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BROADCASTING, PUBLIC POLICY AND THE FIRST AMENDMENT*

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THERE continues to be deep interest in the development of a general theory of the First Amendment, especially as cases claiming its protection have become so major a part of the workload of the United States Supreme Court in recent years. Here at least the American lawyer has some appetite for generalization. But as we move from issues of obscenity to those of loyalty oaths to those of public-issue picketing to those of prejudicial publicity during a criminal trial to those of libel, it becomes apparent that our contemporary communications problems have stubbornly distinctive characteristics making them resistant to ready generalization. One of the most awkward areas from the point of "fit" with a free speech theory has been that of broadcasting.

This essay proposes to explore the relationships between broadcasting and the traditions of the First Amendment, in the hope of inducing a wider confrontation of the anomaly of having at the moment in the United States two traditions of freedom of the press—that of the written and spoken word and that of the broadcast word.

THE TWO TRADITIONS

Popular discussion of the matter is rich in paradox. A year or so ago John Pemberton, the Executive Director of the American Civil Liberties Union, speaking at a conference on broadcasting and election campaigns observed that "in terms of the role of free speech in the functioning of a system of self-government, radio and television broadcasting have taken the place of the stump and the soap box in 1791." Having thus placed broadcasting at the very heart of the democratic process, he then quickly added: "Although the stump and the soap box were not subject to regulation in 1791, *it is not*

* This essay is largely based on a memorandum written a year ago for the Columbia Broadcasting System, a circumstance which accounts for certain emphases of style and content. I am most grateful to CBS for their generous support of my study of the broadcasting-free speech problem and for their courtesy in permitting me to borrow so heavily from the memorandum here.

A useful bibliography on the general problem can be found in 1 Emerson, Haber and Dorsen, *Political and Civil Rights in the United States* 869-901 (1967).

inherently inconsistent with the role of broadcasting as the comparable vehicle for politically influential discussion *that it is comprehensively regulated today*. Nor is it inconsistent with the First Amendment that this is so"¹

Then going back a few years, there is that oft quoted remark of Herbert Hoover when as Secretary of Commerce he spoke on behalf of the Radio Act of 1927: "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*."²

What strikes the ear as odd about these comments is the reversal of role. Mr. Hoover is surely not remembered as a harsh critic of the selfishness of the free market. Yet something about broadcasting as a form of communication has moved him to so speak. The ACLU has for a generation been the conscience of the nation on issues of free speech. Yet Mr. Pemberton, too, is caught by something special in broadcasting which alters his expected reaction to comprehensive government regulation of the most influential channel of political discussion.

In brief, we all take as commonplace a degree of government surveillance for broadcasting which would by instant reflex ignite the fiercest protest were it found in other areas of communication.

And when the anomaly is recognized, it sometimes has ironic consequences. Consider for a moment the speech of Bernard Kilgore, President of the Wall Street Journal, at Colby College in 1961 on accepting the Elijah P. Lovejoy Award. In an eloquent defense of the principles of a free press, Mr. Kilgore had these words of caution:

I would like to make one final suggestion that I know is controversial. But I would like to suggest that we are going to get the issue of freedom of the press obscured dangerously if we try to stretch it to fit the radio and television industries that operate and apparently must operate for some time in the future under government licenses. I concede right at the start that radio and television do transmit news and information about public affairs . . . Yet I do not see the broadcast media becoming an effective substitute for the printed word. Even this is not the main issue. The main issue is what damage we may do to the basic rights of freedom of the press if we undertake to stretch—or more properly limit—this freedom to a concept which somehow makes it compatible with a government license. It seems to me that no matter how loose the reins may be, and I am inclined to think in recent years they have been looser than they are going to be in the future, the argument that freedom of the press protects a

¹ Address by John de J. Pemberton, Jr., National Conference on Broadcasting and Election Campaigns, October 13, 1965 (emphasis added).

² Speech by Herbert Hoover, as Secretary of Commerce, Fourth National Radio Conference, November 9, 1925 (emphasis added).

licensed medium from the authority of the government that issues the license is double talk

I think that if we try to argue that freedom of the press can somehow exist in a medium licensed by the government we have no argument against a licensed press.³

One is tempted to paraphrase the bon mot that if you have a Hungarian for a friend, you don't need an enemy.

Mr. Kilgore's speech could well be taken as the text for my personal sermon. He confronts the anomaly of the two traditions properly and does not try to gloss over it; *he would solve it cleanly by simply denying to broadcasting any kinship in the free press*. But if Mr. Kilgore is correct, how dismal the position of broadcasting is today. It is cut off from partnership in a great American tradition of freedom. My objective is in effect to show that Mr. Kilgore has given up the battle too quickly.

The split in tradition is illustrated again by two cases decided at approximately the same time. In *New York Times Co. v. Sullivan*,⁴ the Supreme Court, in reversing on First Amendment grounds an Alabama libel judgment against the *Times*, restated the American speech principles with an exciting freshness and sweep. The Court spoke of "the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." The opinion spoke neither in terms of clear and present danger formula nor of balancing but used a new idiom, finding the "central meaning of the First Amendment" in the principle that there could be no offense of seditious libel in a free society. The exact reading of the case need not be argued here; the point is simply that it was a major liberating event in the traditional world of the First Amendment.⁵

At about the same time in the broadcast world of the First Amendment, the *Palmetto* case⁶ was being decided. It marked a revolution in the opposite direction; it was the high point of Commission claims to regulate program content.⁷ And while the Commission's claims were not ratified by the Court of Appeals which found alternate grounds for upholding the Commission's refusal to renew the license, the contrast between the two events is

³ Speech by Bernard Kilgore, Colby College, November 9, 1961.

⁴ 376 U.S. 254 (1964).

⁵ See Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 Supreme Court Rev. 191; Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965); Meiklejohn, *Public Speech and the First Amendment*, 55 Geo. L.J. 234 (1966).

⁶ *Robinson v. FCC*, 334 F.2d 534 (1964), affirming, 33 F.C.C. 250 (1962).

⁷ The case involving a refusal to renew a license in part because of offensive programming by licensee. The programming, although vulgar, fell short of obscenity as a legal matter.

striking evidence that the legal norms are at the moment developing along quite separate lines.

If one reviews the legal developments under the Radio Act of 1927 and the Communication Act of 1934, one cannot quite suppress the feeling that what is lacking is one good case of injustice by government—which has been corrected by the courts. What broadcasting has needed is its own *Zenger* case. The greatest obstacle to the development of a vigorous tradition of freedom of speech in broadcasting may well have been the placidity and the decency of the FCC. The Commission has claimed the widest powers, but it has exercised them with discouraging circumspection.

But my suspicion is that the two traditions of the press have by today grown so far apart that the broadcasting world would not recognize a *Zenger* case if one came along. Indeed, I would be tempted to argue that *Palmetto* and *Pacifica*⁸ were just such opportunities for historic controversy over government control which were largely ignored by the industry.

ONE FRIENDLY VOICE

Perhaps the final irony is that at the moment the chief stirrings of an impulse congenial to the older traditions of a free press comes not from the industry, or from the press, but from one of the Commissioners. In at least two recent cases Commissioner Lee Loevinger has expressed doubts about the extent of the Commission's powers with an eloquence and a vigor that to my knowledge has had no counterpart in industry statements.

We will consider below the analytic aspects of the cases. For the moment we are concerned only with the Commissioner's rhetoric in dissent. It is the rhetoric of the grand tradition of free speech and free press.

In *In re Lee Roy McCourry*,⁹ the Commission set for a hearing an application for a UHF frequency for Eugene, Oregon, because the applicant had listed 70 per cent time for entertainment, 30 per cent for education, and nothing for the other categories involved in the FCC's quotas for "balanced programming." In this unpromising context, Commissioner Loevinger filed a fiery dissent, in which Commissioner Hyde joined, reviewing at length the prior cases and concluding:

Whatever else may be said on this subject, it comes down to this. The Commission is clearly making a choice between competing interests and values. Presumed quality and balance of TV programming is one choice and preservation of a wider area of freedom of expression for the broadcaster is the other. However, if the community involved here gets an additional television station which devotes only

⁸ *In re Pacifica Foundation*, 36 F.C.C. 147 (1964); 6 P. & F. Radio Reg. 2d 570 (1965).

⁹ 2 P. & F. Radio Reg. 2d 895 (1964).

30 per cent of its time, to educational programs and fails to carry agricultural bulletins, local talent, talks or discussion programs, no large injury will be done either to the community or to the society in general. On the other hand if the principle is established that the Commission has the right or power to prescribe either directly or indirectly the kind and quality of programs that must be carried by broadcast licensees then the vital interest of society, the nation and perhaps the world in the fullest freedom of communications and expressions of ideas, in whatever form, may be compromised. As between these interests, I do not believe any clear sighted man can long hesitate. A lack of satisfying programs on TV would be a small price to pay for the maintenance of the fullest freedom of communications and the unimpaired vigor of those private rights which thinkers from Milton, Jefferson, and Mill to the present Supreme Court have disclosed to be fundamental to the existence and preservation of a free and democratic society.¹⁰

The second case is *Faith Theological Seminary, Inc.*,¹¹ which involved an application for transfer of a license to an organization controlled by one Rev. McIntyre who had strong views about other religious groups. Over the protests of various community groups, the Commission approved the transfer, holding that the transferee deserved a chance to show that he could comply with the "fairness" doctrine. This time Commissioner Loevinger concurred in the result but wrote a separate opinion full of misgivings about the stance of the Commission. He concluded:

The mandate to grant licenses that serve the public convenience, interest, or necessity does not constitute the FCC the moral proctor of the public or the den mother of the audience. The Commission is not only forbidden to disqualify an applicant on the basis of his religious and political statements, it is prohibited from inquiring into them as a basis for official action. . . . If the allegations concerning Dr. McIntyre are true, I would disagree strongly with his religious and political views and would find them obnoxious. However, his religious and political views are of no legal significance or proper official cognizance. The Commission has no choice in this case and the result reached is compelled by basic legal and constitutional principles. By upholding today the principles which protect speech and beliefs that are repugnant to me I preserve principles that in another day and in other circumstances may survive to protect views and statements which I cherish.¹²

IS THERE REALLY A PROBLEM?

