roughly approximate such results.

Rules might increase *diversity* where they lead broadcasters to offer different fare. Differences may be measured by a program's content (or format), its cast, its producers, its distributors, its audience, or any other measure of program type one finds appealing. Treating diversity as a goal separate and distinct from competition must imply that, in some cases, (small amounts of) competition should be sacrificed to achieve (larger amounts of) diversity. Very difficult policy questions arise when one must sacrifice (some of) one of these values to achieve (more of) the other. Such a concern with diversity might be justified either because of the perceived or asserted failure of competition to work adequately in this industry or because of a view that, in

a democracy, diversity of information may be more important than efficient competition.

Localism has frequently been discussed but never well defined by the Commission. The fundamental problem is that if one has already maximized competition and diversity, in whatever mix of the two a person prefers, it is unclear what remaining public interest values are protected by an additional commitment to localism. Suppose *localism* means programs of interest to people who reside near the station. Fostering competition and promoting diversity should lead stations to produce such programs. To say that the FCC may need to sacrifice the values of competition and diversity to achieve the value of localism, in that sense, seems to be a contradiction in terms. Suppose, alternatively, that *localism* means programs produced in the station's community or featuring performers who reside there. If competition and diversity in broadcasting would not produce such programs, what conception of the public interest suggests that viewers would nevertheless be better off if such local programs were to be broadcast instead of those generated by competition and diversity?[17] Thus, it is relatively clear to us that localism serves little or no valuable purpose beyond the goals of competition and diversity.

In sum, as a theoretical matter, neither charging listeners and viewers directly for broadcasts nor financing them from advertising revenues can produce an ideal outcome, as measured by economic policy analysis. There are no readily available, objective, widely agreed upon criteria for evaluating the economic performance of broadcast markets. And we cannot simply assume that competition, which the FCC has traditionally used as the principal method for evaluating those markets, will yield results superior to those monopoly produces.

These observations mean that it is more challenging to evaluate regulation of broadcasting than, for example, pencil manufacturing. They do not mean, however, that critical analysis of the broadcasting industries or of the FCC is impossible. Rather, they suggest that one should be aware that the most an analyst often can hope to do is to

17. Perhaps such a conception of localism as a policy goal rests on the view that the public whose interest governs includes performers and producers as well as viewers.

measure at the margin, asking whether this behavior or this regulation will make the situation better or worse and at what cost.

Further, these observations suggest to us that the FCC usually should engage in structural rather than behavioral regulation and oversight. On this view, the Commission is likely to be on firmest ground when acting to ensure that the structure of the industry is such that viewers are able to make their desires count effectively in many ways. Competition appears likely to approximate ideal outcomes in many cases and to beat monopoly in most. Conversely, the Commission is likely to be on weakest ground when it restricts entry or seeks to dictate specific programming or the terms on which it is offered. It seems easier to describe the structural conditions under which viewer desires are most likely to be satisfied than to discover and define those desires administratively and direct licensees to satisfy them.

To others, however, these observations teach a different lesson. They argue that the Commission, in enforcing the public interest of fostering diversity, should actively promote programming that lacks mass appeal but is important to specific viewers. Further, the FCC should aggressively attack duplicative programming designed to capture many viewers without regard to more intensely (if less widely) held tastes.

As the remainder of this book shows, we doubt the wisdom and utility of these diversity-based roles for the FCC's implementation of the public interest standard. In our judgment, arguments that the Commission should assume such roles underestimate the values served by competition among broadcasters, overestimate the FCC's capacity for wisdom and beneficence, and sanction dangerous degrees of government control over the flow of information. But, as the preceding discussion explains, we cannot simply dismiss such arguments on the grounds that they interfere with the free market's ability to maximize consumer satisfaction or to promote most effectively consumer sovereignty.

It is easy to show why we should not have a Federal Pencil Commission. The FCC has a more substantial claim to legitimacy.

BROADCASTERS' SPECIAL ACCESS TO A UNIQUE RESOURCE

As noted above, a common theme in the literature encouraging FCC oversight of broadcast programming is that such regulation merely extracts a quid pro quo. Listeners and viewers get programming that is in the public interest, while broadcasters receive special access to a unique resource—the electromagnetic spectrum. Here, we describe more specifically just what this resource is and explain how broadcasters use it.

Encoding, Transmitting, and Receiving Technology

People have always valued the ability to communicate rapidly over long distances. Imagine two mountains separated by a valley ten miles wide. People situated on one mountain may have valuable information to share with those living on the other, such as approaching storm clouds.

Centuries ago, such communication might have occurred by smoke signals.[18] Today, it might take place as a cellular telephone communication between drivers of two automobiles. Although the cellular system seems infinitely more advanced than the smoke signal, these two communications systems have much in common: each transmits encoded information, at the speed of light, to a receiver that decodes the information. This way, each very quickly sends lots of information a long way.

In short, telecommunications technology differs in detail, but not in its essential concept or function, from smoke signal technology.[19] By employing telecommunications rather than smoke signals, people can pack more information into a second's worth of transmission and can transmit that information over longer distances. One might understand telecommunications, then, as the latest in an evolving

18. The smoke-signal analogy is suggested by DON L. CANNON & GERALD LUECKE, UNDERSTANDING COMMUNICATIONS SYSTEMS 1 (2d ed., Texas Instruments Learning Center 1984).

19. By *telecommunications* we mean the electronic transmission, by wire or radio, of audio, video, or textual (including numerical) data. The term thus encompasses not only conventional broadcasting, but also transmission of information and entertainment by cable, microwave, or satellite.

technology for extending the speed and reach of data (or information) transmission.

To progress from smoke signals to wireless radio transmissions required that people learn to convert information to electromagnetic radiation. This is what Marconi taught us. The radio waves he discovered—that today carry sound, pictures, numbers, and other data through the ether—are basically sine waves, *encoded* with information, that are generated by a power source and then *transmitted* by that power source to a device (the receiver, or radio, or TV set) that searches out the sine wave and strips off the encoded information.[20] Today, a perception exists that there are almost countless telecommunications products, markets, and technologies available. Yet virtually all of them are defined simply by the encoding and transmitting process they employ. That is, telecommunications technologies, or markets, are usually defined by the manner in which they encode information and the means by which they transmit it.

To a policy analyst, then, the difference between AM and FM radio is that one uses amplitude modulation and the other uses frequency modulation to encode sine waves. Television is simply frequency modulation with visual data (pictures) attached to the audio data.[21] Conventional telephone communication is like AM radio in that it requires little spectrum because it transmits only voice data, but is unlike radio in that it transmits locally by wire, and so it is somewhat easier to exclude people from listening in on the communication. Communications satellites are very tall transmitting and receiving antennas and CB radios are portable AM radio stations transmitting at very low power.

Similarly, altering the technology employed in a telecommunications system can change the effects it produces. For example, the

20. To invent broadcast radio, then, one had to discover how to encode the human voice onto energy waves and then to decode that information at a receiver. Similarly, television requires the ability to break a picture down into bits of data (millions of points of light). Once Marconi invented the wireless telegraph (that is, learned to encode and decode dots and dashes on radiated energy waves), creating radio and television were comparatively simple engineering tasks.

21. As will become clear, because a television signal must convey more data than an FM radio signal, a television broadcast employs more bandwidth in the spectrum than does an FM radio broadcast.

extent to which a radio broadcast through the airwaves creates potential interference with other signals is reduced if the broadcast is not radiated in all directions, but is transmitted only from one point to another, or is radiated at less power. The amount of information that can be transmitted through a cable of a certain size can be increased by switching from coaxial to fiber-optic cable. The amount of spectrum necessary to transmit a television signal can be reduced if a digital signal rather than an analog signal can be employed.

Finally, such an alteration of technology usually is available. No technology is the only way to accomplish a given end. Transoceanic cables can substitute for geostationary orbiting satellites. Telephone calls and television signals can be transmitted by wire or over the air. A weak broadcast signal can be strengthened by boosting the power at which it is radiated or by using a relay station to capture and retransmit the signal.

The preceding discussion would rate an "F" (excessively shallow and incomplete) if written for electrical engineers, but it is just about all the technology one needs to know to understand policy arguments that center on the premise that broadcasters use a unique, scarce resource. Principally, this is so because the discussion reveals that broadcasting (or telecommunications) is a service or a good. At least for centuries and probably forever, people have valued the ability to receive (or send) lots of information, very quickly, over long distances. Encoding the information onto a radio wave and transmitting it via wire or ether is one way to accomplish those goals.

Choosing a telecommunications technology, then, is like choosing virtually any other good. One compares price and quality. There are lots of ways to get data from one place to another. For a specific task, some are cheaper, some are faster, and some are more reliable than others. A particular telecommunications technology will be chosen for a specific data transmission task based on its price and quality as compared with other ways of getting the job done. Should one write or phone? Presumably, the choice is made by comparing the costs and benefits of each. Further, as new desires arise, new configurations of telecommunications technology will be developed to create cost-effective ways of satisfying those desires. Cable television wedded telephone and radio technology to serve the desires of viewers for more

signals of greater clarity. Cellular telephone combined the same technologies to increase accessibility at some cost to clarity and the ability to exclude unwanted listeners.

One major difference between markets for telecommunications goods and markets for other goods is that governmental regulation plays a very large role in determining what kinds and quality of telecommunications services may be offered at what costs. The central issue in telecommunications law is why telecommunications goods and markets are not treated like most other goods and markets. For most goods—such as books, desks, shoes, or kitchen utensils—government subjects the industry to laws of general applicability, such as antitrust, labor, and securities regulation. But government does not control entry, prices, quantity, or quality, or appoint a regulatory agency to oversee the industry's performance or enact legislation specific to that industry.

The Electromagnetic Spectrum

What is this spectrum that the government controls so tightly but relinquishes without charge? "Spectrum is the entire available range of sinusoidal signal frequencies."[22] Recall that telecommunication through the ether involves the transmission of encoded sine waves. These waves can be made to vary in length, which is conventionally measured in meters. The wavelength determines the frequency of the signal.[23] Very long waves have very low frequencies because they repeat infrequently. Short waves are high frequency because they recur more often.

The unit of measurement of frequency is a hertz. One hertz was the lowest frequency (longest wave) imaginable when the measuring system was adopted. AM radio broadcasts in the United States occupy frequencies between 535 kHz (for kilohertz, one thousand hertz) and 1605 kHz. FM radio broadcasts occur at frequencies between 88 MHz (for megahertz, one million hertz) and 108 MHz.

22. CANNON & LUECKE, *supra* note 18, at 87.

23. Technically, "[t]he relationship between the frequency in hertz and the wavelength in meters is simply that the frequency times the wavelength is equal to the speed of light." *Id.* at 88.

Thus, the spectrum is that range of lengths of radio waves which, to date, people have learned to encode, transmit electronically at the speed of light, and decode. It follows, of course, that the spectrum—like chemistry's periodic table—has expanded substantially during the past 100 years. For example, when the FCC was established in 1934, spectrum capacity was under 300 MHz. By the end of World War II, usable spectrum had increased to 40 GHz (for gigahertz, one billion hertz).

Various frequencies (that is, various wavelengths) of radio waves have somewhat different characteristics. For example, broadcasts at the very lowest frequencies require very large antennas because exceedingly long waves must be propagated. Radio waves in the medium frequency, which includes AM radio, are reflected back to earth by the ionosphere, particularly at night. Thus, the reach of many of those signals is considerably extended.[24] Transmissions in the very high frequency (VHF) and ultra high frequency (UHF) range are not reflected back to earth and so can usually be captured clearly only by a receiver that is within the transmitting antenna's line of sight. Above UHF, which includes the superhigh and extremely high frequencies, the wavelengths are so small that they can be packed into narrowly focused beams of energy, such as are used in microwave and radar technologies.

The different characteristics of the various frequencies are interesting to note but are seldom crucial in determining where the signal carrying particular types of data could be located. This is especially true for mass communications media. Television signals, for example, are transmitted not only in both the VHF and UHF bands, but also clearly and effectively at much higher frequencies by microwave and through satellites. Radio broadcasting, as noted, takes place all the way from 535 kHz to 108 MHz.

To generate a good quality signal, then, the particular location of that signal in the electromagnetic spectrum is rarely crucial. At the very least, a rather wide range of choices will be available. For

24. This also means that, for signals at these frequencies, the problem of interference is greater at night than during the day.

example, television's Channel 2 could be located at countless places in the spectrum.

But the extent of the spectrum (bandwidth) that the signal may occupy is often very important. The preferred amount of bandwidth for a particular use depends on the amount and types of information that must be impressed on the radio waves. For example, much more bandwidth is required to carry a color television signal than to carry the human voice. (Indeed, since television signals contain an audio component, the point is axiomatic.) The preferred amount of bandwidth also depends on the technology being employed. The same information subjected to traditional analog encoding will require more bandwidth than if encoded digitally and compressed.

By now, it should be apparent that the spectrum is just a concept, something like the multiplication tables. More specifically, the spectrum is a list of wavelengths (frequencies) at which people, to date, have learned to transmit data effectively via encoded electrical impulses sent through the ether.

The Spectrum as a Resource

We can also think of the spectrum as a resource that can be possessed. We might say that government has allocated part of the spectrum to a particular service and awarded the right to operate that service within the spectrum to specific firms. If we look at the spectrum[25] as a resource, it possesses certain characteristics.

First, the spectrum can help create wealth or value. As noted above, many people are often willing to pay substantial sums for the ability to send (or to receive) lots of data quickly from far away.

Second, this resource can be used in varying amounts for the same purpose. For example, to get a television signal from a New York stage to a Los Angeles nightclub, one could use no spectrum (send it via wire, door-to-door), some spectrum (wire from New York to Los Angeles, but broadcast to the nightclub), or nothing but spectrum

25. More precisely, we use "the spectrum" here as shorthand for "the ability to transmit information by radio wave on this frequency free of (a certain amount of) interference."

(transmit directly from stage to satellite, which transmits, in turn, directly to the nightclub).

Third, different parts (or types) of the resource can be used for the same purpose. For example, a clear and dependable television signal can be transmitted from many different parts of the spectrum. No law of physics states that television's Channel 2 must be transmitted (as it currently is) at 54 MHz to 60 MHz.

Fourth, this resource is invariably costly to use because it could always be employed for a different valuable end. For example, if one person is broadcasting a television signal on Channel 2 in New York, then someone else cannot use those frequencies for mobile telephone or FM stereo or dispatching ambulances. Just because we do not observe someone paying money for the right to broadcast does not mean that it is costless to use the spectrum.

Collectively, what do these observations tell us? Principally, they tell us that the spectrum is a productive resource just like any other productive resource such as labor, steel, land, or investment capital. Like labor, use of the spectrum can create wealth. Like steel, spectrum can be used in varying amounts with other resources (inputs) to produce similar results (outputs). The spectrum has substitutes. Like land, the spectrum encompasses a variety of locations, and often these different locations can substitute for each other. Channel 2 can be located at many places in the spectrum, just as a McDonald's can be located at many places in the city. Like deployment of investment capital, spectrum use always inflicts a cost on society in that some alternative productive use is always available.

Allocating Spectrum Use

Because spectrum is a costly and productive resource that can be used in varying amounts, in different ways, and for different purposes, some mechanism had to be devised to allocate the spectrum—that is, to decide how much of what parts of it would go to what people for what uses.

Markets. In a free-market capitalist economy, the usual mechanism for allocating resources is a pricing system. In such a system, potential

users of the resource bid for it. Those bids establish the value of the resource, and, as the resource is awarded to the highest bidder, it is employed in its most highly valued use. In other words, the resource is as productive as it can be, given present technology and knowledge and the limits of the market mechanism as an evaluator of value.[26]

At an early stage in the developing science of telecommunications, a very different approach was taken toward the problem of allocating spectrum. As we detailed in Chapter 2, the 1912 Act declared that broadcasting without a license was illegal and that only the government could convey a license. Further, licenses were, and still are, handed out without charge and, although most of them may subsequently be bought and sold, these licenses are valid for only a brief period of time. Moreover, the license is frequently valid for transmitting only a particular type of data and often specifies the precise technology the broadcaster must use.

The decision to seize and control the spectrum gave an administrative agency, rather than producers, ultimate control over the search for the most efficient ways of packaging spectrum use with other resources to produce goods. Perhaps, due to the nature of communication by radio wave, these decisions were wise or even inevitable. Perhaps neither a market for producers to acquire spectrum rights nor a market for consumers to purchase information services would function as well as most free markets. Unfortunately, however, the two reasons most commonly given for the government's spectrum seizure belie a woeful ignorance of the spectrum itself.

Spectrum Scarcity. Sometimes it is said that the government must control the spectrum because it is scarce. But every productive resource—such as labor, steel, land, or investment capital—is scarce in that (a) if it is given away for no charge, people will request more of it than is available, and (b) if we could add more of it, the additional

26. Markets often do not do a very good job of valuing public goods such as roads because people may not reveal their true evaluation of the good, in the hope that someone else will provide the good while they take a free ride on it once it is produced. Also, markets evaluate goods by giving more votes to those with more money. Inequalities in the distribution of wealth may generate evaluations in the marketplace that seem quite unfair or irrational. For example, in South Africa it is more likely that a white family will own a swimming pool than that a black family will own a house.

increment also could be put to a productive use. To say that the spectrum is in this sense scarce is quite true. The statement, however, means only that if spectrum were sold in open markets, it would fetch a price greater than zero. No one believes that government must control the allocation of every good that, if sold on the market, would command a price.

To say that spectrum is scarce, then, is only to say that it must be allocated among those who desire it. Therefore, it begs the question to say that administrative allocation is necessary because of spectrum scarcity.[27] The real issue seems to be whether spectrum is scarce in some unique manner (unlike, say, land or iron ore) that peculiarly requires an allocation mechanism unique to this resource.

Interference. Another common assertion is that government must control the spectrum to prevent interference among users. Certainly, interference will destroy the utility of the spectrum resource. If two transmitters broadcast at the same time, on the same frequency, from the same location, in the same direction, and at the same power, neither is likely to be heard.

Interference will, however, destroy the value of any resource, but usually government does not choose to displace the market to prevent interference. Two people cannot comfortably sit at the same time in the same desk chair. Yet this fact has not led government to parcel out the right to sit in a chair. Rather, ownership of the chair is taken to confer authority to exclude others from sitting in it, no matter how eager they may be to do so.

So interference, like scarcity, when offered to explain why government refuses to permit open markets in the right to use the electromagnetic spectrum, is a bogeyman. All resources are subject to interference in the sense that their value will decline if everyone attempts to use them at once. This is why governments recognize property rights (which include the right to exclude others from using) in resources exchanged through the marketplace. Therefore, the issue

27. Furthermore, as will become clear in subsequent chapters, the government control over allocation ensures that there will be an excess demand, which in turn produces a conclusion of scarcity that provides the initial pretext for regulation. *See* J. Gregory Sidak, *Telecommunications in Jericho,* 81 CALIF. L. REV. 1209, 1227–31 (1993).

is not whether effective use of the spectrum requires assurances of protection from interference. Surely it does. Rather, the issue appears to be whether the problem or risk of interference in telecommunications is sufficiently unique (as compared, for example, with upstream interference with downstream water users or adjacent landowners' interference with underground oil wells) to compel government to control the spectrum rather than to define the extent to which ownership conveys an authority to exclude.

Conclusions

The ultimate regulatory question about the electromagnetic spectrum, then, is not whether broadcasters enjoy privileged access to a valuable and scarce resource. They do. Anyone who receives any property from the government enjoys privileged access to a valuable and scarce resource. The ultimate questions are, rather, whether the spectrum should be allocated administratively and, if so, why.

Allocating the spectrum by administrative fiat rather than by private-sector, open-market auctions may be wise.[28] Perhaps peculiar features of the spectrum resource mean that spectrum markets will not work well. This fact, however, does not seem to justify imposing any additional structural or behavioral regulations on the industry beyond those necessary to protect the technical aspects of the allocation system, such as prohibitions on interference. In particular, the fact that broadcasters are given access to the spectrum does not seem to provide any reason for failing to accord them First Amendment rights to be free of content regulation, rights that are as fully robust as those enjoyed by publishers, street speakers, or performing artists.

SUMMARY

When assessing whether any industry operates in the public interest, we usually ask whether informed consumers of the industry's product can obtain that which they desire from a competitive market. Broadcast

28. Although, as we have seen, such allocation is not justified by the commonly expressed rationales that the spectrum is scarce and that government allocation is necessary to prevent interference.

regulation seems to rest on the premise, however, that this industry requires supervision of its structure and behavior by an independent, expert agency that determines what products (that is, broadcasts) are or are not in the public interest.

In this chapter, to lay a sound foundation for a review of the history of FCC public interest regulation of broadcast programs, we have examined the four assertions (or assumptions) that commonly underlie defenses of such regulation:

1. Broadcasters are monopolists.
2. Broadcast programs are a uniquely pervasive presence in the homes of Americans and are uniquely accessible to unsupervised young children.
3. Competition in broadcasting does not fully satisfy the goals we should have for the performance of this industry.
4. Broadcasters enjoy access to a unique—and uniquely scarce—resource, the electromagnetic spectrum.

Assertion 1 is patently untrue. A more limited version of this assertion—that broadcasters sometimes enjoy some market power—is probably correct, but it is quite unclear what types of content regulation the assertion might justify. Assertion 2 may be correct, but will justify little, if any, content regulation of broadcast programs. Assertion 3 is neither provable nor falsifiable. Assertion 4 is not correct and, if it were, it seems incapable of serving as a justification for content regulation.

Pulling these conclusions together, we see that conventional theories of regulation suggest that a rigorous definition of the FCC's mandate to regulate in the public interest might lead the agency to adopt some modest content-based regulations (depending on their costs and benefits) to diversify or to circumscribe the range of broadcast programming that unregulated markets would otherwise provide. One serious issue seems to be whether competition in the provision of broadcast programs will, because these programs are public goods or because broadcasters exercise some market power, produce insufficiently diverse programming. Careful policy analysis must ask whether there are cases in which the benefits of regulation designed to achieve

diversity exceed its costs or vice versa. A second key issue is whether broadcasting's pervasive presence and accessibility to children justifies some carefully tailored and narrowly circumscribed rules that protect young people from injurious programming without unduly circumscribing the interests of adults or children in the free flow of information and entertainment.

If all of the foregoing analyses are correct, these are the only questions that will, in the end, merit serious consideration (subject only to any limitations the Constitution may impose). The next two chapters explore what content regulations the FCC has adopted or seriously considered to expand program diversity (Chapter 4) or to exact a measure of conformity (Chapter 5).

4

Diversity

DOES THE PUBLIC INTEREST permit or require the Commission to mandate certain program types to enhance diversity? As we observed in Chapter 3, the public interest is neither self-defining nor self-evident. If the Commission is to implement the public interest rationally, it first needs a theory of what regulation is supposed to accomplish and how it works.

For some, however, any such grand theory is beside the point. Senator Clarence Dill loved the elasticity of the public interest standard. So did Felix Frankfurter when he wrote for the Supreme Court. As life-long regulator-observer Henry Geller has said, "all the 'public interest' means is, 'We give up. Congress doesn't know.'"[1]

But commissions and courts are constrained, if only by their interactions with each other, to couch what they do in rational, public-regarding justifications that seem to be consistent with other policies adopted in analogous contexts. Consequently, the FCC usually has rested its regulations of program content, or regulations of industry structure and behavior that are designed principally to affect program content, on one or more of the four justifications identified in Chapter 3.

1. ERWIN KRASNOW, LAWRENCE LONGLEY & HERBERT TERRY, THE POLITICS OF BROADCAST REGULATION 251 (3d ed., St. Martin's Press 1982). The public interest "is ill-defined to the point of being meaningless." Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, 56 LAW & CONTEMP. PROBS. 145, 147 (1993).

In Chapters 4 and 5 we describe the evolution of those regulations. As a general matter, the Commission's attempts to alter the programming choices that would otherwise result from unregulated broadcast markets can be placed in one of two categories: those designed to add to the choices available to viewers and listeners, and those designed to reduce those options. The former, usually justified as attempts to generate "diversity" that would not otherwise exist, we describe here in Chapter 4. The latter, typically justified as necessary means to require broadcasters to conform to a public need for minimal standards of decency or taste, we review in Chapter 5.

Minimum Diversity Levels

In the mid-1970s a federal court observed that the only way that broadcasters could fulfill their obligations under the Communications Act was to air programs that met "somebody's view of what constitutes the 'public interest.'"[2] That could not be the determination of the broadcaster because the licensee "is in an obvious conflict of interest."[3] Nor could viewers and listeners define the public interest, "[s]ince the public cannot through a million stifled yawns convey that their television fare, as a whole, is not in their interest."[4] Hence, someone had to have the authority. The FCC, with the assistance of Congress, must determine what programming is in the public interest, at least by "interesting itself in general program format and the kinds of programs broadcast by licensees."[5]

Although there is great ambiguity about what constitutes programming in the public interest, some types of programs so obviously qualify that they engender no debate. Programming that informs viewers about the issues of the day (and the future), as well as information on which viewers may cast a knowledgeable ballot, are of this order. The FCC and Congress have consistently believed that

2. National Ass'n of Indep. Television Producers & Distribs. *v.* FCC, 516 F.2d 526, 536 (2d Cir. 1975).

3. *Id.*

4. *Id.* Why turning off their sets and letting the ratings drop would not work was unexplored by the court.

5. *Id.*

producing this type of programming was mandated by the public interest, and the Fairness Doctrine and equal-time provision were designed to force broadcasters to air such programs. High-quality programming of whatever type is also in the public interest,[6] but the FCC has been hesitant to specifically require it, possibly because of the uncertainty about what constitutes high-quality programs.

The Fairness and Related Doctrines

The Fairness Doctrine[7] requires stations to inform their viewers and listeners about the major issues of the day and to do so in a roughly balanced manner. Although the doctrine was officially promulgated in the 1949 report, *Editorializing by Broadcast Licensees*,[8] its roots go back to the FRC's hostility to "propaganda stations." In *Great Lakes Broadcasting* the FRC stated that when a program consists of discussion of "public questions," the public interest mandates "ample play for the free and fair competition of opposing views."[9] Accordingly, as the FRC warned WEVD, a station must "operate with due regard for the opinions of others."[10]

The Commission's concern that stations "[present] all sides of important public questions fairly, objectively and without bias" resulted, in the 1940 *Mayflower Broadcasting* decision, in the conclusion that a station could never editorialize.[11] The Commission stated that "[r]adio can serve as an instrument of democracy only when devoted to the communication of information and exchange of ideas fairly and objectively presented."[12] The so-called *Mayflower* Doctrine

6. Citizens' Communications Ctr. *v.* FCC, 447 F.2d 1201, 1213 n.35 (D.C. Cir. 1971).

7. What follows is brief and descriptive. *See infra* Chapter 9 for a comprehensive description and analysis of the Fairness Doctrine.

8. Editorializing by Broadcast Licensees, Report of the Commission, Dkt. No. 8516, 13 F.C.C. 1246 (1949) [hereinafter Broadcast Licensees].

9. Great Lakes Broadcasting, Grounds for Decision of the Commission, FRC, THIRD ANN. REP. 33 (1929).

10. FRC, Decision, SECOND ANN. REP. 154 (1928) (reporting decisions of Aug. 22, 1928).

11. Mayflower Broadcasting Corp., Proposed Finding of Fact and Conclusions of the Commission, 8 F.C.C. 333, 340 (1940).

12. *Id.*

assumed that a licensee that took an editorial position could not meet the "requirements inherent in the conception of the public interest"[13] to present fairly all viewpoints about controversial issues.

When the Fairness Doctrine was officially announced in 1949, *Mayflower*'s major premise—that the public interest required licensees to "[present] all sides of important public questions fairly"[14]—was retained, but the conclusion that licensee editorializing was inconsistent with overall fairness was discarded. The FCC now took the position that a licensee not only could, but should, air editorials; its duty was to be fair to all sides. Articulating the Fairness Doctrine and its underlying principles, the Commission spoke of "the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different . . . viewpoints concerning . . . controversial issues."[15] In words the Supreme Court would echo twenty years later, the Commission concluded that "[i]t is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public . . . which is the foundation stone of the American system of broadcasting."[16]

Having announced the Fairness Doctrine, the Commission returned to more pressing tasks: allocating television stations to communities and then to licensees. Fairness complaints, like all other aspects of the licensees' performances in the public interest, were considered at renewal time. Because the Commission was loathe to deny renewal of a license except for the most flagrant, egregious conduct, this meant that for all practical purposes fairness complaints were not considered at all.

Once VHF licensing was behind it, however, the Commission demonstrated a keen interest in the Fairness Doctrine. Indeed, most key aspects of the doctrine were worked out between 1962 and a summarizing report in 1974.[17] The triggering development was procedural. At

13. *Id.*
14. *Id.*
15. Broadcast Licensees, *supra* note 8, at 1249.
16. *Id.*
17. The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standard of the Communications Act, Fairness Report, Dkt. No. 19260, 48 F.C.C.2d 1 (1974) [hereinafter Handling of Public Issues].

the suggestion of a young staff attorney, Henry Geller, the Commission decided in 1962 that it would rule on fairness complaints as they were received rather than wait until renewal time. As a result, the complaints were taken seriously. Furthermore, the promise of adjudication produced complaints for adjudication.

Then, in 1963, in response to a licensee's request for clarification, the Commission announced its *Cullman* Doctrine. *Cullman* required that if only one side of an issue was presented during a sponsored program—as was the attack on the proposed Nuclear Test Ban Treaty that Cullman Broadcasting inquired about—the other side must be presented even if no one was willing to pay.[18] Soon the Commission expanded the Fairness Doctrine to encompass cigarette advertising[19] (and the D.C. Circuit extended that to controversial advertising in general),[20] and promulgated its personal attack rule that required licensees to notify individuals or groups attacked during the broadcast of controversial public issues and to give those attacked a reasonable opportunity to respond.[21]

The Commission determined that Red Lion Broadcasting had violated the Fairness Doctrine when it broadcast a paid program attacking liberal writer Fred Cook and did not afford him an opportunity to reply. This latter development resulted in the Supreme Court's holding for the first time that the Fairness Doctrine did not abridge but enhanced freedom of the press.[22] Paraphrasing the FCC's 1949 report, the Court wrote that "[i]t is the right of viewers and listeners, not the right of broadcasters, which is paramount."[23]

Red Lion, especially the sentence just quoted, was read by many as an invitation to the Commission to compel citizen access to broadcasting whereby airtime would be granted on some basis for citizens (or groups) to raise and discuss issues of importance to them.

18. Cullman Broadcasting Co., Inc., Responsibility Under the Fairness Doctrine, Dkt. No. 63-849, 40 F.C.C. 576 (1963).

19. *See infra* Chapter 6 (The Malleable Public Interest: Cigarette Advertising).

20. Friends of the Earth *v.* FCC, 449 F.2d 1164 (D.C. Cir. 1971).

21. Radio Broadcast Services, Personal Attacks; Political Editorials, 32 Fed. Reg. 10,303 (1967).

22. Red Lion Broadcasting *v.* FCC, 395 U.S. 367 (1969).

23. *Id.* at 390. Note that the Court omitted "Government" from the "not" part of the quotation.

The 1949 report, however, had held "the public" to be paramount while simultaneously rejecting the claims of "any individual member of the public."[24] Duties fell on licensees and could not be delegated elsewhere. Furthermore, section 3(h) of the Communications Act forbade imposing common carrier status on broadcasters.[25] Accordingly, the Commission flatly rejected citizens' claims to access.[26] The D.C. Circuit differed,[27] but the Supreme Court agreed with the Commission.[28] The Fairness Doctrine left decisions about who and what to cover to the licensees' discretion.

While the Commission refused to expand the Fairness Doctrine to encompass access, it almost simultaneously contracted the doctrine by reversing its earlier conclusion (which the D.C. Circuit had enthusiastically embraced in *Banzhaf* v. *FCC*)[29] that the Fairness Doctrine encompassed cigarette advertising.[30] The Commission had initially thought that it could limit *Banzhaf* to cigarettes only. When the D.C. Circuit held that such a limitation was irrational,[31] the Commission realized that it was indeed faced with a parade of horribles: "And now a word against our sponsors." Instead, it simply retreated to its pre-*Banzhaf* position that ordinary product commercials raise no fairness issues,[32] and the courts acquiesced.[33]

All those events culminated in a 1974 FCC report that summarized and codified developments to that point. The report demarcated a mature Fairness Doctrine and an FCC confident that the doctrine operated without significant adverse consequences.[34]

24. Broadcast Licensees, *supra* note 8, at 1249.

25. 47 U.S.C. § 153(h).

26. Complaint by Business Executives' Move for Vietnam Peace, Concerning Fairness Doctrine, 25 F.C.C.2d 242 (1970).

27. Business Executives' Move for Vietnam Peace *v.* FCC, 450 U.S. 642 (D.C. Cir. 1971).

28. CBS *v.* Democratic National Committee, 412 U.S. 94 (1973).

29. Complaint Directed to Station WCBS-TV Concerning the Fairness Doctrine, 8 F.C.C.2d 381 (1967), *aff'd*, Banzhaf *v.* FCC, 405 F.2d 1082 (D.C. Cir. 1968).

30. The cigarette controversy is fully discussed *infra* Chapter 6 (The Malleable Public Interest: Cigarette Advertising).

31. Friends of the Earth *v.* FCC, 449 F.2d 1164 (D.C. Cir. 1971).

32. Handling of Public Issues, *supra* note 17, at 23.

33. Public Interest Research Group *v.* FCC, 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).

34. Handling of Public Issues, *supra* note 17, at 7–8.

Over the next decade that position became increasingly untenable. In response to growing criticism of the Fairness Doctrine as, in effect, a "tax" on the presentation of controversy, the Commission began a new study of the doctrine. The result was a 1985 FCC report concluding that the doctrine did not further the public interest, but did indeed cause a chilling effect on broadcasters, and thus reduced their incentives to air programming that raised controversial issues. The report also concluded that only Congress (by legislation) or the courts (by invalidating the doctrine under the First Amendment) could correct the problem.[35] The D.C. Circuit quickly disabused the FCC of the notion that the Commission was powerless to do anything,[36] and in 1987 the Commission repealed the Doctrine administratively.[37] The D.C. Circuit found the repeal supported by public interest considerations,[38] and the Supreme Court denied certiorari.[39] Congress, meaning the Democrats, once passed a bill to recodify the doctrine,[40] but President Ronald Reagan vetoed it.[41]

During most of the time we were writing this book, many industry observers expected Congress to pass, and President Bill Clinton to sign, a bill enacting the Fairness Doctrine into law. Alternatively, the doctrine's proponents probably will also seek to present the legality of the FCC's 1987 repeal to other federal circuit courts, in the hope of generating a conflict with the D.C. Circuit that will trigger Supreme Court review or else pressure a reconstituted Commission to readopt the doctrine.

35. Inquiry into § 73.1910 of the Commission's Rules and Regulations Concerning General Fairness Doctrine Obligations of Broadcast Licensees, Report, Gen. Dkt. No. 84-282, 102 F.C.C.2d 143 (1985).

36. Radio Television News Directors Ass'n *v.* FCC, 809 F.2d 863 (D.C. Cir. 1987).

37. Complaint of Syracuse Peace Council, Memorandum Opinion and Order, 2 F.C.C. Rcd. 5043 (1987).

38. Syracuse Peace Council *v.* FCC, 867 F.2d 654 (D.C. Cir. 1989).

39. 493 U.S. 1019 (1990). *See* Devins *supra* note 1, at 152-65.

40. S. REP. NO. 742, 100th Cong., 1st Sess. (1987), *reprinted in* 133 CONG. REC. H4160 (June 3, 1987).

41. RONALD REAGAN, 1 PUB. PAPERS 690 (1987).

Political Broadcasting – Equal Time

The best-known provision in the Communications Act is section 315, the so-called equal-time provision. Section 315 is not precisely an equal-time rule; rather, it provides that if a broadcaster allows one candidate to gain airtime, the broadcaster must allow the candidate's opponents a like opportunity. Thus, if free time is given to *A*, free time must be given to *B*. But if *A* pays, then *B* must also pay. If *B* has no money left to buy airtime, then *B* must be consoled by Anatole France's observation that the "law in its majestic equality forbids the rich as well as the poor from sleeping under the bridges of Paris."[42]

Congress did not leave creation of equal opportunities to chance or to the Commission. Section 18 of the 1927 Radio Act contained the equal-time provision that is now section 315 of the Communications Act of 1934. Radio was a novel instrument in 1927, but legislators foresaw the impact it could have on them. If a station turned itself over to one candidate while denying the other airtime, this might affect the election result. With reelection prospects at issue, the debate that brought forth section 18 of the 1927 Radio Act was full and careful. There was never any doubt that Congress was going to place some provision about candidates' access to the air in the Radio Act; the only question was the content of the regulation.[43]

Western progressive senators, who had made careers out of fighting railroads and utilities, saw the emerging industry as the latest incarnation of monopoly. Furthermore, as monopolists, broadcasters might well back an incumbent's opponent and deny the incumbent airtime. This could not be in the public interest. Representative E.L. Davis of Tennessee combined these two fears perfectly by speaking of a monopoly which could "charge one man an exorbitant price [or arbitarily exclude him] and permit another man to broadcast free or at a nominal price."[44] Senator Robert Howell of Nebraska saw radio as a "supervehicle of publicity" and worried that one day legislators

42. ANATOLE FRANCE, THE RED LILY 91 (Modern Library 1917).

43. HUGH CARTER DONAHUE, THE BATTLE TO CONTROL BROADCAST NEWS 9–18 (MIT Press 1989); David H. Ostroff, *Equal Time: Origins of Section 18 of the Radio Act of 1927*, 24 J. BROAD. 367 (1980).

44. 67 CONG. REC. 5483 (1926).

would awaken and find that they had "created a Frankenstein monster."[45] Section 18 was the method of tethering the potential monster's effects.

FCC enforcement was easy and limited because the Commission construed section 315 according to its literal terms.[46] Then, in February 1959, the evening news on Chicago's WBBM and WNBQ showed Mayor Richard Daley greeting the president of Argentina at Midway Airport during a snowstorm. Mayor Daley was running for reelection, and one of his opponents, Lar "America First" Daly, demanded equal free airtime because of Mayor Daley's "use" of the two stations. The stations, quite naturally, refused. Mayor Daley's greeting was news, and Lar Daly, a perennial candidate who wore an "Uncle Sam" costume, was a joke. Not, however, at the FCC, which ordered the stations to grant Daly equal time.[47]

Congress was taken aback. Mayor Daley had simply done what incumbents do, and WBBM and WNBQ had done what incumbents expect broadcasters to do. The decision was universally denounced and bills to overturn it quickly went into the legislative hopper. An aging Clarence Dill flew East and testified that the 67th Congress had never intended anything as crazy as requiring a station to think about equal time when deciding whether to put an incumbent on the news. In just three months, section 315 was amended. News was exempted from the equal-time constraints.[48]

By that time there was one side-effect of section 315 that was well known. Broadcasters were reluctant to grant free airtime to participants in a multicandidate race. The 67th Congress had understood that equal time would apply to non-major-party candidates. Senator Robert LaFollette's 1924 third-party candidacy was fresh in the minds of many

45. *Id.* at 12,503.

46. A major exception was President Eisenhower's speech to the nation, a week before the 1956 election, on the Suez crisis. The Commission initially refused to rule on whether Governor Stevenson was entitled to airtime, and then, when the networks gave Stevenson free time, ruled that broadcasting Eisenhower's speech had not triggered an obligation. LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 154–56 (University of California Press 1987).

47. Reconsideration and Motions for Declaratory Rulings or Orders Relating to the Applicability of § 315 of the Communications Act of 1934, as amended, to Newscasts by Broadcast Licensees, Interpretive Opinion, 26 F.C.C. 715 (1959).

48. DONAHUE, *supra* note 43, at 55–66.

legislators.[49] But LaFollette was a serious candidate. Many races, like the Chicago mayoralty, attracted a number of frivolous candidates. And even the most public-spirited station is unlikely to waste airtime on debates where fringe candidates receive equal time with the (usually two) main candidates. This was especially true at the presidential level, where sometimes two dozen individuals become legally qualified in one state or another.

In August 1960 Congress suspended section 315 for one season to allow presidential debates. Millions watched the "Great Debates" that may have provided the margin of victory for John Kennedy.[50] Their successes, however, produced no follow-up. The needs of Lyndon Johnson and then Richard Nixon prevented subsequent Congresses from authorizing debates. Then, in 1975, the Commission took the first of two decisions that allowed the "bona fide news event" exception to swallow the prohibition against granting free time to major candidates while ignoring the minor ones. The Commission ruled that if debates between candidates were scheduled by a third party, then they could be covered as a bona fide news event.[51] Under the exception Congress enacted to overrule the *Lar Daly* rule, this coverage would not trigger an obligation to give equal time to those candidates not represented at the debate.

Eight years later the Commission completed the process by recognizing the obvious and ruling that it was the debates themselves, not sponsorship by a third party (such as the League of Women Voters), that were bona fide news events. This freed broadcasters to cover genuine debates no matter how they came about.[52] Essentially the Commission concluded that section 315, by thwarting election

49. Ostroff, *supra* note 43, at 370–72.

50. THEODORE H. WHITE, THE MAKING OF THE PRESIDENT 1960 293–94 (Atheneum 1961).

51. Petition of the Aspen Institute Program on Communications and Society and CBS, Inc., for Revision or Clarification of Commission Rulings Under §§ 315 (a)(2) & 315 (a)(4), Declaratory Order, Memorandum Opinion and Order, 55 F.C.C.2d 697 (1975).

52. Petitions to Change Commission Interpretation of Subsections 315 (a)(3) and (4) of the Communications Act, Report and Order, BC Dkt. No. 82-564, 54 Rad. Reg. 2d (P & F) 1246 (1983), *aff'd,* League of Women Voters Educ. Fund *v.* FCC, 731 F.2d 995 (D.C. Cir. 1984).

campaign coverage, was not operating in the public interest, and that the risks of abuse of deferring to broadcaster judgments were minimal.

While the Commission contracted the sweep of section 315 when it concluded that the statute deterred coverage, it has also expanded section 315 where it deemed it necessary, although the agency has also relied on the Fairness Doctrine in those cases. Thus, if a station editorializes for one candidate, it must grant his opponents free time to respond. Furthermore, under the *Zapple* rule, if the station sells time to supporters of candidate *A*, it must sell like time to supporters of candidate *B*. That *Zapple* takes section 315 rather than the Fairness Doctrine as its principal source is apparent from both the requirement of equal opportunities and the Commission's statement that *Cullman* obligations are not required. Thus, just like section 315, if supporters of candidate *B* cannot afford to buy the time, the station need not air their message free.[53] The Commission has yet to state whether either of these rules survives repeal of the Fairness Doctrine, although if we are correct that they take their inspiration principally from section 315, then both should remain.

Finally, as part of pre-Watergate campaign reform, Congress granted to candidates for federal office the right to purchase airtime for their ads at the broadcaster's lowest unit charge.[54] Previously, consistent with section 315, a station could always refuse to provide any time to any candidate. Congress determined that the possibility that candidates for federal office might not gain airtime for ads was not in the public interest and remedied it with section 312(a)(7). This guaranteed access builds upon section 315's lesser-known provision requiring that time be sold to candidates at the station's "lowest unit charge" for the same classes and amounts of time.

53. Request by Nicholas Zapple, Communications Counsel, Committee on Commerce for Interpretative Ruling Concerning § 315 of the Fairness Doctrine, Dkt. No. 70-598, 23 F.C.C.2d 707 (1970).

54. 47 U.S.C. § 312(a)(7). The statute was held to be constitutional in CBS *v.* FCC, 453 U.S. 367 (1983) (also known as *Carter/Mondale*).

Quality Programming

Complaints about the quality of television are an American staple. No one has done it better than John Kennedy's FCC Chairman, Newton Minow. His Vast Wasteland speech,[55] delivered to the convention of the National Association of Broadcasters, was a blistering diatribe on the quality of television: "When television is bad, nothing is worse."[56] To be sure, Minow noted that some programs were good and "enriched" the viewers, but these were so few that he could—and did—name them for his audience.[57] Yet at the end of a speech that, his protestations to the contrary notwithstanding, sounded in censorship, Minow appealed to his audience's better instincts rather than suggest a regulatory solution.

Minow understood that quality cannot be legislated and that, as the 1960 *Commission Policy on Programming* stated, licenses could not be conditioned upon the Commission's "own subjective determination of what is or is not a good program."[58] But members of the FCC have not always been so perceptive. In the days just before the dawn of television, the FCC issued a fifty-nine-page booklet, *Public Service Responsibilities of Broadcast Licensees*[59] (the so-called *Blue Book* for its pale blue cover), that represented the Commission's blueprint for programming in the public interest.

The method of FCC instruction to its licensees was that of the fall from grace and the comparison of what a station might have offered with what it aired instead. The Commission named stations and programs. One of the prime examples given in the *Blue Book* is the programming history of WBAL, Baltimore, originally licensed to Consolidated Gas, Electric Light and Power Company. The station's programming policy stated that its goal was to air programming of

55. NEWTON MINOW, EQUAL TIME 48 (Atheneum 1964).

56. *Id.* at 52.

57. The shows were "The Fabulous Fifties," "The Fred Astaire Show," "The Bing Crosby Special," "Victory," "Twilight Zone," "The Nation's Future," "CBS Reports," and "The Valiant Years." *Id.* at 51–52.

58. Network Programming Inquiry, Report and Statement of Policy, 25 FED. REG. 7291, 7293 (1960) [hereinafter 1960 Programming Statement].

59. FEDERAL COMMUNICATIONS COMMISSION, PUBLIC SERVICE RESPONSIBILITIES OF BROADCAST LICENSEES (1946) [hereinafter BLUE BOOK].

"high musical and artistic standards."[60] Over 90 percent of the station's programs were rendered by its own studio organizations: WBAL Concert Orchestra, Opera Company, Salon Orchestra, Ensemble, Dinner Orchestra, String Quartet, Dance Orchestra, Male Quartet, Mixed Quartet, and Trio. Then WBAL was sold to the Hearst interests, and all that vanished. Instead of airing an NBC program "U.S. Coast Guard on Parade," the station broadcast transcribed music with six spot announcements.[61] Under Consolidated Gas, WBAL had been excellent; under Hearst, it was questionable whether WBAL operated in the public interest.

The *Blue Book* treated the public interest as encompassing four requirements: holding down advertising while airing public affairs programming, and providing sustaining (that is, unsponsored) programming and local live programming. In blunt terms the Commission promoted, first, live programming over that which was prerecorded and, second, unsponsored programming over that with commercials. Stations following this lead would produce quality programming and operate in the public interest.

Why did the Commission believe that some programming was so good that it might not be able to obtain a sponsor? One reason offered was that some excellent writers might reject a sponsor.[62] Another was that sustaining programs were the experimental laboratory of broadcasting. A station could try out new types, and as it found winners, they would acquire sponsorship.[63] A third reason was that some minority tastes ("having less than maximum audience appeal") deserved airtime regardless of sponsorship.[64] Finally, the Commission believed that sustaining programming was genuinely good, and it listed examples. Thus, Mutual affiliates were chided because so few aired the "Halls of Montezuma," which featured both the Sea Soldiers' Chorus and the Marine Symphony Orchestra.[65]

60. *Id.* at 7.
61. *Id.* at 9.
62. *Id.* at 17.
63. *Id.*
64. *Id.* at 15.
65. *Id.* at 32–33.

In Chapter 3 we questioned what localism could add to the proper mix of diversity and competition. It is hard to see what there is to live programming, beyond airing uncorrectable error—the 1946 version of "Boops and Bloobers"—that makes it superior to that which is taped. Furthermore, if local live programs were popular, there would be no need to require them. The Commission apparently believed that, like sustaining programs, once the audience had a chance to hear them, they would become popular. It praised a feed mill in Missouri that developed "a quartet called the 'Happy Millers,' which sang hillbilly and western music" over the local station and met with "phenomenal" public acceptance.[66] However excellent such programs are, we stand with Judge Henry Friendly, who questioned "whether the Commission is really wise enough to determine that live telecasts . . . e.g., of local cooking lessons, are always 'better' than a tape of Shakespeare's Histories."[67]

The view that quality comes from sponsorless or local or live programming appears today as a quaint relic of another era. Although high cost cannot guarantee quality, very low cost will almost guarantee its absence. The Prime Time Access Rule (PTAR) offers an excellent, and more recent, verification.[68] The PTAR forbids, with some exceptions, the ABC, CBS, and NBC television networks from offering more than three hours of prime time entertainment programming Monday through Saturday. When the FCC promulgated the PTAR in 1970, it expressed the view that the rule would stimulate the nonnetwork production of network quality prime time programming in the vacated time slot.[69] Thus, the rule would expand the number of suppliers of quality programs as it enabled syndicators to produce network quality programming (which presumably at its best is the best it gets).

The FCC had assumed that prime time quality is a function of the time slot during which the program is aired. A quarter century of the

66. *Id.* at 38.

67. Henry Friendly, *The Federal Administrative Agencies*, 75 HARV. L. REV. 1055. 1071 (1962).

68. Thomas G. Krattenmaker, *The Prime Time Access Rule*, 7 COMM/ENT 19 (1984).

69. Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting, Report and Order, 23 F.C.C.2d 382, 385–87 (1970); *see* Thomas Schuessler, *FCC Regulation of the Network Television Program Procurement Process*, 73 Nw. U. L. REV. 227, 287 (1978).

PTAR has demonstrated what everyone, certainly the FCC, should have known from the outset. Prime time quality rests on the tremendous economies of scale of networking whereby the network can spend more money to produce or acquire a program than a less widely distributed alternative and yet incur less cost per viewer in doing so.[70] When one takes away the economies of scale, as does the PTAR, one takes away the ability to create high-cost programming.[71] By so doing the rule virtually guarantees a lower quality for PTAR programs than those network programs that follow from 8:00 to 11:00 P.M.

Together, the *Blue Book* and the various formulations of the PTAR during the early 1970s suggest that the Commission may have a recurring tendency to try to induce quality programming directly by manipulating the conditions under which broadcast programs are produced. Those incidents also suggest, however, that such efforts are likely doomed from the outset. Quality is a function of viewers' desires and broadcasters' resources, elements the FCC cannot control.[72]

As one praises quality, it is also worth remembering the programming policy statement of WBAL when licensed to Consolidated Gas: because the station intended to "[maintain] high musical and artistic standards," jazz was forbidden.[73] When the PTAR failed to produce the anticipated programming, the FCC reworked it to allow the networks to program during the access period if they aired the right

70. FCC NETWORK INQUIRY SPECIAL STAFF, 2 NEW TELEVISION NETWORK ENTRY, JURISDICTION, OWNERSHIP AND REGULATION 217–30 (1980).

71. STANLEY M. BESEN, THOMAS G. KRATTENMAKER, A. RICHARD METZGER, JR. & JOHN R. WOODBURY, MISREGULATING TELEVISION 143 (University of Chicago Press 1984).

72. In a highly amusing, decade-long battle with the FCC throughout the 1970s, the D.C. Circuit attempted to mandate that radio stations with a nonduplicated classical music format be forced to maintain that format unless they could prove that it was not profitable. WNCN Listeners Guild *v.* FCC, 610 F.2d 838 (D.C. Cir. 1979). The rubric of the D.C. Circuit position was "unique format," and thus it could encompass any nonduplicated format that a station wished to abandon. But in reality it was about maintaining classical music. Despite D.C. Circuit orders beginning with *Citizens Committee* v. *FCC*, 436 F.2d 263 (D.C. Cir. 1970), the FCC refused to yield. Ultimately, after a decade of ping-pong between court and Commission, the Supreme Court intervened on the side of the FCC. FCC *v.* WNCN Listeners Guild, 450 U.S. 582 (1981). Market demand, not D.C. Circuit preferences, would thus decide whether a quality format would continue.

73. BLUE BOOK, *supra* note 59, at 7.

stuff: documentaries or children's programming.[74] Those were added to the already existing exceptions for the Olympics and the Rose Bowl (the former, in 1972, having been subject to the original version of the PTAR). There seems to be, in short, a consistent tendency to adopt definitions of quality that, at least in retrospect, are quite contestable.

Even if First Amendment considerations permitted the Commission to review specific programs to sort the good from the bad, government fiat cannot create high-quality programming, however fervently critics of television might wish otherwise. In nonbroadcast contexts the Supreme Court has understood this. Almost simultaneously with the publication of the *Blue Book*, the Supreme Court spoke to government determinations of acceptable literature: "What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another."[75]

Diversifying Program Mix

As it became obvious that the PTAR was not producing prime time quality programs, the FCC fell back on the rationale that at least it added new sources of programming, thereby increasing the chances of a more diverse fare in prime time.[76] From *Great Lakes Broadcasting* to the *Blue Book* to the PTAR to the present, the FCC has never wavered in its belief that diverse programming is in the public interest. The issue has always been how to achieve it.

Licensing Before 1960

The FRC was willing, as *Shuler* and *Brinkley* indicate, to deny renewal to aberrant stations. The purpose of the *Blue Book* was to alert licensees to their obligations so that the nonrenewal option was unnecessary. The industry reacted so strenuously and negatively to the

74. Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule § 73.658(k) of the Commission's Rules, Second Report and Order, Dkt. No. 19622 50 F.C.C.2d 829 (1975) [hereinafter Prime Time Access Rule].

75. Hannegan *v.* Esquire, 327 U.S. 146, 157–58 (1946).

76. Prime Time Access Rule, *supra* note 74, at 829.

Blue Book[77] and the political climate changed so rapidly that there was a question about whether the FCC could be serious about enforcing its strictures. Two subsequent decisions involving Hearst's WBAL demonstrated that the Commission was not serious.

A few months after the *Blue Book*, Hearst, uncontested, was awarded a VHF station in Baltimore. Later in the year the Public Service Radio Corporation, a group headed by columnist Drew Pearson and radio newsman Robert S. Allen, filed a competing application for WBAL's AM frequency. Yet Hearst prevailed after several years of hearings, notwithstanding the *Blue Book*'s criticisms of Hearst's programming and the fact that Hearst now had two major broadcast outlets in Baltimore. The key factor in Hearst's favor was the quality of his programming![78]

Thereafter, the FCC had little reason to challenge incumbent AM stations. The Commission focused its mission on passing out the golden eggs of VHF stations, not on stripping radio licensees of their right to broadcast. As noted earlier, Fairness Doctrine issues were also submerged by TV licensing in the 1950s. Indeed, in this period all programming issues took a back seat to allocating television stations. And when a programming issue finally did emerge at the end of the 1950s, it was the quiz show scandals.[79] FCC Chairman John Doerfer told an incredulous House committee that those scandals did not create violations of then-applicable law, and that because the licensees were unaware of the deception, those scandals did not implicate the public interest, either.[80]

77. *To Amend the Communications Act of 1934: Hearings on S. 1333 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 80th Cong., 1st Sess. (1947).

78. Application of Hearst Radio, Inc., for Renewal of License, Decision, Dkt. No. 7400, 15 F.C.C. 1149, 1177–79 (1951). That result had been foreshadowed by three decisions to renew in 1947 in which the licensees had serious shortcomings but convinced the Commission that they were trying to come into compliance with the *Blue Book*'s criteria.

79. Discussed *infra* Chapter 6 (The Creation of the Public Trustee Image).

80. KENT ANDERSON, TELEVISION FRAUD 144 (Greenwood Press 1978), notes that Doerfer "was probably the most besieged witness of the hearings." That is going some, since many of the other witnesses had been actively involved in perpetrating the fraud on the public. Anderson's view nevertheless appears accurate. The representatives could not comprehend the public official in charge of the FCC explaining that existing law precluded agency action and that the problem was sufficiently difficult that a change in

Licensing After 1960

The 1960 Programming Statement. Like the *Blue Book*, the *1960 Programming Statement*[81] reflected the belief that a licensee should offer its viewers[82] a balanced programming diet. Lest a licensee wonder what constituted balanced programming, the Commission listed the "major elements usually necessary to meet the public interest."[83] Balance required fourteen (overlapping) types of programs: "1. Opportunity for Local Self-Expression, 2. The Development and Use of Local Talent, 3. Programs for Children, 4. Religious Programs, 5. Educational Programs, 6. Public Affairs Programs, 7. Editorialization by Licensees, 8. Political Broadcasts, 9. Agricultural Programs, 10. News Programs, 11. Weather and Market Reports, 12. Sports Programs, 13. Service to Minority Groups, 14. Entertainment Programming."[84]

The Commission expressly abandoned the *Blue Book*'s infatuation with sustaining programming because it recognized that sponsorship had nothing to do with the public interest of the program. The Commission stated that broadcasters should know their community and be responsive to its "tastes, needs and desires." If a broadcaster did, "he has met his responsibility."[85]

The *1960 Programming Statement* mentioned neither quantity nor quality. The explanation appears to be that the statement, issued after a staff study and an *en banc* hearing, was a preliminary report and further proceedings were anticipated. Although these never occurred, within three years a series of actions substantively implemented the

the law to deal with the problem might not be beneficial. Thus, Representative John Moss explosively asked Doerfer: "Regulating in the public interest could not require that the public be protected against fraud?" *Investigation of Television Quiz Shows: Hearings Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 535 (1960).

81. 1960 Programming Statement, *supra* note 58, at 7291.

82. Although it does not say so explicitly, the *1960 Programming Statement* was written with television at the forefront of the FCC's agenda. Between 1946, when the *Blue Book* was published, and 1960, the agency's concerns about broadcast programming had shifted largely from radio to television programs.

83. 1960 Programming Statement, *supra* note 58, at 7295.

84. *Id.*

85. *Id.*

1960 Programming Statement. Each action took the form of a revision or elaboration of the processes to which licensees were subjected at renewal time. Collectively, those actions virtually guaranteed renewal for those who took seriously the *1960 Programming Statement*'s policies.

Comparing Promise with Performance. The renewal application of station KORD-AM from the Tri-Cities area of Washington was the first step. KORD's programming during its prior three years had varied substantially from what KORD had told the Commission it intended to do. In the spring and summer of 1961, KORD's renewal application was first designated for a hearing, and then, in response to KORD's pleading of surprise, the station received a short-term renewal.[86] The message was clear: a station's word was its bond.

Minow's Vast Wasteland speech had a similar message. The Commission was going to take renewals seriously; maybe, his listeners would think, "*too* seriously."[87] The Commission intended to match programming promises with programming performance. Where was the line to be drawn between automatic renewal and a hearing? "Why should you want to know how close you can come to the edge of the hill?"[88] Instead of worrying about the line and "playing brinksmanship with the public interest," do better.[89] Minow thus simultaneously urged broadcasters to offer more and told them they would be held to it. Furthermore, not only should the station ascertain community "tastes, needs and desires," but the FCC might do the same and find out whether the community really cared about the station.[90]

Matching promises to performance was an attractive idea. The Commission, like many a parent, has always viewed telling an untruth as more reprehensible than the activity the untruth is supposed to conceal. "Promises versus performance" was just another application of this general principle. Furthermore, First Amendment issues—to the

86. Application of KORD, Inc., for Renewal of License, Memorandum Opinion and Order, File No. BR-3410, 21 Rad. Reg. (P & F) 781 (1961).
87. MINOW, *supra* note 55, at 57 (emphasis in original).
88. *Id.* at 58.
89. *Id.*
90. *Id.* at 57–58.

extent they existed—could be pushed further to the background by focusing on what the licensee promised to do rather than on the licensee's programming.

Ultimately, the charm of promises versus performance stemmed from the FCC's ability to create circumstances so that the licensee's promises would closely match Commission preferences. Processing guidelines and an ascertainment policy, the second and third steps toward turning the *1960 Programming Statement* into legal constraints, were attempts to do just that.

Processing Guidelines. Less than two months after Minow's speech, the Commission, through an informal directive to the staff on routine license renewals, authorized *pro forma* grants if the renewal application met certain criteria (or explained to the staff's satisfaction why it did not).[91] If the application came up short, then only the entire Commission could grant a renewal. The so-called processing guidelines specified limits on commercials, set ceilings on entertainment and network programming, and provided that failure to air programs in most of the fourteen categories (sports, weather, and children were not mentioned) required an explanation.[92]

The goal of the processing guidelines was to get broadcasters to do "more" by establishing a floor to see whether they had done enough. The theory was sound; its immediate implementation was flawed. The Commission did not publish the guidelines, probably did not set the floor high enough, but did not enforce it anyway.

The point of a floor is to guarantee that no one falls below it. Minow, wanting broadcasters to guess where the floor was, lost the ability to set it where all could see it. A licensee, unwilling to take chances, might have upped its nonentertainment programming to the Commission's minimum if only the station knew what that minimum was.

91. Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order, Dkt. No. 83-670, 98 F.C.C.2d 1076, 1078 n.3 (1984) [hereinafter Television Deregulation].

92. *Id.*

This defect was finally cured in 1973 by a public announcement of the guidelines, trimmed, however, to a promise of 10 percent nonentertainment programming.[93] If Minow and subsequent members of the Commission had wanted more nonentertainment programming, they could have set a higher floor. Apparently, they did not believe that higher minimums were sustainable (maybe because of broadcast economics, maybe because they doubted their own willingness to enforce the rules). Nor were the Commissioners willing or able to require that the public interest programming be spread across the fourteen categories set out in the *1960 Programming Statement*. Finally, the Commission neither stripped licenses nor set renewals for hearings if a station fell below the minimums. In practice, whatever reasons a station offered were sufficient for what it aired.[94]

In 1984, as part of the general deregulation of television, the Commission dropped the guidelines. It found that in the expanded market virtually all stations exceeded the minimum anyway, and so the guidelines no longer served a purpose.[95]

Ascertainment. Before the *1960 Programming Statement* a licensee was assumed to know its community either because the licensing criteria preferred local people active in civic affairs or because, to succeed, a broadcaster, like any entrepreneur, had to know what customers want. The *1960 Programming Statement* carried this further with several statements alerting the broadcaster to "consider the tastes, needs and desires of the public he is licensed to serve in developing his programming and [to] exercise conscientious efforts not only to ascertain them, but to carry them out as well as he reasonably can."[96] By 1971 this became a full-fledged formal requirement of the FCC, complete with a *Primer*,[97] which then-Professor Douglas Ginsburg aptly character-

93. Amendment of Part O of the Commission's Rules—Commission Organization—with Respect to Delegations of Authority to the Chief, Broadcasting Bureau, Order to Delegation of Authority, 43 F.C.C.2d 638, 640 (1973).

94. Applications for Renewal of Standard Broadcast and Television Licenses for Oklahoma, Kansas and Nebraska, 14 F.C.C.2d 1 (1968).

95. Television Deregulation, *supra* note 91, at 1080–85.

96. 1960 Programming Statement, *supra* note 58, at 7295.

97. Primer on Ascertainment of Community Problems by Broadcast Applicants, Report and Order, Dkt. No. 18774, 27 F.C.C.2d 650 (1971).

ized as "a monument to the imagination of lesser government servants, few of whom have ever been given so free a hand to issue guidelines."[98]

The ascertainment aspect of the *1960 Programming Statement* was infused with substance almost immediately in *Suburban Broadcasting*,[99] where an application was filed for an Elizabeth, New Jersey, FM station that was an exact duplicate of applications Suburban had filed for FM stations in Alameda, California, and Berwyn, Illinois. Although there was no competing application, the Commission denied Suburban's on the ground that the individuals wholly lacked knowledge of the area they intended to serve.

After the FCC issued the *Ascertainment Primer* a decade later, lack of knowledge would have been impossible. The *Primer* issued in 1971 and then updated (by splitting initial applications from renewals) in 1976[100] required, in mind-numbing detail, random surveys of the community, plus interviews with community leaders, taken from nineteen specified categories, to determine the problems—not the programming desires—of the community. It was, in the words of Commissioner Glen Robinson, "an adult education course in local civics."[101] At the course's conclusion, the broadcaster was to determine what programming to offer that dealt with (some of) the problems thereby ascertained.

For broadcasters, ascertainment, which cost between $2,500 and $9,000 per year,[102] was an IQ test. If they could follow the *Primer*, they would be renewed without hassle. But if they erred procedurally and had an angry constituent group, then they faced Commission hearings.[103] The problems with ascertainment were multifold. The Com-

98. DOUGLAS H. GINSBURG, REGULATION OF BROADCASTING 183 (West Publishing Co. 1978).

99. Applications of Patrick Henry et al., Suburban Broadcasting, Decision, File No. BPH-2731, 20 Rad. Reg. (P & F) 951 (1961), *aff'd sub nom.* Henry *v.* FCC, 302 F.2d 191 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 821 (1962).

100. Ascertainment of Community Problems by Broadcast Applicants, First Report and Order, Dkt. No. 19715, 57 F.C.C.2d 418 (1976) [hereinafter Ascertainment Primer].

101. *Id.* at 460 (Commissioner Robinson, dissenting).

102. Television Deregulation, *supra* note 91, at 1100.

103. Bamford *v.* FCC, 535 F.2d 78 (D.C. Cir. 1976); Application of Maranatha, Inc., Memorandum Opinion and Order, Dkt. No. 83-670, 56 F.C.C.2d 194 (1975); Application of Frank M. Cowles for Construction Permit, Decision by the Review

mission never inquired whether ascertainment was either necessary or valuable.[104] Nor was it willing to state that the purpose of ascertainment was to force licensees to air programs that community interest groups wanted. Ascertainment was entirely about process. But local groups, unhappy about the station, cared less about process; they were interested in programs. Yet the two never met. All the Commission would do was determine whether the process was good enough. If it was, then the product was deemed satisfactory.[105]

As a result, in the Commission's own words, ascertainment created "litigation over trivia."[106] Everyone likes to recount a favorite ascertainment absurdity. Ours is the Commission's solemn pronouncement on whether an ascertainment interview that took place at a restaurant where a belly dancer performed was sufficiently serious to count.[107] If the interview did not count, then the ascertainment was defective, and a hearing would be necessary on whether the public interest would be served by a renewal.

When the Commission finally considered television deregulation, ascertainment, the laughing stock of everyone except those required to pay and those who wanted any method available to litigate, was a sure goner. By the Commission's own estimate, eliminating its ascertainment rules saved the industry almost 67,000 work hours annually.[108]

Children's Programming

"[C]hildren watch enough television, and no regulatory initiative need be introduced to get them to watch more."[109] Yet to listen to the

Board, 37 F.C.C. 2d 405 (1972); *review denied*, 42 F.C.C.2d 1127 (1973).

