networks and broadcasters simply have not offered free time to major presidential candidates for discussion and debate because of the knowledge that, if they did so, they would be inundated with requests by insignificant splinter parties and groups. Thus, the law completely discourages broadcasters from asking major candidates to engage in free debate and discussion, since it requires them to grant equal time to candidates whose interest to the public is not more than the smatter of votes that they receive at the polls.[7]

Section 315 restrictions also serve to deprive broadcasters of the ability to expose candidates to the public on the local and state level by offering free time for debate and discussion. All of the parties to these comments have experienced situations, such as where there were sixteen candidates for governor, eleven candidates for mayor, ten candidates in a congressional primary, etc., which by sheer arithmetical weight made it impossible for them to offer free time for meaningful debate and discussion. If we multiply the volume which might be involved in an election for a single office by the number of offices which might be involved in a single election ranging from state to federal, broadcasters have no freedom whatsoever to treat major parties, offices and candidates with the extensive attention the electronic press believes they deserve. The same restriction applies even where time is sold rather than donated by the
136 broadcast licensee. Here again the sheer number of competing candidates often requires the station to refuse to carry any message by political candidates for a particular office even though the political candidates are willing to pay for the time, since meaningful equal time could not be made available to ten or twenty other candidates for the same office. The net result is that the public

[7] For example, in 1956 the presidential candidate of the American Party received 483 votes and the presidential candidate of the Christian Nationalist Party is reported to have reecived only eight votes.

often receives no information whatsoever from the broadcast media concerning the candidates for particular public offices, as contrasted to the substantial political discussion which could be made available by the broadcaster if he were permitted to exercise the free journalistic judgment accorded by the Constitution to the "press."

The Commission's vacillating approach toward a broadcaster's right to editorialize and his situation as a Commission licensee have served to restrict, inhibit and frustrate the exercise of freedom of speech in this area. Prior to the Commission's decision in the *Mayflower* case[8] broadcasters had been free to editorialize. In the *Mayflower* decision the Commission flatly forbade broadcast editorialization, and this prohibition remained in effect until 1949, when the Commission, quite begrudgingly, decided to permit editorialization so long as it comported with the fairness doctrine.[9] Since then the Commission has sought to encourage editorialization by licensees, and, in its 1960 Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry,[10] it elevated editorialization by licensees to one of "the major elements [of broadcast performance] usually necessary to meet the public interest, needs and desires . . . ." [11] If there are no constitutional limitations upon its discretion, there is nothing to prevent the
137 Commission from returning to the flat prohibition on editorialization which it previously applied.

The confusion arising from the Commission's action in forbidding or greatly qualifying a broadcaster's right to editorialize has undoubtedly had an effect upon the exercise

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[8] *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940).

[9] FCC Report, Editorializing By Broadcast Licensees (hereinafter "FCC Editorializing Report"), 25 R.R. 1901 (1949).

[10] 20 R.R. 1901 (1960).

[11] *Id.* at 1913.

of this right by broadcasters. While we do not pretend to know all the causes, approximately 40% of AM stations, about 55% of TV stations and 70% of FM stations in 1965 did not editorialize. Many have exercised "self-censorship" by remaining silent in the area of editorial opinion because they are not certain of the burdens and hazards. Nor have the fairness doctrine concepts which the Commission has applied to the right to editorialize been conducive to free editorialization by broadcast licensees. In substance, the Commission has conditioned each individual broadcaster's right to editorially speak what is on his mind and conscience with a requirement that the broadcaster also give equal exposure to contrary ideas which may be abhorrent to the mind and conscience of the broadcaster. Thus, the Commission has invaded the sphere of intellect and spirit by compelling broadcasters to publish what is not in their minds[12] and to broadcast matters which their "reason" tells them should not be published.[13] On occasion some broadcasters find that broadcasting views contrary to their own mind and conscience is too high a price to pay for the right to editorialize, and, therefore, they "self-censor" expressing editorial opinion upon issues on which they may have personal views. The "self-censorship" is not accidental but an apparent purpose of the fairness doctrine.

A similar inhibition follows from the Commission's requirement that any editorial endorsement or opposition to a political candidate must be accompanied with an
138 offer of free time to spokesmen for candidates for the same office to reply to the editorial endorsement or opposition. Any station desiring to oppose a political candidate because he is a Communist, a member of the

[12] *Cf. West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

[13] See *Associated Press* v. *United States*, 326 U.S. 1, 20 n. 18 (1945).

American Nazi Party, a member of the Ku Klux Klan or other radical extreme racist or economic group will naturally think twice before attacking such a candidate if, as a condition, he must give spokesmen for such groups the right to express views which are contrary to the mind and conscience of the broadcaster. A broadcaster will often determine that it would be an imposition on the public to force upon it a vicious racial and religious diatribe by a candidate such as George Rockwell of the American Nazi Party as part of the price of a voluntary editorial opposition to his political candidacy. Further, by the calculus of chance, the reply of the spokesman might benefit the candidate the broadcaster opposes in some cases more than the broadcaster's editorial endorsement may benefit the candidate he supports. The chances are that this requirement will serve effectively as an absolute prohibition against editorial political endorsement in many cases.

Another inhibiting effect of the fairness doctrine flows from situations where there are so many divergent views on a particular issue that the burden of handling them all makes it impossible for the broadcaster to deal with any particular side because of the fairness doctrine requirements. Thus, parties to these comments have experienced situations where there have been as many as eight or ten sharply divergent viewpoints existing on public issues such as the need for more public college facilities, water problems in the Western states, fluoridation of water, etc. The burden and impossibility of discovering and properly analyzing all of these different views for presentation has sometimes caused the subject to be ignored in its entirety. For example, if a station desired, after considerable research, to support the need for additional public college facilities, it would have to expose as many as seven or eight contrary viewpoints expressed by such parties as low tax groups; spokesmen for private universities; spokesmen for the large university versus the

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small college, and vice versa; legislative and educational groups having different educational philosophies; proponents of trade schools versus junior colleges; etc. In balancing the amount of time it would be required to give meaningful exposure to such a volume of divergent viewpoints as against public need for other kinds of programming, the broadcaster may often determine that his editorial viewpoint on public education would result in an imposition upon, rather than a benefit to, the public.

Another restriction of speech flowing from the Commission's fairness doctrine results from the requirement that a broadcast station broadcasting one side of a controversial issue must broadcast other substantial sides of the same issue, since this requirement compels the broadcaster to substitute other sides of the controversial issue for programs which he might determine were more needed by the public.[14] In short, the Commission, in its fairness doctrine, has reached an *a priori* conclusion that the broadcast of all, rather than one side of a particular controversial issue, is more socially desirable and more in the public interest than any other conceivable program that the broadcaster might otherwise broadcast. Thus, in many instances, in order to meet the compulsory mandate of the fairness doctrine, the broadcaster is forced to delete programs desired by the public merely to show the other side or to give an opposing candidate equal time. Because of the time limitations under which a station operates, this results in the program which might otherwise have been broadcast being deleted from the station's program schedule, quite as effectively as if the Commission had ordered such other program not to be broadcast. For a governmental mandate that establishes priority of communications in media limited by hours of the

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[14] A similar result flows from the equal opportunity provisions of Section 315 with reference to equal time for political candidates.

day not only orders the communication of preferred
140 messages but effectively prohibits communication of messages having a lower order of governmental preference.

The so-called "personal attack" requirement which compels a station to send a tape or script and offer time to a person so attacked also serves as an inhibiting factor in determining the amount of free-wheeling opinion and robust debate a broadcaster may be willing to carry.

Broadcasting has reached the point of development where many sponsors are willing to underwrite the broadcast of public affairs programming, thus extending their horizons beyond the historical entertainment and news sponsorship. The Commission has construed the fairness doctrine to require a broadcaster carrying, for the first time, one side of a controversial issue on a sponsored program to carry other sides sustaining if a sponsor cannot be found for such other sides. In short, if the broadcaster carries one side of a controversial issue presented by a sponsor, he may find himself compelled to contribute a like or even greater amount of time to those with opposing viewpoints if they are either unable or unwilling to pay for time to express their opposition. Since *time* is the principal commodity a broadcaster has to sell, this compulsion results in a confiscation of the broadcaster's time by the Commission without compensation. The inhibiting effect that this has upon the broadcaster is readily apparent—few broadcasters desire to sell one hour of time if they are required to throw in a bonus of an additional hour merely to meet the Commission's fairness doctrine. This burden may, in many cases, induce the broadcaster to avoid the meshes of the fairness doctrine by exercising government-coerced "self-censorship" to the extent of avoiding the broadcast, for the first time, of one side of a particular controversial issue even though a sponsor may be willing to pay for such broadcast.

The Commission seems to recognize that the restrictions here discussed necessarily tend to deter broadcast programming in the matters of public affairs, for the Commis-
141 sion has found it necessary in a wide variety of ways to impose upon the broadcaster an obligation to devote time to public affairs as an essential element of his obligation to operate in the public interest.[15] Thus, restrictions beget more restrictions, and there is no end in sight.

To recapitulate, based upon experience,[16] it is the consensus of the parties to these comments that:

(1) The equal opportunity provisions of Section 315 have served to inhibit and restrict broadcasters from offering to the public debates and discussions by major political candidates.

(2) The fairness doctrine requirements that all significant sides of controversial issues must be presented by each individual station have served to inhibit and restrict the broadcast of controversial issues in varying degrees.

(3) The doubts created by the Commission's past actions in the editorialization area, as well as the application of the fairness doctrine concepts to broadcast editorials, have served to restrict and inhibit not only the number of stations which in fact editorialize, but also have served to restrict the number of editorials broadcast by individual stations.

(4) The "personal attack" requirements of the fairness doctrine have served to restrict the uninhibited, ro-

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[15] See FCC Public Notice, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance (hereinafter "FCC 'Fairness Primer' "), 29 Fed. Reg. 10416, 2 R.R. 2d 1901 (1964).

[16] See Appendix A for a more complete factual discussion of the restrictive and inhibiting effects of the fairness doctrine and the equal opportunity requirements of Section 315.

bust and wide-open debate of controversial issues, since the burdens flowing therefrom—plus the Commission's implicit disapproval of the broadcast of such personal attacks—tend to coerce stations to blunt the edges of sharp debate.

142 (5) The asserted right of Congress and the Commission to interfere in such constitutionally-protected areas as the broadcast publication of controversial issues, editorials and political discussions, has created arbitrary hazards in the form of possible Commission sanctions, resulting in the adoption by broadcasters of a form of government-coerced "self-censorship" which has led to the broadcasting of less, rather than more, information of this type to the public.

(6) Both the equal opportunity provisions of Section 315 and the fairness doctrine have the effect of ordering broadcasters to carry programs preferred by government in place of those preferred by the broadcasters or the public.

II.

The Operational and Legal Environment in Which Broadcasting Functions

We ask indulgence at this juncture for acceptance, *arguendo,* of the views we hold most firm (and which we will further support with documentation and argument) that:

A. There is no established constitutional principle that discretionary legislative or administrative restraints on communications are justified:

1. If the facilities of the medium are scarce, relatively or absolutely; or

2. If the medium is highly effective and widely attended; or

3. If a license from government is required before operations are commenced; or

4. If a license is a privilege rather than a right; or

143 5. If the medium uses the public domain; or

6. If the restraint is after the communication, in the form of a penalty, and not before, in the form of a command; or

7. If the medium is privately-owned and operates for a profit; or

8. If it advocates one point of view and excludes all others.

B. The press (all mass media) is not a stagecoach obligated to carry all ideas ready to travel.

We ask this indulgence because the threshold constitutional principle involved here is most often ambushed by interminable arguments on the foregoing "ifs," all of which are completely sterile as devices to dilute the liberty of the press (all mass media). We wish first to consider whether this threshold constitutional principle can be invoked here to support the constitutionality of the fairness doctrine or Section 315. That principle is: *Such restraints are constitutionally acceptable only if a serious and substantial threat to our social order is imminently present to a high degree—that is, we are faced with a clear and present danger.*

From a review of all the Commission literature which presents (we confess, quite confusingly) the rationale for the fairness doctrine and Section 315, we can extrapolate only one postulate that, if supportable as true, might meet this threshold constitutional standard. The postulate is: The success and viability of our democratic institutions are seriously and immediately threatened because the electorate

is exposed in high degree to one-sided communications on political and social issues, and its judgments, therefore, will fall short of the intelligence that is demanded if our democratic institutions are to survive. To justify the fairness doctrine and Section 315, this postulate *must* be true.

In testing this postulate, it is necessary first to determine the quality and quantity of communications that
144 normally and regularly reach the typical voter. This involves an understanding of the universe of communications that influence the opinions that he forms.

The weight of these influencing communications and their source have been widely studied by our modern social scientists. They tend generally to classify sources as primary, reference and media sources. The primary sources include family, church, school and economic and social environment of the individual. The communications within these primary groups are credited with a high degree of influence. Thus, it is well established that a person's religious faith and political beliefs may be influenced far more by his family background than by any fine-spun media discussion of theological or political principles.

The reference sources include such organizations as labor unions, service clubs, professional and business associations, veterans organizations, political parties and other similar groups. Social scientists have established that the communications within these organizations have a substantial influence in the formation of the opinions of its members. For example, membership in a labor union and its communications will have a significant effect upon a person's opinion of a guaranteed annual wage, and membership in the American Medical Association and its communications will have a substantial influence upon a doctor's views on Medicare.

With the mass and variety of communications that pass within the primary and reference groups, it certainly cannot be assumed that a condition of one-sidedness on the part of the typical voter is threatened, even assuming one-sided mass media. And, when the massive and diversified communications that do in fact reach the typical voter through mass media are considered, it is completely unreasonable to assume that a significant number of adults in the United States are in the circumstance of making political judgments and decisions after having heard only one side of the issue.

145 There are 1,763 daily newspapers in the United States with a total daily circulation of over 60 million.[17] There are approximately 478 weekly periodicals with a total circulation of approximately 105 million.[18] There are also 1,445 monthly periodicals with a total circulation of 185 million.[19] There are 666 general monthly and weekly consumer magazines having a total annual circulation of 4,781,310,000.[20] In 1964 there were 20,540 new books published in the United States covering all categories of human endeavor and covering a wide range of contemporary religious, sociological, economic and political issues.[21] In addition, 7,909 new editions of older works were published during that year.[22] Also, over 36 million college textbooks were sold during the year 1963.[23] There are 13,750 four-wall and drive-in motion picture theaters in

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17 Editor and Publisher International Yearbook, 1965.

18 1965 Statistical Abstract of U.S. 524, No. 730 (1958 figures).

19 *Ibid.*

20 Magazine Advertising Bureau, *The Growth of the Magazine Publishing Industry,* Circulation No. 3 (1964).

21 1965 Statistical Abstract of U.S. 527, No. 734.

22 *Ibid.*

23 *Id.* at 526, No. 733.

the United States which have an average weekly attendance of in excess of 43 million.[24] There were 502 new motion pictures released in the United States during the year 1964.[25] Finally, the public is exposed to a wide variety of information in numerous lecture halls, public parks and streets, and through adult education activities. All of this in addition to 6,347 broadcasting stations.

With the exception of broadcasting, none of the sources of influential communications alluded to above is subject to the equal opportunity or fairness restrictions im-
146 posed upon the broadcaster. Indeed, advocacy—not objectivity—is their typical style. Their combined influence on opinion formation is patently so overpowering that to leave them free of government-imposed standards of equal access to candidates and points of view and yet impose the same on broadcasters is an exercise in gnat-swatting.

From this consideration of the market place of political and social ideas, it is not only clear that no one-sided condition on the part of the electorate can exist but, rather, the certainty is that there is a virtual deluge of diversified, conflicting and antagonistic opinions that flood the electorate. Therefore, there is no serious social evil that imminently threatens our democratic institutions. And this is constitutionally decisive, in our view, because it completely destroys the extrapolated postulate for the restrictions the government seeks to impose upon the broadcaster.

We think there must be agreement that the postulate on the threshold constitutional test discussed above has no support in what really exists.

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[24] Film Yearbook, 1965.

[25] *Ibid.*

Even if we isolated broadcasting from the combined opinion-influencing communication media discussed above, which the Commission does erroneously,[26] there is a total absence of any substantial, serious and imminent threat of unfairness on the part of broadcasters. Even though broadcasters may protest the application of the fairness doctrine by the Commission as a complex and ambiguous *legal* obligation, the concept of fairness was adopted by the broadcast industry out of business prudence as a sound journalistic ethic long before it was made obligatory as a matter of definitive Commission policy. As
147 early as 1929, in an early *ad hoc* application of a fairness concept, the Commission found that "the great majority of broadcasting stations are, the Commission is glad to say, already tacitly recognizing a broader duty than the law imposes upon them"[27] in the broadcast of discussions of issues of importance to the public. In 1939 the National Association of Broadcasters Code included the following industry expression of the doctrine of fairness:

> "As part of their public service, networks and stations shall provide time for the presentation of public questions including those of controversial nature. Such time shall be allotted with due regard to all the other elements of balanced program schedules and to the degree of public interest in the questions to be presented. Broadcasters shall use their best efforts to allot such time with fairness to all elements in a given controversy."