One embarrassment in attacking seriously the topic of free speech in broadcasting is that the admitted benignity of the FCC has made it difficult to mount appropriate indignation. Whatever the posture of the theory, in

¹⁰ *Id.* at 907.

¹¹ *In re George Borst*, 4 P. & F. Radio Reg. 2d 697 (1965).

¹² *Id.* at 707.

practice things are not at all bad and broadcasting does not live under a shadow of government tyranny. Why then get excited about it now?

There are several lines of answer. There is the general point that in matters of free speech it is always seasonable to keep the basic doctrine straight. There is the fact that in Commissioner Loevinger the government itself is offering a promising ally. There is the fact that often, as in *Faith Theological Seminary* or *Pacifica*, the decision falls on the right side of the line but only after the claim to control has been made and scrutiny has taken place. There is the still fresh memory of how quickly public opinion can be aroused as with Chairman Minow's famous "wasteland" critique.

But I suspect the big point goes not to these overt issues but to the insidious loss of morale that comes from the recognition that the government is looking over your shoulder while you communicate.

In a talk entitled *Broadcast Licenses and the Freedom of the Press*, before the National Association of Broadcasters some years back, Mr. Richard Salant put his finger on the problem. He reported the extraordinary amount of informal government inquiry, criticism, and surveillance that followed upon CBS's interview in 1957 with Premier Khrushchev, and then sought to explore the implications. Noting that the broadcaster needed a license to go into business he went on:

This puts us on the spot before we even get started. No matter what the laws may say about immunity from censorship and about our entitlement to the guarantees of the First Amendment there is always the brooding omnipresence that a broadcaster is a licensee and if he is not a licensee, he cannot be a broadcaster.

We are reminded of this basic dilemma with rather frightening regularity. Time and time again we are called to account by those who have, directly or indirectly, power of life and death over us. Every time we deal in our news or public affairs broadcasts with a public controversy concerning which there are strongly contending views, we can at least expect letters from legislators, public officials and private citizens representing important organizations who accuse us of partiality and call on us for an accounting—line by line and second by second.¹³

Mr. Salant, echoing Mr. Kilgore, raised the dismal question whether in a practical world the brute fact of the license spoiled the game.

The psychology of freedom is a subtle business and it may prove to be true that you can't beat the fact of the license. It would seem worth exploring however whether a vigorous redefinition of *freedom within licensing* might work to create a significantly different climate of opinion in the industry, in the government, and in the public.

¹³ Speech by Richard Salant, *Broadcast Licensees and the Freedom of the Press*, before National Association of Broadcasters, 1957.

REGULATION BY DOSSIER—THE CBS FILE

It may be useful to pause to document in detail Mr. Salant's point. CBS furnished me with its complete file of FCC complaints covering the period from 1960 through 1964. There are some 35 items in all.

In each case the ceremony is much the same and the files read like the letters-to-the-editor column of a lively magazine, *but with one important difference*. Each time, the Government of the United States has acted as intermediary to pass along the complaint and each time there is the form letter with the telltale paragraph:

Since it is the practice of the Commission to associate complaints with its files on the licensees involved and to afford them the opportunity to comment thereon, it is requested that you submit a statement concerning the above matter.¹⁴

Despite this polite wording and despite the bureaucratic triviality of so much of the correspondence, it should not be forgotten that it is the Government that is "requesting" an answer; that it is affording a chance to defend against the complaint; and that it is making the matter one of permanent record on the theory that it is *relevant* to some exercise of power by it. *It is, therefore, a claim to government jurisdiction over the content involved*. The good sense with which the Commission has handled such complaints on the merits does not obscure the fact that it claims jurisdiction to handle them. Nor is there any mystery about the jurisdiction it is claiming—it is storing the complaint and answer for evaluation at the time of license renewal.

Two points should be underscored. So far as I know, the Commission does not attempt at the time to screen the complaints; it apparently follows the rule that any complaint, however trivial or outrageous, deserves to be passed on under government auspices. Nor, so far as I know, does it ever decide that a complaint about programming falls outside its jurisdiction. The second point is that so far as I know no licensee has ever been heroic enough to refuse to answer through these channels on the grounds that it is none of the Commission's business.¹⁵

The results, although often trivial and often funny, bear a haunting analogy to the FBI files on individuals during the hey-day of the loyalty programs in the 'fifties.¹⁶ The FBI too, had a very low threshold and put virtually everything into the file for evaluation. Thus such questions as "Do you read the New Republic?" or "Do you like Russian ballet?" or "What

¹⁴ The exact wording changes somewhat over the years, but the message remains the same.

¹⁵ But see A Complaint about Complaint, Broadcasting, Jan. 23, 1967, at 47.

¹⁶ See, for example, E. Bontecou, The Federal loyalty-security program (1953).

do you think of Paul Robeson?" were widely thought by the public to indicate that the Government was censoring all these items since it had found it relevant to ask about them.

Perhaps the anxieties in that instance were exaggerated; certainly no one ever lost a Government job just because he read the New Republic. But it is arresting how much more sensitive people were to the implications of that dossier than the industry and press appear to be to those of the FCC dossier. The principle, I think, is that the Government cannot ask colorless questions about the content of communications; once it asks, the matter is no longer colorless. Thus the point about the CBS file is that 35 times in five years the Government has asked pointedly about the content of CBS communications.

A good third of the items are of the kind that CBS must have been glad to have the chance to clear up, as in the instance where the televising of a golf tourney was cut off just as Jack Nicklaus was shooting!¹⁷ Or the delightful letter from the parent who protested that her four-year old was being frightened by spot announcements during Captain Kangaroo, apparently urging the building of bomb shelters!¹⁸

The remaining two thirds, however, strike a different note. They deal with the network's fairness in handling controversial public issues from birth control to fluoridation to housing to migrant workers to krebiozen to the Congo to Zionism to firearms control. In most instances the CBS reply is animated and admirable and CBS does not sound in the least intimidated. But the very seriousness and fullness of the replies indicate how strange the ceremony is for the American press.

One example will have to suffice. Item 12 is a series of letters between the FCC and CBS concerning a June 15, 1961, broadcast by Walter Lippmann. The complaint goes to bias in Lippmann's views on foreign policy and to the absence on the program of a counter-view. It appears from the CBS reply that the Lippmann program was so well received that Senator Mansfield had the transcript read into the Congressional Record. Nevertheless the Commission having received a complaint about it, asks CBS to account. Apparently there was some brief delay in replying which elicited the following from the Commission:

Commission records indicate that as of this date no response to the above mentioned letter has been received. As you are aware, expeditious handling of Commission requests for information is a minimum requirement which the Commission has the right to expect of its licensees. Accordingly, it is expected that you will submit the information requested, in duplicate, within ten (10) days of the date of this letter.

¹⁷ Letter of January 13, 1964; Item No. 29 in the file.

¹⁸ Letter of April 9, 1962; Item No. 16 in the file.

Think of the outcry if some great daily newspaper were requested by government, and so peremptorily requested, to furnish a justification for printing the views of Walter Lippmann! To answer a letter is, to be sure, no great burden. But freedom has in no small part depended on awareness of the difference between doing something as a matter of grace and doing it as a matter of obligation.

In the end there are two important aspects of the FCC dossier technique. First, it serves to extend the appearance of control far beyond what rule-making or formal decisions would suggest, and it does so by a process which is really not public and which is awkward to challenge. Second, as Mr. Salant has pointed up, it serves to create psychologically an atmosphere of surveillance which is destructive of the morale of a free press.

EVOLUTION AND THE FIRST AMENDMENT

Some part of the current mood is due perhaps to an insufficient familiarity with the movement within traditional speech doctrine, broadcasting apart. The truth is that, as constitutional law goes, it is a young field still very much in a state of development.

The first serious judicial construction of the First Amendment does not come until 1917 with Learned Hand's opinion in *Masses v. Patten*¹⁹ and the famous clear and present danger formula of Justice Holmes does not appear until the *Schenck*²⁰ case in 1919. Nor is it until *Gitlow*²¹ in 1925 that it is held that the First Amendment applies to the states via the Fourteenth Amendment thus creating for the first time a real arena of activity for the Supreme Court in the free speech field. Moreover, as late as 1932 in *Near*²² it is necessary for the Court to announce firmly that the First Amendment is not limited to the Blackstonian idea of free speech as simply absence of prior restraints. Further, it was not established until *Burstyn*²³ in 1952 that movies too are within the protection of the Amendment. And it was not until *Roth*²⁴ in 1957 that the Supreme Court first confronted the constitutionality of regulating obscenity. As recently as 1963 the Court in *Button*²⁵ found that under certain circumstances litigation itself might come under protection as the exercise of First Amendment

¹⁹ 244 Fed. 535 (S.D.N.Y. 1917); reversed on other grounds, 245 Fed. 102 (C.A. 2d 1917).

