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CASENOTES

CONSTITUTIONAL LAW—Dismissal of a Government Employee, who had an Expectation of Continued Employment, for Stigmatizing Reasons does not Constitute an Unconstitutional Deprivation of Property or Liberty. *Bishop v. Wood*, 96 S. Ct. 2074 (1976).

Procedural due process requires that a government employee be afforded a termination hearing if he can demonstrate that he has been deprived of "liberty" or "property"[1] as a result of being discharged from his job. The Supreme Court has defined a liberty interest in public employment as the right to be free from damaging statements in the course of dismissal.[2] Correspondingly, a property interest is said to arise when an individual has an expectation of continued employment based upon provisions in employment statutes or contracts.[3] Recently, however, in *Bishop v. Wood*,[4] the Supreme Court ruled that due process protections do not necessarily attach even when an employee has an apparent expectation of continued employment and when his reputation may be damaged as a direct result of termination.[5]

The petitioner, Carl Bishop, was hired as a policeman for the city of Marion, North Carolina, in 1969. In 1972, the Marion City Manager, acting on the recommendation of the Chief of Police, terminated Bishop's employment without affording him a hearing to determine the sufficiency of the grounds for his discharge.[6] The petitioner was informed that his

1. The fifth and fourteenth amendments provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. CONST. amends. V, XIV, § 1.

2. *See* Paul v. Davis, 424 U.S. 693, 701-10 (1976); Arnett v. Kennedy, 416 U.S. 134, 157 (1974).

3. *See* Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

4. 96 S. Ct. 2074 (1976).

5. *Id.* at 2079-80.

6. *Id.* at 2077. Article II, section 6, of the personnel ordinance of the City of Marion provides:

> *Dismissal*; A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent,

dismissal was based on a failure to follow orders, poor attendance at police training classes, contributing to low morale, and conduct unbecoming an officer.[7] After his removal, Bishop brought suit in federal district court alleging that the city's failure to provide him a hearing violated his constitutional rights of due process as guaranteed by the fifth and fourteenth amendments.[8] The district court granted summary judgment in favor of the city, finding that it had not created any expectation of continued employment and therefore had not deprived Bishop of any constitutionally protected interest.[9] The court of appeals affirmed per curiam,[10] and certiorari was granted.[11]

In affirming the district court, the Supreme Court held that Bishop had not been deprived of a property or liberty interest and thus was not entitled to a hearing prior to his removal.[12] Although the majority conceded that the Marion city ordinance could be read to guarantee a property interest in continued employment,[13] the Court deferred to the district court's interpretation that the statute was not so intended.[14] Justice Brennan, joined by Justice Marshall in dissent, asserted that Bishop was deprived of a liberty interest, noting that his opportunities to obtain future employment would be constrained due to the stigmatizing effects of the charges levied against him.[15] Similarly, Justice White, joined by Justices Brennan, Marshall, and

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inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice.

7. The reasons were communicated orally to Bishop in private, but they were never given to him in writing until provided in answers to interrogatories during pretrial discovery. *See* 96 S. Ct. 2074, 2076 (1976).

8. At the district court level Bishop argued that since he had been on the police force for over six months and was therefore considered a "permanent" employee, he had acquired tenure or at least an expectancy of continued employment sufficient to constitute a property right. *See* Bishop v. Wood, 377 F. Supp. 501, 503 (W.D.N.C. 1973).

9. *Id.* at 505.

10. 498 F.2d 1341 (1974).

11. 423 U.S. 890 (1975).

12. 96 S. Ct. 2074 (1976).

13. *Id.* at 2078.

14. *Id.* at 2078-81. No North Carolina court had ever interpreted this ordinance. When a state law is subject to differing interpretations and there is no state decision clarifying it, federal courts may proceed to resolve the question. When this has been done the Supreme Court will occasionally defer to the decision of the lower courts, based on the presumption that the lower courts are more familiar with local law and hence more qualified to render judgment. *See* Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1091 n.86 (1974).

15. 96 S. Ct. at 2080-81.

Blackmun, argued that the petitioner did have a constitutionally protected property interest in his position that required due process protection[16] and that, by approving the district court's opinion, the majority had effectively ruled against the dictates of prior law.[17]

I. The Evolution of Property and Liberty Interests Under Due Process

Only recently, through judicial recognition that public employment may confer property and liberty rights upon an individual, has the due process clause become significant in relation to government employment. From Justice Holmes' finding that a person "may have a constitutional right to talk politics, but . . . no constitutional right to be a policeman,"[18] to the court's observation in *Bailey v. Richardson*[19] that "the due process clause does not apply to the holding of a Government office,"[20] public employment had been considered a privilege to which due process guarantees would not attach.[21] Since *Bailey*, however, there has been a general broadening of litigants' procedural protections[22] which has been paralleled by an erosion of the "rights-privilege" theory.[23] Significant inroads have been made in that doctrine by rulings that protect the ability of individuals to exercise basic constitutional rights in the course of public employment[24] and by decisions that have recognized distinct property and liberty interests in government positions.[25]

16. *Id.* at 2085 (White, Brennan, Marshall, & Blackmun, JJ., dissenting).

17. *Id.* at 2083-84. Justice Blackmun stated his belief that the district court's analysis of state law was improper. *Id.* at 2085-86. *See* text accompanying notes 69-72 *infra.*

18. Holmes first suggested the "rights-privileges" distinction in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

19. 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951).

20. *Id.* at 57.

21. *See* Case Comments, *Constitutional Laws: No Hearing Required Prior to Dismissal for Cause of Nonprobationary Federal Employee*, 59 Minn. L. Rev. 421, 423 (1974).