104. Television Deregulation, *supra* note 91, at 1098; Ascertainment Primer, *supra* note 100, at 460 (Commissioner Robinson, dissenting).

105. William C. Canby, Jr., *Programming in Response to the Community*, 55 TEX. L. REV. 67, 75 (1976).

106. Revision of Application for Construction Permit for Commercial Broadcast Station, Memorandum Opinion and Order, 50 Rad. Reg.2d (P & F) 381, 382–83 (1981).

107. Application of Doubleday Broadcasting Co., Inc., for Renewal of License for Station KITE, Memorandum Opinion and Order, File No. BR-1766, 56 F.C.C.2d 333 (1975).

108. Television Deregulation, *supra* note 91, at 1099.

109. Children's Television Programming and Advertising Practices, Report and Order, Dkt. No. 19142, 96 F.C.C.2d 634, 641 (1983) [hereinafter Children's Programming].

debates on children's television, one might conclude that children do not watch enough television. Thus, over the past two decades there have been persistent demands for more children's programming that would be available throughout the week at appropriate hours.

The *1960 Programming Statement* listed programs for children as one of the favored categories, and the FCC thought children's programming was sufficiently important that it exempted such programming (to no avail) from the network limitations of the PTAR. No one defined children's programming: is it what children watch or what children should watch?

Two separate and distinct problems merge to create the paucity of children's programs on commercial television. The first is a defective market. The second is defective people. The former is easier to explain.

The nature of advertiser-supported commercial television makes creating specific programs for children risky. There are too few viewers and those few lack purchasing power. The Commission noted: "Purchases of products advertised to children fall into a very few categories and constitute only a small portion of household budgets . . . . [Thus,] broadcasters have little incentive to present programming designed to attract children and even less incentive to program for specific subcategories of children."[110] Yet many adults, especially parents, may value children's programming over the alternatives aired. This may well be a classic case of market failure as described in Chapter 3.[111]

Despite what some adults value, there are several problems with the above. First, as school demonstrates, what adults think children should be concentrating on is not necessarily what children will concentrate on. A really great chemistry exhibition may not strike a child as better than a rerun of "Gilligan's Island." Furthermore, the type of programming desired is available on Public Broadcasting Service (PBS),[112] yet children and their parents are not spinning the

110. Children's Television Programming and Advertising Practices, Notice of Proposed Rulemaking, Dkt. No. 19142, 75 F.C.C.2d 138, 145 (1979).

111. *See supra* Chapter 3 (The Limits of Competition).

112. Dorothy Singer, Codirector of Yale's Family Television Research and Consultation Center, states that "people just don't use public television or know the riches that

dials to watch it. Lurking in all this, as it was in the *Blue Book*, is the illusive issue of quality. When an adult objects to a child's watching "The Jetsons," presumably the adult has an idea of a "better" program the child should be watching. But can the FCC define such programming successfully, and if so, will broadcasters air it and will children watch it?[113]

Those wishing to regulate to correct the problems of children's programming have maintained several constants.[114] They seek: (1) processing guidelines and the impetus they provide toward required minimum amounts; (2) the availability of the desired programming throughout the week and not just during the dead time on Saturday morning; and (3) age-specific programs, dividing a small audience into even smaller segments.

The Commission has been consistently recalcitrant to do anything. Thus, Commissioner Henry Rivera acidly stated, "[A] broadcaster has a 'special' duty to children, [but] nothing special is required to fulfill it!"[115] The Commission has perceived the underlying issue as quality,[116] and it has not believed that regulation could accomplish anything useful in that regard.

Although the problem might best be traced to market defects and parental defects, Congress determined that the fault lay with Commission and broadcaster defects. Hence, Congress adopted the "Children's Television Act of 1990,"[117] which requires that the FCC consider, at renewal, whether the licensee has served the "educational and

are there." *Roundtable: Expert Witnesses: What Do We Tell (and Show) the Kids*, BROADCASTING & CABLE, July 26, 1993, at 76. Since PBS is available in all markets and "Sesame Street" and "Mr. Rogers' Neighborhood" have been on for decades, it is difficult to conclude so blithely that people do not know about public television programming. Maybe people do not care. Or maybe Singer is wrong.

113. The November 1993 Nielsen sweeps, the first test of the so-called FCC-friendly children's programs, *see infra* note 119, indicate that, if given alternatives, children are not so impressed by educational programs as are adults. FCC-friendly series "are besetting stations with woeful share losses among key kids 2–11 and 6–11 demographics." Mike Freeman, *Kids Still Favor Big 'E' over Three R's*, BROADCASTING & CABLE, Jan. 17, 1994, at 24.

114. We discuss objections to advertising and violence *infra* Chapter 5.

115. Children's Programming, *supra* note 109, at 661 (Commissioner Rivera, dissenting).

116. *Id.* at 648, 653.

117. 104 Stat. 996 (1990).

informational needs of children" with its programming, "including programming specifically designed to serve such needs." The Commission implemented the law without enthusiasm,[118] and broadcasters took this as a signal to do nothing. Thus, in the first batch of renewals an episode of "Leave It to Beaver" was listed as being children's programming: "Eddie misunderstands Wally's help to girlfriend, Cindy, and confronts Wally with his fist. Communication and trust are shown in this episode."[119] The resulting outrage forced an unwilling Commission to act. Its tentative conclusions are that children's programs are those that are educational first, entertaining second.[120]

For reasons stated in Chapters 2 and 3, Congress believes that there is a quid pro quo for the free broadcast license. Thus, rather than direct PBS or the U.S. Department of Education to produce quality children's programming and distribute it free to broadcasters, Congress ordered a very reluctant industry to produce it. It remains to be seen whether the industry can or will and, if so, whether children will watch such programming. In the interim, the Commission is placed in the position of a national censoring nanny, deciding which programs are really informative and which are entertaining. Implicit in its conclusion that children's programming is first educational and second entertaining is that children's programming consists of programs that children should watch rather than programs that they do watch. The definition also excludes programs viewed as a family[121] (because they are entertainment first, and presumably, to the extent they are discussed, parents, rather than the program, offer the education).

118. Policies and Rules Concerning Children's Television Programming, Report and Order, Dkt. No. 90-570, 6 F.C.C. Rcd. 2111 (1991).

119. Harry F. Waters, *On Kid TV, Ploys R Us*, NEWSWEEK, Nov. 30, 1992, at 88.

120. Revision of Programming Policies for Television Broadcast Stations, MM Dkt. No. 93-48, 1993 FCC Lexis 987 (1993). The Commission specifically approved of "Pee Wee's Playhouse" and disapproved of "The Flintstones." This is an interesting echo of the early days of the PTAR when it exempted "Mutual of Omaha's Wild Kingdom" while refusing to exempt "Lassie" from the rule.

121. Children's Programming, *supra* note 109, at 646-47. The Commission had previously been unwilling to conclude that these were not important programs for children.

Outlet and Source Diversity

Some Commission regulations are designed to diversify program selection to some extent, but without overtly employing program content as criteria. We have already seen some examples of such regulations. The Commission's ascertainment rules, for example, required licensees to consult widely within their community about listeners' and viewers' desires. The agency hoped that, following those consultations, a station would be more likely to broadcast a range of programs that appealed to the station's potential audience. The FCC also enforces a comprehensive set of equal employment opportunity (EEO) rules. The Commission justifies the rules, in part, on the grounds that licensees will be more likely to broadcast programs that appeal to all people within its community of license if the licensees' hiring practices are not discriminatory and, therefore, yield a more diverse management staff.

The ascertainment and EEO rules might be described as content-neutral behavioral regulations. They seek to alter program content by changing licensee behavior, but without directly specifying the types of programming the Commission hopes to induce.[122] Such rules, in theory, will lead the licensee to offer a more generously diverse program menu but not a slate of specific selections chosen by the Commission.

More commonly, the agency's attempts to increase diversity through content-neutral regulations have taken one of two additional forms. First, the FCC has adopted many regulations of station ownership. Most ownership limits have been explained, at least in part, on the grounds that changing the identity of the programmer would broaden the mix of broadcasts the programmer otherwise would choose. Programs might be more diverse if program outlets were more diverse. Second, for many years the Commission has regulated the

122. Of course, the rules are in fact linked to content. The FCC selected those groups that licensees were supposed to survey under the ascertainment rules. Such groups were selected on the grounds that they tended to be underserved by existing programming. Similarly, to the extent that they do affect programming decisions, EEO rules are more likely to protect program desires of groups that are explicitly protected by the hiring rules (especially racial minorities and women) than the desires of those that are not protected by the rules (such as sports fanatics or gourmet chefs).

commercial practices of the major networks in their acquisition and distribution of programs. Those regulations assertedly were intended to reduce network dominance over program selection by affiliates. Programs might be more diverse if they came from more diverse sources. We refer to both of these forms of regulation as "structural" because they seek, in part, to increase program diversity by altering the effects of industry structure.

Because neither the FCC's ownership regulations nor, for the most part, its network regulations directly address program content, they fall at the periphery of our concerns in this book. Nevertheless, as discussed in greater detail below,[123] content-neutral regulation of industry structure and commercial practices often can be an effective alternative to agency regulations that prescribe or proscribe program decisions to enhance diversity. Accordingly, we briefly review the main features of those regulations in the remainder of this chapter.

Initially, however, it is necessary to put those types of regulation in perspective. Any careful study of the Commission's efforts to increase program diversity through ownership limitations or controls on network commercial practices will reveal that their impact is minimal in relation to two other features of broadcast regulation.

First, FCC broadcast licensees are fully subject to federal antitrust laws.[124] Thus, a merger between station owners cannot be effected if it would unduly increase concentration in broadcast program markets.[125] Networks are constrained by antitrust laws from embedding anticompetitive exclusionary terms or practices in their agreements with program suppliers or affiliated stations.[126] In short, antitrust law protects against anticompetitive erosion of broadcast program diversity,

123. *See infra* Chapters 10 and 11.

124. United States *v.* RCA, 358 U.S. 334 (1959): "The prohibitions of the Sherman Act apply to broadcasting." NBC *v.* United States, 319 U.S. 190, 223 (1943).

125. THOMAS W. BRUNNER, THOMAS G. KRATTENMAKER, ROBERT A. SKITOL & ANN ADAMS WEBSTER, MERGERS IN THE NEW ANTITRUST ERA 123 (Bureau of National Affairs 1985).

126. FCC, NETWORK INQUIRY SPECIAL STAFF, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION 653–716 (1980) (analyzing Department of Justice antitrust suits against ABC, CBS, and NBC regarding program acquisition practices and the consent decrees with which the suits were settled).

just as it protects against such reduction of diversity in other product markets, like computers or pencils.

Thus, we do not need FCC rules to prevent two dominant networks from merging and thereby eliminating their rivalry in pursuing viewers. Nor must the Commission intervene to prevent one network from reducing diversity by obtaining agreements from program suppliers that unreasonably restrain their availability to other networks or stations. The antitrust laws prevent such actions. Government prescreening of mergers and the availability of private actions for anticompetitive exclusionary agreements tend to ensure that those prohibitions will be effective. Therefore, the types of FCC regulations discussed here can have beneficial effects only to the extent that the agency can identify, and seek to foster, diversity values that competition does not adequately promote.

Second, nothing the FCC can do affects the level of competition or extent of diversity in programming as much as the agency's spectrum allocation decisions. The Commission determines how much of what parts of the spectrum shall be made available for mass communications services, such as FM radio or conventional television. The agency also decides how much bandwidth to allocate to each station and where each may be located. Thus, it is the Federal Communications Commission, not any law of physics, that decides how many broadcasters, in each service type, can be available to households throughout the United States.[127] Diversity of outlets is largely a function of the agency's spectrum allocation policies toward conventional and emerging technology.

As noted above,[128] a principal determinant of the extent of program diversity within local markets is the number (diversity) of broadcast stations available in the market.[129] A similar phenomenon governs the extent of competition and diversity among national networks. For example, if most households could receive only three commercial television signals, it would prove almost impossible for

127. *See supra* Chapter 3 (Broadcasters' Special Access to a Unique Resource).

128. *See supra* Chapter 3 (The Limits of Competition).

129. Indeed, the number of stations may be a more important determinant of diversity than the number of independent licensees.

four commercial television networks to be viable. As knowledgeable observers in the mid-1970s described the precable situation:

> If it were not for the FCC's TV allocation plan, which created low-power, local stations, we could all have access to a great many more channels. The same spectrum could be used for powerful regional stations, no one of which could serve a small community . . . . The essence of the DuMont Plan was to have fewer cities with TV stations, but to have each station cover a large geographical area, spanning a number of cities. Such a plan would permit the creation of new networks and increase the number of choices available to each viewer . . . . [S]uch an increase in the number of channels may increase diversity of programming, and certainly increases competition . . . . [C]onsideration of the DuMont Plan does point up the choice that was before the FCC in the early years of television—a greater range of diversity of programming and competition versus localism in decision-making.[130]

If, however, most households could receive four comparably good signals, then it would be almost impossible to prevent four viable networks from materializing.[131]

In short, agency controls on station ownership and regulation of network program acquisition and distribution processes might expand the diversity of programs otherwise offered in the broadcast marketplace. Those rules, however, would have relatively small effects on program diversity—whether through increasing diversity of broadcast outlets or of program sources—when compared with the larger impacts produced by the application of antitrust laws to this industry and by the Commission's spectrum allocation plans for radio and television.

130. BRUCE M. OWEN, JACK H. BEEBE & WILLARD G. MANNING, JR., TELEVISION ECONOMICS 124 (Lexington Books 1974). The DuMont Plan takes its name from the then-aspiring fourth network. At the time of the Commission's allocation decision, DuMont realized that if there were not at least four television outlets available everywhere, one network—undoubtedly itself—could not survive. It was wholly correct; indeed, ABC was considered half a real network throughout most of the 1960s.

131. BESEN ET AL., *supra* note 71, at 5–16.

Ownership Regulations

The FCC enforces several regulations that limit or regulate who may own broadcast outlets. Three of these seem most likely to be defended, in substantial measure, on the grounds that they may contribute to the diversity of programs stations broadcast. First, Commission standards for determining which of competing applicants shall be awarded a license for a particular broadcast station treat ownership by a racial minority as a "plus" to be weighed along with other factors. Second, the FCC limits the number of outlets within the same broadcast service and in the same local market that a licensee may control. Third, the Commission also places a limit on the number of outlets nationwide that any licensee may own within the same broadcast service.

Minority (and Gender) Preferences. The FCC never discriminated on the basis of race in awarding broadcast licenses. Nevertheless, in 1970 racial minorities owned no television stations and just ten radio stations.[132] This triggered both the judiciary and Congress to push the FCC to grant racial preferences. The FCC later decided to adopt gender preferences as well. Underlying those decisions is the conclusion that a minority or woman owner is more likely to offer programming aimed at minority or female audiences than is a white male owner.

In the late 1960s the Commission adopted strict EEO policies,[133] justified in part by its obligation to promote diversity of programming.[134] But as the national policy of nondiscrimination turned into affirmative action, the FCC went only as far as determining that it would give a minority applicant a preference *if* there was a showing that the applicant's minority background would influence programming.[135] In *TV-9, Inc.* the D.C. Circuit overruled this policy and held

132. U.S. CIVIL RIGHTS COMM'N, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 280 (1971).

133. Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, Memorandum Opinion and Order and Notice of Proposed Rulemaking, Dkt. No. 18244, 13 F.C.C.2d 766 (1968).

134. NAACP *v.* FPC, 425 U.S. 662, 670 n.7 (1976).

135. Application of Mid-Florida Television Corp. for Construction Permit for New Television Broadcast Station, Decision. File No. BPCT-1801, 33 F.C.C.2d 1, 17-18;

that the FCC had to give a preference to a minority candidate *because* minority background would influence programming.[136] The FCC had made similar empirical judgments about nonracial characteristics that could influence service, for example, in favoring local ownership. Now, the court held, the public interest required the Commission to do so on the basis of race.

In 1978, following a conference at which participants testified that minority ownership surely would increase programming diversity,[137] the Commission implemented *TV-9*. First, it accorded a preference to minority[138] applicants in comparative hearings when the minority owner is to participate actively in day-to-day management. Second, it announced a so-called distress sale policy for broadcasters facing a hearing and expected loss of license. Those unlucky few would be allowed to avoid the hearing (and probable subsequent loss of license) by selling their station, for up to 75 percent of its fair market value, to a minority-controlled group.[139] Third, the agency offered tax certificates allowing a deferral of capital gains to broadcasters who sold to minority groups. All of those policies were designed to increase minority ownership and thereby increase and change programming to and about minorities: "Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community, but also enriches and educates the non-minority audience."[140]

During President Reagan's second term, the Commission, like other federal agencies, came to question race-based preferences. Believing that the Constitution[141] allowed such preferences only when

(Rev. Bd.) *review denied*, 37 F.C.C. 559 (1972).

136. TV-9, Inc. *v.* FCC, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

137. FCC MINORITY OWNERSHIP TASK FORCE, REPORT ON MINORITY OWNERSHIP IN BROADCASTING 4–6 (1978). Contrast John H. Garvey, *Black and White Images,* 56 LAW & CONTEMP. PROBS. 189, 212 (1993): "It is poor arithmetic to suppose that we add and do not subtract when we give more licenses to minorities."

138. Minority is defined as "Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 980 n.8 (1978).

139. *Id.* at 983.

140. *Id.* at 980–81.

141. That is, the equal protection component of the Fifth Amendment.

they were essential to achieving diverse programming and where a proven nexus exists between the owner's race and the station's programming, the Commission decided it needed a study to determine whether the factual predicates existed.[142] Before the FCC could complete its study, Congress included a provision in the Omnibus Budget Reconciliation Act of 1987 forbidding the FCC from either repealing or continuing to examine its minority ownership policies.[143] Congress could not stop litigation, however, and in 1989 separate panels of the D.C. Circuit upheld the minority preference in comparative hearings[144] but struck down the distress sale policy.[145] The full D.C. Circuit ducked by refusing to hear either *en banc*.

The Supreme Court resolved that D.C. Circuit conflict by holding that both policies were constitutional in *Metro Broadcasting* v. *FCC*.[146] Ever since the *Bakke*[147] decision over a decade earlier, the Court has consistently rejected either extreme in deciding affirmative action cases. That is, an affirmative action program is neither per se constitutional nor per se unconstitutional. But in avoiding the extremes, the Court produced fragmentation.

Justice William J. Brennan's five-man *Metro Broadcasting* majority opinion reasons from the premise that a federal agency may make decisions based on race if the governmental objectives are important and the policy is substantially related to the achievement of the objectives. Because the Court itself can label objectives as it pleases, the application of this test essentially turned on the empirical question of whether there was factual support for the proposition that minority ownership means different programming.

The Court found that the Commission and Congress had already answered the question. Brennan reasoned that the 1978 decision of the

142. Reexamination of the Commission's Comparative Licensing, Distress Sales, and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classification, Notice of Inquiry, MM Dkt. No. 86-484, 1 F.C.C. Rcd. 1315 (1986).

143. 101 Stat. 1329 (1987). *See* J. Gregory Sidak, *The Recommendation Clause,* 77 GEO. L.J. 2079, 2128–32 (1989). The interplay among Congress, Commission, and the courts is described in Devins, *supra* note 1, at 169–80 (1993).

144. Winter Park Communications *v.* FCC, 873 F.2d 347 (D.C. Cir. 1989).

145. Shurberg *v.* FCC, 876 F.2d 902 (D.C. Cir. 1989).

146. 497 U.S. 547 (1990).

147. Board of Regents *v.* Bakke, 438 U.S. 235 (1978).

Commission was a product of the Commission's "expertise."[148] This was then supplemented by Congressional determinations to the same effect.[149] Nothing more was necessary, although Brennan added that there was a "host" of added empirical support.[150] By "host" he meant three studies that were anything but conclusive on the issue.[151]

Brennan's opinion answered the constitutional question. But it could not answer his supposed "test"[152] in fact because to know whether there is a nexus between minority ownership and programming diversity, there has to be some study of the empirical relationship between the two. Those studies cited by the Court were sufficient to withstand minimum rationality, in that they show that there may be a cause-and-effect relation,[153] but that is all.[154] When the FCC decided to inquire, Congress forbade it to acquire the information and has continued the prohibition every year thereafter.[155]

The Commission's 1978 decision to implement *TV-9* rejected granting a similar preference to women. Simultaneously, in a comparative hearing for an FM station, the FCC's review board reached a similar decision.[156] Five months later, it reversed course: "Upon further reflection, we now believe the better course is to consider female ownership and participation, despite the absence of record evidence . . . ."[157] Eventually, the policy reached the D.C. Circuit, which overturned it in a blistering opinion by then-Judge Antonin Scalia.[158]

After the court then voted to rehear the case *en banc*, the FCC changed course and asked for a remand to reconsider all its preference

148. *Id.* at 570.

149. *Id.* at 573–79.

150. *Id.* at 580.

151. Matthew Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 340–46 (1991).

152. Justice Brennan had demonstrated a similar unwillingness to apply his *Bakke* test to the facts of that case.

153. "Congress and the Commission have determined that there *may be* important differences . . . ." 497 U.S. at 580 (emphasis added).

154. *Id.* at 602–03 (dissent).

155. Lamprecht *v.* FCC, 958 F.2d 382, 385 (D.C. Cir. 1992).

156. Application of Gainsville Media, Inc., for Construction Permit, Decision, Dkt. No. 20622, 70 F.C.C.2d 58, 66 (Rev. Bd. 1978).

157. *Id.* at 143, 149

158. Steele *v.* FCC, 770 F.2d 1192 (D.C. Cir. 1985).

policies. The court agreed;[159] then Congress stepped in to bar the Commission action. Accordingly, the Commission maintained its FM gender preference along with all its race preferences.

As a result, Barbara Marmet prevailed over Jerome Lamprecht for a new Maryland FM station. Lamprecht was a thirty-year-old male who had stopped attending the University of Maryland full time to begin a career in broadcasting. He had worked as an announcer, program director, station manager, and general manager at various stations. Marmet, by contrast, was a fifty-eight-year-old woman who divided her residences among Bethesda and Frederick County, Maryland, and Amelia Island, Florida. Her civic activities included being a sustaining member of the Washington Junior League, the Chevy Chase Country Club, the parents' committee of the St. Albans School, and treasurer of her garden club. Her husband is a communications lawyer. If Marmet had been male, she would have lost.[160]

The D.C. Circuit, in an opinion by Clarence Thomas issued after he had taken his Supreme Court seat, held the gender preference policy unconstitutional without even considering what women's programming is and whether it is underrepresented on the air.[161] *Lamprecht* interpreted *Metro Broadcasting* as requiring that any predictive judgments about the different behavior of men and women as station owners must be sustained by meaningful evidence (to avoid the risk that the judgments merely reflected stereotypical assumptions about men and women). The FCC offered no evidence that women were likely to program differently, and the court held that a Congressional Research Service study[162] also failed to show a nexus between gender and programming.[163]

The race preferences remain, but do they work? Do they add minority owners who then program differently? We cannot know.

159. Steele *v.* FCC, 806 F.2d 1126 (D.C. Cir. 1986) (table).

160. Lamprecht *v.* FCC, 958 F.2d 382, 386–88 (D.C. Cir. 1992).

161. *Id.* at 395. *See supra* Devins note 1, at 180–84.

162. CONGRESSIONAL RESEARCH SERVICE, MINORITY BROADCAST STATION OWNERSHIP AND BROADCAST PROGRAMMING: IS THERE A NEXUS? (1988).

163. This study had been relied upon in *Metro Broadcasting* as part of the "host" of evidence available to the Commission and Congress. Judge Thomas's opinion questioned the study's methodology, but treated it as valid for minorities without demonstrating the nexus for women.

Comparative hearings or distress sales are infrequent. The tax certificates, by contrast, do add minority owners because the certificates provide real incentives to sell to minorities. Reportedly twenty television stations and almost 200 radio stations are now owned by African-Americans, but there is troubling evidence that the ownership may be paper only and that after the required year of minority ownership, many a station passes back into white ownership.[164] Nor do we know whether minorities program differently. A major reason is that Congress will not let the FCC find out, and, in the absence of government data, academics are not rushing in to fill the void.[165] What we can observe is that this is another policy created in the public interest where no one has made the effort to inquire whether it works.

Local Market Ownership Limits. Beginning in 1940, when AM radio had become quite powerful and both FM radio and TV were incipient services, the Commission began to codify proscriptions on ownership of more than one broadcast station in a market.[166] By 1970, the Commission's rules not only prohibited common ownership of two AM stations or two FM stations or two TV stations in the same market, but also forbade common ownership of a VHF station and a radio station in any local market.[167]

164. David A. Vise & Paul Farhi, *FCC Minority Program Spurs Deals—and Questions*, WASH. POST, June 3, 1993, at A1. According to a study compiled by the Department of Commerce, from 1991 to 1992 minorities acquired ownership of twenty-seven stations, but gave up ownership of twenty-one, for a net gain of six. From 1992 to 1993, eleven new stations were acquired, but twenty-one were lost, for a net decrease of ten. U.S. DEP'T OF COMMERCE, ANALYSIS AND COMPILATION BY STATE OF MINORITY-OWNED COMMERCIAL BROADCAST STATIONS ii (Oct. 1993).

165. One forthcoming study by two very careful researchers concludes that "increasing the number of minority-owned broadcasting stations increases the amount of minority-oriented programming" and that "increasing the number of female-owned stations . . . would be just as effective as increasing minority-oriented programming." Jeffrey Dubin & Matthew Spitzer, *Testing Minority Preferences in Broadcasting* 1 (1994) (on file with California Institute of Technology).

166. FEDERAL COMMUNICATIONS COMMISSION, SIXTH ANN. REP. 68 (1940) (prohibiting "duopoly" in FM and in TV); Multiple Ownership of Standard Broadcast Stations, 8 Fed. Reg. 16,065 (1943) (forbidding operation, within same market, of two AM stations or of two TV stations).

167. Amendment of §§ 73.35, 73.240, and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, First Report and Order, Dkt. No. 18110, 22 F.C.C.2d 306 (1970); *modified,* 28 F.C.C.2d 662

The Commission justified those restrictions by its desire to diffuse the ownership of broadcast station licenses as well as to avoid possible anticompetitive behavior by "duopoly" licensees. So far as we can ascertain, none of those limitations was ever developed or defended on any more general theory concerning the likelihood that joint ownership would (or would not) affect owners' programming incentives within those markets. Nor did the Commission ever conduct any empirical study of the relative programming incentives under which joint or single owners operate.

More recently, the agency became concerned that radio stations were operating at very low (or even nonexistent) profit margins and concluded that permitting in-market combinations would enable stations to attain cost-saving efficiencies. Accordingly, the FCC relaxed its duopoly rules to permit a single licensee to control up to two AM and two FM stations in any market that has fifteen or more stations, so long as their combined share of that local market does not exceed 25 percent. In smaller markets, a single licensee may own up to three stations, no more than two of which may be in the same service, so long as the jointly owned stations constitute less than 50 percent of the stations in the market.[168]

Nationwide Ownership Limits. The Commission also has enforced, for several decades, limits on the number of broadcast stations that any one licensee may control nationwide. There is little reason to believe that such regulations affect program diversity, because competition for viewers and listeners occurs in local, not national, markets. Thus, the fact that an AM radio station in New York also owns an AM station in Los Angeles is unlikely to affect the competitive choices or incentives that dictate its offerings in New York. Also, the rules limit only multiple ownership. They do not restrict the number of affiliation agreements that a radio or television network may enter into across the nation. Affiliation agreements tend to permit networks and affiliates to

(1971). The rules permitted existing combinations to continue and the modifications permitted AM-FM combinations and proposed to treat UHF-radio combinations on a case-by-case basis.

168. Revision of Radio Rules and Policies, Report and Order, MM Dkt. No. 91-140, 7 F.C.C. Rcd. 2755 (1992).

behave as though they were commonly owned,[169] so national ownership limits can be circumvented to some extent by forming networks.

The current national multiple ownership rules for television stations were adopted in 1984.[170] Those rules cap national ownership at twelve stations or any lesser number of stations that reach 25 percent of the national audience. Two exceptions are provided. A group may control fourteen stations, so long as two stations are controlled by members of a minority group and the fourteen stations reach no more than 30 percent of the national audience. For UHF stations, only 50 percent of the audience in their local markets is counted toward the national audience cap.

The Commission rewrote the rules for radio services in 1992.[171] As of September 16, 1994, a single owner may have a cognizable ownership interest in up to twenty AM and twenty FM stations, and noncontrolling interests in up to three additional AM and three additional FM stations that are small businesses or minority controlled. Unlike television, the radio rules do not contain additional limits for national audience reach.[172]

Network Regulations

Since 1946, the FCC has imposed a number of regulations on the relations between television networks and their affiliates and program suppliers.[173]

169. BESEN ET AL., *supra* note 71, at 50–66.

170. Amendment of § 73.3555 [formerly §§ 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, Memorandum Opinion and Order, Gen. Dkt. No. 83-1009, 100 F.C.C. 2d 17 (1984), *on reconsideration*, 100 F.C.C. 2d 74 (1984).

171. The current rules appear at 47 C.F.R. § 73.3555(e)(1)(i) (1993).

172. For a general discussion and analysis of the FCC's multiple ownership rules see Andrea L. Johnson, *Redefining Diversity in Telecommunications*, U.C. DAVIS L. REV. 87 (1992); Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U. L. REV. 401 (1989).

173. The discussion in this section is taken from two sources: BESEN ET AL., *supra* note 71, at 31–49; Krattenmaker, *supra* note 68. These sources contain further details on the rules discussed here and complete citations to all the rules and supporting FCC reports.

Affiliation Rules. The Commission's *Chain Broadcasting Report* of 1941 imposed a number of restraints on the terms that radio networks might embed in their affiliation agreements with local radio stations. The Commission repealed those rules' applicability to radio in 1977 because of the explosive growth of radio networks and the resulting competition among them that occurred in the intervening decades. But the Commission had extended the rules to television networks in 1946 and supplemented them with further television network-affiliate rules following a 1957 study of television networking. As to television networks, those rules remain in place.

Most of the network-affiliate rules were adopted on the ground that they limit the ability of dominant networks to extract from their affiliates onerous contract terms that may also entrench existing networks' advantages over potential competitors. The rules prohibit or require certain terms in affiliation agreements. Agreements between networks and their affiliates may not prevent affiliates from broadcasting programs of another network,[174] may not confer territorial exclusivity on the affiliate,[175] may not grant the networks "options" on their affiliates' time,[176] must permit the station to reject network programs,[177] and may not prevent or hinder an affiliate from altering its rates for the sale of nonnetwork broadcast time[178] or permit the network to represent its affiliates in the sale of national advertising time.[179]

Note that all of these rules are content-neutral. They apply to all network programming regardless of its content, format, or intended audience. Nevertheless, to the extent that the rules are effective, they should alter somewhat the precise amount of network programming that an affiliate will carry.[180] This will yield an increase in diversity of

174. 47 C.F.R. § 73.658(a) (1993).
175. *Id.* § 73.658(b).
176. *Id.* § 73.658(d).
177. *Id.* § 73.658(e).
178. *Id.* § 73.658(h).
179. *Id.* § 73.658(i). It is well established that the antitrust laws apply to network dealings with stations. United States *v.* RCA, 358 U.S. 334 (1957). Therefore, it is not clear that there is any necessity for a set of FCC rules regulating this relationship. To the extent, however, that the principal effect of the Commission's rules is not to restrict inefficient, anticompetitive practices, but solely to redistribute income between networks and their affiliates, these rules could not be justified on antitrust grounds.
180. It is quite possible, however, that the principal effects of these rules will be to

programming only in the sense that the substituted programs will be different in some unspecified manner from those which would have been carried. Whether they would be different in some dimension that is relevant to diversity is an open question.

Program Acquisition Rules. In 1970, after lengthy investigation of television network program procurement practices, the Commission adopted its financial interest and syndication rules. The syndication rule forbade the dominant television networks to engage in domestic syndication of any program or foreign syndication of independently produced programs. The financial interest rule prevented the same networks from obtaining any financial interest or proprietary right in independently produced programs, except the exclusive right to network exhibition in the United States.

Those rules should have had no discernible effect on the programs networks chose to offer. They affected only the terms on which rights were acquired.[181] In any event, the Commission largely repealed them in 1993.[182]

alter the compensation affiliates obtain from carrying network programs rather than the programs they clear. BESEN ET AL., *supra* note 71, at 67–93.

181. *Id.* at 127–36. The FCC's explanations for the rules largely centered around the notion that they would enhance program producers' wealth. *Id.* at 129. The agency, however, also suggested that the rules would prevent networks from favoring programs in which they had acquired financial interests or syndication rights. *Id.* There was, however, no suggestion that ending such favoritism would affect the diversity of network programming, whether measured by the mix of program types or program producers or the distribution of creative control between networks and producers.

Presumably, an attempt to reinstate the financial interest and syndication rules would also encounter jurisdictional objections. It is quite unclear where the agency gets authority to regulate the commercial dealings of television networks and their program suppliers. Although both the networks and many program suppliers own television stations, they are not licensed by the Commission in their capacities as networks or program producers. The FCC successfully contended, when the rules were first promulgated, that the agency had "ancillary jurisdiction" to control network program supply contracts. Mount Mansfield Television *v.* FCC, 442 F.2d 470 (2d Cir. 1971). It is not obvious that courts would be so indulgent today. *See* Thomas G. Krattenmaker & A. Richard Metzger, Jr., *FCC Regulatory Authority over Commercial Television Networks: The Role of Ancillary Jurisdiction,* 77 NW. U. L. REV. 403 (1982).

182. Evaluation of the Syndication and Financial Interest Rules, MM Dkt. No. 90-162, FCC Lexis 2362 (1993). At this writing, virtually all that remains of the rules is a three-year limit on active network syndication of prime time entertainment programming.

Prime Time Access Rule.[183] The PTAR was also promulgated in 1970. It, too, results from the previous investigation of network program procurement practices.[184] The rule, still in effect, provides that television stations affiliated with ABC, CBS, or NBC and located in the top fifty markets may exhibit no more than three hours of network (or syndicated off-network) programming during prime time.[185]

The PTAR is, however, riddled with exceptions that render it a content-based regulation. Certain types of programs, defined solely by their content, do not count against the three-hour network limit. These include: telecasts of the Rose Bowl or the Olympic games; documentary programs (except on Saturday when they do count); a half-hour (but no longer) regularly scheduled network news broadcast (but only if that broadcast follows a local news or public affairs program at least one-hour long); children's programming (again, except on Saturdays, when these do count); and political broadcasts by legally qualified candidates for public office.

The PTAR also differentiates among programs on the basis of their source. Entertainment programs count against the three-hour limit only if they were produced for exhibition by ABC, CBS, or NBC. Thus, for example, a tape of the program "Hee Haw" counts against the limit if the tape was made in the 1960s, when "Hee Haw" episodes were produced for exhibition on CBS. A "Hee Haw" tape made in the 1970s, however, does not count against the limit, because when those program episodes were made, the show was not on any network schedule but was produced for first-run syndication (that is, distribution directly from program producer to stations). And, of course, programs produced for other networks—such as Fox, Home Box Office, or

183. The rule is also discussed earlier in this chapter and is discussed *infra* Chapter 10.

184. The rule is codified at 47 C.F.R. § 73.658(k) (1993). The specific illustrations of the rule's operation are taken from Krattenmaker, *supra* note 68, which also provides complete citations for the assertions made in the text as well as a rather comprehensive critique of the rule.

185. In form, the rule restricts network programming only on affiliates in the top fifty markets. But the viewer base outside those markets is too small to support expensive first-run network programming by itself, so the rule's practical effect is to force ABC, CBS, and NBC to cease programming (except within the "merit programming" exceptions) for an hour of prime time each night.

PBS—do not count, either. To the modest extent that the PTAR reduces the amount of telecast programming that was purchased or produced by ABC, CBS, or NBC, it might be said to increase the diversity of program sources.

The Commission has never offered a clear statement of the goals and objectives of the PTAR. It has been variously explained as a device to: (1) make available to stations from sources other than ABC, CBS, or NBC prime time quality programming; (2) increase the amount of locally produced programs broadcast by network affiliates; or (3) increase the amount of first-run syndicated programming.[186] The PTAR almost certainly has altered the programming that affiliates of ABC, CBS, and NBC otherwise air. The rule has diversified programs by limiting the options available to stations and their viewers. It remains to be explained how the public interest is furthered by declaring that one source of programming (first-run syndication) must be preferred over another (network programming), except for certain "meritorious" network fare.

Summary

Chapters 10 and 11 provide a thorough analysis of the role that content-neutral structural and behavioral regulations can play in protecting and enhancing program diversity. At this point it is sufficient to note two main points. First, the types of federal regulations concerning the broadcasting industry that most directly and most substantially affect program diversity are the Commission's spectrum allocation rules and the application of conventional antitrust law to the broadcast industry. Second, the FCC has, to some extent, supplemented those key regulations with certain other rules that may somewhat affect the diversity of broadcast outlets or program sources.

In particular, the Commission's regulation that gives a preference, in comparative hearings, to members of minority racial groups may have a tendency to increase broadcast programming aimed at minority audiences, although this remains to be proved. The restrictions on joint ownership of broadcast stations in the same market surely increase, at

186. Krattenmaker, *supra* note 68, at 28.

least in most large markets, the number of firms that own stations. The Commission, however, appears never to have studied whether increases in the number of owners tend to produce more diverse programming. Finally, the agency's PTAR was intended to bias network program decisions somewhat (in favor of offering those shows, like children's programs, that are exempt from the rule)[187] and certainly has reduced the amount of programming telecast by ABC, CBS, and NBC while increasing the amount produced by first-run syndicators.

187. Nothing is simple about the Rube Goldberg–type device that is the PTAR. The precise rule for children's programming is that it is exempt from the rule *except* on Saturday night. (Go figure!) 47 C.F.R. § 73.658(k)(1) (1993).

5

Conformity

REGULATORS WHO KNOW what should be aired also know what should not be aired. It comes with the territory. If commissioners know that political discussions are better than soap operas and local news is better than a National Basketball Association game, then why should commissioners not also know that an uninterrupted movie is better than one with commercials, an Italian mobster is better than a Nordic one, a kiss is better than a gunfight, a hug is better than sex, and Whitney Houston's "Run to You" is better than the Beatles' "Lucy in the Sky with Diamonds"?

For almost every attempt by the FCC to coerce or coax diversity, there is another to mandate or persuade conformity. Sometimes the presentation of diverse programming threatens other regulatory goals, such as protecting public sensibilities or reducing the stimuli for inappropriate (and maybe illegal) behavior. In these circumstances the demand for diversity may be replaced by its opposite, the demand for conformity.

The First Amendment does not expressly exempt broadcasting from its coverage, and section 326 of the Communications Act forbids the FCC to engage in censorship. Thus, the Commission must consider whether programming it finds offensive is nevertheless of a type the First Amendment protects. If so, the agency must consider whether its authority to act in the public interest permits the Commission to act in ways short of censorship to keep the airwaves clean. Those questions

have been asked and answered in the context of sex, drugs, violence, and advertising.

Sex

When Congress or the FCC talks of sex on radio or television, it is essential to realize that no one is talking about programs that are legally obscene. Obscenity can be proscribed in any medium, and doing so for broadcasting raises no media-specific issues. But neither sex and obscenity nor nudity and obscenity, as the Supreme Court told us,[1] are synonymous, and only in broadcasting does the government attempt to regulate discussions of sex or depictions of nudity.

Before the 1970s there was little offending programming about sex on either television (where even married couples slept in separate beds) or radio, and with the few transgressors, the Commission expressed its disapproval through applications of the public interest standard.[2] Then on a January night in 1970, WUHY, a college FM station, aired an interview with Jerry Garcia of the Grateful Dead.

Garcia expressed his views on a number of issues from music to philosophy to ecology to interpersonal relations. In just six paragraphs, he used *like* improperly and redundantly sixteen times. But the same was equally true for *fuck* and *shit*, which he used as adjectives or substitutes for *et cetera*, and occasionally as introductory expletives.

A stunned Commission found that Garcia's profanity was entirely gratuitous and that he could have expressed any ideas he had without resorting to such language.[3] Resting its decision on section 1464 of the Criminal Code, which prohibits the broadcasting of "obscene, indecent, or profane" language, the FCC fined WUHY.[4] Legally, Garcia's language could not be obscene because it lacked an appeal to the

1. Roth *v.* United States, 354 U.S. 476 (1957) (sex); Jenkins *v.* Georgia, 418 U.S. 153 (1974) (nudity).

2. In a 1987 study, Powe details these cases. Lucas A. Powe, Jr., American Broadcasting and the First Amendment 166–74 (University of California Press 1987).

3. WUHY-FM, Eastern Education Radio, Notice of Apparent Liability, 24 F.C.C.2d 408 ¶ 7 (1970).

4. 18 U.S.C. § 1464: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . or imprisoned."

prurient interest, a requirement of obscenity. Hence, the Commission found the interview "indecent," because it was patently offensive and wholly without redeeming social value.

The next Commission target was a new format, so-called topless radio, live call-in shows discussing a sexual topic of the day. The novelty of the format was that the (male) announcer would elicit from the (typically female) caller intimate personal and sexual details. The format originated in Los Angeles, but spread quickly across the nation, and produced outraged responses from within the industry and Congress.

The Commission responded to congressional demands to rid the airwaves of such filth by ordering its staff to monitor and tape several of the "topless" shows. Sonderling Broadcasting's WGLD-FM in the Chicago suburb of Oak Park was selected as the sacrificial station, and the Commission listened to a twenty-two-minute highlights tape from a five-hour broadcast of "Femme Forum." The day's topic was oral sex, and the highlights tape contained several titillating discussions including a caller's recommendation to use it to break the "monotony" of highway driving. She added the helpful advice to "watch out for truck drivers."[5]

No four-letter words had been aired, and WGLD was no college station; indeed, "Femme Forum" was the highest-rated program in the Chicago market.[6] No matter, the Commission concluded, the discussion was so "blatant" that it was obscene. Therefore, even if the program was limited to adults only, it could be—and now was—banned. The Commission expressed the fear that if WGLD could air such filth, then anyone could. Switching the dial then would become an unsafe exercise for decent people.

Sonderling was fined $2,000 and dropped the format immediately, as did every other station using it. A citizens' group appealed, but the D.C. Circuit affirmed the Commission.[7] The court's conclusion that "Femme Forum" was obscene made a mockery out of the Supreme Court's obscenity decisions. First, to be obscene the dominant theme

5. Sonderling Broadcasting Corp., Notice of Apparent Liability for Forfeiture, 27 Rad. Reg.2d (P & F) 285, 286 (1973).

6. POWE, *supra* note 2, at 184.

7. Illinois Citizens Comm. for Broadcasting *v.* FCC, 515 F.2d 397 (D.C. Cir. 1974).

of the material must appeal to the prurient interest. A twenty-two-minute tape could not support a finding about "dominant theme;" indeed a five-hour program would have produced at least forty-four (and probably around sixty-six) minutes of commercials. The court responded that listening was episodic, and so "dominant theme" had no meaning for radio.[8] Second, the Supreme Court's obscenity definition also required the material to be patently offensive, as measured by contemporary community standards. How the number-one-rated program could be patently offensive by its community's standards is a mystery. The court solved it by ignoring it.

While *Sonderling* was awaiting decision at the D.C. Circuit, the Commission received a complaint about Pacifica Foundation's WBAI-FM in New York City. On Tuesday, October 30, 1973, Pacifica aired a program about attitudes toward language in contemporary society. At about 2:00 P.M. it played a twelve-minute monologue from comedian George Carlin's "Occupation: Foole" album that emphasized four-letter words. At one point Carlin listed seven of them as "words you couldn't say on the public . . . airwaves."[9]

Six weeks later the FCC received a letter from a man who claimed to have heard the program while driving with his young son[10] and who could not "understand the broadcast . . . over the air that, supposedly, you control."[11] The Commission sat on the complaint for fourteen months because it had a much bigger problem to deal with: Congress (which, according to the FCC rules of practice and procedure, consists of two oversight committees) was hopping mad about sex and violence on television and wanted to know what the Commission was going to do about it.[12]

8. *Id.* at 405.

9. FCC *v.* Pacifica Found., 438 U.S. 726 (1978). The entire monologue is reprinted in an appendix to the opinion. *Id.* at 751–55.

10. Whether he heard the monologue is not known. That he attempted to mislead the FCC is. His son was fifteen at the time. POWE, *supra* note 2, at 186.

11. 438 U.S. at 730.

12. Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence*, 64 VA. L. REV. 1123, 1128–29, 1215 (1978). Indeed, Congress wanted to know so badly that it threatened to cut off the Commission's funding. To paraphrase Dr. Samuel Johnson: "Nothing so focuses the mind of a regulatory agency as the threat of imminent loss of funding. . . . Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." JAMES BOSWELL, 3 BOSWELL'S LIFE OF JOHNSON

The perceptive FCC Chairman, Richard Wiley, suddenly saw dark clouds on the TV horizon if broadcasters did not show "taste, discretion, and decency."[13] The "dark clouds" parted in February 1975 when the Commission announced to Congress that the networks and the National Association of Broadcasters—prodded by the FCC—had adopted a "family viewing hour" that would imbue the beginning of network prime time with good taste each night. During the first hour of prime time, the networks would avoid programs that emphasized sex or portrayed violence. The Commission also cheered its recent victory over topless radio in the D.C. Circuit and announced a "clarification" of its prior position on broadcasting indecency.[14]

The clarification was the declaration that Carlin's monologue could not be aired (except possibly late at night). The Commission did not care whether the monologue had serious literary, artistic, or political value. The monologue was not legally obscene, but that did not matter, either. The program was "indecent" and could not be aired if there was a chance that children could be in the audience.

On review, although the D.C. Circuit reversed,[15] the Supreme Court affirmed the Commission in a 5–4 decision. The Court agreed with the FCC that "indecency" was "material that depicts or describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[16] Further, the FCC could, without constitutional violation, channel such indecent programming to appropriate hours. But why? Justice John Paul Stevens explained that "[t]hese words offend for the same reasons that obscenity offends."[17] Unfortunately, that is hardly an explanation.[18] Obscenity offends only because many people would

167 (September 19, 1777) (George B. Hill ed., rev. & enl. ed. by L.F. Powell, Clarendon Press 1934).

13. POWE, *supra* note 2, at 187.

14. Citizen's Complaint Against Pacifica Foundation, Declaratory Order, 56 F.C.C.2d 94, 98 ¶ 11 (1975).

15. Pacifica Found. *v.* FCC, 556 F.2d 9 (D.C. Cir. 1977).

16. FCC *v.* Pacifica Found., 438 U.S. 726, 732 (quoting 56 F.C.C.2d at 98 ¶ 11).

17. *Id.* at 746.

18. Judge Harry Edwards subsequently observed, "[W]e do not appear to know how the exposure to indecent (as opposed to violent) material affects children, either with respect to their senses of self-worth, their senses of respect for members of the opposite sex, or their behavior patterns as functioning members of society." Action for Children's

rather live without it. Constitutionally, for speech that is not obscene, the fact that some people would rather not live with a type of speech is a wholly unacceptable reason for denying other people the right to say what they please.[19]

Shifting from the message to the medium, the Court concluded that radio was an intruder in the home and uniquely accessible to children. Therefore, it should hold its tongue when there is a reasonable chance children could be listening.

The FCC of the early 1970s was the most censorship-oriented Commission since the early days of the FRC. The Supreme Court's decision in *Pacifica* was its victory. But that Commission no longer existed when the Supreme Court decided *Pacifica*. By this time, President Carter had remade the FCC with his appointments. The newly composed Commission wanted no part of the previous FCC's victory and refused to exercise its newly granted powers. First, it made it clear that indecency encompassed only the seven dirty words Carlin uttered. Commissioner Tyrone Brown wryly noted that one word had been assigned to each of the seven commissioners.[20] Second, limiting *Pacifica* to its facts, the Commission concluded that such language was indecent only when employed repeatedly. Isolated use of one or more of the magnificent seven was okay.[21] Third, the agency decided to assume that children turned off their radios at 10:00 P.M. Thereafter, a safe harbor existed where indecent programs were permissible because there was not a reasonable risk that children were in the audience.[22]

So confined, *Pacifica*'s grant of authority remained idle for almost

Television *v.* FCC, 11 F.3d 170, 185 (D.C. Cir. 1993) (concurring).

19. Bolger *v.* Youngs Drug Prods. Corp., 463 U.S. 60, 71 (1983); Carey *v.* Population Services Int'l, 431 U.S. 678, 701 (1977). Because the statement in *Pacifica* was based on the Justices' own values, we shall not pursue it. When we come to violence later on in the chapter, concerns are based on social science evidence, and we shall explore that evidence.

20. L.A. Powe, Jr., *Consistency over Time: The FCC's Indecency Rerun*, 10 COMM/ENT 571 (1988). At the time, the FCC consisted of seven commissioners; today it has five.

21. Application of WGBH Educational Foundation for Renewal of License for Noncommercial Educational Station, Memorandum Opinion and Order, 69 F.C.C.2d 1250, 1254 ¶ 10 (1978).

22. Powe, *supra* note 20, at 571.

a decade. Then in 1987, under tremendous pressure from religious conservatives,[23] the FCC suddenly switched course and began a crusade against indecency. The Commission's first three targets were: (1) a radio broadcast of the play *The Jerker*, then also playing on the New York stage to favorable reviews,[24] in which two gay men dying of AIDS discuss their sexual fantasies (in graphic detail) over the telephone;[25] (2) the popular "Howard Stern Show,"[26] a radio program combining rock music and talk that "can most kindly be described as abusive, misogynistic, and homophobic . . . discuss[ing] matters ranging from testicles to bestiality;"[27] and (3) a radio broadcast of a song, "Makin' Bacon," that "contained a number of patently offensive references to sexual organs and activities as measured by contemporary community standards for the broadcast medium."[28] The FCC abandoned as too narrow the view that only Carlin's magnificent seven were indecent and instead adopted a "generic definition of indecency"[29] of undetermined scope and moved the beginning of the safe-harbor period from 10:00 P.M. to midnight.[30]

Several developments have occurred since the 1987 trilogy. Caught between a Congress that demanded that indecency be suppressed and

23. John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329, 344–47 (1989).

24. According to a reviewer, the play's "gamy language" served "a poignant purpose by pointing out, more bluntly than any other play dealing with Acquired Immune Deficiency Syndrome, how the epidemic has threatened one of the fundamental reasons for an entire group's very existence—its freedom of erotic expression—and challenged its hard-won self-esteem." N.Y. TIMES, Apr. 30, 1987, at C6. "Gamy" the language was. For example, "None of this nicey-nice, lovey-dovey stuff. I want to make you eat ass, suck my balls, and drink my piss like you never have before. You get me?" Pacifica Foundation, Inc., Memorandum and Order, 2 F.C.C. Rcd. 2698, 2700 ¶ 22 (1987).

25. *Id.* at 2698 ¶ 5.

26. Infinity Broadcasting Corporation of Pennsylvania, Memorandum Opinion and Order, 2 F.C.C. Rcd. 2705 (1987).

27. Lili Levy, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49, 102 (1993). Levy's article provides the best overview of what the FCC is doing and its consequences.

28. The Regents of the University of California, Memorandum Opinion and Order, 2 F.C.C. Rcd. 2703 ¶ 5 (1987).

29. Public Notice, New Indecency Enforcement Standards to Be Applied to All Broadcast and Amateur Radio Licensees, 2 F.C.C. Rcd. 2726 (1987).

30. Infinity Broadcasting, Pacifica Foundation, The Regents of the University of California, Reconsideration Opinion, 3 F.C.C. Rcd. 930, 937 n.47 (1987).

a D.C. Circuit that recognized that First Amendment rights of adults (and older teens) were affected, the Commission tried to appease its political master by broadening the scope of indecency regulation. The FCC decided a "child," for purposes of defining indecent programming, was anyone under eighteen,[31] a reversal of its previous view that twelve marked the age when people no longer need the FCC to shield them from indecent programs.[32] The D.C. Circuit held that this conclusion lacked an adequate rationale.[33] The FCC, however, reaffirmed its position, only to be reversed again by the D.C. Circuit. The court would not countenance treating a seventeen-year-old like a seven-year-old, acidly noting that, "[w]hile a child's ability to make decisions is presumed to be inferior to an adult's, the capacity for choice does not remain dormant throughout childhood until appearing *ex nihilo* upon the arrival of a person's eighteenth birthday."[34] With the panel having reached such a sensible conclusion, the court voted to rehear the case *en banc*.[35]

At Congress's direction,[36] the FCC also removed the safe-harbor provision by banning indecency twenty-four hours a day. The D.C. Circuit also held that provision unconstitutional.[37] Subsequently, Congress mandated,[38] and the FCC adopted,[39] a midnight to 6:00 A.M. safe harbor. That, too, was held unconstitutional by a D.C.

31. Pacifica Foundation, 2 F.C.C. Rcd. 2698, 2699 ¶ 16 (1993); The Regents of the University of California, 2 F.C.C. Rcd. 2703, 2704 n.10 (1987).

32. In a 1976 legislative proposal on indecency, the Commission concluded that childhood ended when kids become teenagers: "Age 12 was selected since it is the accepted upper limit for children's programming in the industry and at the Commission. The Commission considered using the generally recognized age of majority—18—but concluded that it would be virtually impossible for a broadcaster to minimize the risk of exposure to 18-year olds." 122 CONG. REC. 33,367 n.119 (1976)

33. Action for Children's Television *v.* FCC, 852 F.2d 1332 (D.C. Cir. 1988).

34. Action for Children's Television *v.* FCC, 11 F.3d 170, 179 (D.C. Cir. 1993), *vacated*, 1994 U.S. App. Lexis 6438.

35. 1994 U.S. App. Lexis 6438, *vacating* 11 F.3d 170.

36. Departments of Commerce, Justice and State, The Judiciary and Related Agencies Appropriation Act, 1989, Pub. L. No. 100-459, §607, 102 Stat. 2186, 2228 (1988).

37. Action for Children's Television *v.* FCC, 932 F.2d 1504, 1507 (D.C. Cir. 1991).

38. Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16, 106 Stat. 949, 954 (1992).

39. Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, Report and Order, GC Dkt. No. 92-223, 8 F.C.C. Rcd. 704, 704 ¶ 1 (1993).

Circuit panel,[40] only to have the full court vote to rehear the case *en banc*.[41]

The Commission has also expanded its definition of indecent programming[42] and has limited defenses available to stations that air indecency outside the safe harbor. The Commission's (untested) legal position is that it is irrelevant whether children actually listen to the offending program (or station). Pacifica, which aired *The Jerker*, attempted to defend the program by noting that "Arbitron ratings confirm that KPFK's listening audience rarely consists of children."[43] The Commission pronounced itself "unpersuaded" because the test it applied is whether children are listening anywhere;[44] if they were, then they might be listening to KPFK.

The attack on topless radio left open the question of how a top-rated program could be patently offensive by contemporary community standards. That same question reappears constantly in the new indecency crusade, especially in the efforts—now totaling over one million dollars in fines and temporarily holding up license transfers involving Stern's parent, Infinity Broadcasting[45]—to drive the "How-

40. Action for Children's Television *v.* FCC, 11 F.3d 170 (D.C. Cir. 1993).

41. Editorial, *Right the First Time*, BROADCASTING & CABLE, Feb. 28, 1994, at 54.

42. Professor Levy notes that "certain of the mainstream commercial station personnel continued their attempt to resist . . . by using humorous innuendo to 'get around' the newly announced standard . . . . [T]he Commission then expanded its enforcement actions against increasingly indirect and coded references to sexuality." Levy, *supra* note 27, at 104. The indecency ban now covers double-entendre where the sexual meaning is understandable, as the FCC concluded with respect to "The Candy Wrapper Song:"

> It was another Payday. I was tired of being a Mr. Goodbar. So when I saw Miss Hershey standing behind the Powerhouse on the corner of Clark and Fifth Avenue, I whipped out my Whopper and whispered, "Hey, Sweet Tart. How'd you like to Crunch on my Big Hunk for a Million Dollar Bar?"
> She immediately went down on my Tootsie Roll and, you know, it was like pure Almond Joy . . . .
> I was giving it to her Good N' Plenty, when all of a sudden, my Star Burst. Yeah, as luck would have it, she started to grow a bit Chunky and complained of a Wrigley in her stomach. Sure enough, nine months later, out popped a Baby Ruth.

Letter, Oct. 26, 1989, From Mass Media Bureau to Cox Broadcasting Division, 6 F.C.C. Rcd. 3704, 3706 (1991).

43. 2 F.C.C. Rcd. 2698 ¶ 7 (1987).

44. *Id.* at 2701 ¶ 24.

45. Kim McAvoy, *Stern Warning: FCC Delays Station Sales*, BROADCASTING &

ard Stern Show" from the air. Whatever else the "Howard Stern Show" is, it is popular. Until yanked from the air in Chicago by a licensee,[46] it was in all the major markets, and is the number-one-rated morning show in the two largest markets.[47] Because the definition of indecency requires the broadcast to be "patently offensive by contemporary community standards for the broadcast medium,"[48] one might think that popularity should per se establish that a program is not patently offensive. And conversely, if few are listening, who cares? The Commission has been adamant that popularity is irrelevant.

In *Miller* v. *California*,[49] the Supreme Court announced its definition of obscenity. The Court justified a local rather than a national test of contemporary community standards because "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."[50] The Court's First Amendment understanding did not allow sexually explicit materials in more conservative regions, but equally did not allow those conservative communities to impose their views on regions with differing standards. Possibly because indecency was a political bone to the religious right, the FCC has avoided any like attempt to balance.

The Commission categorically rejects any idea of local diversity. Thus, San Francisco must be limited to that which is acceptable to the nation. When KMEL-FM defended by arguing that its programming,

CABLE, Jan. 10, 1994, at 62. The transfers were approved three weeks later. Edmund L. Andrews, *Employer of Howard Stern Wins F.C.C. Purchase Vote*, N.Y. TIMES, Feb. 1, 1994, at D1. The transfer was reluctantly approved and came between the FCC's loss in the indecency case, *Action for Children's Television* v. *FCC*, 11 F.3d 170 (1993), in November, and the vote by the full D.C. Circuit to rehear the case *en banc* on February 16, 1994. Agency officials said "that two of three commissioners who voted today . . . strongly favored trying to revoke Infinity's 22 radio licenses as well as block the new acquisitions . . . and [i]f they hadn't been constrained by the court case, they could have set Infinity for a hearing, no doubt about it." *Id.* at D1 & D2. Simultaneously, however, the Commission added another $400,000 in fines. *Id.* at D1.

46. Peter Viles, *Stern Dropped in Chicago; Lawsuit Likely*, BROADCASTING & CABLE, Aug. 30, 1993, at 24.

47. Julie Tisner, *From Radio Rage, Raging Best Sellers*, BUS. WK., Nov. 1, 1993, at 43.

48. FCC *v.* Pacifica Found., 438 U.S. at 732.

49. Miller *v.* California, 413 U.S. 15 (1973).

50. *Id.* at 32.

"consisting almost entirely of double entendre and innuendo" was not offensive by San Francisco standards, the Commission informed the station that the "generic indecency standard" was "nongeographical[ly]" based.[51] What is patently offensive in San Francisco is therefore defined by "the views of the average [national] viewer or listener."[52] The Commissioners will "draw on their knowledge" of those viewers "as well as their general expertise in broadcast matters."[53] Thus, five people fortunate enough to have been appointed to the Federal Communications Commission can dictate what over 200 million adults should find patently offensive.

In his *Pacifica* dissent, Justice William J. Brennan claimed that the result "permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority."[54] The current Commission has one-upped that. It permits minority tastes completely to preclude a protected message from entering the homes (and cars) of a receptive, unoffended majority. By threat and fines, the Commission hopes to create a single nation, a single market, and a single standard that rejects the views of the fourteen large markets where the "Howard Stern Show" reigns as one of the most popular morning radio programs.[55]

It would be incorrect to argue that indecency law affects only the worst programming and touches nothing serious. The Commission intentionally "reject[ed] an approach that would hold that if a work has merit it is per se not indecent."[56] *The Jerker* is serious, as the *New York Times* review demonstrates.[57] The "Howard Stern Show" however scatological and misogynistic, "is also virtually always political and tied to some commentary on current events."[58] KSD-FM in St. Louis read from an interview in *Playboy* by Jessica Hahn about

51. Liability of San Francisco Century Broadcasting for a Forfeiture, Memorandum Opinion and Order, 8 F.C.C. Rcd. 498 ¶ 6 (1993).
52. *Id.* at 499.
53. *Id.*
54. 438 U.S. at 766 (dissenting).
55. Tisner, *supra* note 47, at 43.
56. 3 F.C.C. Rcd. 930, 932 ¶ 17 (1987).
57. *See supra* note 24.
58. Levy, *supra* note 27, at 171.

her alleged rape by the Reverend James Bakker—only to be fined.[59] WLUP-FM Chicago was fined[60] for discussing photographs of the famous singer (and first black Miss America) Vanessa Williams that appeared in *Penthouse*, even though the same were "considered newsworthy by mainstream news organizations at the time."[61] And the material that, when broadcast, resulted in over a million dollars of fines[62] to stations airing the "Howard Stern Show" has, when distributed in book form, sold one million hardcover copies just two weeks after it was released.[63]

All of these issues—the relevance of whether children (however defined) are in the audience, the relevance of strong ratings, the permissibility of a national standard, and the absence of a defense of serious merit—will eventually be adjudicated by federal courts. It remains to be seen whether the Commission can explain what it thinks it is doing, although Commissioner James Quello made an effort when he stated: "We will continue indecency enforcement. We have to remember that the Gores [Vice President and Mrs.] are both strong on indecency."[64]

DRUGS

For at least the past three decades, administration after administration has declared its own war on drugs. After Vice President Spiro Agnew finished his highly publicized attacks on the Eastern establishment media, he delivered a less publicized attack on popular music: "[I]n too many of the lyrics, the message of the drug culture is purveyed. We should listen more carefully to popular music, because . . . at its worst it is blatant drug-culture propaganda."[65] Agnew specifically attacked

59. Letter, Sept. 27, 1990, to Radio Station KSD-FM, 6 F.C.C. Rcd. 3689 (1990).

60. Liability of Evergreen Media Corp. for a Forfeiture, Memorandum Opinion and Order, 6 F.C.C. Rcd. 502 (1991).

61. Levy, *supra* note 27, at 119.

62. Harry A. Jessell, *Infinity Fined $500,000 for Stern*, BROADCASTING & CABLE, Aug. 16, 1993, at 15.

63. Kurt Anderson, *Big Mouths*, TIME, Nov. 1, 1993, at 61.

64. *Quoted in* Nat Hentoff, *Censors of the Airwaves*, WASH. POST, Mar. 6, 1993, at A21.

65. *Quoted in* POWE, *supra* note 2, at 176.

"Acid Queen" by the Who as "present[ing] the use of drugs in such an attractive light that for the impressionable, 'turning on' becomes the natural and even the approved thing to do."[66] Agnew, like other members of his generation, had difficulty understanding the music embraced by the young. "Acid Queen" was, in fact, a blistering attack on the ravaging consequences of LSD.[67]

Although Agnew picked an ill-conceived target, he had a point. Popular music, reflecting culture, had shifted from hot cars and surfing to drugs. The cultural revolution that seemed to be overtaking American youth embodied both those media of expression—rock music and drug use. Whether rock music was manufacturing the experimentation with drugs, beginning with marijuana and then moving on to LSD, or simply reflecting it is another matter indeed.

Typically, society blames depictions of social ills in the mass media as causes of those ills. After rock and roll appeared in the 1950s, there were Senate hearings on its relationship to juvenile delinquency.[68] Today, we blame urban violence on those who film it for television. In the 1970s it was only a matter of time before someone would level the charge that popular music was encouraging drug use; it just happened to be that the someone was the Vice President. The Vice President also happened to be three years behind the times. Songs glorifying drugs peaked in 1967, and after the "disintegration of the San Francisco Summer of Love, the drug song phenomenon subsided."[69]

The FCC, like other adult institutions, could not realize the phenomenon was gone when its members, like other adults, could not even understand the lyrics played. The Commission understood Agnew's message, however, and after a six-month delay, it acted decisively by issuing a short notice "point[ing] up" broadcasters' duties regarding song lyrics "tending to promote or glorify the use of illegal drugs [such] as marijuana, LSD, 'speed,' etc."[70] The notice required

66. *Id.* at 177.

67. The lyrics are printed *id.*

68. *Hearings on S. 2834 Before the Senate Subcomm. on Communications of the Comm. on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. (1958).

69. R. SERGE DENISOFF, SOLID GOLD: THE POPULAR RECORD INDUSTRY 389 (Transaction Books 1975).

70. Licensee Responsibility to Review Records Before Their Broadcast, 28 F.C.C.2d

broadcasters to interpret the import of each song's lyrics before airing it so as to determine "whether a particular record depicts the dangers of drug abuse, or, to the contrary, promotes such illegal drug usage."[71] Failure to do so would "raise . . . serious questions as to whether continued operation of the station is in the public interest."[72] Omitted from the notice, however, was an explicit prohibition against airing songs that, as determined by the licensee, in fact, promote illegal drug use.

The Commission was fully aware that the natural consequences of its action would be censorship; three concurring opinions and a dissent made it unmistakable. Commissioner Nicholas Johnson, in his dissent, alleged the Commission's action to be "an unsuccessfully-disguised effort" at censorship.[73] The three concurring opinions agreed, stating they would have preferred a less disingenuous course than the majority. Commissioner Robert E. Lee expressed his hope that the action would "discourage, if not eliminate" drug lyrics from the air and noted, "I expect the industry to meet its responsibilities."[74] Commissioners Thomas Houser and H. Rex Lee thought that the Commission had not gone far enough. Drug lyrics were only a part of the larger problem of a "pill-oriented society . . . . To the extent that broadcast media contributes, wittingly or unwittingly, to the drug problem, the Commission is charged with the responsibility of ensuring that the public interest will prevail . . . ."[75]

The press reported the Commission's notice as a directive to licensees not to play drug-oriented songs.[76] It was well known in the trade that "talk of 'responsibility' . . . is simply a euphemism for self-censorship,"[77] and the industry had no difficulties comprehending its

409 (1971).

71. *Id.*

72. *Id.*

73. *Id.* at 412.

74. *Id.* at 410.

75. *Id.* at 411.

76. Licensee Responsibility to Review Records Before Their Broadcast (F.C.C. 71-205), Memorandum Opinion and Order, 31 F.C.C.2d 377 (1971) [hereinafter *Licensee Responsibility*].