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[26] The Commission has held that the requirements of fairness apply to a broadcast licensee irrespective of the position which may be taken by other media on the issue involved, and a licensee's own performance in this respect, in and of itself, must demonstrate compliance with the fairness doctrine. FCC "Fairness Primer," *supra* note 15, 29 Fed. Reg. at 10418-19, 2 R.R. 2d at 1910-11.

[27] *Great Lakes Broadcasting Co.*, 3 FRC Ann. Rep. 32 (1929).

In 1940, when the Commission first set forth the fairness doctrine as a definitive obligation and policy, it merely turned a widespread industry practice into a legal obligation without any explanation as to how such government intrusion could be warranted under the clear and present danger test postulated above.

The Commission has ignored the salient fact that Congress, in leaving the development and operation of broadcasting to private enterprise, had *ipso facto* built in forces serving the cause of fairness far more effective than any conceivable government intrusion—among others, that right conclusions are more likely to be gathered out of a multitude of competing stations than through any kind of authoritative selection. It is the experience of the parties to these comments that any station desiring to achieve widespread community and listener acceptance must gain a reputation for responsibility and maintain a relatively high
148 "credibility quotient." Since listener acceptability may be equated with station profitability, any profit-motivated station under our privately-owned broadcast system will naturally tend to avoid offense to any group, to moderate advocacy and to attempt to gain a reputation for apparent integrity and fairness. Another force working for the cause of fairness and moderation is the competition which exists not only between broadcast stations but also between other competing media. Such competing media are also standing by ready to combat any error of unfairness committed by any broadcaster and, to the extent that they are able to do so, they diminish the community acceptance and hence the profits of the station committing such an error. Another force compelling the broadcast of varying sides of controversial issues is that "controversy" simply happens to be good programming which will arouse and maintain the public's interest and attention in the same manner that "conflict" arouses and maintains interest in drama. In short, under our competitive private enterprise

system of broadcasting, no profit-motivated broadcaster could prosper by sacrificing community and listener acceptance at the altar of "unfairness."[28]

We recognize that the above conclusion will bring forth protests in somewhat the following form: Admitting
149 that the vast majority of broadcasters operate under a high journalistic ethic of fairness and objectivity and that the profit-making motive of the broadcaster carries with it inherent forces of moderation and fairness, what about the bad apples in the barrel? What is to be done about the Dr. Shulers[29] who use their stations to make defamatory attacks and to engage in anti-Catholic and anti-Semitic tirades? What about the Southern broadcast station which broadcasts nothing but segregationist viewpoints? Or what about the station

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[28] Strangely enough, broadcasters are far more often criticized for being bland, inoffensive, innocuous and unwilling to take a strong stand in the broadcast of public affairs programming than of being unfair. If such accusations are justified, one thing is certain: namely, that Section 315 and the fairness doctrine have encouraged their development, which leads to the query whether one of the most significant benefits the Commission might bestow upon the ideal of an informed electorate might be the abolishment of the fairness doctrine and the establishment of a constitutionally-approved "hands-off" policy encouraging vigorous, one-sided editorial advocacy by stations on important public issues of the day, unblunted by the moderating influence of the fairness doctrine, with ultimate reliance upon the aggregate of competing stations and other media to fill in the "other sides" with equally vigorous one-sided advocacy. Certainly, this would assure greater unfettered interchange of ideas than is now the case where broadcasters are assigned the hybrid role of moderator and advocate without being able to play either role wholeheartedly because of fear of Commission intervention.

[29] *Trinity Methodist Church, South* v. *FRC, supra* note 1. In commenting upon the Shuler decision, a former law school professor stated: "The amazing thing about *Trinity* is that the District of Columbia court decided the case as it did, despite the Supreme Court's holding in *Near* v. *Minnesota* [283 U.S. 697 (1931)], decided within the year. Difficult as it is to distinguish the facts in *Near* from *Trinity*, one cannot deny the different results. The circuit court could have reached correctly its decision only if the first amendment were not applicable to radio." Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 Geo. Wash. L. Rev. 719, 758 (1964).

owner who orders his news staff to slant the news so as to favor some viewpoints and public officials and to discredit others? If broadcasting is to operate in the public interest, is it not necessary for the Commission to suppress such excesses and abuse? Fortunately, perhaps, wiser heads and more authoritative voices than ours have answered these emotion-packed questions in a manner which makes them far more rhetorical than one might assume at first blush.

As stated by the Supreme Court in *Cantwell* v. *Connecticut*:[30]

> "To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

150 As Madison had observed:

> "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press."[31]

Despite this, "the Constitution specifically selected the press . . . to play an important role in the discussion of public affairs." It was a "constitutionally chosen means * * * thoughtfully and deliberately selected" by the framers of our Constitution "to improve our society and keep it free."[32]

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[30] 310 U.S. 296, 310 (1940).

[31] Quoted in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964).

[32] *Mills* v. *Alabama*, 34 U.S.L. Week 4418, 4419 (U.S. May 23, 1966).

Although it was recognized that abuses and excesses by the press were inevitable, the framers of the Constitution early determined that such abuses and excesses must be brought within the mantle of protection of the First Amendment if the freedoms of expression were to have the "breathing space" that they "need . . . to survive."[33]

It is noteworthy that the framers of our Constitution were not acting out of naivete when they decided to bring abuses and excesses by the press within the mantle of protection provided by the First Amendment. Prior to the adoption of the First Amendment, in the period immediately before and after the Revolution, the American press became increasingly partisan and often scurrilous.[34] The framers of the Constitution, such as Jefferson, Hamilton, Franklin and Madison, were all subjected to scurrilous personal attacks by the press. Furthermore, in this period, which is often referred to as the period of the "party press," most newspapers were either Federalist or
151 Republican in their approach and were devotedly one-sided. The early history of this "new and rather wild journalism"[35] should give pause to those who argue that restrictions may be placed on the press in the name of "fairness." The First Amendment was adopted to prevent restrictions from being placed on newspapers which individually were clearly one-sided and were thought to be legitimately so. The "truth" was left to be found by citizens in a market place composed of *all* opinion sources. Ben Franklin had stated that his newspaper was not a stagecoach, with seats for everyone.[36] It was

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[33] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964); *NAACP* v. *Button*, 371 U.S. 415, 433 (1963).

[34] The historical background in this paragraph is based on Mott, American Journalism 71-162 (3d ed. 1962).

[35] *Id.* at 143.

[36] *Id.* at 55.

Franklin's point of view that prevailed and not that of the Royal Governor who in 1770 complained of the radical and influential Boston Gazette: "The misfortune is that some seven-eighths of the people read nothing but this infamous paper." [37]

Thus, there were plenty of journalistic abuses and excesses at the time the Constitution was being framed, which prompted a contemporary to observe that "the American press has been abominably gross and defamatory." [38] But this was accepted by the constitutional framers as the price of a press free of government intervention. Madison's Report on the Virginia Resolutions expressed this concept eloquently, when, after referring to the abuses of the press, he went on to say:

> "It has accordingly been decided . . . that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which

152 have been gained by reason and humanity over error and oppression . . . ." [39]

In thoughtfully and deliberately selecting the press to improve our society, the founding fathers decided, on balance, that the ultimate public interest would be better served by permitting the abuses and excesses of the Shulers and their ilk to exist and even thrive under the mantle of protection of the First Amendment than it would be to permit the

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[37] *Id.* at 75.

[38] *Id.* at 146.

[39] Quoted in *Near* v. *Minnesota*, 283 U.S. 697, 718 (1931); see *Cantwell* v. *Connecticut*, 310 U.S. 296, 310 (1940); *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940).

government to prune them away at the danger of injuring the vigor of that part of the press yielding proper fruits. Fearing the occasional tyrannies of government far more than the occasional abuses and excesses by the press, they amended the Constitution so that free speech and press should be guaranteed. Since this ultimate public interest determination was incorporated into the First Amendment, it cannot now be altered by legislative or administrative tampering, no matter how much the Commission may differ with the public interest conclusions on this point embraced by the First Amendment.

III

Discussion of Specific Constitutional Considerations

Up to this point, we have requested the reader to accept, *arguendo,* certain constitutional principles[40] without further support or documentation. Among these is what we have designated as the threshold constitutional standard which we contend must be met to support the constitutionality of the fairness doctrine and Section 315; namely,

that such restraints are constitutionally justifiable
153 only if a serious and substantial threat to our social order is imminent to a high degree—that is, we are faced with a clear and present danger. We have previously shown that, as a matter of fact, no clear and present danger of an extremely serious substantive evil exists justifying this type of government interference. The "evils" upon which the Commission apparently relies are highly speculative in terms of both imminence and seriousness. As we have further shown, there is not even a significant history of evils from which the Commission may draw support. At this point we will discuss and document our contention that the "clear and present danger" standard is a mini-

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[40] See generally Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma,* 32 Geo. Wash. L. Rev. 719 (1964).

mum compulsion of the First Amendment which must be met before the Commission or Congress may justify the interference with speech and press manifested by Section 315 and the fairness doctrine.

A. The Clear and Present Danger Doctrine

The Supreme Court has generally recognized that the freedom guaranteed by the First Amendment is subject to some limitation, such as where speech is uttered "in such circumstances or of such a nature as to create a clear and present danger" that it would bring about "substantive evils" within the powers of government to prevent.[41] However, in holding that the protection of the First Amendment is not absolutely unlimited, the Court has emphasized that "the limitation has been recognized only in exceptional cases."[42]

In *Bridges* v. *California,* 314 U.S. 252 (1941), the Supreme Court described the clear and present danger doctrine as

> "a working principle that the substantive evil must
> 154 be extremely serious and the degree of imminence extremely high" before government interference will

be warranted.[43] Justice Rutledge's classic exposition of the clear and present danger doctrine in *Thomas* v. *Collins*[44] also warrants repetition:

> "The case confronts us again with the duty our system places on this Court to say where the indi-

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[41] *Schenck* v. *United States,* 249 U.S. 47, 52 (1919); see *Wood* v. *Georgia,* 370 U.S. 375 (1962); *Bridges* v. *California,* 314 U.S. 252 (1941); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Thornhill* v. *Alabama,* 310 U.S. 88 (1940).

[42] *Near* v. *Minnesota,* 283 U.S. 697, 716 (1931).

[43] 314 U.S. at 263. The Court also emphasized that the clear and present danger doctrine does not "purport to mark the furthermost constitutional boundaries of protected expression" but does "no more than recognize a minimum compulsion of the Bill of Rights." *Ibid.*

[44] 323 U.S. 516, 529-30 (1945).

vidual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. * * * That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. * * *

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly."

155 We challenge that anyone, on the basis of fact and logic, could rationally conclude that the success and viability of our democratic institutions are seriously and immediately threatened because the electorate is deprived of balanced and multi-sided information on political and social issues to a degree which would warrant the dubious intrusions of government through Section 315 and the fairness doctrine. It is sophistry to pretend that any dangers

the Commission may perceive as grounds for application of the fairness doctrine are other than doubtful, remote and highly speculative in terms of either imminence or seriousness. Plainly, neither the fairness doctrine nor the equal opportunity provisions of Section 315 can be reconciled with the clear and present danger doctrine which stands at the threshold as a minimum compulsion of the First Amendment preventing otherwise dubious intrusions by government into the field of communications.

The Supreme Court's recent decision in *Mills* v. *Alabama*[45] unconditionally condemned a "fairness" concept as a "reasonable" justification for impinging upon the First Amendment. In short, the Court implied that an abstract need for fairness did not meet the clear and present danger test. Thus, the state had defended a statute outlawing editorials on the grounds that it promoted fairness by avoiding confusing last-minute charges and countercharges which could not be answered until after the election was over.[46] Referring to this "fairness" defense, the Supreme Court stated:

> "We hold that no test of reasonableness can save a state law from invalidation as a violation of the First
> 156 Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election."[47]

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[45] 34 U.S.L. Week 4418 (U.S. May 23, 1966).

[46] The Alabama Supreme Court, in sustaining the statute prohibiting editorials, stated: "It is a salutary legislative enactment that protects the public from confusive last-minute charges and countercharges and the distribution of propaganda in an effort to influence voters on an election day: when as a practical matter, because of lack of time, such matters cannot be answered or their truth determined until after the election is over." 278 Ala. 188, 195-196, 176 So. 2d 884, 890.

[47] 34 U.S.L. Week at 4420.

If a fairness concept would not serve as a rule of reasonableness which could save the Alabama law prohibiting editorials from invalidation as a violation of the First Amendment, as the Supreme Court found, we submit that the Commission's fairness doctrine likewise cannot serve as a justification for invading the freedoms of speech and press protected by the First Amendment, since the Court has held that "no test of reasonableness" can save a law resulting in such an invasion.

The *Mills* decision contained other far-reaching implications involving the Commission's regulatory approach toward station editorialization and its application of the fairness doctrine. At the outset, we believe that the *Mills* decision cannot be reconciled with the Commission's action in the *Mayflower* case, which led to a nine-year flat prohibition of editorialization. Further, even when the Commission did permit stations to editorialize, in its report on editorialization in 1949, it refused to acknowledge the unconstitutionality of the *Mayflower* prohibition, but rather permitted editorialization under its construction of the fairness doctrine.[48] Thus, the Commission tacitly reserved the right to reinstate the flat prohibition of the *Mayflower* decision if it found it in the public interest to do so. The Commission's continued assertion of power over editorialization stands as a threat to silence broadcast editorials at the whim and caprice of the Commission, absent any admitted constitutional restraint. The exercise of such power over editorials may not be reconciled with the conclusion of the *Mills* decision that "suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change,
157 which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution

[48] See Editorializing Report, 25 R.R. 1901, 1914 (dissenting opinion of Commissioner Jones).

thoughtfully and deliberately selected to improve our society and keep it free. * * * It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press.'' [49]

At this point we will turn to the discursions that so often have aborted attempts to face up to the clear and present danger doctrine. However unavailing they are, it seems that they must be dealt with.

B. Rationalizations Attempting To Circumvent the Application of First Amendment Protections to Broadcasting Are Specious

Whenever broadcasters contend that they are entitled to the same constitutional protection as any other media making up the constitutionally-protected press, exponents of government interference respond that broadcasting is ''different'' and that the protections of the First Amendment do not easily translate into the environment of the broadcast media. The ''differences'' usually offered are that there is a physical limitation on broadcast facilities, that broadcasters must be licensed, that broadcasting is a privilege, that the public owns the airways, and a host of other sophistries. As we shall demonstrate, these contentions that the First Amendment's protection of broadcasting is ''different'' than its protection of other media of mass communications are without merit.

1. The ''Scarcity'' Argument

One of the principal grounds advanced to prove the thesis that radio and television are ''different'' is that the limited spectrum space leads to physical limitations which warrant a different application of the First Amendment protections to the field of broadcasting than to other mass

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[49] 34 U.S.L. Week at 4419.

media. The *physical* limitation of the radio and
158 television spectrum is often contrasted to the potentially infinite number of newspapers and magazines as grounds for different treatment under the First Amendment. This is sophistry for two reasons.

In the first place, with many cities having only one daily newspaper and thousands of others having none, it is generally conceded that there is a shortage of daily newspapers in the United States. Today there are three times as many radio and television stations (6,347) as there are daily newspapers (1,763). If scarcity is justification for setting aside the protections of the First Amendment, it would thus necessarily limit the First Amendment's applicability to newspapers even more than in the case of broadcasting stations. However, no one has had the temerity to suggest that newspapers have lost any of their rights under the First Amendment because of the recently experienced and accelerating shortage of newspapers.[50]

In the second place, the Commission has allocated over 1800 UHF and VHF television channels to approximately 1200 communities. However, there are only 718 commercial and educational stations on the air. Under these circumstances, it is difficult to conclude that the shortage of spectrum space has acted as any real brake upon the expansion of television stations. The real limitation on the expansion of radio and television has been economic rather than physical, as the Commission has often recognized. Aside from this, the physical limitation becomes even more of an abstract irrelevancy when the fact is considered that there are three times as many radio and television stations as there are daily newspapers. As one commentator noted

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[50] If it becomes economically viable, as it is already technically feasible, to distribute newspapers by facsimile, it is difficult to assume that the Commission would utilize the scarcity argument to justify interference with such facsimile distribution to the extent that it has applied the argument to broadcasting.

in this regard, "Even if we were to give some constitutional respectability to the numbers game, and limit our-
159 selves to comparing daily newspapers to television stations, we rapidly face the fact that even today each metropolitan area generally has more television stations than newspapers."[51] After making a thorough analysis of the inadequacies of the scarcity argument, he summarized his conclusions on this issue as follows:

> "At any event, all mass media are limited and the limitations are essentially economic; no discussion can alter that fact. If limitation, for whatever reason, can limit freedom, then freedom must be limited for all mass media. In short, to the argument that radio and television are different, one might ask: Different from what? How different? Is the difference significant? Until a better argument than the totally irrelevant physical limitation factor is offered, we suggest that freedom is too important to be sacrificed because of an ancient myth. The fable of 'difference' ought to be immediately reviewed and classified for what it is."[52]

We submit that this thesis is irrefutable.

2. The "Powerful Voice" Argument

Lurking behind the scarcity argument is the sentiment sometimes expressed that broadcasting is such a powerful voice that to permit it to operate under the full protections of the First Amendment would place broadcasters in a position to unduly influence public opinion.