22. Among "property" interests that now fall within the ambit of procedural due process requirements of prior hearings are; revocation of parole, Morrisey v. Brewer, 408 U.S. 471 (1972); repossession of goods, Fuentes v. Shevin, 407 U.S. 67 (1972); revocation of driver's license, Bell v. Burson, 402 U.S. 535 (1971); termination of welfare benefits, Goldberg v. Kelly, 397 U.S. 254 (1970); and garnishment of wages, Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

23. *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968). *See also* Keim v. United States, 177 U.S. 290, 293-94 (1900).

24. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968) (freedom of speech); United States v. Robel, 389 U.S. 258 (1967) (freedom of association); Torcaso v. Watkins, 367 U.S. 488 (1961) (freedom of religion); Shelton v. Tucker, 364 U.S. 479 (1960) (freedom of association).

25. *See* Connell v. Higenbotham, 403 U.S. 207 (1971); Mohr & Willet, *Constitutional*

One of the most significant of these latter rulings was *Board of Regents v. Roth*.[26] The respondent, Roth, was hired as a probationary assistant professor at Wisconsin State University for one year. Under Wisconsin law, a probationary employee had no guarantee of continued employment,[27] nor did he have any grant of a hearing upon termination.[28] After being informed that he would not be rehired and would not be given a termination hearing, Roth brought suit against the university alleging infringement of his due process rights. In the course of holding that there had been no due process violations, the Supreme Court articulated standards for asserting legitimate property and liberty interests. The majority stated that in order to be entitled to claim a property right an individual must have secured a beneficial interest[29] created or defined by some existing extra-constitutional source, such as tenure provisions, contracts, or state law.[30] In Roth's case, since there was no state statute, university rule, policy, or contract that granted him an interest in reemployment, the Court found that he had been deprived of no property interest.[31]

The majority's analysis of the alleged liberty interest was considerably different. It maintained that a violation of liberty occurred when dismissal or nonrenewal seriously damaged one's standing and associations in the community[32] or imposed a stigma or other disability that foreclosed an individual's freedom to take advantage of future employment opportunities.[33] While con-

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and Procedural Aspects of Employee Access to Federal Courts: Promotion and Termination, 8 VALPARISO L. REV. 303, 312-22 (1974).

26. 408 U.S. 564 (1972).

27. Roth was not a tenured professor, nor was there any basis for belief that his job was permanent in nature. Wis. Stat. § 37.31(1) (1967), in force at that time, provided in pertinent part that: "All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher."

28. Board of Regents Rule II provided: "During the time a faculty member is on probation no reason for non-retention need be given. No review or appeal is provided in such case."

29. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it . . . . He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577. The term "entitlement" was first used in Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970). *See generally* Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89.

30. "[Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. at 577.

31. *Id.* at 576-78.

32. *Id.* at 573.

33. *Id.* The Court relied on the language of Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971): "Where a person's good name, reputation, honor, or integrity is at

ceding that Roth's nonretention might impede his career, the Court did not find that he was deprived of a liberty interest, noting that "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another."[34]

On the same day as *Roth*, the Court decided the companion case of *Perry v. Sindermann*.[35] Sindermann had taught at a state junior college for four years under a series of one-year contracts. When his last contract expired, the Board of Regents decided not to renew it and, as in *Roth*, failed to provide the respondent a hearing on this decision. Sindermann brought suit claiming that he had a right to a termination hearing. The Supreme Court agreed, noting that, unlike Roth, Sindermann had alleged that the college had a de facto tenure program.[36] The Court determined that the existence of such a program justified a legitimate expectation of continued employment and this constituted a sufficient property interest[37] to require that the school provide a termination hearing.[38]

After *Sindermann* and *Roth*, the bases for asserting a property interest sufficient to invoke a hearing seemed well defined. A litigant would have to show a claim of entitlement to a benefit that was created by contract, statute, rule, or understanding. Under this analysis, procedural due process would assure that an individual would not be arbitrarily deprived of a benefit to which a state had said he was entitled.[39]

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stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *See* Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

34. 408 U.S. at 575. Justice Douglas, dissenting, strongly disagreed with the majority view: "Nonrenewal of a teacher's contract is tantamount to a dismissal and the consequences may be enormous. Nonrenewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State." 408 U.S. at 585. *See* Ground, *Due Process and the Untenured Teacher: A Review of Roth and Sindermann*, 10 URBAN L. ANN. 283, 293 n.56 (1975).

35. 408 U.S. 593 (1972).

36. The Court quoted the Odessa tenure provisions:

> *Teacher Tenure*: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.

Id. at 600.

37. The Court noted that "[a] person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Id.* at 601.

38. "In this case the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement . . . ." *Id.* at 602-03.

39. *See The Supreme Court, 1973 Term*, 88 HARV. L. REV. 83, 86 (1974).

Although this doctrine appeared to be clear after *Sindermann* and *Roth*, the Supreme Court soon divided over its application in *Arnett v. Kennedy*.[40] Kennedy was an employee of the Office of Economic Opportunity (OEO)[41] who, following certain public comments critical of his superior, was removed from office pursuant to provisions of the Lloyd-LaFollette Act.[42] Rather than pursue an administrative appeal,[43] Kennedy brought suit alleging that termination under the Act denied him due process of law because he was not afforded a trial-type hearing prior to removal.[44] A majority of the Justices,[45] applying the precedents of *Roth* and *Sindermann*, reasoned that

40. 416 U.S. 134 (1974).

41. *Id.* at 147.

42. 5 U.S.C. § 7501 (1970). This section provides in relevant part:

(a) An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

(b) An individual in the competitive service whose removal or suspension without pay is sought is entitled to reasons in writing and to —

(1) notice of the action sought and of any charges preferred against him;

(2) a copy of the charges;

(3) a reasonable time for filing a written answer to the charges, with affidavits; and

(4) a written decision on the answer at the earliest practicable date.

Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay.