77. The phrase comes from Commissioner Lee Loevinger, Complaint of Anti-Defamation League Against KTYM, 6 F.C.C.2d 385, 398 (1967).

new responsibilities. At WDAS-FM in Philadelphia, the number of songs considered unsuitable jumped from thirteen to over 500 in just one week.[78] WNTN in Newton, Massachusetts, ordered the elimination of all Bob Dylan songs "because management could not interpret the lyrics."[79] Another Massachusetts station ordered "an immediate ban on all music containing lyrics even remotely dealing with politics, sex, and to a minor degree ecology."[80]

In what seems an inexplicable choice, rather than talk to the Bureau of Narcotics and Dangerous Drugs,[81] the Commission turned to the United States Army for assistance. Drawing on an existing Army list, the Commission's Bureau of Complaints and Compliance issued a list of twenty-two songs containing "so-called drug-oriented lyrics."[82] This list of "do not plays" was circulated throughout the industry, and its songs were effectively banned. A number of very popular songs were knocked off the air, including "Lucy in the Sky with Diamonds" and "With a Little Help from My Friends" by the Beatles, "Eight Miles High" and "Mr. Tambourine Man" (a Dylan song) by the Byrds, "Coming into Los Angeles" by Arlo Guthrie, "White Rabbit" by the Jefferson Airplane, and "Truckin" by the Grateful Dead.[83]

The "do not play" list, following on the heels of the notice requiring broadcasters to preview song lyrics before airing, was the farthest extension of censorship yet attempted by the Commission. The Commission's decision in *WUHY*, holding illegal the broadcast of the Jerry Garcia interview, was over a year old, but it appeared to ban

78. Note, *Drug Lyrics, the FCC, and the First Amendment*, 5 LOY. L.A. L. REV. 339, 348 (1972).

79. *Id.* at 348 n.114.

80. *Id.* at 366.

81. One reason may have been that its director expressed strong doubts that there was any connection between drug lyrics and drug use. N.Y. TIMES, Mar. 28, 1971, at 41.

82. Yale Broadcasting *v.* FCC, 478 F.2d 594, 603 (D.C. Cir. 1973) (Bazelon, C.J., dissenting from denial of motion for rehearing *en banc*).

83. POWE, *supra* note 2, at 179. Censorship breeds excesses. Some stations ceased playing "Puff, the Magic Dragon" by Peter, Paul, and Mary on the grounds that this gentle song about growing up was really an inducement to marijuana use. Furthermore, the "do not play" list included "The Pusher" by Steppenwolf. It would be hard to imagine a more antidrug song than this one about people walking "with tombstones in their eyes" and the singer wishing he could be President so that he could "declare total war on the pusher man." The lyrics are reprinted *id.* at 179–80.

only two words and did so with explicit statutory authority from the Criminal Code. The "do not play" list, however, banned entire songs because they took the wrong position (or were mistakenly perceived to be taking the wrong position) on one of the most controversial topics facing the United States (and one that mainstream news media were avoiding). If the Commission wished to test the outer limits of its public interest powers, it had created a superb vehicle.

The Commission had no such wish. Instead it wanted to have its cake and eat it, too. And, with a little help from its friends (here, the D.C. Circuit), it managed just that.

The Commission's message—"do not play"—had been received. What it wished now was not to lose. Several requests for reconsideration were filed in response to the notice, and the Commission used them as an opportunity to issue a second, clarifying notice that repudiated the "do not play" list and eschewed any desire to censor.[84] No action would be taken against stations that played songs with drug lyrics. The Commission now stated that what it really meant to do was reiterate the obligation, taken from the *1960 Programming Statement*,[85] that a station be aware of the substance of its programming.

Was the real intent of the Commission to alert stations about drug lyrics in the hopes they would ban them or to reiterate the *1960 Programming Statement*? Testifying before Senator Gaylord Nelson of Wisconsin, Chairman Dean Burch stated that Commissioner Johnson had mischaracterized the Commission's actions as banning drug lyrics. Nelson then asked Burch what he would do if a station continued to play songs promoting drug use. Burch replied: "I know what I would do. I probably would vote to take the license away."[86]

The task of determining what the Commission had "really" done fell to the D.C. Circuit, in a challenge by Yale Broadcasting. The licensee stated that it intended to deal with the problem of drugs by complying with the Fairness Doctrine (that is, actually presenting both

84. *Licensee Responsibility*, 31 F.C.C.2d 377 (1971).

85. 25 Fed. Reg. 7291 (1960), discussed *supra* Chapter 4 (Diversifying Program Mix: Licensing Before 1960).

86. *The Effect of the Promotion and Advertising of Over-the-Counter Drugs on Competition, Small Business, and Health and Welfare of the Public: Hearings Before the Senate Subcomm. on Monopoly of the Select Comm. on Small Business*, 92d Cong., 1st Sess., pt. 2, at 736 (1971).

sides of the debate) and that the Commission had engaged in censorship by banning drug lyrics. Not so, the Commission responded; the second notice shows that the goal was just to reaffirm the *1960 Programming Statement* in a new context.

The D.C. Circuit fully accepted the Commission's position. Consequently, by objecting to that position, Yale Broadcasting was arguing that it need not know what it was airing. This meant that the licensee was the epitome of a rich spoiled brat. In an opinion omitting discussion of either how the industry reacted to the Commission orders by banning the records or why the industry would so behave, the court expressed its "astonishment that the licensee would argue that before the broadcast it has no knowledge, and cannot be required to have any knowledge, of material it puts out over the airwaves."[87] Yale Broadcasting could not claim to be operating in the public interest. "Supposedly a radio licensee is performing a public service—that is the raison d'etre of the license. If the licensee does not have specific knowledge of what it is broadcasting, how can it claim to be operating in the public interest?"[88] Indeed, the licensee's claim that it need not know what it airs says "a great deal about quality in this particular medium of our culture."[89]

The Commission's attention quickly wandered to other things—especially topless radio—and the season of panic ended. Eventually, some of the music that was targeted reemerged in the 1980s as "golden oldies" and can now be heard on formats targeting the aging baby boomers. The boomers' teenagers could themselves discover a lost generation of popular music recounting the joys of marijuana, and some of their own music now, too, extols drugs.[90] But broadcasters need not think twice about whether to air the songs; the Commission that tried to ban drug lyrics has receded into history. Drug use, of course, has not.[91]

87. Yale Broadcasting *v.* FCC, 478 F.2d 594, 599 (D.C. Cir. 1973).

88. *Id.* The court went on: "But with reference to the broadcast of that which is frequently termed 'canned music,' we think the Commission may require that the purveyors of this to the public make a reasonable effort to know what is in the 'can.' No producer of pork and beans is allowed to put out on a grocery shelf a can without knowing what is in it and standing back of both its content and quality."

89. *Id.*

90. John Leland, *Just Say Maybe,* NEWSWEEK, Nov. 1, 1993, at 51-52.

91. Portrayals of drugs began as a radio problem, but by the 1980s were a television

VIOLENCE

Violence makes good viewing,[92] and the FCC, with the exception of cheerleading for the family viewing hour mentioned earlier,[93] has never shown any concern about it. But virtually everyone else has.

On October 20, 1993, Attorney General Janet Reno told members of the Senate Commerce Committee and the broadcast industry that if television did not move immediately to cut back on depictions of murders and violence, then Congress and the White House would do so for them.[94] Never in the decades of debate over televised violence has there been so direct a threat of censorship. Reno opined that she had learned that the industry had been promising to cut back for years and had not done so, so she thought the time had just about run out.[95] Her testimony accepted as fact the violence hypothesis: that viewing portrayals of violence on television leads to antisocial aggression in real life.

Senate hearings on the violence hypothesis go back four decades to hearings on juvenile delinquency chaired by Estes Kefauver in the 1950s[96] and Thomas Dodd in the 1960s.[97] Industry protestations that

problem. Network censors had to make choices about how casual drug use might be portrayed. For most of the 1980s "drugs either vanished from popular entertainments or appeared in the role of the villain." *Id.* at 52. Thus, when NBC ran *Lethal Weapon* as its "Sunday Night Movie" on October 30, 1990, the network edited out the scene where Danny Glover and Mel Gibson each have a Coors in Glover's boat, and Glover's daughter complains that she is grounded for marijuana, while they are allowed to drink beer.

92. As far as we can tell, the graphic violence in *Lethal Weapon*, *supra* note 91, was not edited at all.

93. *See supra* notes 13–14. The family viewing hour is described in GEOFFREY COWAN, SEE NO EVIL (Simon and Schuster 1979).

94. Michael Wines, *Reno Chastises TV Networks on Violence in Programming*, N.Y. TIMES, Oct. 21, 1993, at A1.

95. Ellen Edwards, *Reno: Curb TV Violence*, WASH. POST, Oct. 21, 1993, at A1. In a like vein, Committee Chairman Ernest Hollings told industry representatives that he felt he had heard it all before when they promised to do better. "There's no education in the second kick of a mule." *Id.* at A13.

96. *Juvenile Delinquency (Television Programs): Hearings Before the Senate Subcomm. to Investigate Juvenile Delinquency of the Comm. on the Judiciary*, 83d Cong., 2d Sess., 84th Cong., 1st Sess. (1954–55).

97. *Juvenile Delinquency (Effects on Young People of Violence and Crime Portrayed on Television): Hearings Before the Senate Subcomm. to Investigate Juvenile Delinquency of the Comm. on the Judiciary*, 87th Cong., 1st & 2d Sess., pt. 10 (1963), 88th Cong.,

stations would do something are more recent; they go back just two decades. In the early 1970s, Senator John Pastore, enamored with the way the Surgeon General had ended the controversy over the effects of smoking on health, hoped for a repeat with television and violence.[98] Using the Eisenhower Commission's report on the causes and prevention of violence[99] and the subsequent five-volume study of the surgeon general,[100] Pastore kept the violence issue alive for most of the 1970s.[101] The industry technique of vague promises with little subsequent performance succeeded in outlasting Pastore, and during the 1980s little was heard about televised violence.

Just as the concern of the early 1970s was caused by the urban unrest of the late 1960s, the current concern is triggered by the well-publicized rise of random violence throughout the nation, from drive-by shootings to a new arms race, this time in the public schools. This concern and the fears of a link between violence on the screen and in the streets were then heightened in October 1993 by three copycat incidents that ended in violent death. In one, a five-year-old boy copying MTV's "Beavis and Butt-head" set his house on fire, killing his two-year-old sister.[102] In the others, eighteen-year-old Michael Singledecker and twenty-four year-old Marco Birkhimer (in separate incidents) acted out a scene from the Disney movie *The Program* and lay down in the center of a highway as a test of courage. Each was killed.[103]

Although these are tragic incidents, none would be averted by a regulation of network violence, because the first involved a cable channel[104] and the latter two a movie. The lack of congruence

2d Sess., pt. 16 (1965).

98. Krattenmaker & Powe, *supra* note 12, at 1127.

99. NAT'L COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY (1969).

100. NAT'L INSTITUTE OF MENTAL HEALTH, U.S. DEP'T OF HEW, TELEVISION AND SOCIAL BEHAVIOR (1972) (in 5 volumes).

101. Krattenmaker & Powe, *supra* note 12, at 1127–33. A useful study of the hearings is WILLARD D. ROWLAND, JR., THE POLITICS OF TV VIOLENCE (Sage Publications 1983).

102. Tom Morganthau, *Can TV Violence Be Curbed?*, NEWSWEEK, Nov. 1, 1993, at 26.

103. *Id.*

104. The child's mother had blamed "Beavis and Butt-head," "but a neighbor

apparently bothers no one.[105] Ever since 1947, when the House Un-American Activities Committee targeted Red propaganda from Hollywood, any congressional attack on the entertainment industry gets good press.[106]

Interestingly, as television became slightly less violent in the 1990s, American society appeared decidedly more violent. Even before Reno's speech, Senator Paul Simon pressured the networks to promise to institute a system of parental warnings about violent programming.[107] Congress, however, suggested that it wanted an actual decline in the amount of violence on television.

Everyone who thinks about the issue understands that it is impossible and unwise to eliminate all violence from drama; violence has been integral to plot development from the Greeks to Shakespeare to the present. The top-rated miniseries, *Lonesome Dove*, featured hangings, shootings, butcherings, and other graphic violence because the Texas frontier was a violent place and violence was necessary for the plot. Surely, few would wish to eliminate such a critically acclaimed and Peabody Award–winning series. What the critics wish instead is to eliminate violence that is glamorous or gratuitous.

Violence has always been a part of network television. "There seemed to be [in the 1950s] an unspoken premise that evil men must

interviewed on CNN reported that the family didn't even have cable television and that the kid had a local rep as a pyromaniac months before." Brian Siano, *Frankenstein Must Be Destroyed: Chasing the Monster of TV Violence*, 54 THE HUMANIST 19, 24 (No. 1, 1994).

105. The reason may be that senators do not know what is on television or what the basic structure of the industry is. Thus, a *New York Times* analysis reported that some network executives said it was apparent that the politicians watched very little television. One executive said that despite long interview sessions with network officials, some committee staff members never understood the difference between the stations that a network owns and its affiliates, which are owned by other companies. "David Westin, the senior vice president of Capital Cities Communications, parent of ABC, said, 'We were certainly struck by the lack of sophistication about the difference between network television and cable television and local television.'" Bill Carter, *Uproar on TV Violence Frustrates the Networks*, N.Y. TIMES, July 5, 1993, at 41.

106. Thus, Senator Paul Simon stated, "I can tell you that none of the sponsors of these [antiviolence legislative] initiatives is losing votes back home with these ideas." Elizabeth Kolbert, *Entertainment Values vs. Social Concerns in TV Violence Debate*, N.Y. TIMES, Aug. 3, 1993, at C13.

107. Edmund L. Andrews, *4 Networks Agree to Offer Warnings of Violence on TV*, N.Y. TIMES, June 30, 1993, at A1.

always in the end, be forcefully subdued by a hero; that the normal processes of justice were inadequate, needing supplementary individual heroism."[108] The prototype for violent network programming was the western. For years "Gunsmoke" started (and ended) with Marshal Matt Dillon in a one-on-one quick-draw gunfight. In the heyday of the western in the 1960s, the genre dominated the ratings; but by the mid-1970s the western was history. Its place was taken by the action-adventure format that had been perfected in the incredible number-one hit, "The Untouchables," in the late 1950s and early 1960s. "Miami Vice" was a direct descendant.

As we wrote this book, three facets of televised violence stood out. First, it is more graphic and more realistic. There is a qualitative, if not quantitative, change from "The Untouchables" to "Miami Vice," with the latter's "lavishly choreographed sequences of violence and pursuit, always accompanied by loud, pulsating music."[109]

The second facet is that the realistic violence is often only too real. While viewers see no one killing and mutilating people in the genocide of Bosnia, we know that the dead we see on the news have been brutally murdered. Similarly, the inferno at the Branch Davidian compound in Waco was televised live. Viewers saw no one burning, but they knew what was happening inside. And, of course, virtually everyone saw—again and again and again—Rodney King and Reginald Denny being brutally beaten.

Third, and implicit in the first two, prime time network television is not the perpetrator of televised violence; it is cable, and yet (thus far) no regulatory proposals include cable. Open *TV Guide* and look at the four networks' prime time schedules. Two format types dominate: sitcoms and magazines such as "60 Minutes," "20/20," and "Forty-Eight Hours." The violence migrated to cable where the reruns of the action adventure series, from "Miami Vice" to "Hill Street Blues" to "Hawaii Five-O," are available nightly. So, too, are unedited versions of the very violent motion picture fare, such as *Terminator* and *Die Hard*, which has been so popular for the past few years.

It is ironic that the networks are under fire when they are

108. ERIK BARNOUW, TUBE OF PLENTY 215 (2d ed., Oxford University Press 1990).

109. *Id.* at 510. The same changes are readily apparent in movies like *Terminator, Lethal Weapon,* and *Die Hard.*

producing less violence and that those demanding action are demanding it where it has already been taken. Howard Stringer, the President of CBS, states that network entertainment programming has arguably never been tamer,[110] and Michael Dann, who has programmed for the networks for four decades, states that it is less violent today than at any time since the 1950s.[111] They are right. But society seems more violent, and the increase in news programming, plus the magazine format, have brought actual, not fictional, violence into American homes in undreamed-of quantities.[112] While almost no one suggests that news should downplay violence,[113] the combination of real violence on television screens with real violence in society generates the demands to lessen the reduced fictional violence on television.

Although we have concluded that the networks are not guilty as charged, to be honest we must note that over any period of years, television entertainment will be decidedly more violent than American society. Our teenagers will have seen thousands upon thousands of murders on television by the time they graduate from high school.[114] Critics assume that this must have some effects. And no one suggests that the effects are positive.[115] Dr. Brian Wilcox, Director of the

110. Morganthau, *supra* note 102, at 27.

111. Elizabeth Jensen & Ellen Graham, *Stamping out TV Violence: A Losing Fight*, WALL ST. J., Oct. 26, 1993, at B1.

112. We are hardly the first to note that American televised violence is equally available over the air in Canada, but American real-life violence is not.

113. The reason for the qualification is that Hillary Rodham Clinton entered the debate and suggested that excessive news coverage of violence may have a harmful effect on children. Kim McAvoy, *Hillary Clinton Decries Excess Violence in TV News*, BROADCASTING & CABLE, Mar. 14, 1994, at 47. Until that time we were unaware of anyone's making a similar suggestion. Indeed, Senator Simon has been quite clear that his target was entertainment, not news. CNN Transcript No. 883, *Larry King Live*, Aug. 2, 1993, at 4.

114. Christopher Lee Philips, *Task Force on TV Violence Formed*, BROADCASTING & CABLE, June 14, 1993, at 69.

115. No one more so than Brandon S. Centerwall, M.D. He states that the "epidemiological evidence indicates that if, hypothetically, television technology had never been developed, there would today be 10,000 fewer homicides per year in the United States, 70,000 fewer rapes, and 700,000 fewer injurious assaults." *Television and Violence*, 267 J. AM. MED. ASS'N 3059, 3061 (1992); an earlier version appeared as *Exposure to Television as a Risk Factor for Violence*, 129 AM. J. EPIDEMIOLOGY 643 (1989). Centerwall compares annual crime rates (particularly homicide) in the ten-to-fifteen-year

American Psychological Association's Office of Public Interest Legislation, testified that "because we are, by nature, aggressive, we learn to inhibit our aggression. That's what education does . . . . But by watching so much violence on television, there is a disinhibiting effect."[116]

The copycat incidents demonstrate what everyone knows: people learn from watching television[117] (as well as from the movies,[118]

period after television was introduced in the United States, Canada, and South Africa. He concludes that in each nation, the homicide rate doubled between the introduction of television and the time it took for small children nursed on television to grow up and commit the crimes television taught them to commit. According to the author, he controlled for a vast "array of possible confounding variables." 267 J. AM. MED. ASS'N, at 3061. He did not take into account—nor could he—either the breakdown of the family structure or the waning influence of religion in the societies studied. We cannot tell whether or how Centerwall dealt with the fact that a specific age group "males 17-24" commits the bulk of the violent crimes.

There is one other point that Centerwall, along with virtually all others, misses. Assuming that television teaches and causes bad things, does it not also teach and cause good things? Indeed, is that not the purpose of requiring children's programming or giving added funding to PBS? Centerwall's figures assume that television has only negative consequences and a that hug or a display of caring has no consequences at all. Neither he, nor we, have any idea whether the supposed good things television shows might balance out the supposed bad things television shows. That would still leave the argument that television could be better, but it further reveals Centerwall's silliness in listing the numbers of bad things that would not have happened if technology had stalled at radio. Leonard D. Eron & L. Rowall Huesmann, *The Relation of Prosocial Behavior to the Development of Aggression and Psychopathology*, 10 AGGRESSIVE BEHAVIOR 201 (1984), believe that those who learn prosocial behaviors are less likely to engage in aggressive behaviors because they believe the two types of behavior are incompatible.

116. *Television Violence Act of 1989: Hearings Before the House Subcomm. on Economic and Commercial Law of the Judiciary Committee on H.R. 1391*, Serial No. 34, 101st Cong., 1st Sess. 53-54 (1989) [*Brooks Hearings*]. Both because scientific data had resulted in the banning of cigarette commercials and because Chairman Jack Brooks is a notorious cigar smoker, there were numerous references to smoking in those hearings. Brooks produced a great one liner: "White rats die from smoking cigarettes, not cigars." *Id.* at 52.

117. Some children of the authors' generation tried to join Superman in leaping off rooftops. Jensen & Graham, *supra* note 111, B1. Rod Serling's "Doomsday Flight" produced several copycat incidents. The story involves a caller who hides an altitude bomb aboard an airliner and demands a ransom. If the airline refuses to pay, he will not divulge the location of the bomb, and the plane will be destroyed as it descends for landing. In the end, the pilot saves the plane by selecting Denver's airport, which is located at an elevation above the critical altitude. "Doomsday Flight" gained its notoriety because before the program even ended, one airline received an identical bomb threat; four similar threats came during the next twenty-four hours and another eight during the following week. Exported to other countries, the show made one Australian criminal

records,[119] and reading[120]). That is not controversial; what the social scientists tell us is that the violence hypothesis is correct: watching televised violence causes viewers to be more aggressive.[121] Similarly, psychology textbooks from introductory psychology to social psychology to child development all assert that viewing television violence leads to "aggressive, antisocial, or delinquent behavior."[122] This certainty rests on the results from the three types of studies that purport to test (and prove) the violence hypothesis: laboratory experiments, field experiments, and correlational studies.

Laboratory studies typically focus on two groups, an experimental group, which is exposed to a violent film clip, and a control group, which sees a nonviolent film clip. Researchers then attempt to measure differences in subsequent behavior of the two groups. One technique, pioneered by Stanford University's Albert Bandura, subsequently places the two groups of young children in a room with a Bobo Doll, a large inflated plastic figure.[123] Bandura's results are that those children who have been exposed to the violent film will behave more aggressively toward the Bobo Doll than the children in the control group.

A second methodology, typically using college freshman and sophomores, measures violence via a Buss Aggression Machine. As

$500,000 richer when Qantas Airline decided to protect a Hong Kong–bound flight. BOAC had the best response; when it received a similar threat, it arranged for a London-bound flight to land instead at Denver. Krattenmaker & Powe, *supra* note 12, at 1134. Only one copycat incident resulted in a lawsuit. NBC aired a film, *Born Innocent*, where a girl is raped with a plumber's helper. Four days later Oliva N., aged nine, was attacked by several boys and raped with a Coke bottle. The boys had seen and discussed *Born Innocent*. A California appellate court ruled that NBC could not be held liable because there was no showing—nor could there be—that NBC "incited" the boys to action. Olivia N. *v.* Nat'l Broadcasting Co., 126 Cal. App.3d 488, 178 Cal. Rptr. 888 (1st Dist. 1981).

118. See the example of *The Program* discussed *supra* in text accompanying note 103.

119. Waller *v.* Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991) (suicide after listening to Ozzy Osbourne's *Wizard of Oz* record album).

120. Herceg *v.* Hustler Magazine, 814 F.2d 1017 (5th Cir. 1987) (teenage boy died in an act of autoerotic asphyxia after reading an article entitled *Orgasm of Death*).

121. There is an important difference between being aggressive and being violent, given the way American society rewards aggressive behavior. For this discussion we shall presume that the aggression manifested is antisocial unless we state otherwise.

122. GEORGE COMSTOCK, THE EVOLUTION OF AMERICAN TELEVISION 224 (2d ed., Sage Publications 1989), listing the books at 224-25.

123. ALBERT BANDURA, AGGRESSION (Prentice-Hall 1973).

employed, the subject believes the machine gives mild electrical shocks to the experimenter's associate (who poses as just another subject of the experiment) whenever the associate makes a mistake. The machine in fact does not shock, but instead measures both the duration and intensity of the intended shocks, which are then treated as measures of the subjects' aggressiveness. The leading experimenter in this area has been the University of Wisconsin's Leonard Berkowitz,[124] and his results—again, those who have seen the violent film clip shock longer and harder than those who have seen the nonviolent film clip—are so well known that they are called the "Berkowitz Paradigm."[125]

There are many variations on both the Bandura and the Berkowitz experiments, but however they are conducted, the results are overwhelmingly the same. "It seems clear that this work has demonstrated that viewing violent material on television or film in the laboratory can increase aggressive responses in the laboratory."[126] We are aware of no reputable scientist who holds to the contrary. Indeed, Professor George Comstock writes that the experiments are "so consistent in outcome, so complementary and plausible in leading to explanations for the effects . . . and so logically linked to and consistent with the outcome of research on other kinds of media effects . . . that challenges to external validity have become much reduced in force."[127]

The problem with the laboratory experiments is that they seem unrelated to any real-world problem. People do not go around attached to Buss Aggression Machines. No one thinks that hitting a Bobo Doll is a violent, antisocial act. The assumption underlying the laboratory research is that the cause-and-effect relationships shown in the laboratory also occur in the real world;[128] indeed, that is central to the violence hypothesis. Yet the laboratory results show, at most, that

124. The major article is now three decades old: Leonard Berkowitz & Edna Rawlings, *Effects of Film Violence on Inhibitions Against Subsequent Aggression*, 66 J. ABNORMAL & SOC. PSYCHOL. 405 (1963). Krattenmaker & Powe, *supra* note 12, in notes 79–89 cites and summarizes many of the studies.

125. Thomas R. Kane, Joanne M. Joseph & James T. Tedeschi, *Person Perception and the Berkowitz Paradigm for the Study of Aggression*, 33 J. PERSONALITY & SOC. PSYCHOL. 663 (1976).

126. Jonathan L. Freedman, *Effect of Television Violence on Aggressiveness*, 96 PSYCHOLOGICAL BULL. 227, 228 (1984).

127. COMSTOCK, *supra* note 122, at 228.

128. Indeed, "this is always true of laboratory work." *Id.*

televised violence causes harmless behavior. Where is the criminal violence that television is said to spawn? That is where field experiments, conducted in natural settings, and correlational studies, using real-world data, come in.

Field studies have proven difficult to conduct (because it is amazingly difficult to hold variables in check), and there are not very many of them in the literature. We shall not attempt to discuss the various field experiments; that has been done elsewhere.[129] In a typical field study, boys in a private school will be placed in two groups, with one allowed to watch violent television programs while the other is not. Behavior patterns, both before and afterward, are measured to see what effects the television diet may produce. Analysis of all the field experiments reaches an invariable conclusion; in Jonathan Freedman's words, "this research offers only the slightest encouragement for the causal [violence] hypothesis. Indeed many readers might be inclined to interpret it as evidence against a causal effect of television violence on aggression."[130]

Social scientists appear unconcerned about the field experiment's results because correlational data, using real-world viewing and behavior, confirm the laboratory experiments. Thus, several of the leading social scientists write: "What is most impressive about the media violence research is the way in which the laboratory experiments, correlational . . . field studies, and longitudinal developmental studies all complement each other in linking exposure to media violence with subsequent aggression."[131]

129. *Id.* at 229–35; MATTHEW SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES 105–06 (Yale University Press 1986); Krattenmaker & Powe, *supra* note 12, at 1142–44.

130. Freedman, *supra* note 126, at 234; see also *id.* at 243: "The field studies have produced quite mixed and unimpressive results. A few studies found some rather weak evidence for an increase in aggressiveness following exposure to violent programs; others found no effect or even a reversed effect. The two studies with mass data reached opposite conclusions, one finding no effect of television on violent crime, the other purporting to find a dramatic increase in homicides on the third day after prize fights were shown on closed-circuit television. Taken as a whole, this body of research offers only the slightest encouragement for the causal hypothesis; it certainly does not provide sufficient support to justify the conclusion that viewing television violence has any effect on subsequent aggression."

131. L. Rowell Huesmann, Leonard D. Eron, Leonard Berkowitz & Steven Chaffee, *The Effects of Television Violence*, *in* PSYCHOLOGY AND SOCIAL POLICY 191, 192 (Peter

In the typical correlational study the researchers obtain a host of data about age-cohort subjects: always included are television program preferences and some measures of aggressiveness or antisocial behavior. Most correlational studies indicate a moderate .10 to .20 correlation between those who prefer to watch violent programming and those who are more aggressive.[132] Indeed, "[a]lmost all researchers would agree that more aggressive children generally watch more television and prefer more violent television."[133] Correlational studies, however, contain a major potential problem: correlation cannot prove causation. Thus, while viewing violent programs is positively correlated with aggressive behavior, it may be that (a) viewing the violence causes the aggressive behavior, or (b) aggressive behavior causes the individual to like to view violence, or (c) a third (or more) variable causes each of the observed behaviors. Social scientists are satisfied that they have eliminated (c), the possibility of other variables, because every plausible "third" variable has been tested and found unable to explain the correlation between viewing violence on television and aggressive behavior.[134]

Two studies especially stand out. William Belson gathered data on 1,600 London boys and tested a number of hypotheses. He found that the data were "strongly supportive of the hypothesis that high exposure to television violence increases the degree to which boys engage in serious violence (like firing a revolver at someone or frightening someone by pretending to throw them off a balcony)," but not for less serious violence.[135] Furthermore, because the effects of viewing violence should be cumulative, one would expect to see violent behavior in adults resulting from viewing violence as children. This is

Suedfeld & Peter Tetlock eds., Hemisphere Publishing 1991).

132. Freedman, *supra* note 126, at 237; there is also a modest positive correlation, however, between viewing television (regardless of its content) and aggressive behavior. *Id.* at 236.

133. L. Rowell Huesmann, *Psychological Processes Promoting the Relation Between Exposure to Media Violence and Aggressive Behavior by the Viewer*, 42 J. SOC. ISSUES (No. 3) 125, 126 (1986).

134. COMSTOCK, *supra* note 122, at 229.

135. WILLIAM BELSON, TELEVISION VIOLENCE AND THE ADOLESCENT BOY 15 (Saxon House 1978). Belson investigated the reverse of the violence hypothesis, that those who are violent prefer violent programming, and he found that proposition not supported by the data. *Id.*

exactly what the long-running study by L. Rowell Huesmann, Leonard Eron, and their associates has found: preferring and watching violent television at age eight constitutes a predictor of real violent behavior—such as serious crimes—as adults.[136]

Regardless of whether Pastore's hope that social science would settle the debate over the violence hypothesis has been realized, Congress and the White House appear ready to act because the public wants something done about violence generally. The networks' first response (authorized by a specific three-year exemption from the antitrust laws)[137] was a joint proposal to air violence advisories alerting viewers about forthcoming violence when appropriate.[138] As Reno's testimony shows, there are serious threats to do more, and that may include censorship.

At this point it becomes crucial to see whether the scientific studies of the violence hypothesis provide data that can support regulation. Looked at from this perspective, it seems clear that, because the definitions of violence used by the social scientists do not conform to the definitions of violence in American law (or generally what people think about improper behavior), the studies do not support the policy conclusions of those who, using the data, demand action. The studies' failings are twofold: first, they ignore the consequences of violent action; second, they include too much that is not violent by any acceptable normative definition.

First, no laboratory subject is punished for hitting a Bobo Doll or hitting the shock button on the Buss Aggression Machine. Yet in the real world, there are sanctions for violence. Sometimes the victim may retaliate; sometimes a third party—whether a parent or the police—may inflict a punishment on the perpetrator of violence. We are aware of no

136. L. ROWELL HUESMANN & LEONARD D. ERON, TELEVISION AND THE AGGRESSIVE CHILD (L. Erlbaum Associates 1986); L. Rowell Huesmann, Leonard D. Eron, M.M. Lefkowitz & L.O. Walder, *The Stability of Aggression over Time and Generations*, 20 DEVELOPMENTAL PSYCHOLOGY 1120 (1984); *see also* Leonard Eron, L. Rowell Huesmann, Eric Dubow, Richard Romanoff & Patty Warnick Yarmel, *Aggression and Its Correlates over 22 Years*, *in* CHILDHOOD AGGRESSION AND VIOLENCE 249 (David H. Crowell, Ian M. Evans & Clifford R. O'Donnell eds., Plenum Press 1987); Huesmann, *supra* note 133.

137. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 501, 104 Stat. 5089, 5127 (1990).

138. Andrews, *supra* note 107, at A1.

experiments where the subjects are informed that if they hit a Bobo Doll, they will lose their playtime for a week, or if they press the shock button on a Buss Aggression Machine, they will be placed on disciplinary probation by their college. We suspect that if either of these possibilities were introduced, a null hypothesis outcome would be the overwhelming result of the experiments.[139]

More fundamentally, the studies employ no acceptable definition of the very kind of behavior sought to be measured: "violence." Such a definition will distinguish between beating Reginald Denny with a brick and subduing the person beating Denny. Incorporating normative, social connotations is essential for intelligent policymaking. Thus, Professor Matthew Spitzer, in his summary of the various studies, writes:

> The studies all measured subjects' aggressive or violent behavior. But the studies must give information about behavior that is normatively bad, before they can provide any policy guidance. Can violence be good, or at least not bad? Violence in justifiable self-defense or in defense of a third party arguably garners little social disapproval. Chopping wood with an axe, knocking down a dilapidated building, blasting a quarry, and tackling a halfback also seem innocuous to most people. To rule out these and similar examples of unobjectionable aggression, one must proffer a reasonably precise definition of bad violence. Krattenmaker and Powe, after a lengthy investigation, proposed the following definition: "the purposeful, illegal infliction of pain for personal gain or gratification that is intended to harm the victim and is accomplished in spite of societal sanctions against it." Their defini-

139. Maybe an answer is that in our society perpetrators of violence do not (or need not) worry about subsequent punishment, and therefore the express lack of punishment for being "violent" in the experiment corresponds to a real-world lack of punishment for being violent anywhere (at least where the victim will not seek revenge). Furthermore, peer pressure may matter more than societal sanctions, and that pressure may encourage, if not require, violence. Those considerations, however, simply suggest that the remedy of censorship is unnecessary (because punishing violent behavior will suffice) or ineffectual (because it is peer pressure, not televised violence, that induces illegal acts).

> tion describes a large class of normatively unappealing behavior. Unfortunately none of the studies reviewed above focused on such behavior.[140]

Our definition may not be perfect, but it is vastly better than any definition now being used in the study of the violence hypothesis, and it reflects, we believe, the way most people in our society perceive violence.

Whether viewing violent behavior simulated on television tends to cause its occurrence seems to be the question about which researchers and the public care. Such violence, however, is precisely the sort of behavior that no researcher in a laboratory may seek to cause and that no "real world observer" can hope to witness systematically. The social science research to date has not only left this question unanswered; it has left it unasked. Until it is both asked and answered, statements that the extant data "justif[y] action"[141] are themselves unjustified if that "action" means governmental demands that the networks lower the amount of violence.

Nevertheless, as we have noted, the demands are becoming more strident.[142] Some raise constitutional issues, some do not.

At this writing, much publicity has been given to the idea of a so-called V-chip.[143] This device would be imbedded in newly manufactured television sets. When parents activate the chip, it would disable the set from receiving signals that are identified by broadcasters as

140. SPITZER, *supra* note 129, at 114.

141. This was what Surgeon General Jesse Steinfeld told Congress in 1972. *Surgeon General's Report by the Scientific Advisory Comm. on Television and Social Behavior: Hearings Before the Senate Subcomm. on Communications of the Comm. on Commerce*, 92d Cong., 2d Sess. 26 (1972). It is also the conclusion of Attorney General Reno.

142. Among the current proposals are one from Senator Ernest Hollings tracking indecency regulation and therefore limiting violence to late at night. Another, by Representative John Bryant, would require the Commission to "consider stations' efforts to reduce violent programming at license renewal time" as well as to set violence standards and fine stations for exceeding them. *Three New Anti-Violence Bills on the Table*, BROADCASTING & CABLE, Aug. 9, 1993, at 10.

143. At least during the spring of 1993 this was Representative Edward Markey's proposal. *Markey Suggests Violence 'Lockbox,'* BROADCASTING & CABLE, May 17, 1993, at 41. In early 1994 the cable industry, through a committee of the National Cable Television Association, endorsed the V-chip. Edmund L. Andrews, *Cable Industry Endorses Ratings and Lock Out Devices*, N.Y. TIMES, Jan. 22, 1994, at 1, 49.

containing violent material. How government would define and enforce the standards broadcasters are to employ remains a mystery, however.[144] Nor is there any reason to believe that parental supervision will address the problem as critics have defined it.[145] For those who believe that depictions of violence on television are a significant contributor to the purposeful, illegal infliction of pain in the real world, the only remedy that promises to work will be reducing, not supervising, violence.

We are sure, contrary to the blithe assurance of Attorney General Reno,[146] that any mandatory limit on violence would raise very serious constitutional problems. First, there are obvious vagueness issues. Coming up with a satisfactory definition of glamorous or gratuitous violence is going to be no easy task (as nearly forty years of attempting to define obscenity show). Senator Simon and others may know it when they see it,[147] but unless Simon is running for the office of network censor, a definition that others can apply will be necessary. And to see whether the definition can be applied to leave in the needed, while eliminating the glamorous or gratuitous, will be an amusing spectator sport.

If the regulators can fashion a constitutionally acceptable definition of violence, they then need to explain why they are not forbidden by the First Amendment to engage in such direct censorship. The Supreme Court has exhibited little tolerance for censorship that rests on the view that the censored speech is likely to cause others to engage in antisocial behavior. As Justice Louis D. Brandeis observed more than a half-

144. The cable industry coupled its endorsement of the V-chip with its intention to create an independent monitor and a new violence-rating system. If the cable industry or the networks or both will do their own defining of improper violence, then the legislative definitional problems will disappear. Senator Simon immediately expressed approval of the cable proposal. *Id.* at 49. A senior vice president of CBS expressed a contrary opinion: "As for a ratings system that leads to a V-chip, we are unalterably opposed, because we think it leads down a slippery slope to censorship." *Id.* at 25.

145. Professor George Gerbner states, "The notion of parental control is an upper-middle class conceit." Elizabeth Kolbert, *supra* note 106, at C18. We agree that it is harder than the Attorney General seems to think, but the main point is that unless widely done, it will be ineffectual.

146. Michael Wines, *supra* note 94.

147. The phrase is from Justice Stewart's explanation of how he adjudicated obscenity cases. Jacobellis *v.* Ohio, 378 U.S. 184, 197 (1964).

century ago, the constitutionally proper remedy for such speech is not to punish it, but to counter it with better speech and to punish those who engage in illegal behavior.[148]

A ban on televised violence, justified on the grounds that such a ban is reasonably necessary to prevent real violence, would, according to the case law typified by *Brandenburg* v. *Ohio*,[149] require the government to prove that the prohibited televised violence incites immediate lawless behavior by its viewers. No evidence supports that conclusion or anything remotely approaching it. At best the social science evidence recounted above holds that if enough violent programs are seen over enough time, some of those watching will be more likely to commit violent acts than will other members of the population. That conclusion—which parallels the older fears about obscenity's wearing away the social fabric of society over time—is a far cry from what is necessary to justify censorship under the Supreme Court's decisions. Nor does it begin to suggest that television is a more serious contributor to violence than any other medium or than many other causes of social decay.[150]

The obscenity analogy suggests another way regulators might frame the debate. We think violence censorship can overcome constitutional objections only if the Supreme Court is willing to extend *Pacifica* to all situations in which regulators believe that the broadcast medium has a more harmful effect than the print medium. Essentially, the Court would have to take the position, implicit in much congressional discussion, that when it comes to broadcasting, anything goes. Chapter 8 is devoted to exactly that issue.

ADVERTISING

Seven decades ago, Herbert Hoover expressed fears that most regulators and critics subsequently have echoed: "It is inconceivable

148. Whitney *v.* California, 274 U.S. 357, 376 (1927) (concurring).

149. Brandenburg *v.* Ohio, 395 U.S. 444 (1969).

150. It might be argued that standard First Amendment tests are inapplicable when children will be the actors behaving illegally or when materials shown to children will lead to criminal behavior as adults. *Butler* v. *Michigan*, 352 U.S. 380 (1957), holds to the contrary with its conclusion that the Due Process Clause precludes the government from regulating what is available to adults to protect children from their own future actions.

that we should allow so great a possibility for service, for news, for entertainment, for education and for vital commercial purposes to be drowned in advertising clutter."[151] The FRC followed with a reminder to stations to limit advertising and asserted that "regulation must be relied upon to prevent abuse and overuse of the privilege."[152] The *Blue Book* concurred: "[A] limitation on the amount and character of advertising has been one element of the 'public interest.'"[153]

People dislike commercials for many reasons. They interrupt programs. More care is often devoted to their creation than to programs. Commercials mislead children. They create wants that cannot be fulfilled. They teach an attitude of consumption when, as a society, what we need is sharing. The reasons vary, but no one likes commercials (except those who really like them—thus the cable network "shopping channels"). Yet, as the *Blue Book* recognized, "[a]dvertising represents the only source of revenue for most American broadcast stations and is therefore an indispensable part of our system of broadcasting."[154] So commercials cannot be eliminated, but maybe they can be reduced.

While the Commission has noted the tensions between advertising and the public interest, it has eschewed rigid commercial limits. The Commission's early strategy to limit commercials was to rely on self-enforcement via the National Association of Broadcasters' Code of Good Practice.

One of the initiatives of Chairman Newton Minow was to codify by rule the NAB Code.[155] Broadcasters were outraged[156] and rushed to Congress, where the House of Representatives quickly passed a bill specifically denying the Commission the power to impose commercial limits.[157] The Commission then gave up[158] without the

151. Speech to the first National Radio Conference, Feb. 27, 1922, *quoted in* Daniel E. Garvey, *Secretary Hoover and the Quest for Broadcast Regulation*, 3 JOURNALISM HIST. 66, 67 (Autumn 1977).

152. Great Lakes Broadcasting, FRC, THIRD ANN. REP. 32, 35 (1929).

153. FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 41 (1946).

154. *Id.* at 40.

155. Docket No. 15083, discussed extensively in *Broadcast Advertising, Hearings Before a House Subcomm. of the Comm. on Interstate and Foreign Commerce*, 88th Cong., 1st Sess. (1963) [hereinafter *Broadcast Advertising*].

156. See *Broadcast Advertising, supra* note 155. The NAB President, Leroy Collins, was just one of many industry spokesmen opposing codifying the NAB Code. *Id.* at 241.

157. H.R. 8316, 88th Cong., 2d Sess. (1964). The vote is recorded at 110 CONG. REC.

need for Senate action.

Thereafter it was clear, as it had been before, that broadcasters should not air too many commercials, but that whatever limitations were observed existed through the requirement that an applicant for a license or a license renewal tell the Commission how many minutes per hour would be allocated to commercials.[159] As Commissioner Kenneth Cox explained, the policy was "case-by-case" and a radio licensee could safely air 30 percent commercials (for television, it was 20 percent) without trouble; if the station wished to air more, it would "get a letter."[160] When the FCC went public in 1973 with its processing guidelines,[161] it allowed radio twenty commercial minutes per hour and television sixteen commercial minutes per hour.[162]

As we noted in Chapter 4, deregulation eliminated the processing guidelines (which were in fact higher than the NAB Code limits).[163] With the guidelines out, presumably most stations would follow the Code. But ironically, because the NAB Code did restrict advertising, the Carter Justice Department concluded that it was an antitrust violation. In a negotiated settlement, the Justice Department forced the NAB out of any role in limiting advertising in broadcasting.[164]

As just detailed, historically the Commission's (and critics') concern has been with the amount of time allocated to commercials. But with so many viewing options available, a station that runs too

3909–10 (1964).

158. Amendment of Part 3 of the Commission's Rules and Regulations with Respect to Advertising on Standard, FM, and Television Broadcast Stations, Report and Order, Dkt. No. 15083, 36 F.C.C. 45 (1964).

159. Application of Accomack-Northampton Broadcasting Co. for Construction Permit for New FM Station, Dissenting Statement Regarding the Application, 8 F.C.C.2d 357 (1967).

160. Roundtable, *The FCC's Role in TV Programming Regulation*, 14 VILL. L. REV. 629, 644 (1969).

161. Discussed *supra* Chapter 4 (Diversifying Program Mix: Licensing After 1960).

162. Amendment of Part O of the Commission's Rules—Commission Organization—with Respect to Delegations of Authority, Order by the Commission, 43 F.C.C.2d 638, 640 (1973). The guidelines carried built-in exceptions that allowed broadcasters to go higher some of the time.

163. Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order, MM Docket No. 83-670, 98 F.C.C.2d 1076 (1984).

164. T. BARTON CARTER, MARC A. FRANKLIN & JAY B. WRIGHT, THE FIRST AMENDMENT AND THE FIFTH ESTATE 393 (3d ed., Foundation Press 1993).

many commercials faces the real possibility that its viewers will simply push the remote control and find equally enjoyable alternative viewing. Hence, the critics' concerns have moved elsewhere: first to the protection of children and second to the fear that we may be creating a society in which our status rises or falls "through what we are able to buy."[165]

A major goal of the effective children's advocacy group, Action for Children's Television (ACT), was the elimination of all commercials on children's programming. ACT argued that social science evidence showed young children could not distinguish between programs and commercials, and the FCC agreed. In 1974 it concluded that children are "far more trusting of and vulnerable to commercial 'pitches' than are adults . . . and very young children cannot distinguish conceptually between programming and advertising."[166] But the Commission would not ban advertising, because to do so would undermine the economic base to create children's programming.[167] The Commission also rejected the milder request that it order the networks to provide instructional programming for children to enable them to understand what television advertising was attempting to do.[168] Chairman Richard Wiley did, however, convince the NAB and the Association of Independent Television Stations to limit commercials in children's programming to nine-and-a-half minutes per hour on weekends and twelve on weekdays.[169]

Then, with deregulation, the Commission abandoned virtually all limits on advertising to children. In the only part of the FCC's massive

165. JUDITH WILLIAMSON, DECODING ADVERTISEMENTS: IDEOLOGY AND MEANING IN ADVERTISING 13 (Marion Boyars 1978).

166. Petition of Action for Children's Television for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14-Hour Quota of Children's Television Programs, Children's Television Report and Policy Statement, Dkt. No. 19142, 50 F.C.C.2d 1, 11 ¶ 34 (1974).

167. Action for Children's Television *v.* FCC, 564 F.2d 458 (D.C. Cir. 1977), affirmed the Commission's decision.

168. Complaint of Council on Children, Media, and Merchandising Against American Broadcasting Companies, Inc., and CBS, Inc., Memorandum Opinion and Order, 65 F.C.C.2d 421 ¶ 3 (1977).

169. According to Cole and Oettinger, Wiley "employed the tactics of a Kojak." BARRY COLE & MAL OETTINGER, RELUCTANT REGULATORS 267–77 (Addison-Wesley 1978).

television deregulation order of 1984 that was not sustained by the D.C. Circuit, the court reversed the failure to control advertising to children.[170] Before the Commission could implement the court decision, Congress passed the Children's Television Act of 1990, which mandated no more than ten-and-a-half commercial minutes per hour on weekends and twelve on weekdays.[171]

ACT had also complained vigorously about the number of television shows that starred "toys," such as "Strawberry Shortcake," "Pac-Man," and "He-Man and the Masters of the Universe." This trend on Saturday mornings caused one critic to assert that children's television was becoming "a listless by-product of an extraordinary explosion of entrepreneurial life forces taking place elsewhere—in the business of creating and marketing toys."[172] ACT argued that the television toy shows were created for the sole purpose of selling the toys and thus were program-length commercials. The Commission disagreed, noting that entering this area might result in "Sesame Street" and "Peanuts" running afoul of the commercial ban.[173] Congress has revived the issue. Just as the Children's Television Act forces the Commission to define what is a children's program, so too it will require the Commission to know when a children's program really is a prohibited program-length commercial.

The underlying concern about children's watching a program featuring toys readily available for purchase is that the program creates unnecessary (and possibly harmful) wants within children and that any decision by the parent—to yield or not to yield—is an imposition on family life. The critique of commercials aimed at adults is similar, but because the ads are more sophisticated, so is the explanation.

As with children, we are told, television advertising teaches adults

170. Action for Children's Television *v.* FCC, 821 F.2d 741 (D.C. Cir. 1987).

171. Children's Television Act of 1990, Pub. L. No. 101-437, § 102, 104 Stat. 996 (1990). In the summer of 1993 the Commission fined three stations $15,000 each for exceeding the commercial limits on children's programming. The stations had admitted their violations on their renewal applications (failure to do so is grounds for nonrenewal), and each station had its license renewed. Kim McAvoy, *FCC Fines 3 TV's for Exceeding Kids Ads Limits*, BROADCASTING & CABLE, July 26, 1993, at 10.

172. Tom Enselbadt, *The Shortcake Strategy*, *in* WATCHING TELEVISION 70 (Todd Gitlin ed., Pantheon Books 1986).

173. Complaint of Action for Children's Television, Memorandum Opinion and Order, 58 Rad. Reg.2d (P & F) 61 (1985).

the wrong values. And it does so in an inherently unfair way that too frequently exploits women in the process. The wrong value is consumption. Advertising "encourage[s] us to dispose of what we have and replace it with that which they are selling[;] the commercial message itself . . . embodies the ideal of conspicuous consumption."[174] The commercials also enjoy a symbiosis with the entertainment. Commercials show the products the viewer (now) wants. The entertainment shows a world where people have achieved almost universal economic success. They live "above and beyond the constraints imposed on ordinary mortals."[175] The viewer is enticed to join that world by purchases and more purchases.

The ads are deceptive—although not in the legal sense of the term—because they are not really about the product. They are about the viewer and his or her life.[176] An advertising executive explains, "[W]hat we're doing is wrapping up your emotions and selling them back to you."[177] Helping the sale, especially in beer and automobile ads, are incredibly attractive women. "The everyday reality is that women's sexuality is used to sell things, their commodified bodies are plastered on advertising to stimulate men to buy things. Their very identity as autonomous persons is electronically transformed into media images of marketable chattel."[178]

So far, critics have not been so bold as to suggest that the FCC take action. That is just as well; even if advertising exploits sexuality, that is not where the Commission's concerns about sex lie. In the area of commercials, the Commission will continue its historic posture of inaction, and even if that changes, the critics not only lack a constituency outside the academy, they have ready-made adversaries with substantial constituencies fully capable of doing battle successfully. Whatever fights the Commission might wish to pick, this would not be one.

174. STUART EWEN, ALL CONSUMING IMAGES 241 (Basic Books 1988).

175. BARNOUW, *supra* note 108, at 174.

176. JOHN O'TOOLE, THE TROUBLE WITH ADVERTISING: A VIEW FROM THE INSIDE 89 (Chelsea House 1981).

177. *Quoted in* Ronald K.L. Collins & David M. Skover, *Commerce & Communications*, 71 TEX. L. REV. 697, 709 (1993).

178. *Id.* at 710 n.71.

CONCLUSION

Policymakers who attempt to create good programming will invariably attempt to suppress bad programming. After reviewing FCC censorship efforts, we can see that it is easier to suppress bad programming than to create good programming and that there may be more agreement about what is bad than what is good. Accordingly, trying to stamp out bad programming has been a more constant goal than trying to stimulate good (or diverse) programming.

If the Commission has not been entirely successful in its censorship policies, it has not been for want of effort. With drug lyrics the Commission was successful (during the period it cared). Ironically, since the FCC's concern flagged while drug use did not, the Commission likely produced some evidence that music was not responsible for drug use. With respect to sex and indecency, the answers are not in. Carlin's seven dirty words are audible on both school grounds and cable, if not on radio or network television. Sexual discussions have been toned down some on radio, but not, we think, on television, as ABC's critically acclaimed and highly rated "NYPD Blue" demonstrates.[179] Ratings and society being what they are, the Commission is not going to drive television characters back into separate beds as in the 1950s; sex is just too ubiquitous.

Whenever the Commission regulates program content, its rules rest on the (often unstated) view that listeners and viewers cannot be trusted to fend for themselves. The censorship regulations reviewed in this chapter, however, portray a different kind of viewer helplessness than the diversity regulations reviewed in Chapter 4. The diversity regulations required what was deemed good or appropriate programming to be available on each and every station. Implicit was the fear that some viewers would be too stupid (or too obstinate) to change channels and find the good programming. But if it were available everywhere, they could be trapped into watching, unable to flee to what they (mistakenly) would rather watch. Conversely, much of what has been discussed in this chapter is popular, but disfavored, programming. It must be

179. "NYPD Blue" received publicity before airing when the Mississippi-based American Family Association took out a full-page advertisement in the *New York Times* to protest it. N.Y. TIMES, June 20, 1993, at E18.

banned (or lessened) on all stations because there is a fear that viewers and listeners will change channels and find it if it is available anywhere.

In both cases the Commission and Congress regulate programming because they are unable to regulate viewers and listeners. And in both cases they regulate programming because they believe that viewers and listeners are incapable of making wise choices. In no other medium of communication are consumers so frequently treated as if they do not know what they want and therefore given what they do not want so as to better them.

6

The Public Interest

WE ATTEMPTED in Chapters 2 and 3 to describe conceptually, based on the origins of broadcast regulation and the dominant theories of regulatory economics, the logical parameters of the public interest standard as it might permit or require FCC regulation of program content. In Chapters 4 and 5 we described the principal content-based rules that the Commission has in fact administered. Those rules, we saw, frequently exceed any bounds that our theories might suggest.

Accordingly, in this chapter we seek to trace the evolving content of the public interest standard in the courts and search for some alternative view of what powers—and limits on those powers—that standard might establish. A fortunate byproduct of that search is that most of the opinions we review concern FCC licensing decisions. As we shall see, the Commission has occasionally used its licensing authority to seek to control program content. What we find in this search, however, is not the evolution of an objective, ascertainable standard rooted in careful policy analysis. Rather, this chapter shows how the breadth of the public interest concept, as wielded by regulators and judges, finally led to its being supplanted by an alternative carrying less intellectual baggage.

THE MALLEABLE PUBLIC INTEREST

Courts came to see that the public interest was either an empty concept or one that was infinitely manipulable—indeed, they did a fair job of

joining in the manipulation—so that it could always suit the intuitive predispositions of the elite controlling the FCC at any particular time. In short, the public interest is whatever the people who enforce it want it to be.[1] In defining the public interest, enforcers tend to be motivated by partisan political goals and by their own program preferences.

Once it became clear that the emperor had no clothes, federal courts had to choose between dressing him or deposing him. If the public interest can be characterized as no standard at all, then are all FCC regulations unconstitutionally arbitrary and capricious? Led by Warren Burger, the D.C. Circuit and the Supreme Court chose to reconceptualize the emperor's costume. These courts stopped talking about the FCC's public interest regulation and started to discuss broadcast stations' "public trustee" obligations.

To some extent, the change was in rhetoric only. FCC Commissioners remain free to enforce their own political and cultural agendas while reviewing courts continually refer to the enterprise as public trustee obligation rather than public interest regulation.

The shift in language, however, may have had more tangible consequences as well. First, inventing a theory that the FCC enforces a public trustee obligation may have saved courts from having to declare the entire regulatory venture intellectually and legally bankrupt—or at least postponed the day when such a declaration would be issued. Second, the public trustee concept seems peculiarly well suited both to exalt the interests of listeners and viewers over those of stations and programmers (speakers) and to explain the federal courts' greater powers of judicial review over the agency. Finally, if public trustee rhetoric serves to induce the idea that stations' principal duties are to serve their audiences, this may hasten the day when the FCC and its reviewing courts declare that the principal purpose of broadcast regulation is to leave stations free to broadcast what their audiences desire.

We begin this chapter with illustrations drawn from licensing cases that show why the public interest became so fully undressed that, as Professor Richard Stewart would note, "we have come not only to

1. Or, as Senator Dill wisely observed at the outset, the "public interest" standard "covers just about everything." LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 61 (University of California Press 1987).

question the agencies' abilities to protect the 'public interest,' but to question the very existence of an ascertainable 'national welfare' as a meaningful guide to administrative decision."[2] We then detail the creation of the judiciary's substitute, the broadcaster as public trustee. Although courts state that the public trustee model came into existence with the Communications Act,[3] that is incorrect; its origins are far more recent.

Carroll Broadcasting

Carroll Broadcasting[4] illustrates the ability of judges to manipulate the public interest standard. West Georgia Broadcasting was awarded an AM license to broadcast from Breman, Georgia, in the northwestern corner of the state about fifteen miles from Alabama. Carroll operated an existing AM station in Carrollton, a larger city some twelve miles distant. Carroll contended that there were insufficient advertising revenues available to support two stations in the area and therefore West Georgia's application should be denied. The Commission held that no evidence was necessary because "Congress had determined that free competition shall prevail in the broadcast industry."[5]

Not necessarily so, replied a distinguished D.C. Circuit panel of Judges Prettyman, Bazelon, and Burger. In most cases competition is the rule. But when insufficient revenues are alleged, then the public might suffer. "Of course the public is not concerned with whether it gets service from A or from B or from both combined. The public interest is not disturbed if A is destroyed by B, so long as B renders the required service. The public interest is affected when service is affected."[6]

Normally, economic injury is a matter of private concern, but when it "spells diminution or destruction of service," it crosses the line and becomes a matter of public concern.[7] By "service" the court

2. Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1683 (1975).
3. CBS *v.* Democratic Nat'l Comm., 412 U.S. 94, 117–118 (1973).
4. Carroll Broadcasting Co. *v.* FCC, 258 F.2d 440 (D.C. Cir. 1958).
5. *Id.* at 442.
6. *Id.* at 444.
7. *Id.*

meant "good service." Thus, "if the situation in a given area is such that available revenue will not support good service in more than one station, the public interest may well be in the licensing of one rather than two stations. To license two stations where there is revenue for only one may result in no good service at all."[8] The judges believed that the Carrollton-Breman area could be better served with a single station—and thus only one choice—than with two stations surviving on "insufficient" revenues.

The latter point, insufficient revenues, explains the otherwise counterintuitive conclusion that the public would not be better served by two stations than one. If there is an explanation for the court's notion of "insufficient revenues," we think it must result from the court's assumption that reduced revenues would lead stations to cut the least profitable programming, which is "merit" programming (or good service). Thus, West Georgia Broadcasting, by threatening Carroll Broadcasting's profits, threatened its merit programming, and because the same forces would be at work on West Georgia, there might be two stations on the air in the community with neither offering merit programming (because they would have insufficient profits to support it).

The court did not spell this out. Service was the code word for the assumptions. Nowhere did the court explain why it believed that merit programming had so few listeners that it attracted few (if any) advertisers. Nowhere did the court explain why programming with fewer members of the public listening might be more in the public interest than programming with greater numbers of listeners. And more significantly, nowhere did anyone suggest that the residents of Carrollton and Breman should be consulted about whether they preferred two stations in the area (even if both minimized merit programming) to just one.

No one suggested consulting the listeners, because they were not experts in determining the public interest. That expertise rested in Washington, D.C., first with the FCC and, that failing, with the D.C. Circuit. As experts in the public interest, the members of those bodies did not need to know anything about northwestern Georgia.

8. *Id.* at 443.

Political Preferences

One thing those experts always know is who got them their jobs and who can take them away. Consider what happened in Tampa, Florida, when newspapers applied for the two VHF frequencies allocated to Tampa.[9]

Tampa's two daily newspapers, each of which already owned a local AM station, applied for separate VHF authorizations. The morning *Tribune*, which had a circulation of 110,000, was opposed by two groups, one with no other communications interests, the other with communications interests in nearby St. Petersburg. The afternoon *Times*, with a circulation of slightly less than half the *Tribune*'s, was opposed by two groups with no other communications interests.

When confronted with competing applications for a new broadcast facility, the Commission holds a "comparative hearing" to determine which applicant is the more meritorious. In comparative situations, the FCC had concluded that the public interest was represented by factors such as local residence, diversification—that is, lack of other communications interests, especially in the license area—and past broadcast experience, all of which were weighed in making the final decision. Precedent indicated that the decisions would turn on how the Commission weighed the broadcast record of the two papers—the records being quite similar—against the need for bringing new media owners into the Tampa area. Either granting or denying the papers' applications could be justified.

The *Tribune* decision came down first. The paper won.[10] Although it was not owned by local residents, its diversification problem was deemed acceptable because "when there is a variety of diversely owned stations and newspapers in the community," diversity of ownership is less significant than it otherwise might be.[11] This was the case in Tampa, where there were thirteen newspapers in the larger community, including two Spanish-language papers, and two, with circulations of about 70,000, in St. Petersburg.

9. The Tampa story is taken from POWE, *supra* note 1, at 81–83.
10. 9 Rad. Reg. (P & F) 719 (1954).
11. *Id.* at 770.

With diversification minimized, the *Times* was a cinch, because it was locally owned, was smaller, and had an equally good broadcast record. Imagine the surprise when four weeks later it lost.[12] This time the Commission emphasized the need for diversity of outlets. No mention was made of the two Spanish papers or, for that matter, of most of the other media mentioned in the *Tribune* decision. Instead, the focus was on the *Times*, "one of the two daily newspapers, and the only evening newspaper, in Tampa," which had the "largest circulation of any afternoon newspaper on the Florida west coast."[13]

While each decision was plausible individually, taken as a pair, they appear irreconcilable. It is hard to believe the same Tampa, Florida, is being discussed, and unless one knew better, he would conclude that the *Times* rather than the *Tribune* was the dominant paper with the far larger circulation.

In fact, the decisions are easy to reconcile if one recalls that Commissioners are expert, first and foremost, at gratifying the wishes of those who appoint and pay them. Why did the *Times* lose? It had the misfortune of being one of the rare newspapers that editorialized in favor of Governor Adlai Stevenson in 1952. And the *Tribune*? It liked Ike.

Tampa turned out to be a stark case of a nationwide phenomenon. Coincidentally, not a single newspaper that supported Governor Stevenson was awarded a television license in a contested hearing at the FCC. Indeed, only one Democratic paper won a comparative hearing and that paper, the now defunct *Miami Daily News*, had the good fortune to file a joint application with the Republican *Miami Herald*. Conversely, the only way a Republican could lose was to have the misfortune of being opposed by another Republican paper.[14] Hence, liking Ike was necessary, but not sufficient.

12. 10 Rad. Reg. (P & F) 77 (1954).

13. *Id.* at 92, 138.

14. Bernard Schwartz, *Comparative Television Licensing and the Chancellor's Foot*, 47 GEO. L.J. 655 (1959). Schwartz's choice of title aptly places the Commission's expertise in perspective.

Cultural Values

The FCC VHF licensing scam was, of course, extreme, but politics has an unfortunate way of trumping expertise. So does the desire to inflict one's own cultural values on the American public.

In Chapter 4 we discussed *Suburban Broadcasting*[15] as a major way station on the road to the *Ascertainment Primer*. Unlike Carroll, where the community's desires, if not needs, were irrelevant, Suburban lost because it had made no effort to find out what Elizabeth's "needs and interests" were. Rather, Suburban filed an application that proposed programming identical to that offered on two other Suburban-owned stations hundreds of miles away. The Commission noted that it generally had "presumed that an applicant for such a community would satisfy its programming needs, assuming that the applicant had at least a rudimentary knowledge of such needs." But the facts showed that Suburban did not. "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 needs duplicated those of Alameda, California, and Berwyn, Illinois, or, in the words of the examiner, could 'be served in the same manner that such "needs" are served by FM broadcasters generally.'"[16]

To the extent that Suburban placed residents in the public interest forefront, it took some of the vagueness out of the standard, and the D.C. Circuit affirmed. But admittedly going beyond "the narrow point at issue upon this record,"[17] Judge Bazelon offered a thought on tastes and the public interest: "It may be that a licensee must have freedom to broadcast light opera even if the community likes rock and roll music, although that question is not uncomplicated. Even more complicated is the question of whether he may feed a diet of rock and roll music to a community which hungers for opera."[18] Even more complicated! Why would the issue of programming opera to a community that wishes rock not be so complicated as programming

15. 20 Rad. Reg. (P & F) 951 (1961).
16. Henry *v.* FCC, 302 F.2d 191, 193 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 821 (1962).
17. *Id.* at 194. "These are questions we need not decide here."
18. *Id.*

rock to a community that wishes opera? The answer jumps off the page. Some programming is better than others, and a prime example is opera over rock and roll music. In a simple two-sentence dictum, Bazelon explained the implicit assumptions of the 1946 *Blue Book*[19] and undressed the public interest: it represented the tastes (or prejudices) of those who have the power to enforce it. Although Bazelon illustrated it about as well as it can be done, everyone—Congress, the courts, and the Commission—joined to underscore the message in the effort to drive cigarette advertising from the public airwaves.

Cigarette Advertising

It has been over two decades since those wonderful days of yore when the likes of Tom Selleck rode the Marlboro horse and convinced thousands of Americans that by smoking Marlboros they, too, could grow big, strong, and handsome and get all the beauties who inhabit beer ads. The story of the Marlboro Man's ride into the broadcast sunset illustrates the public interest, with its lack of constitutional restraints, at its best.

In 1966 Professor John Banzhaf wrote to WCBS and "requested free time be made available to 'responsible groups' roughly approximate to that spent on the promotion of 'the virtues and values of smoking' [as] 'socially acceptable and desirable, manly, and a necessary part of a rich full life.'"[20] Banzhaf's request combined aspects of both section 315 with its equal opportunities requirements and the Fairness Doctrine. From the former came the demand for roughly equal time. From the latter came the demand, based on *Cullman Broadcasting*,[21] that the broadcaster provide airtime free if no one would pay for it (and, it being available free, no one would). Banzhaf was proposing the most imaginative—or, alternatively, the

19. FEDERAL COMMUNICATIONS COMMISSION, PUBLIC SERVICE RESPONSIBILITIES OF BROADCAST LICENSEES (1946), discussed *supra* Chapter 4 (Minimum Diversity Levels: Quality Programming) and Chapter 5 (Advertising).

20. Complaint Directed to WCBS-TV Concerning Fairness Doctrine, 8 F.C.C.2d 381 (1967).

21. 40 F.C.C. 576 (1963).

most off-the-wall—use of the public interest standard, and therefore FCC power, in the Commission's history.

WCBS responded to Banzhaf that it had recently broadcast several news and information programs about the health hazards of smoking as well as five American Cancer Society public service announcements. Those met whatever requirements the Fairness Doctrine might impose, but, in any event, the station doubted that the Fairness Doctrine applied to "commercial announcements solely and clearly aimed at selling products and services."[22] Banzhaf then forwarded the correspondence to the Commission and stated that WCBS's antismoking programming was "insufficient to offset the effects of paid advertisements broadcast daily for a total of 5 to 10 minutes each broadcast day."[23]

In a remarkably short and almost cavalier decision, the Commission agreed:

> The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that, however enjoyable, such smoking may be a hazard to the smoker's health.[24]

All hell broke loose. This would be the first of three rulings on that controversy over the next four months. The Commission quite quickly was made to understand that it had to offer some reasons for what was a startling policy decision, one potentially striking near the core of an advertiser-supported medium. So reasons it supplied, all the while holding the course against the pressure from its most important constituents.