²⁰ *Schenck v. United States*, 249 U.S. 47 (1919).

²¹ *Gitlow v. New York*, 268 U.S. 652 (1925).

²² *Near v. Minnesota*, 283 U.S. 697 (1931).

²³ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

²⁴ *Roth v. United States*, 354 U.S. 476 (1957).

²⁵ *NAACP v. Button*, 371 U.S. 415 (1963).

rights. And, as we have already noted, in 1964 in *New York Times*,²⁶ the Court effected a major shift in its idiom for handling speech problems.

The legal issues as to the status of broadcasting and the Amendment have never been confronted by the Court, despite the oft quoted dictum in the NBC case in 1943. There still remains therefore, the chance for a major collision of broadcasting with existing First Amendment doctrines.

THE FIRST AMENDMENT AND POLICY

I am arguing, as a lawyer, that the legal battle over the application of the First Amendment to broadcasting is not yet over and not yet lost, whatever the general professional impressions to the contrary. It is, I think, of high importance that the industry insist on an authoritative determination of its legal position, but it is equally important that it not overestimate the significance of the law here. The wisest of our commentators on free speech, Professor Chafee, has said of the First Amendment:

[It] is much more than an order to Congress not to cross the boundary which marks the extreme limits of lawful suppression. *It is also an exhortation and a guide for the action of Congress inside that boundary. It is a declaration of national policy in favor of public discussion of all public questions.* Such a declaration should make Congress reluctant and careful in the enactment of all restrictions upon utterance, even though the courts will not refuse to enforce them as unconstitutional.²⁷

The point is that the policy implications of the First Amendment extend farther than its legal inhibitions and that there is no reason why government must exert its legal power over speech to its uttermost boundary. Professor Chafee was speaking of free speech generally, but his thesis has special force for broadcasting where a technical "fluke" may arguably lay a special predicate for legal regulation.

I am thus suggesting there has been a twin error. First, the industry has under-estimated its legal position and given up too soon. Second, on the assumption its legal position is weak, it has neglected the possibility of building *policy*, not legal arguments, upon the First Amendment.

THE STATUTORY SCHEME

The history of broadcasting legislation has often been recounted and requires only brief summary here.

The early informal arrangements under the Secretary of Commerce came to disaster with the mandamus in *Hoover v. Intercity Radio*,²⁸ when the

²⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

²⁷ Z. Chafee, *Free Speech in the United States* 6 (1941) (italics added).

²⁸ 286 F. 1003 (D.C. Cir. 1923).

courts decided the Secretary was powerless to decline to license even on the grounds of interference with signals. There soon followed the 200 days which shook the broadcasting world and left an indelible impression of the dangers of nonregulation. "The result," said Justice Frankfurter, "was confusion and chaos. With everybody on the air, nobody could be heard."²⁹

The Radio Act of 1927 was the consequence; it established the basic scheme of an administrative agency (then the Federal Radio Commission), empowered to regulate broadcasting through the device of licensing. In 1934 the current Communications Act was passed and it has remained "the constitution" of broadcasting with few changes over the intervening thirty-two years.

Legal arguments about the powers of the FCC start, of course, with the statute but do not stop there long. The first question always is what powers Congress *intended* to give the Commission. There is some ambiguity in the legislative history and perhaps a very intensive study of it could marshal evidence that the Act has been misread. This seems an unprofitable line of attack at this late date, however, because of the generality of the statute and because of the long history of administrative construction to which the courts are likely to defer.

Further, for our immediate purposes it is evident that two of the key cases on control of programming, *KFBK Broadcasting Co. v. FRC*,³⁰ and *Trinity Methodist Church v. FRC*³¹ in which the Commission action was *affirmed* by the courts, arose prior to the enactment of the Communications Act of 1934 and were known to Congress at the time of its adoption.

There is, therefore, little promise in pursuing the matter as one of statutory construction. The argument, if there is to be one, must move to constitutional ground.

It is true, as Mr. Horsky has suggested that if a court were moved by First Amendment considerations it probably would as a matter of statesmanship avoid the constitutional challenge by finding that the Commission action did *not* serve the statutory standard of "the public interest convenience and necessity," or that it violated the no censorship provisions of Section 326.³² But it is a mistake to conclude, therefore, that we are reduced to an argument over statutory construction, and nothing more. *Since it is, in effect, the First Amendment which determines what the statute means, the argument must draw directly on the experience with the First Amendment.*

²⁹ *NBC v. United States*, 319 U.S. 190, 212 (1943).

³⁰ 47 F.2d 850 (D.C. Cir. 1932).

³¹ 62 F.2d 850 (D.C. Cir. 1932).

³² Charles A. Horsky, *Radio, Television & the First Amendment* (Memorandum for CBS, August 3, 1961).

It is worth emphasizing, however, that the statutory scheme, although little changed by Congress since its inception is not the product of a clear, full blown theory of how to handle the special problem of broadcasting, but is a curiously *ad hoc* effort. Except for the specific prohibitions of obscenity, profanity, lotteries and for Section 315 on equal time and fairness, the statute is silent about program control. On the other hand, there is the mandate of Section 326 against censorship, and the key rejection in Section 3(h) of the idea that licensees are common carriers. Further, over-all, there is the basic rejection of the idea of government ownership; stations are to be operated by private owners on a competitive basis. Yet all broadcasting requires a license, and the licenses are not to be issued for longer than three-year periods.

The result is thus a hybrid: There is neither government ownership nor private ownership—the licensee can never acquire property rights in the license. Again, the station owner is a publisher not a facility like the telegraph or telephone, and there is explicit prohibition of censorship by the Commission. Yet on the other hand, there are the equal time and fairness requirements, and over-all the agency is given broad regulatory powers under the vague standard of “public interest, convenience and necessity.”

The truth must be that Congress was not sure just how to resolve the tensions between licensing and the First Amendment.

THE PROBLEM OF PRIOR LICENSING

There are certain confusions about the Anglo-American traditions on prior restraints on speech as applied to broadcasting that need to be put to one side.

They reside in three questions: (i) whether freedom of speech means anything *more* than the absence of prior restraints; (ii) whether prior restraints are *per se* unconstitutional; (iii) whether the licensing of broadcasting is a prior restraint and subject to challenge on this ground.

In the *Dr. Brinkley* case³³ the decision in part rested on the court's assumption that censorship and free speech meant simply absence of prior restraints, and this notion still reappears from time to time in controversy over the Commission's powers. It is true that there the court was construing a statute and not the Constitution, but the meaning is presumably the same for both purposes. In any event, today it is familiar learning that this is a totally mistaken view of freedom of speech. The idea is usually associated with a vigorous passage in Blackstone, and the Supreme Court did not put the matter fully to rest until the opinion of Chief Justice Hughes in *Near v. Minnesota*.³⁴

³³ *KFKB Broadcasting Ass'n v. Fed. Radio Comm'n*, 47 F.2d 670 (D.C. Cir. 1931).

³⁴ 283 U.S. 697, 713-716 (1931). “The Blackstonian theory dies hard, but it ought

The opposite point—whether prior restraints are bad *per se*—has been somewhat more troublesome to put to rest. Because of John Milton and English history, prior licensing has come down to us with a tarnished reputation. Contemporary analysis has, however, found it increasingly difficult to see why the technique of licensing, apart from criteria, poses more of a threat to freedom than does subsequent punishment.⁸⁵ And in *Times Film Corp. v. City of Chicago*,⁸⁶ the Court squarely held that there could be valid prior restraints, and that there was no “absolute privilege against prior restraints under the First Amendment.”

There remains, however, some presumption against the validity of prior restraints, and a momentum on the part of the courts to scrutinize with extra care the procedures used and the ambiguity of the criteria for licensing.⁸⁷

The question, therefore, is whether this presumption against prior restraints can be exploited in argument over the FCC's powers. In *Palmetto*, for example, this was the principal point argued in the amicus brief filed by the American Civil Liberties Union: namely, that the Commission's standards were too vague to satisfy the requirements for prior restraints laid down in cases like *Kunz*.

There are, however, as I see it, two difficulties in this line of attack. First, the formula “public interest convenience and necessity,” although enormously vague, has been blessed by the courts so often in areas of agency regulation as to make it most unlikely that it would be found wanting in matters of program regulation. Thus, we find Justice Frankfurter who was the author of the decision condemning the criterion used in *Kunz*, quoting with approval, in his opinion in the *NBC* case the dictum from the *Pottsville* case⁸⁸ about the public interest formula: “This criterion is not to be interpreted as setting up a standard so indefinite as to confer unlimited power.”⁸⁹

Second, in large part, the problem areas relate to license *renewals* and to appraisal of *past* performance. In these instances the Commission realistically is imposing subsequent punishments if it refuses to renew, and the argument seems to me stronger put in these terms.

And even where initial applications are involved, it would seem better to be knocked on the head once and for all.” Z. Chafee, *Free Speech in the United States* 9 (1948).