43. Kennedy was a "nonprobationary" employee and was therefore entitled to appeal to the Civil Service Commission any decision involving his removal or suspension. 5 U.S.C. § 7701 (1970); 5 C.F.R. §§ 771.101-.226 (1974).

44. Kennedy was advised of his right to reply to the reasons for his dismissal in writing or orally and to submit affidavits. He was also advised that the material upon which his notice was based was available for his inspection. 416 U.S. at 137. Kennedy additionally alleged that the Act was unconstitutionally vague and overbroad. The Court disagreed. *See* note 45 *infra*.

45. The judgment of the Court was delivered in a plurality opinion written by Justice Rehnquist in which Chief Justice Burger and Justice Stewart joined. The views of the Court were presented in five opinions, which can be summarized as follows:

(1) Plaintiff was not entitled to a full evidentiary hearing prior to removal (6-3, Marshall, Brennan, & Douglas, JJ., dissenting).

(a) Plaintiff had a "property" interest in his employment requiring procedural due process protection (6-3, Rehnquist, Burger, & Stewart, JJ., disagreeing).

(b) Procedural due process protection of plaintiff's "property" interest did not require a full prior hearing (3-3, Marshall, Brennan, & Douglas, JJ., disagreeing; Rehnquist, Burger, & Stewart, JJ., not reaching the question).

(c) Protection of plaintiff's "liberty" interest did not require a full prior hearing (5-3, Marshall, Brennan, & Douglas, JJ., disagreeing; White, J., not addressing the question).

(2) Plaintiff could be discharged by the very person who brought the initial charges against him (5-4, Marshall, Brennan, & Douglas, JJ., dissenting; White, J., dissenting to the extent the hearing official was the object of slander that was the basis for the proposed discharge).

since the statute guaranteed Kennedy continued employment absent cause for discharge, he had a legitimate claim of entitlement which constituted a property interest.[46] The Court went on to say that, even though this interest was established, the existing procedures provided Kennedy adequate due process protection.[47]

Not all of the Justices, however, were as quick to follow the *Roth-Sindermann* analysis. Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, noted that the extent of the entitlement was determined by the terms of the Lloyd-LaFollette Act; thus Kennedy had a property right in his job only because the Act prohibited removal except for cause.[48] Justice Rehnquist argued that if a state can substantively limit the extent of the entitlement, it should also be able to limit the extent of dismissal procedures. Since the Act delineated the procedures applicable to an individual's dismissal, Rehnquist concluded that there could be no claim of entitlement to continued employment once those procedures had been followed.[49] Although this argument has a certain logical appeal, the rest of the Court disapproved of it, suggesting that while a state could define the extent of a property interest, it could not thereafter deprive an individual of that interest without constitutional due process safeguards.[50]

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(3) The Lloyd-LaFollette Act's standard for dismissal was not unconstitutionally vague or overbroad (6-3, Marshall, Brennan, & Douglas, JJ., dissenting).

The above summary appears in Case Comments, *Constitutional Law: No Hearing Required Prior to Dismissal for Cause of Nonprobationary Federal Employee,* 59 MINN. L. REV. 421, 422 n.6 (1974).

46. 416 U.S. at 166-67 (Powell & Blackmun, JJ., concurring in part); *Id.* at 184-85 (White J., concurring in part and dissenting in part); *Id.* at 203-06 (Douglas J., dissenting); *Id.* at 208-09 (Marshall & Brennan, JJ., dissenting).

47. Once the threshold determination of an infringement of property or liberty has been established, the extent of due process required is determined by balancing the governmental interests against the individual's private interests. *See* Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961). *See generally* Friendly, *Some Kind of Hearing,* 123 U. PA. L. REV. 1267 (1975). The Justices in *Arnett* differed as to the nature of the hearing required. *See* note 45 *supra.*

48. 416 U.S. at 152.

49. But the very section of the statute which granted him that right, a right which had previously existed only by virtue of administrative regulation, expressly provided also for the procedure by which "cause" was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it.

416 U.S. at 152.

50. *See* note 46 *supra.*

Unlike its property analysis, the Court was more unified in its discussion of the liberty interest. Following the *Roth* approach, the Court stated that liberty was not infringed by dismissal from employment alone, but rather by dismissal based upon unsupported charges which could injure the reputation of an employee.[51] It was further noted that if such charges are levied, due process intercedes to provide the person an opportunity to clear his name. The Court stated that if Kennedy had pursued an administrative appeal, where he would have had a hearing, he would have had ample opportunity to clear his name. Thus the majority concluded that due process had not been violated.[52]

This type of liberty interest analysis was subsequently modified in *Paul v. Davis*.[53] Davis' name and photograph had been placed upon a flyer captioned "Active Shoplifters," which was distributed to merchants throughout Louisville, Kentucky.[54] At that time, the respondent had been charged with shoplifting but had not been convicted.[55] In an effort to seek redress, Davis sued, claiming a deprivation of liberty. Specifically, he asserted that the "shoplifter" designation would inhibit him from entering business establishments for fear of being suspected of shoplifting and would seriously impair his future employment opportunities.[56] Ruling against Davis, the Supreme Court narrowed the circumstances under which an individual could claim a loss of liberty.[57] The Court asserted that a liberty interest can only trigger the procedural guarantees of the Constitution when there has been a deprivation of a right granted by the state[58] or where the state inflicts

51. 416 U.S. at 157.

52. "Since the purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name,' a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause." *Id.* For an interesting discussion of the subsequent history of Kennedy's claim, *see* Martin, *The Improper Discharge of a Federal Employee by a Constitutionally Permissible Process: The OEO Case*, 28 AD. L. REV. 27 (1976).

53. 424 U.S. 693 (1976).

54. *Id.* at 694-97.

55. *Id.* Shortly after circulation of the flyer the charge against the respondent was dismissed.

56. *Id.* at 697.