Cigarettes presented a health issue, yet commercials never discussed it. Worse, instead of showing beaten-down smokers with hacking coughs, commercials showed, in the words of a Federal Trade Commission report:

22. Banzhaf *v.* FCC, 405 F.2d 1082, 1086 (D.C. Cir. 1968).
23. 8 F.C.C.2d at 381.
24. *Id.* at 382.

> in all the array of positive images an element of escape from actuality. Some cigarette advertising transcends mere image association and projects its own separate and unique world. Examples include "Salem Country," a land in which romantic couples romp and preen through shifting sylvan settings . . . and "Marlboro Country," where there daily unfolds the simple male heroic virtues of the "Old West." Worry over health has been banished from these Shangri-las.[25]

For the FCC this reconfirmed "the simple controversial issue" at stake: "It is the affirmative presentation of smoking as a desirable habit which constitutes the viewpoint others wish to oppose."[26] The claim that no controversial issue of public importance is presented is "neither realistic nor persuasive."[27]

With its major conclusion reaffirmed, all the Commission had to do was clear up a few minor points. Thus, it reaffirmed that this was a fairness, not a section 315, ruling, and therefore equal time was not necessary (although broadcasters, because of the repetition of cigarette commercials, were going to have to do more than usual). And the Commission categorically rejected the argument that the ruling might be broadly applicable to other product advertising "such as: automobiles, food with high cholesterol count, alcoholic beverages, fluoride in toothpaste, pesticide residue in food, aspirin, detergents, candy, gum, soft drinks, girdles, and even common table salt."[28] This was a case about a unique product, with a unique background, including the famous 1964 report "Smoking and Health: Report of the Advisory Committee of the Surgeon General," and the Federal Cigarette Labeling and Advertising Act of 1965.[29] Thus, the "'parade of horribles' argument [was not] impressive"; cigarettes were a "unique" category.[30]

25. FTC Report of June 30, 1967, *quoted in* 9 F.C.C.2d at 939 ¶ 37.
26. 9 F.C.C.2d at 939 ¶ 38.
27. *Id.* at 940 ¶ 38.
28. *Id.* at 942–43 ¶ 44.
29. Pub. L. No. 91-222, 84 Stat. 87 (codified at 15 U.S.C. § 1331) (1970).
30. 9 F.C.C.2d at 943 ¶ 44. This latter point brought comments from two concurring Commissioners. Lee Loevinger doubted that the distinction between cigarettes and other products could hold. *Id.* at 954. Nicholas Johnson responded that, of course, it could: "By

The mop-up was not quite complete. Did the Commission mean that cigarette companies could get airtime to rebut any health claims made by their opponents? There was language indicating just such a conclusion, but in a final supplemental opinion, the Commission withdrew that language and retreated behind the generalities of licensee discretion that the Fairness Doctrine incorporates.[31] Now it was off to court.

The D.C. Circuit, like the Surgeon General, the FCC, and the FTC, was ready to enlist in the battle against smoking. But it wanted to be sure that, in entering and winning that battle, it did not commit itself to conflicts over advertising other products. Seemingly unlike the FCC, the court understood the novelty of the case. Only once, in a situation predating the Fairness Doctrine, involving alcohol and not subsequently followed, had the Commission found that advertising must be balanced by presenting the other side of issue.[32] Furthermore, the Commission has been—properly—hesitant to find that controversial issues are raised by implication.[33] Yet, in *Banzhaf*, the Commission had done both.

The court's opinion is hardly a model of clarity in large part because the court was embracing the Commission's Fairness Doctrine rationale while working overtime not to do so.[34] Thus, the court tried

drawing the line at cigarette advertising we have framed a distinction fully as sound and durable as those in thousands of other rules laid down by courts every day since the common law system began." *Id.* at 958. Shortly thereafter, when a Banzhaf-like complaint argued that high-powered cars and high-test gasoline commercials "imply that the good life is somehow inexorably connected with the use of powerful cars and high-test gasoline," the FCC majority kept the promise to limit fairness applications to cigarette commercials only. Commissioner Johnson, citing Loevinger's concurrence while forgetting his own, stated that a distinction between cigarettes and other products was untenable. So much for the common law system. The D.C. Circuit then held that there was no distinction between the various implicit messages and therefore the Fairness Doctrine applied here as well. Friends of the Earth *v.* FCC, 449 F.2d 1164 (D.C. Cir. 1971).

31. Applicability of the Fairness Doctrine to Cigarette Advertising, 10 F.C.C.2d 16 (1967).

32. Petition of Sam Morris for Denial of Application of KRLD Radio Corp. for Renewal of License, 11 F.C.C. 197 (1946) (station in temperance belt had to accept antialcohol ads if it aired liquor ads).

33. Banzhaf *v.* FCC, 405 F.2d 1082, 1092 (D.C. Cir. 1968) (noting refusal to require time for atheists based on broadcasts of church services).

34. Given *Friends of the Earth*, 449 F.2d 1164 (D.C. Cir. 1971), coming just three years later, the hesitancy is surprising.

to read the FCC decision as resting on the public interest standard separately from the Fairness Doctrine. It accomplished that in two steps. First, the court yanked the phrase, "licensee's statutory obligation to operate in the public interest,"[35] out of context by ignoring the rest of the sentence, which described the licensee's duty to present both sides of controversial issues. Second, the opinion quoted part of a sentence in the Commission's conclusion that its main point would be lost if everyone concentrated too intensely on "the specifics of the Fairness Doctrine."[36]

These moves allowed the court to conclude that the decision rested independently on the public interest standard without the need to delve into the jurisprudence of fairness: "[W]hether the ruling is viewed as a new application of the fairness doctrine or as an independent public interest ruling, the question is the same."[37] From the court's perspective, the Fairness Doctrine served to put "flesh" on "policy bones" once the public interest standard was satisfied.[38]

Yet even the public interest standard seemed "too vague" for the court in this context of reviewing program content.[39] It needed some limiting definable standards. Enter the public health. Surely that is a "core" subset of the public interest.[40] "The public health has in effect become a kind of basic law, both justifying new extensions of old powers and evoking the legitimate concern of government wherever its regulatory power otherwise extends."[41] Furthermore, here the Commission could claim no expertise, and therefore its decision was necessarily bounded by the expertise of others. To show how neat the fit was, the court could note that "the Commission expressly refused to rely on any scientific expertise of its own."[42] The decision was indeed limited because it addressed a "unique danger authenticated by official and Congressional action."[43] The court then found that the

35. 405 F.2d at 1091, quoting 9 F.C.C.2d at 927 ¶ 14.
36. *Id.* at 1092, quoting 9 F.C.C.2d at 949 ¶ 64.
37. *Id.* at 1092.
38. *Id.* at 1093.
39. *Id.* at 1096.
40. *Id.* at 1097.
41. *Id.*
42. *Id.* at 1098.
43. *Id.* at 1099.

First Amendment was no bar, and the Supreme Court, having just sustained the constitutionality of the Fairness Doctrine in *Red Lion*,[44] denied certiorari.[45]

The tobacco industry was spending $250 million a year on broadcast advertising only to have the Fairness Doctrine operate to generate—essentially for the first time—a barrage of antismoking commercials. Faced with counterproductive advertising and a decline in cigarette consumption for the first time,[46] the tobacco industry showed its altruism[47] by suggesting to liberal congressmen that cigarette commercials be banned from the airwaves. And so they were;[48] the tobacco industry took its advertising elsewhere to places where there would be no antismoking commercials: billboards, newspapers, magazines, and women's tennis. The congressional ban effectively took both halves of the controversial issue off the air. Antismoking messages went largely the way of Salem Country and the Marlboro Man.

Broadcasters were left with a gaping hole in their traditional revenue stream and an opportunity to litigate. Their issue was hardly frivolous. After all, *Banzhaf* had concluded that "cigarette advertising implicitly states a position on a matter of public controversy."[49] Since when had Congress been empowered to ban one view of a controversial position of public importance on the grounds that it was wrong and might improperly influence behavior?

Ask that simple question, and you get this simple answer: because the speech Congress banned was broadcast. A three-judge district court happily noted that "the unique characteristics of electronic communications make it especially subject to regulation in the public interest,"[50] and these were just advertisements anyway, entitled to no constitutional

44. Red Lion Broadcasting Co. *v.* FCC, 395 U.S. 367 (1969).

45. 396 U.S. 842 (1969).

46. Capital Broadcasting *v.* Mitchell, 333 F. Supp. 582, 588 (D.D.C. 1971) (dissenting).

47. *Cigarette Advertising and Labeling: Hearings Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 81 (1969) (compliment to industry by Senator Moss).

48. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (codified at 15 U.S.C. § 1335) (1970).

49. 405 F.2d at 1102.

50. 333 F. Supp. at 584.

protection. Thus, *Banzhaf*'s conclusion that they implicated the Fairness Doctrine was irrelevant.[51] If Congress wanted to ban cigarette advertising, there was ample reason to do so. The Supreme Court thought so too, but instead of explaining, summarily affirmed.[52]

While Congress had been considering the ban, the Commission began its preparations for a post–Marlboro Man world. Having the tobacco companies respond to American Cancer Society announcements could hardly be in the public interest, so the Commission ruled that the Fairness Doctrine would not be triggered by the presentation of antismoking spots.

Just how did the Fairness Doctrine require antismoking ads be aired for broadcasts of cigarette commercials, but not cigarette commercials in response to antismoking ads? Again, the answer was simple. Once Congress had forbidden the broadcast of cigarette ads, thereby defining the public interest, the issue had ceased to be controversial. After all, everyone knew the health hazards that flowed from smoking. The Fourth Circuit agreed: "[t]he fundamental basis of this obligation is the licensee's responsibility to serve the public interest by providing information about cigarettes' unique threat to public health."[53]

Banzhaf is clearly correct that public health is at the core of the public interest. Thus, it is necessarily in the public interest to find low-cost ways to promote public health. The court's sleight of hand was to conclude that deciding that cigarettes would always lose was therefore in the public interest. If cigarettes are advertised and others wish to counter without charge, cigarettes lose. If cigarette ads are banned and broadcasters wish they could still air them, cigarettes (and broadcasters) lose. If a broadcaster presents programming designed to show the health hazards of smoking and tobacco companies wish to present their side of the issue, cigarettes lose.

51. *Id.* at 585.

52. Capital Broadcasting *v.* Mitchell, 405 U.S. 1000 (1972) (Justices Douglas and Brennan would have noted probable jurisdiction).

53. Lazus & Brother Co. *v.* FCC, 447 F.2d 876, 883 (4th Cir. 1971).

THE CREATION OF THE PUBLIC TRUSTEE IMAGE

Origins

As the intellectual stock of the public interest waned, an alternative vision of broadcast regulation appeared, that of the broadcaster as trustee. The image of the broadcaster as a trustee suggested that even if there were no specific regulations affecting broadcasters' conduct, the broadcaster, as trustee, should automatically do what is in the best interests of the trust beneficiaries—the viewers and listeners in the area. Although this vision had its origins at the FCC, its real impetus came from the public reaction to very public events: the making and the unmasking of the quiz show folk heroes.

There had been sporadic mentions[54] of broadcasters as trustees going back further than the 1949 report, *Editorializing by Broadcast Licensees*,[55] which formally initiated the Fairness Doctrine. The report stated that "licensee responsibility is to be exercised in the interest of, and as a trustee for the public at large which retains ultimate control over the channels of radio and television communication."[56] The Commission explained that "the foundation stone of the American system of broadcasting . . . is the right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee, or any individual."[57]

54. At the dawn of the regulatory age, the FRC in its *Third Annual Report* wrote of a decision denying renewal that stated: "[S]tations operating under Government license are trustees of property, this property to be used for the benefit of the public; that the trust so imposed on this applicant and assumed by it has not been fully kept, in that there have been no regular hours of operation . . . . " FRC, THIRD ANN. REP. 31 (1929) (discussing Technical Radio Laboratory *v.* FRC). Almost two decades later, the Commission denied a transfer application because the transferees had previously had troubles with the Federal Trade Commission and the Office of Price Administration and were evasive in their testimony to the FCC. Affirming a denial of the transfer, a three-judge district court found their past behavior "made inadvisable their being accorded the public trust of operating a radio station." Mester *v.* United States, 70 F. Supp. 118, 121 (S.D.N.Y. 1947). The Supreme Court then summarily affirmed. 332 U.S. 749 (1949).

55. Editorializing by Broadcast Licensees, Report of the Commission, Dkt. No. 8516, 13 F.C.C. 1246 (1949) [hereinafter Broadcast Licensees].

56. *Id.* at 1247 ¶ 3.

57. *Id.* at 1249 ¶ 6.

The next FCC mention of the public trust came in the Commission's *1960 Programming Statement*.[58] It is just that, a mention: "The licensee is, in effect, a 'trustee.'"[59] Newton Minow's Vast Wasteland speech a year later refers to the broadcasters' "responsibilities as public trustees."[60] Amazingly, as he recounted thirty years later, he had intended the speech to be "remembered for two words—The words we tried to advance were 'public interest.'"[61] A D.C. Circuit opinion two months after the Vast Wasteland speech also referred to broadcasting as a public trust.[62]

Despite the official mentions of trustee, the key antecedent to development of this new theory came from the quiz show scandals and the hearings before Representative Oren Harris's committee during the fall of 1959. When CBS aired "The $64,000 Question" in 1955, the infant television industry found a huge winner; thus, it was imitated extensively.[63] Some of the contestants became national celebrities, none more so than Charles Van Doren, a handsome bachelor in his late twenties, who was a member of a famous literary family. Van Doren, for fifteen weeks on NBC's "Twenty-One," captured the nation's

58. 25 FED. REG. 7291 (1960).

59. *Id.* at 7294.

60. NEWTON MINOW, EQUAL TIME 55 (Atheneum 1964).

61. Newton Minow, How Vast the Wasteland Now?, Address at the Gannett Foundation Media Center, Columbia University (May 9, 1991), *reprinted in Public Interest in Broadcasting: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 16 (1991).

62. The court reversed an FCC approval of a transmitter move that resulted in a poorly served area's receiving less television and a better-served area's receiving more. In a paragraph Warren Burger could not have improved upon, the court noted that the move would no doubt increase advertising revenues and wrote: "Television and radio are affected with a public interest: the Nation allows its air waves to be used as a matter of privilege rather than of right. The enterprises which today are profiting so handsomely from radio and television may in the end find it in their own best interest to treat their business primarily as a public trust." Television Corporation of Michigan *v.* FCC, 294 F.2d 730, 733-34 (D.C. Cir. 1961). Two years earlier, a Senate report, while discussing scarcity, stated that "broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust." S. REP. NO. 562, 86th Cong., 1st Sess. 9 (1959). The report had opined that but for scarcity, "the committee would have no hesitation in removing completely the present provision regarding equal time and urge the right of each broadcaster to follow his own conscience." *Id.* at 8.

63. At the height of the quiz show mania, five new shows were introduced on a single day. SYDNEY HEAD & CHRISTOPHER STERLING, BROADCASTING IN AMERICA 209 (4th ed., Houghton-Mifflin Co. 1982).

viewers, made the cover of *Time*, got his Ph.D., became an assistant professor at Columbia University, and signed a $50,000-a-year contract with NBC to appear on the "Today" show.

Then, a shocked America learned that the shows it had vaulted to the top of the Nielsen ratings were rigged. They were just as true to reality as was Jack Benny's butler, Rochester. The time spent watching, with all the suspense and rooting for favorites, like Van Doren, had been unnecessary. The nation had been duped.[64] The associate producer of "Twenty-One" offered the only defense:

> [E]veryone seemed to be happy . . . . We were providing the network with a top rated show. We were providing the agency and the sponsor with a show that sold his product. So the network was happy, the sponsor was happy. The contestants, many of whose lives were changed, were happy in this, and the audience, who used to watch our show week after week, from the letters we got, they were very happy.[65]

But now no one was happy, the representatives made clear, with "fraud" and "deceit" rolling off their tongues.

Although nothing done was illegal,[66] it was now mandatory that broadcasters understand their "responsibility,"[67] because of the "massive betrayal of public trust."[68] The quiz show scandals were a national topic, and they put the idea, if not the exact words, of breach of trust, in the air. Representative Steven Derounian, the one member of the Harris Committee who was blunt with Van Doren—"I don't think an adult of your intelligence should be commended for telling the truth"[69]—summed it up in *Life* magazine: "The networks are responsi-

64. Anderson provides the best discussion of the quiz show scandal. KENT ANDERSON, TELEVISION FRAUD (Greenwood Press 1978).

65. *Investigation of Television Quiz Shows: Hearings Before the Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. (1960) [hereinafter *Harris Hearings*].

66. Except lying under oath about what had been done.

67. The three most frequently used words at the hearings were *fraud*, *deceit*, and *responsibility*.

68. *Harris Hearings, supra* note 65, at 211.

69. *Id.* at 641.

ble to the people. They are given free channels over which to telecast, and they cannot afford, or be permitted, to violate this public trust."[70] In a few years that idea would reverberate through a D.C. Circuit opinion, blasting both the Commission and Lamar Broadcasting, the licensee of WLBT in Jackson, Mississippi.

Lamar Broadcasting and United Church of Christ

Lamar Broadcasting played its chosen role of unreconstructed racist to the hilt.[71] As early as 1955, WLBT deliberately cut off a network program on race relations on which Thurgood Marshall, then General Counsel of the NAACP, was speaking and in its stead flashed, "Sorry, Cable Trouble."[72] Two years later, the station put on a program urging the maintenance of segregation and then refused eleven requests to present opposing views. The Commission noted complaints regarding those actions when reviewing the station's file at the time of its 1958 renewal and initially deferred the renewal. Subsequently, however, it granted a new three-year term. The FCC found that although Fairness Doctrine violations had occurred, they were isolated instances of improper behavior not meriting any sanctions.[73]

In the fall of 1962, James Meredith's entry into Ole Miss generated a new round of fairness complaints based on WLBT's unwillingness to present any view but that of segregationists. The station's general manager blithely announced his own views: "The word of the hour, of the day, of the year, is 'never.'"[74] With complaints pouring in about WLBT and other Mississippi stations, the Commission began an investigation. In the interim, WLBT's license came up for renewal again. Lamar Broadcasting's response to the various charges being leveled against it was simple: the station "had always fully performed its public obligations."[75]

70. Steven Derounian, *Quiz Prober Raps Winners, TV Brass*, LIFE, Oct. 26, 1959, at 38.
71. The factual discussion of WLBT is taken from POWE, *supra* note 1, at 90–92.
72. Office of Communication of the United Church of Christ *v.* FCC, 359 F.2d 994, 998 (D.C. Cir. 1966).
73. *Id.*
74. FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT 89 (Random House 1975).
75. POWE, *supra* note 1, at 91.

Before the Commission, several parties, including the Office of Communication of the United Church of Christ, which claimed a substantial membership in the area, requested to intervene against renewal. Not surprisingly, they alleged that WLBT did not comply with the Fairness Doctrine and did not serve its 45 percent black viewing audience. The allegations of programming abuse were "particularized and accompanied by a detailed presentation of the results of a typical week's programming."[76]

The request for intervention was based on the concept of "standing"—petitioners' claim that they had a sufficient interest in the matter of renewal—that they had a right to be heard by the agency. In a defensible interpretation of then-existing law, the Commission rejected the claim to standing. It believed that standing must be predicated on a legally enforceable right and that the would-be intervenors had none. They had neither more nor less injury than the general viewing public in the area,[77] and, in a marvelous, but nevertheless accurate, twist on injury, the law of standing presumes that when everyone is injured, no one has standing.

Still, while the challengers had no legal right to be heard, the Commission claimed to have listened anyway. Indeed, the Commission asserted "that it in effect accepted [the would-be intervenors'] view of the facts."[78] To believe that, however, is asking too much. More modestly, the Commission also stated that "it fully considered the claims [of the would-be intervenors] even though denying them standing."[79] No harm, no foul, so to speak.

But if the challengers' assertions are accepted, Lamar Broadcasting's flat denial that it never failed in its public interest obligations created a dispute about what necessarily constituted "material facts." Under section 309(e) of the Communications Act, a hearing is required to resolve such a dispute. In a startling combination of decisions, the Commission concluded: (1) no hearing was necessary (and therefore, if section 309(e) is to be taken seriously, no issues of material fact

76. 359 F.2d at 998 n.4.

77. *Id.* at 999 (citing the FCC finding that "petitioners . . . can assert no greater interest or claim of injury than members of the general public").

78. *Id.* at 1000.

79. *Id.* at 1004.

about WLBT's performance remained to be resolved); (2) WLBT did not merit a full renewal (necessarily meaning—even without regard to (1)—that WLBT had not met its public interest obligations during its prior term);[80] but (3) a probationary one-year renewal was appropriate under the circumstances. Given the racial tensions and conflict then pervading Jackson, the Commission concluded, a properly operated station was "needed immediately"[81] to help the whole community resolve its differences. To ensure that WLBT would be that station, the Commission imposed five "strict conditions"[82] on this renewal, including a requirement that the station clean up its programming.[83]

Possibly there may have been a time during the New Deal when the FCC's action might have been seen as an example of sophisticated expertise to which reviewing courts should defer. But in fact, to anyone willing to pay attention to the details, the FCC's analysis left its conclusion in shambles. It provided not a classic, but rather a tragic, example of agency capture. And the days of total judicial deference to administrative determinations were ending.

During the hearings on the quiz show scandals, FCC Chairman John Doerfer had said that there was nothing the Commission could do about the fraud on the public, and he indeed wondered whether anyone should care.[84] With WLBT the FCC again was saying that there was nothing it wished to do. Responding much like the incredulous Congressmen,[85] Warren Burger, writing for the D.C. Circuit, graphically characterized this behavior: "It would perhaps not go too far to say it elected to post the Wolf to guard the Sheep in the hope that the Wolf would mend its ways because some protection was needed at once and none but the Wolf was handy. This is not a case, however, where the Wolf had either promised or demonstrated any capacity and willingness to change."[86]

80. *Id.* at 1007.

81. *Id.* at 999 (quotation marks in original).

82. *Id.* at 997.

83. *Id.* at 999: "(d) 'That the licensee immediately cease discriminatory programming patterns.'"

84. *Harris Hearings, supra* note 65, at 463–543.

85. For example, the question to Doerfer: "Regulating in the public interest could not require that the public be protected against fraud?" *Id.* at 535.

86. 359 F.2d at 1008.

Burger was not in a deferential mood, and the real question was what rationale the court would use to reverse the Commission. The chosen method of reversal was the law of standing. Maybe no one cared enough to ask the residents of Carrollton and Breman, and they had taken no initiative to tell the FCC what they wanted, but if citizens wished to take the initiative themselves, then the FCC was duty bound to listen. Building upon, while changing, two decades of decisions, the court brought citizens into the FCC process, not simply as silent beneficiaries of the public interest, but as participants demanding that their rights be respected.

Standing is the handmaiden of substantive law. That is, the broader the law of standing—the greater the types of claims entitled to be heard as of right—the broader the underlying substantive law. Conversely, the narrower the law of standing—restricting the number and types of claims—the narrower the underlying substantive law. In saying that viewers had the right to be heard, the court was saying they had something relevant to add, something that must be considered in the final analysis. Broadened standing brought broadened judicial supervision.

Increased standing allowed the D.C. Circuit to survey a larger record. Despite the agency's assertions to the contrary, the FCC had not sufficiently considered the evidence that the would-be intervenors had presented. The D.C. Circuit did. The result was a remand; the Commission would reconsider WLBT's performance on the basis of the data the citizen-intervenors would provide. Astoundingly, after *Lamar Broadcasting* returned to the FCC on remand, the Commission managed to grant a full term renewal to WLBT. The D.C. Circuit, again through Burger, who by the time the opinion came down had been confirmed as Chief Justice and would take his seat in only three days, subsequently reversed that judgment and ordered the Commission to strip Lamar Broadcasting of its license.[87] Telling the Commission the way a renewal had to be decided was unprecedented;[88] yet this was the natural outgrowth of the decision on standing and the expanded opportunities it provided the reviewing court.[89]

87. Office of Communication of United Church of Christ *v.* FCC, 425 F.2d 543 (D.C. Cir. 1969).

88. POWE, *supra* note 1, at 92.

89. It is here, rather than Judge Leventhal's consistent quoting of himself to the effect

Although it was not as clear at the time, Burger's forceful explanation for mandating citizen standing provided the rationale for the new authority the D.C. Circuit would exercise over the agency and its licensees. It came in one of the most famous statements about broadcast regulation:

> A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.[90]

What is striking about this very powerful paragraph is that while it talks of "enforceable public obligations" and "a public trust," it nowhere mentions the public interest as their locus. What the court was doing, consciously or not, by introducing trust language, was nothing short of reconceptualizing broadcast regulation. Disinterested expertise in pursuit of the public interest was being shelved, and in its stead was the striking analogy of the law of fiduciary obligations.

The trust analogy fit broadcasting like a glove. Broadcasters were granted a wonderful corpus: "the free and exclusive use of a limited and valuable part of the public domain."[91] The beneficiaries of the trust were the viewers and listeners. They were owed duties. Those would include compliance with applicable laws, but could include more. The broadcaster-trustee was, after all, a fiduciary and therefore was bound to act in the interests of the beneficiaries, even if there were no applicable rules on a specific subject.

that agencies and reviewing courts should take a "hard look" at the case, where the active judicial supervision of Commission actions began. WAIT Radio *v.* FCC, 418 F.2d 1153 (D.C. Cir. 1969); Pikes Peak Broadcasting *v.* FCC, 422 F.2d 651 (D.C. Cir. 1969); Greater Boston Television *v.* FCC, 444 F.2d 841 (D.C. Cir. 1970).

90. 359 F.2d at 1003.

91. *Id.*

With the quiz show scandals, it had not mattered that no law had been broken or that Doerfer doubted whether the problem could be dealt with by law. Similarly with WLBT, it did not matter whether specific Commission rules were broken. In both cases the broadcasters breached their trust; they acted wrongly regardless of any applicable rules. The public and the D.C. Circuit understood that, even if the Commission did not. When, on remand, the Commission granted WLBT a full renewal and the case returned again, Burger explained his conception of the relationship of trustee obligations to the public interest standard. "Broadcasters are temporary permittees—fiduciaries —of a great public resource and they must meet the highest standards which are embraced in the public interest concept."[92]

Red Lion

In retrospect, it is surprising how rapidly the rhetorical transformation from public interest to public trustee took place. Begun in 1966 with *United Church of Christ*, it was essentially completed in 1973, and was so thoroughly embedded in the law that by the 1980s it was typical for the Commission and reviewing courts to conceptualize issues concerning broadcast regulation as problems of enforcing public trustee obligations, rather than questions concerning the meaning of the public interest.

The Supreme Court had decided few significant broadcast cases, but at the time Burger was writing *United Church of Christ*, the biggest broadcast case of all was simmering at the FCC, and in 1969 the Court announced its most comprehensive position on the First Amendment as it relates to broadcasting. The Court left its standard First Amendment precedents in the earlier volumes of the *United States Reports*. In *Red Lion*,[93] which upheld the constitutionality of the FCC's personal attack rules, the Court fashioned an entirely new First Amendment, one the Court thought appropriate for the supposed[94] unique circumstances of broadcasting.[95] Without citing (the soon to be nominated Chief

92. Office of Communication of United Church of Christ *v.* FCC, *supra* note 87, at 548.
93. *Red Lion*, 395 U.S. 367 (1969).
94. *See infra* Chapter 8 (Scarcity).
95. 395 U.S. at 386–89.

Justice) Warren Burger's opinion in *United Church of Christ*, *Red Lion* echoed his view of the broadcaster-listener relationship.

Part of *Red Lion* is traditional. When evaluating the FCC's authority to promulgate the regulations at issue, the Court spoke the statutory language of public interest.[96] And, in concluding that broadcasting's characteristics differed significantly from those of print, the Court reaffirmed *NBC*'s[97] scarcity rationale. But the First Amendment portions of the opinion were different; they were both a "celebration of public regulation"[98] and a refinement of *United Church of Christ*'s effort to reconceive the rationale for broadcast regulation.

The broadcasters' First Amendment argument in *Red Lion* was simple. *New York Times* v. *Sullivan*[99] had concluded that government could not use civil juries to superintend the news product. The Court believed this would be too fearsome a governmental intrusion into public debate because, unless strictly limited,[100] it was likely to result in self-censorship rather than in vigorous debate. The broadcasters offered a similar theory why the Fairness Doctrine (and its corollary, the personal attack rules) injected an atmosphere of caution into broadcast decisions.

The Court was having none of it. The pages of *Red Lion*'s First Amendment discussion were dominated by three words: *license*, *licensed*, and *licensee*. More applicants seek a license than will obtain one; broadcasters are licensed; thus, they are licensees. A license is a privilege, not a right: "licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them."[101] The repeated use of some variant of *license* set an unmistakable tone for an unmistakable result.[102] No one would dare utter such language about the *New York Times*.

96. 395 U.S. at 380 ("the amendment [to section 315] vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard"); *id.* at 383 ("an obligation to operate in the public interest").

97. NBC *v.* United States, 319 U.S. 192 (1943).

98. LEE BOLLINGER, IMAGES OF A FREE PRESS 71 (University of Chicago Press 1991).

99. New York Times *v.* Sullivan, 376 U.S. 254 (1964).

100. By a standard of clear and convincing evidence and "actual malice."

101. 395 U.S. at 394.

102. On page 389 alone some variant of *license* appears ten times.

The grant of a license to broadcast creates no First Amendment rights vis-à-vis citizens who lack a license:[103] "There is nothing in the First Amendment which prevents the Government from requiring 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."[104] Thus, the government may impose duties on those who are selected to broadcast. Paraphrasing, without citing, the FCC's 1949 report, *Broadcast Licensees*, the Court stated that those duties ran to the public: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[105] Broadcasters' duties required implementing the "right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences."[106]

Where does the First Amendment fit in this? Its mandate, "to preserve an uninhibited marketplace of ideas,"[107] is central. Broadcasting must "function consistently with the ends and purposes of the First Amendment."[108] Neither Congress nor the FCC may abridge this.

As with *United Church of Christ*, trust imagery is everywhere in *Red Lion*, from the express terms of "proxy,"[109] "fiduciary,"[110] and "obligations,"[111] to the overall concept. The trust corpus com-

103. "No one has a First Amendment right to a license [and] as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused." *Id.* at 389.

104. *Id.*

105. *Id.* at 390. The FCC stated in *Broadcast Licensees*: "It is this right of the public to be informed rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting." 13 F.C.C. at 1249 ¶ 6.

106. 395 U.S. at 390. Again, the FCC stated in *Broadcast Licensees*: "And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups that make up the community." 13 F.C.C. at 1249 ¶ 6.

107. 395 U.S. at 390.

108. *Id.*

109. *Id.* at 389, 396.

110. *Id.* at 389.

111. *Id.*

prises the "broadcast frequencies [that] constituted a scarce resource whose use could be regulated and rationalized only by government."[112] The trust, a license, places restraints and "conditions"[113] in favor of others. The beneficiaries are, of course, "the people as a whole . . . viewers and listeners."[114] Their right, and therefore the trustees' duty, is programming about "social, political, aesthetic, moral, and other ideas and experiences."[115] Should there be a breach, "the Commission is not powerless to insist that [broadcasters] give adequate and fair attention to public issues."[116]

Red Lion created a trust hierarchy. At the very top are viewers and listeners whose rights are paramount. At the bottom are broadcasters, mere proxies for the greater good. In between is government—Congress, the Commission, the federal courts—ready to execute the will of the people to receive their due.

Despite the fact that both *United Church of Christ* and *Red Lion* used the language and imagery of the public trustee standard, there was an important difference between them. The D.C. Circuit, on the front lines of administrative review, was fed up with the FCC and was seeking methods of obtaining better performance and exerting greater control. The Supreme Court remained far more enamored with administrative agencies generally and the FCC in particular. Indeed, following *Red Lion*, in every single case it reviewed where the D.C. Circuit reversed the FCC, the Supreme Court sided with the Commission. From *NBC* through *Storer*[117] to *WNCN Listeners Guild*,[118] the FCC was used to hitting home runs at a Court that believed communications was an area where "wise planning is essential"[119] and the FCC represented the wise planner.[120]

112. *Id.* at 376.
113. *Id.* at 394.
114. *Id.* at 390.
115. *Id.*
116. *Id.* at 393.
117. United States *v.* Storer Broadcasting Co., 351 U.S. 192 (1956) (upholding limits on station ownership by a single entity).
118. FCC *v.* WNCN Listeners Guild, 450 U.S. 582 (1981) (reversing D.C. Circuit conclusion that the FCC cannot let market forces determine radio formats).
119. *Red Lion*, 395 U.S. at 399.
120. *Id.* at 380, 388, 396–400. The Court's fawning was reminiscent of *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940): The public interest standard is "a

Thus, it was ironic that Justice White's efforts to hand broadcasters a stunning defeat caused him to use the language of the public trust, the very language Burger had used to short-circuit the FCC. Nevertheless, as a result of White's stirring language, the reconceptualization of broadcast regulation started by Burger gained momentum, as would be demonstrated in the "advertorial" cases that were just beginning.

Access Claims

With the Vietnam War continuing apace, an unusual antiwar group, the Business Executives' Move for Vietnam Peace (BEM), attempted to purchase airtime to present its antiwar views. WTOP in Washington, D.C., operating under a policy common to most stations, refused to sell airtime to anyone addressing controversial issues. The BEM went straight to the FCC; while its case was pending, the Democratic National Committee (DNC) requested the Commission to issue a declaratory ruling that the networks be required to sell it airtime for fund-raising purposes.

Both the BEM and the DNC argued that the public interest standard of the Communications Act or the First Amendment (or both) mandated that stations accept editorial advertising. Rights of viewers and listeners were, after all, paramount, and the Fairness Doctrine, with its emphasis on editorial responsibility and structured debate, did not suffice. All too often groups like the BEM waited for coverage of their positions only to find that it never came or that, when it did, it was distorted or not forcefully presented. *Red Lion*, they argued, mandated some form of access to ensure that the public would receive the information it needed. The FCC rejected those arguments out of hand,[121] but following on the heels of *Red Lion*, it now joined the D.C. Circuit and Supreme Court in referring to broadcasters as public trustees, albeit in a perfunctory labeling manner.[122]

supple instrument for the exercise of discretion by an expert body which Congress has charged to carry out its legislative policy." No wonder that Richard Stewart could muse that some saw "the 'public interest' as a twentieth century replacement for God." Stewart, *supra* note 2, at 1683 n.63.

121. Democratic National Committee, 25 F.C.C.2d 216 (1970); Business Executives' Move for Vietnam Peace, 25 F.C.C.2d 242 (1970).

122. 25 F.C.C.2d at 221, 222.

The two reviewing courts also saw broadcasters as trustees, but in their opinions trusteeship carried substantive import. The rub was that those courts could not agree on what that import was.

The D.C. Circuit repeated *United Church of Christ* and *Red Lion* in characterizing "broadcast licensees [as] the 'proxies' or 'fiduciaries' of the people."[123] If the analogy is useful, one might expect the court to conclude that as trustees, holding a public corpus,[124] broadcasters are bound by the governing trust instrument (in this case the Communications Act). Apparently relevant to this case would be section 3(h), which prohibits treating broadcasters as common carriers. Bent on fashioning a right of access, however, the D.C. Circuit found it preferable to recast the First Amendment. In words that still bring to mind Lewis Carroll's *Alice in Wonderland*, the D.C. Circuit found that a constitutional provision prohibiting an abridgment of freedom of speech and the press created an "'abridgeable' right to speak"[125] through the purchase (over the "seller's" objections) of airtime for advertorials.

The Supreme Court not only uprooted the D.C. Circuit's linguistic nonsense, but eradicated the style of the case as well. *BEM* became *CBS* v. *DNC*.[126] Yet for all their differences, the courts agreed that broadcasters are public trustees. Unlike the D.C. Circuit, however, the Supreme Court saw no need to wriggle out of the logical conclusion that a trustee may not, consistent with its trust, turn its operation over to someone else. The Supreme Court was quite satisfied with the way a trustee model operated to produce an appropriately informed public. Warren Burger's opinion echoed his public trustee[127] imagery in

123. Business Executives' Move for Vietnam Peace *v.* FCC, 450 F.2d 642, 652 (D.C. Cir. 1971).

124. "It has long been recognized that the airwaves are 'a limited and valuable part of the public domain,' leased out temporarily by the federal government which retains ultimate control over them . . . . Almost no other private business—almost no other regulated private business—is so intimately bound to government and to service to the commonweal." *Id.* (footnotes omitted).

125. *Id.* at 655. The supposed authority for the statement is *Red Lion*: "[I]t is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." 395 U.S. at 388.

126. CBS *v.* DNC, 412 U.S. 94 (1973).

127. Burger placed quotation marks around the phrase each time he used it. 412 U.S. at 117, 118, 125. The first two times he used "public trustee" were in Part III of the

United Church of Christ and elaborated the trustee's duty as one defined principally by the Fairness Doctrine and the paramount interests of audiences, not speakers.

Central to the broadcaster's obligations was the "duty of fairly and impartially informing the public audience."[128] This reflects the Fairness Doctrine's origins and the influence of the philosopher Alexander Meiklejohn. Both Meiklejohn and the Fairness Doctrine minimized speakers' desires in favor of the interests of listeners who need to be fully and fairly informed so that they could "vote wise decisions."[129] Burger quoted Meiklejohn's analogy to a New England town meeting: "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[130]

There are a variety of ways that issues can be presented fully and fairly; thus "the broadcaster is allowed significant journalistic discretion in deciding how best to fulfill Fairness Doctrine obligations."[131] A trustee must be accorded "broad discretion to decide how" best to meet the trust needs.[132] There is no necessary congruence between the desires of individuals to speak and the needs of the public for information. The trust creates the necessary mediating structure between private interest in speaking and public needs for information. If the interest-group access scheme was implemented, then the journalistic discretion that allows the Fairness Doctrine to function would erode, and the needs of the public "would no longer be 'paramount' but subordinate to private whim."[133]

Because interest group access could undermine discretion and promote speaker claims over listener needs, it was inconsistent with the public trustee standard. In *United Church of Christ*, Burger told Lamar Broadcasting that it could not behave as if it were the *Jackson Daily*

opinion, which was joined by only two other justices (because of its treatment of state action); the third time, where its use was identical with the former two, he spoke for the Court.

128. *Id.* at 117.
129. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 26 (Harper & Row 1948).
130. *Id.* (*quoted in* 412 U.S. at 122).
131. 412 U.S. at 111.
132. *Id.* at 118.
133. *Id.* at 124.

News.[134] In *CBS* v. *DNC*, in less inflammatory circumstances, he made a similar observation: "A licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee.'"[135] Trustees must be responsible for all their actions; they can never forget their duties to beneficiaries.[136]

Recognizing the Change

Almost single-handedly, Burger had created public trustee broadcasting to replace public interest broadcasting. The exchange, begun in 1966, was completed in 1973 with *CBS* v. *DNC*. The rhetorical transformation is reflected in four law review articles, three of which were written by highly knowledgeable observers of broadcast regulation. The first, in 1964, is a superb student Note in the *Harvard Law Review* offering the most sophisticated discussion to that date of content regulation.[137] The public interest is prominent; trust imagery is wholly absent.

Then, in 1966, Roscoe Barrow, who headed the FCC's Office of Network Study in the 1950s and who, along with Louis Jaffe, was one of the two senior academics writing about the FCC in the 1960s, wrote about network programming. He argued that the practices of the "networks in production, selection, scheduling and exhibition of programs adversely affect the public interest."[138] Broadcasters delegate to the networks the selection of programs, and the networks then choose programs designed to "achieve the highest ratings" instead of "high quality shows such as original drama, public affairs, and children's programs."[139] Barrow argued that the FCC should regulate

134. 359 F.2d at 1003.

135. 412 U.S. at 118.

136. To some extent, the D.C. Circuit might have agreed with the foregoing. It, too, embraced the trustee model, but then trumped it with the First Amendment. Burger, however, saw no necessary inconsistencies because *Red Lion*'s First Amendment model had incorporated the trustee concept in placing listener needs over and above those of the speaker. "To agree that debate on public issues should be 'robust and wide-open' does not mean we should exchange 'public trustee' broadcasting" for the alternatives. *Id.* at 125.

137. Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701 (1964).

138. Roscoe Barrow, *The Attainment of Balanced Program Service in Television*, 52 VA. L. REV. 633, 660 (1966).

139. *Id.* at 664.

to prevent this. The article cites the public interest over and over; once in passing it refers to the broadcaster as a public trustee.

The first prominent mention of trusteeship came from former Commissioner Lee Loevinger, who, writing immediately after *Red Lion*, sensed something different about the Court's discussion of the scope of the First Amendment rights involved. Loevinger entitled his article "Free Speech, Fairness and Fiduciary Duty in Broadcasting."[140]

Finally, in 1982, then-Chairman of the FCC, Mark Fowler, and his legal assistant, Daniel Brenner, in discussing the Commission's actions to influence program content, argued that references to the "trusteeship model"[141] had influenced broadcast programming since the initial imposition of FCC regulations:[142] "The Commission thus has not hesitated to consider programming and prescribe categories of desirable programming when defining the duties of licensees. Governmental guidance in broadcast decision-making [is] the fundamental characteristic of the trusteeship model."[143]

CONCLUSION

Did the change from the public interest to the public trustee standard matter? The answer is clear: yes and no. Changing a name or a label cannot change reality. Thus, the switch from a discredited public interest standard to a perception of the broadcaster as trustee can do nothing to prop up a regulatory scheme beset by its own internal contradictions and constantly overwhelmed by changing technology. Reality ultimately holds all the trumps.

But changing the name did more than better describe an existing relationship. As Orwell knew, control over language affects the way we perceive reality. Because the public interest no longer carried real meaning (except to those who deluded themselves into believing that the public interest, in someone else's mind, could mean what it meant

140. 34 LAW & CONTEMP. PROBS. 278 (1969).

141. Mark Fowler & Daniel Brenner, *A Marketplace Approach to Broadcast Regulation*, 62 TEX. L. REV. 207, 213 (1982).

142. *Id.*

143. *Id.* at 217.

to them), an appeal to the public interest has been hollow, as Richard Stewart so aptly noted.[144] That was true in the mid-1960s and more so twenty years later. The public trustee image carried no such negative baggage.

As a positive image, the public trustee conception mandated a hierarchy with the beneficiaries at the summit. The broadcaster-trustee was at the base with independent rights to exercise only to the extent that regulators could conclude that broadcaster independence evidently furthered the audience's welfare. In this manner, the public trustee imagery itself may give powerful legitimacy to the claim that the remedy for failed regulation is more regulation.[145] Thus, the death of public interest did not necessarily mean the end of regulation. Indeed, Burger's own articulation of the relation of public trustee to public interest was that trustees "must meet the highest standards which are embraced in the public interest standard."[146]

We should note that while we were writing this book, there again were calls for regulation in the "public interest." The Democratic party has successfully painted the 1980s as a time of private interest run riot. Representatives and Senators have leveled identical charges at the FCC's deregulatory actions and broadcaster behavior in the new environment. When private interest is perceived as harmful, the natural alternative is its theoretical opposite, the public interest. Just as President Bill Clinton has talked of reinventing government, FCC Commissioner Ervin Duggan has stated that it is time to "rejuvenate and reinvent the principle of public interest."[147]

We interpret this and other statements to mean that regardless of labeling, be it public trustee or public interest, there is likely to be regulation. Accordingly, the appropriate questions are whether that regulation is constitutional, and, if so, whether it works. We address those questions in the remainder of this book.

144. See *supra* the quoted text accompanying note 2.

145. "The nostrum most approved by an administrator for the ills of a regulated industry is more regulation; to him it seems as obvious as to the doctors of another era that the remedy for unsuccessful bleeding is more bleeding." Louis Jaffe, *James Landis and the Administrative Process*, 78 HARV. L. REV. 319, 320 (1964).

146. 425 F.2d at 548.

147. BROADCASTING & CABLE, June 7, 1993, at 91.

7

Broadcasting and the Supreme Court

THE FIRST AMENDMENT STATES that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Yet, as we have already noted, federal courts have rarely employed the First Amendment to restrain Congress's or the Commission's attempts to regulate the content of broadcast programs. In this chapter we show how and why the Supreme Court has consistently denied virtually all broadcasters' First Amendment objections to content-based regulation. In Chapter 8 we explain why these decisions are untenable and thus require rigorous policy analysis to take serious account of free speech principles in establishing acceptable boundaries for public interest regulation of broadcast programming.

OVERVIEW

The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[1] Learned Hand authored that famous observation in an opinion applying the Sherman Antitrust Act to the Associated Press. The government sued to enjoin an exclusionary practice that hindered certain newspapers (and therefore their readers) from acquiring information. By eliminating the artificial

1. United States *v.* Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

barrier, the government claimed, the suit would facilitate the ability of willing parties to add to the diversity of information within their communities. Both Hand and, subsequently, the Supreme Court found nothing in the First Amendment to prevent government from obtaining an injunction against this press behavior.[2]

Hand distinguished a "multitude of tongues" from "any kind of authoritative selection." In so doing, he articulated a core First Amendment position: no censorship. Furthermore, he recognized that the principle of freedom of expression rests upon the premise that individuals are fully capable of choosing what they would hear, read, or believe. The sovereignty of individual choice necessarily limits the ability of government to exercise those choices for its citizens.

In 1974 the Supreme Court, without citing Hand, applied those principles in *Miami Herald* v. *Tornillo*.[3] The *Herald* had savaged Tornillo, a candidate for state representative, in a pair of preelection editorials. Citing a long-standing but unused state law granting a right of reply to candidates assailed by a newspaper, Tornillo demanded that the *Herald* print his replies to the editorials. The *Herald* refused. Tornillo lost the election, but prevailed in the Florida Supreme Court, which linked the empirical reality of increased concentration of media ownership to a theory of the press's public service obligations. The court stated that "freedom of expression was retained by the people through the First Amendment for all the people."[4] The court believed that public debate on public issues was too important to be left in the hands of the few rich and fortunate enough to own instrumentalities of mass communication.[5]

The U.S. Supreme Court unanimously reversed. Although it agreed with the Florida court's identification of the problems of media concentration, the Supreme Court found Florida's solution—requiring a reply—an unconstitutional infringement of press freedom for two reasons. First, a right of reply might chill a newspaper's willingness

2. Associated Press *v.* United States, 326 U.S. 1 (1945). The political and theoretical background of the *Associated Press* case is developed in LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 207–12 (University of California Press 1991).

3. 418 U.S. 241 (1974). The fullest treatment appears in L.A. Powe, Jr., *Tornillo*, 1987 SUP. CT. REV. 345.

4. Tornillo *v.* Miami Herald, 287 So.2d 78, 82 (Fla. 1973).

5. *Id.* at 91.

to enunciate its views on an issue.[6] Second, and more fundamentally, the Constitution places editorial choice in the hands of editors.[7]

The Court's conclusions were hardly surprising. Previous Court decisions had established that freedom of the press meant that government was without power to determine what should or should not be printed. Even if the governmental policy is designed to and does promote diversity, the government may not coerce publication of information. People may read what they choose and believe what they choose, and government's duty is simply to leave those choices in private hands.

Because people are free to choose, competition arises for their choices. The array of available options—from mainstream to counter-cultural newspapers, magazines, books, or film—reflect the well-understood fact that speakers must actively compete for an audience. Society's goal is to have a well-functioning market or forum of ideas, information, and entertainment, not to have each speaker within the forum perform as a microcosm of the whole (even if any speaker were capable of doing so).

It is worth noting that, even without the constraints imposed by the First Amendment, this is the usual American approach to business markets. We achieve diversity in computers by allowing each company, whether large or small, to seek its own market niche for its product line. We do not expect Apple or Cray or Dell or IBM to fully duplicate the products of each and every company (although, of course, they may do so if they choose). We require those companies to obey all laws of general applicability—such as antitrust, antidiscrimination, labor, securities, and tax—but there are no laws telling the industry what it must produce or conversely what it may not create. Nor have we created a regulatory commission with powers to regulate the computer industry in the public interest, thereby creating entry barriers.

To be sure, there may also be industry-specific safety or environmental standards (for example, requiring air bags in automobiles). Such air bag regulatory standards are imposed because of a fear that market-

6. 418 U.S. at 256–57.
7. *Id.* at 258.

based diversity could produce a "race to the bottom." It has been argued that some of broadcasting's minimum content standards are similarly justified. Thus, former Commissioner Nicholas Johnson has analogized the Fairness Doctrine to a fifteen-mile-per-hour school zone to make the obvious point that while most drivers would slow down anyway, it is necessary to protect children against the few who would not.[8] Johnson's analogy speaks volumes about regulators' views of the roles of citizens and the state in broadcasting.[9]

The purpose of the speed limit is to protect children from being maimed or killed. To the extent it works (and it appears to), its benefits are significant. Furthermore, it is almost cost-free to drivers, who lose but a minute or two of their time. The Fairness Doctrine, however, is not a fifteen-mile-per-hour school zone. First, as we shall demonstrate in Chapter 9, the doctrine is not cost-free.[10] More fundamentally, its benefits cannot be analogized to those of the school zone. Johnson may believe that Fairness Doctrine violations maim or kill the citzenry's intellect, but, even if true (which it is not), this is hardly the same order as physical maiming. More basically, because children are children, we are aware that there are limits on our abilities to control their spontaneous and unthinking behavior. Presumably, adults can either switch the dial or supplement the unfair program they have heard with added materials.

At bottom, Johnson seems to believe that citizens are children and need the wise hand of government to watch over the information they receive from broadcasters who are indifferent to their audiences' welfare. This is, of course, the very opposite of Learned Hand's recognition that individuals are fully capable of choosing what they wish to hear, read, and believe. Nevertheless, as we have already noted in Chapter 5 and shall note again in Chapters 8 and 11,

8. *Public Interest in Broadcasting: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 35 (1991).

9. It also does not appear behaviorally correct. Even those who cared about children might only slow to twenty miles per hour when children were present, and if no children were around (and there were no reduced speed zone), few, if any, would bother to slow to fifteen, twenty, or even twenty-five miles per hour in the absence of the law.

10. *See infra* Chapter 9 (Costs, Benefits, Effects, and Alternatives: Distorting the Fairness Doctrine).

Johnson's point represents a major intellectual underpinning of broadcasting regulation.[11]

From the very inception, Congress, the FCC, and the courts have refused to extend to broadcasters the constitutional protections accorded to the print media. Nor have they treated broadcasting as just another industry, like computers.

Two reasons dominate why regulation of broadcasting has been largely freed of First Amendment considerations. First and foremost, as we have detailed in Chapters 2 and 3, broadcasting has been perceived as fundamentally different from other industries and other media. Second, broadcast regulation initially developed during roughly the early 1920s through the late 1930s, while First Amendment jurisprudence was in its embryonic stage. The Supreme Court did not invalidate a state statute under the First Amendment until 1931.[12] Another thirty-four years passed before the Court held that a congressional enactment violated the First Amendment.[13] The slow development of this jurisprudence, coupled with the Supreme Court's reluctance to apply constitutional limitations to advancing technology, has had a major impact on the constitutional status of broadcasting.

In the past two decades, academic scholarship has increasingly realized that broadcasting does not present unique First Amendment issues. But that scholarship, we think, has failed to account for the First Amendment context from which the myth of uniqueness stems. Nor has it noticed the extent to which understanding that broadcasting issues are not unique would only lead courts to bring modern First Amendment theory to bear on this medium in just the same way the Court brings modern theory to bear on other media such as magazines or mass demonstrations.[14] Consequently, what follows concentrates heavily on the general jurisprudential background against which federal courts developed the myth of broadcast uniqueness.

11. *See supra* Chapter 5 (Conclusion); *infra* Chapter 8 (Equality Without a Difference); and Chapter 11 (The Problems for the Critics: Viewers and Listeners).

12. Stromberg *v.* California, 283 U.S. 359 (1931).

13. LaMont *v.* Postmaster Gen., 381 U.S. 301 (1965). Though, a year earlier, in a decidedly robust moment, the Court resurrected the Sedition Act of 1798 (long since dead of its own expiration date of 1801) to declare it unconstitutional. New York Times *v.* Sullivan, 376 U.S. 254, 276 (1964).

14. We make this point more explicitly in subsequent chapters.

The Early Cases

We described earlier the *Shuler* and *Brinkley* cases, in which the D.C. Circuit reviewed various challenges to decisions of the Federal Radio Commission that revoked licenses because of the licensees' programs.[15] In both cases the court understood the most serious challenge to be the claim that the Commission violated Radio Act section 29's "no censorship" provision by inquiring into the licensees' past programming. The court answered that the Commission could look back; no censorship meant no censorship in advance. Section 29 thus was not a bar to ascertaining whether past programming was in the public interest.[16] Such governmental action merely punished speakers after the fact; it did not proscribe further utterances.

Although the court did not say so, this was the English common law position on prior restraints, as described by Blackstone.[17] In 1905, Justice Oliver Wendell Holmes had mistakenly stated that this was precisely the meaning of the First Amendment.[18] Beyond reciting what the Commission had said—"obviously, there is no room in the broadcast band for every school of thought"[19]—neither the *Shuler* nor the *Brinkley* opinion offered any First Amendment analysis.

In this respect the cases were also a logical extension of a trio of 1915 Supreme Court decisions dealing with movie censorship.[20] Ohio and Kansas had authorized prior censorship of movies, including the news film *Mutual Weekly*. Mutual mounted a constitutional challenge to the schemes based largely on the two state constitutions' protections of liberty of opinion, but it also included a claim based on the federal

15. *See supra* Chapter 2 (The Commission and the Courts).

16. KFKB Broadcasting *v.* FRC, 47 F.2d 670, 672 (D.C. Cir. 1931); Trinity Methodist Church *v.* FRC, 62 F.2d 850, 851 (D.C. Cir. 1932).

17. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 151 (1769).

18. Patterson *v.* Colorado, 205 U.S. 454, 462 (1907). Holmes later recanted, "I was simply ignorant." *Quoted in* POWE, *supra* note 2, at 65.

19. *KFKB*, 47 F.2d at 672.

20. Mutual Film Corp. *v.* Indus. Comm'n of Ohio, 236 U.S. 230 (1915); Mutual Film Co. *v.* Indus. Comm'n of Ohio, 236 U.S. 247 (1915); Mutual Film Corp. *v.* Kansas, 236 U.S. 248 (1915). All were diversity cases, and the principal issue in each was whether the state constitutional guarantees of freedom of speech and the press applied to movies. In *Mutual Film* the Court rejected the argument that movie censorship violated the Bill of Rights. *Id.* at 258.

Bill of Rights. The Supreme Court unanimously rejected the contentions: "The first impulse of the mind is to reject the contention [that movies could claim to be a protected aspect of liberty of expression]. We immediately feel that the argument is wrong or strained."[21]

Motion pictures might be "mediums of thought," but so too were a lot of other things, "the circus and all other shows and spectacles," for instance.[22] Obviously, these could claim no constitutional protection. They were not intended to be included within the protections of freedom of expression, and, accordingly, censorship of motion pictures did not "abridge the liberty of opinion."[23]

Brinkley and *Shuler* applied similar reasoning without even bothering to set it on paper. Even without its express articulation, another explanation for those cases seems to be that they arose when "speech" seemed to mean books or periodicals or political orations, but not "shows and spectacles" such as the circus or radio. In Brinkley's case that explanation is perfectly explicable. Protecting a quack like Brinkley has all the appearance of protecting the Ringling Brothers Circus. Furthermore, *Brinkley* would have been an odd starting point for protecting freedom of the press. As of the date the D.C. Circuit rejected the "goat gland" doctor's appeal, the Supreme Court had yet to sustain a single First Amendment claim, and in those cases reaching the Supreme Court, no lower court had sustained such a claim.

Shuler's case should have been different. Four months after *Brinkley* and before *Shuler*, the Supreme Court decided *Near* v. *Minnesota*.[24] *Near* expanded the definition of prior restraint to include cases enjoining an individual from certain future speech on the basis of similar speech uttered in the past. Minnesota had enjoined Near from publishing or circulating "a malicious, scandalous or defamatory newspaper."[25]

The analogy is close between the Minnesota injunction and the FRC determination that it would not license in the future a broadcaster who had aired particular programs in the past. Furthermore, the

21. 236 U.S. at 243 (Ohio).
22. *Id.*
23. 236 U.S. at 258 (Kansas).
24. 283 U.S. 697 (1931).
25. *Id.* at 706.

programming that had placed Shuler on the wrong side of the public interest was indistinguishable from the newspaper articles that got Near enjoined.[26] Both had railed against municipal corruption during the era of prohibition, and neither had been in the slightest bit temperate while doing it. Thus, Near had been enjoined because his prior articles were "malicious, scandalous and defamatory,"[27] while Shuler's license was not renewed because his broadcasts were "sensational rather than instructive."[28]

Yet Near prevailed as the Supreme Court held the Minnesota gag law unconstitutional. Shuler, by contrast, lost, as the D.C. Circuit sustained the FRC's decision not to renew, without even citing *Near*. Like their counterparts below, the Supreme Court justices did not find discussing *Near* important either, and they declined to review *Shuler*.[29] The combination of a restrictive view as to what constituted "speech" and a restrictive view of what constituted an abridgment of that speech—with both views rooted in the courts' unfamiliarity with or disinterest in the fledgling broadcast medium—seem to account for what appear, in light of modern First Amendment jurisprudence, strikingly cavalier analyses of Brinkley's and Shuler's claims.

THE *NBC* CASE

The Supreme Court's reconciliation of those cases, such as it was, came a decade later in *NBC v. United States*,[30] where the networks unsuccessfully challenged the Chain Broadcasting Rules. Assertedly seeking to increase competition and foster localism in broadcasting, the rules were designed to decrease network power over local affiliates. Essentially, the rules were an effort to allow affiliates to select programming free of network constraints. The Commission believed that if affiliates were left to their own choices, they would produce

26. LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 131 (University of California Press 1987).

27. 283 U.S. at 706.

28. Trinity Methodist Church *v.* FRC, 62 F.2d 850, 851 (D.C. Cir. 1932).

29. *Cert. denied*, 288 U.S. 599 (1933).

30. 319 U.S. 192 (1943). The present versions of the Chain Broadcasting Rules, now applicable only to television networks, are explained *supra* Chapter 4 (Outlet and Source Diversity: Network Regulations).

added local programming at the expense of the networks' national programming.

Once the Supreme Court sustained the rules as an appropriate exercise of the Commission's power to regulate in the public interest, it faced, for the first time, a First Amendment challenge to the FCC's regulatory power. This was not, however, the best test case or, for that matter, even a good test case for the networks, because the rules did not preclude a single station from airing any materials anytime it wished. In fact, the rules purportedly facilitated a station's decision to exercise programming choice by making it easier for an affiliate to reject network programming when the affiliate wished to air alternatives. Nor did the Chain Broadcasting Rules limit or prohibit any network programs. The rules addressed only the commercial methods by which those programs were distributed.

The First Amendment claim was so weak that the Court almost summarily brushed it aside. Since the rules looked like specific applications of the antitrust laws,[31] the networks contended that the exclusive remedy was antitrust enforcement, "not in expanding the power of the licensor of instruments of free speech. Only by circumscribing the power of the licensor with the strictness required by the guarantees of the First Amendment can freedom of the press be preserved."[32]

In retrospect, we can see that this was a very prescient argument. Of course, it went the way of most farsighted observations. The Court was unmoved. Indeed, the Court seemed anxious to establish a First Amendment principle for broadcasting that was as belittling to the medium as it was remote from the specific contours of the case before it. If the networks' position were correct,

> it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited

31. In *Associated Press* v. *United States*, 326 U.S. 1 (1945), the Court squarely upheld the application of antitrust laws to commercial practices in the mass media over a First Amendment objection.

32. Brief for NBC at 36–37, in NBC *v.* United States, 319 U.S. 192 (1943).

> facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.[33]

Thus, denial of a station license on the grounds of public interest "if valid under the Act, is not a denial of free speech."[34]

There it was, just as the Commission had been saying since 1928, but now stamped with the Supreme Court's imprimatur. There was not room for everyone; choices had to be made. Those choices were in the public interest. Accordingly, the First Amendment could not be a bar to making them. In short, the distinction between broadcasting and print, between *Shuler* and *Near*, was the scarcity of broadcast facilities that necessitated some mechanism for choosing among would-be broadcasters.

In Chapter 8, we analyze carefully the claim that scarcity—the need to ration broadcast licenses—justifies the *NBC* dictum. What is important for present purposes is the legal climate in which the Chain Broadcasting case arose.

The networks' First Amendment claim was not only ill-chosen, because of the way the Chain Broadcasting Rules operated, but was also ill-timed. The Supreme Court was still living in the shadow of the *Lochner* era,[35] where the judiciary functioned as a self-appointed overseer of legislation affecting social and economic conditions, from child labor, to maximum hours, to minimum wage, to reasonable rates of return on investments. For an eighteen-month period beginning in 1935, the Court dismantled key aspects of the New Deal and looked as if it might, in the immediate future, hold everything from the National Labor Relations Act to Social Security and the Tennessee Valley Authority unconstitutional. But after Roosevelt's landslide reelection and his subsequent Court-packing plan, Justice Owen Roberts made his "switch in time that saved nine."[36] Thereafter, Roosevelt, who was

33. 319 U.S. at 226.
34. *Id.* at 227.
35. This was named for *Lochner* v. *New York*, 198 U.S. 45 (1905).
36. *Court Packing Plan, in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 203, 204 (Kermit Hall ed., Oxford University Press 1992).

the first president in American history to serve a full term without a single appointment to the Supreme Court, made seven appointments before World War II.

The aftermath of 1937, like the aftermath of Vietnam, left everyone searching for the lessons of the prior mistakes so that the errors would not be repeated. Although the justices drew different lessons from the pre-1937 mistakes, on one thing they were united completely: the federal government had to be free to seek a better and fairer economic environment. Whatever its choices were, the Court was going to sustain them without hesitation.[37]

What function was left for the Court? Five years before *NBC*, Justice Harlan Fiske Stone had dropped a hint of an answer in his famous footnote 4 of *Carolene Products*.[38] The text of *Carolene Products* affirmed that economic regulation would sail through the courts without serious scrutiny. Footnote 4 indicated that the Court would not look so favorably on certain other laws. In more recent years, the academic focus of footnote 4 has been on Stone's category of "discrete and insular minorities." At the time and for some years thereafter, however, the Court seemed guided more by Stone's claim that the Court would treat legislation impinging on the Bill of Rights differently from legislation regulating markets.

Stone justified heightened judicial solicitude for the First Amendment on the grounds that free discussion keeps the political process open and assists in the repeal of undesirable legislation. In Stone's view, economic legislation received almost a conclusive presumption of constitutionality as an outcome of the normal democratic process. But, in turn, he suggested that when the process might not be open—for example, because of laws restricting speech (or voting)—then that presumption was no longer justified. Accordingly, laws impinging on speech were not entitled to a strong presumption of constitutionality.

Another line of cases reinforced the judicial solicitude for freedom of speech and the press at the time.[39] Unlike most provisions of the

37. *See, e.g.*, Wickard *v.* Filburn, 317 U.S. 111 (1942) (finding that the power to regulate interstate commerce could reach wheat that was to be consumed by animals on the farm where it grew).

38. Carolene Prods. *v.* United States, 304 U.S. 144, 152 n.4 (1938).

39. Gitlow *v.* New York, 268 U.S. 652 (1925); Stromberg *v.* California, 283 U.S. 389

Bill of Rights, the First Amendment (along with the just compensation requirement of the Takings Clause of the Fifth Amendment[40]) had been held applicable to the states (via the Due Process Clause of the Fourteenth Amendment). In *Palko* v. *Connecticut*,[41] Justice Benjamin N. Cardozo explained why: "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom."[42]

The analyses of *Palko* and footnote 4 to *Carolene Products* merged rapidly into the view that the First Amendment occupied a "preferred position"[43] in a constitutional hierarchy. At its apex was the First Amendment; below came the right to vote and the various guarantees of procedural regularity; at the bottom were those provisions that before 1937 limited regulation of the economy. The hierarchy thus reinforced the rigid dichotomy between economic rights and personal rights. The former had virtually vanished from the roster of values that judges would protect. The latter, especially those resting on the First Amendment, were the special preserve of the judiciary.

In the *NBC* case the networks litigated themselves right onto the wrong side of this rigid dichotomy. Their claim to freedom of the press offered the rare[44] chance for a corporation to prevail on a constitutional issue. On the other hand, the case looked like a pair of economic giants (NBC and CBS) attempting to free themselves from New Deal regulatory policy. Because the constitutional claim was so weak, the case did not cause the Court to pause over the question of whether its dichotomy was too rigid or too artificial. Therefore, the *NBC* Court saw no need to consider whether some regulatory issues might nevertheless raise serious constitutional issues.

(1931); Near *v.* Minnesota, 283 U.S. 697 (1931); Grosjean *v.* American Press Co., 297 U.S. 233 (1936).

40. Chicago, Burlington & Quincy R.R. *v.* City of Chicago, 166 U.S. 226 (1897).

41. 302 U.S. 319 (1937).

42. *Id.* at 327.

43. The phrase first appears in *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115 (1943).

44. The *Los Angeles Times-Mirror* successfully prevailed on its theory that the First Amendment placed limits on the power of courts to punish for contempt uttered out of court. That case was paired with an appeal by Harry Bridges, a labor union official, because of an identical challenge to a constructive contempt of court charge. Bridges *v.* California and Times-Mirror Co. *v.* Super. Ct. of Cal., 314 U.S. 252 (1941).