⁸⁵ Emerson, *The Doctrine of Prior Restraint*, 20 *Law & Contemp. Prob.* 648 (1955); Freund, *The Supreme Court and Civil Liberties*, 4 *Vand. L. Rev.* 533 (1951).

⁸⁶ 365 U.S. 43 (1961).

⁸⁷ As to procedure, see *Freedman v. Maryland*, 380 U.S. 51 (1965); as to criterion, see *Kunz v. New York*, 340 U.S. 290 (1951).

⁸⁸ *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

⁸⁹ *NBC v. United States*, 319 U.S. 190, 216 (1943).

to argue the impropriety of the *substantive* criterion and not to rest on vagueness or on an effort to have a little of the historic bad name of prior restraints rub off on FCC licensing practices.

In brief, Milton's *Areopagitica* should not be the first line of argument against the FCC.

ENTERTAINMENT VERSUS PUBLIC ISSUES

One of the genuinely interesting issues raised when we attempt to apply a First Amendment analysis to broadcasting is what difference it makes that broadcasting has been essentially an entertainment medium. Is not the free speech tradition primarily devoted to the protection of unpopular *ideas*? In brief, does the subject matter of broadcasting make it more vulnerable to government control?

Mr. Kilgore had something of the point in mind. After "conceding" that broadcasting did transmit news he went on to say: "This does not seem to me to be their basic or anyway their main function—the time and effort they spend on it is generally small in proportion to their entertainment function. But they do carry news."⁴⁰ Implicit is the notion that broadcasting raises a free speech issue only because it now carries some news.

I had occasion to explore the underlying problem a few years ago in an article on obscenity, and I shall indulge in a lengthy quotation from myself.

I suggest that the difficulties in working out the implications of the new free-speech doctrine also reflect a difficulty with the older forms of that doctrine. The classic defense of John Stuart Mill and the modern defense of Alexander Meiklejohn do not help much when the question is why the novel, the poem, the painting, the drama, or the piece of sculpture fall within the provisions of the First Amendment. Nor do the famous opinions of Hand, Holmes, and Brandeis. The emphasis is all on truth winning out in a fair fight between competing ideas. The emphasis is clearest in Meiklejohn's argument that free speech is indispensable to the informed citizenry required to make democratic self-government work. The people need free speech because they vote. As a result his argument distinguishes sharply between public and private speech. Not all communications are relevant to the political process. The people do not need novels or drama or paintings or poems because they will be called upon to vote. Art and belles lettres do not deal in such ideas—at least not good art or belles lettres—and it makes little sense here to talk, as Mr. Justice Brandeis did in his great opinion in *Whitney*, of whether there is still time for counter-speech. Thus, there seems to be a hiatus in our basic free speech theory.⁴¹

⁴⁰ *Supra* note 3.

⁴¹ Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Supreme Court Rev. 1, 15-16.

° Mr. Meiklejohn, as would be expected, offered a spirited and persuasive rejoinder.

In reply to that friendly interpretation I must at two points record a friendly disavowal. I have never been able to share the Miltonian faith that in a fair fight between truth and error, truth is sure to win. . . . In my view "people need free speech" because they have decided, in adopting, maintaining and interpreting their Constitution to govern themselves rather than to be governed by others. . . . Moreover, as against Professor Kalven's interpretation, I believe, as a teacher, that the people do need novels and dramas and paintings and poems "because they will be called upon to vote. . . ." ⁴²

It was always a pleasure to lose an argument to Mr. Meiklejohn. And on closer analysis it is apparent that what we were debating was not *whether* art should be protected as fully as ideas, but rather *why*. We were assuming that society would so protect it and were exploring simply whether, therefore, traditional speech theory did not have a somewhat provincial rationale.

In any event, the courts seem to have had less trouble with the point than Mr. Meiklejohn and I. The law declines to draw a distinction between news and entertainment. The tradition perhaps begins back in 1808 with Lord Ellenborough's opinion in *Carr v. Hood*,⁴³ vigorously establishing the privilege of fair comment on literary works—in that instance a travel book—as an essential aspect of "liberty of the press." The point is made more explicitly a century and a half later in *Jenkins v. Dell Publishing Co.*,⁴⁴ a right of privacy case, in which defendant's claim of a newsworthy privilege was challenged on the grounds that the magazine, *Front Page Detective*, was designed largely for entertainment. Judge Hastie upheld the privilege although admitting the magazine was sold more for "entertainment" than "information." He held it was neither feasible nor desirable to distinguish between news and entertainment.

The authoritative disposition of the issue at the constitutional level comes in *Burstyn v. Wilson*⁴⁵ in which the Court repudiated its prior holding in *Mutual Film Corp. v. Industrial Com'n*⁴⁶ that the movies were purely entertainment and beyond the reach of free speech protections. In upsetting the application of the New York movie censorship law on First Amendment grounds, the Court said:

⁴² Meiklejohn, *The First Amendment Is an Absolute*, 1961 *Supreme Court Rev.* 245, 263.

⁴³ 1 Campbell 350, 354n (1808).

⁴⁴ 251 F.2d 447 (3d Cir. 1958).

⁴⁵ 343 U.S. 495 (1952).

⁴⁶ 236 U.S. 230 (1915).

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from a direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.⁴⁷

The Court then quoted with approval the following dictum from *Winters v. New York*,

The line between the informing and the entertaining is too elusive for the protection of that basic right (a free press). Everyone is familiar with instances of propaganda through fiction. What is one man's amusement teaches another doctrine.⁴⁸

However the issues stands as a matter of theory, it thus appears safe to conclude that for legal purposes nothing turns on a distinction between entertainment and news.

There have been, however, consequences of the fact that broadcasting in contrast to the press is entertainment oriented. First, many of the public controversies have involved matters of *taste* rather than dangerous opinion. It thus has been possible for people to urge government intervention to raise the taste of broadcasting without a sense that they are directly violating a tradition of freedom for the market place of ideas. And, second, it has perhaps caused the members of the industry to think of themselves as show business rather than as editors and publishers, thus fostering the loss of identification with the press.

AN INSIGHT MORE FUNDAMENTAL THAN WE CAN USE

Everyone is aware of certain differences between broadcasting and the press, and we have dealt with several thus far. But, to my mind, the freshest perspective on the problem comes from confrontation with the economist. However, as will be apparent in a moment there is one embarrassment: the perspective is so radical by today's views that although I am persuaded of its correctness, I am not clear how it can be used in public discussion. To anticipate the conclusion, broadcasting may be subject to two errors which cause virtually all of its problems but which are too well and deeply established to hope to eradicate. The problem, therefore, may be to devise a way of living with the errors.

The economic analysis has been put concisely and powerfully by Ronald Coase, in his *Evaluation of Public Policy Relating to Radio and Television*

⁴⁷ *Supra* note 44, at 501.

⁴⁸ 333 U.S. 507, 510 (1948).

Broadcasting: Social and Economic Issues,⁴⁹ I shall only touch the main analysis. To the traditional claim that broadcast frequencies are a scarce resource and, therefore, must be allocated by government, Professor Coase makes the economist's rejoinder that all resources are scarce but that fact alone does not invoke government allocation—and that it does not because elsewhere in our society we use the pricing mechanism to allocate scarce resources. The point of insight in Professor Coase's analysis is not that it was a mistake to license frequencies in order to avoid interference, but that it was a mistake not to use the traditional pricing mechanism to determine who should get the license. In brief, he asks why we have not awarded licenses to the highest bidder. And before one rushes to answer that it would be unseemly and against public policy to award these valuable resources to the highest bidder, it is well to reflect on how we allocate almost all other valuable resources.

It is undoubtedly somewhat late in the day to urge auctioning as the practical remedy for broadcasting's ills, but the point can still be a profitable touchstone for analysis. First, it points up the fact that the decision not to use price as the allocator has imposed on the FCC the impossibly difficult task of deciding who is most qualified to use this means of communication, a question we blissfully do not have to confront with respect to making steel, automobiles, frankfurters, television sets or, for that matter, books. Second, it points up the fact that the current allocation of licenses involves a spectacular *subsidy* since the Government insists on giving them away. We shall suggest later that it may be fruitful to state the basic issue as one of how to allocate communication subsidies without violating the First Amendment. This arrangement has also I suspect, the consequence of trapping the industry into positions of public trusteeship not chargeable to the rest of the press. Certainly the FCC claims of a "public service easement" in programming tie back directly to this initial gift from government. Third, and perhaps most important for us, it provides one analytic answer to the dilemma of how the FCC can rationally choose among two technically qualified applicants for a license if it cannot also consider their programming.

Professor Coase's second point goes to the economic organization of broadcasting in the United States and to the conspicuous fact that it is one market in which the consumer cannot vote with dollars. It is not that advertising sponsorship is evil because it is commercial; it is rather that its logic necessarily seeks programs best for advertising results and this means programs with the largest audiences. The upshot is that broadcasting is programmed for the largest common denominator and that minorities, who

⁴⁹ 41 J. Land & P.U. Econ. 161 (1965). See also Coase, The Federal Communications Commission, 2 J. Law & Econ. 1 (1959).

are able to buy their way into other markets, are left out of this one and complain. If there is a legitimate complaint about the quality of programming, it is not that the quality is low but that the programming is, among American communications, uniquely nonrepresentative:

Once again the remedy appears too radical to be helpful. It is, of course, the widespread use of pay TV and subscription radio. But again the point may prove a touchstone for analysis. To a considerable extent the Commission's concern with fairness and with program balance rests on the nonrepresentative nature of broadcasting today. And since these concerns run against the economic self-interest of the broadcaster they are doomed to futility unless the FCC is forced to play a role of so directly controlling programming as to conflict flagrantly with the First Amendment.