57. In its analysis, the Court reviewed and synthesized the holdings of several major "liberty" cases: Board of Regents v. Roth, 408 U.S. 564 (1972) (liberty interest is threatened if dismissal will impose stigma or disability on employee); Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961) (revocation of security clearance not a deprivation of liberty); Wieman v. Updegraff, 344 U.S. 183 (1952) (state loyalty oath violates due process); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (attorney general's designation of organizations as "communist" not a deprivation of liberty); United States v. Lovett, 328 U.S. 303 (1946) (congressional withholding of government employee's pay stigmatized their reputations).

58. 424 U.S. at 710, *citing* Goss v. Lopez, 419 U.S. 565 (1975). The Court found

damage to an individual's reputation in the course of employment termination.[59] Since Davis' case did not fall within either of these two categories he was denied relief.

II. NARROWING THE ENTITLEMENT

After *Davis*, the methodology of liberty and property analysis appeared well settled. Yet, the Court opted not to apply it in *Bishop*. It is unclear why the *Bishop* Court would not accept the assertion of a deprivation of property; not only was Bishop classified as a "permanent" employee, but he was employed under an ordinance which plainly conditioned his dismissal on cause, much like the statute in *Arnett*.[60] Accordingly, due process would appear to require some form of a termination hearing. By a clever bit of obfuscation, however, the Supreme Court avoided having to confront this requirement.

The Court commenced its analysis of the property question with the usual assertion that a claim of entitlement must be determined by reference to state law.[61] It proceeded to note, however, that the Marion ordinance was susceptible of various interpretations and could be read as either providing or failing to provide an entitlement.[62] Generally, when faced with such a situation, the Court would examine the statute and determine de novo whether an entitlement was present. Here, however, unlike *Roth* and *Sindermann*, the district court and the court of appeals had already declared that the ordinance did not confer a property interest upon Bishop. Accordingly, the Court held that since there was no authoritative state court inter-

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that the language of Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971), stating "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential," referred only to governmental action depriving an individual of a right previously held under state law. 424 U.S. at 708.

59. 424 U.S. at 710.

60. Indeed, the Marion ordinance is more specific as to grounds for dismissal than the statute involved in *Arnett*. The only element the Marion ordinance lacks is the phrase "for cause." 5 U.S.C. § 7501 (1970), the basis for the *Arnett* decision, provides in part: "(a) An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service."

61. 96 S. Ct. at 2077-78. *See* note 30 *supra*.

62. The Court stated:

> On its face the ordinance on which petitioner relies may fairly be read as conferring such a guarantee. However, such a reading is not the only possible interpretation; the ordinance may also be construed as granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures.

96 S. Ct. at 2078.

pretation of the ordinance, it would defer to the district court's interpretation.[63]

The Court's deference seems misplaced. When confronted with questions of state law that bear upon the judgment of the lower federal courts, the Supreme Court is reluctant to overrule decisions by federal judges supposedly skilled in the law of particular states.[64] In these situations the Court will ordinarily defer[65] to the lower court's interpretation of state law unless it is clearly erroneous or unreasonable.[66] In *Bishop*, the district court's opinion could have been considered unreasonable;[67] at best it was clearly flawed.

The district court totally ignored the "cause" criterion in the Marion ordinance, stating flatly that "the city had not created by regulation or policy, any condition in which its employees could expect continued employment."[68] More important, as was noted by Justices Blackmun and Brennan

63. *Id.* at 2078-79.

64. *See, e.g.*, United States v. Durham Lumber Co., 363 U.S. 522, 526-27 (1960) (interpretation of North Carolina property law); Propper v. Clark, 337 U.S. 472, 486-87 (1949) (determination of responsibilities of "temporary receiver" under N.Y. Civ. Prac. Act); Township of Hillsborough v. Cromwell, 326 U.S. 620, 629-30 (1946) (determination of validity of state tax assessment); Huddleston v. Dwyer, 322 U.S. 232, 237 (1944) (remand for interpretation of Oklahoma rulings on tax assessment); MacGregor v. Mutual Life Assurance Co., 315 U.S. 280, 281 (1942) (construction of Michigan statute).

65. The concept of deference is not to be confused with the somewhat similar doctrine of abstention. Under the abstention doctrine, the Court will refuse to hear a case for fear that a "federal court decision of some state law issues risks improvident interference with a valid state program or unnecessary decision of a federal constitutional question . . . ." Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1090 (1974). *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

66. *See* United States v. Durham Lumber Co., 363 U.S. 522, 526-27 (1960) (deference to lower court's interpretation of state property law); Sims v. United States, 359 U.S. 108, 114 (1959) (deference to lower court's interpretation of duties of state auditor); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 534 (1949) (deference to lower court's determination of applicability of state statute of limitations); Estate of Spiegel v. Comm'r, 335 U.S. 701, 707-08 (1949) (deference to lower court's determination of rights of reverter of trust settlor).

67. Even if a decision is not unreasonable it is arguable that the Court should not ipso facto defer. This should hold particularly true in a situation such as *Bishop*, where state law has become the determinative factor in applying federal constitutional guarantees. In Helvering v. Stuart, 317 U.S. 154 (1942), a case often cited in support of deference, Mr. Justice Stone, joined by Justices Black and Douglas in dissent, noted: "When state law has not been authoritatively declared we pay great deference to the reasoned opinion of circuit courts of appeals . . . . But we have not wholly abdicated our function of reviewing such determinations of state law, merely because courts of appeals have made them." *Id.* at 172.