In the first place, the more than six thousand broadcast stations are not "a powerful voice" because they do not speak as one voice. Diversity of ownership effectively precludes any such uniformity since the thousands of

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[51] *Sullivan, op. cit. supra,* note 40, at 759.

[52] *Id.* at 761.

broadcast station owners represent a wide cross-
160 section of political, regional, religious, economic and social beliefs. These stations compete with each other and with a flood of other media.

In the second place, it would be a philosophical anomaly to hold that full and free discussion and exposition of ideas and issues can be achieved by confining the liberty to speak to the weak while limiting, conditioning or silencing the strong. It does not tax reality to suggest that uniformly the most powerful voice that speaks on such issues is government itself. It was one of the purposes of the First Amendment to provide a counter to the power of government. As Justices Douglas, Warren and Black stated in reaching (as the majority did not) the constitutional issue presented by the Corrupt Practices Act:

> "Some may think that one group or another should not express its views in an election *because it is too powerful,* because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group—labor or corporate. * * * First Amendment rights are part of the heritage of all persons and groups in this country.[53]

Justices Douglas and Black further stated in a movie censorship case:

> "Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas. On occasion one may be more powerful or effective than another. * * * Which medium will give the most excitement and have

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[53] *United States* v. *International Union*, 352 U.S. 567, 597 (1957) (dissenting opinion) (emphasis added).

> the most enduring effect will vary with the theme and the actors. It is not for the censor to determine in any case." [54]

161 It would be anomalous, indeed, to conclude that, because broadcasting may be a highly or "more" effective means of communication, its effectiveness *per se* could be used as grounds for depriving it of First Amendment protections.[55]

3. The "Licensing" Argument

One of the more specious reasons—bootstrap in nature—offered for limiting or not even applying the First Amendment to radio and television is that these communications media, as a physical imperative, must be licensed under the public interest standard and that this necessity, in some way, supersedes or qualifies the safeguards of the First Amendment. While the Supreme Court in the *NBC* case [56] indicated that an unsuccessful applicant for a license was not, by this circumstance alone, deprived of his rights under the First Amendment, it is an over-extension of this obvious conclusion to further conclude that if a license is granted the licensee thereby and thereupon forfeits the protections of the First Amendment. Such a view would construe the commerce clause as vesting in Congress the

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[54] *Superior Films* v. *Dept. of Education*, 346 U.S. 587 (1954) (concurring opinion).

[55] Aside from the fact that Congress, by virtue of its power over commerce, was a midwife at the birth of broadcasting and thereafter its taskmaster, one may assume that broadcasting's effectiveness, as much as anything else, led Congress to forcing the equal opportunity provisions of Section 315 upon the broadcast industry even though we assume the Commission does not seriously believe that newspapers could be forced to give equal space in their pages to opposing candidates. It is apparent, however, that if the First Amendment permits such compulsion to be applied to broadcasters, it could with like legality be applied to newspapers and other communication media, unless there are "grandfather rights" under the First Amendment.

[56] *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

power to nullify the First Amendment. Realizing that censorship dangers inhere in the exercise of legislative or administrative licensing powers, the Supreme Court has made it quite clear that it will exercise extraordinary vigilance over any licensor in order to make certain
162 that he does not exercise the licensing function in a manner which will violate the free speech and press guarantees of the First Amendment.[57]

A related argument is sometimes advanced that a license is a "privilege" and not a "right"[58] and that this in some manner deprives the licensee of his First Amendment rights. Implicit in this argument is the corollary assumption that "unconstitutional conditions" may be imposed on the grant or retention of a privilege. However, it is firmly established that the government may not condition the grant of privileges upon the relinquishment of constitutional rights. This proposition was unequivocally stated by the Supreme Court in the case of *Sherbert* v. *Verner,* 374 U.S. 398, 404 (1963), wherein it was stated, "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial or placing of conditions upon a benefit or privilege." As further stated by the Court in *Hannegan v. Esquire,* 327 U.S. 146, 156 (1946): "[G]rave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. * * * Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated."

Section 315 conditions the right of a broadcaster to carry a discussion by one political candidate upon his granting

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[57] See *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936); *Kunz* v. *New York,* 340 U.S. 290 (1951); *Hannegan* v. *Esquire,* 327 U.S. 146 (1946).

[58] See statement of then Chairman Newton N. Minow in Freedom and Responsibility in Broadcasting 173 (Coons ed. 1961).

all opposing candidates equal time. The Commission's fairness doctrine and editorial policy condition the right of a broadcaster to present one side of a controversial issue upon his presenting all other significant sides of the
163 same issue. That such a condition upon communications denies liberty is beyond doubt. As stated in *Near* v. *Minnesota*:[60]

> "[I]t does not matter that the newspaper or periodical is found to be 'largely' or 'chiefly' devoted to the publication of such derelictions [defamation]. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made."

In short, if a broadcast station has the right, without previous restraint, to broadcast one side of an issue, this right cannot be made dependent upon a condition that it broadcast something else, more or less, on the other side. Further, since the Supreme Court's recent decision in *Mills* v. *Alabama*,[61] which struck down as unconstitutional an Alabama statute which, *inter alia*, made it a crime for a newspaper to editorialize in support of a candidate on election day, we do not assume that anyone would seriously argue that a broadcast station does not have the constitutional right to editorialize in support of a political candidate. As indicated by the principle laid down in *Near*, if a broadcast station has the right, without previous restraint or fear of subsequent punishment, to editorially

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[59] *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Hannegan* v. *Esquire*, *supra* note 57; *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922). See Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960); Hale, *Unconstitutional Condition and Constitutional Rights*, 35 Colum. L. Rev. 321 (1935).

[60] 283 U.S. 697, 720 (1931).

[61] 34 U.S.L. Week 4418 (U.S. May 23, 1966).

endorse a candidate, this right cannot be conditioned upon or made dependent upon its broadcasting something else, more or less.

4. The "Public Domain" Argument

A further excuse offered for government invasion into the field of broadcast programming is that the "public owns the air waves" and that the broadcasters' use of this public property is, therefore, subject to greater exemptions from the protections of the First Amendment than might otherwise be the case. This excuse has an obvious defect because if the use of the public domain deprives a communications media of a right to be free from government censorship, then what media today can be free? In short, if the use of public property does not distinguish radio and television from other communications media, the assertion adds nothing to justify broadcasting being treated differently.

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All communications media use the publicly-owned postal system; all to a greater or lesser extent use public highways, streets, and airways; all do this under government regulation and many pursuant to a license or permit. Thus, few printed media could survive without a permit to use the second-class mails. Streets, parks, and halls in many ciites cannot be used for meetings or speeches without permits from city authorities. The fact that newspaper, magazines, and other forms of communications use these publicly-owned facilities has never been grounds for permitting government to interfere with the dissemination of information by these media. Indeed, as the court emphasized in *Hannegan* v. *Esquire*,[62] the fact that public property such as the post office facilities are used for dissemination of information by the press requires extraordinary precautions to assure that the government does not, as a price

[62] 327 U.S. 146 (1946).

of private use of such public facilities, attempt to invade protections of the First Amendment.[63]

The explosions of the electronic age have made our society of complex and private persons and activities so interdependent that the creation of public thoroughfares for private use is a major and imperative undertaking of government, as it always has been to a degree. To say that the liberties of speech and press cannot survive their use of such public thoroughfares is to say that they could exist, if at all, only in the old-fashioned ante-electronic age. But the courts, with great vigilance, have fought to dispel the idea that old-fashionedness or uselessness is any part of the character of the First Amendment. Rather, they emphasize that the First Amendment is capable of adaptation to each new fashion of communication—which must be if all other liberties we prize are to survive:

> "If we ever agree that modern mechanical devices and modern mass interest in public affiairs have destroyed the validity of those [First Amendment] principles, we will have lost parts of the foundation of the Constitution." [64]

5. The "Content" Argument

One of the most time-honored excuses offered for Commission intrusion into broadcast programming is that the

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[63] Furthermore, employment in a business in the public domain cannot be conditioned upon adherence to unconstitutional government commands. *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) (religious oath for notary public); *Wieman* v. *Updegraff*, 344 U.S. 193 (1952) (state employees loyalty oath). *Cf. Hague* v. *C.I.O.*, 307 U.S. 496, 515 (1939): streets and parks "have immemorially been held in trust for the use of the public . . . ."

[64] *Rumely* v. *United States*, 90 U.S. App. D.C. 382, 393, 197 F. 2d 166, 177 (1952), *aff'd on other grounds*, 345 U.S. 41 (1953). See also discussion and cases cited in Part I, *supra*.

Commission does not censor, because it only examines and weighs the "overall programming" to determine the good judgment and good faith of the licensee in applying the fairness doctrine, without going into the content of particular programs. It is impossible, however, to conceive how the Commission might determine whether a licensee was living up to its fairness doctrine without looking at the content of the licensee's programs. How otherwise might the Commission determine whether an issue was controversial, whether a balanced multi-sided presentation had been made, or whether a statement constituted a personal attack? The Commission itself, in its Editorializing Report, recognized that it might be "called upon to weigh conflicting evidence to determine
166 whether the licensee has or has not made reasonable efforts to present a fair and well-rounded presentation of particular public issues."[65] What evidence will the Commission weigh other than the content of the programs containing the particular public issue? It is difficult to imagine a more strenuous type of censorship over content being exercised than that in which the Commission would indulge if it were to place any broadcaster on trial for violating the fairness doctrine.

6. The "Prior Restraint" Argument

Perhaps the most specious of all the arguments advanced to support Commission intrusion into programming is that the First Amendment applies only to "prior restraints" but does not apply to "subsequent punishment." In short, it is argued that, since the Commission does not require broadcasters to submit the content of programs for approval prior to broadcast, but leaves the broadcaster

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[65] 25 R.R. 1901, 1911.

free to broadcast what he may desire, subject only to such subsequent punishment as the Commission may choose to apply if the Commission disagrees with what he has broadcast, there is no "prior restraint" and, hence, no violation of the First Amendment.[66] The fact that the broadcaster may have his license renewal application denied, or be required to face revocation of license proceedings, forfeiture penalties, or cease and desist orders as a subsequent punishment if his programming does not meet Commission standards, whatever they may be, is totally ignored as a source of unconstitutional restraint by those advocating this unique position.

However, it has been clear since *Near* v. *Minnesota,* 283 U.S. 697, 715 (1931), that freedom of speech and press might be " 'rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty
to publish what he pleased, the public authorities
167 might nevertheless punish him for harmless publications.' 2 Cooley, Const. Lim. (8th ed.) pp. 885." As the eminent administrative law authority Professor Louis L. Jaffe once pointed out to Chairman Minow during a symposium on freedom in broadcasting, no such distinction between prior restraints and subsequent punishments may be properly made under the First Amendment to the Constitution, since the Supreme Court has abandoned such distinctions.[67]

Thus, the Supreme Court, since *Near* v. *Minnesota,* has ignored this distinction and has tested the validity of government interference by its operation and effect. If the scheme of regulation serves to restrain or inhibit free

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[66] Former Chairman Newton N. Minow has been among others who have advanced this contention. See *Freedom and Responsibility in Broadcasting* 172-74 (Coons ed. 1961).

[67] *Op. cit. supra* note 66, at 172-74.

speech and free press, the scheme is unconstitutional. This is true whether the restraint or inhibition is coerced by government by direct prior restraint or by indirect prior restraint flowing from threat of subsequent punishment. It applies whether the restraint or inhibiting effect is direct or indirect and, indeed, even if such restraining influence is unintended by government.[68]

Applying these constitutional principles to the fairness doctrine, the Commission's editorialization policies and the equal opportunity provisions of Section 315, it is beyond a doubt that the regulatory scheme effects a real and substantial restraint and inhibiting effect upon the exercise of the freedom of the press guaranteed by the First Amendment. The Commission's fairness doctrine and the proposed rules here being considered are clearly "instruments of regulation" and have been accepted by the broadcast industry as such. The present and intended weapons of formal and informal sanctions by the Commission for the purpose of forcing compliance with its "fairness" concepts are clearly coercive. Broadcasters cannot be
168 expected to lightly disregard thinly-veiled threats of denial of their renewal applications, possible revocation proceedings or monetary forfeiture penalties if they do not come around to the Commission's views on fairness. The broadcasters' "self-censorship' 'in the area of controversial and political issues, compelled and defined in scope by Congress and the Commission, is no less virulent because it may be privately administered by broadcasters out of fear and timidity than if the Commission applied flat prohibitions against editorialization and adopted similar compulsions as to what broadcasters may or must broadcast. The Commission's fairness policies and the

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[68] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Smith* v. *California*, 361 U.S. 147 (1959); *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Near* v. *Minnesota*, 283 U.S. 697 (1931).

equal opportunity provisions of Section 315 clearly deter broadcasters from selecting all those programs which they desire to broadcast, because of doubt of whether they could prevail in retaining, their license free of sanction if they exercise such freedom of selection or because of fear of the delay and expense of having to undergo lengthy litigation in order to establish their right to do so. In sum, the Commission's fairness doctrine and Section 315 have consistently served to dampen the vigor and limit the variety of electronic-press reporting in a manner which is inconsistent with the First Amendment.

7. The "Private Restraint" Argument

In rationalizing the constitutionality of the fairness doctrine in its Editorializing Report, the Commission stated:

> "The most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communications free from any governmental dictation as to what they can or cannot hear *and free alike from similar restraints by private licensees.*"[69]

Through this reference to "similar restraints" by a private licensee, the Commission spuriously attempted to
169 shift the onus of the abridgement of freedoms of the press resulting from its own actions by implying that a private licensee could be guilty of unconstitutional abridgement of speech and the press if the licensee failed to give the public access to all sides of public questions.

Admittedly, one of the paramount interests protected by the First Amendment is the public's access to a free flow of information and ideas. However, the First Amendment protects this paramount interest only from interfer-

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[69] 20 R.R. at 1912 (emphasis added).

ence by governmental action and not from action by private persons. This principle was applied specifically to broadcasting in the *McIntire* case,[70] involving a station's refusal to carry certain sponsored religious programs, wherein the court stated:

> "[T]he First Amendment was intended to operate as a limitation to the actions of Congress and of the federal government. The defendant [broadcast station] is not an instrumentality of the federal government but a privately owned corporation. The plaintiffs seek to endow WPEN with the quality of an agency of the federal government and endeavor to employ a kind of 'trustee-of-public-interest' doctrine to that end. But Congress has not made WPEN an agency of government. For this court to adopt the view that it has such a status would be judicial legislation of the most obvious kind."

Thus, the Commission cannot excuse its own invasions and restraints upon the freedoms protected by the First Amendment on the grounds that such invasions are necessary to prevent First Amendment "abridgments" by the private broadcaster. Whatever interests of the public may be protected by the First Amendment, they are only protected from action by government. No court has ever accepted the Commission's implication that the refusal of a licensee to air all sides of a public issue is itself a denial of First Amendment rights to the American people. If this unique concept were accepted, not only broadcasters but all other communications media would be required to present the "other side" as a constitutional condition precedent to taking a public position on any controversial issue or to giving editorial en-

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[70] *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597, 601 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946).

dorsement or other exposure to any political candidate. The fact is, however, that the press protections of the First Amendment embrace the right of the press to speak unfairly, one-sidedly, even falsely, or not at all. A requirement of fairness is contrary to

> "the theory of our Constitution . . . that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, *unfair,* false, or malicious." [71]

While the press in general certainly has strong moral and ethical obligations to provide fair and objective reporting on information essential to an informed electorate, these moral and ethical obligations have not yet been converted into a *legal* obligation by the First Amendment.[72]

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One final note should be added to this discussion. The Supreme Court has recently encouraged "uninhibited, robust and wide-open" debate on public issues by eliminating the private action against the press for libel, in the absence of actual malice, as an unwarranted obstacle
171 to such debate.[73] It is somewhat incongruous to find that the Commission at the same time is adding new obstacles to "uninhibited, robust and wide-open" de-

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[71] *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 298-99 (1964) (concurring opinion of Goldberg, J.) (emphasis added).

[72] As Justices Black, Douglas and Rutledge have noted: "[I]t assumes the impossible" to suppose that mass media, including radio, would at all times be equally fair "as between the candidates and officials they favor and those whom they vigorously oppose." The Justices stated that, for this reason, all media should be equally free so as to combat error in one another. *Kovacs* v. *Cooper,* 336 U.S. 77, 103 (1949) (dissenting opinion).

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

bate by creating a new personal action against the electronic press; namely, the right of a person personally attacked during an uninhibited debate to assert an absolute right to use the station's microphone and time for reply, and the right of a spokesman for an opposing political candidate to assert an absolute right to use the station's microphone and time if the station endorses another political candidate. In the final analysis, if free speech has the function of providing that "debate on public issues should be uninhibited, robust and wide-open, and that it may well include vindictive, caustic and sometimes unpleasantly sharp attacks on government and public officials,"[74] how is that function served if, as is the case, broadcasters are often timid in involving themselves and their stations in discussions of controversial issues, editorialization and discussions by political candidates because of regulations designed to promote fairness? If the Supreme Court could find that the constitutional guarantees of the First Amendment required a federal rule denying to public officials[75] a cause of action against the press for libel because of the restraining influence such libel suits may have upon wide-open discussion, the underlying principle would dictate that the Commission should eliminate the burdens of its fairness doctrine.