In light of these reflections at least one recent case, *Connecticut Committee Against Pay TV v. FCC*,⁵⁰ takes on ironic overtones. The court, in assuring the committee which opposed the pay TV experimental trial run that no harm would come from it, said:

The Commission has declared its determination to oversee carefully the form which programming takes under the subscription system. Surely its power to see that this area of the public domain is used in the public interest is not less for "paid" television than for the existing system of so-called "free" television.⁵¹

It is, I think, unnerving to realize that what really sets broadcasting apart from, say, book publishing is not licensing as such, but rather the twin economic idiosyncracies that the resources are allocated by government gift rather than by price, and that the consumers cannot vote with dollars to get the programs they want. And it may for at least a moment be worth pausing to ask with Professor Coase what would be left of the case for government control of programming if licenses were allocated to the highest bidder and if there was widespread pay TV. But the key task is to explore what policy can be worked out for the independence of broadcasting *if* we continue to have licensed commercial broadcasting and do not auction the licenses.

A NOTE ON THE COMMON GROUND ON WHICH ALL SPEECH CAN BE REGULATED

Communications apart from broadcasting are, of course, not altogether immune to regulation. To some extent, therefore, the regulation of broadcast programs is predicated on these general premises for regulation of speech and press. Insofar as this is true there is no distinctive problem of broad-

⁵⁰ 301 F.2d 835 (D.C. Cir. 1962).

⁵¹ *Id.* at 838.

casting as the First Amendment posed, since presumably no one wishes to argue that broadcasting should be regulated *less* than the press. In theory this *common ground* of prohibited speech would include the direct advocacy of serious criminal action,⁵² contempt of court,⁵³ libel,⁵⁴ invasions of privacy⁵⁵ and above all obscenity.⁵⁶ There is a good deal of controversy still raging as to the precise limits of the First Amendment in these areas and a formidable amount of commentary.⁵⁷ The point for present purposes, however, is that whatever the appropriate public policy, it can be worked out without regard to any distinctive vulnerability of broadcasting to government regulation. It, therefore, need not concern us here.

ONE DISTINCTIVE GROUND—THE NATURE OF THE MEDIA

A point of general interest is whether something about the *media* justifies regulation of broadcasting which goes beyond that of the press.

The Court, speaking abstractly, has furnished dicta looking both ways as to whether there are relevant differences among the media. Indeed, in *Burstyn v. Wilson*⁵⁸ we have examples of both. The basic rationale of the decision rejects various arguments as to why movies are different from other media and places movies squarely under the First Amendment. Yet in the course of its opinion the Court says:

Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems.⁵⁹

And in *Times Film Corp. v. City of Chicago*,⁶⁰ the Court is careful to limit its decision upholding prior licensing, ("We are dealing only with motion pictures."), evoking on this point a sharp dissent from four of the Justices:

⁵² Compare *Dennis v. United States*, 341 U.S. 494 (1951) and *Yates v. United States* 354 U.S. 298 (1957).

⁵³ Subject however to the serious qualifications found in such cases as *Bridges v. California*, 314 U.S. 252 (1941) and *Wood v. Georgia*, 370 U.S. 375 (1962).

⁵⁴ Subject to the serious qualifications found in *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1967).

⁵⁵ Subject to the qualifications found in *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

⁵⁶ Subject to the qualifications found in *Roth v. United States*, 354 U.S. 476 (1957); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Ginzburg v. United States*, 383 U.S. 463 (1966).

⁵⁷ Chafee, *Free Speech in the United States* (1948); Meiklejohn, *Political Freedom* (1960); Emerson, *Toward a General Theory of the First Amendment* (1966); Kalven, *The Negro and the First Amendment* (1966).

⁵⁸ 343 U.S. 495 (1952).

⁵⁹ *Id.* at 503.

⁶⁰ 365 U.S. 43 (1961).

Again, in the sound truck case, *Kovacs v. Cooper*,⁶¹ Justice Frankfurter concurring is explicit that there are relevant differences:

The various forms of modern so-called "mass communications" raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison. . . . Movies have created problems not presented by the circulation of books, pamphlets or newspapers and so the movies have been constitutionally regulated . . . broadcasting in turn has produced its brood of complicated problems hardly to be solved by an easy formula about the preferred position of free speech. . . .⁶²

On the other hand, in *Paramount Pictures*, the Court observed:

We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.⁶³

And in *Superior Films v. Dep't of Education*, Justice Douglas concurring stated:

Motion pictures are, of course, a different medium of expression than the radio, the stage, the novel or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas.⁶⁴

These generalizations apart, however, there are perhaps three specific places where the nature of the broadcasting medium affects the argument.

First, there is the obvious point about limited channels and interference which lays a predicate for licensing that as a physical matter has no counterpart in the press.

Second, there is the problem of televising trials where the intrusion of the TV apparatus in the courtroom poses a different issue than that of the presence of the press.⁶⁵

Third, and most interesting, is whether the nature of broadcasting requires some adjustment of what is permissible regulation of obscenity. There has been little analysis of this problem thus far. It was a latent issue in *Palmetto* but neither the parties nor the Commission nor the Court of Appeals relied on it. It was the point of the petition, requesting the Court to

⁶¹ 336 U.S. 77 (1949).

⁶² *Id.* at 96.

⁶³ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

⁶⁴ 346 U.S. 587, 589 (1954).

⁶⁵ This is currently a hotly debated issue between the press and TV on the one side and the legal profession on the other. See *Estes v. Texas*, 381 U.S. 532 (1965) and *Sheppard v. Maxwell*, 384 U.S. 333 (1966). In each case the defendant was granted a new trial because of the disturbance caused by the intrusion of the press.

limit its ruling to books, filed by the Commission itself in *Grove Press v. Christenberry* which involved *Lady Chatterley's Lover*.⁶⁶

The issue turns on considerations of the captive audience possibilities.⁶⁷ A fundamental principle of freedom of speech is that one cannot be forced to hear; cannot, that is, be "captured" as an audience.⁶⁸ The traditional problem of obscenity law has been whether one can be kept from material *he wishes* to see. The latent issue is whether the law can be used to *protect* people from being *involuntarily confronted* with obscene materials. Arguably, television raises two problems in this connection. There is the chance of sudden intrusion into the home of the "obscene" stimulus. It may be easier to "close the book," as Justice Fairchild of Wisconsin Supreme Court had suggested as the "summary remedy" for those who complained about the *Tropic of Cancer*, than it is to turn off the TV set or change the channel. More important, it may argue for a revision of the holding in *Butler v. Michigan*,⁶⁹ that the general circulation of materials to adults could not constitutionally be limited on the grounds they would be harmful to children. Since television is so much the child's medium of entertainment today, it is not altogether easy to decide how far, if at all, general television programming might be regulated on their behalf.

LOYALTY PROGRAMS FOR LICENSEES

Since World War II First Amendment problems have often shifted from a concern with the content of the message to a concern with the loyalty of the speaker. On close analysis, this proves to be the problem at the heart of the Smith Act cases,⁷⁰ and this has characterized the loyalty oaths, the administrative loyalty programs, the Congressional investigations, the Communist Control Act registration, the Attorney General's list, etc.

The problems raised touch many areas of the society and are in no sense peculiar to broadcasting. There is one distinctive point of contact to be noted however. It is a by-product of licensing that it serves to facilitate government patrolling of loyalty. Thus, it was never suggested that newspaper editors,

⁶⁶ 276 F.2d 433 (2d Cir. 1960). See also Network Programming Inquiry, 25 F.R. 7291 (1960).

⁶⁷ This must be the basis also for the statutory prohibition against *profanity*. It is doubtful today that profanity, absent the breach of peace potential of "fighting words" as in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), constitutionally can be made an offense.

⁶⁸ Compare the "buscasting" case, *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952). See also *Kalven, The Negro and the First Amendment* 149-160 (1966).

⁶⁹ 352 U.S. 380 (1957).

⁷⁰ *Dennis v. United States*, 341 U.S. 494 (1951); *Yates v. United States*, 354 U.S. 298 (1957).

for example, take non-Communist oaths or that it be made a crime to be a publisher and a member of the Party. To a limited extent, however, loyalty has been a concern of the FCC, and has thus generated a special problem of broadcasting and the First Amendment.

The most explosive example of this kind of policing appears to have been in the case of Edward Lamb. Mr. Lamb has written his version of the matter in his autobiography.⁷¹ The role of the FCC appears to have been shocking and an instance of rabid McCarthyism. However, the instance seems an exceptional departure for the Commission; moreover the radical vice, the sponsoring of perjured testimony, appears to have been a totally aberrant feature. The point, however, is that were it not for the fact Mr. Lamb was seeking the renewal of a license to broadcast, which was eventually granted, there would have been no basis for government surveillance of his associations and loyalty.