68. 377 F. Supp. 501, 505 (W.D.N.C. 1973).

in dissent,[69] the lower court misconstrued state law. The district court relied on *Still v. Lance*,[70] a state court decision, for the proposition that a "contract of employment which contains no provision for the duration or termination of employment is terminable at the will of either party."[71] The *Still* court, however, arrived at this conclusion in the context of a statute that contained no "for cause" standard.[72] The North Carolina court noted that this was in sharp contrast with another provision of the statute that required "cause" for dismissal.[73] Under that provision, notice and hearing were required.[74] The Marion ordinance with its "cause" standards is thus similar to this latter portion of the statute in *Still*, and would also appear to require termination notice and hearing.[75]

A final consideration weighing in favor of an independent review of the state law by the Supreme Court was that the district court opinion was written prior to the decision in *Arnett v. Kennedy*. Given the similarities of the statutes in *Bishop* and *Arnett*, the latter decision might have provided grounds for the district court to find an entitlement. The Court, however, did not consider this factor[76] or any other factor unfavorable to its deference to the district court's interpretation. Instead the Court concluded that, because the district court's interpretation of the ordinance was tenable, because it derived some support from state law,[77] and because it was accepted by the Fourth Circuit, independent Supreme Court review of state law was "foreclose[d]."[78]

Justice White, in dissent, was disturbed by this holding.[79] He argued that

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69. 96 S. Ct. at 2085-86 (Blackmun & Brennan, JJ., dissenting).

70. 279 N.C. 254, 182 S.E.2d 403 (1971).

71. 377 F. Supp. at 504.

72. 279 N.C. at 260, 182 S.E.2d at 407. N.C. GEN. STAT. §§ 115-142(b) (1965) provided in relevant part:

> When it shall have been determined by a county or city board of education that an employee is not to be retained for the next succeeding school year it shall be the duty of the county or city superintendent to notify the employee, by registered letter . . . of the termination of his contract.

73. N.C. GEN. STAT. §§ 115-145 (1965).

74. 279 N.C. at 260, 182 S.E.2d at 407.

75. This was essentially the argument advanced by Justices Blackmun and Brennan in dissent. *See* 96 S. Ct. at 2085-86.

76. Indeed, the Court relegated *Arnett* to a footnote stating: "The Court's evaluation of the federal regulations involved in *Arnett* sheds no light on the problem presented by this case." 96 S. Ct. at 2078 n.8.

77. The Court referred to Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971). *See* text accompanying notes 70-74 *supra* for discussion of this case.

78. 96 S. Ct. at 2079.

79. Justice White was jointed in his dissent by Justices Brennan, Marshall, and Blackmun.

what the Court had done was to covertly follow the repudiated reasoning of Justice Rehnquist in *Arnett*.[80] Justice White maintained that the district court's finding that Bishop had no property interest was based upon the fact that the Marion ordinance described its own procedures for determining cause and these procedures had been followed.[81] This was essentially the "procedure can limit the right" argument advanced by Justice Rehnquist in *Arnett*.[82] White claimed that the majority, while purporting to construe the district court's opinion differently, actually impliedly sanctioned this analysis.[83] To support this he pointed to the Court's concluding paragraph which stated: "In this case, as the District Court construed the ordinance, the City Manager's determination of the adequacy of the grounds for discharge is not subject to judicial review; the employee is merely given certain procedural rights which the District Court found not to have been violated in this case."[84] By this language White felt the majority implicitly conceded that "the ordinance supplie[d] the 'grounds' for discharge and that the City Manager must determine them to be 'adequate' before he may fire an employee."[85] The holding that Bishop had no property interest in his job rested, therefore, on the fact that state law provided no procedures for assuring dismissal only

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80. 96 S. Ct. at 2083-85.

81. Justice White relied on the district court language stating:

> It is clear from Article II, Section 6, of the City's Personnel Ordinance, that the dismissal of an employee does not require a notice or a hearing. Upon request of the discharged employee, he shall be given written notice of his discharge setting forth the effective date and the reasons for the discharge. It thus appears that both the city ordinance and the state law have been complied with.

377 F. Supp. at 504. White's reasoning on this point is questionable. Rather than applying an analysis similar to that used in the *Arnett* plurality, it seems that the district court simply did not see an entitlement in the termination standards, as indicated in its conclusion:

> [Bishop] had no tenure, and the city had not created by regulation or policy, any condition in which its employees could expect continued employment. Since his dismissal resulted in no deprivation of an interest or right protected by the Fifth or Fourteenth Amendments, he was not entitled to a formal hearing prior to said dismissal.

Id. at 505.

82. *See* text accompanying notes 48-50 *supra*.

83. "The majority purports, at pp. 2077-78, n.8, to read the District Court's opinion as construing the ordinance *not* to condition dismissal on cause . . . . However, later in its opinion the majority appears to eschew this construction . . . ." 96 S. Ct. at 2083. The Court's note 8 referred to, states in pertinent part: "In this case, a holding that as a matter of state law the employee 'held his position at the will and pleasure of the city' necessarily establishes that he had *no* property interest." *Id.* at 2078 n.8.

84. 96 S. Ct. at 2084.

85. 96 S. Ct. at 2084.

for cause.[86] Thus, White argued that according to the majority the right to a job apparently given by the Marion ordinance was redefined by the procedures provided in the ordinance, and as redefined would be infringed only if these procedures were not followed.[87] This, he concluded, was precisely the reasoning rebuked by six members of the Court in *Arnett*.[88] Although the basis for White's analysis may be questioned,[89] it raises the question of whether the plurality in *Arnett* has become a majority. Unfortunately, since the Court deferred to the lower court and never expressly construed the statute or addressed the merits, the answer is unclear.[90]

The Court's position on liberty is somewhat clearer. Bishop was discharged on grounds of insubordination, contributing to low morale, and conduct unbecoming an officer.[91] The Court found that dismissal without a hearing on these grounds did not deprive Bishop of any liberty interest.[92] Justice Stevens noted that the reasons for Bishop's termination were first communicated orally to him in private and were later "stated in writing in answer to interrogatories."[93] Therefore, the Court determined that since the first communication was not made public, it could not properly be a basis for claiming that Bishop's interest in his " 'good name, reputation, honesty, or integrity' was thereby impaired."[94] And furthermore, because the second communication was made in the course of a judicial proceeding which did not commence until after Bishop had been discharged, it could not "provide retroactive support for his claim."[95]