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[74] *Id.* at 270.

[75] The *New York Times* doctrine may extend to libel actions by other than public officials. See *Rosenblatt* v. *Baer*, 383 U.S. 75, 84 n. 10, 86 n. 12, 88-91 (1966); *Pauling* v. *News Syndicate Co.*, 335 F. 2d 659, 671 (2d Cir. 1964) (Friendly, J.), *cert. denied*, 379 U.S. 968 (1965); *Afro-American Publ. Co.* v. *Jaffe*, U.S. App. D.C. No. 18363, decided May 27, 1965 (concurring opinion) (reargued *en banc* Oct. 18, 1965); *Pauling* v. *National Review, Inc.*, 34 U.S.L. Week 2575 (N.Y. Sup. Ct., New York Cty., decided April 21, 1966).

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IV

Even if a Constitutional Power to Require "Fairness in Broadcasting Resides in Congress, the Statutory Provisions Upon Which the Commission Relies as Authorizing it to Promulgate the Fairness Doctrine Are Unavailing Because They Are Vague and Lack Explicitness

Thus far it has been contended that both Section 315 and the fairness doctrine are beyond the constitutional power of the Congress and of the Commission. In this section it is further contended that, even if such a power resides in Congress, the statutory provisions upon which the Commission relies as authority for the fairness doctrine are defective on either of two separate grounds: (1) the statutory provisions upon which the Commission relies as its authority to promulgate the fairness doctrine fail to meet constitutional requirements of narrowness and preciseness, and thus cannot be used as authority for the Commission to tinker with First Amendment rights; and (2) the statutory provisions upon which the Commission relies as its authority to promulgate the fairness doctrine are not sufficiently explicit to establish that Congress *intended* to authorize the Commission to tinker with First Amendment rights.

A. Unconstitutional Vagueness

It is firmly established that a vague statute regulating conduct and touching upon First Amendment rights is unconstitutional. The Commission bases its fairness doctrine upon such vague provisions of the Communications Act. This vagueness, with its implications of sweeping authority in the Commission, inhibits protected speech; it makes possible Commission arbitrariness; and it effectively precludes judicial review.

173 The defects of the statute are demonstrated and compounded by the practice of the Commission under

the fairness doctrine in general, and now through the proposed rule. The vagueness persists; it has produced Commission inconsistencies and arbitrariness (particularly iu regard to unpopular but clearly controversial causes); and it is only a rare licensee who thinks it useful to raise a challenge—administrative or judicial—to a ruling by the Commission or its staff.

1. The Statutory Provisions Relied Upon By The Commission Are Too Vague To Permit Commission Impingement Upon First Amendment Rights

The Commission has based its authority for the "fairness doctrine" upon the "public interest, convenience, and necessity" requirements in the Communications Act, and, since 1959, upon that clause of Section 315(a) which recognizes an obligation of the licensee to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." See FCC "Fairness Primer," 29 Fed. Reg. 10416, 2 R.R. 2d 1901, 1903 (1964). Neither of the quoted standards is self-defining, and both suffer from the same vice of vagueness which has prompted the Supreme Court to strike down legislation which impinges upon the First Amendment area and vests virtually uncontrolled discretion in administrative officials.[76]

Even if Congress intended the Commission to issue rules and regulations to effectuate the vague Congressional standards, such power cannot constitutionally be bestowed upon administrative officials when First Amendment rights are so intimately involved.

174 "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regu-

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[76] *E.G. Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Staub* v. *City of Baxley*, 355 U.S. 313 (1958); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Saia* v. *New York*, 334 U.S. 558 (1948); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938).

> lated, suppressed, or punished is finely drawn. * * * The separation of legitimate from illegitimate speech calls for more sensitive tools . . . ." [77]

The evils of such a sweeping standard, especially where First Amendment rights are involved, have been cited often by the High Court. Vagueness in a statute or rule bearing on speech causes the speaker to " 'steer far wider of the unlawful zone' Speiser v. Randall, 357 U.S. 513, 526 . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964). Therefore, statutes restrictive of First Amendment freedoms "must be narrowly drawn to meet the precise evil the legislature seeks to curb," and "the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation." *United States* v. *C.I.O.*, 335 U.S. 106, 142 (1948) (Rutledge, J., concurring), quoted approvingly in *Baggett* v. *Bullitt*, *supra*, 377 U.S. at 372 n. 10.[78]

A vague statute of the nature here in question not only inhibits legitimate speech, but it provides a cloak for the exercise of arbitrary power by administrative officials. (See cases cited at note 76, *supra*.) "It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes." *NAACP* v. *Button*, 371 U.S. 415, 435 (1963). The Commission has *in fact* applied the "vague and broad statute" in a discriminatory manner.

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[77] *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958), quoted in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963).

[78] See also *Ashton* v. *Kentucky*, 34 U.S.L. Week 4398 (U.S. May 16, 1966); *NAACP* v. *Button*, 371 U.S. 415 (1963); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Cantwell* v. *Connecticut*, *supra* note 76; *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

The proposed rule on its face discriminates against "foreign groups or foreign public figures" (§ 73.123
175 (b)). The fairness doctrine as applied discriminates openly against atheists, *Mrs. Madalyn Murray,* 5 R.R. 2d 263 (1965), and communists (and the "communist viewpoint"), FCC "Fairness Primer," 29 Fed. Reg. 10416, 10417-18, 2 R.R. 2d 1901, 1908 (1964). In a dissenting opinion in the *Murray* case, Commissioner Loevinger noted the Commission's application of the fairness doctrine to assure contrasting *religious* viewpoints but not a contrasting *atheistic* viewpoint. He thought that the conflicting cases "suggest that the fairness doctrine applies only when viewpoints acceptable to the Commission are involved. This anomaly simply emphasizes the error of the Commission's whole approach to this subject." 5 R.R. 2d at 269. See Appendix B. The Commission is not unlike the censor whose broad authority was held unconstitutional in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 504-05 (1952); "[T]he censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies."

It is worth noting that the Commission, in a series of events of which the latest is the *Murray* case, has retreated under public pressure from its early ruling informing licensees that they must provide time to spokesmen for atheism, *Robert Harold Scott,* 11 F.C.C. 372, 3 R.R. 259 (1946).[79]

Another example of Commission inconsistency and arbitrariness under the fairness doctrine is the line of rulings on the extent of the licensee's obligation to seek out responsible reply comments. Compare *The Evening News*

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[79] See *Hearings Before the House Select Committee to Investigate the Federal Communications Commission Pursuant to H. Res.* 691, 80th Cong., 2d Sess. 181-88, 200 (1948); *Letter to Edward J. Heffron,* 3 R.R. 264-a (1948); *Robert H. Scott,* 5 R.R. 859 (1949); *Robert H. Scott,* 25 R.R. 349 (1963).

Ass'n., 6 R.R. 283 (1950) (licensee should allow discussion of labor side on public issue and "continue to make available its facilities" for management side); with 176 *Dominican Republic Information Center*, 16 R.R. 431 (1957) (network attempt to obtain other side on *Galindez-Murphy* case prior to broadcast was sufficient, and time need not be made available to the Dominican Republic after the broadcast); and with *Jefferson Standard Broadcasting Co.*, 17 R.R. 339 (1958) (licensee violated requirement of fairness doctrine by not making adequate presentation of other side of "pay-TV" controversy even though it had sought several spokesmen for that side and had kept offer open). These cases, also, suggest that the fairness doctrine might be applied in some proportion to the acceptability of the viewpoints to the Commission.

Moreover, in avoiding a patently unworkable situation, the Commission has apparently been forced to make an arbitrary distinction between types of program formats subject to the "personal attack" principle. It is generally understood that the principle is not intended to apply to a station's regular newscasts, where other persons' newsworthy and controversial charges of crime and corruption are constantly being reported.[80] If the reply time had to be provided in this situation, the station would either be hopelessly burdened from the effort and expense of seeking replies and providing air time for them, or it would have to forego a large part of its journalistic function. Yet, as the Commission reads the statute, Section 315(a) of the Act makes the total fairness doctrine applicable to news-type programming, and this fact places the Commission in a dilemma which casts more doubt on the legality of the fairness doctrine: either the personal attack principle

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[80] Such a distinction may be made in interpreting the vague expression "presentation of views" as used in the phrase "during the presentation of views on a controversial issue of public importance." (§ 73.123(a).) But is not a news report of other persons' views still a "presentation of views"?

makes impossible demands upon the broadcaster, further aggravating the abridgement of First Amendment rights, or by carving out an exception to that principle the Commission violates Section 315 which allegedly requires
177 an across-the-board application of fairness doctrine principles. The personal attack principle itself cannot be so narrowly construed. A news-program exception to the principle is inconsistent with the Commission's own rationale that "elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station . . . ." Notice of Proposed Rule Making, p. 1; FCC "Fairness Primer," 29 Fed. Reg. 10416, 10420, 2 R.R. 2d 1901, 1915 (1964); FCC Editorializing Report, 25 R.R. 1901, 1907 (1949). "[T]he licensee must be fully aware of the contents of the program, whatever its source or his actual involvement in the broadcast. The crucial consideration, as the Commission stated in Mapoles, is that, 'his broadcast facilities [have been] used to attack a person or group' (Letter of September 18, 1963 to Douglas A. Anello, FCC 63-850)." FCC "Fairness Primer," *supra,* 29 Fed. Reg. at 10421, 2 R.R. 2d at 1917. *Cf. Lar Daly,* 19 R.R. 1103 (1960). The only way the Commission can legally resolve this dilemma is by renouncing the entire personal attack principle. At the least, the selective enforcement of the principle points up the potential for arbitrariness inherent in the vague authority of the Communications Act.

Another defect in the fairness doctrine is that the overly-broad standards of the Communications Act effectively preclude judicial review in an area where constitutional freedom is in jeopardy. The Commission "is allowed, in essence, to define its own authority, to choose the direction and focus of its activities," because Congress itself has not made these decisions and the courts are powerless to make them. See *Watkins* v. *United States,* 354 U.S. 178, 205-06 (1957); *United States* v. *Peck,* 154 F. Supp. 603 (D.D.C.

1957) (both cases: defectively-broad mandates of congressional investigating committees).[81]

178 The statutory standards here involved are "completely lacking in . . . terms susceptible of objective measurement."[82] The phrases "public interest, convenience, and necessity" and "reasonable opportunity for the discussion of conflicting views on issues of public importance," have, to use words of the Supreme Court, "no ascertainable meaning either inherent or historical" (*Thornhill* v. *Alabama*, 310 U.S. 88, 100 (1940) (referring to the phrase "without a just cause or legal excuse")).[83]

Assuming that "fairness" is a constitutionally justifiable purpose in regulating speech in broadcasting, the definition of such terms as "reasonable opportunity," "conflicting views," and "issues of public importance," as well as such a nebulous term as "public interest," cannot be left to the Commission anymore than the definition of a "religious, charitable or philanthropic cause" could be left to the secretary of the Connecticut public welfare council in *Cantwell* v. *Connecticut*, 310 U.S. 296, 301-02 (1940). First Amendment rights are jeopardized where a government official may regulate speech, not as a ministerial function (*id.* at 306), but after "appraisal of facts, the exercise of judgment, and the formation of an opinion" (*id.* at 305).

The Commission may not distinguish its regulatory scheme on the ground that it is only used for the purpose

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81 The latter case was said to have "constituted an even more serious threat to freedom of thought and expression. For these hearings consisted of the questioning of persons employed in the newspaper field, in radio and television." 154 F. Supp. at 605 (Youngdahl, J.).

82 *Cramp* v. *Board of Public Instruction, supra* note 78, at 286.

83 Compare *Staub* v. *City of Baxley*, 355 U.S. 313 (1958) (solicitation's "effects upon the general welfare of citizens of the City of Baxley" held to be a statutory test "without semblance of definitive standards or other controlling guides governing the action of the Mayor and Council in granting or withholding a permit").

of encouraging speech. The Commission has shown that, in its view, the statute is broad enough to permit the absolute suppression of an extremely vital kind of speech—
editorializing, *Mayflower Broadcasting Corp.*, 8
179 F.C.C. 333 (1940).[84] Moreover, the theory of the
cases is that a vague statute in this field is inherently defective because it inhibits speech, thus presumptively defeating any stated purpose to expand speech. See also arguments at pages 5-13, *supra.*

The fact that the Commission continues to struggle clumsily, inconsistently and often arbitrarily with its own implementation of the fairness doctrine is indication enough that the enabling statute is not clear enough to provide a framework within which details can be confidently worked out. The Commission is doing more than applying standards already provided by Congress contrary to the Supreme

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[84] The uncontrolled discretion of the Commission is exemplified by its changing positions on licensee editorializing. After nine years of prohibiting editorializing as being contrary to the public interest, the Commission decided to permit it so long as it comported with fairness doctrine requirements. FCC Editorializing Report, 25 R.R. 1901 (1949). Since then the Commission has sought to *encourage* editorializing. See e.g. FCC Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry, 20 R.R. 1901, 1913, (1960); *Hearings on Broadcast Editorializing Practices before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 88th Cong., 1st Sess. 87 (1963) (testimony of FCC chairman E. William Henry); Speech by FCC chairman Newton N. Minow before the National Association of Broadcasters Public Affairs/Editorializing Conference, March 1, 1962, published in Minowa and Laurent, Equal Time 148 (1964). Chairman Henry, apparently not wishing to promote just every kind of editorializing, qualified his endorsement by stating to the subcommittee on Broadcast Editorializing Practices: "We have cautioned, however, that the licensee should not do so [editorialize] if he is not prepared to act fairly and to employ an adequate staff as the foundation for meaningful and intelligent editorialization." *Hearings, supra.* In the future the Commission may wish to judge licensee performance in part on whether the licensee's editorials have been "meaningful and intelligent," ignoring as it has done thus far, the First Amendment implications of its statements and decisions concerning program content. Moreover, the Commission's view would permit it to ban station editorials any time it decides such action is once again in the "public interest."

Court command that "sensitive tools" forged by Congress must be used when administrators tinker with First Amendment rights.

180 The Commission's Proposed Rule and Fairness Doctrine Are Similarly Vague, and, Together With the Threat of Sanctions and the Lack of Effective Judicial Review, Produce an Unconstitutional Prior Restraint on the Licensee's Speech

For the reasons stated above, the purported statutory authorization for the Commission's fairness doctrine is defective and cannot be remedied by the Commission. However, even if the Commission, as the delegate of Congress, could constitutionally cure the vice of vagueness in the statute, it has failed to do so. The proposed rule, like the fairness doctrine in general, is vague and possesses all the actual or threatened evils discussed above.

Accepting *arguendo* the Commission's position that the fairness doctrine has been enacted into Section 315(a) (but see subpart B, *infra*), that section speaks of an obligation to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." The Commission standard is somewhat different in that it states the requirement as that of "affording reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance."[85] Thus the Commission reads-in a qualification that the issues covered by the fairness doctrine are those which are "controversial."

What is one man's "controversy" is another man's dogma; what is "reasonable" opportunity to one person is too little and too late (or, too much and requiring re-

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[85] FCC "Fairness Primer," 29 Fed. Reg. 10416, 2 R.R. 2d 1901, 1904 (1964). This also is substantially the language used in the Notice of Proposed Rule Making, p. 1.

sponse) to another; what is a "conflicting" or "contrasting" view to one person is substantially the same ideology to another; and what is an "issue of public importance" to one person justifies invocation of a right of privacy in the eyes of another. Thus, of the myriad ideas which are discussed on any given broadcasting station,
181 the licensee will conclude that many clearly fall either within or without the meaning of the fairness doctrine, but that many are open to question on this point. Even assuming that it would be otherwise constitutional for the Commission to control speech in broadcasting by clearly defining these ambiguous terms, it is an impossible task.

The proposed rule, Section 73.123, is a prime example of the futility of the Commission's effort. In codifying the "personal attack" principle it adds more ambiguous words: an opportunity for personal reply must be afforded when an attack is made "during the presentation of views" on that person's "honesty, character, integrity, or like personal qualities." § 73.123(a). It is obvious that there are problems involved in defining what is an "attack" and what is "personal," as well as what constitutes a "presentation of views" (see page 47 *supra*), to say nothing of the vagueness of the terms "honesty, character, integrity or like personal qualities." It is impossible to predict all the situations in which problems of interpretation could arise. And what constitutes an attack upon an "identified . . . group"? Is an attack on "the City Council gang" an attack on each city councilman or on the Council as a group? To whom should time to respond be offered when an attack is made on "the Irish Mafia"? In Section 73.123(b), who are included in the phrase "persons associated with the candidates in the campaign"—a candidate's wife and children? even if the attack is somewhat personal? largely personal?

The Commission recognizes in a variety of language in the Notice that there will be problems of interpreta-
182 tion,[86] but it minimizes the significance of this by stating (1) that the Commission is available for interpretation "in appropriate cases" (Notice, p. 1 n. 1) and (2) that "it is not our intent to use the proposed rule as a basis for sanctions against those licensees who in good faith seek to comply with the personal attack principle" (Notice, p. 2).