This was again one of the problems in the *Pacifica* case,⁷² although the Commission in the end "cleared" the station of charges of Communist affiliation. And in at least three cases the Court of Appeals has upheld denial of licenses where the applicant has declined to answer questions about his affiliations.⁷³

The free speech and other issues raised in such instances can be complex, and perhaps have their closest counterparts in instances where admission to the bar has been denied.⁷⁴ The issues are noted here simply because they connect up with the general problems of control of subversive activity and the First Amendment. However, they do bear an interesting analogy to certain cases which are very much within the distinctive problems of broadcasting: where the character of an applicant has been challenged under the fairness doctrine, such as *Lamar Life Broadcasting Co.*,⁷⁵ where applicant was a

⁷¹ No Lamb for Slaughter (1963); see also his pamphlet for the Center for the Study of Democratic Institutions, "Trial by Battle," The Case History of a Washington Witch Hunt (1964).

⁷² 36 F.C.C. 147 (1964).

⁷³ *Borrow v. FCC*, 285 F.2d 666 (D.C. Cir. 1960); *Cronan v. FCC*, 285 F.2d 288 (D.C. Cir. 1960); *Blumenthal v. FCC*, 318 F.2d 276 (D.C. Cir. 1963). It should be noted that all three cases involved the issue of licensing radio operators rather than radio stations. There was an impressive dissent by Judge Washington in the *Borrow* case arguing that Congress had not intended the commission to condition licensing on these grounds and questioning the policy that could by this logic deprive Communists of all means of livelihood.

⁷⁴ *Schwartz v. Board of Examiners* 353 U.S. 232 (1957); *Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *In Re Anastaplo*, 366 U.S. 82 (1961); see Kalven and Steffen, *The Bar Admissions Cases: An Unfinished Debate Between Justice Harlan and Justice Black*, 21 *Law in Transition* 155 (1961).

⁷⁵ 38 F.C.C. 1143 (1965), reversed for hearing, *United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

Mississippi segregationist and *Noe v. FCC*,⁷⁶ where a Jesuit applicant was challenged as under dominion of the Pope!

THE CORE ISSUE—WHAT FOLLOWS FROM THE FACT OF LICENSING

After so long and meandering a preface, we come at long last to the truly distinctive problems of the First Amendment and broadcasting.

They rest on the fact that to avoid the physical interference among signals which could render broadcasting impossible, the Commission must license broadcasters. The fact is obvious but the crucial question is: What exactly follows from it? Does a rational licensing policy require that the Commission to some extent consider the service, that is, the kind and quality of the communications furnished? Does it, therefore, follow, as Mr. Kilgore argued, that because of the brute fact of licensing, the traditions of the First Amendment cannot help the broadcaster?

If this were true, there would be no regulation of content which would not be within the Commission's powers so long as it was not grossly arbitrary and capricious. And interestingly enough the Commission itself has never claimed this degree of jurisdiction. It has always publicly embraced a position against "censorship." Further, Section 326 prohibiting censorship must refer to something; that is, there must be some regulation which the Commission might try that would defeat the intention of Congress.

My thesis is that the traditions of the First Amendment do not evaporate because there is licensing. We have been beginning, so to speak, in the wrong corner. The question is not what does the need for licensing permit the Commission to do in the public interest; rather it is what does the mandate of the First Amendment inhibit the Commission from doing even though it is to license. What we need to confront is what the policies of the First Amendment imply as to the appropriate criteria for licensing communications.

The thesis would emphasize two points: First, the tensions between licensing and the First Amendment require that judgments about programming be kept to a *minimum*; that ground be yielded grudgingly; perhaps some regulation here is a *necessary evil* but it should always be remembered that that is all it is. Second, if we phrase the question in terms of what are the appropriate criteria for licensing communications we may be able to draw on analogies from elsewhere, such as the allocation of second class mail subsidies, the licensing of the streets for parades, and even the role of the chairman at a town meeting.

What has been missing in the controversy over FCC control is a precedent setting the *outer boundaries* of that control and establishing something that

⁷⁶ 260 F.2d 739 (D.C. Cir. 1958).

the Commission *cannot do* despite its power to license. Law, it has been said, is determined by a choice between competing analogies. What is sorely needed in this field is the competing analogy to set against the claims for control. We have at the moment the worst of all possible worlds. There is official lip service to freedom of the press in broadcasting but no agreement that there is anything the Commission cannot do.

It is, of course, easier to rephrase the question than to answer it. In the pages that remain we shall attempt some first steps toward answering by reviewing the judicial experience with the issues, by looking to the analogies from elsewhere, and by suggesting an *anatomy* of kinds of issues of program regulation against which to test policy.

THE PROBLEM IN THE SUPREME COURT—CASES OTHER THAN THE NBC CASE

The precedents in the Supreme Court having any bearing on the problem are well known and have often been reviewed. Nevertheless it is relevant to review them briefly once again in order to underscore that the issues are still open at the level of the Supreme Court and to emphasize how little the *decisions* themselves have put to rest.

It is generally agreed that *National Broadcasting Co. v United States*, in 1943 is the leading case. Before reading it closely, we shall run through the other seven Supreme Court cases.

Federal Radio Commission v. Nelson Brothers Co.,⁷⁷ involved a comparative hearing in which petitioner, the existing station on the frequency, had been denied renewal and the frequency awarded to another applicant. The Court of Appeals reversed, finding the Commission's action "arbitrary and capricious." The Supreme Court reversed, reaffirming the action of the Commission. The Court held that this was not revocation of a license and that the only question was the "equitable distribution of frequencies." It held further that it was not arbitrary, in pursuit of the "public interest convenience and necessity," to allocate frequencies at the expense of an existing station. There was no discussion of programming or the First Amendment.

Federal Communications Commission v. Pottsville,⁷⁸ offered a broad opinion on a narrow issue, again unrelated directly to our immediate concerns. The opinion by Justice Frankfurter was an essay in praise of the flexibility and expertise of administrative law and a warning against assuming that the technicalities of the common law will continue to apply to this important new development. It was a warning also that courts were to play a modest role in reviewing agency procedures and decisions. Specifically, the

⁷⁷ 289 U.S. 266 (1933).

⁷⁸ 309 U.S. 134 (1940).

petitioner had been denied a license because the Commission found him not qualified financially. On appeal, the Court of Appeals had reversed and remanded, holding that the Commission in appraising his financial qualifications had made an error in interpreting state law. On remand, the Commission had set the matter for a comparative hearing joining consideration of petitioner with that of other applicants for the frequency who had filed later. The Court upheld the Commission, saying:

The fact that in its first disposition the Commission had committed in a legal error did not create rights of priority in the respondent, as against later applicants, which it would not otherwise have possessed.⁷⁹

The two cases read together make it evident that the public interest formula is a powerful and flexible one giving large powers of discretion to the Commission so that it may override the equities of the existing user of the frequency in *Nelson* and the equities of the prior claimant, who loses only because of a Commission error, in *Pottsville*. This does not tell us, however, whether the formula is powerful enough to override the counter policies of the First Amendment.

Federal Communications Commission v. Sanders Brothers Radio Station,⁸⁰ is, by dictum, a little closer to our concerns. Petitioner had protested the licensing of an additional station in his community on the ground that it would cause economic injury to him. He had lost before the Commission, but the Court of Appeals had reversed because of the failure of the Commission to make findings on the economic injury issue. The Court upheld the Commission in an opinion which once again sketched the general framework of broadcasting regulation, emphasizing that the field of broadcasting is "one of free competition." It concluded that economic injury, although relevant to considerations of "public interest convenience and necessity" was not "in and of itself" a factor the Commission must weigh. So we add economic injury to the equities the Commission can override in pursuit of the public interest.

However, Justice Roberts in the course of generalizing about the overall arrangement uttered a dictum that has haunted the Commission ever since:

But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.⁸¹

⁷⁹ *Id.* at 145.

⁸⁰ 309 U.S. 470 (1940).

⁸¹ *Id.* at 475.

One cannot, of course, make too much of so casual a remark in a case which did not remotely involve issues of program control. And it has become fashionable to argue that it is erased by the opinion of Justice Frankfurter in the *NBC* case three years later. It might be well, however, not to throw the remark away altogether; it was made by an able justice and for a unanimous court which included Justice Frankfurter. It represents at least a contemporary summing up of the arrangement and certainly suggests that control of programming was not a salient feature of it.

For the moment we will skip the *NBC* case. Next then in chronological order is *Federal Communications Commission v. WOKO*.⁸² A license renewal was denied because applicant misrepresented his financial position. The Court affirmed holding it immaterial whether the misrepresentation in fact influenced the Commission's decision. "The fact of concealment," said Justice Jackson, "may be more significant than the facts concealed."⁸³

We come next to *Regents of the University System of Georgia v. Carroll*.⁸⁴ The precise issue involved a technical point about the relation of state and federal law. The FCC had refused to renew petitioner's license unless it repudiated a contract with T, on the grounds that the contract deprived petitioner of the requisite degree of control over its own operations and programs. Petitioner repudiated the contract and was sued for breach of contract and lost in the state courts. The Supreme Court held on appeal from the contract action that the Commission had no power to adjudicate the validity of the contract but only to decide the status of the license. Impossibility of performance is a matter for state law and although the result here is harsh, the Court will not intervene.