Justice Brennan, in dissent, disputed the Court's logic. He was primarily disturbed by the Court's apparent requirement that a damaging statement made in the course of termination must be made public before it could infringe liberty. Noting that Bishop was in a profession in which prospective employees are invariably investigated, he felt that there was no reason

86. *Id.*
87. *Id.*
88. *Id.* text accompanying note 50 *supra.*
89. *See* note 81 *supra.*
90. Indeed, it is interesting that none of the dissenting justices raised the question of deference.
91. 96 S. Ct. at 2077.
92. *Id.* at 2079-80.
93. *Id.* at 2079.
94. *Id., citing* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); *see also* Paul v. Davis, 424 U.S. 693 (1976).
95. 96 S. Ct. 2079-80. Bishop also argued that the reasons for his discharge were false, to which the Court responded: "Even so, the reasons stated to him in private had no different impact on his reputation than if they had been true. And the answers to his interrogatories, whether true or false, did not cause the discharge." *Id.* at 2080.

to assume that the city would not convey these reasons to prospective employers and subsequently impair Bishop's ability to obtain employment.[96] Furthermore, he argued that the fact that answers to interrogatories were "published" after discharge was irrelevant, for due process still required an opportunity for an employee to clear his name when it had been damaged.[97]

The majority's position finds some support in *Paul*, which held that the damage to reputation must be inflicted in the process of terminating employment. Technically, disclosure of stigmatizing information in discovery is not done in the process of termination. But this is a tenuous point and on balance Brennan's dissent seems sounder. The thrust of previous decisions was to provide an opportunity to clear one's name if damaged. Although the notion that the stigma had to be made public may have been implicit in those decisions, it was never expressly stated. Moreover, it is more reasonable to believe that, where it is clear that the reasons for termination will be passed on and will restrict employment opportunities, a hearing should be required.

III. Conclusion

Regardless of which argument is more reasonable, the *Bishop* decision seems to have narrowed the concept of liberty in government employment. It would now appear that in order to claim a deprivation of liberty due to stigmatization in the course of discharge, one must also show that the stigma was made public[98] by means other than litigation or collateral attack on that termination. The decision's effect on the nature of the property interest is more difficult to delineate. The majority's deference to the lower court in particular raises many questions. The Court indicated that when a litigant attempts to assert that a state law confers an entitlement, it would be preferable for a state court to determine if an entitlement was present. But when the state has not done so, the majority also indicated that the lower federal courts may interpret the law subject only to a "clearly unreasonable" standard of review. Thus, on its face, the *Bishop* decision appears to give the state and the lower federal courts essentially the last word on due process in this area. Yet it is likely that this issue will arise again and that the Court used the deference procedure in this case to avoid directly ad-

96. 96 S. Ct. at 2081.

97. *Id.* The majority maintained that to provide an employee with a post-deprivation hearing when the stigmatizing reasons become known during litigation "would penalize forthright and truthful communication . . . between litigants . . . ." 96 S. Ct. at 2080. *But see* 96 S. Ct. at 2081 n.3 (Brennan, J., dissenting).

98. The question remains as to what "made public" means. The *Bishop* Court provided no criteria.

dressing the constitutional issue of property interests in government employment. By avoiding such a decision, however, the Court created uncertainty regarding the status of Justice Rehnquist's argument in *Arnett* that the procedure of a law can limit the entitlement granted by it. The *Bishop* majority seemed to implicitly embrace this reasoning. But again, as with the doctrine of deference, one must await another case for a clarification of the issue.

Warren J. De Vecchio

COMMUNICATIONS—FAIRNESS DOCTRINE—FCC Finds Violation by Licensee of Obligation to Provide Adequate Coverage of Important Public Issues. *Mink v. Radio Station WHAR*, 59 F.C.C.2d 987 (1976).

The fairness doctrine is a vital component of Government regulation of radio and television broadcasting.[1] The doctrine requires the broadcaster to devote a reasonable percentage of broadcast time to the coverage of public issues, and requires that this coverage be fair and balanced.[2] Although the

1. Government regulation of the radio industry began with the Radio Act of 1912, ch. 287, § 1, 37 Stat. 302 (repealed 1927), which asserted the public nature of the airwaves and upon this premise established governmental regulation and licensure of radio stations. *See* S. DAVIS, THE LAW OF RADIO COMMUNICATION 54-57 (1st ed. 1927). The impotence of the Radio Act and the resultant unfettered and disruptive broadcasting by an ever-increasing number of radio licensees prompted congressional enactment of the Radio Act of 1927, ch. 169, § 1, 44 Stat. 1162 (repealed 1934), which created the Federal Radio Commission (FRC) and charged it with the responsibility of assigning frequencies and of awarding broadcast licenses according to the "public convenience or necessity." *See* W. JONES, REGULATED INDUSTRIES, CASES AND MATERIALS 1023-28 (1967). The Communications Act of 1934, 47 U.S.C. § 151 (1970), superseded the Radio Act of 1927 and replaced the FRC with the Federal Communications Commission (FCC), charging it with regulation and licensure of broadcasters according to the "public interest, convenience or necessity." For a brief discussion of this legislative development, see Malone, *Broadcasting, The Reluctant Dragon: Will the First Amendment Right of Access End the Suppressing of Controversial Ideas?*, 5 U. MICH. J.L. REFORM 194, 212-13 (1972).

The Supreme Court, in NBC v. United States, 319 U.S. 190 (1943), held that the FCC's general authority to regulate program content in the public interest was consistent with the first amendment. It was from this authority to regulate broadcasting in the public interest that the FRC and the FCC derived the fairness doctrine.