The first point only emphasizes the vagueness of the standards involved and encourages the broadcaster to avoid governmental "red-tape" and expense on close questions by simply avoiding, if possible, the situations which give rise to those questions, or by following uncritically the informal advice of the Commission staff. This also emphasizes the wide range of control over program content left to *ad hoc* agency determination, thereby placing the Commission in the role of censor and effectively giving it the final word on what views are to be expressed, how they are to be expressed and by whom they are to be expressed. The danger of this governmental power is heightened by the practical necessity of the broadcaster to act upon FCC *staff* advice.

The second point (assuming, as we need not, the *Commission's* good faith)[87] actually increases the ambiguity in

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[86] *E.g.*, "We have used the phrase 'reasonable opportunity' here and in the proposed personal attack rule because such opportunity may vary with the circumstances; in many instances, comparable [?] opportunity in time and scheduling is clearly appropriate. But in some, where the endorsement involved may be one of many and involve just a few seconds time, reasonable opportunity may call for more than a few seconds if there is to be a meaningful response." Notice, p. 4.

[87] "[E]xperience teaches us that prosecutors too are human." *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287 (1961). "Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964).

the applicability of sanctions under the fairness doctrine. Not only must the licensee determine the meaning of such terms as "controversial" and "issues of public importance," but it must also guess at the manner in which the Commission will enforce them as a matter of "good
183 faith."[88] The "good faith" test is also inconsistent with the first point above, which as a practical matter compels licensee adherence to informal staff advice even if the licensee in "good faith" disagrees.

Such a regime of regulation violates due process of law and the First Amendment. *Baggett* v. *Bullitt*, 377 U.S. 360 (1964). Even when acting in "good faith," the licensee is compelled to make a usually impossible distinction between when he is absolutely sure that there has been no personal attack and when he "recognizes that there may be some dispute concerning this conclusion"; in the latter case the licensee "should" take steps to preserve a record of the broadcast in question "for a reasonable period of time" (Notice, p. 2 n. 2). These vague requirements will further discourage the station from broadcasting "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

The Commission's record of past inconsistent and arbitrary rulings (see pages 45-48, 49 n. 84, *supra*) leads to greater licensee inhibitions on still unsettled questions, especially where unpopular causes may be seeking exposure.

Assuming *arguendo* that judicial review could be effective in curbing Commission abuses in this area (but see pages 48-49, *supra*), the licensee's "stake" in any one

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[88] The Commission states that it will act against a licensee only where "there could be no reasonable doubt under the facts that a personal attack had taken place (e.g., a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Communist" (Notice, p. 2). Quaere as to *whose* reasonable doubt. Quaere also as to whether a statement correctly reciting a person's conviction for embezzlement or for violation of the Smith Act would raise at least a "reasonable doubt" as to the applicability of the fairness doctrine.

statement, program, or issue probably would be "insufficient to warrant a protracted and onerous course of litigation."[89] In many situations, such as elections, the delay required for formal Commission consideration and court review would effectively moot the problem. See (1) *Republican National Committee*, 3 R.R. 2d 647, *petition for review denied sub nom. Goldwater* v. *FCC*, U.S. App. D.C. No. 18936 (Oct. 27, 1964), *cert. denied*, 379 U.S. 893 (1964) (Goldberg and Black, JJ., dissenting); *Republican National Committee*, 3 R.R. 2d 767 (1964) ("equal opportunities" provision and "fairness doctrine" in-
184 voked; final Commission decision one day before election day); (2) *Daly* v. *Columbia Broadcasting System, Inc.*, 309 F. 2d 83 (7th Cir. 1962) ("equal opportunities" ordered by Commission five days before election day; petition for reconsideration denied four months later); (3) *Columbia Broadcasting System*, 14 R.R. 720 (1956) (Commission refused to hold that "equal opportunities" provision was not applicable until one day before the election).

The lack of clear standards, the potential and actual arbitrariness of the Commission, and the general absence of judicial review, impose upon the broadcast licensee a burden of "self-censorship" condemned by the Supreme Court. See *New York Times Co.* v. *Sullivan, supra*, 376 U.S. at 279; *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). The self-censorship resorted to in order to provide programming in conformity with the Commission's known views (or to eliminate programming which raises a question not immediately answerable by the Commission) is enforced by the threat of fines under the forfeiture provision of the Act;[90] and of license revocation[91] or denial of re-

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[89] *Freedman* v. *Maryland*, 380 U.S. 51, 59 (1965).

[90] 47 U.S.C. § 502.

[91] 47 U.S.C. § 312(a).

newal;[92] as well as by the threat of such a classic prior restraint as a cease and desist order.[93] The Commission states in its Notice of Proposed Rule Making that one of its purposes is "to assist the Commission in taking effective action in appropriate circumstances when the procedures are not followed" (Notice, p. 2), a clear reference to above-mentioned sanctions. The proposed rule would add the raised fist to the lifted eyebrow in the arsenal of weapons used by the Commission to regulate speech on the airwaves through the fairness doctrine.

This scheme of regulation, combining as it does uncontrolled Commission discretion and Commission
185 threats of possibly catastrophic economic loss, is a "prior administrative restraint" far more direct and coercive than that struck down in the *Bantam Books* case, where the threatening agency did not itself control the sanctions. Any such prior restraint on speech bears "a heavy presumption against its constitutional validity."[94]

B. Lack of Explicit Delegation

In addition to the constitutional requirement for narrowness and precision in a statute bearing on First Amendment freedoms, there is an established line of Supreme Court decisions holding that there must be "explicit" authorization for agency action "within the area of questionable constitutionality . . . ." *Greene* v. *McElroy,* 360 U.S. 474, 506 (1959); *Kent* v. *Dulles*, 357 U.S. 116 (1958); *Hannegan* v. *Esquire*, 327 U.S. 146 (1946); *Ex parte Endo,* 323 U.S. 283 (1944). The congressional authorization will not be inferred from general language or congressional acquiescence. The asserted statutory authorization for the

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[92] 47 U.S.C. § 307(d).

[93] 47 U.S.C. § 312(b).

[94] *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963).

proposed rules is clearly lacking in the required explicitness.[95]

In *Greene* v. *McElroy, supra,* the Supreme Court held that the Defense Department lacked authorization to impose loyalty-security procedures which denied affected persons the right of confrontation and cross-examination. The Department argued that the President had "in general terms" authorized its procedures; that congressional authorization could be "inferred" from general legis-
186 lation concerning the armed services; and that both Congress and the President had acquiesced in the Department's loyalty-security program (360 U.S. 495, 506). The Court, however, rejected the Department's contention (*id.* at 506-07):

> "If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here. In many circumstances, where the Government's freedom to act is clear, and the Congress or the President has provided general standards of action and has acquiesced in administrative interpretation, delegation may be inferred. * * * But this case does not present that situation. We deal here with substantial restraint on employment opportunities of numerous persons imposed in a manner which is in conflict with our long-accepted notions of fair procedures. Before we

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[95] We recognize that the "public interest, convenience and necessity" language of the Act is sufficiently explicit to authorize the Commission to conduct its normal regulatory functions, *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940), and that the Congress was not required to provide "an itemized catalogue of the specific manifestations of the general problems," *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 220 (1943). But when, as here, Commission action enters an "area of questionable constitutionality," only "the most explicit" authorization will suffice. *Greene* v. *McElroy, supra*, 360 U.S. at 506, 508.

> are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. * * * Such decisions cannot be assumed by acquiescence or nonaction. * * * They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them."

In *Kent* v. *Dulles, supra,* as in *Greene,* the Court struck down agency action of doubtful constitutionality due
187 to the absence of explicit legislative authorization.

The issue in *Kent* was the Secretary of State's authority to deny passports to applicants who refused to answer questions concerning alleged Communist beliefs and associations. A 1926 statute authorized the Secretary to "grant and issue passports" and "a large body of precedents grew up which repeat over and again that the issuance of passports is 'a discretionary act' on the part of the Secretary of State." 357 U.S. at 123-24. Nonetheless, the Court stated (*id.* at 129-30):

> "Since we start with an exercise by an American Citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or

withhold it. * * * Its [a passport's] crucial function today is control over exit. And, as we have seen, the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress. * * * and if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. * * * Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. * * * We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.

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"To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs and associations. Congress has made no such provision in explicit terms; and absent one, the Sec-
188 retary may not employ that standard to restrict the citizens' right of free movement."

Hannegan v. *Esquire, supra,* involved First Amendment questions posed by the Postmaster General's denial of a second-class mailing permit to *Esquire* magazine on the ground that it contained material deemed vulgar and risque. He purported to act under a statute which restricted the second-class "privilege" to publications "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry" (327 U.S. at 148-49). The Court

held, however, that this statute did not authorize the Postmaster General's action. It stated, in language pertinent to the instant case (*id.* at 155-56):

> "We may assume that Congress has a broad power of classification and need not open second-class mail to publications of all types. * * * And the Court held in Ex parte Jackson, 96 U.S. 727, that Congress could constitutionally make it a crime to send fraudulent or obscene materials through the mails. But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in United States ex rel. Milwaukee Social Democrat Publishing Co. v. Burleson, 255 U.S. 407, 421-423, 430-432, 437, 438. Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. The provisions of the Fourth condition [of the statute] would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country."

In short, the Commission, no less than the courts, "must assume, when asked to find implied powers in a grant
189 of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Ex parte Endo, supra,* 323 U.S. at 300. And Congressional acquiescence in Commission decisions in the area of "fairness" cannot be deemed a substitute for explicit statutory authorization.

The Commission has historically based its fairness doctrine on the "public interest" criterion which governs its

licensing functions under the Act, contending, in substance, that licensees which do not fairly present both sides of controversial public issues do not operate in, or serve, the "public interest." See FCC "Fairness Primer," and appendices thereto, 29 Fed. Reg. 10416, 25 R.R. 1901 (1964). Since 1959, the Commission has also relied upon language added in that year to Section 315(a) as follows:

> "Nothing in the foregoing sentence [exempting bona fide news programs from the 'equal opportunities' requirement of the section] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

The proposed rules here are said to be authorized by Section 315, along with those sections (§§ 4(i), 303(r)) authorizing the Commission to adopt rules and regulations "not inconsistent with law" in the performance of its functions under the Act.

The quoted amendment to Section 315, however, does not purport to impose a new "obligation" upon licensees or to delegate new authority to the Commission. Rather, it is phrased in terms of preserving a pre-existing "obligation" against implied repeal by reason of enactment of the "news program" exception to the "equal opportunities" requirement. The Statement of the House Managers in the Conference Report concerning the amendment indicates that the quoted language was intended as a "restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communica-

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tions Act of 1934." H.Rept. No. 1069, 86th Cong., 1st Sess. 5 (1959). See also S. Rept. No. 562, 86th Cong., 1st Sess. 9, 13 (1959). Since the Commission has repeatedly premised its fairness doctrine on the "public interest" criterion of the 1934 Act, and the 1959 amendment by its terms is simply a reaffirmation of an "obligation" presumed to exist under that Act, it is pertinent to consider whether the pre-1959 statutory scheme in fact contains authorization for the fairness doctrine.

Extended discussion is unnecessary, we submit, to conclude that it does not. Under the cited Supreme Court decisions, statutory language authorizing the Commission to grant broadcast licenses upon a finding that the "public interest, convenience, and necessity" will be served falls far short of an "explicit" authorization to direct licensees to adhere to detailed "fairness" requirements in their programs relating to controversial public issues. This conclusion is reinforced by the existence of Section 326, which prohibits censorship by the Commission or interference with "the right of free speech by means of radio communication." And the very specific and narrow language of Section 315, affording "equal opportunities" to "legally qualified candidates," plainly did not authorize the Commission to extend that right to other classes of persons via the fairness doctrine.

Indeed, the legislative history of Section 315 lends credence to the view that Congress, at the time of both the 1927 and 1934 Acts, considered and rejected a "fairness doctrine." Section 315 was taken *in haec verba* from Section 18 of the Radio Act of 1927. The bill reported by the Senate Committee at the time of the 1927 Act contained a provision stating:

191 "If any licensee shall permit a broadcasting station to be used . . . [to broadcast any matter for a valu-

able consideration], or by a candidate or candidates for public office, *or for the discussion of any question affecting the public,* he shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce: Provided, that such licensee shall have no power to censor the material broadcast." (Emphasis added.)[96]

This provision was stricken on the floor of the
192 Senate,[97] and a substitute provision affording "equal opportunities" to "candidates" alone was adopted

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[96] See S. Rept. No. 772, 69th Cong., 1st Sess. 4 (1926); 67 Cong. Rec. 12503 (1926).

[97] At the time the amendment changing this section was proffered on the floor of the Senate, the following colloquy occurred between Senator Dill, principal author of the Senate bill, and Senator Willis:

"Mr. Dill . . .
After we got it out [of Committee] we realized that the 'common carrier' phrase was an unwise phrase to say the least . . .

* * *

"Mr. Willis. I think that remedies one serious objection I had in mind, as to line 12, particularly, which is proposed to be stricken out, where it says 'or for the discussion of any question affecting the public.'
"Mr. Dill. That is a rather broad statement.
"Mr. Willis. Yes." (67 Cong. Rec. 12358).

Senator Howell disagreed with the amendment and stated that:

"It [the provision respecting candidates] is important, but it has not anything like the importance of the provision he has stricken out—the discussion of public questions."

Senator Dill responded:

"That is such a general term that there is probably no question of any interest whatsoever that could be discussed but that the other side of it could demand time . . . I sympathize with the Senator's position; but the opposition to that was so strong in the minds of many that it seemed to me wise not to put it in the bill at this time . . ." (67 Cong. Rec. 12504).

by the Senate and, after slight modification in conference,[98] enacted as Section 18.

Several years later, the 72nd Congress adopted a bill (H.R. 7716) which would have amended Section 18 to extend the "equal opportunities" requirement to situations where a broadcasting station was used "in support of or in opposition to any candidate for public office, *or in the presentation of views on a public question to be voted upon at any election, or by a government agency . . .*" (emphasis added). The report of the House conferees stated: "This amendment broadens Section 18 . . . designed to insure equality of treatment to candidates for public office, those speaking in support of or in opposition to any candidate for public office or in the presentation of views on public questions." H. Rept. No. 2106, 72d Cong., 2d Sess. 6 (1933). The bill, however, was pocket vetoed by President Hoover.

In the following Congress, which enacted the 1934 Act, the Senate Committee reported a bill containing a proposed Section 315 identical to the proposed amendment to Section 18 included in H.R. 7716, discussed above. The report of the committee stated that the proposed section "extends the requirement of equality of treatment of political candidates to supporters and opponents of political candidates, *and public questions before the people for a vote.*" S. Rept. No. 781, 73d Cong., 2d Sess. 8 (1934). (Emphasis added.) Although this bill was adopted by the Senate,

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98 Even though the language was stricken in the final Senate bill, the Senate conferees apparently urged the adoption of a section containing the "questions affecting the public" language at the Senate-House conference on the 1927 Act. The Senate debates on the bill reported out of conference contain the following:

> "Mr. Howell: Yes, the Senate Conferees . . . are still in favor of these provisions; but I am informed that at least two of the House conferees insist that if these provisions are reinserted the bill will be killed" (68 Cong. Rec. 4152).

the House refused in conference to accede to the
193 Senate provision, and Section 315 was enacted in language identical to Section 18 of the 1927 Act. See H. Rept. No. 1918, 73d Cong., 2d Sess. (1934).

Thus, Congress in 1959 was plainly mistaken in its view that the Commission's fairness doctrine was authorized under the 1934 legislation. In light of the negative character of the language in the 1959 amendment, it is evident that this language does not have operative effect and is no more than a misguided attempt to protect against implied repeal an "obligation" erroneously presumed to exist under legislation enacted by another Congress 25 years previously. See *United States* v. *Price,* 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"); *United States* v. *United Mine Workers of America,* 330 U.S. 258, 281-82 (1947).

Even assuming, *arguendo,* that the 1959 amendment is to be given operative effect, it does not follow that the proposed rules in question are authorized with the explicitness required by the Supreme Court decisions discussed above. The 1959 language relating to "fairness" is very general in form, in marked contrast to the specific language of the Section's provisions concerning "equal opportunities." At most, there is a broad direction or policy pronouncement that licensees should "afford reasonable opportunities for the discussion of conflicting views on issues of public importance"; and perhaps the Commission is thereby authorized to consider a licensee's overall "fairness" in the presentation of public issues in determining whether its operations have been in the public interest.

The proposed rules, however, are very specific in application. If a licensee endorses a political candidate, it must within 24 hours offer "a reasonable opportunity for a candidate or a spokesman of the candidate to respond. . . ."

Similar provisions would apply in the case of "personal attacks" on an "identified person or group." The
194 rules would thus extend in only slightly attenuated form the "equal opportunities" obligation that Congress has restricted to "legally qualified candidates" and which, as discussed above, it has declined to extend to other persons (see *Felix* v. *Westinghouse Radio Stations,* 186 F.2d 1, 3-6 (3rd Cir. 1950), *cert. denied,* 341 U.S. 909 (1951)). In the context of a narrowly drawn "equal opportunities" requirement and the Act's prohibition against Commission interference with freedom of speech (§ 326), the general "fairness" language of the 1959 amendment clearly lacks the requisite explicitness to constitute authorization for a Commission directive that persons and groups (other than "legally qualified candidates") must in specified situations be afforded the opportunity to use the licensee's facilities.