There are just two more cases. *Federal Communications Commission v. ABC Inc.*,⁸⁵ is arresting because this time a claim of Commission authority is rejected. At issue are FCC rules prohibiting "give-away" programs. The Court unanimously invalidating the rule, holds that these programs cannot be said to be lotteries within the statutory prohibition and that therefore the Commission has exceeded its authority. As the case is argued, no general premises about program control are implicated; it goes simply on the narrow issue of what a lottery is. Nevertheless the case is a comforting indication that there are some limits to Commission power.

Finally, *Farmers Union v. WDAY*,⁸⁶ holds that the equal time mandate of Section 315 coupled with the prohibition against censorship, suspends state law making a station liable for defamation. The rationale is that under

⁸² 329 U.S. 223 (1946).

⁸³ *Id.* at 227.

⁸⁴ 338 U.S. 586 (1949).

⁸⁵ 347 U.S. 284 (1954).

⁸⁶ 360 U.S. 525 (1958).

the federal policy the station owner has been left helpless to protect himself. The Court, it might be noted, although dealing with another subtle point of federal preemption, spoke approvingly of the equal time provision which, however, no one was directly challenging. "The thrust of Sec. 315," said Justice Black, "is to facilitate political debate over radio and television."⁸⁷

The box score then is not impressive for either side of the controversy over Commission power. There is one case finding beyond the Commission's powers an effort to very specifically outlaw a given kind of program (*ABC*) and there is a broad dictum against program control (*Sanders*). On the other hand, there is implicit approval of the equal time requirement (*WDAY*) and approval of rules against surrender of control (*Regents*) or misrepresentations to the Commission (*WOKO*). Finally, the public interest formula under which the Commission acts is powerful enough to override a series of specific equities (*Sanders, Pottsville, Nelson*).

Whatever the balance of dicta, certainly it cannot be said, the *NBC* case apart, that the Court has ever confronted the application of the First Amendment to agency claims to control programming. We turn then to the *NBC* case.

THE PROBLEM IN THE SUPREME COURT—THE *NBC* CASE

The *NBC* case in 1943⁸⁸ was elaborately briefed and argued and served perhaps historically as a great occasion for measuring Commission powers. (Perhaps the industry thought this was to be their *Zenger* case). It produced a major opinion from the Court, and if there is a leading Supreme Court precedent for us, this surely is it.

The *decision*, however, did not involve program control, at least in the critical sense of control of content, but rather the independence of the station owner from outside control. In issue were the Chain Broadcasting Regulations promulgated after elaborate and extensive hearings by the Commission. The effort to enjoin the regulations was unsuccessful in the Court of Appeals, and its action was affirmed by the Supreme Court.

The stance of the case is highlighted by the fact that Mr. Justice Murphy filed a lengthy dissent arguing simply that regulation of this sort should be left to Congress. It is noteworthy that Justice Murphy, who earned the reputation of being second to none in sensitivity to free speech issues, chose not to mention them in this case, presumably on the ground that they were not really involved.

The nature of the issue before the Court is suggested by the seven regulations which were under attack. They covered such matters as: control of

⁸⁷ *Id.* at 534.

⁸⁸ *NBC v. United States*, 319 U.S. 190 (1943).

local station rates by the network, network programs, network option time provisions, the length of the contract term, and provisions for territorial exclusivity and exclusive affiliation. They reflect a blend of anti-trust concerns and the policy that the station owner should not delegate his job.

To dispose of the various challenges to the regulations, Justice Frankfurter was moved to write a 35-page opinion. After an elaborate review of the regulations themselves and of the legal history of broadcasting, he turned to the major challenge that Congress had not authorized such rule-making. The argument was predicated on the premise that the Commission was limited to supervision of technical engineering and financial aspects only. In rejecting this claim that the Commission was reduced to a traffic cop, the Justice uttered two oft-quoted dicta:

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accomodate all who wish to use them. Methods must be devised for choosing among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was "the public interest, convenience, or necessity," a criterion which is "as concrete as the complicated factors for judgment in such a field of delegated authority permit."⁸⁹

And again one paragraph later:

The Commission's licensing function cannot be discharged therefore merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities each of whom is financially and technically qualified to operate a station?⁹⁰

The language must be read in context. First, the Court was simply *construing* the statute at this point in an effort to meet the challenge that the regulations were not authorized. The concern is not with what the Constitution permits but with what Congress intended. Moreover, the Court is engaged in defeating a single narrow counter-argument, namely, that as a matter of Congressional intent, and not of constitutional necessity, the Commission may consider only financial and engineering criteria in licensing. It is this position Justice Frankfurter is rejecting, a position *narrower than*

⁸⁹ *Id.* at 215-216.

⁹⁰ *Id.* at 216-217.

any free speech concerns would dictate. He is not indicating what criteria *beyond* financial and engineering the Commission may consider—except as it is necessary to dispose of the case before him. Surely he is not saying that since the Commission's powers are not limited to the technical-engineering stopping point, they are unlimited by any other considerations and if the Commission finds it in "the public interest" that certain content not be transmitted over radio and television, that is the end of the matter.

What he had in mind and was addressing his generous language toward was nothing more complex than the *wasting* of frequencies. Thus, in a paragraph not so often quoted, he observes:

These provisions individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments "to the larger and more effective use of radio in the public interest." We cannot find in the Act any such restriction of the Commission authority. Suppose, for example, that a community can because of physical limitations be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. The stations might interfere with each other so that neither could be clearly heard. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified might apply for and obtain licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. *The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission.*⁹¹

The crucial point is that there is *a decisive distance* between what Justice Frankfurter is confronting and endorsing here, and the claim to police vulgarity in *Palmetto*, or the controversial discussion of homosexuality in *Pacific*, or the concern with Rev. McIntyre's views that upset Commissioner Loevinger in *Faith Theological Seminary*, or the official request for an explanation of the bias in the Walter Lippmann broadcast.

Finally, the opinion does contain some explicit discussion of the First Amendment and provides the only reference we have by the Supreme Court to broadcasting and the Amendment. The petitioners, having attacked on a variety of other grounds appear to have thrown in an appeal to the Amendment as a sort of last resort. In any event it is noteworthy that Justice Frankfurter does not reach it until the next to last paragraph of his lengthy opinion. The passage catches a great judge at an unimpressive moment.

We come finally to an appeal to the First Amendment. The Regulations even if valid in all other respects must fail because they abridge, say the applicants,

⁹¹ *Id.* at 217-218 (italics added).

their right of free speech. If that be so, it would follow that every person whose application for a license is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic and that is why, unlike other modes of expression, it is subject to governmental regulation.⁹²

I find it difficult to construe this passage. Surely petitioners were not arguing that radio could not be licensed at all because of the First Amendment. Yet that is the position that is being answered. Surely Justice Frankfurter is not suggesting that because facilities are limited, radio, unlike other modes of communication, is subject to unlimited government regulation. Yet that is what he has come close to saying.

The remainder of the paragraph, however, makes it clear that Justice Frankfurter is not eliminating First Amendment considerations from broadcasting, but is simply saying that certain criteria for licensing are permissible, and certain are not.

But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views or upon any other *capricious* basis. If it did, or if the Commission by these regulations proposed a choice among applicants upon some such basis, *the issue before us would be wholly different.*⁹³

Several things are to be noted here. First, he is consciously reserving for another day "the wholly different" issues that would be presented if the regulation of programming were of another kind. The decision is limited to the narrow question at hand. The Chain Broadcasting Regulations do not offend freedom of speech, although other types of regulation well might. Second, the First Amendment traditions are so strong that regulation on the basis of political, social, or economic views cannot be conceived of as in the public interest, although over the long history of mankind it has more often been so conceived of than not; it would be in his phrase "capricious." Finally, he suggests the limit to the dilemma he has previously posed. If the Commission were confronted with two applicants equal except for their political, economic, or social views, it could not resort to those views in order to choose between them. Therefore, the need to choose among applicants for a license tells us little about the permissible criteria by which such a choice can be made, in a society with a commitment to the values of the First Amendment.

⁹² *Id.* at 226.

⁹³ *Id.* (italics added).

The *NBC* case does not, therefore, alter the impression left by the other Supreme Court cases. The crucial issues about control of programming are yet to be confronted by the Supreme Court of the United States.

THE PROBLEM IN THE LOWER COURTS

As would be expected, the lower courts and in particular the Court of Appeals for the District of Columbia have had far wider experience with the problem than the Supreme Court. A detailed review of these cases would be inappropriately burdensome at this point.⁹⁴ Reading them, however, makes it apparent that control over programming is a highly ambiguous term and there are all gradations of control involved in FCC activity. The choice is not a simple one between no control and total regulation of content. Some of the Commission moves as, for example, with respect to independence of the station owner or the requiring of some sustaining programs or one preferring live local talent or the requiring of investigation into needs of the community or the avoidance of duplicate programs, whether feasible or not, seem to me clearly not interferences with freedom of speech. At the other extreme the concerns with content expressed in *Palmetto*⁹⁵ and *Pacifica*⁹⁶ and perhaps *Trinity Methodist Church*⁹⁷ seem clearly acts of censorship. In between, and posing novel questions, are balanced programming and fairness.