THE *RED LION* CASE

Over a quarter of a century passed before the Court authored another syllable on the constitutional status of broadcasting. The case, *Red Lion Broadcasting* v. *FCC*,[45] also reached the Court at a pivotal time in the jurisprudence of the First Amendment. Beginning in 1964 with *New York Times* v. *Sullivan*[46] and ending seven years later with the *Pentagon Papers* decision[47] came a singularly remarkable era in First Amendment jurisprudence that encompassed not only libel and prior restraints, but domestic security, street demonstrations, obscenity, and the legacy of Justices Oliver Wendell Holmes and Louis D. Brandeis. "The Court's decisions generally pushed for a newer, farther boundary . . . . Never before or since has there been such an outpouring of law on freedom of speech and the press. And never has it been so protective of the interests of dissent and so skeptical of government claims of the social harm that supposedly would be forthcoming" if its claims were not sustained.[48]

The Court's path-breaking decisions in this relatively brief period were in harmony with prevailing First Amendment scholarship. That scholarship stemmed from roots that reached back (sometimes unconsciously) to the works of Zechariah Chafee, who dominated the field between the World Wars as no one has in recent times.[49] Two characteristics of Chafee's work are particularly relevant here. First, he sought what were, for his times, the widest imaginable protections for freedom of speech. Second, he sought doctrinal bases for those protections that might fit comfortably in the prevailing constitutional jurisprudence of the times.

Chafee's first book, *Freedom of Speech*, appeared in 1920.[50] Shortly thereafter he defended his highly speech-protective views by

45. 395 U.S. 367 (1969).
46. 376 U.S. 254 (1964).
47. New York Times *v.* United States, 403 U.S. 713 (1971).
48. POWE, *supra* note 2, at 97, 104.
49. For an illuminating study of Chafee's scholarship and its subsequent influence, see Graber's 1991 analysis. MARK A. GRABER, TRANSFORMING FREE SPEECH (University of California Press 1991). The discussion of First Amendment jurisprudence in the text draws heavily on this excellent work.
50. ZECHARIAH CHAFEE, FREEDOM OF SPEECH (Harvard University Press 1920).

insisting that *Lochner* and its progeny should "serve as precedents justifying similar protection for freedom of speech."[51]

A rewritten and expanded version of his first book appeared in 1941 as *Free Speech in the United States*. *Lochner,* of course, was then no longer an appealing jurisprudential vehicle for Chafee's substantive views on free speech. Continuing to believe, however, that protection of speech had to have a doctrinal basis acceptable to sitting justices, in his second version he switched course and embraced *Carolene Products*' footnote 4.[52] Indeed, Chafee brilliantly turned *Lochner* on its head by arguing that "drastic restrictions on speech are comparable to rigid [*Lochner*ian] constitutional limitations on lawmaking" because both tend to freeze "present distribution[s] of property." In support he noted that it "is really not surprising that Justice Holmes dissented in both *Lochner v. New York* and *Abrams v. United States*. Liberty for discussion which may lead to the formation of a dominant opinion belongs side by side with liberty of the lawmakers to transform the dominant opinion into the statute that is its natural outcome."[53]

Chafee, in adopting footnote 4, thus found it necessary to divorce speech rights from economic rights. Before Chafee, however, "American libertarians had historically agreed that both economic and expression rights were vital to a functioning system of freedom of speech."[54] After all, what good is a right to speak for someone who lacks sufficient economic resources to be heard? But the rationale of footnote 4, as Professor Mark Graber notes in his insightful *Transforming Free Speech*,

> depends on the assumption that substantive policies and political processes are independent of each other. Courts must be able to secure democratic processes without limiting elected officials' policy choices. If economic and social policies affect

51. Zechariah Chafee, *Law and Liberty*, *in* FREEDOM IN THE MODERN WORLD 98 (Horace M. Kallen ed., Coward-McCann, Inc. 1928).

52. This was hardly a stretch. Chafee had long since concluded that legislatures "can be trusted to recognize dirt or discriminate between dangerous and harmless machinery" but "cannot be trusted to discriminate between dangerous and harmless ideas." ZECHARIAH CHAFEE, THE INQUIRING MIND 69 (Da Capo Press 1928).

53. *Id.* at 361 (discussing 198 U.S. 45 (1905) and 250 U.S. 616 (1919)).

54. GRABER, *supra* note 48, at 159.

> electoral outcomes, then the principled distinction Chafee and Justice Stone tried to make between judicial activism on behalf of free speech and judicial activism on behalf of economic rights breaks down.[55]

Chafee could not walk that path; neither he "nor his audience was prepared to endorse any constitutional argument that explicitly permitted courts to protect specific economic rights."[56]

Graber concludes that "to salvage some form of activism on behalf of expression rights, Chafee made a fateful decision. The constitutional defense of free speech, he declared, would implicitly pretend the distribution of economic resources did not affect the system of freedom of expression."[57] Chafee knew that misdistribution of economic resources biased the democratic process, for he wrote of "the increasing tendency for the most effective instrumentalities of communication to be bounded and shaped by persons who are often on one side of many public questions."[58] But this was not a problem for courts. Their job was to police the speech side of the equation and ignore the economic side.

Chafee offered powerful academic support for a rigid dichotomy between speech rights and economic rights. Academics who followed him accepted it so fully that the relation between speech and economic opportunities to speak became lost. During the 1964–71 period, when one spoke of speech, one talked of nothing else.[59] *Red Lion* confronted the Court and its academic supporters with the stark reality that they had sought to ignore.

Red Lion was decided in 1969, near the height of the Court's open embrace of the First Amendment. The Court no longer professed to

55. *Id.* at 160.
56. *Id.* at 161.
57. *Id.*
58. ZECHARIAH CHAFEE, THE BLESSINGS OF LIBERTY 108 (Lippincott 1956).
59. Virtually the only exception was an article by Jerome Barron. Jerome Barron, *Access to the Media—A New First Amendment Right?,* 80 HARV. L. REV. 1641 (1967). Barron was able to see that speech without reach lacked much meaning—probably because he did not come out of Chafee's tradition and indeed had not written on the First Amendment before the piece (maybe thereby facilitating his novel insight). *See* POWE, *supra* note 2, at 245–46.

believe that "entertainment" was not "speech." Further, the case was far removed temporally from 1937 (and 1943 when *NBC* was decided) and presented no corporate giant attacking the revered New Deal. Quite the contrary. The Red Lion, Pennsylvania, station had aired a "Christian Crusade" program in which the Reverend Billy James Hargis had attacked liberal journalist Fred Cook. Cook, who had fired the opening salvo at Hargis and others in an article in *The Nation*,[60] demanded free airtime to respond under the Commission's soon-to-be-codified personal attack rules (which were offshoots of the broader Fairness Doctrine).

The case appeared to have everything[61] needed to win a First Amendment case. Red Lion, an AM radio station in a tiny hamlet near York, faced legal action because of something it said. Red Lion advanced a simple, perfectly framed First Amendment position: the government cannot force a speaker to say what the speaker does not wish to say.

That position seemed more than amply supported by the constitutional framework the Court erected in *New York Times* v. *Sullivan*[62] and shored up in subsequent cases. In *Sullivan* the Court formed a dynamic First Amendment doctrine by blending philosopher Alexander Meiklejohn's arguments that the First Amendment forbade government to penalize controversial speech[63] and Justice William Brennan's towering insight that regulation inhibits (or "chills") even speech it does not literally proscribe.[64]

Nevertheless, the Supreme Court unanimously[65] rejected Red Lion's claim. The *Red Lion* opinion treated prevailing First Amendment doctrine the same way the *NBC* opinion treated *Near*, by ignoring it. As detailed in Chapter 6,[66] three words dominate *Red Lion*'s First

60. *Hate Clubs of the Air*, THE NATION, May 25, 1964, at 525.

61. Red Lion's attorneys lacked only one thing: knowledge, concealed from everyone, that the complaint was filed as part of an orchestrated attempt to force pro-Goldwater forces off the air. FRED FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT 32–42 (Random House 1975).

62. 376 U.S. 254 (1964).

63. *See infra* note 67.

64. Speiser *v.* Randall, 357 U.S. 513 (1958).

65. Justice William O. Douglas did not participate.

66. *See supra* Chapter 6 (The Creation of the Public Trustee Image: Red Lion).

Amendment discussion: *license*, *licensed*, and *licensee*. The First Amendment does not preclude requiring a broadcaster "to conduct himself as a proxy or fiduciary with obligations" to implement the "right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences."[67]

The first of the Court's two key First Amendment pronouncements in *Red Lion* is that "[t]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment."[68] After such a statement First Amendment scholars should expect a reference to Justice Louis D. Brandeis's famous recitation in *Whitney* v. *California*[69] detailing the myriad purposes the framers of that amendment had for protecting freedom of speech. But with its emerging public trust focus, the Court did not head in that direction. Instead, Justice Byron White followed with his other key First Amendment proposition: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[70]

This positioning of listeners' rights above broadcasters' rights creates a public trust hierarchy and sheds new light on the previous pronouncement about the ends and purposes of the First Amendment.

67. 395 U.S. at 389, 390. Meiklejohn, so important to *New York Times* v. *Sullivan*, was also important to *Red Lion*. This time Meiklejohn's importance flowed from his New England town meeting as a model of democratic decision making because it merged so readily into the public trust concept the Court was beginning to validate. Meiklejohn's First Amendment demanded that rational citizen-governors consider the options fully and then "vote wise decisions." With his town-meeting analogy, Meiklejohn focused not on "the words of the speakers, but the minds of the hearers." Thus, "what is essential is not that everyone shall speak, but that everything worth saying shall be said." With the focus on the listeners rather than the speakers, the state may play a moderating role to ensure that ideas essential to decision making are brought forward and redundancies limited. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 24–28 (Harper & Row 1948). It is worth noting that Meiklejohn had distinctive ideas about radio and free speech; radio had no claim to First Amendment protections because it had "failed" in its promise to assist in national education. Radio was engaged in making money rather than "enlarging and enriching human communication." Because the First Amendment, in Meiklejohn's view, was intended "only to make men free to say what, as citizens, they think, what they believe, about the general welfare," radio flunked the test and thereby forfeited any claim to constitutional protection. *Id.* at 78–89.

68. 395 U.S. at 390.

69. 274 U.S. 357, 375–77 (1927) (concurring).

70. 395 U.S. at 390.

Instead of the usual First Amendment concern with governmental interference in the marketplace (or with individual liberty), the Court took the marketplace metaphor in a different direction. *Red Lion* focused on what happens when the market malfunctions, wholly or partially, and blocks some ideas from entry. As though the case involved the application of antitrust law to a merger that would create a monopoly in broadcasting within Red Lion, the Court suggested that government might selectively intervene to remove entry barriers and thereby promote efficiency. Instead of being a negative force in the marketplace, the government had a positive role to play, even though it played that role by selectively intervening on the basis of program content.

The affirmative role of government emerged from the idea of a trust and as a response to Red Lion's telling contention that "broadcasters will be irresistibly forced to self-censorship and their coverage of public issues will be eliminated or at least rendered wholly ineffective" by governmental supervision.[71] This "chilling effect" argument was a major strength of the broadcasters' case. *Sullivan* held that the potential chilling effect of governmental regulation could render that regulation unconstitutional. How, then, could such an effect be avoided in broadcasting? Justice White provided a direct answer: the government would be responsible for preventing any inhibiting effect. Should the government perceive that a licensee is too timid, thereby breaching its fiduciary duty, the FCC would have the obligation to strip the licensee of its right to broadcast. In the Court's view, the chilling effect would not exist because the same mechanism that was thought to cause the chill would also serve to warm it up. So much for *Near* and the prior restraint doctrine.

There is no doubt that Red Lion lost because the Court thought that broadcasting was different from other media. *Near* and *Sullivan* concerned the rights of newspapers, not broadcasters, and so they had no relevance to *Red Lion*.

The key is understanding why broadcasting was different, and this had little to do with the discussions of scarcity. The Court perceived a difference, rather, because the rigid dichotomy between the right to

71. *Id.* at 393.

speak and the right to command economic resources, so well ensconced in First Amendment doctrine, was self-evidently and dramatically untenable in *Red Lion*.

The *Red Lion* Court could not implicitly assume, as it normally did, that distribution of resources had nothing to do with speech because the facts of *Red Lion* invalidated this assumption on its face. Red Lion could only claim *its* speech rights because of the *existing governmental* allocation of property rights, an allocation that had taken place, not in the distant past, but instead within the lifetime of each of the members of the Court. The fact was right in the open—staring the Court in the face.

Without its license from the FCC, Red Lion could not have attacked Cook and would not be in the position to deny his request for rebuttal time. Contrary to standard First Amendment doctrine, *Red Lion* showed that property rights had plenty to do with speech rights: "[T]he fact remains that broadcasters have often attained their present position because of their initial governmental selection . . . . Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurements . . . are the fruit of a preferred position conferred by the Government."[72] Instead of a rigid dichotomy, it turned out to be all but impossible to disentangle the two; the public trustee idea became an essential rationalization for the situation.

When the Court perceived that the case presented something fundamentally new, it ignored all that had gone before. As Dean Lee Bollinger summarizes the case, the *Red Lion* Court "enthusiastically embraced the concept of regulation. It took the affirmative and reconceived the fundamental theoretical underpinnings . . . of the relationship between the press and government."[73] First Amendment law was remade from scratch into a public trust concept to match the suddenly novel intersection of market power and regulatory supervision, circumstances wholly unanticipated by the prevailing First Amendment doctrine.

Of course, broadcasting is unique only in that, given its regulatory

72. 395 U.S. at 400.

73. LEE BOLLINGER, IMAGES OF A FREE PRESS 72 (University of Chicago Press 1991).

history, the inseparability of speech and economic rights in that medium is strikingly self-evident and undeniable.[74] In fact, in all cases speakers enjoy a government "license," whether it be a permit to parade on Main Street, the copyright for a book, or the deed to a printing press. All speakers' claims for protection from government can be recast as pleas for a right to employ governmentally defined and protected resources free of public interest supervision.

Did the Court's new insight, that speech rights and distributions were hopelessly entangled, mean that other First Amendment arenas could be refashioned along the lines laid out by *Red Lion*? First and foremost, what about newspapers, where economic power, protected by government-enforced property rights, translated into the power to control (and perhaps to distort) the flow of news and opinion, and where a significant consolidation was occurring?

Miami Herald v. *Tornillo*[75] starkly presented this question. The *Herald* did not yet have its monopoly in Miami, but it had a viselike grip on the Miami market and a joint operating agreement with its smaller afternoon competitor, the *Miami Daily News*. Furthermore, the right of reply law, triggered by the *Herald*'s editorials, was remarkably similar to the personal attack rules sustained in *Red Lion*. Finally, Tornillo's counsel was Jerome Barron, who had been in print before *Red Lion* recognizing (although not in these terms) the invalidity of the dichotomy laid out in footnote 4 of *Carolene Products*.

In *Tornillo*, Barron placed the economic resources issue in its most powerful light, and, while he downplayed *Red Lion*, the case fit like a glove. Still, the Court was having none of it. It returned quickly and even more unanimously[76] to its standard First Amendment doctrine: government may not interfere with the press. *Red Lion*, when contrasted with *Tornillo*, really did mean that broadcasting was unique—so unique that *Red Lion* was not even cited.

THE *LEAGUE OF WOMEN VOTERS* CASE

Eventually, in the face of much academic grousing that the Court's

74. Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375.

75. 418 U.S. 241 (1974).

76. Justice Douglas had not participated in *Red Lion*.

views on scarcity were a relic from the era of the crystal set, the Court dropped a footnote saying that if an appropriate body such as Congress or the FCC would say that scarcity belonged in the ash-heap of history, the Court would reconsider.[77] The footnote was part of a historic case, *FCC* v. *League of Women Voters*, where the Court for the first time found a broadcast regulation unconstitutional. The void provision, section 399 of the Public Broadcasting Act,[78] forbade any noncommercial station receiving funds from the Corporation for Public Broadcasting (CPB) from editorializing. The theory behind the provision was that stations taking public money ought not turn around and use it to propagate their views.

The rationale really was not bad. Its fit was. Noncommercial stations could put on controversial positions at will; what they could not do was call them editorials. Furthermore, the statutory ban came into play so long as a station received any CPB funds, no matter how few.

Brennan's opinion for the Court bobs and weaves as it plods to its result. When all the unnecessary verbiage is stripped away,[79] a result

77. FCC *v.* League of Women Voters, 468 U.S. 364, 376–77 n.11 (1984): "The prevailing rationale for broadcast regulation based upon spectrum scarcity has come under increasing criticism in recent years . . . . We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."

78. 81 Stat. 365 (1967), amended by 95 Stat. 730 (1981).

79. Despite the *League of Women Voters* footnote and the FCC's subsequent acceptance of the invitation to conclude that scarcity is a relic of the past, the Court returned to *Red Lion* in *Metro Broadcasting* v. *FCC*, 497 U.S. 547 (1990), where it upheld minority ownership preferences as designed to achieve more diverse programming. "We have long recognized that '[b]ecause of the scarcity of frequencies, the Government is permitted to put restraints on licensees in favor of others.'" *Id.* at 566 (quoting *Red Lion*). Justice Brennan successfully cobbled together a bare majority to sustain the affirmative action program despite the earlier decision in *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989). Justice White should have been with the dissenters, thereby changing the result. But White joined Brennan on condition that the opinion be based on "*Red Lion*'s endorsement of diversity-based broadcast regulation." Neal Devins, *Congress, the FCC, and the Search for the Public Trustee,* 56 LAW & CONTEMP. PROBS. 145, 179 (1993). If Paris was worth a mass, affirmative action was worth a cite to *Red Lion*.

In the cable "must carry" case, the Court again distinguished broadcasting from other media (this time cable) on the basis of scarcity. The Court almost proudly noted that from the "inception" other courts and commentators had criticized scarcity, but the Court had "declined to question its continuing validity." That disinclination continued

emerges that is best explained by the subsequent abortion counseling case:[80] there need not have been much public funding involved at all, and therefore Congress did not pay enough for the station's First Amendment rights that section 399 deemed forfeit.

THE *PACIFICA* CASE

Red Lion and *League of Women Voters* could be paired to suggest that, as applied to broadcasting, the First Amendment holds that supposed speech-enhancing rules—like the Fairness Doctrine—are constitutional, but speech-banning rules are not. In the rhetoric that has occasionally surfaced, scarcity justifies public interest rules to add voices, but not to delete them.[81]

The pairing is nice, but *FCC* v. *Pacifica Foundation*[82] trumps. There, in agreeing with the FCC that George Carlin's "filthy words" monologue was "indecent," a bare majority of the Court held that the FCC could ban speech from the airwaves that would be legal everywhere else.[83] The Commission may combat too much diversity as well as too little.

As we detailed in Chapter 5,[84] *Pacifica* arose after the Commission had banned drug lyrics and topless radio from the air. The Commission's decision was announced along with the family viewing hour, an agreement that the networks' first hour of prime time would be, in the words of the chief CBS censor, safe "for the most uptight parent you can imagine watching the show with his children."[85] That

"here." Turner Broadcasting Sys., Inc. *v.* FCC, 114 S.Ct. 2445, 2457 (1994). The Court was at least partially correct: it did use scarcity to distinguish cable. But Justice Anthony Kennedy's assertion that scarcity had been questioned from the inception was belied by his own citations to authority. The earliest was Ronald Coase's seminal article, published some three decades after the "inception." Ronald Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959). Had Kennedy wished citations between Coase and the mid-1980s, there were a few available. See *infra* Chapter 8, nn.76–77.

80. Rust *v.* Sullivan, 500 U.S. 173 (1991).

81. FCC *v.* Pacifica Foundation, 438 U.S. 726, 770 (Brennan, J., dissenting) (quoting 556 F.2d at 29 (Bazelon, J., concurring)).

82. 438 U.S. 726 (1978).

83. Rosenfeld *v.* New Jersey, 408 U.S. 901 (1972) (school board meeting).

84. *See supra* Chapter 5 (Sex).

85. *Quoted in* L.A. Powe, Jr., *Or of the [Broadcast] Press*, 55 TEX. L. REV. 39, 50 n.84 (1976).

parent may have been driving with his young son[86] when he heard Carlin's monologue at 2:00 P.M. on Tuesday, October 30, 1973. He wrote the FCC that he could not "understand the broadcast . . . over the air that, supposedly, you control."[87] The Commission fully agreed, banning "indecent" programming, such as Carlin's monologue, regardless of any literary, artistic, or political value. Carlin's magnificent seven words and other indecency could not be aired if there was a chance children could be in the audience.

By a 5–4 vote, the Supreme Court agreed. Justice John Paul Stevens's prevailing opinion explained that Carlin's filthy words might be appropriate elsewhere, but certainly not over the radio: "Of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."[88] While the reasons are "complex," two stand out in *Pacifica*'s context.[89] "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans."[90] Broadcasters enter into the privacy of the home, and because listeners are "constantly tuning in and tuning out" prior warnings would not be effective in protecting the unwilling listener.[91]

The first reason applies to everyone, the second just to the young. "[B]roadcasting is uniquely accessible to children, even those too young to read."[92] Parents may need help in their own households, and the government has its own independent interest in the "well-being of its youth."[93] These reasons combine independently to justify cleaning the public air of words inappropriate for children.

Unlike *NBC* and *Red Lion*, where the First Amendment claim intertwined speech rights and economic control, *Pacifica* was a clear case of censorship, a classic First Amendment issue. Yet, however classic, the five-justice majority could not agree on a First Amendment rationale. Accordingly, *Pacifica* became a broadcast case.

The cause of the *Pacifica* Court's inability to formulate a First

86. POWE, *supra* note 26, at 186.
87. 438 U.S. at 730.
88. *Id.* at 748.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 749.
93. *Id.*

Amendment rationale for the case was the Court's continuing ambivalence at the fundamental insight of *Roth* v. *United States*[94] that sex and obscenity are not synonymous. Unfortunately for doctrinal coherence, with sex divorced from obscenity, line drawing became irrational to impossible. A Warren Court legacy was an increasing protection for sexually explicit and offensive speech which finally, between protecting the private possession of obscenity in *Stanley* v. *Georgia*[95] and allowing speakers to say "fuck" in *Cohen* v. *California*,[96] came close to taking all the wraps off.

President Richard Nixon, leading a new and less sexually permissive national coalition, got the opportunity to change things with four Supreme Court vacancies to fill before he had served three years. The four Nixon appointees plus White coalesced in *Miller* v. *California*[97] and *Paris Adult Theatre I* v. *Slaton*[98] to reformulate obscenity law. This, then, stopped the judicial, if not the cultural, bleeding.

Paris Adult held that adults had no constitutional right to see or obtain obscene materials. With this as a cornerstone, the deeply divided Court could determine how much farther, if at all, to retrench from the public sexual revolution. *Pacifica* seemed especially likely to raise questions about the scope of *Cohen,* which had overturned a conviction for wearing apparel containing the slogan "Fuck the Draft" in an opinion that sharply curtailed government's power to proscribe speech because it contained indecorous language.

The intellectual lead fell to Stevens, who argued that some speech—public discussions of sex, for instance—just was not so important as other speech and therefore should not receive the constitutional protections accorded worthier speech.[99] *Pacifica* was his second attempt to gain a Court for this view. From his perspective, garbage (even if speech) should be treated as garbage, and the depictions of sex publicly available in the mid-1970s were garbage. The medium for distribution did not make the garbage any less

94. 354 U.S. 476, 487 (1957).
95. 394 U.S. 557 (1969).
96. 403 U.S. 15 (1971).
97. 413 U.S. 15 (1973).
98. 413 U.S. 49 (1973).
99. Young *v.* American Mini Theatres, 427 U.S. 50 (1976).

noxious.

When Stevens wrote that Carlin's "words offend for the same reason that obscenity offends,"[100] Stevens was not talking about radio; he was justifying the need to take action against the content of the speech. There is nothing about the state's interest in suppressing obscenity that is media-specific; it can be banned regardless of its chosen medium. Stevens was laying the groundwork for a similar conclusion for indecency.[101] Thus, when Stevens turned to *Cohen* (as he did three times), he served notice, through transparently thin distinctions,[102] that he would be pleased to erode *Cohen*'s First Amendment status.

From the perspective of Stevens's plurality opinion, *Pacifica*'s discussion of broadcast uniqueness was hopefully but a transitory pause on the way to a return to the pre-*Cohen* view that use of language like Cohen's and Carlin's was so close to obscene that it was not worth splitting the difference. *Pacifica* was the first step in applying the conclusion to broadcasting; the next nonbroadcast case would be the vehicle to take the second step of applying it generally.

For this position, Stevens had three solid votes: his own and those of Chief Justice Warren Burger and Justice William Rehnquist. Three equally solid votes, Justices Brennan, Potter Stewart, and Thurgood Marshall, were implacably opposed. Thus, the necessary fifth vote in this projected transformation had to come from among Justices White, Harry Blackmun, and Lewis Powell.

All three had voted with the *Miller* majority to facilitate the suppression of what the opinion referred to as "hard core" pornography;[103] the question was, were they now willing to go further and see *Miller* as but a first step. In *Erznoznik* v. *City of Jacksonville*,[104] White voted to permit cities to ban nudity shown at drive-in movies

100. *Pacifica*, 438 U.S. at 746.

101. *Id.*: "Indeed, we may assume, *arguendo*, that this monologue would be protected in other contexts." Given the tenor of the opinion, "*arguendo*" carries the weight of that sentence.

102. Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence*, 64 VA. L. REV. 1123, 1229–30 & nn.638, 639, 642 (1978).

103. Chief Justice Burger's opinion uses "hard core" five different times to describe the targeted materials.

104. 422 U.S. 205 (1975).

where the screen was visible to passersby. Powell (joined by Blackmun), however, wrote for the Court in finding the ban overly broad. The ordinance, he noted, would reach "a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous."[105]

A year later, in *Young* v. *American Mini Theatres*, White joined Stevens's initial effort to remove unworthy speech from constitutional protection, while Powell provided the fifth vote to approve Detroit's zoning restriction on the location of adult theaters. There was no need to worry about inadvertent or wholesome nudity here; Detroit's ordinance targeted films that emphasized "specified anatomical areas."[106] This was not *Erznoznik*'s mild nudity; yet the dissent accurately charged that both cases were about "offensive speech" that was not obscene and that the ordinance was content-based. Therefore, the dissent argued, *Erznoznik* was controlling.[107] Powell, however, distinguished *Erznoznik* as a "misconceived attempt directly to regulate the content of expression"[108] and contrasted Detroit's ordinance as merely a zoning law that furthered "governmental interests wholly unrelated to the regulation of expression."[109] He backed this conclusion by noting the two aspects of the case he found to be dispositive: (1) there was no content restriction on creators of adult movies, and (2) those who wished to see them were unhindered in any significant way.

Pacifica exposed the weaknesses of Powell's distinctions. Like *Erznoznik*, it dealt with a content ban limited to a single medium. Unlike *American Mini Theatres*, that ban prevented those who might desire to hear the disfavored speech over the radio from doing so. Therefore, to adhere to his prior positions, it appeared that Powell had only two choices: vote to reverse the FCC or admit error. Instead, he chose a third course, one that allowed him to suppress the offending words without eating judicial crow. Powell concluded, as had the plurality, that broadcasting was unique. What was really unique, however, was the merging of *Erznoznik*, *American Mini Theatres*, and

105. *Id.* at 213.
106. 427 U.S. at 53.
107. *Id.* at 87–88.
108. *Id.* at 84.
109. *Id.*

Pacifica, which had placed Powell and Blackmun in doctrinal boxes that offered few outlets for escape.

In sum, the *Pacifica* Court consisted of four dissenters who opposed the dirty words ban, three justices in Stevens's plurality who seemingly wished to extend it beyond broadcasting, and Powell and Blackmun, who needed broadcasting to be unique to take them out of their self-created doctrinal confines. Despite Stevens's efforts to make broadcasting doctrinally unique, it was really unique only for Powell and Blackmun, and unique to them because their needs were unique. Thus, while *Pacifica* is typically seen as a prime example of the medium, not the message, controlling the result, in fact it is the opposite. For seven of the nine justices what was at stake was the message not the medium.

Pacifica thus was like *NBC* and *Red Lion* in that it came to the Court when the Court was in turmoil and confusion over a fundamental First Amendment principle. Further, like *NBC* and *Red Lion*, *Pacifica* left us with a doctrine that broadcasting is different from other media, yet in fact deeper tensions and conflicts within the Court and its First Amendment jurisprudence better explain the result.

The area of sexually offensive speech was as confused as the mid-1960s obscenity law that Justice John Marshall Harlan believed was an "intractable" problem.[110] Yet, in fact, sexually offensive speech proved tractable. In a little over a decade, subsequent events sorted it out and left Powell and Blackmun's quandary as a quaint relic of the mid-1970s.

Stevens prevailed on but a single issue: kiddie porn was a new category of garbage, which could be banned even though not obscene.[111] But other highly offensive speech short of obscenity, from *Hustler*'s parody of Jerry Falwell having sex for the first time in an outhouse with his mother,[112] to Dial-A-Porn,[113] to flag burning,[114] was held protected. *Miller*, despite its shaky aftermath, proved to be a more or less stable line, and therefore the Warren Court legacy

110. Interstate Circuit *v.* Dallas, 390 U.S. 676, 704 (1968).
111. New York *v.* Ferber, 458 U.S. 747 (1982).
112. Hustler Magazine *v.* Falwell, 485 U.S. 46 (1988).
113. Sable Communications *v.* FCC, 492 U.S. 115 (1989).
114. Texas *v.* Johnson, 491 U.S. 397 (1989).

remained largely intact.

As the area restabilized, *Pacifica*, instead of being an important move toward eradicating the Warren Court past, was limited to its facts, and the handiest fact was that broadcasting was unique. Powell and Blackmun, probably the only members of the Court who believed in that conclusion, prevailed, albeit hardly for the reasons offered.

Review

NBC, *Red Lion*, *League of Women Voters*, and *Pacifica* set the contours: the spectrum is scarce, but the medium is pervasive. Accordingly, "it is well settled that the First Amendment has a special meaning in the broadcast context."[115] Knowing what is an unconstitutional limitation on print does not guarantee a corresponding knowledge for broadcasting because the theory undergirding the constitutional status of print—or of any other mass communications medium in the United States—will not suffice to explain the First Amendment theory of broadcasting.

The Court asserts that it had to create a distinct theory for broadcasting because the public trustee character of the licensee, combined with the special and unique characteristics of the medium, mandates a set of rules that "serve the ends and purposes of the First Amendment."[116] In truth, the Court probably created the distinct theory because the principal broadcast–First Amendment cases—*NBC*, *Red Lion*, and *Pacifica*—each came to the Court when the underlying free speech theory applicable to that case was in serious disarray. In each case, it was convenient to retreat to facile generalizations about differences between broadcasting and other communications media to avoid grappling with the real issues at hand. When we examine those generalizations, it becomes apparent that the Court has seen two sides of a coin and concluded that it witnessed two separate objects. This conclusion is even more apparent when we consider, in the next chapter, what specific justifications might be offered for treating broadcasting differently.

115. *Pacifica*, 438 U.S. at 741–42 n.17.
116. *Red Lion*, 395 U.S. at 390.

8

Broadcasting Versus Print

THE DAYS WHEN COMMENTATORS celebrated the Supreme Court's distinctions between broadcasting and print are long since past. Now the Court's conclusions are the objects of derision. Judge Robert Bork noted that "the attempt to use a universal fact [physical scarcity] as a distinguishing principle necessarily leads to analytical confusion."[1] Nor has *Pacifica*'s conclusion that broadcasting is an intruder fared better. Indeed, "it is not true that the FBI or CIA breaks into millions of American homes to deposit the latest Sony radios in bedrooms and living areas . . . . If homeowners truly believed that radio or television was an intruder, we should expect to see sets out on the streets for garbage collection."[2]

Yet even if the Court's statements appear less than persuasive, the Court has stated accurately that "it is well settled that the First Amendment has a special meaning in the broadcast context."[3] Accordingly, we explore here the existing and potential justifications for creating a broadcast-related First Amendment separate and distinct from that for print (and virtually every other medium of mass communication in the United States).[4]

1. Telecommunications Research & Action Ctr. *v.* FCC, 801 F.2d 501, 508, *reh'g denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

2. LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 210 (University of California Press 1987).

3. FCC *v.* Pacifica Foundation, 438 U.S. 726, 742 n.17 (1978).

4. Perhaps it bears emphasis that the dichotomy reflected in present law is not between

SCARCITY

Scarcity—the need to ration licenses—was the first and remains the foremost rationale for the disparate application of the First Amendment to broadcasting. Justice Felix Frankfurter used it in *NBC* to turn away the networks' frivolous First Amendment argument against the Chain Broadcasting Rules.[5] Then *Red Lion* offered scarcity as the justification for regulating program content: "Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed in this medium."[6] The two cases offered differing theories of scarcity, but neither offered a satisfactory explanation of its own theory.

When *Red Lion* said that "broadcast frequencies constitute a scarce resource,"[7] the Court revealed again that a little knowledge—in this case about economics—can be a dangerous thing. "Scarce resource" is a redundant phrase. Every resource is scarce, be it oil, gas, clean water, trees, or iron ore. A "nonscarce resource" is a contradiction in terms.

This "analytical confusion," as Judge Bork euphemistically put it, makes scarcity a hard argument to pin down. Since it is nonsense to speak of a resource that is not scarce, different people, including different justices, will mean different things when they use words that, literally, describe what cannot be—a resource that is unique because it is scarce.[8]

It is conceivable that the judges found the spectrum unique because they could not understand how broadcast technologies operate. Their almost reverential praise for the expansiveness of the Communications Act, detailed in Chapter 2,[9] is explicable as stemming from a belief

broadcasting and print. Rather, it is between broadcasting and every other medium of mass communications. The Court truly thinks (or seriously pretends) that broadcasting is *unique*.

5. NBC *v.* United States, 319 U.S. 192 (1943).

6. Red Lion Broadcasting Co. *v.* FCC, 395 U.S. 367, 390 (1969).

7. *Id.* at 376.

8. Imagine trying to understand—in practical, not metaphorical, terms—what an author means in writing about "the world of unicorns." That is the trouble we have in reading opinions and articles about the "uniquely scarce resource" that broadcasters employ.

9. *See supra* Chapter 2 (The Commission and the Courts).

that no snapshot of legislation could possibly cope with something as magical as Marconi's discovery. Furthermore, because the judges could not comprehend how telecommunications worked—only experts could do that—the electromagnetic spectrum was indeed unique. It was uniquely incomprehensible.

But, of course, this is no longer the case. In Chapter 3 we provided a relatively simple explanation of the electromagnetic spectrum as a resource, like any other resource, whose costs and substitutes are relevant considerations.[10] With that discussion as a background, we now set out to evaluate the various rationales for affording broadcasting distinct (and decidedly inferior) First Amendment protection that are grounded in the view that somehow broadcasting employs a uniquely scarce resource.

Throughout these different uses of scarcity, there is one constant: the comparison to print. Explicitly or implicitly, the assertion always includes the phrase: "broadcasting is scarce and print is not because . . . ."

Although there are different ways of classifying and counting the arguments, there appear to be five different variants of the scarcity theory.[11] The majority trace their roots to *NBC* and *Red Lion*, while at least two seem more to be attempts to rediscover scarcity in the wake of the critiques of the other versions. As described above, each theory, of necessity, is a claim of *unique* scarcity, an assertion that broadcasting (or the spectrum) is scarce in a way that print media (or paper) is not.[12]

10. *See supra* Chapter 3 (Broadcasters' Special Access to a Unique Resource).

11. Spitzer also lists five, although his categories are defined in terms more explicitly economic than ours. Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1013–18 (1989).

12. There is another way to read these scarcity arguments. Their proponents may, in truth, not believe that broadcasting differs from print but, rather, prefer the First Amendment jurisprudence reflected in broadcasting cases over that applied in newspaper cases. Their true agenda, whether consciously understood or not, might well be to have *Red Lion* and *Pacifica* govern the regulation of the press rather than *Miami Herald* v. *Tornillo*, 418 U.S. 241 (1974), or *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). See the section, Equality Without a Difference, of this chapter, *infra*. For present purposes, we take the claims of radio's uniqueness at face value. In Chapters 10 and 11, *infra*, we address the issue of which jurisprudence is better if, as we believe, a unitary legal standard is called for.

Chaos

Remembering the chaos that occurred after Commerce Secretary Herbert Hoover abandoned all attempts to regulate stations, *NBC* summed the situation up: "The result was confusion and chaos. With everyone on the air, nobody could be heard."[13] How clearly this situation appears to contrast with print, where one reporter can write what she wishes on her piece of paper, and another reporter can do likewise on hers, and neither interferes with the other.

The problem with that form of the argument is that its analogy is wrong. It is true that if everyone broadcasts, no one can be heard. But it is also true that if everyone at a park speaks at the same time, no one can hear and, equally, that if one reporter writes her message on a piece of paper and another writes over it, no one can read either message. In the last two examples, the real-world solutions are that most people listen rather than speak at the park and that our system of property rights allows the owner of the paper to prevent anyone else from writing over her message.

The chaos Frankfurter noted was not the work of technological scarcity, but, rather, the lack of a property mechanism allocating exclusive control of a specified frequency. To see that this is true, one only need look at the world as it exists. Now that federal law creates a right to broadcast free of interference, chaos has disappeared with no change in technology.

The drafters of the Radio Act and the Communications Act deliberately avoided creating a conventional private property rights mechanism for the ether. Whether or not they acted, as Thomas Hazlett suggested,[14] to prevent the development of homesteading the ether following *Oak Leaves*,[15] there is no doubt that the Radio Act was designed to foreclose any system of private, fee-simple property rights by substituting government licensing instead.[16]

13. 319 U.S. at 212.

14. Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133 (1990).

15. Tribune Co. *v.* Oak Leaves Broadcasting Station, Circuit Court of Cook County (Nov. 17, 1926) (unreported case) *reproduced in* 68 CONG. REC. 216 (1926).

16. *See supra* Chapter 2.

The limited-term licenses are thereafter renewed in a *pro forma* manner; therefore, they can be, and always have been, bought and sold on flourishing open markets where the market price reflects that value of the expectation of permanent ownership. In 1987, at the height of the 1980s boom in broadcast properties, 775 radio stations, 59 television stations, and 132 radio-TV combinations changed hands; similar numbers of stations were bought and sold in succeeding years.[17] One must go back to 1975 to find a year in which fewer than two dozen television stations were sold, and to 1972 for a sale of fewer than 300 radio stations.[18] The government gives the license away initially, but thereafter a marketplace reigns (subject to *pro forma* approval of any sale by the FCC).

Perhaps it is useful to have a commission allocate licenses to determine which parts of the spectrum may be used for various forms of electromagnetic communications. But no commission is necessary to prevent chaos. Property rights are necessary to prevent chaos. These rights are equally necessary for broadcasters and newspaper publishers. If we did not have a conventional system of private property rights for paper, we would need a Federal Paper Commission to allocate that "scarce resource" and avoid chaos. Only the creation of property rights in paper can avoid "chaos" in newspaper publishing, although that is not evident to most people (including Supreme Court justices) because the common law created and recognized such rights centuries ago.

To prevent chaos (interference) in broadcasting or publishing, then, requires not a commission, but a system of property rights. It follows, of course, that if one decides to create a commission, it need do no more than define and protect property rights (that is, allocate spectrum among certain uses and define and punish interference). Both the market for paper and the market for broadcast licenses prove these points.

17. BROADCASTING AND CABLE MARKET PLACE J-80 (Broadcasting Publications Inc. 1992). The total 1987 prices exceeded $7.5 billion; when the market dropped back in 1991, the prices were just $1.7 billion.

18. *Id.*

Finite Limits

A second form of the unique scarcity argument also traces its roots to *NBC*:

> The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication—its facilities are limited; . . . the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another.[19]

Broadcasting frequencies are inherently limited, but print is not. More trees can be grown; more spectrum cannot be created. Spectrum is "scarce" in the sense that it is not "abundant."

This version of the argument is both right and wrong. It is true that more trees can be grown. Yet, it is equally true that they cannot be grown for use *today*. The resources available *now* for print are inherently limited; so are the resources available for broadcasting.[20]

Similarly, just as additional trees can be made available for later use, so too can additional frequencies become available. On a single day in 1984, the FCC allocated 684 new FM stations in the lower forty-eight states—two dozen more than the number of stations in the entire country at the time of the Chain Broadcasting Report. We can—and do—add more broadcast stations to service as the technology improves. This aspect of broadcasting development has remained constant from its inception.

The idea that the resources necessary to broadcast are inherently finitely limited, while those necessary to print are not, was not accurate even in 1943, when Frankfurter wrote. The Commission had just authorized FM and VHF services that would vastly expand the usable

19. 319 U.S. at 213.

20. In the recent cable "must carry" case, the Court contrasted cable and broadcasting on just this basis: "The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium." Turner Broadcasting Sys., Inc. *v.* FCC, 114 S.Ct. 2445, 2457 (1994). Perhaps the majority may be forgiven, as the sentence is designed to bolster the conclusion that cable is entitled to more than just minimal First Amendment rights.

spectrum. We continue that expansion today with the hundreds of newly developed low-power stations[21] and the increased use of satellites for transmission. In short, the broadcast spectrum, just like paper, is finitely limited; yet neither of those resources exists in some fixed natural state, incapable of expansion.

Excess Demand

Justice Byron White's unique scarcity construct in *Red Lion* had a more economic cast than did Frankfurter's. Thus, White wrote in terms of an excess in demand as proof that broadcast frequencies are scarce: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, . . . [where] 100 persons want broadcast licenses but there are only 10 frequencies to allocate, . . . only a few can be licensed."[22]

This statement is accurate. It is an equally accurate description of newspaper publishing. That is the reason that owners are able to sell publishing rights. If there were more papers than there were people who wanted to own them, then newspapers could not be sold. The market for newspapers brings supply and demand into equilibrium. At the market price, everyone who wants a paper gets one. Radio and television licenses, however, are given away by the government. So long as the license can then be sold for more than the legal and administrative costs of seeking it—and there was a time before the extensive cable penetration when a VHF license was aptly characterized as a license to print money[23]—it is hardly surprising that more people initially want a license than there are licenses to allocate at the going (zero) price.

The "excess demand" vanishes as soon as the licenses to broadcast are in private hands, when they can be exchanged at market prices. Broadcast licenses today are bought and sold with vastly greater

21. There are over 800 low-power stations in the lower forty-eight states and over 200 others in Alaska. BROADCASTING AND CABLE MARKET PLACE, *supra* note 17, B-81 to B-93.

22. 395 U.S. at 388–89.

23. Interestingly, investor Warren Buffett states that a daily newspaper with a monopoly operates like "an unregulated tollbooth." John Morton, *Buffett No Longer Bullish on Newspapers*, WASH. JOURNALISM REV., June 1991, at 46.

frequency than are newspaper concerns, and (just as with newspapers) anyone who wants a station—and has the money—can buy one. The market for broadcast licenses functions like any other market, with supply and demand generating an equilibrium price.

In short, and to repeat, newspapers and broadcast stations are both scarce. Therefore, some method must be chosen to allocate their ownership. For newspapers, the chosen method is to buy and sell on open markets. It is not readily apparent, in this case, that people who want newspapers do not get them, because everyone who wants a newspaper at the going price gets one. Apparent or not, it is true; there are people unwilling to pay the going price for a newspaper who still would want one at a lower price. For broadcast stations, the chosen method is to give licenses away (among the group of persons willing to pay the administrative and legal costs of seeking the license). In this case, it is more readily apparent that people who want broadcast stations do not get them. But apparent or not, it is no more true than for newspapers.

White's observation in *Red Lion* that more people want licenses than can get them, then, is simply an alternative phrasing of the scarcity argument. Neither method of phrasing has any logical bearing on whether the application of the First Amendment should differ for the broadcast or print media. Any difference that White observes is only a difference in government rules about commodity pricing—namely, market equilibrium prices may be charged for newspapers but not for initial broadcast allocations—not a difference between the two media that has some logical relationship to their First Amendment status. The fact that government chooses to maintain a price of zero for the spectrum does not justify government control of the content of programs broadcast over that spectrum. If the government seized all the paper (and made it illegal to cut trees for private manufacture of paper) and gave it away, while private markets controlled the allocation of the spectrum, there would be an "excess demand" for paper. That is, we would be able easily to observe people who "wanted" but did not "receive" paper. But would that justify imposing public trustee obligations on newspapers but not on broadcasters? Surely not.

Entry Barriers

Another unique scarcity argument is that anyone can start up a newspaper, but not everyone can start up a broadcast station. Like the initial Frankfurter version of the scarcity argument, this one also carries an implicit assumption that answers the very question being asked. Why is it that not everyone can broadcast? Simply put, the existing scheme of regulation prevents entry. Under such circumstances, to say that one cannot start up a broadcast station is simply to recite the relevant provisions of the Communications Act; and to say that anyone can found a newspaper is to note that there is no Federal Newspaper Entry Act. Thus, this loading of the question fails to advance the analysis.

Although we cannot find this precise contention in the literature, we suspect that some proponents of the entry-barrier theory mean to make a more subtle claim. Perhaps proponents of the view that broadcasting should enjoy limited First Amendment rights mean to claim that there is a peculiar reason why not everyone can start up a broadcast station, and that reason, in turn, explains why broadcasters should enjoy circumscribed First Amendment rights.

By asserting "anyone can start a newspaper," we might mean that a license is not required to start a newspaper, only a willingness to pay the going price for the necessary resources. We know this is true because we have free markets in newspaper resources—for example, paper, ink, and printing presses—and so we can observe people acquiring the resources to start a newspaper.

It is not true, however, that anyone can start a broadcast station who is willing to pay the going price for the necessary resources. True, one can always buy an existing station, just as one can always buy an existing newspaper. But one can start another broadcast station only so long as the FCC has allocated spectrum for that service that no one else is using. Suppose that someone wishes not to buy an existing facility, but rather to enjoy the satisfaction of starting a station from scratch.[24] For example, a firm might be willing to buy, at the going price, a group of FM radio stations that occupy 6 MHz of continuous

24. Another way to phrase the argument is this: one can just buy the resources to start a newspaper, but one cannot create, say, an FM radio authorization where none exists.

VHF spectrum[25] to start up a TV station.[26] But current FCC rules forbid the firm from transmitting TV signals over spectrum allocated to FM radio. Therefore, the firm, although willing to pay the going price for the resources necessary to start a TV broadcast station, is unable to do so.

This argument as developed—like its less complicated version—only states the fact that there is an FCC but not a Federal Newspaper Entry Commission. To be complete, the argument must claim that there is a good reason for the failure to permit open markets to allocate spectrum across uses. Such an argument can be made.

In one sense, we know that markets in spectrum rights function quite well; people buy and sell broadcast stations every day. But these transactions transfer only rights within designated areas of the spectrum. No one seems to know whether a market across uses (for example, from FM to TV) would function (tolerably) well. It might. But it might not.[27]

If we need administrative, rather than market, allocation for the different uses along the spectrum, then there is a limitation on starting up a broadcast station that does not apply to newspaper entry. The TV-FM hypothetical illustrates that cases may arise in which someone who is willing to pay the going price for the resources necessary to start a broadcast station (and who, for whatever reasons, does not wish to

25. The present FM band, wide enough to accommodate three TV stations at the current 6 MHz bandwidth for TV stations, lies between the spectrum allocated to TV Channels 6 and 7.

26. That could be done if the FCC repeals or waives its local group ownership rules.

27. To simplify, it may be that unregulated markets cannot efficiently allocate the spectrum across uses. Because neither the United States nor any other country has tried markets for such a purpose, we do not know whether they would work (tolerably) well. There are two reasons to fear that markets might not work. First, some believe that the difficulties in defining and detecting undue interference would be greater (perhaps prohibitively so) when different uses occupy the same band of the spectrum. Second, unregulated markets would impose extraordinarily high coordination (transaction) costs of switching spectrum from one use to another when much of the value of the spectrum derives from the kind of equipment consumers own. Thus, our would-be TV entrant who acquires FM band space would find that its audience could hear, but not see, its programs. Only if TV sets were reengineered, so that they could scan continuously through the VHF spectrum, could a broadcaster quickly and profitably switch between FM and TV. (In our view, this is a good reason why the FCC ought to permit sets to be designed in that manner.)

purchase an existing station) nevertheless may not be able to start the station because of some reasonable policy or insurmountable natural barrier.

This spectrum "scarcity," apparently maintained by governmentally enforced entry barriers, might in reality be a necessary protection against an otherwise inevitable market failure. And it might justify government regulation of content to increase diversity that the entry barrier stifles. We know that the argument cannot be applied to print, because we have open markets that work (tolerably) well in allocating resources between publishing and nonpublishing uses.

Because we are unaware of any scarcity proponents who have articulated this argument, we had to create it for them; we can create the responses as well. First, we are hypothesizing a very idiosyncratic (and probably nonexistent) would-be owner—one who will not be satisfied by acquiring an existing station. Second, the argument rests on the unproven assertion that spectrum markets will not work well across distinct broadcast uses. Perhaps the government should analyze the market before imposing nonmarket controls, particularly when the medium's First Amendment protections are at stake. Conversely, it may be appropriate for the government to use nonmarket controls but, so long as it is allocating spectrum among uses, government must pay attention to the relative values of those uses. If more highly valued uses are allocated comparatively more spectrum, then the chance is reduced that administrative allocations will block shifts to more valuable uses.

Finally, the argument seems to support a different First Amendment doctrine for broadcasting than for print only during periods in which there is reason to fear that the administrative allocation might be unduly constricting the broadcasting band. There is no reason to deny First Amendment protection to existing stations on the theory that no one can create additional stations unless we know that existing stations are too few (compared with, for example, newspapers) to support a robust marketplace of ideas. In fact, during most of the history of U.S. television, numerous assignment channels have been vacant in most communities. And in all communities, radio and television stations far outnumber newspapers. For all those reasons, we reject the idea that a unique entry barrier makes broadcasting different from print.

In any event, to turn to what we can observe rather than what we can conjecture, we do not see new newspapers springing into existence despite the fact that anyone can start a newspaper. Instead, daily newspapers are folding. Dallas, Little Rock, Los Angeles, Miami, Pittsburgh, St. Louis, San Antonio, and Tulsa have recently seen a daily newspaper die. That trend is likely to halt only when competing dailies are fully extinct. A notable demise was that of the *Washington Star*, which came not long after Time Inc. paid $30 million for the ailing newspaper. Yet despite the incredible resources of Time, the newspaper could not make a successful go of it.

If keeping an ailing newspaper afloat is a difficult feat, beginning a new one is even more so. Over the past fifty years, fewer than five competing start-ups continue to exist independently, and the only one that appears to turn a profit—the *Slidell* (Louisiana) *Daily Sentry-News*—knocked its competitor out. Major areas have seen a number of failed attempts to start a daily: New York City (twice), Long Island, Philadelphia, Atlanta, Phoenix, and Oklahoma City, to name just the largest.

Fifteen years ago, the estimated start-up costs (including plant and equipment) for a paper with a circulation of 60,000 were $15 million to $20 million. For a quarter-of-a-million circulation, the cost would have been $40 million. Yet, if the paper was successful and could be sold for a mere $500 per subscriber,[28] then the initial investment, yielding $125 million, might seem worth the gamble. It could not succeed, however.

Today, technology has lowered newspaper start-up costs. Yet new dailies have not come into existence as one might expect, thereby confirming the 1975 pronouncement of economist Bruce Owen: "[H]ead-on competition among newspapers in the same town is a disequilibrium situation, one that will eventually be succeeded by merger, failure of one newspaper, or a joint operating agreement."[29]

28. "Mere" is accurate. Even in the early 1980s, Rust Belt papers sold for $500 per subscriber while Sun Belt papers went for significantly more. *Freedom of Expression: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess., Serial 97-139 (1982) at 140. [Hereinafter *Packwood Hearings*]. Now the price per subscriber would probably be double that. John Morton, *A Bad Time to Be Hawking a Newspaper*, WASH. JOURNALISM REV., Sept. 1992, at 52.

29. BRUCE OWEN, ECONOMICS AND FREEDOM OF EXPRESSION 52–53 (Ballinger 1975).

True to the Owen pronouncement, in 1978, the New York *Trib* was started and closed within three months and generated losses of $5 million. The *Philadelphia Journal* lasted four years, with losses of $15 million. The Unification Church's *Washington Times* was reportedly losing $35 million each year in the mid-1980s, and there is no indication that it will ever break even. And when the *Herald Examiner* met its demise in 1989, even Los Angeles could no longer support two dailies.

The principal reason why new newspapers do not come into existence is that newspapers achieve tremendous economies of scale. Excluding overhead costs, it takes just about as much money to publish the next issue of an already existing newspaper as it does to publish the first issue of a new newspaper. Thus, although the costs of production are the same, the larger paper can spread its costs over a broader circulation base. Furthermore, advertisers are exceptionally devoted to paying the lowest cost per thousand readers. A larger newspaper, then, even though it charges a higher price per line of advertising, can justify that charge by its distribution to a greater subscriber base. A smaller paper, even with a decidedly lower charge per line, still faces the problem of its lesser circulation. It simply costs advertisers less to reach each reader of the larger paper. Until these economic facts change, competing newspapers are not going to spring up.

Some new daily newspapers do, of course, come into existence. In the mid-1960s, Gannett recognized that the space program would cause a population explosion around Cape Canaveral, so it entered the local market, which had no daily, to create the *Cocoa Today*. Often, where no daily exists, a weekly or biweekly such as the *Maui News* will move into daily circulation as the population grows. But those are small papers facing no local competition. Where there is competition, a bleak future awaits the weaker paper.

The prices in newspaper sales, now well over the early 1980s price per subscriber mentioned earlier, reflect the scarcity and monopoly that dailies enjoy. Indeed, the "overriding consideration in determining the value of any newspaper is its level of competition."[30] Because newspapers are monopolies, they sell for premiums that broadcast

30. Morton, *supra* note 28, at 52.

properties do not enjoy. To the extent that they are monopolies and broadcasters are not, one might expect newspapers rather than broadcast stations to be classified as scarce.

Numerical Scarcity

All the arguments thus presented have failed to demonstrate "something" uniquely scarce about broadcasting as compared with print. One final argument remains: numerical scarcity. There are, when compared with print, too few broadcast outlets. Perhaps print and broadcast are both scarce, but the latter is more so in that it appears less frequently.

Numerical scarcity tells us to look at the number of outlets. At the end of 1990, 1,469 television stations and 10,794 radio stations were operating daily—no stations broadcast only once a week.[31] Those numbers have increased every year for three decades. On the newspaper side, there were about 1,600 dailies and 7,476 weeklies (free as well as paid).[32] Those numbers have been trending downward for years. Again, as with the preceding discussion on entry barriers, it is with some irony that newspapers, rather than broadcasting, might better be classified as the "more scarce" medium by this test.

How should we compare those figures? If the comparison is between broadcast outlets and daily newspapers, the result is clear: newspapers, not broadcasting outlets, are numerically scarce. If the comparison is broadcast outlets with dailies and weeklies, then it is a wash. If only dailies are compared with television, then it remains a wash. If, however, only the approximately 700 VHF stations are compared with dailies, the dailies come out ahead by quite a margin, but that presupposes a significant UHF handicap that no longer exists.[33]

Newspapers generate too few outlets to make the case of numerical broadcast scarcity, so to make the case, a different basis of comparison

31. BROADCASTING YEARBOOK at A-3 (Broadcasting Publications Inc. 1991).

32. John Morton, *It Can't Get Any Worse, Can It?*, WASH. JOURNALISM REV., Mar. 1992, at 66.

33. This is indicated by the fact that the *Broadcast and Cable Market Guide* does not break its statistics out between VHF and UHF. The figure for VHFs was taken from the *Broadcasting Yearbook*, *supra* note 31, at A-3.

is necessary. Proponents of scarcity theory then usually employ, for comparison with the number of stations, either all printing presses or all printed matter (books, community newsletters, handbills, and so forth). From that perspective, broadcasting is overwhelmed, and the numerical scarcity case can be made.

That version of the scarcity rationale, however, does not explain why a handbill passed out near Central Park should be equated with WCBS. Nor does it take account of CB radio or low-power television stations. If a handbill can cancel out WCBS, then why can a low-power station not cancel out the *New York Times* or a book publisher?[34] There are no a priori answers here because it is just a game of counting numbers, which is what makes relative numerical scarcity such an attractive argument to its adherents.

Proponents of numerical scarcity have two advantages. First, they are free to determine for themselves just what is to be compared with broadcast outlets. Not surprisingly, the selected comparison will always give broadcasting a lower number, which is the designated test for relative scarcity. Second, the structure of the argument can always result in the conclusion that there are "too few" broadcast outlets. The charm of this argument is its vagueness—there is no way to disprove it. These qualities are best used to reinforce the faith of believers in numerical scarcity rather than to convert the nonbelievers.

The Commission

The FCC has been on both sides of the scarcity fence and, at various times, has sat upon it. While asserting the scarcity rationale to justify content regulation of broadcasters, the Commission has frequently (often simultaneously) adopted schemes to exacerbate the scarcity problem. In the late 1920s, the FRC refused to expand the AM band.[35] In the early 1950s, the FCC adopted a television allocation scheme that its staff had already stated was inadequate[36] and guaran-

34. To make the point more concrete, the numerical theory seems to suggest that it made sense to rule against Tornillo because he could always print a handbill to counter the *Miami Herald*, but it would be wrong to resolve the *Red Lion* case by telling the aggrieved party to tell his side on a CB radio. We cannot fathom the logic behind this.

35. Hazlett, *supra* note 14, at 155–56.

36. Henry Geller, *A Modest Proposal for Modest Reform of the Federal Communica-*

teed that, for decades, no more than three networks could exist.[37] When cable's promise of added channels started to become a reality in the 1960s, the Commission worked overtime to bring it to a halt so as to protect the existing system of scarcity.[38] Indeed, just one year before *Red Lion*, the Court had placed its imprimatur on the Commission's shackling of cable.[39] The FCC has always behaved parsimoniously in its spectrum allocations policies.[40]

In its *1985 Fairness Doctrine Report*, however, the FCC accepted the Supreme Court's invitation from *League of Women Voters*[41] and pronounced the scarcity rationale a thing of the past. Without looking at print—except to note the obvious, that it competes with broadcasting "for the time that citizens devote to acquiring the information they desire"[42]—the Commission noted the continued consistent growth of both radio and television. One table (which did not include cable) was especially telling. In 1964, three-quarters of all Americans received between one and six television signals. Just two decades later, two-thirds of all Americans could receive seven or more signals.[43] If scarcity meant an absence of choice, its time had passed.

Conclusions About Scarcity

Writing in the early 1980s, Daniel Polsby noted that only the Supreme Court had anything good to say about scarcity in the prior decade.[44]

tions Commission, 63 GEO. L.J. 705, 707–10 (1975).

37. STANLEY M. BESEN, THOMAS G. KRATTENMAKER, A. RICHARD METZGER, JR. & JOHN R. WOODBURY, MISREGULATING TELEVISION: NETWORK DOMINANCE AND THE FCC (University of Chicago Press 1984); *see supra* Chapter 4 (Outlet and Source Diversity: Ownership Regulations—Nationwide Ownership Limits).

38. POWE, *supra* note 2, at 219–25.

39. United States *v.* Southwestern Cable Co., 392 U.S. 157 (1968).

40. Thomas W. Hazlett, The Political Economy of Radio Spectrum Auctions (1993) (on file with Institute for Government Affairs, University of California, Davis).

41. FCC *v.* League of Women Voters, 468 U.S. 364, 376–77 n.11 (1984).

42. Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143 at 199 (1985) [hereinafter 1985 Fairness Doctrine Report].

43. *Id.* at 205.

44. Daniel Polsby, *Candidate Access to the Air*, 1981 SUP. CT. REV. 223. Assuming that the Court's reference, in *Turner Broadcasting Sys., Inc.* v. *FCC*, 114 S.Ct. 2445, 2457 (1994), to "inherent" scarcity is something "good," Polsby's statement remains all too apt.

In the legal literature this has remained true. Only those born during an era in which scarcity appeared real and permanent are able consistently to avoid questioning the basis of their conclusions, and to a large extent they have passed from the scene.

Outside the legal literature, the belief—or at least the assertion of a belief—in a scarcity theory exists because those who wish to continue broadcast regulation believe that some theory of unique scarcity must exist. Otherwise, broadcasters could not be controlled by the government—or its perception of the "public interest."

Clinging to a scarcity rationale does serve a useful purpose. Because the rationale is so untenable, its continued existence demonstrates that there is *something* about broadcasting that leads people to know that it may be regulated without regard to the First Amendment. That "something" is the reason for continued regulation. We await its revelation. We only know it is not scarcity.

INTRUSION

Scarcity theories are useful mostly as props for content-based regulations that are designed to enhance diversity, the types of FCC rules described in Chapter 4. When regulators want to reduce diversity and generate conformity, as in the rules discussed in Chapter 5, they find it illogical to claim that scarcity cries out for conformity. In *Pacifica*, the Supreme Court filled this void by providing its second rationale for the second-class status of broadcasters under the First Amendment. There, the Court stated that radio is an "intruder" in the home, "uniquely pervasive" and "uniquely accessible to children."[45] At one level, those statements suffer from the same defect as claims that broadcasters employ a uniquely scarce resource; that is, they are factually untenable.

At another level, the Court's assertions are far less satisfactory because of the kinds of regulation they purport to justify. The intrusion rationale drives the conclusion that certain types of programming that viewers and listeners would wish to hear may be barred (at least during most time periods) from the air because someone else does not want to hear them. Formally, the scarcity rationale is used to justify substitut-

45. 438 U.S. at 748, 749.

ing some different programming for what a broadcaster might air.[46] Intrusiveness, by contrast, is said to explain complete bans on certain types of programming that a broadcaster may consider; it seemingly was used in *Pacifica* to reduce adult programming to that deemed fit for children.[47] The latter is censorship pure and simple; the former may be objectionable as well, but it is indirect censorship, undertaken for the articulated goal of enhancing, not limiting, options.[48]

As noted at the beginning of the chapter, it is not clear except in an Orwellian sense what the Court means by equating a radio with an "intruder." The imagery carries the minimum implication of unwantedness and suggests unlawfulness as well. Radios and televisions are not forced upon citizens, but in fact are considered to be among the most valued household purchases. Intruders they are not.

Furthermore, even if for some reason we could conclude that a radio is an intruder, that does not distinguish it from a newspaper, a magazine, or a book. In each case, the product—that is, newspaper, book, radio—is brought into the home by the voluntary actions of the resident; yet in each case the product may contain information that is unwanted or offensive to the resident. An obvious example occurred two years before *Pacifica*. Many newspapers carried a picture of Vice President Nelson Rockefeller giving a crowd of hecklers "the finger."[49] For some Americans that was as offensive as anything said in Carlin's satirical monologue. Did this make the newspaper an "intruder" and subject to regulation? The answer is obviously no.

Maybe the Court really wished to rest not on radio as an intruder, but instead on the conclusion that radio is "uniquely pervasive." Yet, again, the conclusion was unsupported by any reasons. This not only makes it difficult to ascertain *Pacifica*'s rationale, but also makes it a moving target. Indeed, if the *Pacifica* Court meant to make an empirical statement, there do not appear to be empirical tools available

46. These are the regulations discussed in Chapter 4, *supra*.

47. These are the regulations discussed in Chapter 5, *supra*.

48. As we explain in Chapter 9, *infra*, some "diversity" regulation—especially the Fairness Doctrine—as implemented, in fact produces censorious effects.

49. September 17, 1976; the *New York Times* did not run the picture and put the story on page 16.

to show why radio is "uniquely pervasive" in ways that newspapers, magazines, and books are not.

The Court focuses on the assaultive nature of Carlin's words in *Pacifica*: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying the remedy for an assault is to run after the first blow."[50] The Court may have been trying to distinguish indecency processed through hearing from indecency processed through sight because precedential remedy for visual indecency is not state censorship, but private censorship—namely, for offended viewers to avert their eyes.[51]

If this analysis parallels the Court's, then the holding of *Pacifica* is limited to the regulation of radio and is of no further concern to us because no one who advocates the regulation of radio does not feel similarly about television. If *Pacifica* is to apply to television, then it has to take as its premise that the assault occurred by surprise in the home and that the rights of unoffended viewers are to be controlled by the sensibilities of the offended viewers.

At this point, either the analysis turns back on itself to make television an intruder despite its invitation or *Pacifica* becomes only a case about children and the First Amendment. Assuming that the latter is correct,[52] it is no longer important to discuss the differences between media for general regulatory purposes.[53]

POWER

Pacifica's conclusions are more fallacious than *Red Lion*'s. It is, quite simply, ridiculous to view a television set as an intruding child molester. Yet *Pacifica*'s imagery may point toward something even more basic. "Intruder" and "uniquely pervasive" could be echoes of

50. 438 U.S. at 748–49.

51. Cohen *v.* California, 403 U.S. 15 (1971); Erznoznik *v.* City of Jacksonville, 422 U.S. 205 (1975).

52. See Chapter 7 (The *Pacifica* Case), *supra*, where we show that, for most members of the *Pacifica* Court, the fact that broadcasting was involved was of no moment. This suggests that "intrusiveness" can never be employed to support broadcast censorship outside the narrow area of speech that is indecent as to children.

53. Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence*, 64 VA. L. REV. 1123, 1232–35 (1978).

the commonly voiced, if largely unexplained, conclusion that broadcasting is just too powerful a force to be left unregulated. Thus, *Pacifica* may be a bridge between scarcity's justification for content regulation and a more general concern about the power of this medium.

The idea that television is an especially powerful communications medium has been with us at least since Marshall McLuhan.[54] This idea received widespread national coverage when Vice President Spiro Agnew made similar assertions about the power of television.[55] That Agnew represented the Right of the political spectrum is irrelevant because the belief in the power of television is equally widespread on the Left.[56] More recently a major argument advanced for retention of the Fairness Doctrine is that television is so powerful that there is no genuine substitute for televised information.[57] The problem with all those assertions, however, is that it is difficult to ascertain just what sort of power television is alleged to possess.

At one time, the power rationale might have been intertwined with the scarcity assertion to suggest that the elemental fact of the television medium was that it consisted of three and only three speakers: CBS, NBC, and ABC.[58] Those three speakers could be perceived as maintaining oligopoly power in the marketplace of ideas. But that day, if it ever existed, is past; the networks' power—whatever it was—has been broken by deregulation and technology.

The cornerstone of the power hypothesis—to the extent that it retains any appeal today—appears to be not the past dominance of the networks, but instead the extraordinary amount of television Americans watch and its supposed credibility. The average home has its television going for almost seven hours each day. Furthermore, almost two-thirds

54. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (New American Library 1964); TONY SCHWARTZ, THE RESPONSIVE CHORD (Anchor Press 1973).