195 CONCLUSION

Upon the foregoing premises, the parties to these Comments respectfully urge that this proceeding be terminated without rule making because the Commission's fairness doctrine and Section 315, upon which rule making is predicated, violate the First Amendment or because the fairness doctrine is otherwise unlawful.

Respectfully submitted,

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Radio Television News Directors Association

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RKO General, Inc. (WOR-AM-FM-TV), New York, New York; (WHBQ-AM-TV), Memphis, Tennessee; (KHJ-AM-FM-TV), Los Angeles, California; (WNAC-AM-TV, WRKO-FM), Boston, Massachusetts; (WGMS-AM), Bethesda, Maryland; (WGMS-FM), Washington, D.C.; (KFRC-AM-FM), San Francisco, California

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Roywood Corporation (WALA-TV), Mobile, Alabama

Time-Life Broadcast, Inc. (KLZ-AM-FM-TV), Denver, Colorado; (WFMB-AM-FM-TV), Indianapolis, Indiana; (WOOD-AM-FM-TV), Grand Rapids, Michigan; (KOGO-AM-FM-TV), San Diego, California; (KERO-TV), Bakersfield, California

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June 20, 1966

APPENDIX A

Inhibitive Effects of The Section 315 "Equal Opportunities" Provision And the Fairness Doctrine

Broadcasters are consistently and directly inhibited from producing public service programming by the "equal opportunities" provision of Section 315.

As CBS president Frank Stanton has stated:

> "* * * Whatever the objectives of fairness and equality in which section 315 was doubtless originally rooted, 30 years of experience have established that the section represents an idea which once may have seemed to be good, gone completely wrong.
>
> "The inescapable conclusion is that section 315 does far more harm than good, and that its result is neither to increase diversity of opinion nor expand free speech, but rather as a matter of practical necessity is a compelled suppression and blackout.
>
> "This compulsion is as simple as it is obvious: Time and time again radio and television have been unable to present candidates to the American people because broadcasters have known that under section 315 a half hour to a Democratic or Republican candidate can mean a total of 4, 8, or 16 half hours to obscure and unknown opponents. So when a half hour has had to be multiplied to 8 hours, we have had to forego the half hour. The result has been less, not more, broadcasting in the public interest."[1]

Dr. Stanton has also explained why Section 315 does not work to the benefit of significant third-party candidates:

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[1] *Hearings on Political Broadcasters-Equal Time Before a House Subcommittee on Interstate and Foreign Commerce,* 86th Cong., 1st Sess. 123 (1959).

197 "As a practical matter, the Norman Thomases do not get an opportunity in the campaign unless the stations give time to the Democratic and Republican candidates. I am now speaking under 315.

"If we moved from the restrictions of section 315, I am persuaded that responsible broadcasters would give time, or give an opportunity for the significant third-party spokesman to inject their discussion of the issues at least as they see them in the campaign.

"In the 1960 campaign for President and Vice President, when we had the temporary suspension, all three of the network groups gave time to the third-party candidates, or to the third parties. Even Norman Thomas was invited on to one of those programs, though he was not a candidate in 1960, but because he represented a point of view which the network organization felt should be given some airing.

"We could not have done that if section 315 had been in effect because to open it up to a handful of minority parties, as we did in the 1960 campaign—and when I say 'we' I mean that all 3 of the networks did it—we would have opened ourselves up to possibly as many as 14 other demands for equal time.

"So that prior to 1960, what happened was that the broadcaster did not offer any time and did not live up to the full opportunity that he had within his capabilities simply because he knew that he would be inundated by requests from insignificant splinter parties and groups."[2]

The present Section 315 requires, except for the narrow "news" exceptions, that any free or purchased broadcast

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[2] *Hearings on Political Broadcasts Before the Senate Committee on Commerce*, 87th Cong., 2d Sess. 38-39 (1962).

time for candidates be made available on an equal basis for all candidates in that race. Parties to these Com-
198 ments have been inhibited by this requirement from providing *any* air time in election situations in which to do so would have tied-up their facilities with "fringe" candidates beyond a point which they believed to be in the public interest.

One party states the following:

> "Two specific examples of situations which caused us to restrict our political programming occurred within the recent past:
>
> "In the 1965 fall primary elections for the [City] Council, 65 candidates were entered on the ballot. Great public interest centered around only a few of these candidates and, had the limiting provisions of Section 315 not been in effect, we would have presented at least two types of programs to satisfy the interests of our listeners and viewers. One of the types would have been a documentary program examining the personalities of the leading contenders as well as the issues involved. In another program type, we would have presented the leading candidates answering questions put to them by staff newsmen. Obviously, any such service to the public was made impracticable because of the necessity for providing equal opportunities for the appearance of the remaining candidates of the total of 65 involved.
>
> "For the same reasons we avoided special programs relating to the election of 6 persons as members of the Board of Trustees for [a local college] from a field of 54 candidates."

Another party writes:

> "We have encountered definite restrictions where we have been inclined to offer free time to political can-

didates. The reason being that the principal candidates would be the logical users of valuable prime free time, but the also-rans and the so-called lunatic fringe preclude such offerings. In this state, the two principal
199 candidates receive more than 95% of the votes and the miscellaneous others split up a mere nothing."

This party explained:

"[We] offered the two then candidates for the office of U.S. Senate . . . free prime time for debate. This offer was made a day or two before the end of the filing dates, and when these two principal candidates were the only candidates. They accepted the offer, the debate was scheduled, and announced publicly.

"At the last minute, before the deadline for filing, [another person] filed his candidacy which only required 350 names on a petition, and then proceeded to demand equal time. We gave [him] thirty minutes of prime time. It was a most pitiful, disgraceful performance. * * * As a result of this experience, we will no longer offer free time for political candidates where we are likely to get involved with miscellaneous, also-rans, and lunatic fringe candidates demanding equal time. Clearly this removes from the sincere and proper candidates the opportunity to use free and prime time on our stations . . . and just as clearly it indirectly means that the unknown minority and fringe candidates are exercising a veto and keeping the principal candidates off the air under free time conditions."

Still another party to these Comments gave this example of "self-censorship" coerced by Section 315:

"In the 1964 . . . General Election, there were 17 candidates for County Sheriff. None of the candidates was a familiar political figure and [the station] wanted very much to present four or five of the candidates to its au-

dience so that they might become acquainted with the important (we felt) candidates. The remaining 12 or 13 candidates were largely ex-policemen, perpetual office-seekers, and people with histories of brushes with law enforcement. An hour of public service time could have been devoted to the leading candidates which would have informed the public and helped the candidates. A program on which all 17 appeared would have given each candidate something under 4 minutes and would have served only to confuse the electorate even further. Obviously, such a program was not produced."

One party observes that the Section 315 effect of suppressing regular reports from incumbents seeking re-election deprives the public of information in which it would have had an interest.

The inhibiting effects of the fairness doctrine are admittedly more subtle, especially because the Commission in effect compels the broadcasting by a licensee of at least some controversial public issue programs "in the public interest." A number of the parties to these Comments have expressed the view that they approach possible programs involving controversial issues and open debate with great caution because of the complexities and burdens of the fairness doctrine. One party noted that it finally decided as a matter of safety on one issue to give time to the KU Klux Klan and similar organizations. This party concluded that "to some extent the time devoted to the 'lunatic fringe' is at the sacrifice of the time devoted to understanding the real issues." Several parties indicated that they would give more time to programs involving controversial issues if it were not for the "nut" factions that claim time under the fairness doctrine.

Even viewpoints which the licensee would concede to be "significant" can be so varied on any particular issue that

the station is inhibited from undertaking a review of them. Some of the experiences of the parties follows:

1. "A typical example would be a program involving the race problem in which inordinate numbers of splinter groups claim to represent significant and slightly different points of view. A panel discussion would be impossible because of the large number of groups to be represented, and a documentary program would lose
201 effectiveness and be unsuited for broadcast if it were handicapped by the need to cover all points of view.

"Another instance might concern a broadcast covering the pros and cons of flouridation of the municipal water supply to prevent tooth decay. Suppose we arrange a broadcast debate between qualified medical or dental authorities arguing the benefits and dangers of adding flouride to the water supply. Following the debate, a group representing civil liberties accuses us of not touching on the legal aspects of flouridation, where upon another debate is arranged. Following this, a taxpayers' group asks for time to expose another side of the problem, the cost of initial equipment and continuing costs of chemicals used in the flouridating process. This calls for another debate, or at least the representation of this viewpoint, and then its opposing viewpoint, perhaps by a city authority. And on and on. The point is, we would not feel free to do what a newspaper does when it covers only one aspect of a problem—in this case, whether flouridation is beneficial or harmful to health."

2. "[We] investigated the possibility of presenting a program on the right of the United States to pursue its present course in the war in Vietnam. It was our original intent to present only the 'hawk,' 'dove,' and administration viewpoints. However, our investigation led to the belief that there were so many other views

of the situation, e.g., 'pacifist,' that we could not present all of them and hence, decided not to schedule the program."

3. "There are several conflicting viewpoints on the Jr. College situation. That segment of our population that are old enough to have seen their children through college only want to protect their tax base. They are against any expense of education, and especially 'squandering money on needless Jr. Colleges.' There is a definite group who favor a broad based Jr. College
202 program (such as California has established) which would create a sizable number of Jr. Colleges in the state to augment the few now in existence. This would require the selection of locations (bickering between cities), increased taxes, the transfer of some students et cetera. There is another group that doesn't believe in the Jr. College system because of intellectual reasons, and who favor more the trade school or vocational school techniques.

"The several private colleges in this state which depend upon substantial enrollment fees understandably are not enthusiastic about an expanded Jr. College system.

"I trust we have already gotten sufficient detail to show you varying viewpoints. We would like very much to editorialize on behalf of the forgotten student from the high schools of this state who deserve an opportunity for higher education, whose parents have been paying state taxes low these many years. If we were to devote editorial time to this subject, we would be submerged by requests from all kinds of sizable groups who have conflicting viewpoints. We do not wish to get involved in this kind of squabbling and cluttering up of our broadcast schedules, and to add to the public confusion of the issue."

Various parties also express reluctance to program one side of an argument in such circumstances as when the "other" side refuses to appear, or when such programming would likely invite requests for time on a number of issues (e.g. The John Birch Report).

Various parties to these Comments find that fairness doctrine restrictions on editorialization produce results such as fewer editorials, inhibitions regarding the endorsement of political candidates, and inability of radio and television to balance one-sided newspaper opinion in the community by presenting more of another side (the latter point being true of all controversial public issue programming).

203 The many-sided-issue complaint of broadcasters is heard also with respect to editorials:

> "The problem of a supplemental water supply for our area presents a many sided controversy in that there are several potential sources of water, a myriad of ways in which the water can be delivered and an unending array of potential tax sources for payment of water. Were we to endorse a single course of action in any of these three matters and take an editorial position, the requests for air time to air differing viewpoints would be overwhelming. There are other issues similarly complex, but the one above is the best current example."

Similarly, a number of the parties find that the personal attack doctrine as enunciated even prior to rule-making is burdensome administratively, and that it tends to inhibit the station from controversial issue programs in general, and discourages live, discussion programs in particular. Said one party: "This requirement, in our opinion, effectively discourages the use of the live, informal discussion programs." Said another: "This requirement would make me extremely hesitant to do a documentary on an undesirable political situation."

Any controversial public issue for which there is a definite point of decision raises another problem. Whether it be an election of officials, a referendum, or the vote of a legislature (or the veto of a chief executive), the broadcaster is obligated to provide time for all sides of the controversy before that point of decision. In many cases, the complexities involved in ascertaining significant viewpoints, and deciding upon the appropriate format and amount of time for reply, are so great, and the time remaining is so short, as to discourage the licensee from presenting any discussion of the issue. In some cases, of course, a licensee is forced to make a decision on a complex situation,
often without Commission guidance and in a short
204 space of time. How many individual stations could
have been expected to react as the networks did in the three following cases?

1. On February 11, 1959, Lar ("America First") Daly, requested equal time on WBBM to campaign for the office of Chicago mayor; CBS refused his request. On February 19, the FCC directed CBS to provide equal time to Daly. On February 20, CBS refused to comply and filed with the Commission a petition for reconsideration. The election was held on February 24. How many individual stations, with an FCC decision pending against them, would have stood by their determination on the equal-time question pending a decision on a petition for reconsideration? (The Commission reaffirmed its decision of February 19 on June 17, 1959.) See *Daly* v. *Columbia Broadcasting System, Inc.*, 309 F.2d 83 (7th Cir. 1962).

2. On November 1, 1956, five days before election day, Adlai Stevenson and the Socialist Party candidate for president by telegram requested equal time on the three major broadcast networks to respond to an address on the Suez crises delivered to the nation by President Eisenhower on October 31. On the same day, the three networks by

telegram requested the advice of the FCC to the effect that no such equal time was required. On the same day, the FCC by telegram advised the three networks:

> "For the FCC to conclude that Section 315 does not apply in the circumstances you have outlined is dependent on such an involved and complicated legal interpretation that we are unable to give you such a declaratory ruling at this time." 14 R.R. at 720.[3]

On November 5, the Commission informed the networks by telegram that equal time is not required when the
205 President reports to the nation on an international crises. The election was held on November 6. How many individual stations would have waited until the day before the election before making a final decision on whether to give Governor Stevenson and the Socialist Party candidate equal time? See *Columbia Broadcasting System, Inc.*, 14 R.R. 720 (1956).

3. Immediately after the Supreme Court, on October 28, 1964, denied a writ of certiorari to review a denial of equal time to Senator Goldwater, the Republican National Committee requested time under the fairness doctrine. On October 29, the Republican National Committee complained to the Commission that the networks had rejected its request. On November 2, the Commission released its decision that the networks had acted within their discretion in refusing time to Senator Goldwater. The election was held the next day. How many individual stations, with a complaint pending against them, would have waited until the day before the election before making a final decision on whether to provide time to Senator Goldwater? See *Republican National Committee,* 3 R.R. 2d 647, *petition for review denied sub nom. Goldwater* v. *FCC,* by 3-3 decision

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[3] Commissioner Hyde dissented: "The answer is clear in the language of the statute . . . ." 14 R.R. at 722.

of the U.S. Court of Appeals for the District of Columbia, No. 18935 Oct. 27, 1964, *cert. denied,* 379 U.S. 893 (1964); *Republican National Committee,* 3 R.R. 2d 767 (1964).

Parties to these Comments have experienced similar situations which have forced them to act at their peril in denying a request for reply time.

206 APPENDIX B

APPLICATION OF THE FAIRNESS DOCTRINE TO RELIGIOUS QUESTIONS

In the "Fairness Primer"[1] the Commission traced the history of the development of the fairness doctrine as a part of the regulatory process. The first cited decision involving the application of the principle of fairness was *Great Lakes Broadcasting Company,* 3 FRC Ann. Rep. 32 (1929), in which a station whose programming was devoted exclusively to the religious beliefs of a single sect had applied for a modification of its license. In denying the application and granting that of a mutually exclusive competitor, the Federal Radio Commission stated that "the station is used for what is essentially a private purpose . . . and, in addition, is constantly subject to the very human temptation not to be fair to opposing schools of thought and their representatives."[2] In 1938, the Commission denied the application of a group who proposed to use a station "primarily for the dissemination of religious programs to advance the fundamentalist interpretation of the Bible" and who had stated that "in connection with religious broadcasts, the station's facilities would be extended only to those whose tenets and beliefs in the interpretation

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[1] 29 Fed. Reg. 10416, 2 R.R. 2d 1901 (1964).

[2] Quoted in *Young Peoples Association for the Propagation of the Gospel,* 6 F.C.C. 178, 181 (1938).

of the Bible coincide with those of the applicant.'"[3] It is thus apparent that during the early days of radio regulation, the Commission and its predecessor established that an important factor in a licensee's legal obligation to serve the public interest was the obligation to be "fair" in its programming and that this obligation was applicable to religious questions.

207 In 1946, the Commission received the complaint of an atheist who alleged that three California stations had broadcast direct arguments against atheism as well as numerous church services, Bible readings and prayer meetings, but had refused to make time available to proponents of atheism.[4] The stations replied to the complaint arguing that (1) the carrying of programs on atheism would not be in the public interest and (2) the question of the existence of a deity was not a controversial issue of public importance in their service areas.

The Commission dismissed the petition, apparently because it felt many stations had indulged in similar practices and the selection of these three particular stations for punishment would be arbitrary. The opinion discussed freedom of speech and indicated the Commission's position that under the First Amendment a licensee could not bar protected speech from access to the airways. Using as examples the minority position of the early Christians and the attacks by established churches on some of the ideas of Jefferson, Jackson, and Lincoln, the opinion went on to point out that as long as open discussion of all viewpoints is permitted, sound ideas and institutions become stronger under criticism. Although stating that an individual licensee was permitted a wide discretion in deciding which

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[3] *Young Peoples Association for the Propagation of the Gospel, supra* note 2, at 180.