⁹⁴ There are upwards of 50 precedents in the lower federal courts involving the FCC and some aspect of control over programming. The ones most relevant for our purposes are noted briefly in notes 95-101. For the most part the others involve such issues as: misrepresentation, independence from outside control, avoidance of duplication, "hobby" broadcasting, preference for local "live" programming, ratio of sustaining to commercial programs, inquiry into community needs, prior conduct of applicant outside of broadcasting. Often such criteria are not sharply tested in the cases, but are given the status of factors in the Commission may consider, along with many others, in weighing applicant's merit. See also Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701 (1964).

⁹⁵ 33 F.C.C. 250 (1962). The case involved the refusal to renew the station license because of the vulgarity of a disk jockey's programs. Since the material fell short of obscenity, the case presented a claim by the commission to regulate bad taste. Further, the context was a refusal to renew a license and not a comparative hearing. The case thus might have provided a key precedent. The Court of Appeals affirmed the FCC action on the grounds of misrepresentation, side stepping altogether the First Amendment problem. *Robinson v. FCC*, 334 F.2d 534 (D.C. Cir. 1965).

⁹⁶ 36 F.C.C. 147 (1964). Although in the end the FCC renewed the *Pacifica* license after a sustained public attack on the station, its opinion and order reflect a careful scrutiny of both Communist affiliations of the principals and of the content of five programs including such items as a discussion of homosexuality by eight homosexuals, the Albee play *The Zoo Story*, and reading of avant-garde poems and fiction. See also 6 P. & F. Radio Reg. 2d 570 (1965), subsequent license renewal limited to one year.

⁹⁷ 62 F.2d 850 (D.C. Cir. 1932), Case antedates Communication Act of 1934. Renewal of license denied because of broadcast of "defamatory and untrue" matter.

And, in any event, *Palmetto*, *Pacifica*, *Lamar Life*,⁹⁸ *McCourry*,⁹⁹ and *Faith Theological Seminary*¹⁰⁰ have added some range and variety to that very short standard list of thirty years ago, *KFBK*¹⁰¹ and *Trinity Methodist Church*.

FAIRNESS AND BALANCED PROGRAMMING

These types of governmental concern with programming remain, for me, the puzzle.

They have the virtue of not judging particular content. In theory at least any odious, hated or unpopular message could be expressed, or any level of taste could be expressed, or any level of taste could be indulged, without violating either requirement.

On the other hand they make possible the informal control by dossier which the Commission exercises.

The objections to the program quotas go more to the point that they are futile than that they are dangerous.¹⁰² One need not reach constitutional ground to argue against the policy. In communities served by several stations it is hard to see why this sort of proportional representation of program content is sensible, and there are many examples of high quality specialization. Further, the devastating weakness of the scheme is that everything counts as one, Bach and rock and roll are music, Shakespeare and Westerns are entertainment. The requirements cannot serve to raise the quality of programming; they can only serve to even out the categories of mediocrity. It would clear the "air" if the Commission would give up on this ghost-like claim to supervise programming. And in the end it is well to remember that one Commissioner, at least, has seen in it an unconstitutional claim to censor.

⁹⁸ 38 F.C.C. 1143 (1965), question of whether Mississippi licenses could meet the standards of the "fairness" doctrine in handling race news; one year license renewal reversed on appeal and remanded to Commission for a hearing. *United Church of Christ v. FCC* 359 F.2d 994 (D.C. Cir. 1966). But compare *Anti-Defamation League of B'nai B'rith v. FCC* 4 F.C.C.2d 190 (1966), renewing license of allegedly anti-semitic broadcaster.

⁹⁹ 2 P. & F. Radio Reg. 2d 895 (1964). Refusal of applicant to promise to do *any* broadcasting to fill 5 of the 7 Commission program quotas for balanced programming. Commissioner Loevinger filed a vigorous dissent.

¹⁰⁰ *In re George Borst*, 4 P. & F. Radio Reg. 2d 697 (1965). Commissioner Loevinger filed a vigorous dissent. Issue concerns capacity of applicant with strong religious views to meet requirements of fairness doctrine in the handling of religion.

¹⁰¹ 47 F.2d 670 (D.C. Cir. 1931), antedates the 1934 statute. Court affirms the denial of license renewal to one Dr. Brinkley, who had used station exclusively to vend his "patent medicines."

¹⁰² *Kalven and Rosenfield*, *Minow Should Watch His Step in the Wasteland*, *Fortune Magazine*, Oct., 1962, at 116.

The fairness problems are more lively and closer to fighting issues.¹⁰³ It is easy to argue that such regulations are not aimed at content but simply at having both sides heard; that they are supportive of freedom of speech therefore. There are at least three objections, however. First, it misconceives the utility of bias in public discussion. Public discussion is all a sort of adversary process on a grand scale, kept alive by the lively and firm expression of opinions. The Supreme Court has recently recognized the point in the *New York Times* case when it speaks of the commitment to discussion on public issues that is "*uninhibited, robust, and wide open*."¹⁰⁴ It is most unlikely that public discussion will have that muscle tone if each publisher must worry about being fair to both sides. An analogy may help. Think of a town meeting where the chair would rule that *each* speaker must be fair to both sides! Second, it seems an impossibly vague standard for a licensee to follow. What is fair treatment of a controversial issue? Third, it easily extrapolates into "anticipatory unfairness" so that a licensee is rejected because he would probably not be able to satisfy the doctrine. This raises the kind of problems posed in *Noe*, *Lamar Life*, and *Faith Theological Seminary*. Finally, this doctrine in particular is the predicate for regulation by dossier; it is thus invites the widest informal surveillance by the Commission.

SOME ANALOGIES

The speech problems posed by broadcasting are probably not unique, but belong to a category that is hard to capture. Various analogies come to mind and suggest the possibility of working toward a firmer theory of how communications problems of this type ought to be handled. There is, for example, the granting of subsidies via the mail; the selection of books for a public library; the selection of courses for a curriculum in a state run school; the rationing of news print during war time; the licensing of parades; the chairing of a town meeting. In all of these, some regulation of "programming" seems inevitable and the problem is nevertheless to stay within a tradition of freedom of communication. Let me consider one or two briefly.

Take the town meeting which is often thought of as a model of free speech in operation. If the Chairman is keeping order he has problems

¹⁰³ Indeed, some aspects of the fairness doctrine are currently under constitutional attack in the courts. *Red Lion Broadcasting Co. v. F.C.C.*, 10 P. & F. Radio Reg. 2d 2001 (1967). The litigation may produce the most definitive answer we have yet had on the relation of broadcasting to the First Amendment.

¹⁰⁴ *Kalven*, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 *Supreme Court Rev.* 191.

somewhat like those of broadcasting. Not everyone can talk at once nor can they talk too long since time is scarce nor can they talk far off the point. *The speakers are in effect "licensed" by the chairman*, yet no one has ever said that this spoiled the game.¹⁰⁵ What is understood by us all here is an implicit standard limiting the chairman to noncontent regulation. He may supervise the program but only in this critically limited sense. Probably the FCC can go somewhat farther, but it may prove profitable to play with the analogy of the FCC as the chairman of the meeting.

Then consider cases like *Cox v. New Hampshire*,¹⁰⁶ holding that it is constitutional to require licensing of parades to avoid having two parades on the same corner at the same time. Here again is an analogy to the Roberts Rules of Order of the town meeting and another firm example of the comparability, at times, of licensing with freedom of speech and press. The case has not yet arisen, but what would we think if the state were to choose between competing parades on the grounds that it preferred the quality or public service of the one parade over the other. Here again is an analogy it may prove profitable to play with.¹⁰⁷

Finally, there is the mail subsidy and here we have an instructive case from the Supreme Court, *Hannegan v. Esquire*.¹⁰⁸ The Postmaster had revoked second class mailing privileges of Esquire magazine on the grounds that it did not meet the statutory requirement of being a publication "originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts." Having originally held that the magazine was obscene, the Postmaster abandoned this contention and argued simply that it was not up to the standards for the second class mail subsidy. The analogies to the Communications Act seem to me not far fetched. Communications are involved. The government is granting a subsidy under a broadly worded statutory formula and an administrative agency is handling it. Further, as in *Palmetto*, the official wishes simply to extend a bit the boundaries of obscenity.

Yet the judicial reaction is explosive. The Court speaking through Justice Douglas emphatically disavows that Congress meant to give any such power to the Postmaster.

To uphold the order of revocation would therefore grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred.¹⁰⁹

¹⁰⁵ Compare Meiklejohn, Political Freedom 24-28 (1960).

¹⁰⁶ 312 U.S. 569 (1941).

¹⁰⁷ Kalven, The Concept of the Public Forum: *Cox v. Louisiana*, 1965 Supreme Court Rev. 1.

¹⁰⁸ 327 U.S. 146 (1945).

¹⁰⁹ *Id.* at 151.

A requirement that art or literature conform to some norm prescribed by an official smacks of an ideology foreign to our system Congress has left the Postmaster General with no power to prescribe standards for the literature or the art which a mailable periodical disseminates.¹¹⁰

The *Esquire* case can serve to bring to a close these reflections about freedom of speech in broadcasting. It is a perfect example of the Court beginning in the right corner. By using the free speech tradition as its touchstone the Court readily construes the Congressional grant of power to the Postmaster. And it points up once again that with the allocation of subsidies as with licensing, the First Amendment question is simply: Under *what criteria* may government so act? Perhaps if we begin to push that question, we may slowly begin to integrate our two traditions of freedom of communication in the United States.

¹¹⁰ *Id.* at 158.