55. Speech *reprinted in* N.Y. TIMES, Nov. 14, 1969, at 24.

56. Numerous examples are provided in Comment, *Power in the Marketplace of Ideas*, 52 TEX. L. REV. 727, 753 (1974).

57. 1985 Fairness Doctrine Report, *supra* note 42, at 199; Charles Ferris & James Kirkland, *Fairness—The Broadcaster's Hippocratic Oath*, 34 CATH. U. L. REV. 605 (1985). Ferris was President Carter's FCC chairman.

58. L.A. Powe, Jr., *Or of the [Broadcast] Press*, 55 TEX. L. REV. 39, 60 (1976).

of the public uses television as the source of most of its news, and almost half ranks television as the most believable news source.[59]

Beyond noting the undeniable fact that too many people watch too much television, it is hard to know what to make of those statistics. Presumably, they cannot mean that in 1930, when most people obtained their news from newspapers, and found them to be the most credible news source, that newspapers were entitled to lesser First Amendment protection. Yet if that is not what the statistics mean, it is hard to create an alternative, short of some McLuhanesque view that the medium is the message, and that by changing the medium from print to television, we change the power of the message not in amount but in kind so that we really cannot comprehend television's full power. This may be true. But if we lack the tools to articulate what the problem is, we can hardly expect a government agency to know what it is supposed to do to lessen that power. Indeed, under those circumstances, any action by the government would be as likely to exacerbate as to lessen the medium's power.

As we wrote this book, the Cable News Network first drove America into Somalia by airing pictures of starving Somalis and then drove America out of Somalia by airing pictures of dead Americans. To some this is a perfect illustration of television's power. Yet we would do well to recall that just under a century ago, William Randolph Hearst's *New York Journal* brought America into the Spanish-American War.[60] And unless the First Amendment has no applicability to influential newspapers,[61] Hearst's advocacy was a protected exercise of freedom of the press.

There are several reasons to reject general regulation of television based upon its supposed power. First, as we have just seen, the power theory does not set forth the firm distinction between those with and

59. BROADCASTING YEARBOOK, *supra* note 31, at A-3.

60. Hearst sent artist Frederick Remington to Cuba in December 1897. "Remington, legend has it, wired Hearst soon after his arrival: Everything is quiet. There is no trouble here. There will be no war. I wish to return.—Remington. Hearst replied: Please remain. You furnish the pictures and I'll furnish the war.—W.R. Hearst." JEAN FOLKERTS & DWIGHT TEETER, VOICES OF A NATION: A HISTORY OF THE MEDIA IN THE UNITED STATES 276 (Macmillan 1989).

61. The statement is rhetorical, but has a legal answer as well from the *Pentagon Papers Cases*, New York Times Co. *v.* United States, 403 U.S. 713 (1971).

without "power" that we would normally expect from government before it imposes restrictions on selected speakers. Thus, the theory hardly explains why all television stations are powerful and the *New York Times* or the *Washington Post* are not, and to the extent it does, it is wrong. Second, the power theory presumably rests on a fear that power will be abused. Yet history teaches that the fear said to justify regulation of speech exists all too often only in the minds of the regulators. Third, the theory paints a singularly unattractive portrait of the nation. As Louis Jaffe explained:

> The implication that the people of this country—except the proponents of the theory—are mere unthinking automatons manipulated by the media, without interests, conflicts, or prejudices, is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American public.[62]

Power, with its underlying premise of fear, may drive the theory that there are differences between the media, but for all the above reasons we strongly doubt that any court would be willing to adopt it. It is too unattractive and speculative for a constitutional theory. When you think about it, in this day and age, it is difficult to state with a straight face that a UHF transmitter is a uniquely powerful medium of communication.

The power hypothesis may, however, explain why we regulate. Just as the Tudor-Stuart monarchs feared the changes that print might induce, and thus sought to limit the right to print only to licensed parties, so, too, twentieth century leaders feared the changes broadcasting might unleash. And future elites may fear the changes that new communications technology may herald for their eras. But to explain is not to justify, and a distinction of constitutional magnitude must be justified. Power, like pervasiveness and scarcity, provides neither justification nor an analytical basis for distinction.

62. Louis Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 787 (1972).

PUBLIC PROPERTY

The only possible rationale grounded in logic and precedent that could justify refusing to subject government regulation of broadcast programming to conventional First Amendment analysis stems from government ownership of the spectrum. From the Radio Act to the present, government has claimed ownership, and with ownership comes control. As Justice Robert Jackson observed, "it is hardly lack of due process for the Government to regulate that which it subsidizes."[63]

There is no doubt that the Communications Act results in subsidies to broadcasters. First, those few licensees who acquired their station long ago and with no opposition paid minimal costs for a very valuable right (although most of them invested heavily in establishing the industry in the first place). Second, those who prevailed in comparative hearings paid significant legal and administrative costs, sufficient to preclude the vast majority of Americans from even applying for a license, but nevertheless well below the free-market value of the license once awarded. Finally, even the majority of broadcasters, who purchased their stations at free-market prices from previous holders, enjoy the subsidy that comes from FCC policies limiting competition by limiting spectrum uses.

Like other subsidies provided by governments, this one appears unjustified to those not receiving it. Furthermore, because it involves speech and because the grant of a license necessarily denies speech rights on that frequency to others,[64] the subsidy may appear more pernicious than other subsidies. After all, speaking at a public park involves a *de minimis* subsidy and no right to exclude other would-be speakers day after day. Nevertheless, the exclusivity has nothing to do with the subsidy. Some people would be equally excluded from

63. Wickard *v.* Filburn, 317 U.S. 111, 131 (1942).

64. To the extent that this argument might be modified to suggest that the rights in question are of those who lose in a comparative hearing, there are two answers. The first is that it does not make sense to correct any denial of First Amendment rights to *A* by also denying First Amendment rights to *B*. Second, we are unaware of a single case in broadcast history in which a challenge based on a regulation of the types discussed in Chapters 4 and 5 has ever been brought against a licensee by the party defeated in a comparative hearing by that licensee. Hence, to the extent that this argument might be made and seen as a corrective to licensing, it appears to cover a null set.

broadcasting if the government auctioned off the spectrum. In either situation, those excluded by the initial licensing decision can purchase a station on the open market, where, as we have noted,[65] hundreds change hands annually. If there are people excluded from broadcasting, they are excluded for financial reasons.

Here, we think, is the rub. To many it just seems unfair that only those with ample resources can own a station (and therefore communicate through this medium), while those without cannot.[66] However unfortunate a lack resources is, that same condition holds equally true for newspaper ownership, as A.J. Liebling's well-known dictum attests: "Freedom of the press is guaranteed only to those who own one."[67] In a capitalist society, those with more resources have more options. There may be unfairness in this, but it has nothing to do with the Communications Act.

In Chapter 11 we detail the recognized civil liberties principles that govern all other means of mass communications; one of them is directed toward reducing the costs of acquiring access to the media (so long as the method selected does not itself violate the First Amendment). Another notes that nothing in the First Amendment speaks to the ownership of the means of mass communications. If the government wishes to adopt a common carrier approach, it may (although we shall suggest that there are good policy reasons not to do so).[68] The First Amendment precludes government's dictating the content of speech; it does not dictate structural regulations.

Ownership and control often seem inseparable. But just as a common carrier scheme can separate ownership of the entity from control of the information, so, too, the Supreme Court has held for over fifty years that government ownership of parks does not entitle the

65. Scarcity: Excess Demand, *supra*.

66. Just because a license is free does not mean that the poor can compete with the rich. The attorney's fees alone for a contested hearing are vastly beyond the resources of most Americans. Furthermore, a potential applicant must provide evidence of the financial ability to build and operate the station should the license be granted. Practically, this means a letter of credit, again something the vast majority of Americans will not be able to acquire.

67. A.J. LIEBLING, THE PRESS 61 (Pantheon Books 1981).

68. Chapter 11 (The Appropriate Scope of Regulation: Application of Basic Principles to Broadcast Media), *infra*.

"owner" to dictate what speakers can or cannot say. The greater—ownership—does not necessarily include the lesser—content regulation. Government ownership, without more, is not sufficient to justify anything beyond the use of a traffic cop to ensure noninterference.

Not too long ago that answer and the reference to public forums such as parks would have been sufficient. But in the early 1980s, the Court created a new class of governmental property called the "nonpublic forum."[69] If a means of communication controlled by the government is deemed to be a "nonpublic forum," then the government can control who uses it and what they say pretty much as it pleases. We are hardly the first, nor shall we be the last, to note that the Court's cases in the public forum area are wholly incoherent and result-oriented. They create a shell game whereby the Court may label anything except a park or a street as either a "designated public forum" or a "nonpublic forum" and then treat the label as outcome-determinative: in the designated public forum, speech may not be regulated; in the nonpublic forum, it may.

It is too late to argue that the government's claim to own the airwaves is invalid. Therefore, its ownership brings control, and that, in turn, has been exercised to grant some people, the broadcaster-licensees, the use of government property for speech purposes. In public forum terms, this scenario looks like the airwaves are a "designated public forum." Under the doctrine applicable to designated public forums, any limitation on the content of speech must be narrowly drawn to advance a compelling governmental interest. Essentially, the doctrine blunts the argument that government ownership means government control.

If, however, government property is classified as a nonpublic forum, then the rules for such forums permit outcomes resembling those flowing from ownership as control. Precedent allows the government to prevail on "extremely flimsy justifications."[70] With the rules governing nonpublic forums applied to the airwaves, the Court can sustain broadcast regulation as appropriate to preclude interference,

69. Perry Education Ass'n *v.* Perry Local Educators' Ass'n, 460 U.S. 37 (1983); Cornelius *v.* NAACP Legal Defense & Education Fund, 473 U.S. 788 (1985).

70. Spitzer, *supra* note 11, at 1036.

provide an equitable distribution of licenses, and guarantee access by groups that lack licenses.[71]

The shell game precludes knowing how the Court would characterize the airwaves as a forum. Professor Matthew Spitzer has written an extended analysis, concluding that the Court's failure to apply meaningful distinctions in this area results in an inability to predict beyond flipping a coin; the Court could just as easily uphold as invalidate regulation.[72]

But predicting results is not the same as justifying them. The Court may be anxious to substitute "public ownership" for "scarcity" or "uniquely accessible" as a rationale for excluding broadcasting from normal constitutional protections of speech and the press. Such a move, however, would not provide a more satisfactory justification for the current constitutional status of broadcast speech.

The biggest problem with the public ownership argument is that it proves too much. The government's ownership of the airwaves comes from a legislative decision to claim ownership. Suppose that the government now decides to add to its ownership of the airwaves the ownership of the air as well.[73] If it were to do so, then the government could demand that all outdoor speech conform to rules regulating the use of the public's air because, of course, speech travels through the air.

Absurd? We think so. But does the First Amendment bar such legislation? Instinctively, we think yes, thereby raising the intended question of how broadcasting might be distinguished. Maybe the Court would respond that with the air, everyone who wishes to speak may do so, and that is not true of broadcasting, where some rationing mechanism is necessary. Thus, the argument doubles back into scarcity and offers an extreme variant of the "too few" version: scarcity exists so long as a single person who wishes to use the resource is precluded from doing so. Note, however, that this version of scarcity does not distinguish broadcasting from print; instead, it distinguishes speech from press.

71. *Id.* at 1038–39.
72. *Id.* at 1028–41.
73. Krattenmaker & Powe, *supra* note 53, at 1222.

We are back to the beginning again, which is right where we belong. There are no relevant distinctions that justify a different treatment of broadcasting from print. Having said that, we must note that we are not sure it matters.

Equality Without a Difference

By refusing to extend the full protections of the First Amendment to broadcasting, the Court has sustained the basics of broadcast program regulation that have existed for sixty years. Spitzer wisely counsels that "it takes a great deal of tugging and hauling before the Supreme Court will strike down as unconstitutional an old social institution."[74] We think it not inconceivable that the Court could admit that scarcity has vanished but nevertheless sustain regulation.

Pacifica states that "it is well settled that the First Amendment has a special meaning in the broadcast context."[75] Broadcasters employ a scarce resource that the government owns to transmit messages that are pervasive and powerful. No matter how carefully one parses the individual components of this argument, or how frequently she notes that the description aptly fits the print media as well, it still sounds good when she says it fast. If one has an overwhelming instinct to deny conventional First Amendment protection to broadcasters without appearing to eviscerate free speech law, it is not very hard to invent an excuse for doing so that is convincing to those accustomed to and comfortable with the present status quo. We think a future Court might state that the "special meaning" comes not from scarcity or pervasiveness, but from the reality that broadcasters have enjoyed a privileged monopoly status through extremely lucrative grants of federal property, and that, because this monopoly status has been a product of federal law, it would not be unconstitutional to continue regulation.

If the Court reconceived the justification for broadcasters' diminished rights to free speech in this manner, it would necessarily

74. Spitzer, *supra* note 11, at 1029. Certainly there was nothing in *Turner Broadcasting Sys., Inc.* v. *FCC*, 114 S.Ct. 2445 (1994), to indicate that the Court was having second thoughts about broadcasting regulation—although, equally certain, the issue did not require the Court to have second thoughts.

75. 438 U.S. at 742 n.17.

abandon first-generation broadcast scholarship and its reliance on the scarcity rationale and adopt one of the subsequent views. Second-generation broadcast scholarship asked whether the First Amendment might present more serious difficulties to regulation than initially thought[76] and eventually rejected scarcity as untenable, but split over what this would mean for continued regulation.[77] In 1976 Dean Lee Bollinger argued that even though (actually he said "because") broadcasting and print are indistinguishable, we can nevertheless deny First Amendment protections to broadcasting because to do so gives us "the best of both worlds."[78]

By the mid-1980s, a third generation of scholarship appeared that did not even find it important to ask whether there is a distinction between broadcasting and print. It was sufficient to ask whether regulation might accomplish good things. If it could, then it was constitutional. That position is best represented by the writings of Professors Owen Fiss and Cass Sunstein.[79] Their viewpoint is a generally applicable First Amendment theory, which can apply to print as well, but the style of their advocacy is to focus on how regulation can improve broadcasters' performance.

Two separate premises underlie this new theory. First, private power is at least as potentially dangerous as state power. Second, there is no reason to believe that a marketplace of ideas works. All preferences are socially constructed. Viewers are not trapped into a false consciousness; rather they are molded by a misshaped consciousness. Given sufficiently foreclosed options and enough force-feeding, they will learn to watch what academic critics already value: "If better options are put more regularly in view, it might well be expected that

76. Harry Kalven, *Broadcasting, Public Policy, and the First Amendment*, 10 J.L. & ECON. 15 (1967); Glen Robinson, *The FCC and the First Amendment*, 52 MINN. L. REV. 67 (1967).

77. Powe, *supra* note 58 (arguing that such regulation would be unconstitutional); Lee Bollinger, *Freedom of the Press and Public Access*, 75 MICH. L. REV. 1 (1976) (arguing that such regulation was necessary).

78. Bollinger, *supra* note 77, at 27. He elaborates on his thesis in a later work. LEE BOLLINGER, IMAGES OF A FREE PRESS (University of Chicago Press 1991).

79. Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Owen Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987). *See also* CASS SUNSTEIN, THE PARTIAL CONSTITUTION (Harvard University Press 1993); CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (Free Press 1993).

at least some people would be educated as a result. They might be more favorably disposed toward programming dealing with public issues in a serious way."[80]

Thus, there is no inherent dilemma and nothing antidemocratic in substituting good programming for the programming that viewers would otherwise choose. Choices are foisted upon viewers one way or another, and because that must be the case, it makes the most sense to have the best choices imposed. Although this viewpoint is antithetical to standard First Amendment doctrine, it bothers neither Fiss nor Sunstein, both of whom conclude that the standard First Amendment conclusions, with their emphasis on consumer sovereignty, are as misguided as the protection of property rights before 1937.[81]

Both Fiss and Sunstein are from the progressive left and have determined that broadcasters are insufficiently leftist, but can be moved in the correct direction through appropriate regulation. From the other end of the political spectrum, Paul Bator, while speaking to the Federalist Society, offered the conservative refrain that broadcasters are too liberal.[82] Like Fiss and Sunstein, he would refashion television to reflect his—but, presumably, not Fiss's or Sunstein's—worldview by preventing broadcasters from claiming full First Amendment rights and instead checking television through regulation.[83]

Broadcast journalist Ford Rowan's perceptive comment holds true: "Many liberals want regulation to make broadcasting do wonderful things; many conservatives want regulation to restrain broadcasting from doing terrible damage."[84] We believe that this will continue and

80. SUNSTEIN, THE PARTIAL CONSTITUTION, *supra* note 79, at 221. Note that the sentence does not read: "They might be more favorably disposed toward magazines and journals dealing with public issues in a serious way."

81. Sunstein warns that the First Amendment "should not operate as a talismanic or reflexive obstacle to our efforts to experiment." SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH, *supra* note 79, at 81. If the legislature wishes to regulate and has a "reasonable" factual argument, it is "entitled to a presumption of constitutionality." *Id.* at 57. In context, that presumption seems quite high.

82. Paul Bator, *The First Amendment Applied to Broadcasting: A Few Misgivings*, 10 HARV. J.L. & PUB. POL'Y 75 (1987).

83. Bator offered a distinction between broadcast and print much like the one we suggested the Court would adopt if it were determined not to dismantle the regulatory superstructure.

84. FORD ROWAN, BROADCAST FAIRNESS 39 (Longman 1984).

that these writings are the front end of what may become an increasing academic refrain, one that will find the justification for regulation in the regulation itself: that is, because regulation is a good thing, it must be—and therefore is—constitutional.

Bollinger's authoritative statement that regulating broadcasting while leaving print unregulated offers us the "best of both worlds" conveys the unmistakable impression that broadcast regulation works well. Yet Bollinger has never made good on his implicit empirical claim by showing how *any* broadcast regulation has operated to create such a wondrous situation.

The available evidence is quite the contrary. Broadcast regulation has been characterized by the very abuses—favoritism, censorship, political influence—that the First Amendment was designed to prevent in the print media.[85] Professor Ian Ayres recognizes that a substantial case for the flaws of broadcast regulation has been made, but argues that, to fairly evaluate the full sixty years of broadcast regulation, we need also to consider its successes.[86] Only by balancing the positives and negatives can we draw an appropriate conclusion from the evidence.

When Bollinger's *Images of a Free Press*,[87] elaborating his "best of both worlds" thesis, failed to offer a single example of broadcast regulation's working, two dominant possibilities came to the fore. First, Bollinger's "best of both worlds" conclusion may not be empirical at all, but instead theoretical (and maybe theological). Second, demonstrating how broadcast regulations work to achieve their objectives is every bit as difficult as Ayres resignedly realized.[88] A not uncommon, though overly simplistic, assumption is that by showing a regulation and its corresponding programming in compliance, one has demonstrated cause and effect. True, some regulations do have such cause and effect. The Prime Time Access Rule (PTAR) limits networks to three hours of programming during prime time.[89] We know to a

85. Ian Ayres, *Halfway Home: On Powe's American Broadcasting and the First Amendment*, 13 J.L. & SOC. INQ. 413, 417 (1988).

86. *Id.* at 419–27.

87. BOLLINGER, *supra* note 78.

88. Ayres, *supra* note 85, at 427: "A definitive empirical analysis would be a monumental undertaking."

89. *See supra* Chapter 4 (Minimum Diversity Levels: Quality Programming; Outlet and

certainty that much of the nonnetwork programming in the 7:30 P.M. time slot would not air without the PTAR. Accordingly, we can evaluate whether the PTAR represents a plus or a minus. But no regulation should be given credit for producing behavior that would have occurred in the absence of such a rule.

Sunstein claims, without offering any evidence, that regulatory policies are "responsible for the very creation of local [television] news."[90] To substantiate that claim, he needs to show, first, that local news did in fact occur after the FCC ordered it and, second, that it would not have appeared otherwise during that era. Sunstein does neither.[91]

Source Diversity: Network Regulations—Prime Time Access Rule) for discussions of the PTAR.

90. SUNSTEIN, THE PARTIAL CONSTITUTION, *supra* note 79, at 222. In his subsequent book, he repeats the claim. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH, *supra* note 79, at 89. He also states it with more particularity when he claims that the specific regulatory catalyst was the Fairness Doctrine. *Id.* at 59.

91. It appears very difficult to disentangle the numerous reasons why local radio and television news made their appearance. But Sunstein's statement that regulatory policies are "responsible for the[ir] very creation" is at best incomplete and at worst inaccurate. When one of us called to ask him on what he based his unfootnoted assertion, he cited work by Kaniss. PHYLLIS KANISS, MAKING LOCAL NEWS 102 (University of Chicago Press 1991). The book was on his desk, and he noted that she, in turn, relied on the work of Green. MAURY GREEN, TELEVISION NEWS: ANATOMY AND PROCESS 3 (Wadsworth Publishing Co. 1969). Green writes: "When television first faded in on the American scene, circa 1948, station managers regarded news as a bothersome but necessary interruption between wrestling matches and Milton Berle. Unlike entertainment programming, which made money, news was a nuisance which served the sole useful purpose of keeping the Federal Communications Commission off the station's back . . . . The FCC is empowered by law to require that an unspecified portion of a station's broadcast time be devoted to programs serving the 'public interest, convenience, and necessity.' News is so defined." *Id.*

The problem is more complex than Green understands, starting with the facts that radio was already broadcasting news and that some programming had to be found to fit between wrestling and Berle. With the exception of CBS on Monday nights, all three networks had blanks in the weekday prime time programming in the year before the freeze of television licensing (1948–52) and the two seasons after the freeze. HARRY CASTELMAN & WALTER J. PODRAZIK, WATCHING TV 38, 74, 82 (McGraw-Hill 1982). Local programming had to fill those prime time slots as well as the hours preceding prime time.

More basically, television news flowed from radio news, and local radio news was a product of the early and mid-1930s that received a considerable boost as newspapers applied for licenses and purchased existing stations. ERIK BARNOUW, THE GOLDEN WEB 22 (Oxford University Press 1968). By World War II, newspapers owned some 30 percent of all radio stations. HARVEY J. LEVIN, BROADCAST REGULATION AND JOINT

Relatedly, proponents of the Fairness Doctrine often claim that the doctrine is responsible for balanced coverage in broadcasting, when, in fact, most broadcasters, like most newspapers, produce balanced coverage because it represents important journalistic norms to which they subscribe. Indeed, as we show in Chapter 9, the specific (marginal) effect of the Fairness Doctrine has been to act as a counterweight to journalistic ethics and competition—virtually imposing a tax on the coverage of public issues.

More attention must be given to cause and effect. We know that Commission rules may suppress programming broadcasters wish to air. Also, programming that broadcasters do not wish to air may be compelled by rules. It is important, however, to realize that Commission rules do not operate in a vacuum and that broadcasters are also subject to community and competitive pressures. Unless one assumes that regulation is good because government is regulating,[92] a regulation must be evaluated by its costs, benefits, and an appreciation of what would likely happen in the absence of regulation.

We do not believe that just because regulation seeks good results, it is therefore constitutional. The First Amendment avoids the very difficult evaluative inquiries by a prophylactic rule: the tendency of the government to regulate content of speech is generally bad and so prone

OWNERSHIP OF MEDIA 5 (New York University Press 1960). Radio stations then became, not surprisingly, the pioneers of television.

The first clear formal requirement to air news is contained in the *1960 Programming Statement*, 25 FED. REG. 7291 (1960). We do not dispute that, in fact, the FCC saw news as merit programming much earlier. But the important *Blue Book*, the 1946 *Public Service Responsibility of Broadcast Licensees*, listed four types of merit programming, and news was not one: sustaining, local live, discussion of public issues, and minimizing commercials. To be sure, news could be either sustaining (that is, lacking sponsorship) or a part of public affairs programming. Still, the renewals set for hearing (and then granted) in the wake of the *Blue Book* did not include any station cited for lack of news. Community Broadcasting, 12 F.C.C. 85 (1947); Howard W. Davis, 12 F.C.C. 91 (1947); Eugene J. Roth, 12 F.C.C. 102 (1947). One should also note the Commission's overruling of its *Mayflower* Doctrine, which forbade editorializing, 8 F.C.C. 333 (1940). That 1949 switch, formally bringing forth the Fairness Doctrine's report, *Editorializing by Broadcast Licensees*, clearly saw news as a means of satisfying the requirement to present programming dealing with controversial issues, Dkt. No. 8516, 13 F.C.C. 1246 (1949).

Nor does Sunstein's subsequent claim, *supra* note 90, that the Fairness Doctrine is the catalyst fare any better for the reasons already stated.

92. This seems to be Fiss's position in *Why the State?*, *supra* note 79.

to abuse that only the most immediate and compelling danger, together with the absence of content-neutral alternatives, justifies regulating the content of public utterances. This principle is reflected in the Court's recognition in *Miami Herald* v. *Tornillo*[93] that the First Amendment precludes the government from using certain means to achieve even excellent ends. It is the same point that Learned Hand had in mind when he observed that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[94]

Even if, in retrospect, we wish that the Cable News Network had not pricked our consciences about the Somalis, the First Amendment mandates that we debate American policy in the open rather than regulate what CNN (or the over-the-air networks) places on our screens. Furthermore, even if the Somalia operation was a disaster, what type of regulation of the media would have prevented it? And if a regulation could counter CNN's effects, what else might that regulation cause to be deleted from the citizenry's purview? The invasion of the Bay of Pigs? The invasion of Cambodia? The *Pentagon Papers*? Watergate? Arms for hostages? Whitewater? Even to ask such questions is to reaffirm the wisdom in deciding them in advance by adopting the First Amendment.

We believe that no proffered distinction for treating broadcasting differently from print justifies a different regulatory regime. Accordingly, all content regulation of broadcasting that could not be similarly applied to print or other mass communications media properly ought to be regarded as impermissible under the First Amendment. This includes the Fairness Doctrine, the personal attack and political editorializing rules, sections 315 and 312(a)(7), the PTAR, current indecency regulations, and the Children's Television Act of 1990.

Nevertheless, because the Court appears unwilling to undo sixty years of constitutional error,[95] it may be backed into the proverbial

93. 418 U.S. 241 (1974).

94. United States *v.* Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

95. "Although courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continued validity for our broadcast jurisprudence . . . ." Turner Broadcasting Sys., Inc. *v.* FCC, 114 S.Ct. 2445, 2457 (1994) (footnote omitted).

corner, sustaining broadcast regulations for whatever reason appears the most plausible at the time. If this is so, then we need to assess FCC regulation of broadcast program content on the assumption—which has regrettably proven quite accurate to date—that the First Amendment does not constitute a major barrier to such regulation. The chapters that follow seek to provide such an assessment.

9

The Fairness Doctrine

BEFORE THE MID-1980s, when the Fairness Doctrine[1] was headed for repeal, the FCC and the courts could not say enough good things about the doctrine. It was the cornerstone of the public interest structure: "the single most important requirement of operation in the public interest—the *sine qua non* for grant of renewal of license."[2] Thus, when its repeal became a serious possibility, proponents of government regulation rushed to the doctrine's defense, understanding that if the Fairness Doctrine was no longer deemed to be in the public interest, then virtually no obligation-creating regulations could be sustained as being in the public interest.[3]

1. This chapter is an updated version of Thomas G. Krattenmaker & L.A. Powe, Jr., *The Fairness Doctrine Today*, 1985 DUKE L.J. 151, which we completed in the fall of 1984. In our submission letter to the *Duke Law Journal* we noted that various individuals and organizations in Washington, D.C., had already asked for and received the draft of our article, and we expected it might have some impact on the ongoing debate. One of those requesting a copy was the FCC. The subsequent Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143 (1985) [hereinafter 1985 Fairness Doctrine Report], does not cite our article, but its organization parallels our organization, its arguments are the same as ours, and its principal examples are the same as well.

2. Committee for the Fair Broadcasting of Controversial Issues, Memorandum Opinion and Order, 25 F.C.C.2d 283, 292 ¶ 25 (1970), *quoted in* The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Fairness Doctrine Report, Dkt. No. 19260, 48 F.C.C.2d 1, 10 ¶ 24 (1974) [hereinafter 1974 Fairness Doctrine Report].

3. As we shall note, during its heyday the Fairness Doctrine's weaknesses were well understood by public interest lawyers. What has changed between then and now is their

Unfortunately, too much of the discussion about the Fairness Doctrine has taken its cues from the failure of *Miami Herald Publishing Co.* v. *Tornillo*[4] to cite *Red Lion*[5] and its impact on the constitutional issue.[61] While most analysts were debating the Fairness Doctrine in constitutional terms, the debaters lost track of what the Fairness Doctrine represents and how it works.

Although we believe, for the reasons expressed in the prior chapters, that the Fairness Doctrine is inconsistent with a sound view of the First Amendment and should have been declared unconstitutional, our purpose here is not to engage in further constitutional analysis. Rather, we seek to show in this chapter why we believe that the Fairness Doctrine is bad regulatory policy, wholly apart from any considerations of freedom of speech and the press. This analysis of the centerpiece of the public trustee model lays the groundwork for our criticism of the entire public trustee model. Thus, in this chapter we analyze the Fairness Doctrine in great detail. In the following chapters we apply our regulatory conclusions more generally to the entire spectrum of broadcast regulatory issues.

INTRODUCTION

The Fairness Doctrine, promulgated by the FCC several decades ago,[7]

understanding that, after CBS *v.* Democratic Nat'l Comm., 412 U.S. 94 (1973), access was no longer a possibility, and that, as noted in the text, if the Fairness Doctrine goes, so does the rationale for almost everything else.

4. 418 U.S. 241 (1974).

5. Red Lion Broadcasting Co. *v.* F.C.C., 395 U.S. 367 (1969).

6. Much of this literature is discussed in William Van Alstyne, *The Mobius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C. L. REV. 539 (1978).

7. Before its repeal, the general Fairness Doctrine was incorporated in the Commission's Rules and Regulations. *See* 47 C.F.R. § 73.1910 (1983). This occurred in 1978. *See* Notice of Inquiry, 49 Fed. Reg. 20,317 n.1 (1984) [hereinafter cited as Fairness NOI]. The roots of the doctrine are much deeper. *See id.* at 20,319–22. Most commentators trace its origins to a 1929 decision of the FCC's predecessor, the Federal Radio Commission. *Id.* at 20,319–20; *see* Great Lakes Broadcasting, 3 F.R.C., THIRD ANN. REP. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. denied*, 281 U.S. 706 (1930). Subsequently, the doctrine evolved, like a common-law principle, through decisions of the FCC acting on complaints or station applications. *See* Fairness NOI, at 20, 320. In 1949 the Commission issued a policy statement promulgating the doctrine in its present form. Editorializing by Broadcast Licensees, Report of the Commission, Dkt. No. 8516, 13 F.C.C. 1246 (1949) [hereinafter Broadcast Licensees].

repealed in 1987, but likely to be reenacted into law by Congress (and so frequently referred to here in the present tense), purports to require that radio and television licensees give adequate coverage to significant public issues and ensure fair coverage that accurately presents conflicting views on those issues.[8]

Probably no law more clearly reflects the unique balance of regulatory techniques by which the United States governs its broadcast industry. Broadcasters are to be licensed to use, but not own, the radio spectrum.[9] Once licensed, they are to be controlled principally by the forces of competition rather than by government constraints on production of their programs or schedules.[10] Yet frequently these licensees are to sacrifice the pursuit of profits and to act as public trustees of the airwaves.[11]

The Fairness Doctrine, the quintessential public trustee duty, stands as a symbol of what Americans hope for (and many demand from) the broadcast industry: neutral, detached presentation of significant public issues. Such reportage should inform without indoctrinating. It should produce an enlightened citizenry but avoid manipulation of voters' values by an entrenched, uncontrollable oligopoly motivated solely by a desire to maximize its own profits. The Fairness Doctrine, in short, not only symbolizes the public trustee obligations of broadcast licensees, but also neatly encapsulates a journalistic code of ethics to which most reporters and publishers, in

In 1974, after a lengthy study, the FCC reaffirmed the doctrine as a policy to be applied in disputed cases. *See* 1974 Fairness Doctrine Report, *supra* note 2, at 19 ¶ 50.

8. Broadcast Licensees, *supra* note 7, at 1249–50 ¶ 7 (discussing a "long series of decisions" reaffirming this affirmative responsibility on the part of broadcast licensees).

9. The Communications Act of 1934 specifically provides that a "station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof." 47 U.S.C. § 309(h)(1).

10. *See, e.g.*, FCC *v.* WNCN Listeners Guild, 450 U.S. 582, 593–604 (1981) (upholding as not inconsistent with the Communications Act of 1934 the FCC policy that reliance on the market is the best method of promoting diversity in entertainment formats); NBC *v.* United States, 319 U.S. 190 (1943); FCC *v.* Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940) ("Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee to survive or succumb according to his ability to make his programs attractive to the public.").

11. Mark Fowler & Daniel Brenner, *A Marketplace Approach to Broadcast Regulation*, 62 TEX. L. REV. 207, 213–17 (1982).

all media, profess allegiance. This was the view of the FCC when it explained the Fairness Doctrine in 1949:

> If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities.[12]

We believe that, notwithstanding those rather impressive credentials as a symbol of virtuous aspirations, the Fairness Doctrine will not and cannot work. At best, the Fairness Doctrine is, like the 1962 New York Mets, a glorious but futile symbol, full of wondrous pretension and promise, yet utterly devoid of performance and accomplishment.

As a practical matter, the Fairness Doctrine is a failure for two distinct reasons. First, viewed as an exercise of regulatory power, there is no reason to believe that the doctrine achieves its purposes or does so in an efficient manner.[13] Second, as a legal principle, it is utterly meaningless.[14] In our view, these practical considerations are sufficiently compelling that, even were the constitutional issues more nearly balanced on both sides, the case for leaving the Fairness Doctrine in the dustbin of discarded regulations is clear.

Costs, Benefits, Effects, and Alternatives

Perhaps, once upon a time, regulation was valued for its own sake and tested only by asking whether it was aesthetically correct. To judge the

12. Broadcast Licensees, *supra* note 7, at 1251 ¶ 9.

13. Even Professor Cass Sunstein, who is generally enamored with the idea of regulation, has come to this conclusion: the Fairness Doctrine was "hardly a terrific success on its own terms." Cass Sunstein, Democracy and the Problem of Free Speech 54 (Free Press 1993).

14. The Commission's view is gentler: "The regulatory requirements associated with the Fairness Doctrine, are not as clear and unambiguous as the parties [supporting its retention] would have us believe." 1985 Fairness Doctrine Report, *supra* note 1, at 183 n.145.

merits of a regulation, one asked only whether it directed someone to do something that, if done, comported with the public interest. By such standards, as we observed above, the Fairness Doctrine would receive high marks.

So, of course, would a regulation telling restaurants to provide fast, clean, cheap service in comfortable surroundings. Yet, it is difficult to believe that anyone would assess the merits of such a regulation today without also measuring its practical effects, its costs, and the costs and effects of alternative methods of achieving the goals of the regulation. By such standards, the Fairness Doctrine is at best an unnecessary and cumbersome tool for achieving its laudable goals.

The Fairness Doctrine in Operation

Those goals, of course, are to encourage full and fair coverage of controversial issues. They reflect a desire to mold the behavior of both broadcasters and their audiences. For audiences, the Fairness Doctrine reflects a governmental policy that citizens ought to be well informed, even if that is not a priority of the citizen when tuned to the broadcast media. For broadcasters, the Fairness Doctrine sets forth a standard of conduct to be followed in operating the station, although it is obvious that achieving the goals of the doctrine will be accomplished, to some extent, without any fairness doctrine. A station with news programs will introduce viewers or listeners to some facets of public controversies simply by reporting the main events of the day. Furthermore, journalistic ethics will cause some reporters and news programs to be scrupulously fair as a matter of professionalism. The Fairness Doctrine is principally aimed at those stations that would avoid controversy or air biased or misleading programming.[15]

In practice, the apparently complementary goals of the doctrine are pushed in opposite directions because, if the station avoids controversy, it also avoids legal responsibilities.[16] It turns out that there is no

15. Its secondary aim is at stations that wish to comply, but for reasons of negligence or expedience fail to do so.

16. Three public interest groups, the Citizens Communications Center, the Media Access Project, and the Stern Community Law Firm, in their brief to the Supreme Court in *CBS* v. *DNC* noted that "the Commission has never revoked a license for excessively

penalty, because there is no enforcement, for failure to cover controversy.[17] Even in periods when its zest for regulatory intervention seemed almost boundless, the FCC never found itself capable of telling broadcasters which topics in their communities were relatively more newsworthy. Because there is no penalty for not covering a specific controversy, broadcasters can—and everyone agrees some do[18]—avoid some fairness problems simply by not offering programming on some issues.[19]

Further, once a station does decide to broadcast some programming dealing with a controversial issue, it can determine largely as it pleases how much time to devote to the differing viewpoints and who and what materials to use in presenting each side.[20] To reduce the need for close and sustained agency supervision of broadcasters, the

bland or non-controversial programming." Brief for Business Executives' Move for Vietnam Peace, No. 71-864, No. 71-865, at 36 [hereinafter Public Interest Brief].

17. The Commission has only once held a broadcaster to have violated the obligation to cover controversial issues. *See* Representative Patsy Mink, the Environmental Policy Center, and O.D. Hagedorn Against Radio Station WHAR, Memorandum Opinion and Order, 59 F.C.C.2d 987, 997 (1976) [hereinafter WHAR] (Clarksburg, West Virginia, radio station violated Fairness Doctrine by failing to cover the issue of strip mining); 1974 Fairness Doctrine Report, *supra* note 2, at 10 ¶ 25 ("we have no intention of becoming involved in the selection of issues to be discussed, nor do we expect a broadcaster to cover each and every important issue which may arise in his community").

18. 1985 Fairness Doctrine Report, *supra* note 1, at 156 ¶ 19; Fairness NOI, *supra* note 7, at 20, 332, and sources cited therein; *see also* the commentary from the Left in the early 1970s: Donald Malone, *Broadcasting, the Reluctant Dragon*, 5 U. MICH. J.L. REF. 193, 216 (1972); Jonathan Mallamud, *The Broadcast Licensee as Fiduciary*, 1973 DUKE L.J. 89, 99.

19. *See, e.g., Freedom of Expression: Hearings Before the Senate Comm. on Commerce, Science and Transportation*, 97th Cong., 2d Sess. 123, 127 (1982) [hereinafter *Packwood Hearings*] (statement of NBC reporter Bill Monroe):

> It seems clear to me that many station owners and their managers, though they might not wish to admit it, feel that their commercial lives depend on minimizing controversy. Broadcasters do not feel free to follow their own consciences as journalists because they have to answer to a bureaucratic conscience, with its close-packed pages of rules, regulations, and precedents. So the electronic media, by contrast with what the first amendment intended, are stifled and stunted.

20. "[T]he listener or viewer receives the broadcaster's simulation of a debate, in which he has chosen the speakers, the format, the timing, and the content." Public Interest Brief, *supra* note 16, at 34.

Commission built into the doctrine a remarkable amount of broadcaster discretion.[21] As a result, surprisingly little balance is necessary to meet the obligation to cover all significant[22] sides of an issue.

In brief, this is the Fairness Doctrine about which so many accolades have been heard. But proponents wanting to maintain a fairness doctrine often do not argue in favor of the doctrine just described. Enamored with the goals of the Fairness Doctrine, they praise a doctrine that does not exist. As too often described, the Fairness Doctrine (1) grants access to the air (and therefore to the listening and viewing public) to those who would be otherwise excluded; (2) allows, in the words of the head of the Media Access Project, groups to "speak with their own unedited voices";[23] and (3) "never prevents any speech [but instead] only adds more voices or representative views to the debate."[24] All of those assertions are false.

First, the Fairness Doctrine is not, and never has been, an access mechanism. In the wake of *Red Lion*, when public interest groups sought to turn fairness into access, the FCC flatly refused, and the Supreme Court in *CBS* v. *DNC*[25] sided firmly with the Commission. Second, the doctrine does not require that anyone, much less any particular person or group, be given access.[26] Broadcasters often do offer interest groups airtime to present one side of the issue,[27] but the

21. 1974 Fairness Doctrine Report, *supra* note 2, at 10–17. "We believe that the public is best served by a system which allows individual broadcasters considerable discretion in selecting the manner of coverage, the appropriate spokesmen, and the techniques of production and presentation." *Id.* at 16 ¶ 42.

22. 1974 Fairness Doctrine Report, *supra* note 2, at 15 ¶ 39 (only "major" or "significant" opinions are within the scope of the doctrine).

23. *Quoted in* FORD ROWAN, BROADCAST FAIRNESS 74 (Longman 1984).

24. HENRY GELLER, THE FAIRNESS DOCTRINE IN BROADCASTING 5 (RAND Corporation 1973).

25. 412 U.S. 94 (1973).

26. Public Interest Brief, *supra* note 16, at 34.

27. There are reasons why this occurs. As Rowan explains, "single issue pressure groups are apparently the most successful [informal] users of the Fairness Doctrine. Small, local groups, or local chapters of national organizations approach broadcasters for a chance to air their views. Local groups can easily monitor stations and be in a position to jump when something on the air happens to deal with 'their' issue." ROWAN, *supra* note 23, at 74. From a broadcaster's perspective, it may be cheaper to provide airtime than to deny it and risk a letter to the FCC.

doctrine permits broadcasters to meet their obligations in many other ways, such as by having a station reporter provide the information. In the words of *CBS* v. *DNC*, "editing is what editors are for; and editing is the selection and choice of material."[28] Third, whatever the Fairness Doctrine adds to broadcast coverage of an issue, it necessarily subtracts that amount from either that or another issue. It may be comforting to speak of additional voices, but the reality is that just as there are only so many pages in a newspaper, so, too, are there only so many minutes in a broadcast day. When something goes in, something else has to come out. And if it is public affairs that goes in, only those who do not watch television could believe that it will be entertainment that goes out.

Distorting the Fairness Doctrine

Proponents of the Fairness Doctrine fail to address whether the practicalities of administration and enforcement of the doctrine limit the sweep of its goals. Former Commissioner Nicholas Johnson stated that the FCC "should be whipped until it does its job."[29] Too many defenders of the doctrine describe as fact what they believe the doctrine would look like if the FCC were constantly being "whipped." In our experience Fairness Doctrine proponents consistently mischaracterize its effects, ignore its costs, and overlook the availability of competition as an alternative. In fact, the doctrine is an unduly expensive regulatory venture whose real-world effects may well produce results at odds with its own asserted purposes.

Mischaracterizing Effects. The Fairness Doctrine is often explained as one that compels fairness or access by neglected groups by substituting viewers' choices regarding what they wish to hear or see for broadcasters' desires as to what to broadcast.[30] The *Red Lion* opinion echoes

28. 412 U.S. at 124.

29. *Public Interest in Broadcasting: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 80 (1991) [hereinafter *Markey Hearings*].

30. For example, the comments of the head of the Media Access Project quoted above at note 23. At one time the Media Access Project knew better: "Instead of 'robust, wide-open debate' among speakers on controversial issues, the listener or viewer receives the

this view in its now classic assertion that "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[31] Yet the Fairness Doctrine does not give audiences a veto over broadcasters.[32] First, the discretion the doctrine accords to broadcasters leaves them to make key decisions. Because the broadcaster can always choose the spokesman for any opposing view, the doctrine does not guarantee access for any particular individual, no matter how logical that spokesperson may appear. Furthermore, to the extent coverage is required, it is only for significant viewpoints, and then only if the totality of the broadcaster's programming is unbalanced.

Second, and centrally important here, unless the broadcaster voluntarily offers airtime to avoid potential problems, what will air after a finding that the doctrine has been violated is left to a determination by a governmental official. Thus, instead of substituting viewer or citizen control for broadcaster control of programming, the Fairness Doctrine substitutes governmental control.

When fairness regulations are enforced, no Platonic guardian determines whether a program is fair. That decision is made in the first instance by a government attorney in the FCC's Mass Media Bureau—an attorney so publicly unaccountable that her name or title will not even appear on an FCC organization chart. That attorney should, however, be following a more or less coherent set of publicly reviewable guidelines.[33] She may be responding to the complaints of a few listeners or viewers, but "the public" whose interests are being enforced is one that exists in that attorney's or her bosses' eyes, despite the fact that its listening and viewing preferences have never been systematically canvassed—much less proven to be uniform—by the FCC.[34]

broadcaster's simulation of a debate, in which he has chosen the speakers, the format, the timing, and the content." Public Interest Brief, *supra* note 16, at 34.

31. 395 U.S. at 390.

32. This function is performed instead by the on/off and channel selector dials.

33. *See, e.g.*, FCC, THE LAW OF POLITICAL BROADCASTING AND CABLECASTING: A POLITICAL PRIMER 69–71 (Government Printing Office 1984) (outlining the requirements of the Fairness Doctrine within the context of political broadcasting).

34. 1974 Fairness Doctrine Report, *supra* note 2, at 8 ¶ 19 ("[W]e [the FCC] do not monitor broadcasts for possible violations, but act on the basis of complaints received

Conversely, if there were no fairness regulations, the most a broadcaster could hope to gain from misinforming or misleading its listeners is the allegiance of those already ideologically committed to the broadcaster's point of view. That allegiance, probably depending on the issue addressed, may or may not counterbalance the loss of viewers who are not ideologues.[35] But, in the absence of the doctrine, broadcasters would have almost no incentive to provide erroneous or one-sided information to those who do not want it or to refuse all coverage of issues that interest many viewers or listeners. They do, after all, have to convince someone to turn on the set and tune in their frequency.[36] To use an obvious example, Rush Limbaugh's talk show is more likely to appeal to conservatives and those disenchanted with the scale of the federal government than to liberals. To the extent that liberals listen, it is either because Limbaugh is more entertaining than the alternatives or because they wish to be aware of the current targets of his ire.

To the extent that the doctrine has practical effects, they are likely to be felt in two ways. First, the doctrine will inhibit licensees to some extent from covering controversial issues. Second, where stations nevertheless cover such issues, the doctrine is as likely to avoid the appearance of one-sided presentations as to compel fairness.

Although the regulation purports to require that some minimal coverage be given to large public issues, that aspect has proven

from interested citizens. These complaints are not forwarded to the licensee for his comments unless they present *prima facie* evidence of a violation.").

35. For example, we assume that relatively few people have a firm ideological belief respecting the causes of federal budget deficits. If we are correct, then broadcast coverage that points to rising interest rates as the sole cause of deficits will harm the station's ratings more than it will help them. We also assume that most people believe that incest should be a criminal act. If that assumption is correct, then crusading for the retention of criminal penalties for incest—without covering the alternative views that criminal sanctions for intrafamily conduct are difficult to apply fairly and that at least consenting adults should have wider personal liberty—is unlikely to drive many listeners away.

36. The doctrine may, then, prevent the committed ideologue from airing one-sided presentations to similarly committed ideologues. If, indeed, the doctrine is supposed to protect the rights of listeners and viewers, this is a very curious result. Such communications may offend persons who do not agree. Those persons need not tune in to the station, however, because radio and television outlets, unlike newspapers, are relatively plentiful in most communities.

unmanageable and, with a single exception in its entire history, unenforceable. That single instance, involving strip mining in Clarksburg, West Virginia, shows why the requirement to cover a specific issue is unenforceable. Consider initially how the Commission can know that a given issue is so controversial that a station must air programming covering it. The answer, it turns out, is to read the community's local newspaper. Strip mining was a front-page story in Clarksburg for nine out of eleven days in 1974.[37] Therefore, because it had been so well covered in the print media, the Fairness Doctrine required it to be covered by all the broadcast media as well. To spend hours of Commission time and effort to ascertain what the local newspaper is saying so that local broadcasters can duplicate it surely is an idle use of Commission resources. It is also worth noting that the Commission did not receive a single complaint from the affected community about the licensee's default. Instead, the interested citizen was a member of Congress—from Hawaii.[38]

The strip-mining case reveals what a moment's reflection should make evident: the Fairness Doctrine does not identify specific programs that should be broadcast and require broadcasters to do so. No matter how well-staffed the FCC might be, it could never have enough employees to know what issues in the hundreds of American communities are receiving insufficient attention from local broadcasters. Virtually all the doctrine commands is that a broadcaster that does one thing must also do another. For example, if a licensee broadcasts a program on medical fees, it must also include in that program, or another, the view that medical malpractice insurance rates are excessive because of plaintiffs' attorneys and the view that considerable malpractice occurs. Consistent with the Fairness Doctrine, the broadcaster can always choose not to do the first thing. In such a case, of course, neither the broadcaster nor the regulation furthers any public interest. Were the Fairness Doctrine the only factor influencing broadcasters' program selection, we would expect to see little or no broadcast coverage of controversial issues.

37. WHAR, *supra* note 17, at 997.

38. The complainant was Patsy Mink, the non-Honolulu representative from Hawaii. Representative Mink was an active supporter of limitations on strip mining.

Furthermore, even when the broadcaster sets out to air a program with coverage that is balanced for Fairness Doctrine purposes, what is fostered may well be more the illusion of fairness than a genuine exploration of positions.[39] The Fairness Doctrine speaks in terms of balanced coverage—presenting both sides of controversial issues. A typical contested complaint charges the broadcaster with presenting only one side of an issue and ignoring the other side. This method of applying the doctrine can have a perverse impact in light of the reality that most major controversial issues are multisided. Because of a tendency to think in terms of two-sided issues, it is not surprising that the sides are often characterized as "Republican" and "Democratic."

For example, in the early 1970s a group on the Republican Right pressed a major fairness complaint.[40] The group argued that its very hawkish positions on national security issues were being virtually ignored; the debate on the issue was telecast as if the only choices were those of the Democratic Left and the Nixon administration. Although the Commission and a reviewing court decided the case adversely to the complainants on a different ground, the complaint could just as easily have been disposed of on the ground that the network had in fact provided a full and fair discussion of national defense by putting forward the dominant positions of each of the two major parties. It should also be noted that during this period the views of the more hawkish Democrats were underplayed as well.

What this example illustrates is the very real probability that the minority positions of the major parties (not to mention positions that are outside the bounds of the two parties) can be ignored even as broadcasters remain in full compliance with the Fairness Doctrine. The viewpoint of the dominant Democratic faction is presented and countered not by the minority view within the Democratic party, but

39. "[U]nder the Fairness Doctrine, broadcasters generally tend to permit only established—or at least moderated—views to enter the broadcast world's 'marketplace of ideas.'" CBS *v.* DNC, 412 U.S. 94, 187–88 (1973) (Brennan, J., dissenting). That sentence cited numerous articles, mostly written by liberals, arguing that the Fairness Doctrine stifled rather than promoted controversy. Only after *CBS* v. *DNC* rejected access did the Left begin its ardent embrace of the Fairness Doctrine.

40. American Sec. Council Educ. Found. *v.* CBS, 63 F.C.C.2d 366 (1977), *aff'd en banc sub nom.* American Sec. Council Educ. Found. *v.* FCC, 607 F.2d 438 (D.C. Cir. 1979). The case is discussed *infra.*

by the view of the dominant faction within the Republican party. This practice has always satisfied the Fairness Doctrine while providing no coverage of the views of those with nonmainstream positions. No station presenting two viewpoints has ever been found to violate the Fairness Doctrine on the ground that there was a third (unpresented) view that had to be covered.

The *1974 Fairness Doctrine Report* limited the doctrine to only "major" or "significant" viewpoints.[41] In operation, "major" viewpoints and balanced programming "inexorably [favor] orthodox viewpoints."[42] Enforcing the Fairness Doctrine in this manner will provide some information, although largely the type that would be offered in the absence of any legal compulsion, but does not require, as proponents occasionally suggest, that broadcasters seek out views that do not dominate traditional debates. Thus, at a time when there was a serious question of recreational drug use (ignored by the two parties), there was no requirement to present the "legalize" side of the issue.[43] Despite assertions that the purpose of the doctrine is to ensure that the public is not left uninformed,[44] the FCC requires complaints to make a threshold case that the issue in question is already "the subject of vigorous debate" within the community.[45]

Properly viewed, then, the Fairness Doctrine substitutes potential bureaucratic control of programming for the operation of the marketplace. Further, one of the doctrine's principal effects is to avoid the appearance of biased programming concerning controversial issues. It does not force or even encourage broadcasters to give citizens information for which they have expressed a desire, nor does it provide broadcasters an incentive to seek out unconventional views. Rather, as more fully elaborated below, the doctrine actually penalizes broadcasters who seek out controversial issues or unconventional views. Quoting *Red Lion* to the effect that viewers' and listeners' rights should be

41. 1974 Fairness Doctrine Report, *supra* note 2, at 15 ¶ 39.

42. 1985 Fairness Doctrine Report, *supra* note 1, at 188 ¶ 70.

43. Licensee Responsibility to Review Records Before Their Broadcast, 28 F.C.C.2d 409, 415 (1971) (Johnson dissenting), *aff'd*, Yale Broadcasting *v.* FCC, 478 F.2d 594 (D.C. Cir. 1973).

44. Green *v.* FCC, 447 F.2d 323, 329 (D.C. Cir. 1971).

45. Security World Publishing *v.* CBS, Concerning Fairness Doctrine, 59 F.C.C.2d 107, 108 (1976).

paramount or offering the incantation, "public trustee," cannot change those effects of the doctrine.

Ignoring Costs. Proponents of the Fairness Doctrine not only misrepresent the doctrine's benefits but also appear to ignore its costs. In fact, like any other regulation, the Fairness Doctrine imposes costs of enforcement on the government and of compliance on those subject to it—here, broadcast licensees. What are those costs?

The effects on licensees are easiest to assess. Unless the doctrine is totally unenforceable and known to be so, it imposes costs on those subject to it. As we have just observed, however, broadcasters can avoid those costs by choosing to be silent on controversial issues or to offer programs that offend no one.[46] By itself, then, the Fairness Doctrine makes more attractive to broadcasters the option of self-censorship on controversial issues. It is as though the FCC had imposed a tax on reporting matters of public debate.

It may not mean much to NBC to have a Fairness Doctrine complaint pending for a year because of a charge that its 1978 miniseries *Holocaust* violated the doctrine by failing to provide a reasonable opportunity to present the view that there was no "German policy of Jewish extermination during World War II."[47]

The same cannot be said for allegations that are not absurd on their face or for stations that lack network clout. Consider KHOM in Houma, Louisiana, which, like so many stations before 1980, carried Ronald Reagan's radio commentary program.[48] In the first eighteen months the station aired the program, it did not receive a single complaint from anyone in its listening area. But the broadcast of one program produced letters from nine individuals and groups outside the Houma area that claimed they were entitled to free time to respond. KHOM spent time reviewing the tape, and unable to decide whether there had been personal attacks, consequently paid its "tax" to a

46. "Left the discretion to eschew controversy, therefore, many licensees have done so with a vengeance." Public Interest Brief, *supra* note 16, at 36.

47. Application of NBC for Renewal of License of Station WNBC-TV, 71 F.C.C.2d 250, 251 ¶ 4 (1979).

48. *Packwood Hearings*, *supra* note 19, at 125 (statement of Raymond Saadi, station KHOM).

Washington lawyer who advised the station to provide the free air time to those claiming it.[49]

More significant were the costs to station KREM in Spokane, Washington, and to its general manager, Eugene Wilkin.[50] In defending an on-the-spot decision not to allow representatives claiming to speak for all environmentalists to respond to an editorial favoring Expo 74, the station ran up legal fees of over $20,000, spent 480 hours of executive time, and endured a delay in license renewal.[51] Wilkin was branded as "controversial," and his broadcast management career was ended.[52] Why? The four individuals who claimed to represent all of Spokane's environmentalists were representatives of eight neighbors who had broken off from the city's major environmental organization to form their own ad hoc committee. Wilkin saw them only once, on the day he asked for verification that they did, in fact, represent all environmentalists. On that day they responded, "We'll be back with that."[53]

Whether or not these are isolated cases, they are well known to the closely knit broadcast industry. The costs varied from relatively *de minimis* for NBC, to modest for KHOM, to expensive for KREM, to astronomical for Eugene Wilkin. But the very fact that there are costs—costs that can be significant—generates incentives to avoid them. Other factors, such as competition from other media, may induce broadcasters to cover controversial issues and to present various viewpoints about them. Nevertheless, to the extent it has its own impact, the effect of the Fairness Doctrine is quite the opposite.

When the Commission debated the Fairness Doctrine in the mid-1980s, proponents denied that the doctrine had a chilling effect. As noted, the industry had provided several examples of chilling effects. Proponents of the doctrine responded that those data were excessively anecdotal and that the number of anecdotes was not impressive.[54] To

49. *Id.* at 125–26.

50. *See* Complaint by Sherwyn Heckt Concerning Fairness Doctrine, 40 F.C.C.2d 1150 (1973).

51. GELLER, *supra* note 24, at 41–42.

52. *Packwood Hearings*, *supra* note 19, at 227–28 (statement of Eugene Wilkin).

53. *Id.* at 227.

54. 1985 Fairness Doctrine Report, *supra* note 1, at 167; Patricia Aufderheide, *After the Fairness Doctrine*, 40 J. COMM., no. 3, at 47 (1990).

the more significant claim that the doctrine necessarily created a chill (and therefore the recorded instances were far fewer than the actual numbers), supporters of the doctrine responded that the Commission had concluded otherwise in its *1974 Fairness Doctrine Report*.

Red Lion accepted the Commission's assertion that the Fairness Doctrine did not in fact inhibit licensees.[55] The *1974 Fairness Doctrine Report* examined the question more seriously. Yet its "first response" was that there could be no chill because that would be "inconsistent with the broadcaster's role as a public trustee."[56] At best that response is a non sequitur. The question under discussion was not whether a chill is inconsistent with the public trustee model, but rather whether the Fairness Doctrine in fact inhibited licensees from performing their trustee obligations.

Leaving its initial assertion behind, the *1974 Fairness Doctrine Report* noted that the Commission affords wide latitude to broadcasters, that the Commission itself does not monitor for violations, and that the Commission infrequently—ninety-four times during the prior year—asked a licensee to respond to a fairness allegation.[57] The Commission expressed its disbelief that those policies would inhibit broadcasters.

Then it got to the point: "it is obvious that any form of government regulation will impose certain costs or burdens of administration on the industry affected."[58] Therefore, the Fairness Doctrine necessarily imposed costs. "The point is not whether some burden is involved, but rather whether that burden is justified by the public interest."[59]

Here, at last, the Commission understood and properly defined what was at stake. Too often both proponents and opponents of the Fairness Doctrine assume that if a chilling effect is shown, then the doctrine must fall. This is wrong. A chilling effect, by itself, does not make a law unconstitutional. Otherwise, the law of defamation would have been discarded rather than remade in the wake of *New York Times*

55. 395 U.S. at 393–94.
56. 1974 Fairness Doctrine Report, *supra* note 2, at 7 ¶ 16.
57. *Id.* at 8.
58. *Id.*
59. *Id.*

v. *Sullivan*[60] and its progeny. Even if there is a chilling effect on speech, a regulation will be sustained if its benefits outweigh the harms caused by the chill.[61]

The Commission's analysis of this issue was that, given the "public's paramount right to be informed . . . these burdens 'run with the territory.'"[62] Regrettably, having faced the issue, the Commission then ducked it. We have already seen that the Fairness Doctrine, as it existed, did not in fact operate to increase public access to information; instead, it dampened broadcasters' other incentives to cover significant issues.

In *Red Lion*, the Court suggested that if broadcasters were chilled, then the Commission had it within its power to warm them to their obligations.[63] Maybe, by following former Commissioner Johnson's admonition that the Commission "should be whipped until it does its job,"[64] the chill could be avoided by a commitment to enforce the Fairness Doctrine so thoroughly that licensees could not escape the "tax," but would be forced to "pay" it.[65] Given the proven impracticality of defining what issues must be covered,[66] however, this seems an implausible option.

Even if that hurdle could somehow be overcome, when one compares the extent of programming covered by the regulation with the resources available to the FCC, one must wonder what the Fairness Doctrine could plausibly achieve. In 1992 there were 9,555 commercial radio stations and 1,132 commercial television stations operating in the United States.[67] If, on average, each of those stations broadcast a total of sixty minutes of news a day, that would yield 10,687 hours per day of news programming that would have to conform to the Fairness

60. 376 U.S. 254 (1964).

61. L.A. Powe, Jr., *Tornillo*, 1987 SUP. CT. REV. 345, 374–80.

62. *Id.*

63. 395 U.S. at 394.

64. *Markey Hearings, supra* note 29, at 80.

65. As the Public Interest Brief, *supra* note 16, at 36 recognizes, this is difficult to do because the Fairness Doctrine "is inherently difficult to enforce."

66. See WHAR, *supra* note 17, at 987–97, the single instance where the Commission has found a broadcaster to have violated the obligation to cover controversial issues, and 1974 Fairness Doctrine Report, *supra* note 2, at 11–12 ¶¶ 29–31, as evidence of this impracticability.

67. *Broadcasting by the Numbers*, BROADCASTING & CABLE, Feb. 3, 1992, at 54.

Doctrine. That amounts to the equivalent of 46,809,060 five-minute newscasts per year nationwide.[68]

Performing this Herculean enforcement task would be the FCC, with a total budget in 1993 of $140.6 million and 1,755 employees.[69] Of course, not all of the funds or all of the employees are available to enforce the Fairness Doctrine. Among its other duties, the FCC not only manages the entire electromagnetic spectrum but also regulates all interstate telephone and telegraph service, all American communications satellites, and all the technical operations of its broadcast licensees. The Commission also has a number of immediate, pressing matters that will consume many resources. For example, the FCC is now superintending rate regulation of approximately 11,000 cable systems.[70] The Commission also recently authorized a new "personal communications service," which will require it to designate two licensees in each of ninety-four markets and five licensees in each of 487 markets.[71] Technical rules and regulations for all those new licensees also need to be drafted and implemented.

Those data do not reveal precisely how much time and resources the Commission could direct to Fairness Doctrine issues. Surely, however, they demonstrate that any enforcement scheme must select very few targets for investigation, and consequently, must operate oblivious to the kind and quality of nonnetwork informational programming generally being broadcast throughout the United States.[72]

68. Not all newscasts will be unique, for some stations will broadcast identical network programming during some or all of their news periods.

69. Telephone interview with FCC Chairman designate's office, Nov. 15, 1993.

70. Rate Regulation, MM Dkt. 92-266, at ¶ 15 n.30 (May 3, 1993).

71. New Personal Communications Services, Gen. Dkt. No. 90-314, ¶¶ 31–78 (Oct. 22, 1993).

72. James McKinney, Chief of the FCC's Mass Media Bureau, explained how the FCC actually examines fairness complaints:

> It's been said that it's not a good idea to watch how legislation or sausage is made. And I want to raise a new issue with you here today because I don't think it's very pleasant to understand how Fairness Doctrine complaints are adjudicated. But it might be interesting for you to know the process we go through here at the agency, at the lower staff level before the Commissioners get it for a final decision.
>
> We in fact sit down with tape recording, with videotapes of what is being broadcast, what has been broadcast on a specific station. We compare that to newspapers and other public statements that are made in the community. We

Further, the FCC has never had a program for systematically monitoring compliance with the Fairness Doctrine or for randomly targeting stations for investigation at the FCC's initiative.[73] If it did, the inhibiting effect of the doctrine—which the FCC in 1985 concluded was "widespread"[74]—would be greater, in much the same way that added highway patrol cars lower the speed at which motorists drive.[75]

That a rule seeks to govern many transactions or episodes does not necessarily mean it lacks bite. Consider, for example, the antitrust proscription against price fixing or the criminal law prohibition of shoplifting.

The Fairness Doctrine, however, is particularly likely to be dependent for its efficacy on the governmental resources devoted to it. Because the doctrine does not provide clear standards for distinguishing between legal and illegal conduct,[76] only the FCC can tell whether a violation occurs. For the same reason, penalties for noncompliance are not severe. The Commission could scarcely justify revoking a license

> try to make a decision as to whether the issue is controversial and whether it is of public importance in that community which may be two thousand miles away. And when it comes down to the final analysis, we take out stopwatches and we start counting seconds and minutes that are devoted to one issue compared to seconds and minutes devoted to the other side of that issue. All of that is done by people here in Washington who work for me, who may have never been a journalist in their life, many of whom are attorneys. But in the final analysis we start giving our judgment as to what words mean in the context of what was said on the air, what was the twist that was given that specific statement or that commercial advertisement, was it really pro-nuclear power or was it pro some other associated issue. Given that kind of governmental review, does that change anyone's mind as to the chilling effect of having government involved in the process?

James McKinney, Remarks at F.C.C. Fairness Doctrine Hearings (Feb. 8, 1985). A slightly shorter version appears at 1985 Fairness Doctrine Report, *supra* note 1, at 191 n.174.

73. 1974 Fairness Doctrine Report, *supra* note 2, at 8 ¶ 19: "As a matter of general procedure, [the Commission does] not monitor broadcasts for possible violations, but act[s] on the basis of complaints received from interested citizens."

74. 1985 Fairness Doctrine Report, *supra* note 1, at 169 n.97.

75. Curiously, the 1974 Fairness Doctrine Report, *supra* note 2, at 8 ¶ 19, asserts that the facts that the Commission examines very few broadcasts and does no systematic monitoring or targeting for compliance review were reasons to retain the rule. The position seems to be that the Fairness Doctrine was an acceptable regulation because it did not noticeably affect licensees.

76. *Id.* at 183 n.145.

for conduct that was not clearly illegal when undertaken. Indeed, only repeated violations will result in nonrenewal.[77] Further, no private enforcement of the Fairness Doctrine is authorized. It is here, however, that proponents have claimed their greatest successes.[78] Often these involve ballot issues where one side (typically supported by some business) is able to outspend the other. In those circumstances, local groups on the other side have been able to gain free access for themselves (which need not have been the broadcaster's response) and their positions (sometimes, indeed, after spending all their money on the print media).[79] Other "successes" are far more problematic. Thus, some of the doctrine's stronger supporters have taken pride in being able to use a threat of going to the FCC as a means of discouraging broadcasters from airing specific controversial programs.[80]

Those factors suggest either that only repeated, egregious violations of the doctrine by an especially visible licensee are likely to result in substantial penalties or that, perversely, the doctrine is useful only as a tool to silence broadcasters and is in fact welcomed by its proponents for that reason. Taking the doctrine seriously, we can see why it cannot work well.

To revert to our previous analogies, proscriptions against price fixing and shoplifting do not in themselves generate incentives to avoid the purposes the rules seek to promote—incentives that thereby increase the difficulty of enforcement. The Fairness Doctrine gives licensees a substantial incentive to avoid its purpose of informing the public about controversial issues. A prohibition on shoplifting does not make stealing merchandise more attractive.