[4] *Robert Harold Scott,* 11 F.C.C. 372, 3 R.R. 259 (1946).

views and which spokesmen should be presented, the Commission stated that:

> "The fact that a licensee's duty to make time available for the presentation of opposing views on current controversial issues of public importance may not extend to all possible differences of opinion within the ambit of human contemplation cannot serve as the basis for any rigid policy that time shall be denied for the presentation of views which may have a high degree of unpopularity."[5]

In the aftermath of the *Scott* decision, the Commis-
208 sion was subjected to a great deal of criticism by broadcasters, the press, the clergy and Congressmen.[6] The decision was widely interpreted to mean that, when religious programming was carried, "equal time" had to be allocated to atheists.[7] While this storm of criticism brewed around the Commission, it did nothing for almost two years, apparently heeding the advice of its Director of Information, who on December 6, 1946, in a memorandum entitled *Scott Decision* v. *Public Relations,* advised the Commission that "to attempt clarification [would] prompt further argument" and would "surely be interpreted as a sign of weakness on the part of the Commission."[8]

Then, on April 27, 1948, the Commission deferred action on the renewal application of WHAM, Rochester, New York, pending the investigation of a complaint by a member of the Rochester Society of Free Thinkers. The complaint concerned a request for time to answer remarks made in a

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[5] 11 F.C.C. at 376, 3 R.R. at 264.

[6] See Smead, *Freedom of Speech by Radio and Television* 61 (1959).

[7] See Commission letter to Congressman Kersten, reprinted in *Hearings Before the House Select Committee to Investigate the Federal Communications Commission Pursuant to H. Res.* 691, 80th Cong., 2d Sess. 200 (1948).

[8] Reprinted in *Hearings, supra* note 7, at 184.

sermon by Father Ignatius Smith of Catholic University. The sermon clearly attacked atheists by warning that:

> "If the godlessness, the irreligion of so many dozens of millions of our people continues to grow, our greatness is doomed and our future is damned.
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> * * *
>
> "America cannot be preserved by godlessness.
>
> * * *
>
> "We are battling against indifferentism, communism, absolutism, and atheism."[9]

209 In a memorandum to the Commission, the staff indicated that the "station's position [was] squarely in conflict with the Commission's decision in the *Scott* case" and recommended a hearing on the renewal application.[10] The Commission deferred action on the renewal application and decided to request more information from the station. Although several staff letters to the station were drafted, the Commission did not finally approve a letter until July 12, 1948. The letter stated that the Commission's fundamental concern was with the question of whether "the Society of Free Thinkers or anyone else [had] been denied time by WHAM because WHAM disagrees with their point of view."[11] The draft letters prepared by the staff included questions concerning the "importance of balanced programming" and the Commission policy of making radio available to views falling within the protection of the First Amendment.[12] However, on June 19, 1948, the House of Representatives had passed House Resolution 691[13] appoint-

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[9] *Id.* at 141.

[10] *Id.* at 181.

[11] *Id.* at 183.

[12] *Id.* at 182.

[13] See *Final Report of the Select Committee to Investigate the Federal Communications Commission, H. Rept. No.* 2479, 80th Cong., 2d Sess. (1949).

ing a special committee to investigate the Commission, and, apparently remembering the previous storm of protest, the Commission sent the innocuous letter described above. In answer, WHAM submitted a very short letter, which in substance stated *no* time had been denied anyone because the licensee disagreed with their viewpoints.[14] Subsequently, on August 18, the license of WHAM was renewed without opinion.[15] At the Committee hearings on the *Scott* decision, Commission spokesmen tried to ward off congressional criticism by stating that the opinion held only that "a licensee may not, because of disagreement with a particular point of view, preclude the use of his facilities for the presentation of that point of view."[16]

We submit that this construction is a far cry from the commanding language of the *Scott* decision which concluded a discussion of the issues with the statement that "the criterion of the public interest in the field of broadcasting clearly precludes a policy of making radio wholly unavailable as a medium for the expression of any view which falls within the scope of the constitutional guarantee of freedom of speech."[17]

This later construction of the *Scott* decision became official policy when on August 18, 1948, the day the WHAM renewal application was granted, the Commission addressed a letter to Edward J. Heffron, President of the Religious Radio Association, which stated that it had "never stated or indicated that atheists or persons with similar views are entitled to radio time upon request to answer or reply to the various religious broadcasts which may be carried by

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[14] *Hearings, supra* note 7, at 188.

[15] *Id.* at 183.

[16] *Id.* at 188.

[17] *Robert Harold Scott*, 11 F.C.C. 372, 376, 3 R.R. 259, 264 (1946).

a radio station.''[18] On two separate occasions since the congressional hearings in 1948, Scott, through petitions to the Commission, has sought to make use of the rights of atheists to express their viewpoints under the fairness doctrine.[19] His requests have been denied both times on the grounds that the religious programs of the stations in question ''did not present situations in which the station denied the opportunity for presentation of a controversial issue of public importance'' (25 R.R. at 349). Thus, the Commission, without ever having explained its reasons, has come full circle from the position taken in the first
211 *Scott* decision—that sound ideas become stronger under criticism—to the holding that religious programming does not present a controversial subject.

In the light of these precedents and the apparent turnaround in Commission policy, it is interesting to note the Commission's decisions in two recent cases. In *Lamar Life Broadcasting Co.*, 5 R.R. 2d 205 (1965)[20] short-term license renewal was issued to WLBT, Jackson, Mississippi. The Commission held that the practice of excluding all of the area's Negro churches from a 10-minute daily program, in which other churches participated on a rotating basis, was obviously ''inconsistent with the public interest'' (*id.* at 220). In *Brandywine-Main Line Radio, Inc.*, 4 R.R. 2d 697 (1965), the Commission granted an assignment of licenses of WXUR, WXUR-FM, Brandywine, Pennsylvania, over the objections of a number of church and community groups that the assignee's president would use the station's facilities to broadcast intemperate attacks on

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[18] 3 R.R. 264-a.

[19] See Commission letters to Scott at 5 R.R. 859 (1949) and 25 R.R. 349 (1963).

[20] Reversed for failure to hold a hearing on the question of whether the station's programming had met the ''public interest'' standard of the Communications Act. *Office of Communication of the United Church of Christ* v. *FCC*, 7 R.R. 2d 2001 (D.C. Cir. 1966).

people and groups who held religious or political views differing from his own. The Commission, after a discussion of the complaints, including the possibility of religious controversies, relied on the assignee's representations that it would abide by the fairness doctrine in the operation of the station and granted the application. These two cases suggest that the Commission policy concerning the controversial nature of religious programs first enunciated in the 1946 *Scott* decision may still be enforced in some circumstances. However, the Commission's action in *Mrs. Madalyn Murray,* 5 R.R. 2d 263 (1965), indicates that the lesson learned in the congressional hearings on the *Scott* case has not been forgotten. In *Murray,* the Commission was requested, pursuant to the fairness doctrine, to direct 15 Hawaii radio stations to afford broadcast time for
212 the discussion of atheism. In denying the request, the Commission held that no violation of the fairness doctrine had occurred. The concurring opinion of Commissioner Henry makes it clear that the Commission once again relied on the theory that "the carrying of a religious broadcast does not, in and of itself, mean that one side of a 'controversial issue of public importance' was presented."[21]

The *Murray* decision follows from the rationale adopted in the wake of the furor over the first *Scott* case. Atheists and free thinkers consistently have been denied the protections of the fairness doctrine since *Scott,* while Negro churches in Jackson, Mississippi, and Catholic and Jewish groups in Philadelphia have been held to be entitled to fair treatment. The decisions cannot be reconciled, and the only distinguishing fact seems to be that, in the one line of cases, atheists are involved, and, in the other, substantial pressure groups.

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[21] In Commissioner Henry's opinion, controversy would occur in a religious program only where "a bond issue or the nuclear test ban treaty" or some similar issue was mentioned in a sermon. 5 R.R. 2d at 266.

Commissioner Loevinger in his dissenting statement in *Murray* recognized the dichotomy between the majority-concurring opinions in *Murray* and the *Brandywine-Main Line* (*WXUR*) case. First, examining the majority holding that the stations had acted in "good faith", he pointed out that the Commission has held in other cases that good faith alone is not enough to satisfy the fairness doctrine. He went on to state that:

> "If good faith were taken as the test of fairness, the most biased and dedicated extremist would be privileged to present the most partisan and one-sided programming, and the most conscientious and self-critical broadcaster would be subject to the greatest duty of balanced presentation. By such a construction the 'fairness doctrine' would penalize those who are most fair and would be self-defeating. The test of applicability must, therefore, remain the Commission's
> 213 judgment as to whether a broadcasting station has acted with 'fairness' in the sense that it has afforded a fair opportunity for the presentation of conflicting viewpoints on a given issue."[22]

He then proceeded to analyze the *Brandywine-Main Line* case in terms of the *Murray* holding and stated that:

> "As recently as March of this year the Commission had before it an applicant who proposed to broadcast unconventional and unpopular religious and political viewpoints. The majority in that case, over my objection, took some pains to state specifically that the broadcasting by a religious group of its own viewpoint exclusively was not in the public interest and did invoke the fairness doctrine which required the opportunity for the presentation of contrasting viewpoints. * * * [*Brandywine-Main Line* (*WXUR*), 4 R.R. 2d

[22] 5 R.R. 2d at 269.

697.] The contrasting opinions in that case and this one suggest that the fairness doctrine applies only when viewpoints acceptable to the Commission are denied the opportunity for presentation. This anomaly simply emphasizes the error of the Commission's whole approach to this subject.''[23]

Commissioner Loevinger's suggestion that the Commission invokes the fairness doctrine in an arbitrary fashion is especially pertinent to a discussion of the doctrine because, as a Commission, he participates in the many fairness questions which are decided informally by the Commission or its staff. These decisions are not made public and hence are not available for analysis. The reported decisions on the subject, as Commissioner Loevinger has also pointed out, contain ''no public exposition of views or rationale,'' the Commission being ''either unable or unwilling to clarify and specify its own understanding of the 'fairness doctrine'.''[24] In this context, the fore-
214 going analysis of the efforts of atheists to obtain ''fairness'' in the presentation of their viewpoint sheds a great deal of light on the Commission's enforcement of the doctrine in other areas.

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215 **Comments in Opposition to Proposed Rulemaking**

Comes now Griffin-Leake TV, Inc., WBEN, Inc., and KBIF, Inc., through their attorneys, and submit comments in opposition to adoption of the proposed rule in the above-referenced proceeding. In support thereof, the following is shown:

Preliminary Statement

1. On April 8, 1966, the Commission released a Notice of Proposed Rule Making looking toward the adoption of cer-

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[23] *Ibid.*

[24] Loevinger, *The Issues in Program Regulation*, 20 Fed. Comm. B.J. 3, 6 (1966).

tain rules dealing with the obligations of broadcast licensees in cases where personal attacks or editorials either supporting or opposing political candidates are broadcast over the licensee's facilities. With the exception of a few albeit significant changes which will be subsequently discussed, the proposed rules would embody and codify the Commission's prior interpretative rulings which have previously constituted part of the so-called "Fairness Doctrine."

216 2. The "personal attack" provisions of the doctrine presently provide that where a personal attack occurs over the licensee's facilities in connection with a controversial issue of public importance, the licensee must send a transcript or an accurate summary thereof to the individual or group attacked, together with an offer of time for an adequate response. In connection with station editorials endorsing or opposing political candidates, the licensee in appropriate circumstances must inform the candidate or candidates of the station's editorial opposing his or their candidacy or supporting the candidacy of a rival and offer a reasonable opportunity for response.

3. The procedure traditionally employed by the Commission where questions have arisen in these areas has consisted of censuring letters to the licensee and the question considered by the Commission at the time of renewal. If there were sufficient instances in which a licensee had failed to live up to his obligations under the doctrine, the Commission could very well determine that a short term renewal was called for or if the case were severe enough, that no renewal at all should be granted. And, of course, the power of revocation has always existed as an additional measure of enforcement.

4. It is submitted that the present policy and procedure followed by the Commission in connection with this aspect of the "Fairness Doctrine" constitutes a more effective, flexible, fair, and realistic approach than that contemplated by the proposed rule.

5. Paragraph (a) of the proposed rule is applicable where a "personal attack" is made upon the "honesty,
217 character, integrity or like personal qualities of an identified person or group . . . ". Thus, the rule is objectionable initially on the basis of the very obvious ambiguity as to its applicability. What constitutes a "personal attack"? What are "like personal qualities"? What is an "identified group"? In paragraph 3 of the Notice of Proposed Rule Making, the Commission stated that one of the purposes of codification was to "make more precise the licensee's obligations in this important area." The wording with respect to the applicability of the proposed rule obviously falls far short of any desirable degree of precision. Therefore, since the applicability of the proposed rule is latent with substantial uncertainties, it is subject to challenge on the grounds that it does not sufficiently apprise the licensee of his duty and responsibility thereunder, and for this reason, it is probable that the rule, if challenged, would be struck down as being Constitutionally vague.

6. The only "certain" aspect of the proposed rule is that licensees will be subjected to forfeitures for violation. This will be an additional sanction and not a substitute one because a licensee's performance under the "Fairness Doctrine" will still be subject to review at renewal time. It is apparent, therefore, that the proposed rule would serve only to increase the burdens of the licensee under the "Fairness Doctrine" without removing any of its vagueness. Needless to say, in a situation where responsibilities are so vague but sanctions so certain, licensees will naturally be more reluctant to schedule programs of a controversial nature. The rule in the long run would therefore run precisely contra to that which the Commission
218 has recently sought to foster and encourage. See, Memorandum Opinion renewing license of KTYM, released June 17, 1966.

7. Codification of a doctrine which the Commission has previously conceded "does not apply with the precision of the equal opportunities requirement" is not an appropriate method of coping with the problem of fairness. See, *Fairness Primer,* FCC 64-611, July 1, 1964. The flexibility required in dealing with such broad and intangible concepts as "fairness" would not be available under codification. In the past it has frequently been possible to resolve "fairness" problems by an exchange of correspondence between the Commission and the licensee. Now, however, the proposed time limits will effectively preclude such conciliations. Practically speaking, because of the proposed time limitations for supplying a transcript or summary thereof, a licensee will, of necessity, have to decide whether a personal attack has occurred on his facilities without the benefit of a clarifying ruling by the Commission. The rule in effect therefore closes the Commission's door to what has previously constituted a valuable and effective service to the public and to the broadcast licensee. With codification, the Commission therefore loses a very practical tool of administrative flexibility.

8. As indicated above, one of the most conspicuous deficiencies of the proposed rule is the time limitation imposed upon licensees for compliance (seven days in cases of personal attacks and twenty-four hours in editorials concerning political candidates). These time limitations will require the licensee to make practically on-the-spot
219 judgments in an area where answers turn upon complicated factual situations and intangible legal considerations. The fact that correspondence with the Commission for a prior interpretative ruling will be precluded has already been mentioned. Even more distressing is the fact that such time limitations will additionally serve to preclude consultation by the licensee with Washington counsel on whose opinions licensees have traditionally been compelled to rely for resolution of such vague and intangible legal matters. It is simply not realistic to expect a

licensee whose talents lie in the specialized art of broadcasting to also be qualified as a legal scholar. It is submitted therefore that the time limitations of the proposed rule are impractical and totally unrealistic. As the proposed rule now stands, it would deprive the licensee of fundamental rights under the equally "fair" concepts of "due process."

9. The Commission in paragraph 3 of the Notice of Proposed Rule Making stated that the second purpose of codification is to enable the Commission to take effective action where the specified procedures are not followed. This is tantamount to an admission by the Commission that its policy procedures are ineffective. Such, however, is not the case. Recent years have witnessed an increasing use of censuring letters and short term renewals in cases where violations of the "Fairness Doctrine" have occurred.

10. It has been pointed out that codification would serve to increase the burdens of the licensee and would deprive the Commission of the flexibility it has previously had in resolving questions in this area. However, if the Commission should conclude that codification is desirable, then the present wording of the proposed rule should at the minimum be modified in the following respects in order to remove and clarify some of its present vagueness and uncertainty. For example, in paragraph 4 of the Notice of Proposed Rule Making, the Commission stated that the licensee in this regard will continue to be required only to make "good faith judgments." If "good faith" is to be considered as an element of compliance, then an appropriate phrase to that effect should be incorporated within the rule itself. The Commission further stated that the rules are directed to situations where there could be "no reasonable doubt under the facts that a personal attack had taken place." If such is in fact what is contemplated by the Commission, then the wording of the proposed rule should be amended accordingly. In Footnote 1, the Commission indicated that licensees "can and should

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promptly consult the Commission for interpretation of our rulings and policies." If this form of relief is to be afforded to the licensee, then the proposed rule should be amended to guarantee it. Finally, the proposed rule should be modified to provide a longer and more realistic time limitation within which the licensee will be given to comply. Such a time limitation should be sufficient to permit the licensee to evaluate the matter within the specific factual context and consult both with the Commission and with counsel. Anything short of such "fairness" violates the fundamental elements of "due process."