2. The Handling of Public Issues Under the Fairness Doctrine and the Public Inter-

Federal Communications Commission (FCC) has consistently maintained that strict adherence by broadcasters to the dual obligations of the fairness doctrine is the single most important requirement of broadcast operation,[3] the Commission has never affirmatively and stringently enforced the first element of the doctrine, the adequate coverage obligation.[4] Recently, however, in *Mink v. Radio Station WHAR*,[5] the FCC determined that a radio station had violated the fairness doctrine by failing to cover adequately a public issue that was extremely important and highly controversial in the area served by the station licensee. Although based on long-recited principles of fairness doctrine law, this is the first FCC decision in which the Commission explicitly wielded and relied on the adequate coverage obligation of the fairness doctrine to find a violation of the doctrine and to compel licensee programming.

Radio station WHAR served the Clarksburg, West Virginia community, an area that had "the highest percentage of strip mined land of any county in the State."[6] During a period in 1974-75, when Congress was considering significant strip mining legislation,[7] WHAR presented no original programming on the pending legislation or on the general subject of strip mining. Network broadcasts constituted the sole programming presented, and this, at most, addressed the legislation or the subject of strip mining only generally or tangentially.[8] Employing the adequate coverage obligation of the fairness

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est Standards of the Communications Act, 48 F.C.C.2d 1, 7 (1974) [hereinafter cited as 1974 Fairness Report].

3. Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C.2d 283, 292 (1970).

4. The FCC has never promulgated rules or regulations defining what constitutes a violation of the first prong of the fairness doctrine (the adequate coverage obligation). The Commission prefers to abide by an ad hoc determination. Public Communications, Inc., 50 F.C.C.2d 395, 400 (1974). However, guidelines for the sufficiency of a complaint alleging violation of the second half of the doctrine (coverage must be fair and balanced) have been enunciated by the Commission. Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598, 600 (1964). The second prong guidelines, however, may be used as an aid in applying the doctrine's first element. Public Communications, Inc., 50 F.C.C.2d at 400.

5. 59 F.C.C.2d 987 (1976).

6. *Id.* at 995.

7. *See* S. 425, 93d Cong., 2d Sess. (1974); H.R. 11500, 93d Cong., 2d Sess. (1974). The proposed legislation dealt with the reclamation by mining companies of strip-mined land. It would have required the companies to restore the mined land to its approximate original contours and to provide appropriate revegetation of the land to prevent soil erosion. Other legislation included bills designed both to regulate and to prohibit entirely strip mining operations. *See* H.R. 12898, 93d Cong., 2d Sess. (1974); H.R. 13108, 93d Cong., 2d Sess. (1974); H.R. 15000, 93d Cong., 2d Sess. (1974); H.R. 15701, 93d Cong., 2d Sess. (1974); H.R. 15860, 93d Cong., 2d Sess. (1974). Interview with Christopher B. LoPiano, Legislative Representative for the United Mine Workers of America, in Washington, D.C. (Oct. 4, 1976).

8. 59 F.C.C.2d at 995-96. WHAR admitted that the station "would probably have

doctrine, Representative Patsy Mink, the Environmental Policy Center, and a citizen of Clarksburg filed a complaint with the FCC against WHAR. The complainants submitted extensive amounts of material intending to show that the issue of strip mining and the pending legislation in Congress were of extreme importance to the people of the Clarksburg area in terms of environmental quality, job opportunity, and economic and societal stability, and that the strip mining issue was highly controversial, both nationally and locally.[9] The fairness complaint against WHAR charged that the broadcast licensee had failed to inform its listeners of the nature and impact of the pending strip mining legislation. This failure, the complaint alleged, arose from WHAR's lack of original programming on the issue and from WHAR's impermissible delegation of its adequate coverage obligation to outside network programming not tailored to the needs of the area served by the broadcast licensee.[10] The complainants requested the Commission to direct WHAR to immediately schedule programming on strip mining and to reaffirm the licensee's obligations under the fairness doctrine.[11]

WHAR countered with the general contention that its outside network programming had adequately addressed the strip mining and relevant legislative issues,[12] and that the strip mining issue, while "important," was not of sufficient public significance to warrant FCC intervention under the fairness doctrine.[13] Additionally, the station launched a broad attack on the power of the Commission to enforce the adequate coverage obligation of the fairness doctrine.[14]

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carried over 75%" of this outside network programming but professed ignorance as to what specific programs or items were provided its listeners. *Id.* at 990.

9. The complainants used area newspapers and journals, congressional testimony, and research studies to demonstrate that strip mining had an enormous impact on air and water quality in Clarksburg, that it induced social and industrial relocation, and that the pending legislation would significantly affect recreational facilities, employment, and environmental quality. *Id.* at 991-92, 995. To these factors the complainants added "front page" news stories and citizen group response to establish that the issue of strip mining and the relevant legislation were highly controversial both nationally and in the area served by WHAR. *Id.* at 988, 991-92, 995.

10. The petitioners charged that WHAR's broadcast of outside network programming revealed "absolutely no substantive information on the environmental, economic, physical or other aspects of strip mining in Clarksburg or Harrison County [the county in which Clarksburg is situated], or even in West Virginia" and that there was presented "no local perspective, genuine partisan voices or varying point of view. . . ." *Id.* at 992.

11. *Id.* at 989.

12. The broadcast licensee had aired wire service news stories, national network news and public affairs programs, and a tape-recorded message by a West Virginia congressman. *Id.* at 995-96. *See also* note 8 *supra.*

13. 59 F.C.C.2d at 990.