An assessment of the effects and costs of the Fairness Doctrine paints a gloomy portrait indeed. For control by market forces the doctrine substitutes governmental control over programming, largely to attain the end of avoiding the appearance of one-sided presentations. The principal effect of the regulation is to reduce stations' incentives to broadcast controversy over public issues. This effect, ironically and

77. *See infra* text accompanying notes 112–18; 1985 Fairness Doctrine Report, *supra* note 1, at 163 n.75.

78. ROWAN, *supra* note 23, at 71–88; Aufderheide, *supra* note 54.

79. *Id.* at 81.

80. 1985 Fairness Doctrine Report, *supra* note 1 ¶ 49, at 176–77.

thankfully, is mitigated by the FCC's apparent inability, given its limited resources, to enforce the doctrine except randomly or against the most visible broadcasters.[81]

We have yet to discover a defense of the Fairness Doctrine that takes account of its practical effects or its costs. Were such a defense attempted, however, it would only begin the analysis, not end it, for the question would remain whether a more practical and effective method is available to achieve the goals of the Fairness Doctrine. In failing to consider whether preferable alternatives exist, proponents of the Fairness Doctrine commit a third error.

Overlooking Alternatives

Competition among broadcasters for viewers' time and attention is at least as likely as enforcement of a fairness doctrine to serve the laudable public interests for which the doctrine was developed.[82]

81. The FCC has been quite proud of its limited enforcement role. The 1974 Fairness Doctrine Report, *supra* note 2, pointedly noted: "Thus broadcasters are not burdened with the task of answering idle or capricious complaints. By way of illustration, the Commission received some 2400 fairness complaints in fiscal 1973, only 94 of which were forwarded to licensees for their comments." *Id.* at 8 ¶ 19. Only seven of those resulted in findings of violations. As then-Commissioner Glen Robinson observed two years later, the small number of adverse findings can only be the result of three things: astonishing fairness, remarkably ineffective enforcement, or a standard of licensee discretion so broad that almost anything will stand (and he seriously doubted the first). The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Memorandum Opinion and Order on Reconsideration of the Fairness Report, 58 F.C.C.2d 691, 710 (1976) (Commissioner Robinson, dissenting).

82. There have been two major alternatives to the Fairness Doctrine considered over the past decade. One is some form of open access and the other is Henry Geller's suggestion that the licensee be required to list every year ten major issues that it covered. Like the FCC, we believe that neither is particularly apt for obtaining either lively debate or coverage of important issues.

Access proposals in one form or another have been made since *Red Lion*. While we see much that is desirable in a station's adopting an access policy, nothing in any of the proposals ensures that any particular issues will be covered. Although the example seems unbelievable on its face, a San Francisco station with an access policy received but three access messages relating to Watergate or the impeachment controversy between December 1972 and Richard Nixon's resignation. The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 74 F.C.C.2d 163, 174 ¶ 31 (1979). We cannot guarantee that a station would use its own time better than that time would be used if delegated to others, but the likelihood of

Unless radio and television are unique among all media of mass communications, the evidence that competition will work satisfactorily is overwhelming. Sometimes presentations in other media provide balanced coverage of all sides of controversial issues. Other times they do not. In all cases, however, the satisfactory answer has been, and continues to be, to rely on competition within and across media and on the informed judgment of audiences to produce the full story.

For example, no regulation required that the film *The China Syndrome* adequately portray all views on the risks of meltdowns in nuclear power plants. No law required that the *Washington Post* fully cover the election of members of the District of Columbia convention to draft a state constitution. No federal rule provided that the publishers of Richard Nixon's memoirs, *RN*, include a balanced summary of George McGovern's campaign platform. No government agency saw to it that rebuttals be delivered on behalf of individuals parodied in Gilbert and Sullivan operettas. Those and countless other flagrant "violations" of the "Fairness Doctrine" did not go unnoticed,[83] but neither were they occasions for imposing a fairness obligation on these other media. Films, newspapers, books, live theater—and all other media except radio and television—flourish under a regime that eschews governmental assurance of fairness for the results generated by popular choice among competing voices.

Nor is there any reason to believe that radio and television are unique in any relevant way. Neither has any peculiar ability to distort information. Neither is peculiarly sheltered from competition with other media.[84] While some advocates claim that television is "such a

better use by the station, which is, after all, in the programming business, is quite high.

Geller's ten-issue proposal calls for a *post hoc* determination by each station of what were the ten most significant issues it covered during the prior year and a listing of representative programming on those issues as well as the partisan spokespersons who addressed them. The proposal is a wonderful opportunity for complainants to second-guess the station as having covered the wrong issues or the right issues with the wrong people. The FCC rejected the proposal as little more than an additional paperwork requirement. *Id.* at 179. The analysis appears apt.

83. *See, e.g.*, Philip Schrag, *By the People: The Political Dynamics of a Constitutional Convention*, 72 GEO. L.J. 819, 848 (1984) (noting that the *Washington Post* carried but a single story on the campaign for delegates to the D.C. constitutional convention).

84. Thus, an NBC "Dateline" program on the hazards of GM trucks that withheld information about both crash speed and the network's use of incendiary devices was

dominant information source that there are no other realistic alternatives," the FCC wisely rejected the argument because it is a religious, not a factual, claim.[85] If there are no realistic alternatives to television, then thousands of radio stations, magazines, and newspapers would be bankrupt instead of flourishing.

It might also be contended that the three dominant television networks are effectively protected against competition from other television sources. That was true in the past,[86] but it is hardly so now and will be less so in the future. Furthermore, the previous dominance of the ABC, CBS, and NBC networks derived from a series of governmental regulations, many of which have been reversed, that rest on no enduring public interest policy.[87] Thus, if television network concentration is the rationale for the Fairness Doctrine, no public policies have been disserved by the Commission's decisions in the 1980s to deconcentrate networking rather than to continue the Fairness Doctrine.

Finally, competition as a method of achieving fairness comports more squarely with the policies underlying the First Amendment. The Supreme Court explained it in a nonbroadcast context:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise

exposed in all other media (as well as by threat of libel). Doron P. Levin, *In Suit, G.M. Accuses NBC of Rigging Crash Tests*, N.Y. TIMES, Feb. 9, 1993, at B6.

85. 1985 Fairness Doctrine Report, *supra* note 1, at 199 ¶ 87.

86. STANLEY M. BESEN, THOMAS G. KRATTENMAKER, A. RICHARD METZGER, JR. & JOHN R. WOODBURY, MISREGULATING TELEVISION: NETWORK DOMINANCE AND THE FCC 4–17 (University of Chicago Press 1984) (pointing to entry barriers imposed by governmental regulation as protecting network dominance).

87. *Id.* at 168–73 (criticizing present regulatory policies as harmful); Stanley M. Besen & Thomas G. Krattenmaker, *Regulating Network Television*, REGULATION, May/June 1981, at 27–34 (characterizing FCC policies as "misregulation" and concluding that "the FCC spent over thirty years adopting doubtful solutions based on dubious premises").

> of individual dignity and choice upon which our political system rests.[88]

We fail to see how proponents of the Fairness Doctrine can square their position with this view of the policies underlying the First Amendment.

The Net Effects

A mathematical calculation of the costs and benefits of the Fairness Doctrine is not feasible. Rudimentary figures for such an exercise, including the average amounts of news coverage or broadcast time in various media and the costs of different methods of news gathering and disseminating, are not routinely available. Such a calculation, in any event, probably would be beside the point. The articulated purpose of the doctrine is to produce a quality of reporting—balanced and fair—that is not quantifiable and whose beneficial effects are subtle and occur over very long periods of time.

This should not preclude, however, a generalized assessment of the utility of the Fairness Doctrine as a tool for regulating radio and television. When one considers critically the probable effects of the doctrine, its public and private costs, and the results that can be achieved by relying on alternative and cost-free techniques, the doctrine's principal net effects appear to be: (1) to foist upon broadcast licensees the FCC's view of what are significant public issues and what are important positions on those issues; and (2) to reduce incentives among broadcasters to compete for listeners' and viewers' attention by offering programs that address controversial issues. To the extent that those effects are not realized, this is due to the facts that (1) systematic monitoring of compliance with the Fairness Doctrine is impossible, given the relative size of the industry and resources of the agency; and (2) competition among broadcasters and with other media for the public's attention and trust are likely to force broadcasters to cover many sides of significant public issues.

88. Cohen *v.* California, 403 U.S. 15, 24 (1971).

At best, then, it is difficult to grasp how anyone who shares the goals purportedly sought by the Fairness Doctrine can argue that society is better off with it than without it. To the extent that proponents' arguments are based on the use of the doctrine to silence debate,[89] the goal itself violates the First Amendment as well as any conceivable concept of the public interest. As Dean Geoffrey Stone writes:

> Even a cursory glance at the difference between broadcast and print journalism reveals the impact of government regulation. By comparison with the unregulated media, broadcasting is bland, cautious, and studiously nonpolitical. Broadcasters do not endorse political candidates and they do not stake out controversial positions on issues of public importance. There can be no doubt that these differences are due in part to the effects of regulation. Directly and indirectly, government regulation makes broadcasters less willing to participate vigorously in public debate.[90]

Doctrinal Incoherence

Those who remain unpersuaded that the Fairness Doctrine is an ill-advised—indeed, probably counterproductive—regulatory policy necessarily must agree that the doctrine, if it is to work successfully, requires the government to walk a tightrope in defining that which does and does not violate the rule. If, to avoid excessive self-censorship, the doctrine applies too loosely or infrequently, it will not achieve reasonable balance. Conversely, if the Fairness Doctrine tightly constricts all programming that might plausibly touch upon a controversial topic, it will unduly stifle creativity and generate excessively bland programs. The FCC, in these circumstances, is much like Goldilocks rummaging around the home of the Three Bears. The Fairness

89. There seems little doubt that for some people, at some times, this is the goal. *See* 1985 Fairness Doctrine Report, *supra* note 1, at 176–77.

90. Geoffrey Stone, *Imagining a Free Press*, 90 MICH. L. REV. 1246, 1259 (1992). For a similar analysis from an industry insider, see the statement of NBC reporter Bill Monroe, *supra* note 19.

Doctrine cannot be too hot, too big, or too hard. Nor can it be too cold, too small, or too soft. It must be just right.

Leading Cases

Avoiding this predicament is impossible, and escaping it has proved no easier task. While attempting to get the Fairness Doctrine just right, the FCC and the federal courts have shown it to be, in fact, an incoherent legal principle. Four cases, discussed below, starkly reveal the incoherence. Three of them are the major fairness cases of the 1970s, with each resulting in an opinion by the District of Columbia Circuit. The other ended at the FCC. Although arguments can be made against illustration by example, we believe that the problems of fairness enforcement illustrated in these cases are inherent in the doctrine.[91] We further believe that if the Fairness Doctrine cannot solve these cases, proponents of the doctrine bear a very heavy burden of explaining just what cases it can handle and why they are sufficiently important to justify the costs of the doctrine.

The ASCEF Case.[92] In the mid-1970s, the American Security Council Education Foundation (ASCEF) presented the FCC with a study of CBS News's handling of "national security issues." Using four subtopics—Vietnam, American military and foreign affairs, Soviet military and foreign policy, and Chinese military and foreign policy—as aspects of the overarching national security umbrella, ASCEF charged that CBS had violated the Fairness Doctrine by presenting stories that either supported the then-current perception that the Soviet threat was well met by American military preparations or by presenting information suggesting that the Soviet threat was less serious than the Nixon administration perceived and that the United States should decrease its national security efforts.

91. ROWAN, *supra* note 23, contains a fuller discussion of the entire range of Fairness Doctrine cases.

92. American Sec. Council Educ. Found. *v.* CBS, 63 F.C.C.2d 366 (1977), *aff'd en banc sub nom.* American Sec. Council Educ. Found. *v.* FCC, 607 F.2d 438 (D.C. Cir. 1979). An excellent discussion of the complaint, before any FCC action, appears in FRED FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT 167–91 (Random House 1975).

All but ignored, ASCEF alleged, was information suggesting that the Soviet threat was consistently greater than perceived and should be countered by increasing American military spending. Essentially, what ASCEF charged was that on the most important issue of the time—war and peace—one television network was systematically feeding its viewers a distorted and unfair picture over the range of issues encompassing national security.

The FCC declined to hold a hearing on the issue. It dismissed ASCEF's complaint for failure to present a particular, well-defined issue as the Fairness Doctrine requires. The D.C. Circuit, sitting *en banc*, affirmed on precisely the same ground.[93] Even if the complaint were correct, the court held, the complainant has a duty to present a sufficiently manageable issue to the Commission for determination. Here, the majority concluded, the issue was too big and too amorphous. Three dissenters found that conclusion ridiculous. The issue "was plain as day: whether this nation should do more, less, or the same about perceived threats to its national security."[94] If the charge by ASCEF was accurate, then CBS's overly dovish position constituted a massive fairness violation. Yet, in response, the majority ducked the hard questions, "instead carving an ill-defined safe harbor into which the Commission may sail when the waters are rough."[95]

Like Papa Bear's bed, the issue ASCEF presented was too big and too hard for the Fairness Doctrine.

The Private Pilots Case.[96] In late 1969, "NBC Nightly News" carried a three-part story on air traffic safety. One of the segments contained an interview with a private pilot who had circled Shea Stadium during a World Series game. That same segment contained a longer interview with a senior airline pilot, a family man with years of experience flying, who authoritatively stated that the greatest danger in commercial aviation came from private pilots. The NBC reporter twice

93. American Sec. Council Educ. Found. *v.* FCC, 607 F.2d 438, 448 (D.C. Cir. 1979) (*en banc*).

94. *Id.* at 467 (Wilkey, J., dissenting, joined by MacKinnon and Robb, JJ.) (emphasis omitted).

95. *Id.* at 463 (Wilkey, J., dissenting).

96. Petition by National Broadcasting Co. for Reconsideration of Ruling Concerning Fairness Doctrine re Aircraft Owners and Pilots Associations, 25 F.C.C.2d 735 (1970).

stated that the private pilots were a danger in the crowded air around major airports. Thus, it was difficult to escape the conclusion that, correctly or not, private pilots had been attacked. Their trade association unsuccessfully contended that the Fairness Doctrine had been violated.

The Commission agreed with NBC that the programs had been about air traffic. Problems relating to private pilots and the hazards they might create constituted a subissue. Thus, the case was the opposite of the ASCEF case.

In the "private pilots" case, the pilots lost because their issue, even if controversial, was, like Baby Bear's chair, too small.

The Pensions Case.[97] How about a case that, like Baby Bear's porridge, is just right? That was NBC's Peabody Award–winning broadcast, "Pensions: The Broken Promise."

The program was a wonderful hour of prime time muckraking that focused on private pension plans in the era immediately before federal regulation. Although the moderator, Edwin Newman, made an obligatory bow to the fact that not all private pension programs had faults, the dominant theme of the program was that a great many employees who were anticipating a nice pension in retirement would find that they had none. Case history after case history was examined, focusing on such issues as bankruptcy, nonvesting pensions, and inadequate set-asides. Newman said in conclusion, "The situation, as we've seen it, is deplorable."[98]

Accuracy in Media thought NBC had done a hatchet job on private pensions. One need not be an ideological critic to note that the muckraking style of the program was designed to show a serious problem without wasting time on those pension plans that were in good shape.

NBC's lawyers handled the problem by belittling the program's purposes and achievements. Instead of "Pensions: The Broken Promise," the lawyers characterized it as "Pensions: Some Broken Promises," a program about the rather mundane topic of "some of the

97. Complaint of Accuracy in Media, Inc., Against National Broadcasting Co., 44 F.C.C.2d 1027 (1973), *rev'd sub nom.* NBC *v.* FCC, 516 F.2d 1101 (D.C. Cir. 1974).
98. *Id.* at 1039.

problems involved in some private pension plans."[99] To the rejoinder that they were not describing the program that NBC aired or one that would win a Peabody, the lawyers responded that NBC's characterization to the Commission had to be accepted unless it was unreasonable. The Commission quite sensibly found the lawyers' newly minted characterization preposterous. Like Goldilocks after tasting Baby Bear's porridge, the FCC pronounced the Accuracy in Media complaint to be just right. NBC had violated the Fairness Doctrine.[100]

NBC's appeal to the D.C. Circuit presented several arguments. It repeated the claim that its own characterization was binding because it was reasonable and also asserted that a holding against NBC would signal the end of muckraking documentaries. Indeed, such a holding would be a clear warning to all broadcasters to shy away from anything that spelled controversy. As David Brinkley asked in his affidavit, would a program on shoddy highway construction have to devote a reasonable amount of its time to treating the viewers to a visual display of properly constructed roads?[101]

What the "pensions" case taught was that the Fairness Doctrine and aggressive broadcast journalism could not mix, and one would have to give way. The three-judge panel appeared to understand that and reversed the Commission, but on the highly questionable ground that the FCC should have given greater deference to NBC's belittling characterization of its program.[102]

As soon as that conclusion was announced, however, the full court voted to hear the case *en banc*.[103] Apparently unable to agree on what to do some three years after the program aired, the court then returned the appeal to the original panel with a suggestion that the recently enacted federal pension reform laws had mooted the case.[104] The original panel then sent it back to the FCC with a like suggestion, and the case vanished.[105]

99. *Id.* at 1027.
100. *Id.* at 1039.
101. NBC *v.* FCC, 516 F.2d at 1124 n.76.
102. *Id.* at 1125, 1132–33.
103. *Id.* at 1155.
104. *Id.* at 1156.
105. *Id.* at 1180.

The porridge had gone cold. And muckraking documentaries died anyway.

What is one to make of a Fairness Doctrine—designed to protect "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences"[106]—that does not apply to unbalanced reporting about American military strength, air traffic safety, and pension fund security? One might be tempted to conclude that the doctrine has been effectively abrogated by those decisions. Such a conclusion, however, would be wrong. The Commission and the courts occasionally do agree that a case is just right.

The WXUR Case. Consider the controversy over the Reverend Carl McIntire's broadcasts. By the mid-1960s, when he purchased station WXUR, McIntire, whose program aired on hundreds of radio stations across the nation, was a superstar in the group of highly controversial right-wing radio ministers.[107] The transfer of the license was opposed by mainstream civic and religious groups in the Philadelphia area who were concerned about having a station in the area controlled by such a man. The Commission granted the transfer application, but took the unusual step of warning McIntire about the obligations of the Fairness Doctrine, which his statement of proposed programming naturally had promised to satisfy.[108]

When challenged by the same groups again at renewal, McIntire was forced to a hearing. "At the heart"[109] of the proceeding was the Fairness Doctrine. McIntire had been violating it and the personal attack rules in the same way that other stations ran commercials or played Beatles records—he did it as a matter of course without even thinking about it. Monitoring by both the Broadcast Bureau of the FCC and complaining groups provided proof that would convict in any capital case. The principal offending show, entitled "Freedom of

106. *Red Lion*, 395 U.S. at 390.

107. FRIENDLY, *supra* note 92, at 7.

108. George E. Borst, 4 Rad. Reg.2d (P & F) 697, 700 (1965).

109. Application of Brandywine-Main Line Radio, for Renewal of Licenses of Stations WXUR and WXUR-FM, Dkt. No. 17141, 24 F.C.C.2d 18, 21 (1970) [hereinafter Brandywine].

Speech," was hosted by Tom Livezey, a man described by former CBS News President Fred Friendly as possessing a "special talent for attracting those citizens of the City of Brotherly Love who stayed up late worrying about Jews, blacks, radicals, and Billy Graham."[110] What follows will allow one to get a gist of the program:

> CALLER: About this B'nai B'rith Anti-Defamation League . . . why don't they get upset at all this smut and filth that's going through the mails?
>
> LIVEZEY: And who do you think is behind all this obscenity that daily floods our mails, my dear?
>
> CALLER: Well, frankly, Tom, I think it is the Jewish people.
>
> LIVEZEY: You bet your life it is.[111]

Amazingly, the hearing examiner ruled for WXUR. In a conclusion a bit too neat and a bit too cute, he in part excused the violations on the ground that WXUR put out so much controversial programming while the station was short on staff that it was impossible to keep up with all the violations.[112] His other justification was more interesting. No one could deny that WXUR was meeting one of the asserted purposes of the Fairness Doctrine, the presentation of controversial programming. Few stations—and none owned by CBS, NBC, ABC, or the *Washington Post*—could come close. And as for balance, the hearing examiner held that anyone wishing to hear the other side of the issues presented on WXUR could do so with ease; in the Philadelphia area other viewpoints were available on other stations, and no listener need be uninformed. But with the silencing of McIntire that would no longer be the case. Before his purchase of WXUR, McIntire's type of voice was unavailable in Philadelphia, and it would become so again if the FCC ruled against him. Denying WXUR renewal thus would

110. FRIENDLY, *supra* note 92, at 80.

111. *Id.* at 81.

112. *Brandywine*, 24 F.C.C.2d at 42, 53, 70, 71, 135, 138–39 (initial decision of hearing examiner; lack of attention to personal attacks deemed "less reprehensible" owing to shortage of staff), *aff'd*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973).

serve none of the affirmative purposes of the Fairness Doctrine. Instead, it would reduce both the amount of controversy and the range of available opinions on the air in Philadelphia.[113]

Nice try, but legally irrelevant, held the FCC.[114] Once Fairness Doctrine violations of such magnitude are found, it held that the excuses provided by the hearing examiner are entitled to no weight. The station was a rogue, and death was the only appropriate sanction.

By the luck of the draw, on appeal McIntire got the most favorable conceivable panel of the D.C. Circuit, one including both Chief Judge David Bazelon and Judge Skelly Wright. But it was to no avail. The third member, Judge Edward Tamm, agreed with everything the Commission said.[115] Wright ignored what the Commission said was the "heart" of the matter and instead relied on McIntire's breach of his promise to obey the Fairness Doctrine rather than on his violations of the Fairness Doctrine, as if somehow that was a distinction of substance.[116] Bazelon authored a rare dissent, against application of the doctrine, but it was just that—a dissent.[117] It was not even enough to pick up the necessary four votes for Supreme Court review by certiorari. Justice William O. Douglas wished to hear the case, but no one else did.[118]

113. *Brandywine*, 24 F.C.C.2d at 138–39 (initial decision of hearing examiner); *see also* Brandywine–Main Line Radio, Inc. *v.* FCC, 473 F.2d 16, 68–70 & n.30 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) (FCC's strict rendering of fairness requirements deprives radio audience of "robust debate on innumerable controversies" and will have chilling effect on other broadcasters) (citing *Brandywine*, *supra* note 109, at 42, 134). McIntire's own radio program had been canceled by its only Philadelphia outlet before his purchase of WXUR, and he believed his viewpoint was not available in the market. 473 F.2d at 44–45. There was no indication in the record that in the time McIntire operated WXUR another equivalent substitute entered the market.

114. *Brandywine*, 24 F.C.C.2d at 18, 27, 33 (failure to comply with requirements of Fairness Doctrine not excusable because of size of staff or availability of alternative outlet for airing controversial views).

115. Brandywine–Main Line Radio, Inc. *v.* FCC, 473 F.2d at 60–61 (finding "no justification for upsetting a sanction so well substantiated by the record and findings of the Commission").

116. *Id.* at 62–63 (Wright, J., concurring) (concurrence based on licensee's deceptive promise to Commission to comply and subsequent treatment of public license as if "it were private property nonencumbered by public obligations").

117. *Id.* at 63–80 (Bazelon, C.J., dissenting).

118. Brandywine–Main Line Radio, Inc. *v.* FCC, 412 U.S. 922 (1973) (Douglas, J., dissenting from denial of certiorari).

Unanswered Questions

The McIntire episode thus demonstrates that the Fairness Doctrine has some content. The four examples collectively, however, show that the content is incoherent. By what system of logic or intuition could one predict that a bevy of commissioners and judges setting out to protect the public's right to hear all sides of controversial issues would find that, of those four broadcasters, WXUR and only WXUR presented a target worthy of their firepower?

Opponents of the Fairness Doctrine can easily describe how the cases discussed above should have been handled. The results in the network cases were correct—although not for the reasons given—because of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[119] And, so long as radios have dials, the McIntire case was wrongly decided.

Proponents of the Fairness Doctrine have to explain either how the outcomes in those cases can be reconciled satisfactorily or how a differently administered doctrine could yield coherent results in those cases. The most obvious ground for reconciling the actual results is that television network programming is *exempt* from the doctrine. Does any Fairness Doctrine supporter believe in this principle? To us, this principle, which does explain the leading cases, seems irreconcilable with the theoretical assertion of some proponents that television must be subject to the doctrine because there is no realistic substitute for televised information.[120] Once again, professed supporters of the Fairness Doctrine appear to be supporting a doctrine that exists only in their imaginations, not the doctrine employed in fact during its heyday.

If proponents mean to defend a doctrine that might exist, but never has existed, our best guess is that they believe all three network cases were wrongly decided. Any lesser claim would still leave a toothless and incoherent doctrine.

Yet, if the network cases were wrongly decided, the doctrine's proponents still must answer several questions. What if the network

119. New York Times Co. *v.* Sullivan, 376 U.S. 254, 270 (1964).
120. 1985 Fairness Doctrine Report, *supra* note 1, at 199 ¶ 87.

contends, as did NBC in the "private pilots" case, that the program was true and the asserted opposing viewpoint false? Would it have been sufficient, as the FCC argued in the "pensions" case, for NBC to provide time on its early morning program, "Today," for views opposing the dominant theme of "Pensions: The Broken Promise," a prime time "documentary"?[121] If the passage of pension reform legislation mooted the "pensions" case, did the coverage of the Russian invasion of Afghanistan, the candidacy of Ronald Reagan, or the deployment of Pershing missiles in Europe moot the ASCEF complaint, which centered on events occurring from 1972 to 1973?

These are serious questions that strike at the heart of the issue of whether the Fairness Doctrine has, or could have, any intelligible content. For those who have cheered the doctrine's demise, it would be specious to try to answer those questions. But it is not unfair to ask. If the Fairness Doctrine is to be revived, surely those who would choose to retain the rule owe an obligation to explain what it is and how it can work in fact.

We believe the cases demonstrate an inherent dilemma in the Fairness Doctrine. If the doctrine is to be taken seriously, then suspected violations lurk everywhere, and the FCC should undertake a more consistent monitoring of what is aired. If the FCC will not—or cannot—do that, then the doctrine must be toothless except for the randomly selected few who are surprised to feel its bite after the fact. Furthermore, as the McIntire facts demonstrate, it is likely that the egregious cases where enforcement will occur will continue to involve stations that air significantly more controversial programming than the average. Thus, the doctrine will be enforced against those who best serve one of the stated purposes of the Fairness Doctrine: broadcasting controversial programming.

Dean Bollinger's Theory

Because the Fairness Doctrine is at war with controversy and diversity, we have asked, why retain it? Specifically, about a decade ago, at the time the Commission was considering repeal, we issued a challenge to

121. FRIENDLY, *supra* note 92, at 156.

proponents of the doctrine to explain the four cases discussed above.[122] It did not surprise us that no one rushed to respond. Fairness Doctrine proponents are typically more activist than academic in approach, and the action is in Washington, not in legal journals. Additionally, there could be some reluctance to admit that if the doctrine is incoherent, then violations lurk everywhere and more ambitious oversight of the industry is necessary.

One broadcast scholar, Michigan Law School Dean Lee Bollinger, did respond to our challenge. Interestingly, he seemingly accepts our characterization of the cases: "a number of highly controverted decisions, with Commissioners and judges disagreeing about various aspects of the doctrine, unable to give convincing reasons for their views, and frequently reversing themselves over time."[123] Yet he believes that the Fairness Doctrine should be reinstated.

To understand those seemingly inconsistent positions, one has to understand something more of Bollinger's theory. As noted in Chapter 8, Bollinger favors public interest regulation of broadcasting, even if there is no difference between broadcasting and print; indeed, he favors regulation because he believes that there is no difference between the two. With print, court decisions will emphasize freedom. With broadcasting, court decisions will concentrate on accuracy, fairness, and balance. Above each is the importance of an informed citizenry. Bollinger believes that the nation needs "a general exploration of the biases in public thinking."[124] Rather than turn to the social sciences for such studies, Bollinger, who has an all but mystical faith in the ability of federal judges to comprehend everything that might come before them,[125] places the duty of exploration squarely on the Supreme Court. Those premises are essential to his views of the Fairness Doctrine.

Bollinger advances three arguments for his conclusion that the Fairness Doctrine should be reinstated. First, the doctrine is no more

122. Krattenmaker & Powe, *supra* note 1, at 175.

123. LEE BOLLINGER, IMAGES OF A FREE PRESS 122 (University of Chicago Press 1991).

124. *Id.* at 81.

125. Stone, *supra* note 90, at 1253–54: "Bollinger credits the Court with too much vision and too much subtlety . . . . Bollinger's problem is that he thinks the Court is as wise as he is. It is not."

incoherent than any other First Amendment area; he offers libel as an example. Second, the Fairness Doctrine, "which is really a very young idea,"[126] needs more time to develop. Thus, the cases discussed, even if convoluted, "seem like admirable first efforts aimed at developing more sophisticated notions about what actually happens in discussions about public issues."[127] Third, the chilling effect may well be overemphasized, because it rests too much on the self-serving testimony of broadcasters. Thus, a blue-ribbon panel should study the industry, much as the Hutchins Commission studied the media fifty years ago.[128] In the process it should look not only for the chill but also for "instances in which the doctrine influences compliance" without the need for legal recourse.[129]

We think the latter reason for reinstatement of the Fairness Doctrine is inherently weak. We would welcome a new Hutchins Commission and, like Dean Geoffrey Stone, we feel Bollinger would be the appropriate chair.[130] But saying there may be unexplored benefits is not the same as identifying them. Bollinger has been writing in the area for almost two decades and thus far has offered no evidence that there are such unexplored benefits. Quite frankly, we doubt their existence and further doubt that they would outweigh the costs of the doctrine. A call for study should not persuade us to reinstate a failed policy.[131] Although the evidence about how the doctrine works is now a decade older, it nevertheless exists. Nor do we need a blue-ribbon panel to tell us that the sky has not fallen since the doctrine was repealed.

126. BOLLINGER, *supra* note 123, at 84.

127. *Id.* at 123.

128. The Hutchins Commission, discussed *id.* at 27–34, is placed in historical perspective in a 1991 study by Powe. LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 235–36 (University of California Press 1991).

129. BOLLINGER, *supra* note 123, at 126.

130. Stone, *supra* note 90, at 1266.

131. Stone notes in his disagreement with Bollinger's theory of partial regulation of the media that "it is no answer to say: 'We'll compromise by inflicting the restrictions on only some speakers.' We have never permitted such experimentation, such self-indulgence of our 'ambivalence,' when considering the constitutionality of significant and discriminatory restrictions on free expression. There is no reason to begin here." *Id.* at 1258.

Bollinger's second reason for reinstatement, allowing the doctrine to develop over time, fits neatly with his own theory of broadcasting and the judicial function. When he talks of the benefits of the doctrine, of what it is capable of bringing,[132] he is using a broader conception of benefit than we have used. He includes the benefits judges acquire in learning how information is received and its impact on the audience[133] because this assists them in fulfilling Bollinger's mandate to lead a general exploration of the biases in public thinking.[134] Thus, when Bollinger writes that "we really need to know, and do not know yet . . . what benefits we may hope to derive from regulations such as the fairness doctrine, and the extent to which that hope is realized in practice,"[135] he is making the doctrine serve a broader agenda than the stated purposes of the doctrine itself. This may qualify as a benefit for Bollinger, but, leaving aside the problems with his theory, until adopted by some democratically accountable body, it need not be considered by those evaluating the costs and benefits of the Fairness Doctrine as it existed.

Finally, Bollinger's libel analogy seems apt. *New York Times* v. *Sullivan* carried with it the promise to balance successfully the interests of reputation against the chilling effect that civil liability imposes on the press. Yet over the years, that promise has been lost. Like the Holy Roman Empire, which many have observed was neither holy, Roman, nor an empire, the constitutional rules of libel protect neither reputation, the press, nor the public interest in receiving accurate information.[136] Because defense attorneys do so well, winning most of the time and getting paid handsomely all the time, and because there is no organized plaintiff's bar, libel is unlikely to be reformed,[137] even though virtually all scholarship points to such a need.[138] Thus, libel

132. BOLLINGER, *supra* note 123, at 124.

133. *Id.* at 84.

134. *Id.* at 81.

135. *Id.* at 126.

136. L.A. Powe, Jr., *Mass Communications and the First Amendment: An Overview*, 55 LAW & CONTEMP. PROBS. 53, 60 (1992).

137. David Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487 (1991).

138. See, for example, the collection of essays in REFORMING LIBEL LAW (John Soloski & Randall P. Bezanson eds., Guilford Press 1992).

hardly stands out as an area to be praised. To the extent the Fairness Doctrine is perceived as creating similar judicial tasks, we should be thankful yet another time that the Fairness Doctrine has been repealed.

Conclusion

As the FCC considered repeal of the Fairness Doctrine, positions on each side of the debate seemed to harden. In the early 1980s, we put forth a shorter version of the critique contained in this chapter. Our critics asserted that the Fairness Doctrine worked well enough and could be even better with more administrative enthusiasm. They asked what we thought would happen after repeal and were, not surprisingly, dissatisfied with our response that we did not know. They felt they knew. Broadcasting would change for the worse.

Seven years after repeal, we still await the harm. We are unaware of any public complaints that there are existing Fairness Doctrine abuses. The biggest public flap, that an NBC News "Dateline" program on GM trucks withheld significant information, demonstrated a lack of journalistic ethics. But, for all NBC's failings in the matter, not one of them was a Fairness Doctrine violation. The legal problems with the program went to the laws of libel and product disparagement, not to those of balanced coverage (which the program admittedly met).

We think that the hearings Congressman Edward Markey chaired four years after the Commission abandoned the doctrine—hearings clearly designed to provide a forum for critics of the Commission's various deregulatory policies—would have unearthed any abuses. Appearing at the hearings, the president of the National Association of Broadcasters, in prepared remarks, noted that no one had come forth with any broadcaster Fairness Doctrine abuses since repeal.

Only one witness at the hearings suggested the contrary. Bishop Anthony Bosco, representing the United States Catholic Conference, noted that without a Fairness Doctrine, strange things happen.[139] In Chicago, the Catholic Church purchased airtime on CBS radio's WBBM for a series of Lenten announcements on brotherhood and racial harmony. The New York office of CBS canceled the series, not

139. Statement of Bishop Anthony G. Bosco, *Markey Hearings, supra* note 29, at 205.

because of the messages, but because the church holds controversial positions on abortion and the ordination of women. Bishop Bosco contrasted that with Ted Turner's determination in airing a proabortion program on WTBS, even though it would lose money.

CBS was wrong and Turner right,[140] and that is not fair. The legal problem, however, is that in neither situation was the Fairness Doctrine implicated. But Bishop Bosco, like some other proponents, confused form with substance. Because the first name of the doctrine is Fairness, he concluded that it covered anything that was unfair. It never did and never could. Thus, at those hearings, the only stated instance of a problem stemming from the repeal of the Fairness Doctrine was instead an example of the speaker, like some other Fairness Doctrine advocates, mischaracterizing the doctrine and thinking that it could rectify a situation to which it did not apply.

We do not believe Goldilocks would have stayed in the Three Bears' house for over forty years had she always found the porridge, chairs, and beds too hot or too cold, too big or too small, too hard or too soft. Fortunately, the FCC also reached a similar conclusion, finding the Fairness Doctrine an ill-advised and inefficacious regulatory policy. Honoring the journalistic ethic of thorough and balanced coverage is a noble goal. Legislating and enforcing such behavior, however, is at best a meaningless and futile gesture, at worst a counterproductive and unconstitutional act. If every generation nevertheless must indulge itself in one such gesture, it would be far better to bring back the 1962 Mets than to revive the Fairness Doctrine.

140. Actually, Bishop Bosco thought that Turner was wrong. Turner's choice would have been "admirable in pursuit of programming serving the 'public interest, convenience, and necessity.' It can be viewed only with alarm when recognized for what it is: One broadcaster's determination to use the airwaves to promote his own personal views." *Id.* at 206.

10

Regulatory Failure

IN OUR VIEW, all the attempts of the Commission, the courts, and Congress to regulate broadcast programming reflect poor regulatory policy. Chapter 9 presented a detailed analysis of the deep failures in regulatory policy that underlie the FCC's attempts to fashion and enforce the Fairness Doctrine. Here, we seek to generalize from that analysis, as well as from the various other FCC regulations of program content discussed throughout the book.[1] When carefully studied from the standpoint of conventional public policy analysis, even absent free speech considerations,[2] broadcast program regulation to date appears to have been at best a series of misguided attempts to address ill-defined problems. With respect to broadcast programming, the United States has witnessed not so much market failure that justifies regulatory intervention as it has suffered regulatory failure that should be cured by greater reliance on markets, competition, and technological innovation.

Our interest, in this chapter, is not with minute analysis of each policy the FCC has ever pursued. Rather, we seek to explain the systematic failures that typically have infected the agency's policies and

1. *See supra* Chapters 4 and 5. Recall, however, that all the chapters in this book discuss a number of regulations or adjudications that are directed at broadcast program content.

2. *See infra* Chapter 11 (The Appropriate Scope of Regulation) for how program content regulation is a needless affront to civil liberties values.

rules aimed at regulating broadcast programming. Thus, we deliberately paint with a broad brush here.

MARKETS

The relationship between FCC regulation of broadcast programming and the market for broadcasts reflects a deep irony. As we explained in Chapter 3, the case can be made that unfettered markets will do an inadequate job satisfying consumer demand for programs, principally because broadcasts are public goods. Yet, as we now see, regulation of stations' programming choices has virtually never been designed to correct for such actual or potential market failure. Rather, the sad fact is that program regulation to date has been almost wholly oblivious to the positive values that markets promote and, when it does attempt to take account of markets, it usually adopts an unduly narrow view of what constitutes a market.

A proper understanding of the inherent potential for market failure in the production and dissemination of broadcast programs might have led the Commission to investigate several kinds of regulations. For example, the agency might have tried to tie its multiple station ownership limits to the points at which competition seems as likely as monopoly to maximize the satisfaction of listeners' and viewers' desires.[3] Further, the Commission, noting that one problem with advertiser-supported broadcasting is that it fails to respect the intensity of various viewers' preferences, might have pursued a policy designed to achieve at least one pay television station in every television market.[4] Or the FCC might have actively promoted the development

3. *See supra* Chapter 3 (The Limits of Competition) for discussion of how theoretical analysis of listeners' tastes and broadcasters' incentives might generate rules concerning multiple ownership that tend to maximize listeners' satisfaction. To our knowledge, however, the Commission has never even attempted to consider the effects of its multiple ownership rules on the programming incentives of broadcasters.

4. Instead, the Commission perversely pursued an opposite strategy. For a long period, it enforced a "rule of four," which prohibited operating pay television stations in markets with less than four conventional commercial advertiser-supported stations. STANLEY M. BESEN, THOMAS G. KRATTENMAKER, A. RICHARD METZGER, JR. & JOHN R. WOODBURY, MISREGULATING TELEVISION: NETWORK DOMINANCE AND THE FCC 16 (University of Chicago Press 1984). Thus, the Commission, during the 1960s and 1970s, virtually prohibited over-the-air broadcasters from catering to viewers' intensely held

of the cable television industry so that viewers would get the benefit of having, in the same market, both single-channel and multiple-channel programmers, who should have different incentives to respond to different viewers' desires.[5] For the same reason, the Commission, when it first confronted topless radio or George Carlin's monologue, might have asked whether those phenomena catered to intensely held minority tastes rather than treat them as attempts to corrupt the morals of teenagers.

Instead of designing its program policies to correct for market failures, however, the Commission has often operated as though broadcast markets did not exist. Certainly, this was the case with respect to the Fairness Doctrine, where the FCC futilely sought to saddle each licensee in every market with a duty to cover the same issues of public importance from the same perspectives.[6] Similarly, the agency's processing guidelines for license renewal imposed the same percentages of favored program types on every station in each market.[7] The Commission's ascertainment rules[8] and commercialization guidelines[9] were identical for every licensee, regardless of how much competition that licensee faced in its market.[10]

At best, regulations such as these are wasteful. They divert agency time and attention away from pressing issues and toward those a market can resolve by itself and without cost. More fundamentally,

preferences. For other pay programming restrictions imposed in this era, see *id.* at 11–12, 16–17.

5. *See supra* Chapter 3 (The Limits of Competition) for an explanation of how a firm operating a single television channel may have very different incentives in choosing TV programs from a firm that operates many channels. In fact, during the 1960s and most of the 1970s, the Commission virtually waged war against the introduction of cable television. LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 220–30 (University of California Press 1987); Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 77 (1981).

6. Discussed *supra* Chapter 9 (Costs, Benefits, Effects, and Alternatives).

7. Discussed *supra* Chapter 4 (Diversifying Program Mix: Licensing After 1960).

8. Discussed *supra* Chapter 4 (Diversifying Program Mix: Licensing After 1960).

9. Discussed *supra* Chapter 5 (Advertising).

10. Three years before their repeal, the ascertainment requirements were relaxed for stations in smaller markets, even though those markets contained fewer competitors. Ascertainment of Community Problems by Broadcast Applicants: Small Market Exemption, 86 F.C.C.2d 798 (1981).

those regulations fail to appreciate the value of markets. At least outside the broadcasting industry, regulatory policy looks to markets, not to firms, for diversity, value, and the satisfaction of consumer wants. Society does not expect, for example, that each manufacturer of automobiles or each provider of fast food will make available every product of that genre which consumers value. Rather, we look to competition among auto manufacturers and among restaurants to provide diverse fare at low cost through the markets in which they compete.

In the ordinary case, many advantages stem from looking to markets rather than firms to satisfy consumer wants. Firms are thereby permitted to seek lower costs through specialization. Firms are encouraged to innovate. Firms can grow to a size that is efficient relative to the type of product they offer. All those benefits and opportunities would be lost if, for example, regulators told every fast-food establishment that it had to serve every variety of fast food that consumers do (or might) wish to buy.

Radio and television sets have dials. Those dials are easy to operate. There is no reason why listeners and viewers cannot "shop" along the broadcast spectrum for programs they prefer. Indeed, as we have learned from the advent of cable television and the aftermath of radio deregulation, that is precisely what listeners and viewers do. Some listeners and viewers want talk shows; others seek pure entertainment; still others (surprising as it may seem) choose shows that broadcast commercial after commercial.

Sensible regulatory policy, then, would take as its goal the promotion of well-functioning markets in broadcast programming, not the creation of cookie-cutter stations, each of which caters to precisely the same preference exhibited by each member of the audience. Conceiving its goal in this fashion, the FCC should laud, not seek to retard, the development of specialty stations, the broadcast of material that shocks the cultural norm, the evolution of efficient format types and national networks, and the coexistence within markets[11] of

11. A focus on markets rather than firms would also lead the Commission to understand better just how crucial its spectrum allocation policies are to audience welfare. The costs of allocation choices that retard further entry would be more visible to all. That the FCC's spectrum policies have sheltered incumbents is a principal reason

differing methods of financing broadcast programs. All those developments have occurred in the face of the Commission's regulations of program content, yet all have expanded the chance that audiences can benefit from broadcasting—and expanded benefits to audiences more vastly than any Commission program regulation.

Occasionally, the Commission seems to realize that audiences can and do benefit from markets. This realization underlies the agency's decisions in the 1970s to free radio stations to switch formats at will[12] as well as those to scrap its ascertainment and commercialization rules in the early 1980s.[13] More recently, the Commission's children's television programming rules permit stations to fulfill part of their obligations by supporting kid-vid on other stations in their markets. The shortcoming in this aspect of the children's programming rules is that the Commission seems to have an unduly narrow view of what constitutes a market. Children can be nurtured, informed, or entertained in a variety of ways, by each of the mass media and by other institutions as well. Unless an unstated goal of the children's programming rules is to get children to watch more television, why would support of an after-school care center or the distribution of children's books not be equally efficacious methods to alleviate the market failure that generated the rules?

Supporters of the Fairness Doctrine are prone to take a similarly narrow view of markets. A more stylish (if not more convincing) Fairness Doctrine proponent is likely to assert that the doctrine, properly conceived and applied, should compensate for a systematic bias in broadcast coverage of public affairs, a bias that stems from the fact that advertisers pay for broadcast programs and frequently have monolithic views on certain controversial public issues. For example, virtually all advertisers, it might be argued, want broadcasters to take

why broadcasters have not strongly resisted program regulation. To most broadcasters, program restrictions impose costs that are more than offset by the continued restrictions on further entry that those policies help to justify. Better to be a licensee entrusted with a public trustee obligation, but sheltered from extensive competition, than to be unleashed to seek audiences without FCC restraint, but also subjected to the ravages of truly competitive markets.

12. Discussed *supra* Chapter 4 (Minimum Diversity Levels: Quality Programming).

13. Ascertainment is discussed *supra* Chapter 4 (Diversifying Program Mix: Licensing After 1960). Commercialization is discussed *supra* Chapter 5 (Advertising).

a particular side on such issues as the value of free markets or the costs of government regulation of product quality. The Fairness Doctrine, the argument goes, thus forces broadcasters to reject advertisers' collective demands for slanted coverage of certain issues or for a general bland conformity of programming style.

Such an argument ignores the fact that the American people have access to a wide variety of media that are interchangeable as sources of viewpoints and commentary.[14] People can and do turn off the television to read, attend school, and participate in civic institutions. No candidate for public office, even in the larger states, seeks to reach voters only through radio or only through television. It is not only competition among radio stations that moderates the views broadcasters will air, but competition for audience attention between radio stations and one's companions in the car pool or the options on the car's tape or CD player.[15]

In sum, while adopting and enforcing program regulations, the Commission consistently has undervalued the utility of focusing on the behavior of broadcasting markets and foolishly has defined its concerns in terms of the behavior of broadcasting firms.[16] Asking every firm

14. Has anyone reading this book not read a newspaper and listened to the radio simultaneously or watched television while reading a magazine?

15. Lest there be misunderstanding, we are not making the simplistic assertion that, in some sense, every good or service competes with every other good or service. In fact, we mean to use the term *market* here in a rather conventional and precise way—that is, the range of immediate substitutes to which people normally can turn to avoid monopoly pricing (more precisely here, monopoly of viewpoint or format). The point is that, given the formally asserted goals and purposes of the children's television programming rules and of the Fairness Doctrine, each of those regulations implies that broadcasters operate, for purposes of those regulations, in very wide markets, including those illustrated above.

16. We are not, of course, the first to offer this observation. Almost a quarter century ago, Professor Louis Jaffe stated:

> [S]ome who would control [broadcast] programming . . . treat each station as if it must be a communication world in itself. [T]heir image of appropriate programming of a station can be likened to a mother's milk which provides all the nourishment that the child needs. It assumes a listener who is cut off from all other sources of communication and must learn everything from what [one Commissioner] calls "the listener's favorite station." I find this notion of the passive, unadventurous listener peculiarly repellant, and I am sufficiently confident that it is unfair even to those who do a great deal of listening.

in the market to satisfy all consumers' desires makes it more difficult for firms to be efficient and imposes unnecessary regulatory costs on society. Further, when the agency manages to expand its vision beyond stations to markets, it tends to see markets that are too narrowly defined. Finally, as we explain in the section of Chapter 11 headed "The Appropriate Scope of Regulation," a focus on markets reveals that direct regulation of programming is virtually always an unnecessary intrusion into broadcasters' rights of free speech, and that the Commission can attain truly sensible goals without overseeing stations' editorial decisions.

COMPETITION

Another systematic failure underlying most of the FCC's program regulation schemes, and closely allied to the one just discussed, is the agency's habit of overlooking the alternative strategy of fostering competition among broadcasters for audience attention. In particular, throughout its history, the Commission has always had available the alternative regulatory technique of reducing barriers to entry, thus expanding the number of broadcast outlets accessible to the public, and then relying on rivalry among more numerous outlets to attain better programming.

The Commission's failure to crusade for more stations is understandable. Indeed, one might say it is traditional. After all, as explained in Chapter 2,[17] a principal reason for the creation of the former Federal Radio Commission was to reduce competition among existing stations and to retard entry that would occur were the broadcast band expanded. Later, when television appeared, the Commission adopted a comprehensive station allocation plan that put relatively little weight on affording most Americans a large number of television signals. Instead, the plan gave great weight to such factors as placing at least one transmitter in as many communities (and, therefore, congressional districts) as possible. Consequently, the plan did not even attempt to maximize the number of TV stations available

Louis Jaffe, *Program Control,* 14 VILL. L. REV. 619, 620 (1969).

17. Discussed *supra* Chapter 2 (The Federal Radio Commission: Structuring the Broadcast Industry).

to American households.[18] For a more recent example, as soon as cable television became more than a device to expand the reach of existing broadcasters, the FCC set out to restrict cable's further development.[19]

Thus, one might say, with much justification, that one dominant purpose and effect of federal regulation of telecommunications technologies has been to retard the growth of broadcasting (and its functional equivalents, such as cable) especially by limiting the number of broadcast outlets. To explain those policies, however, is not to justify them. Had regulatory policy placed more emphasis on expanding outlets and less on looking over the shoulders of broadcast programmers, American listeners and viewers probably would have gained more benefits from broadcast programming. Certainly, they would have had added choices.

An important reason for this conclusion is that government cannot effectively micromanage, but competitive markets can.[20] FCC content regulations, to be effective, usually need to be rigid. The Fairness Doctrine requires that all stations air all major sides of controversial issues. The political broadcasting rules give equal access to all candidates. The license renewal processing guidelines specify certain minimum percentages of news, information, and public affairs programming and maximum amounts of entertainment programming and commercials and then impose those figures equally on all stations, regardless of the desires of their audiences.

The problem with such approaches is that people do not usually want such a simple, monolithic solution. Some people want 10 percent news, others more, and still others less. Some want equal doses of political information from the Right and the Left, others prefer varying

18. Thomas L. Schuessler, *Structural Barriers to the Entry of Additional Television Networks: The Federal Communications Commission's Spectrum Management Policies*, 54 S. CAL. L. REV. 875 (1981).

19. POWE, *supra* note 5, at 220–30; Besen & Crandall, *supra* note 5.

20. Professor Jaffe has put the same point somewhat differently: "Critics of commercial broadcasting and of the Federal Communications Commission (FCC) should face the hard truth that regulation of programming by the FCC can never be more than marginal. With the possible exception of certain negative controls, in particular the so-called fairness doctrine, governmental machinery is not adapted to the evaluation and improvement of programs. The statute under which the FCC operates was not designed for such a purpose." Jaffe, *supra* note 16, at 619.

degrees and directions of imbalance. Some simply want the media to take their minds off the travails of life. Relying on competition—large numbers of stations competing for listeners' and viewers' attention—rather than agency regulation allows broadcasting to satisfy those varied needs. Competition micromanages the program mixes offered to audiences, while regulation tends to homogenize those offerings.

To the Commission's credit, the agency realized those problems when it turned most recently to the issue of children's television programming. The FCC sought to permit broadcasters a wide range of options to satisfy the statutorily imposed requirement to serve the needs of children. In doing so, however, the Commission initially created a "regulation" or "policy" that was so vague that it compelled almost no station to change its programming significantly.[21]

Those various experiences appear to teach a single lesson. A regulation that drives broadcasters to program what the regulators prefer must impose a rigid, uniform programming prescription on stations. Sensible regulatory policy would usually opt for disciplining stations' program selections by rivalry among lots of stations, thereby inducing a wider variety of correctives to the perceived programming failures of broadcasters.

Micromanagement by competition is particularly preferable to monolithic governance by regulation because of what those regulations address. They govern the content of mass media programs, programs that include such vital matters as political orations and commentary. Surely, it is particularly dangerous to turn government officials loose to set a single broadcast programming standard.[22]

The Court in *Red Lion*[23] sought to avoid this objection by equating private with government censorship. "There is no sanctuary in the First Amendment for unlimited private censorship in a medium not open to all."[24] This makes good theater, but it is a very bad

21. Discussed *supra* Chapter 4 (Diversifying Program Mix: Children's Programming).

22. POWE, *supra* note 5, at 254–55. For a further discussion, *see infra* Chapter 11 (The Appropriate Scope of Regulation).

23. Red Lion Broadcasting Co. *v.* FCC, 395 U.S. 367 (1969). *See supra* Chapter 6 (The Creation of the Public Trustee Image: Red Lion) and Chapter 7 (The *Red Lion* Case).

24. 395 U.S. at 392; *see also* Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

description of the relative effects of government regulation and station program decisions.

Government regulation of program content, when it works, produces uniform programming choices that favor those with political power.[25] Private "censorship" produces disparate programs, favoring those with economic power. If broadcast outlets are abundant, a person or a cause needs comparatively little money to influence a programming decision. For example, today one can buy program time cheaply on AM radio. But federal broadcast regulatory agencies are neither abundant nor cheap to acquire. One needs many allies to aggregate the political power it takes to get the FCC to adopt a program regulation.[26]

Were the Commission consistently to consider competition as an alternative to regulation, it would be able to calculate more precisely and sensibly the costs and benefits of its program regulations. It is difficult to see how, except perhaps in extreme cases, the balance would tilt toward regulation. Competition in the provision of broadcast programs does not produce perfect results,[27] but there is no evidence that regulation does so either. The key is the appropriate mix of policies that can best maximize viewer welfare. It is not costly to society to make entry feasible, and the resulting competition should yield a program mix more attuned to audiences' needs and desires. By contrast, regulation is costly to implement and to enforce, and its benefits are diminished by its inability to be sensitive to different tastes.

Examining the competition alternative should also prevent the Commission from inflating the value of its regulations by attributing to them benefits that would have occurred in any event. Thus, Commissioner Abbott Washburn noted: "They had a terrible tornado down in

25. POWE, *supra* note 5, *passim*.

26. Of course, if one is a representative of the dominant political culture, she is likely to have such allies. But try to think of a small, unpopular, disorganized group that benefits, intentionally or unintentionally, from a past or present FCC program regulation. The only example we have found is the first-run syndicated program supply industry. It is small and disorganized (although not unpopular), yet it is greatly aided by the Commission's Prime Time Access Rule, discussed *supra* Chapter 4 (Minimum Diversity Levels: Quality Programming; Outlet and Source Diversity: Summary).

27. Discussed *supra* Chapter 3 (The Limits of Competition).

Texas this week. Young people listening to a rock station in Wichita Falls might have had no warning of the danger if we didn't require the licensee to provide a minimum of news."[28] Washburn would be undoubtedly surprised to learn that even after deregulation, stations in Texas will alert their viewers and listeners to pending dangers from the climate. No one can credit the Fairness Doctrine for the balanced coverage usually obtained from broadcasters if one is conscious of the market forces that operate independently of the doctrine.[29] Repeal of the doctrine, however, probably did contribute to the abundance of talk shows that emerged in the past few years, shows that likely would be jeopardized by a revival of the doctrine.[30] Some defend the Prime Time Access Rule (PTAR)[31] on the grounds that it created a viable first-run syndication industry. This ignores the fact that the industry has always been viable, capable of supplying programs to stations that could not or would not choose network or local programming. The rule gave more business to the first-run syndication industry but did not empower it to produce programs that it lacked capacity to create.[32]

In short, one can seek to discipline stations' program decisions by agency regulation or by competition. To be an effective disciplining force, regulation almost invariably must impose specific and monolithic program choices on all stations. By contrast, competition micro-manages while it disciplines. Even without fancy empirical surveys of listeners' and viewers' preferences, we know quite well that American audiences have disparate, not uniform, tastes for the quantity of news or children's programming they receive or the extent to which they are informed by balanced sources. Knowing that, it is simply indefensible regulatory strategy to opt for regulation rather than competition as the disciplining force in station program selection.

28. *Quoted in* Lionel Van Deerlin, *The Regulators and Broadcast News,* in BROADCAST JOURNALISM 204, 206 (Marvin Barrett ed., Everest House 1982).

29. For discussions of these points, see *supra* Chapter 9 (Costs, Benefits, Effects, and Alternatives: Distorting the Fairness Doctrine).

30. Discussed *supra* Chapter 9 (Doctrinal Incoherence: Leading Cases; Conclusion).

31. 47 C.F.R. § 73.658(k) (1993).

32. On the effects of the PTAR, see FCC, NETWORK INQUIRY SPECIAL STAFF, 1 NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION 507–13 (1980).

These conclusions are strengthened by the fact that what is being regulated here is not the amount of cheese on a cheeseburger, but the content of programming—often news and political commentary—offered by our most heavily used mass media. The Federal Radio Commission was created in large measure to restrict access to the broadcast spectrum; thereafter, regrettably, that limited access was employed to justify FCC program-content regulation.[33] It is, then, somewhat ironic that the agencies, from their inception, have had it within their power to make the sensible choice to expand outlets and foster competition rather than to undertake a decidedly second-best alternative. Fortunately, on this issue, it is never too late to choose the right path.

TECHNOLOGY

The history of FCC regulation of broadcasting might be described as the repetitious performance of a simple two-act drama. In act one the agency promulgates a regulation. During act two, developments in technology render that regulation useless, meaningless, or (in the worst case) counterproductive. As this dramatic form is repeated, only the identity of the regulation changes; the regulator remains constant, as do the evolution and outcome of the plot.[34]

The Commission's largest and most persistent error in this regard has been the failure to understand the link between program-content regulation and the agency's spectrum-allocation policies. From the very beginning to the present and for the foreseeable future, the bandwidth effectively available for broadcasting has been expanding rapidly. So have alternatives to conventional broadcasting. The 1927 Federal Radio Commission confronted an industry built around a few spots on the AM radio dial. Since then, we have witnessed the expansion of AM radio and the addition of FM radio, VHF and UHF television, radio and television broadcasting at much higher frequency levels by

33. For discussions of these points, see *supra* Chapters 2 and 6.

34. In this fashion, television regulations mimic television, where the garden-variety sitcom or action-adventure series runs the same two-act story in every episode, varying only the names of one or two characters and (perhaps) the locale.

microwave and by satellite, and the growth of cable television and the videocassette and videocassette player-recorder markets.

Each of those developments has rendered progressively less tenable the notion that individual broadcasters need to be regulated so that each will serve all community needs or that broadcast markets need to be regulated so that particular tastes will be served. Yet the Commission was enforcing the Fairness Doctrine most vigorously during the 1960s and 1970s when UHF and cable television were expanding. Congress imposed children's television programming requirements just as microwave- and satellite-delivered television were poised to enter the market on a large scale and after the video rental stores were chock full of children's programs. Indecency regulations were forcefully applied to radio in very recent years, notwithstanding that dozens of easily accessible signals now reach the AM-FM radios of most American listeners so that offensive radio programming is easily avoided.

Those new technologies do more than eviscerate the rationales for content regulation. They tend to make that regulation expensive for those subject to it while simultaneously undermining its rationale. There is no respectable case to be made for the application of children's program requirements to videocassette stores, or for saddling cable television with indecency regulations, or for imposing a Fairness Doctrine on "wireless" (that is, microwave-delivered) cable television. Therefore, those media do not labor under such regulations. Consequently, to the extent that the regulations do require broadcasters employing conventional technologies to program that which people do not wish to view, the regulations simply drive business to these other, newer media. The broadcast media, which remain saddled by the rules, become comparatively expensive to operate because they find it harder to attract viewers and listeners. Meanwhile, to the extent that the rules were designed to force listeners and viewers to receive certain types of programs, the rules do not achieve their purposes because people can turn to the unregulated media for unregulated entertainment and information they desire.

Sometimes, the Commission simply seems oblivious to the technology that underlies the system it regulates. For example, indecency regulation is supposed to shield (or to enable parents to

shield) young people from programming unsuitable for them. Such shielding could be accomplished by regulating the radio or television receivers rather than the programming they carry. Receivers could be designed so that their owners could block out channels they do not wish to receive. Instead of this less intrusive alternative, the Commission chose the more drastic means of regulating programming, apparently because it never considered that the problem it confronted—that children could randomly access broadcast programs—was the artifact of a technology that could be altered. The Commission sees radio and television sets as they are, not as they could be.

The Commission's PTAR, which in effect prevents ABC, CBS, and NBC from offering programs other than news or children's programming during the 7:00 P.M. to 8:00 P.M. period, has been defended on many grounds.[35] One of them is that it enables producers to produce and viewers to watch entertainment programs that are not funneled through the closed, three-network system that controls the selection and broadcast of most prime time programming.[36] Here, too, the Commission appears blissfully unaware of the underlying technological factors. The number of broadcast networks is limited—and, consequently, their programming decisions are greatly affected—by the FCC's spectrum allocation policies. Were the Commission to make more conventional over-the-air commercial television signals available to most households, the number of networks would increase,[37] rivalry among them would spawn more rather than less program diversity,[38] and all would perceive the PTAR as a less desirable or less defensible option. The Commission sees its spectrum allocation plan as it is, not as it could be.

Thus, it appears that when the Commission has considered the questions of whether or how much to regulate broadcast programming, it has consistently failed to recognize the dimensions of the problem

35. For a thorough and critical analysis of the PTAR, see Thomas G. Krattenmaker, *The Prime Time Access Rule: Six Commandments for Inept Regulation*, 7 COMM/ENT 19 (1984).

36. *Id.* at 28.

37. BESEN ET AL., *supra* note 4, at 4–20.

38. See *supra* Chapter 3 (The Limits of Competition) for a discussion on the relationship between the number of broadcasters who seek to serve a set number of viewers and the program decisions those broadcasters make.

confronting the agency that are grounded in technology. In many, perhaps most, cases where the impulse has been to regulate program content, a more sensible regulatory strategy would have been to attend to the technology: either to permit evolving technology to resolve the problem or to regulate the technology rather than the broadcasters' programming choices.

In some respects, it seems strange to report that the FCC has been insufficiently attuned to the relevance of technology. Technology is what this agency is all about. Its predecessor, the FRC, was founded amid chaos in the emerging broadcast marketplace, a chaos brought about by rapid technological change.[39] The Commission's jurisdiction is defined by technology ("communication by wire and radio"),[40] and its regulatory authority to control program content has been justified solely by reference to the peculiar technology broadcasters employ.[41] For all the vagueness of the public interest standard, the Communications Act is clear on this particular point. Section 303(g) directs the FCC to "encourage the larger and more effective use of radio."[42]

Perhaps, however, the Commission's behavior is not so strange. Recall that a principal goal of many who supported the 1927 Radio Act was to halt further expansion of the radio broadcast band.[43] Consider that the FCC will always receive its deepest support from the industry it "regulates," not from listeners and viewers who typically are too disorganized to form oversight and support groups[44] or from potential entrants who by definition do not exist.

Those realities suggest that what a dispassionate policy analysis would describe as a strange failure to take account of technological change is in reality a byproduct of a consistent agency adherence to a central mission, supported by the Commission's key constituents, to retard the pace of technological change. Building on some momentum

39. *See supra* Chapter 2.

40. Communications Act of 1934, § 1 (codified at 47 U.S.C. § 151) (1993).

41. For discussions of *Red Lion* and *Pacifica*, see *supra* Chapter 7 (The *Red Lion* Case; The *Pacifica* Case).

42. 47 U.S.C. § 303(g) (1993).

43. Discussed *supra* Chapter 2 (The Rise and Fall of Hoover's Policies).

44. A stunning exception to this otherwise virtually universal rule is the sustained, organized efforts of viewers (mobilized by Action for Children's Television) to generate federal control of children's television programming.

established during the late 1970s, the Commission aggressively sought to promote the introduction of new broadcast technologies and the expansion of existing technologies during the 1980s. Placed in historical context, however, those actions were aberrations. The Commission previously had a much longer history of restricting new or expanded technology.

Thus, the FCC may have failed to consider seriously addressing perceived shortcomings in the marketplace for broadcast programs with strategies for fostering technological growth because the Commission had a strong predisposition to avoid such strategies owing to its overwhelming desire to stabilize and protect the industry as it was. The Commission may have deliberately formed the habit of seeing existing technology for what it was rather than what it could be because that habit facilitated a grander design to shield incumbents from the damaging vicissitudes of competition.

To the extent this is true, it reveals a titillating irony. As noticed above, one effect of much of the FCC's program-content regulations has been to make more valuable to viewers the unregulated fare of the unregulated emerging media and to make those new media comparatively less expensive to operate. In this manner, the Commission's program regulations carried the seeds of their own undoing. It turns out that—at least in the long run—it is technology, not the FCC, that is in charge.

Conclusion

To some extent, what we have described as three systematic failures of the FCC's regulatory responses toward broadcast programming might be characterized as three ways of looking at the same phenomenon. The agency's regulatory strategies have been lousy because they habitually failed to take account of a strategy much more likely to succeed—employing the Commission's authority over broadcast technology (particularly its spectrum allocation powers) to increase competitors and competition in markets for broadcast programming.

To be sure, there is no reason to assume that such markets, however configured, will always precisely and efficiently satisfy listeners' and viewers' desires. We are even more sure, however, that,

for the reasons sketched above, there is no reason to believe that FCC regulation of program content can better satisfy those desires than expanded, competitive markets. This conclusion holds whether we are talking about direct proscription or prescription of program content or the indirect technique of regulation by raised eyebrow that has long been a Commission favorite.

In response to the foregoing, it is fair to ask, "How come you're so smart?" FCC commissioners are not idiots who want to do the wrong thing. Why, then, are we so confident that the agency has systematically erred in ways that we can identify? If we are so smart, why does the FCC not do it our way?

We think the underlying cause of the regulatory failure we have described is that the FCC is charged with giving away, without explicit charge, a lot of very valuable benefits (in this case, broadcast licenses). Suppose the federal government decided to establish a Federal Sneakers Commission (FSC) to distribute a limited number of licenses without explicit charge and without which one could neither sell nor manufacture sneakers. Probably, this hypothetical FSC would soon operate very much like the FCC described above. FSC commissioners would not be content to hand out sneaker licenses and then declare that the agency had become obsolete. Rather, the commissioners would soon start demanding that each of their licensees produce top-quality sneakers in a specified cluster of varieties and nothing else. If nonregulated sellers acquired a product that was not quite "sneakers," but nevertheless was directly competitive, the FSC would claim "ancillary" jurisdiction to regulate that product as well. Permissible colors for shoelaces would be established while the agency opened a major inquiry into the question whether licensees should be allowed to make or supply their own shoelaces or whether such self-dealing was a threat to the vibrant, independent shoelace industry.[45]

In short, FCC commissioners are neither stupid nor shortsighted. Rather, most (thankfully, not all) have lacked the courage to hand out the freebies and then walk away from the markets they created. Most (again, thankfully, not all) have felt some responsibility to monitor the

45. *Cf.* Donald I. Baker, *The Dockside of Regulation*, REGULATION, Spring 1991, at 22.

behavior of the licensees they created while also attempting to protect the value of what they gave away.