11. In conclusion, it is submitted that codification in this area is not only inappropriate, but it is completely
221 unrealistic and unnecessary. Determinations and compliance in this area can best be achieved through the Commission's existing procedures.

WHEREFORE THE PREMISES CONSIDERED, Griffin-Leake TV, Inc., WBEN, Inc., and KBIF, Inc., respectfully request that the proposed rule not be adopted and that further action in this proceeding be terminated.

Respectfully submitted,

GRIFFIN-LEAKE TV, INC.
WBEN, INC.
KBIF, INC.

By /s/ FRANK U. FLETCHER
Frank U. Fletcher

By /s/ WADE H. HARGROVE
Wade H. Hargrove

Of Counsel: *Their Attorneys*

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June 20, 1966

224 **Comments of Golden Empire Broadcasting Company**

Golden Empire Broadcasting Company, by its attorneys, respectfully submits herewith its comments in response to the Notice of Proposed Rule Making in the above-captioned proceeding, released on April 8, 1966. Golden Empire Broadcasting Company is the licensee of Stations KHSL and KHSL-TV, Chico, California and Station KVCV, Redding, California.

Golden Empire Broadcasting Company opposes the adoption of the rules proposed in the above-captioned proceeding. The Commission has not demonstrated any need for such rules, and Golden Empire Broadcasting Company believes that not only is there an absence of need, but that the "fairness" area is one in which no specific rules should be set forth.

225 Operation in accordance with the principles of the fairness doctrine involves, as indeed the Commission recognizes, the exercise of a great deal of discretion by the individual licensee. The licensee should not be unduly restricted by a set of specific regulations which do not, as they cannot, provide specific solutions to specific problems but do deprive it of the full use of its discretion in solving such problems.

Golden Empire Broadcasting Company therefore respectfully urges that the above-captioned rule making proceeding be terminated without the adoption of any rules concerning "fairness doctrine" procedures.

Respectfully submitted,

GOLDEN EMPIRE BROADCASTING COMPANY

By HALEY, BADER & POTTS

/s/ ANDREW G. HALEY
Andrew G. Haley

/s/ LOIS P. SIEGEL
Lois P. Siegel

Its Attorneys

June 20, 1966

1735 DeSales Street, N.W.
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226 **Comments By Mission Broadcasting Company**

1. The Commission, by a notice of proposed rule making released April 8, 1966 (FCC 66-291) has requested comments with respect to proposed rules codifying policies and procedures heretofore established relating to the so-called "personal attack doctrine" and the matter of political editorials. Mission Broadcasting Company urges the Commission not to adopt the proposed rules. It is of the opinion that the subject matter covered by the notice of proposed rule making requires complete re-evaluation by the Commission.

2. Turning first to the so-called personal attack doctrine, we find no reasoned doctrine but a mass of contradictions. The Commission states that the doctrine is limited to those situations where a personal attack occurs in connection with a controversial issue of public importance. The Commission nowhere explains why such a limitation is necessary or desirable. If, for example, a personal attack is made during a program involving the discussion of
227 a controversial issue of public importance, the person attacked is entitled not only to an opportunity to reply but also to notice of the attack and he must be furnished a script of the program in which the attack occurred. This obligation is absolute—it is unrelated to the truth or falseness of the charge. If, on the other hand, a personal attack is made upon an individual during the course of any other type of program—e.g., by a disc jockey during an entertainment program; by a clergyman during a religious broadcast; by a news announcer or commentator during a news broadcast; etc.—the Commission's policy would not require the attacked person to be notified, he would not be entitled to a script, and apparently he could also be denied an opportunity to reply to the attack. This result would follow from the Commission's doctrine whether or not the charge was correct or false.

3. It is difficult to spell out a rationale for such a policy. The Commission at times states that the policy is based upon licensee responsibility. However, the Commission fails to apply the test. Presumably it is not responsible conduct for a licensee to broadcast or permit the broadcast of a personal attack upon an individual or group if the licensee either knows that the charge is false or is reckless in his failure to try to ascertain whether there is any truth to the charge. If that is the test, why
228 should a false personal attack by a disc jockey or a news commentator be differentiated from a false charge during a panel discussion. Or, if truth or bona fides of the licensee is the test, why apply the rule where the charges made are true? The Commission has never answered these questions.

4. The doctrine as enunciated leaves other questions unanswered. The implication in the Commission's policy is that by complying with the notice and script furnishing procedure the licensee is relieved of any responsibility for broadcasting a personal attack. It is difficult to believe that the Commission is prepared to permit such an abdication of licensee responsibilty by broadcast licensees.

5. The Commission has also stated that the personal attack doctrine is part of the fairness doctrine. Is it Commission philosophy that a well-rounded presentation on a controversial issue is not possible unless the person attacked is given the opportunity of replying? In other areas involving discussion of controversial issues, the Commission leaves it up to the judgment of the licensee to select the spokesman for the differing points of view. Why should the Commission, in the case of a personal attack, lay down a hard and fast rule that the presentation of the opposite point of view in such an attack must be by the person who is attacked? If the Commission believes that fundamental fairness requires that the person attacked be given an op-

portunity to state his point of view, this opportunity
229 should also be extended to a person attacked in an entertainment program or in a news program. The Commission says "no" but furnishes no reasoning for its answer.

6. The anomalies do not end here. The Commission has announced that the doctrine does not extend to personal attacks by political candidates, spokesmen or persons associated with them in a campaign as against other candidates, spokesmen or persons associated with them in a campaign. So far as candidate versus candidate is concerned, the Commission points out that the equal opportunity requirements of Section 315 is the governing consideration. But Section 315 does not apply when the candidate himself is not speaking. If during a political campaign, a personal attack is made by a non-candidate against another non-candidate, the notice and script-furnishing procedure is not applicable. Why not? The Commission offers no explanation. It merely states that it recognizes that it is in need of further experience to delineate more precisely the nature of licensee responsibility in this area. Mission Broadcasting Company believes that the same policy considerations which the Commission has not yet resolved with respect to attacks during political campaigns are also applicable to the entire field of broadcasting. The rigidity inherent in codification of rules should be avoided while the Commission is thrashing about for a reasonable exposition of policy.

230 7. The inconsistency of the Commission's basic position is revealed by its proposed rules on political editorials. If a licensee in an editorial supports or opposes a candidate, he must, within 24 hours, advise the interested person, furnishing him a copy of the editorial and give him opportunity for a reply. Political editorials clearly relate to electioneering but the Commission has indicated that it does not have sufficient experience in the area of electioneer-

ing to come up with a detailed answer. What is there about political editorials that gives the Commission confidence that it has had enough experience to warrant the adoption of detailed rules? A licensee can permit the supporter of a candidate to endorse a candidate, to oppose a candidate, or even to make a personal attack on the opponent. No specific rule comes into play to require notice or the furnishing of a script. However, if the licensee broadcasts a mild editorial supporting or opposing a candidate, the full panoply of notice and script-furnishing comes into existence. Does the Commission believe that there is a greater element of unfairness involved when the station editorializes than when it permits its facilities to be utilized? The Commission has given lip service to encouraging licensees to editorialize. It would appear that what the Commission grants with one hand it takes away with the other. In view of the proposed rule, it is difficult to believe that the Commission is really committed to the cause of station edi-
231 torializing with respect to candidates. If that is its position, it should be forthright and say so. On the other hand, if it believes that licensees should editorialize in this area, there is no reason for the specific notice and script-furnishing rules. There should not be different rules in this area than in the case of other political broadcasts. The test throughout should be the responsibility of the licensee. If the licensee is acting responsibly; if he discharges his duty fairly and honestly, his conduct should not be controlled. On the other hand, if the licensee acts irresponsibly, this bears upon his qualifications. The Commission's rules, however, treat the responsible and irresponsible broadcaster in the same way.

8. The time has come for the Commission to make up its mind in the field of discussion programs and political editorials. The Commission indicates that it encourages licensees to engage in these activities but it subjects them to artificial and unnecessary restraints. The test here, as

in any other aspect of broadcasting, should be licensee responsibility. If a licensee exercises responsibility, its conduct should be unregulated. If a licensee acts irresponsibly, a question is presented of basic qualifications. However, if the licensee permits an irresponsible charge to be aired, he does not acquire responsibility by furnishing a copy of the charge to the person attacked and giving the person an opportunity to reply. On the other hand, if
232 a licensee is acting responsibly, why should he be placed in a strait jacket as to the manner by which he achieves overall balance? There is an urgent need for a thorough re-examination of the whole area covered by the notice.

Respectfully submitted,

MISSION BROADCASTING COMPANY
/s/ JACK ROTH
By Jack Roth, *President*

June 20, 1966

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233 **Joint Comments**

1. The so-called "fairness doctrine" has been applied by the Commission to broadcast treatment of controversial issues of public importance. This doctrine, which had not been expressly established by the Communications Act or by Commission Rule, was initially propounded by the Commission in *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246 (1949). Since then, the Commission has applied the "fairness doctrine" in various situations, including license renewal determinations. The

scope and application of the "fairness doctrine" has been developed by the Commission through policy statements and rulings on individual cases.[1]

2. The Commission now proposes to incorporate into its Rules provisions dealing with two of the various aspects of the "fairness doctrine." In brief the Commis-
234 sion proposes (a) "to codify the procedures which licensees are required to follow in personal attack situations,"[1] and (b) "to implement the *Times-Mirror* ruling as to station editorials endorsing or opposing political candidates."[2]

3. The personal attack situation would be dealt with by proposed Sections 73.123(a) and (b) as follows:

> "(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (i) a script or tape (or an accurate summary, if a script or tape is not available) of the attack; (ii) notification of the date, time and identification of the broadcast; and (iii) an offer of a reasonable opportunity to respond over the licensee's facilities."
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> "(b) The provisions of paragraph (a) shall be inapplicable to attacks on foreign groups or foreign public figures or where such attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other

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[1] See, *e.g.*, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10416 (July 25, 1964).

[1] Notice of Proposed Rule Making, para. 3, April 8, 1966.

[2] Notice of Proposed Rule Making, para. 7.

such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign.

"Note: In a specific factual situation the fairness doctrine may be applicable in this general area of political broadcasts. See Section 315(a); Applicability of the Fairness Doctrine, 29 F.R. 10415."

Endorsement of, or opposition to, political candidates would be dealt with by proposed Section 73.123(c) as follows:

"(c) Where a licensee, in an editorial, endorses or opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to the other qualified candidate or candidates for the same office (i) a script or tape of
235 the editorial; (ii) notification of the date and the time of the editorial; and (iii) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities."

4. The undersigned licensees well recognize their obligation to operate consistent with public convenience, interest and necessity. Nonetheless, they believe that the "fairness doctrine" (including the proposed Rules to codify aspects of it) is not consistent with the First Amendment to the Constitution of the United States or with Section 326 of the Communications Act, and that, moreover, it thwarts, rather than serves, the public interest in free expression. Apart from these threshold objections, the proposed rules should not be adopted because there has been no showing of need for the proposed rules, because they do not offer reasonable assurance of achieving the objective—improved compliance—for which they have been proposed, because the matters to which the proposed rules are directed are not sufficiently precise to be sus-

ceptible to precise rules, and because liability for monetary penalties for violation of rules (to be assessed after the fact and with benefit of hindsight) should not be created in areas where reasonable men, acting in good faith under all of the circumstances presented, could reasonably differ on what is "fair conduct" in a particular situation.

I. The "Fairness Doctrine" Is Not Consistent With the Freedom of Speech Guaranteed By the First Amendment to the Constitution of the United States or With the Prohibition Against Censorship Contained in Section 326 of the Communications Act.

5. The Supreme Court has made clear that the freedoms of speech and press established by the First Amendment to the Constitution of the United States apply to
236 radio and television,[1] and that the protection afforded by these freedoms is not limited to past expression but also includes protection of future expression against prior restraints, such as those here proposed.[2] The Congress also expressly recognized the particular importance of freedom of expression in broadcasting by enacting Section 326 of the Communications Act which provides:

> "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications."[3]

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[1] See United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948); Superior Films v. Department of Education, 346 U.S. 587, 589 (1954).

[2] Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713-19 (1931); Cantwell v. Connecticut, 310 U.S. 296 (1940); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Freedman v. Maryland, 380 U.S. 51 (1965); Mills v. Alabama, 34 U.S. L. Week 4418 (U.S. May 24, 1966).

[3] 47 U.S.C. § 326 (1964 Ed.).

The Commission, as well, has repeatedly recognized the limitations placed on its powers by the First Amendment and by Section 326.[4]

6. It is possible to accommodate need for some degree of government regulation of radio (due to limitations on the spectrum) with the fundamental principles of free speech and free press. Thus, the Commission[5] has
237 in past cases properly refused to interfere with licensee discretion concerning specific program content,[1] except in those special situations where a recognized limitation on free speech comes into play[2]—for example, defamation[3] or indecent language.[4] The courts have also been strict in this respect.[5] Thus, in considering Commission regulations prohibiting certain kinds of program contests, it was ruled that insofar as some of the prohibitions "go beyond the scope of Section 1304 of the Criminal Code [prohibiting lotteries], they may be considered as a form of 'censorship' and to that extent they would be in violation of the First Amendment."[6] The

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[4] Commission Policy on Programming, 20 R.R. 1901, 1905-6 (1960).

[5] "Hence, the Commission in administering the Act and the courts in interpreting it have consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee, and that the *fulfillment of the public interest requires the free exercise of his independent judgment.*" Commission Policy on Programming, 20 R.R. 1901, 1908 (1960) (emphasis supplied).

[1] Rev. J. Richard Snead, 15 R.R. 158, 160 (1957).

[2] Commission Policy on Programming, 20 R.R. 1901, 1909 (1960).

[3] Captain James I. Hamilton, 16 R.R. 170, 171 (1957).

[4] Palmetto Broadcasting Co., 23 R.R. 483 (1962).

[5] One court said "It is clear from history and the interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the FCC." McIntire v. Wm. Penn Broadcasting Co. of Philadelphia, 151 F.2d 597, 599 (3rd Cir. 1945).

[6] American Broadcasting Co. v. United States, 110 F. Supp. 374, 389 (S.D.N.Y. 1953); *aff'd*, 347 U.S. 284 (1954).

court went on to say that, even if the Commission felt that such programs had no value to society, they were as entitled to the protection of free speech as the "best" programs.[7]

7. Under the accommodation described above the Commission focuses on the importance of licensee responsibility but is not permitted to interfere with program decision-
making. Thus, while the Commission properly may
238 prohibit certain network affiliation provisions which
it feels could result in the licensee abdicating its discretion,[1] and expect its licensees to ascertain the needs and interests of the community to be served and to take them into account,[2] it cannot dictate which network programs should or should not be carried by an affiliate or dictate how a station should serve the needs of its service area.

8. Freedom of speech is violated by, and censorship results from, the "fairness doctrine" in two ways—because it acts to inhibit a licensee from carrying programming it feels is in the public interest and because it forces a licensee to carry programming which it may feel is not in the public interest. For example, under the proposed candidate endorsement rule, if a station simply states that it favors the election of a certain candidate, it is required to allow replies which may go far beyond the station's endorsement in length and content. Moreover, this requirement would exist even if the station has

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[7] *Ibid.*

[1] National Broadcasting Co., Inc., 319 U.S. 190 (1943); see also Simmons v. Federal Communications Commission, 169 F.2d 670 (2nd Cir. 1948).

[2] Statement of AM or FM Program Service, Broadcast Application (AM-FM), Section IV-A, Attachment A; Suburban Broadcasters, 20 R.R. 52 (1960), 20 R.R. 951 (1960), *aff'd*, Henry v. Federal Communications Commission, 302 F.2d 191 (D.C. Cir. 1962); Commission Policy on Programming, 20 R.R. 1901 (1960).

previously aired, extensively and equally, the views of the opposing candidates. Thus, the effect of the proposed rule would be to discourage stations from taking editorial positions on candidates. This would be not only contrary to the First Amendment and Section 326 but also
239 would be inconsistent with the Commission's apparent encouragement of stations to editorialize! *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246 (1949). This infringement on free speech cannot be justified as one of the special limitations on the First Amendment customarily recognized by the courts, such as defamation, indecent language, or "clear and present danger."[1] There has been no showing of any countervailing public interest reason to expand the foregoing special limitations to include the "fairness doctrine." Quite to the contrary, it is clear that when a licensee has exercised his own best judgment as to how to deal with a controversial issue of public importance, this judgment must not be forced to yield to Commission formulae, procedures or rules, such as those comprising the "personal attack" and "candidate endorsement" areas under the "fairness doctrine."

9. Any doubt that may have existed on this point has been swept away by the Supreme Court's holding four weeks ago that the freedoms guaranteed by the First Amendment were abridged by a statute making it a crime for the editor of a daily newspaper to write and publish an editorial on election day urging people to vote a certain way on issues submitted to them. *Mills* v. *Alabama,* 34 U.S.L. Week 4418 (U. S. May 24, 1966). There the Court observed:

> ". . . Suppression of the right of the press to praise or criticize governmental agents and to clamor and

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[1] Schenck v. United States, 249 U.S. 47 (1919); Dennis v. United States, 341 U.S. 494 (1951), rehearing denied, 342 U.S. 842 (1951).