Unless and until legislators and judges tell the Commission that it is perfectly all right not to micromanage, or take away the agency's power to give away enormously valuable licenses, or clarify that the Constitution does not permit government to employ for censorship purposes a licensing scheme adopted because of a property-rights problem, the FCC is likely to remain an agency that simply cannot resist the temptation to try to outperform expansive, competitive markets. It is a fool's quest, but the temptation seems irresistible. The solution, equally irresistible, is to remove the temptation.

So long as the temptation remains, we expect a majority of the commissioners to succumb to it. That raises a further question: If the FCC is not regulating in accordance with some objective standard of the "public interest" that compensates for market failures—such as one or more of the standards discussed in Chapter 3—what standards does the agency observe? What does explain the Commission's choices when regulating broadcast program content if not some neutral public interest goal?

The answer seems to lie in the virtually unique degree to which the FCC is subject to political oversight, from both the executive and the legislative branches. We are not the first, nor shall we be the last, to observe that politics has proven inseparable from broadcast regulation.[46] Beginning with Franklin Roosevelt and continuing virtually unabated, presidents have taken a keen interest in what this one particular agency was doing.[47]

So, too, have powerful members of Congress. To be sure, every presidential appointee to a regulatory agency is reminded that the agency is an arm of Congress, not the executive. In House Speaker Sam Rayburn's words to Newton Minow, "you belong to us. Remember that and you'll be all right."[48] What separates the FCC from other agencies is how seriously Congress takes its ownership. "Congress consider[s] the Commission its own."[49]

46. The standard text is ERWIN G. KRASNOW, LAWRENCE LONGLEY & HERBERT TERRY, THE POLITICS OF BROADCAST REGULATION (3d ed., St. Martin's Press 1982).

47. POWE, *supra* note 5, *passim*.

48. KRASNOW, LONGLEY & TERRY, *supra* note 46, at 89.

49. Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, 56 LAW

It appears that what is truly unique about broadcasting is that those governing its regulatory agency intervene with more frequency and intensity than they do in any other industry's agency. Whether it is the staggering amount of wealth to be created and distributed, the concern about how such an important instrumentality of communications performs in affecting electoral outcomes, the intense interests of constituents, or some combination of reasons, government cares.

Minow reported that as chairman he "heard from Congress about as frequently as television commercials flash across the television screen."[50] In the three subsequent decades it has gotten no better.[51] Glen Robinson, a law professor, then commissioner, then law professor again, wryly observed that "it is a poor dog indeed that does not know its own master."[52]

The standards that the Commission employs, then, are political standards. In regulating program content, the agency seeks to reflect the goals, habits, and prejudices of political elites. The content of the Commission's rules is shaped by desires to curry favor with—or to avoid incursions from—executive and legislative branch officials. These desires are tempered by the necessity to protect incumbent broadcasters' interests, to be sure, but not by any particular concerns with politically unpopular viewers or listeners or with firms outside the industry.

From the inception of the FRC, federal regulation of broadcasting has been characterized by the very abuses—favoritism, censorship, political influence—that the First Amendment was designed to prevent in the print media.[53] History has long taught that those governing find interference with others' freedom of speech irresistible, even when constitutional commands are to the contrary. The lessened First Amendment status of broadcasting authorized political incursions that would have been nearly irresistible anyway.

& CONTEMP. PROBS. 145, 149 (1993).

50. NEWTON MINOW, EQUAL TIME 36 (Atheneum 1964).

51. Devins, *supra* note 49; Harry M. Shooshan III & Erwin G. Krasnow, *Congress and the Federal Communications Commission: The Continuing Quest for Power,* 9 COMM/ENT 619 (1987).

52. Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs,* 64 VA. L. REV. 169, 172 (1978).

53. POWE, *supra* note 5, *passim.*

In writing this book we have sought to keep politics secondary, to attempt to persuade the persuadable by the logic of our analysis. Moreover, we do not know of any way to reform this political process short of stripping the agency, by removing the "public interest" standard, of the power to bend to politicians' desires. But with John Roche we know that power corrupts and the fear of losing power corrupts absolutely.[54] Thus, we are not surprised to hear that the House Energy and Commerce Committee "doesn't listen to legal arguments, just ideology"[55] or that some members of Congress dismiss serious constitutional arguments as "legalistic gobbledygook."[56]

But we are not happy to hear this. And we retain a bit of our faith that reason can make a difference even to those wielding power. Thus, in the concluding chapter, we attempt to provide an alternative set of standards for guiding and constraining federal regulation of broadcast program content. We believe that those standards would permit rules and policies responsive to most of the desires and goals of broadcasting's responsible critics, while reducing the opportunities for abuse that abound under the present regulatory regime.

54. *Quoted in* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 238 (University of California Press 1991).

55. Devins, *supra* note 49, at 185 (quoting Mark C. Miller, *Congress and the Constitution* (forthcoming)).

56. *Minority-Owned Broadcast Stations: Hearings on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 55 (1986) (Representative Al Swift).

11

Reinventing Broadcast Regulation

THE LEGAL REGIME that governs government regulation of broadcast program content is intellectually bankrupt. That regime rests upon an impoverished conception of the First Amendment as a guarantor of freedom of speech and the press, and it permits a variety of poorly conceived regulatory strategies.

In this concluding chapter, we present the basic outlines of what appears to be a radically different set of legal and regulatory policies and principles that should, in our view, govern the regulation of broadcast program content. In fact, however, the policies and principles that we advocate are not radical, but conventional. They are the rules by which we govern all other mass media in this country.

To inform this analysis, we first canvass what today's critics of television are saying. We sort out the wishful thinking from the criticism that stems from a realistic appraisal of what TV might offer. Our claim is that the realists, were they to think seriously about it, would realize that we know a better way to attain their (and our) goals.

TELEVISION'S CRITICS

The Vast Wasteland

Television has never been without its critics. Although the perceived defects of the medium are many, we believe that they can be more or less subsumed in two words: *vast wasteland*. Chairman Newton Minow's phrase, from the only speech by an FCC commissioner that

has ever received the slightest public attention, crystallized a perception about television that has lasted over three decades.[1]

In that famous speech to the 1961 National Association of Broadcasters Convention, Minow challenged broadcasters to spend an entire day, without interruption, watching their own stations. "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." All in all "you will observe a vast wasteland."[2] To the extent that he thought broadcasters might be too dimwitted to get the point, he listed their eight good programs by name.[3]

Who Is in the Wasteland?

In the years since the Vast Wasteland speech, much has changed. UHF television, then a ticket to bankruptcy, now flourishes. Its handicap is a thing of the past, with much credit owed to Minow, who pushed for the All-Channel Television Receiver Act of 1962,[4] which forced manufacturers to make sets that got the UHF as well as the VHF channels. A fourth over-the-air network, Rupert Murdoch's Fox, inconceivable since DuMont had gone under after the *Sixth Report and Order*[5] left too many cities with just three VHF stations, finally exists. Furthermore, PBS, then hardly even a dream for the rudderless educational television, can be seen in virtually every market in the United States. Finally, perhaps the most dramatic development of all

1. Newton Minow, Vast Wasteland speech, Address to the National Association of Broadcasters Convention (May 9, 1961), *reprinted in Public Interest in Broadcasting: Hearings before the Subcomm. on Communications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 22 (1991) [hereinafter Vast Wasteland speech]. The speech is more accessible in the collection of speeches published as NEWTON MINOW, EQUAL TIME 48 (Atheneum 1964).
2. *Id.* at 24.
3. *Id. See supra* Chapter 4 note 57 for the list.
4. 76 Stat. 150 (1962).
5. 41 F.C.C. 148 (1952).

is cable and its tens of options for the 60 percent of Americans who subscribe.

Minow, summarizing the scene in 1991, concluded: "The FCC objective in the early 60's to expand choice has been fulfilled—beyond all expectations."[6] No kidding. Cable News Network (CNN) has become the network that even the president watches to find out what is happening. Public affairs programming is available every single minute on C-SPAN I and II. The Discovery Channel and the Learning Channel provide continuous educational programming. Children have Nickelodeon; teenagers MTV. For adults who demand quality, there are Arts & Entertainment, Bravo, and American Movie Classics to name just three. Religious programming is continuously available, and minorities wishing minority-oriented programming have BET and Univision. Everything that anyone wanted in the 1960s—especially ESPN (supplemented by the likes of Prime)—is available at the flip of a switch.

But to television's critics, none of that counts. All of cable's diversity is dismissed by some media critics in a terse suggestion: "Let them eat cable."[7] Unpacked, those four words, stand for the ideas that (1) not every American household is wired for cable; (2) nor can every American afford cable; therefore, (3) broadcasters, as public trustees, must provide a microcosm of the cable offerings for those viewers who cannot or do not subscribe. In Congressman Edward Markey's words: "The people in our country, rich and poor, must have access to the information they need. We cannot have it segregated in terms of the information rich and information poor."[8]

It is, of course, true that not everyone subscribes to cable. But not everyone subscribes to or reads the *New York Times*, *Washington Post*, *Los Angeles Times*, *Wall Street Journal*, *Time*, *Newsweek*, *New*

6. Newton Minow, How Vast the Wasteland Now?, Address at the Gannett Foundation Media Center, Columbia University (May 9, 1991), *reprinted in Public Interest in Broadcasting: Hearings Before the Subcomm. on Communications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 17 (1991) [hereinafter How Vast the Wasteland Now?].

7. Andrew Schwartzman, *in Broadcast Journalism and the Public Interest*, *in* Alfred I. duPont-Columbia University Forum (pt. III), at 44 (1990) [hereinafter *Broadcast Journalism*] (Schwartzman is Director of the Media Access Project).

8. *Id.* at 15.

Republic, *National Review*, and *Sporting News,* either. Somehow, in the critics' world, it is only over-the-air broadcasting that is not supplemented by other information sources.

Thus, in evaluating available information, cable and, of course, print are excluded, because critics typically assume (at least for the purposes of their regulatory arguments) that various media do not compete with or even supplement each other. This is another way of concluding that broadcast television is unique and therefore without effective substitutes, an argument divorced from reality and consistently rejected by the FCC in the past decade.[9] Nevertheless, for purposes of better understanding television's critics, we shall hereinafter assume, *arguendo*, that cable does not count. And, of course, newspapers and magazines do not count either.

Yet excluding all of them is not enough. Radio, too, must be banished. Despite the staggering numbers of hours we spend watching television, most Americans are trapped for some period each day in cars. Some fume; some talk on cellular phones; some listen to CDs; some listen to tape-recorded books. But most listen to the radio.

In the days before deregulation, at least on stations complying in good faith with FCC processing guidelines, stations would provide entertainment, rip-and-read news at a set time, and deliver the occasional public service announcement. Even then, stations segmented their markets into specific formats. Today, unique formats abound, and some stations have dropped all their news and information programming. Yet others have added it, and some stations are all news and information (talk). Drivers have a choice. Their favorite easy-listening

9. In its 1985 report on the Fairness Doctrine, the FCC concluded:

> The record in this proceeding supports the conclusion that the information market relevant to diversity includes not only TV and radio outlets, but cable, other video media and numerous print media as well . . . . These other media compete with broadcast outlets for the time that citizens devote to acquiring the information they desire. That is cable, newspapers, magazines and periodicals are substitutes in the provision of such information.

Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning General Fairness Doctrine Obligations of Broadcast Licensees, Report, Gen. Dkt. No. 84-282, 102 F.C.C.2d 143, 197 (1985) [hereinafter 1985 Fairness Doctrine Report] (quoting Multiple Ownership Report and Order, 49 FED. REG. 31877, 31880 (1984)).

FM station may not offer news, but another station will, if they wish to hit the dial and listen.[10] Indeed, the best-available nonprint news airs twice a day on National Public Radio: "Morning Edition" and "All Things Considered."

For television's critics, however, none of that counts either. It is harder, logically, to explain why the critics take this position. We think they do so principally for three reasons: first, not enough drivers listen to news and public affairs; second, too many people listen to Rush Limbaugh's bombast instead of serious discussions of public issues by relevant experts; and third, once again, television is unique. News and information is not real without pictures that move. It is vastly more difficult to exclude radio than cable or newspapers from our discussion, especially given the quality of NPR's programming and the fact that radio licensees, no less than television stations, are "public trustees," but again, *arguendo*, we shall.

So it is just television, where even a decade ago a mere 4 percent of the American population could not receive at least five over-the-air signals.[11] Here, according to its critics, the vast wasteland remains because even "enlarged choice is not enough to satisfy the public interest."[12] Television does not air enough educational and informational programs, and those that do air are not very good (and often cover the wrong stories).

But is PBS included in that indictment? No. Minow is not alone among the critics of television who like the idea of PBS so much that they want large additional funding.[13] With its "MacNeil/Lehrer Newshour"—the only hour-long over-the-air news, and in prime time in many markets—as well as its numerous other public affairs programs, PBS seems to be exactly what most critics seem to be saying commercial television should be, including the prime time slots for its

10. Linda Wertheimer of National Public Radio notes how deregulation helped NPR: "[T]he consumers of news found a lot of stations they had been accustomed to listening to were no longer providing it. And many of them tuned into us." *Broadcast Journalism, supra* note 7, at 3.

11. 1985 Fairness Doctrine Report, *supra* note 9, at 210. And about two-thirds could receive at least nine.

12. How Vast the Wasteland Now?, *supra* note 6, at 17.

13. *Id.* at 19.

programs.[14] Why is this not sufficient?[15]

At one time, the answer would have been that PBS was not generally available in sufficient markets, but that is no longer true. Now the answer has to be that PBS is not enough and that each broadcaster, as a trustee getting plenty for nothing, owes viewers a duty to do the right thing. We have dealt with this already in Chapter 10. The demand that each station assume full responsibility for each of its listeners' knowledge rests on one of two viewpoints. First, unless every station does it, some viewers will not be exposed to what they otherwise should know. Second, broadcasters, as public trustees, have the obligation to present this programming, because that is what the trust demands, even if neither the trustees nor the beneficiaries think so. For the final time in this chapter, we shall assume, *arguendo*, that the critics are correct. It is therefore time to look through the critics' eyes at the specifics of this continuing vast wasteland—although it is not vast enough to include the print media, cable, radio, or even PBS.

What Is in the Wasteland?

Confounding the critics, the amount of news and public affairs is significantly higher than ever before. It is also popular. During the summer of 1993, five newsmagazines scored in the top-fifteen programs in the Nielsen ratings.[16] Furthermore, as Richard Salant, the former legendary head of CBS News notes, "news has more prime time" than ever before.[17] In 1990 alone, CBS aired 2,400 hours of

14. We recognize that those on the Left think PBS too conservative and those on the Right think it too liberal (points that apply to commercial television as well). But, short of turning a network over to each critic, PBS seems to be closer to what the critics say they want than anything else.

15. A similar argument about excluding PBS children's programming was rejected by the Commission, which noted that the "system was created precisely for the purpose of supplementing the commercial broadcast system" and that the Commission "has reserved channels in its television broadcast table of allotments for the specific use of noncommercial broadcasting stations so that the public would have access to the kinds of informational, instructional, and cultural programming that these stations deliver." Children's Television Program and Advertising Practices, Report and Order, Dkt. No. 19142, 96 F.C.C.2d 634, 645 (1983).

16. AUSTIN AMER. STATESMAN, Aug. 3, 1993, at B4.

17. Richard Salant, *in Network News—Getting Better? Getting Worse?*, *in* Alfred I. duPont–Columbia University Forum (pt. II), at 3 (1990).

news and public affairs, some 40 percent of its broadcast schedule; that was triple the amount aired in 1979, when Salant was retired at age 65.[18]

Yet, the critics say, the content of news and public affairs programs is not very good. Robert Entman's study of CBS News in 1975 and 1986 shows that the amount of news devoted to federal domestic policy has dropped by over 37 percent.[19] That airtime went instead to "human interest" stories and to added coverage of foreign policy.[20] There are, of course "60 Minutes," "20/20," and "Nightline," but there are also programs that seem almost indistinguishable from entertainment shows. There may well be more news and public affairs, but it is just not so good or so hard-hitting as that of an earlier era. Furthermore, religious programming, whether on its own or as public affairs, has diminished as the networks have cut it back by almost half, with establishment religions and ecumenical shows hardest hit.[21]

There is more local news, too. But, the critics ask, is it news? A third of a thirty-minute newscast will be happy talk and commercials. Another third may be devoted to sports and weather (although in some areas weather may well be the news). Human interest is likely to be next. State and local policy issues combined are lucky to do as well as sports.[22] Public affairs are minimized so that people are better informed on national than on local issues.

When one moves to entertainment, the image that critics see jumping off the screen is violence. Although there is less now than

18. Statement of George Vrandenburg, Senior Vice President of CBS, *in Network News—Getting Better? Getting Worse?*, *supra* note 17, at 22.

19. ROBERT ENTMAN, DEMOCRACY WITHOUT CITIZENS 117–18 (Oxford University Press 1989). Domestic policy discussions went from 13,717 to 8,448 seconds per month.

20. *Id.* Human interest stories increased by more than 50 percent, from about 4,000 seconds per month to 6,200 seconds per month. Foreign policy also grew by more than 50 percent, from 5,100 to 7,720 seconds per month.

21. *Public Interest in Broadcasting: Hearings Before the Subcomm. on Communications and Finance of the House Comm. on Energy and Commerce,* 102d Cong., 1st Sess. 181–85 (1991) [hereinafter *Markey Hearings*] (statement of Dr. Westy A. Egmont, president of the Association of Regional Religious Communicators).

22. *Id.* at 110–113 (statement of Tracy Westin, Professor of Communications, University of Southern California). We have generalized from Westin's testimony, but we do not think the critics would disagree (even if many local broadcasters might).

there has been since the late 1950s, critics remember when there was more, know that it is more graphic, and think that, whatever its quantity, that is too much. When teenagers have seen thousands upon thousands of murders on television by the time they are high school graduates,[23] the assumption is that this must create adverse effects.[24]

However violent the United States is, it is not so violent as television portrays it.[25] Its critics have often noted that television is no mirror of modern America. Hispanics know this well: "If you watched 300 different television characters, say, you'd find less than a handful of Hispanics."[26] That might be more than the number of significantly overweight people on the air. Television likes attractive people; its commercials love attractive people. The two merge into a pervasive view that "satisfaction is to be achieved from consumption":[27] "I shop; therefore, I am," to paraphrase Descartes.[28]

Those attractive people are professionals who do not go to church and seemingly live "above and beyond the constraints imposed on ordinary mortals."[29] That is true for black people as well: on television they have achieved almost universal economic success. Like their white neighbors, they too are overwhelmingly professional and well educated. Unlike virtually every other category one could plausibly suggest, blacks have for some years appeared on television in just about their proportion to the population at large. By contrast, poor and working-class people are simply background props in those crime programs showing the decay of urban America.[30] Indeed, they fare no

23. Christopher Lee Philips, *Task Force on TV Violence Formed*, BROADCASTING & CABLE, June 14, 1993, at 69.

24. *See supra* Chapter 5 (Violence).

25. "Crime in prime time is at least 10 times as rampant as in the real world." George Gerbner, Larry Gross, Michael Morgan & Nancy Signorielli, *Living with Television, in* PERSPECTIVES ON MEDIA EFFECTS 17, 26 (Jennings Bryant & Dolf Zillman eds., L. Erlbaum Associates 1986).

26. BRADLEY GREENBERG, LIFE ON TELEVISION 11 (Ablex Publishing Corp. 1980). Almost a decade later, George Comstock claimed that while the numbers might be up, they were still very low. GEORGE COMSTOCK, THE EVOLUTION OF AMERICAN TELEVISION 173 (2d ed., Sage Publications 1989).

27. *Id.* at 172.

28. "I spend, therefore I am." ERIK BARNOUW, TUBE OF PLENTY 540 (2d ed., Oxford University Press 1989).

29. COMSTOCK, *supra* note 26, at 174.

30. *Id.* at 173.

better on the news, where, when covered, it is as victims of some disaster.

Women are more likely to be stereotyped than others. There are more males in prime time, and they are the dominant characters. "Typically, women defer to men, and are unlikely to give orders to men while highly likely to receive orders from them. They are typically portrayed as subsidiary helpmates, as mothers, as creatures seeking status, advantageous marriage, or sexual liaison, or as objects of sexual conquest."[31] But when marriage occurs, sex—between the married couple—all but ends. *USA Today*, reporting on a week of prime time programming, found forty-five sex scenes with less than 10 percent portraying sex between spouses.[32]

What does all this mean? Popular culture and communications researchers have abundant theories.[33] For our purposes it is sufficient to say that the critics are onto something: there is plenty to complain about.

THE PROBLEMS FOR THE CRITICS

The Grass Is Always Greener

The merging of news and entertainment has been appropriately and harshly criticized. Trash news and the horrible syndicated talk shows, with their recycled freak guests,[34] degrade the very idea of news and public affairs. The *Washington Post*'s television critic, Tom Shales, wrote of one program that "it does not provide the viewers with anything worth knowing. [It is] cheaply theatrical, . . . hokey, mawkish, and self-promotional. [It is not news; instead it is] new news,

31. *Id.*

32. Barbara Hansen & Carol Knopes, *TV Reality: Prime Time Tuning out Varied Culture*, USA TODAY, July 6, 1993, at 1A.

33. Perhaps the most interesting are from the "Cultural Indicators" project directed by Professor George Gerbner. *See* George Gerbner, Larry Gross, Michael Morgan & Nancy Signorielli, *The Mainstreaming of America*, 30 J. COMM. 10 (1980).

34. Elizabeth Jensen, *Tales Are Oft Told as TV Talk Shows Fill up Air Time*, WALL ST. J., May 25, 1993, at 1. One frequent guest likens the situation to the nineteenth-century circus emphasis on freaks; but "what's different now is that we, as freaks, are doing the speaking. It isn't the barker telling our story for us."

neo-news, non-news, a sugary news substitute, newsahol. It was produced like an entertainment show."[35]

Shales's blast could have been directed at any number of programs, whether syndicated, or, as that one happened to be, network. The problem with his statement is that it was directed at a then-new program on ABC called "Nightline." If as able and disinterested a critic as Shales can miss the mark so widely, maybe others, who are neither so disinterested nor able, miss the mark as well. Our point is a simple one. It is worth remembering that just because people are critical does not necessarily mean they are correct.

Richard Salant noted with pleasure and irony that now television's critics suggest that the late 1960s and early 1970s were the Golden Era. Salant's pleasure comes from the fact that, during that period, he headed the acknowledged network news of record. His irony reflects the fact that CBS was always subjected to biting criticism. "I remember [the evaluation] was always extremely critical . . . . And yet now we say what was then condemned—'now that was the golden age.'"[36]

The Golden Era that critics recall apparently began sometime after the networks shifted in September 1963, from fifteen minutes of nightly news to a full half-hour. This was a time when Rowan and Martin's "Laugh In"[37] quite accurately referred to ABC as the "Almost Broadcasting Company." For too many purposes there were only two-and-a-half networks, and several communities—Austin, Texas, included—could not receive three stations. PBS was still a glimmer in the

35. *Quoted in* Jeff Greenfield, *Broadcast Journalism*, *supra* note 7, at 10.

36. Salant, *in Network News—Getting Better? Getting Worse?*, *supra* note 17, at 3.

37. In our discussion of violence, *see supra* Chapter 5 (Violence), we implicitly assumed that television violence was the acting out of what would be understood by viewers as real violence if it were actually occurring. In fact, however, the most widely used definition of *violence*, that of Professor George Gerbner, includes slapstick comedy. The definition is "the overt expression of physical force against self or other, compelling action against one's will on pain of being hurt or killed, or actually hurting or killing." George Gerbner & Larry Gross, *Living with Television: The Violence Profile*, 26 J. COMM. 184 (1976). Applying Gerbner's definition to "Laugh In" results in this wonderful and popular comedy becoming one of the most violent programs on television. But then again, "I Dream of Jeannie" was *the most* violent show on television when that definition is employed. *See* Thomas E. Coffin & Sam Tuchman, *Rating Television Programs for Violence: A Comparison of Five Studies*, 13 J. BROADCASTING 1, 13 (1972).

recommendations of the Carnegie Commission on Educational Television.

Although the Golden Era was not so long ago, we lack important data on how stations were performing. In 1968 Commissioners Kenneth Cox and Nicholas Johnson took one batch of renewal applications (which the Commission routinely granted) and studied what the licensees were doing. They selected Oklahoma licensees, because they believed it was a "typical State."[38]

The findings have a familiar ring. Only one of the television stations carried two hours or more of (nonnews) public affairs per week, and that was balanced by two that aired none at all.[39] Several stations did not clear the network Sunday news programs, and there were almost no prime time preemptions of network programming for local public affairs programs. Oklahoma twenty-five years ago sounds very much like anywhere today (with the exception that the Sunday shows, vastly improved from their late-1960s "radio with pictures" format, now would receive clearance): not enough news and local public affairs. Maybe the era was not so golden at the local level.

Salant's memory of intense criticism of the networks was not faulty. The tone had been set when his predecessor, Fred Friendly, resigned because CBS ran a fifth rerun of "I Love Lucy" instead of carrying live George Kennan's testimony on Vietnam before the Senate Foreign Relations Committee.[40] Friendly's highly publicized resignation cemented the conclusion that CBS had placed dollars ahead of the public interest. In a perverse twist, during the Golden Era, CBS canned the profitable and popular "Smothers Brothers Comedy Hour" because its satire was too successful in getting under establishment skins.

While CBS was airing reruns (and ABC a movie), NBC was carrying Kennan live.[41] Part of Friendly's frustration was that CBS was supposed to be the network of record, and yet there was NBC beating it (just as CBS had "beaten" NBC the previous week, when it

38. Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study, 14 F.C.C.2d 1, 11 (1968).

39. *Id.* at 12–13.

40. FRED FRIENDLY, DUE TO CIRCUMSTANCES BEYOND OUR CONTROL 250 (Vintage Books 1967).

41. *Id.* at 234.

had carried Agency for International Development head David Bell live all day while NBC had not come back to Bell after the lunch break).[42] Why did the public interest require both networks (or if only one, then CBS) to cover the same event? Friendly had several observations. First, some communities like Champaign, Illinois, could not receive NBC. Second, some NBC affiliates, in Baltimore, Cincinnati, Kalamazoo, and Grand Rapids, did not carry the network feed on Kennan. Finally, in some markets, such as Austin, Texas, which Friendly noted provides coverage to Johnson City (he meant Stonewall), only a UHF station carried the hearings.[43]

More recently, all three major networks, plus PBS and CNN, carried the Iran-Contra hearings live, day after day. They did the same for the Supreme Court nomination of Robert Bork. And no one is likely to forget the weekend in October 1991 when millions were glued to their televisions, not to watch a forward pass, but instead to hear about several by viewing the Clarence Thomas–Anita Hill soap opera. And, most recently, who can forget O.J. Simpson's "last run" in prime time on a Friday night in a Ford (not Denver) Bronco chased by police, not linebackers. This was, of course, followed by ABC, CBS, and NBC all airing Simpson's preliminary hearing live (at least in part to prevent their viewers from fleeing to CNN). Friendly might find some vindication.

But on the thirtieth anniversary of his Vast Wasteland speech, Minow found a more vast wasteland. "I think the most troubling change over the past 30 years is the rise in the quantity and quality of violence on television. In 1961 I worried that my children would not benefit much from television, but in 1991 I worry that my grandchildren will actually be harmed by it."[44] Beyond too much violence, Minow sees too little education, insufficient funding for PBS, not enough free airtime for candidates. He gives television "only a C for using that technology to serve human and humane goals."[45] No golden

42. "It is worth noting that NBC did not continue their broadcast. Had we not returned to the air when we did, the Senate hearings might have been covered differently from then on, because it was our lead that later caused NBC to go back to continuous coverage." *Id.* at 222.

43. *Id.* at 262.

44. How Vast the Wasteland Now?, *supra* note 6, at 18.

45. *Id.*

era here. That is hardly surprising. Golden eras are always in the past. Salant expressed surprise that his is perceived as the Golden Era; no one thought so then. If one had asked Friendly, he would have pointed back into the 1950s, when he and Edward R. Murrow had their prime time slot.

The grass is always greener elsewhere. No matter what stations do, they could do it better—as they used to, assuming the Golden Era was in fact golden. Or they could do something else. Criticism runs with the territory, and whether there are three or four or five networks, some will necessarily be better than others. The hometown newspaper of one of the authors of this book is one of the nation's best; the hometown newspaper of the other author is one of the nation's worst. While only a few cities can have one of the nation's worst papers, only in Lake Wobegon can everything and everyone be above average.

Will Regulation Work?

Minow states, and other critics would readily agree, that he "reject[s] this ideological view that the marketplace will regulate itself and that the television marketplace will give us perfection."[46] We do not blame him; we can beat up straw men with the best. We have *never* heard or read anyone who claims that the television marketplace gives us perfection or could conceivably do so. The claim, as we understand it, subject to the caveats in Chapter 3, is that the marketplace is better than the alternative—regulation—in providing consumer satisfaction. It is well to recall that the best is the enemy of the better.

An explicit thesis of our argument is that it is not sufficient for a regulation to articulate desirable goals. The regulation must promise to materially advance those goals, and whatever costs it imposes must be outweighed by the benefits the regulation creates; furthermore, if the goals could be achieved in a less costly manner, then the latter should be the approach selected. Yet without searching for alternatives based on competition or technology and even ignoring any costs the regulation imposes, we do not believe that regulation is capable of producing the programming that the critics wish to view.

46. *Id.*

In Chapters 9 and 10 (and to a lesser extent in Chapters 4 and 5) we discussed how well FCC regulations worked. Those designed to suppress certain programs, as Chapter 5 illustrated, have the best chance of working. If courts are willing, censors are able. This worked with drug lyrics in the 1970s and (if sustained by the courts) should work with the crackdown on indecency on radio in the 1990s. It has certainly made life more difficult for Howard Stern and the stations that air his highly popular radio program.[47] It would appear capable of working against too many commercials or commercial minutes. Problems of definition may limit the effectiveness against violence or stereotyping, and, indeed, this may explain why the FCC has never regulated in that area. But if an overly broad definition could be established and sustained, then it too could work.

We have previously noted that changing the channel is an effective way for viewers and listeners to avoid programs that offend or displease. But the premises of regulations requiring conformity are that Gresham's Law produces too much of the offending programming and that viewers, if given the option of choosing what they wish, will choose the wrong programming, thereby failing to make themselves (and therefore the nation) all that they can be. Presumably, if the would-be censors could have their way and their behavioral assumptions prove to be correct,[48] by eliminating inappropriate programming, society could take the first important steps toward creating the new American person. For our part, we stand with *West Virginia State Board of Education* v. *Barnette*: "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."[49]

Regulations designed to create certain programs (in the face of a broadcast desire not to air them) are far less likely to be successful

47. *See supra* Chapter 5 (Sex).

48. See Chapter 5 for discussions about whether various social ills are caused (or exacerbated) by their depictions in the mass media. While the evidence would appear to be out on most of the issues, we did note that although the FCC successfully banned drug lyrics in the early 1970s, that did not appear to stop illegal drug use. *See supra* Chapter 5 (Drugs). For the antecedents of this debate, including early film and comic books, see Krattenmaker and Powe's 1978 study. Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence*, 64 VA. L. REV. 1123, 1288–92 (1978).

49. 319 U.S. 624, 641 (1943).

unless the FCC is willing to invest time and effort into enforcement. Even then stations will likely air only the bare minimum that the Commission is willing to enforce. But none of this deals with the basic thrust of television's critics: that programming is not very good and there is not enough of the truly good—like Murrow's "Harvest of Shame," for example. The rub is that critics wish local news and public affairs programs were different and that entertainment programs were substantially improved.

No regulations are needed to create local news. It has long been a profit center; the problem, as critics see it, is that local news is not very newsy and not very good. There is too much happy talk, weather, boosterism, consumer affairs, and coping. Furthermore, "if it bleeds, it leads."[50] Maybe most local communities do not produce enough news each day. Maybe the local news could be harder (and simultaneously less bloody). Maybe more active debates about local problems could be slotted in. But if, after sixty years of regulation, anyone knows how to mandate this successfully, that person has not stepped forward. Regulation could require local news, but there is no need to do so since local news is aired because viewers want it. No regulation can make local news harder and better, whether it is on a local station or in the local newspapers.

The proliferating talk shows have given voice to many who otherwise would not be heard. While normally adding voices has been the premier goal articulated by many of television's critics, the voices talk shows add are not those the critics want.[51] Critics had assumed that by adding public affairs and information, television would add programmatic discussion toward the specific resolution of tractable policy issues. Without a degree of specificity that ebbs over into very specific (and unconstitutional) content mandates, there is no way to solve this problem. We assume that no one would wish to go back to "Face the Nation" or "Meet the Press" as they existed before David Brinkley taught them what a Sunday morning program could be.[52]

50. Jeff Cohen of FAIR, *Crossfire* (CNN Television Broadcast, Mar. 4, 1993).

51. *Markey Hearings, supra* note 21, at 101 (statement of Ralph Nader that "the airwaves are increasingly polluted by 'tabloid TV' and 'infomercials' that debase the journalistic process"); *id.* at 144 (statement of Jeff Cohen that television is "utterly failing to provide diversity of viewpoints").

52. Ted Koppel, *in Network News—Getting Better? Getting Worse?*, *supra* note 17, at

News and information can be sufficiently well done that watching it is pleasurable.[53] But this creates the risks that it will be less news and information and more entertainment. With the talk shows that is what has happened—only they also look, to the authors at least, like bad entertainment.[54]

Shortly after the Vast Wasteland speech, Louis Jaffe responded with observations that are as valid now as they were then:

> Minow seems to think that there are thousands of clever people ready and willing to civilize his "vast wasteland" with an infinity of pleasant prospects. Look at the other media. There are only a few good movies each year, three or four good plays, and a handful of good musicals. Surely there has never before been anything comparable to TV's enormous maw, hungering for entertainment. How is it possible running on a time-table week in and week out to avoid the stereotype?[55]

Thus, shortly before Minow's speech, Eric Sevareid observed that "considering the number of hours you had to fill, it's surprising that there's even enough mediocrity to go around."[56] What is it about television that places blinders on critics? "To expect the mass production of intellectual quality is simply foolish [because] the inevitability of mediocrity in mass production is as true of all other fields of intellectual creation as it is with television."[57]

26 (1990).

53. Presumably, this explains the high ratings of "60 Minutes" and other newsmagazine programs.

54. When compressed, however, it can be amusing. Thus, the cable network E! presents "Talk Soup," a program that features the "highlights" from the previous day's talk shows.

55. Louis Jaffe, *The Role of Government*, *in* FREEDOM AND RESPONSIBILITY IN BROADCASTING 39 (John Coons ed., Northwestern University Press 1961).

56. *Quoted in* Clifford Durr, BROADCASTING AND A FREE SOCIETY 13 (Center for the Study of Democratic Institutions 1959).

57. Lee Loevinger, *Broadcasting and the Journalistic Function*, *in* PROBLEMS AND CONTROVERSIES IN TELEVISION AND RADIO 327 (Harry Skornia & Jack Kitson eds., Pacific Books 1968).

Television's critics see it as the great underachiever. They demand it be neither "banal, boring nor bad."[58] Instead, it should be constantly uplifting and educational. Minow highlights the demands on television when he grades it a "C."[59] Why so much focus on this ubiquitous medium? The answer, it seems, is that television has replaced the public schools as the repository of hope to achieve a well-educated, thoughtful, compassionate, integrated society. Television is a medium of enormous potential; yet it just does not live up to it.

In holding television's achievements against its potential, critics are behaving as critics should. Nevertheless, they also demand of television what they demand of no other medium: the unattainable.[60] This may be yet another illustration of a peculiar view of over-the-air television: it is unique because it is the one mass medium from which no demands are too great. Therefore, of necessity, it must always fall short.

Viewers and Listeners

A basic problem with the critique of broadcasting is that viewers, when given the option of seeing what the critics like, too often watch something else. And when viewers do watch the type of programming critics like—say local news, the most popular local program—the viewers are satisfied with an inadequate product. What can be done?

"We gotta get us a better audience."[61] Well-educated viewers, like the critics themselves, should do nicely. After all, not only are the well educated generally more critical of television, but they declare, like the critics, that they want not only more informational programming, but also high-quality, serious entertainment programming.[62] There is just one problem, but it is a big one. Studies show that,

58. *Id.* at 326.

59. "A past record within the bounds of average performance will be disregarded, since average future performance is expected." Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 398 (1965).

60. Two years after the Vast Wasteland speech, Minow acknowledged: "Given the best talent, the best intent and the best financing, it is difficult for TV to create quality programming at the fantastic rate programs are consumed." Newton Minow, Address to the National Association of Broadcasters (Apr. 2, 1963), *reprinted in* EQUAL TIME, *supra* note 1, at 252.

61. Greenfield, *in Broadcast Journalism*, *supra* note 7, at 8.

62. COMSTOCK, *supra* note 26, at 67.

despite what the better educated say, what they watch is basically the same as the rest of the population.[63]

At one time it was assumed that if viewers had sufficient opportunities to tune into quality programs, they would learn to like what the critics already liked. Because this is not true, an explanation is needed: "By pandering to audience tastes instead of leading them, by increasing the rate of commercialization and decreasing the quality of news, the television networks have lowered the expectations of audiences to the point where they do not understand quality programming when they see it—and when they do see it they often reject it."[64] It is the broadcasters' fault.

The faith that one person's choices are so obviously better than another's, so that were the others only provided an opportunity to improve, they would, is charming. Indeed, it is hardly surprising to note that, for those who believe their preferences are so good that they ought to be universally imposed, the public interest is alive and well. For those on the receiving end of the imposition, however, belief in the public interest is harder to come by. As Jeff Greenfield aptly observed, "when you no longer need the skills of a safecracker to find PBS in most markets, you have to realize that the reason people aren't watching is that they don't want to."[65]

A universal answer is to blame the networks, something Professor Cass Sunstein implicitly does in postmodern terms: preferences are socially constructed, so government should go construct good ones. Drive the bad choices from the air and leave viewers—at least those 20 or so percent of the population who cannot flee to cable or VCRs—with no options except to watch good programming. Eventually, viewers may be socially constructed to like it. "Preferences that have adapted to an objectionable system cannot justify that system. If better options are put more regularly in view, it might well be expected

63. GARY STEINER, THE PEOPLE LOOK AT TELEVISION (Knopf 1963); ROBERT T. BOWER, THE CHANGING TELEVISION AUDIENCE IN AMERICA (Columbia University Press 1985). Comstock notes that Steiner's original finding was "so startling when it was first reported in the 1960s that it won for Steiner an entry—the only one occupied by a researcher—in Les Brown's *New York Times Encyclopedia of Television* (1977)." COMSTOCK, *supra* note 26, at 68.

64. *Markey Hearings, supra* note 21, at 117–18 (testimony of Tracy Westin).

65. Greenfield, *in Broadcast Journalism, supra* note 7, at 9.

that at least some people would be educated as a result. They might be more favorably disposed toward programming dealing with public issues in a serious way."[66] Those who have raised children with specific goals in mind, and lots of one-on-one time over the years to educate and instruct, can only wish that the transmission of preferences was so easy.

Sunstein has dressed an older argument in more modern garb, but at bottom it is the persistent belief of some elites that if only they could gain power, they would use it to impose their views of the good on those who are less enlightened. There has been a persistent demand from critics for more and better public affairs programming. They call on *Red Lion* as a justification for regulators to require such programming because, of course, "it is the right of the viewers and listeners . . . which is paramount."[67] Behind this, however, is the belief that it is the right of elites to dictate tastes to viewers and listeners that is really paramount.

Viewers and listeners, however, have some trumps. They do not have to submit to Sunstein's construction of the preferences he believes they should have. They do not have to watch PBS or listen to NPR, no matter how good the two are. As the Supreme Court has recognized, "no one has a right to press even 'good' ideas on an unwilling recipient."[68]

Achieving the critics' goals by regulation is vastly more difficult than the critics acknowledge. The First Amendment may yet be interpreted to harmonize broadcasting with the other media of mass communications. And someday, the realization that the public trust has real viewers and listeners as its beneficiaries may lead to the future realization that their needs can best be met in the same way that the needs of consumers of any other medium of mass communications are met.

66. CASS SUNSTEIN, THE PARTIAL CONSTITUTION 221 (Harvard University Press 1993).

67. 395 U.S. at 390.

68. Rowan *v.* United States Post Office Dep't, 397 U.S. 728, 738 (1970).

The Appropriate Scope of Regulation

Suppose television's critics were more realistic in their assessment of the media's promise, more modest in their conception of government's ability to make over its own citizens' values, and more sober in their expectations as to government's ability to alter broadcast programming by direct regulation of broadcasters' program choices. How might the realistic and modest reformer understand the role of regulation in controlling broadcast program content?

We think it is reasonably clear that such a sober reformer would eventually understand that the guiding principles for such regulation are already well established. They are the principles that, shaped by carefully considered First Amendment values, govern the legal regulation of virtually all other mass media in the United States. These principles provide government with ample authority to regulate the media in ways that can improve its performance, while assuring that government is responsive to, rather than responsible for, American culture, information, and politics.

In our view, what has been fundamentally lacking in previous studies of broadcast program regulation in America has been this realization that there is already in place a set of principles that can guide and constrain regulation so that it is efficacious without being stifling. These ground rules of constitutional law and regulatory policy toward the mass media help to ensure that laws governing the media are targeted at issues government can manage, while avoiding regulations that are simply naive or directed at foisting particular preferences on a pluralist society.

In the remainder of this chapter, we explain these ground-rule principles of constitutional law and regulatory policy, show how and why they shape government's basic stance toward all nonbroadcast media, and demonstrate how these principles could govern broadcast regulation equally well. Our argument proceeds from history and logic, not from detailed empirical observation. We proceed in such a way because, as we also explain below, these principles rest on empirical assumptions that one must take for granted in deciding, in the first instance, to nurture a culture and create a political system organized around concepts of freedom of speech and the press.

Basic Principles

Four principles collectively establish the proper responsibilities of government in regulating the structure of the mass media and in supervising access to, and diversity within, those media. These principles are already well known, but are not frequently identified as what they are in fact—the cornerstones of a rather consistent pattern of American regulation of the nonbroadcast mass media. Indeed, we tend to take for granted those bedrock legal principles as they apply to such diverse communications media as books, films, magazines, theater, newspapers, recordings, and speech in public forums.[69]

First Principle. Editorial control over what is said and how it is said should be lodged in private, not governmental, institutions. Two basic rationales underlie this principle. They are well stated in *Miami Herald* v. *Tornillo*,[70] discussed at length above,[71] and so we only summarize them here.

In the first place, both history and theory clearly teach that the imposition by law of "good journalism" or "fair representation" requirements on speakers operates to chill speech, not to liberate, broaden, or protect it.[72] Such government intervention cannot add more speech; at its very best, that intervention can only substitute speech on one topic for speech on another.

In the second place, editorial control, because it is invariably content based, is an inherently impermissible government function.[73]

69. The principles set out below are not, under current law, fully applicable where government itself is the speaker or where the speech is properly classified as "commercial speech." Consequently, the analysis we provide in this chapter does not necessarily apply to cases in which the government is the broadcaster or the broadcast constitutes solely commercial speech. We shall turn, in part, to government speech in our discussion of the fourth principle, *infra* this chapter.

70. 418 U.S. 241 (1974).

71. Discussed *supra* Chapter 7 (Overview).

72. It is for these reasons that no one would dream of imposing a "balanced coverage" rule on Madonna, Steven Spielberg, Tom Clancy, or William F. Buckley, Jr. For some reason, people balk at understanding that this point applies equally well to broadcasting.

73. For an extensive demonstration of this point as applied to the Fairness Doctrine, equal time provisions, and indecency regulation, see Powe's 1987 study. LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT (University of California Press 1987).

When government edits, it does so for debatable purposes and with questionable means; that editing necessarily stifles unpopular viewpoints.[74]

These points are not always obvious, particularly when one first thinks about broadcast program regulation. A newcomer to this area might be tempted to conclude, for example, that if a rule requiring television stations to broadcast more children's programming, or, alternatively, a rule forbidding the broadcast of what is deemed inappropriate programming, can substitute speech on one topic for speech on another, it would be a good thing.

Such a conclusion ignores several facts. First, choosing to spend resources requiring children's programming means that those resources—first by government in requiring, then by producers in creating, and finally by stations in broadcasting—will not be spent on some other form of programming, perhaps junk soap operas, perhaps Spanish-language programming, but something.

Second, such a rule requires government to define what constitutes "children's programming." That definition must be fashioned through political processes and, therefore, must be a political one. It will reflect the current biases and prejudices of the political majority which will create an officially designated list of acceptable programs, formats, or topics. Only if we desire to have a national school board (or a national nanny), rather than a variety of institutions competing for the opportunity to serve parents' and children's welfare, and only if the FCC is well qualified to serve that centrist function, will a requirement that licensees engage in "children's programming" produce an arguably acceptable regime of broadcast program content regulation.

Third, the children's programming regulation cannot guarantee quality. A proponent may believe that any "children's program," no matter how bad, is better than the alternatives, but true quality comes from a program's substance, not its topic.[75] As we discussed in

74. THOMAS I. EMERSON, TOWARDS A GENERAL THEORY OF THE FIRST AMENDMENT 16–25 (Vintage Books 1966).

75. Henry Friendly, *The Federal Administrative Agencies*, 75 HARV. L. REV. 1055, 1071 (1962) (doubting whether "the Commission is really wise enough to determine that live telecasts . . . e.g., of local cooking lessons, are always 'better' than a tape of Shakespeare's Histories").

Chapter 4,[76] efforts to create quality programs, while sporadic, have not been successful.

Finally, shifting from the children's programming example to that banning an unfavorable program type, we reach all the issues involved in censorship. A programmer is forbidden to create, stations are forbidden to air, and adults are forbidden to view and hear programming that would otherwise be available in the market because either Congress or the FCC believes that adults are incapable of evaluating with what they wish to spend their time. It does not matter whether the banning institution represents a permanent majority of Americans, a transient majority, or a minority capturing the institution (as appears to have been the case with the 1987 FCC indecency decisions).[77] It does not matter whether the purpose of the regulation is to entrench or change the status quo. In each case, government fiat substitutes for the choices that adult Americans would otherwise make. As Justice Robert Jackson stated, "[i]f 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."[78]

Second Principle. As a matter of policy, government should foster access by speakers to media. Clearly, government has an important role to play in seeing to it that the media are not monopolized and in expanding the opportunities of citizens to speak and to be heard. People who own instrumentalities of communication have incentives to reduce their use to charge monopoly prices and to prevent or retard the development of competing instrumentalities. We cannot assume that those efforts will always fail of their own accord. Further, government funding of basic research is often an efficient way of uncovering new communications technologies or new uses for established vehicles, both of which can widen access by increasing the number of available communication channels.

76. *See supra* Chapter 4 (Minimum Diversity Levels: Quality Programming).

77. John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329 (1989). As we describe it, *supra* Chapter 5 (Sex): "a political bone to the religious right."

78. West Virginia State Board of Education *v.* Barnette, 319 U.S. 624, 642 (1943).

That government should foster speakers' access to the mass media is not a controversial proposition. What has proved quite contestable, however, although usually only with respect to broadcast regulation, is the meaning of *access*; in broadcasting *access* is often defined as replacing the choice of programming of the broadcaster with that of someone not associated with the station at all. By contrast, when we examine government's relations to other mass media, it seems reasonably clear that, for purposes of that principle, *access* means the ability to reach any willing recipient by any speaker willing to pay the economic costs of doing so. In turn, *economic costs* mean the costs (including opportunity costs) of resources employed in communicating, not necessarily the prices charged by (perhaps monopolistic) owners of those resources.

Those definitions reflect the judgment that it should be a fundamental obligation of government to ensure that communications media are not monopolized or otherwise structured so that only people willing to pay extraordinary amounts have access to them. For example, such a view of access policies means that officials should place a high priority on preventing price-fixing agreements among book publishers, or on assuring that import quotas do not artificially inflate the price of printing presses, or on making widely available new technologies that increase the quantities of data that can be transmitted via the electromagnetic spectrum.

At the same time, the Constitution does not mandate that speakers should be subsidized.[79] One reason for this is that, since resources are limited, subsidization might entail choosing which speakers to fund on the basis of the content of their speech,[80] and history teaches that there is reason to be wary of government choices (although the lessons are not so clear with subsidies). What is clear is that, even in the absence of subsidies, we do not assume that access to book publishers is inadequate if an author is not published because publishers believe her book will not sell enough copies to pay for printing costs.

79. At least with respect to the media of mass communications. There is a subsidy inherent in the mandate that government allow speakers to use the public streets and parks to communicate.

80. As indicated in our fourth principle below, where government can subsidize access without choosing preferred contents or viewpoints, it may do so.

For books—and, in truth, for virtually all media—we do not regard society as responsible for ensuring access to speakers who command small audiences (even if those speakers think they will command larger ones). One reason for this is that no program to subsidize book authors could underwrite all of them. To choose which books to fund, government would likely employ content or viewpoint tests.

Third Principle. Government policies should foster diversity in the media marketplace. If government adheres to the first and second principles, this will follow automatically because it is the opposite side of the coin. The quest for diversity does not require government to provide people speech that they do not value as much as it costs to produce and distribute. And, quite obviously, the quest for diversity is not a justification to censor some programming upon a theory that the censorship will necessarily produce some other programming. Instead, "diversity" is achieved when people are allowed to bid for any information or entertainment they desire—no censorship—and to receive what they seek, so long as they are willing to pay the costs of receiving it—no artificial government-imposed barriers to transmission and reception of speech.

Those principles, too, are evident in our settled expectations regarding legal control of the nonbroadcast mass media. For example, the magazine market is regarded as diverse because people are free to publish or to subscribe to magazines on any or all topics. We do not regard diversity in the magazine market as incomplete if some topics or formats that might lend themselves to magazine treatment are not published because to do so would cost more than subscribers (or advertisers) are willing to pay.[81]

Fourth Principle. Government is not permitted to sacrifice any of the three foregoing principles to further goals associated with either or both

81. One might make precisely the same points about the theatrical film market as well. Movies provide diversity in the sense that people are free to make, to exhibit, and to attend any movie whose costs of production can be covered by expected box office (and tape rental, cable licensing, and other) receipts. We do not regard the movie market as nondiverse, and in need of further government intervention, even though we can easily imagine films that we might like to see but whose costs of production cannot be recaptured by the expected income from selling tickets, and other sources.

of the others. Where such sacrifice is not needed, however, government may extend the goals associated with any of those principles.

The Constitution does not mandate subsidies for those seeking access to or diversity from the mass communications media. The Constitution does not prohibit subsidies either.

Often sound public policy supports subsidizing access to the media (so long as it is a true subsidy, rather than an extraction taken from media competitors).[82] During the era before cable, we were all the richer for the decision to create and subsidize PBS. We cannot know how many magazines have been created and then continue to exist because of second-class mailing privileges, but, again, we are better for their existence, because more information available to choose from is always better than less. Earlier we suggested that the Department of Education might be the best source for creating the types of children's programming deemed appropriate. If they are not countereffective, antidrug ads are a good idea.[83] Indeed, to the extent the marketplace is perceived as impoverished, subsidies may be an effective way of correcting its inadequacies. Furthermore, as Dean Mark Yudof's seminal, award-winning work, *When Government Speaks*,[84] explains, the policy issues, while rich and complex, are largely freed from the restraints that the First Amendment otherwise imposes on government actions.

In short, government does not violate any bedrock principle regarding regulation of the mass media if it chooses to subsidize speakers' abilities to reach audiences, even if this subsidy means that speakers do not pay the full economic costs of their communications. This is true, however, only so long as the subsidy is not administered by government exercising editorial control over speakers or undermining recipients' ability to bid for what they desire.

82. To be a subsidy the costs must be spread generally. The earlier principles preclude taking from *A* to give to *B* or silencing *A* to let *B* speak.

83. Normally, a viewpoint-specific rule would be virtually per se unconstitutional. But when the government is the speaker, it, like other speakers, need not be neutral. The reasons are at least twofold. First, there is no way to silence government. Second, as noted, the First Amendment precludes government from silencing opposing viewpoints.

84. MARK G. YUDOF, WHEN GOVERNMENT SPEAKS (University of California Press 1983).

Sources of the Basic Principles

For those familiar with basic First Amendment law and general American regulatory policy toward the mass media, reflection will reveal that virtually all First Amendment rules and regulatory policies toward the mass media—other than broadcasting—rest on the four principles set out above. Consider the print media. With little or no controversy, we recognize (or tolerate) the following four facts. First, a regulation that provides, "If you write about x, you must behave according to these journalistic norms," puts a chill on writing about x. Second, print media are "accessible" platforms to speakers, even if no one gets published at no cost. Third, the print media provide "diversity," even if we are not assured that every worthwhile view will be propounded or offered for sale. Fourth, the First Amendment divested government of power over, or responsibility for, the behavior of editors.

Why, at least for all mass media other than broadcasting, do we embrace those principles and the results they produce? We think we do so largely because in America citizens and policy makers widely share three empirical assumptions on which those principles rest. These beliefs about the world explain both why we have chosen to have a First Amendment and why our legal regulation of the media is channeled by the four principles just described.

In sum, those principles make sense if we believe in the following three empirical assumptions. First, governmental control over editorial policies will inevitably be exercised in a discriminatory fashion, privileging that which is in vogue, mainstream, and safe while handicapping that which is not. Second, recipients—readers, listeners, viewers—are capable of judging the quality of a speaker's presentation and abandoning those speakers who do not measure up to the recipients' standards. Third, speakers compete within and across media for potential recipients, so that the public is constantly presented with a variety of viewpoints from which to choose. Further, it is only because we believe that markets for ideas and values operate in this fashion that we have chosen to place constitutional constraints on government's authority to regulate speech.

We do not blush to admit that we believe these empirical assumptions are true.[85] Another reason we treat these beliefs about politics, speakers, and listeners as a basis for erecting principles to govern legal regulation of the media is "the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[86] If, for example, we build legal rules on the assumption that recipients can discriminate among speakers and speeches, this should tend to become a self-fulfilling prophecy. Recipients will need to develop the ability to discriminate.

Of course, we cannot prove that those empirical assumptions are generally truthful reflections of reality, and we know that they are not always so. But, for purposes of our argument, it is quite important to note a fact that is not contestable. That fact is that these assumptions about politics, speakers, and listeners underlie virtually every facet of First Amendment law and nonconstitutional regulatory policy toward the (nonbroadcast) mass media. Constitutional and statutory rules aimed at not only the print media, but all mass media other than broadcasting are premised on the notions that, although government has important duties or opportunities to expand access and diversity through content-neutral actions, the goals of an open, stable democracy are best advanced by relying on recipients to choose from among competing speakers unconstrained by government. "To many this is and always will be, folly; but we have staked upon it our all."[87]

Application of Basic Principles to Broadcast Media

As we have noted throughout this book, however, these fundamental principles are not followed when it comes to regulation of the broadcast media. Courts have permitted—indeed, virtually invited—government to dictate broadcasters' editorial policies.[88] Cable system operators have been told to provide access at no cost to certain favored speak-

85. Especially if we add "for the most part and in the long run," which are the conditions that really matter.

86. Cohen *v.* California, 403 U.S. 15, 24 (1971).

87. United States *v.* Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.). *See supra* Chapter 7.

88. Red Lion Broadcasting Co. *v.* FCC, 395 U.S. 367 (1969).

ers.[89] To obtain greater diversity of program fare, government has begun to adopt official definitions of what constitutes acceptable television programming for children;[90] the FCC is actively attempting to suppress indecency on radio;[91] and the attorney general, along with members of Congress, is threatening to censor network television that portrays what is deemed excessive or gratuitous violence.[92]

Analytically, this differential treatment of broadcasting (and other media, such as cable) is surprising because the principles we described are rooted in basic values of free speech, not concerns specific to any medium or group of media. With regard to those mass media—such as VHF television or AM radio—that broadcast over the electromagnetic spectrum or those—like cable television or video cassette recorders—that plug into TV sets, there is no reason to adopt a different definition of *access* or of *diversity*, or to deny the probability of chilling effects, or to exalt the editorial superiority of popularly elected officials (or their bureaucratic delegates). It is equally clear that radio stations, like newspapers, compete with each other and with other media—such as audiocassettes or magazines—for recipients' attention. And, because the four principles we have described form the basis for a perfectly adequate constitutional and statutory policy toward all of the mass media, there is no reason to doubt their ability to preserve well-functioning broadcast media that serve and strengthen a democratic society.

In our view, then, there is simply no reason to accord broadcasting a different legal or constitutional status than any other medium of mass communications. One reason for this is that we already have in place, for all other mass media, a well-defined and well-functioning set of principles to guide and constrain government policies toward those media. These policies can be applied to the broadcast media as easily as they are applied to any other communications medium.

89. 47 U.S.C. §§ 531, 532 (1993).

90. Policies and Rules Concerning Children's TV Programming, Revision of Programming Policies for Television Broadcast Stations, Notice of Inquiry, MM Dkt. No. 93-48, 8 F.C.C. Rcd. 1841 (1993).

91. *See supra* Chapter 5 (Sex).

92. *See supra* Chapter 5 (Violence).

Reformulating Broadcasting Law

It remains to explain what would be entailed in bringing broadcasting[93] within the umbrella of general media law. Even television's harshest critics, if they are sensible and appropriately modest about what a distinct, more Draconian system of broadcast regulation can accomplish, should see that affording broadcasters full protection of general media law still leaves ample room for progressive and helpful regulation. Three central points emerge.

No Content Controls. First, all government content controls should be removed from broadcasters.[94] This includes controls, like the Fairness Doctrine, indecency regulations, or children's television requirements, that dictate what may or may not be said. It extends as well to indirect controls, such as aspects of the FCC's comparative licensing standards that may accord preference to one potential speaker over another on the basis of governmental comparison of the quality of their speech.[95]

Reduce Entry Barriers. Second, government simultaneously ought to undertake an obligation, rooted in free-speech concerns, to reduce barriers to entry that confront potential speakers. This includes those who wish to employ established technologies such as television stations broadcasting in the VHF spectrum. For example, long ago, the FCC made many decisions that substantially constrict the number of VHF stations that can now be on the air.[96] Those decisions can be reversed.[97] The obligation should extend also to potential speakers

93. We refer here not only to over-the-air (conventional) broadcasting, but also to other technologies, such as cable television.

94. More specifically, of course, in line with general First Amendment principles, content regulation should be removed except insofar as it affects "unprotected" speech (such as obscenity or malicious libel) or to the extent that such regulation is necessary to serve an overriding, compelling governmental interest.

95. WNCN Listeners Guild *v.* FCC, 610 F.2d 838 (D.C. Cir. 1979); Application of Simon Geller for Renewal of License of WVCA FM, Memorandum Opinion and Order, Dkt. No. 21104 91 F.C.C.2d 1253 (1982); *see supra*, Chapter 6 (The Malleable Public Interest: Carroll Broadcasting, and Cultural Diversity).

96. Several of these choices are detailed in Thomas L. Schuessler, *Structural Barriers to the Entry of Additional Television Networks: The Federal Communications Commission's Spectrum Management Policies*, 54 S. CAL. L. REV. 875 (1981).

97. This might, however, be a second-best solution today. It might be preferable to free

desiring to employ new technologies, for example, communications networks that link up portable computers. Federal regulation has effectively delayed the entry of, first, portable cellular telephones and, later, portable interactive minicomputers by failing to establish fluid mechanisms for allocating and reallocating spectrum in response to emerging technologies and consumer demand. That omission can and should be remedied.

Reducing entry barriers and extending the spectrum available for communication of information and entertainment serves the goals of both access and diversity as it lowers the costs of communicating and expands the opportunities for doing so. In this fashion, listeners and viewers are empowered, without governmental censorship. By simply turning the channel selector and on/off switches, listeners can force broadcasters to serve their interests and desires.[98] To the sober television critic who understands the modest possibilities of achieving real change through regulation, such a program ought to be vastly more appealing than the kinds of clumsy and usually ineffective content controls that were at the center of the Fairness Doctrine and underlie present regulation of children's television.

Common Carrier Regulation? Finally, government may, consistent with the four basic principles of mass media regulation, require that those who control the means of communication act as common carriers. Interestingly, there is nothing in the basic principles of mass media regulation that specifies who must exercise the editorial function. Our traditions, as well as the specific language of the First Amendment, only tell us who must not be the editor. Editing is not government's job. Speakers edit free of governmental control or interference, but they need not own the facilities over which they speak. Printing

up VHF spectrum for other communications uses and move television to cable and satellite transmission, where it would not block so many other valuable uses.

98. Similarly, government regulation fosters diversity when it helps people make and enforce choices. Thus, no basic principle is violated if government requires that consumers be offered radio or television receivers that are engineered so that channels can be permanently or selectively blocked or so that a very wide range of channels can be received. (Where, however, government mandates that only such receivers be offered, it risks reducing access and diversity by increasing the costs of the receivers beyond the willingness of low-income viewers to pay for the sets.)

presses, sound stages, recording studios, cable systems, and broadcast stations could all be operated as common carriers.[99] They would behave like existing communications common carriers, that is, for example, like local telephone exchange carriers and most long-distance microwave services and satellite carriers.

In some instances, imposing common carrier obligations can be an effective way to ensure that all speakers receive nondiscriminatory access to platforms. Where this occurs, diversity, as we have defined it, is also enhanced. In simple terms, the appeal of common carrier regulation is that it seems directly responsive to sober claims for broadcast-content regulation. If, for example, the claim is that we need a fairness doctrine for radio to permit access by speakers whose views are antithetical to advertisers and so would not be carried by advertiser-funded radio stations, one might offer the common carrier alternative. Under such a regime, any speech by a speaker willing to pay the costs of speaking should be carried (access) and can be received by anyone willing to pay any additional costs of receiving it (diversity).

Common carriage regulation, however, should not be viewed as a panacea. First, such regulation is not costless. At a minimum, government resources must be devoted to defining and enforcing the rules. Further, especially as applied to mass communications media, common carrier obligations can prevent the achievement of substantial efficiencies. Magazine publishers and broadcasters do not simply put out articles or programs. They package groups of articles or programs into a coherent whole. This whole package is often more valuable than the sum of its parts because the package itself communicates. It describes the mix and quality of data or entertainment that the recipient will receive.

To illustrate, a newsmagazine run on a common carrier basis might, in a given week, contain ten stories on health care policy and none on foreign policy, depending on which authors showed up first or bid the highest amounts for available space. Moreover, the stories may reflect very different standards of care in research and writing. Readers might (indeed, probably do) prefer a magazine edited by a single

99. Indeed, there exist markets for renting each of these facilities in the United States today.

publisher because this tends to ensure a greater variety of topics, balanced coverage, and a uniform level of quality. The single publisher can also provide an overarching point of view, which recipients may prefer to receive as well.

Finally, it is not self-evident that common carriers will provide greater access opportunities or diversity of style or viewpoint than will publisher-editors. Where an editor—whether of a newspaper, a broadcast station or a cable system—has the capacity to add a speaker whom audiences wish to receive, it is usually in that editor's best interests to provide that speech so long as the audiences are willing to pay the (marginal) costs of transmitting it.[100] If the problem is lack of capacity, the preferred government response, as outlined above, is clear—help to increase capacity, to reduce entry barriers. If the problem is incompatible ideology, the preferred response is the same. By reducing entry barriers and preventing monopolization, government facilitates competition among editors of diverse ideologies, and thus, fosters access to competing viewpoints.

Common carriage, then, should not be viewed as the preferred basis for organizing or regulating the mass media in the United States. In most cases, its costs will exceed its benefits. But, in the unusual case, common carrier regulation can be a cost-effective means of attaining access and diversity goals without engaging in content regulation. For those reasons, a common carrier regime cannot be said, on a priori or philosophical grounds, to impose a threat to civil liberties comparable to that created by empowering government to displace the decisions of private editors.

Criticisms—Shallow and Deep

Most proponents of increased government control of broadcast program content have not responded to the arguments just advanced because they have never considered them. In their rush to impose their value system on broadcasters, listeners, and viewers, they have not paused seriously to consider whether the faults they perceive in broadcasting

100. STANLEY M. BESEN & LELAND L. JOHNSON, AN ECONOMIC ANALYSIS OF MANDATORY LEASED CHANNEL ACCESS FOR CABLE TELEVISION (RAND Corporation 1982).

could be remedied by means fully consistent with the regulatory policies we employ toward all other mass media. With those critics, we agree that it is too expensive to get on television, and that television offers fare that is both too bland and too vexatious. But we should all be equally able to agree that those problems do not require that FCC employees metaphorically sit in broadcast station control booths. Rather, those government officials ought to be reducing entry barriers and expanding access opportunities for programmers and viewers.

For other critics, our arguments must seem hopelessly naive. These are the new brand of media critics, the ones who believe that the arguments we have just advanced cannot make sense in a world where the distribution of wealth and resources is badly skewed. How can we talk of broadcaster choice, competition among stations, or the sovereignty of the listener-viewer when very few people have the wealth to own a station, when outlets are restricted in number and reach, and when so many broadcast consumers are too poorly educated to make wise choices or too impoverished to be able to make their choices count?

To be quite honest about it, we find it rather easy to continue to talk about these things. What other choice do we have? A society in which one governmental entity dictates standards of taste and value lest thousands of broadcast licensees "dictate" those same things? A medium with only one definition of "children's programming" rather than the same medium operating with several such definitions? Broadcast journalism governed by the White House's view of balance and fairness rather than the views of several networks competing for viewers' attention?[101]

To be sure, our commitment to the bedrock principles of media regulation described in this chapter rests on assumptions that are not always true about the capacities of recipients of speech and of the speechmakers themselves. Interestingly, however, those principles are directly responsive to such inadequacies, wherever they occur. The principles teach that government can and should play important roles in regulating access and fostering diversity. Those techniques, not the

101. *See* POWE, *supra* note 72, at Chapter 8: "The Nixon Assault on the Networks." *See also supra* Chapter 10.

methods of the censor, are the appropriate response to the imperfect world of broadcast programming, no less than to the imperfect world of book publishing.

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