14. WHAR challenged the Commission's power both to take any action against the

The complainants' construction of the strip mining issue as one of extreme importance and serious controversy in the locality served by WHAR was accepted by the Commission, which rejected WHAR's arguments that the Commission had no power to enforce the adequate coverage obligation of the fairness doctrine.[15] Relying on prior fairness doctrine policy and relatively recent case law, the Commission held that some issues in a community could be so critical and of such great public importance that it would be a violation of the fairness doctrine for a broadcast licensee to ignore them or to treat them superficially in its programming.[16] The FCC found that WHAR had failed to cover adequately the strip mining issue and had abused its discretion by relying totally on network programming not appropriately tailored to cover the local ramifications of the issue.[17] The station was directed to submit plans for adequate coverage of the strip mining controversy.[18]

Commissioner Glen O. Robinson, a longtime foe of the fairness doctrine,[19] reluctantly concurred in the judgment of the Commission. Robinson found the decision to be in accord with prior fairness doctrine law, but maintained

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station should its coverage be found wanting and to require an individual licensee to cover a particular issue, even a highly critical one. Further, WHAR claimed that any FCC decision compelling coverage of a particular issue would constitute censorship and intrusion into licensee discretion guaranteed by fairness doctrine law. *Id.* at 989-90.

15. The Commission traced policy statements back to 1949 and cited Supreme Court and FCC cases to support its conclusion that "strict adherence to the fairness doctrine—including the affirmative obligation to provide coverage of issues of public importance—[is] the single most important requirement of operation in the public interest. . . . This obligation includes informing listeners of issues of particular concern to the community which they are licensed to serve." *Id.* at 993.

16. *Id.* at 994.

17. The Commission found that the network programming had only generally or tangentially addressed the strip mining issues. The dispositive determinations were that the outside broadcasts had not been tailored to meet specific community needs and interests and that, in any event, WHAR had no idea of what programming was actually aired. *Id.* at 994, 996-97.

18. *Id.* at 997. WHAR, in response to the Commission's directive, stated that since January 5, 1975, it had broadcast a weekly half-hour telephone-talk radio program, which had addressed the strip mining issue. The licensee indicated that for eight weeks, commencing July 7, 1976, the moderator of the program did "raise the strip mining issue" on each show, either directly or in response to current news events. Because none of the original complainants has questioned this degree of compliance, the FCC has not challenged the adequacy of the coverage, deferring to licensee discretion as to the means of covering an issue when the licensee has indicated an attempt at adequate coverage. Interview with Eduard B. Berlin, Attorney Advisor for the Complaints and Compliance Division of the Federal Communications Commission, in Washington, D.C. (Oct. 26, 1976).

19. *See* Robinson, *The FCC and the First Amendment: Observation on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 131-37 (1967) (written before Robinson's appointment to the FCC); Fairness Doctrine and Public Interest Standards: Fairness Report Regarding Handling Issues of Public Importance, 58 F.C.C.2d 691, 703-14 (1976) (Comm'r Robinson, dissenting) [hereinafter cited as 1976 Fairness Report].

that the unprecedented enforcement of the adequate coverage obligation of the doctrine would hasten its jettison from communications law.[20]

I. The Adequate Coverage Obligation: "The Law Hath Not Been Dead, Though It Hath Slept"[21]

The adequate coverage obligation of the fairness doctrine has been an integral part of fairness doctrine law and rhetoric for almost three decades.[22] Because broadcast frequencies are scarce, Congress, the FCC, and the courts have considered broadcast licensees as fiduciaries or trustees of a great public resource—the airwaves.[23] Congress, in the Radio Act of 1927[24] and the Communications Act of 1934,[25] charged broadcasters, as trustees of a public resource, to operate in the public interest[26] so that their exclusive control of the airwaves would redound to the public good.[27] The FCC and its predeces-

20. 59 F.C.C.2d at 999.

21. Shakespeare, Measure for Measure, Act 2, Scene 2.

22. The FCC's 1949 report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 [hereinafter cited as Editorializing Report], provided the first basic articulation of the fairness doctrine and its adequate coverage obligation: "The Commission has . . . recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station." *Id.* at 1249. There is some dispute as to whether this report, still considered the most comprehensive statement of the fairness doctrine, represents the birth of the doctrine or if antecedent decisions by the FRC and the FCC laid the substantive groundwork for the doctrine. *See, e.g.*, Robert H. Scott, 11 F.C.C. 372 (1946) (all subjects of substantial importance to the community should be presented); United Broadcasting Co., 10 F.C.C. 515, 517 (1945) (each licensee has duty to be sensitive to the problems of public concern in the community and to make sufficient time available for full discussion thereof); Metropolitan Broadcasting Corp., 8 F.C.C. 557 (1941) (broadcast licensee has duty to present well-rounded programs on public controversies of the day); Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. denied*, 281 U.S. 706 (1930) (public interest requires that ample broadcast time be devoted to the fair and free competition of opposing views).

23. "[R]adio stations should not be used for the private interest, whims, or caprices of the particular persons who have been granted licenses, but in a manner which will serve the community generally and the various groups which will make up the community." Editorializing Report, *supra* note 22, at 1248. *See also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389, 394, 396 (1969); Office of Communication of United Church of Christ v. FCC, 425 F.2d 543, 548 (1969), *rev'g on rehearing* 359 F.2d 994 (D.C. Cir. 1966); Editorializing Report, *supra* note 22, at 1247; 1974 Fairness Report, *supra* note 2, at 5-6. *See generally* Mallamud, *The Broadcast Licensee as Fiduciary: Toward the Enforcement of Discretion*, 1973 Duke L.J. 89, 106-13.

24. Radio Act of 1927 ch. 169, § 1, 44 Stat. 1162 (repealed 1934).

25. 47 U.S.C. § 151 (1970). *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377-78, 383-86 (1969); Editorializing Report, *supra* note 22, at 1249-50; 1974 Fairness Report, *supra* note 2, at 4-7.

26. *See* 47 U.S.C. §§ 303, 307(a), (d), 309(a), 312(a)(2) (1970).

27. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 394 (1969).

sor, the Federal Radio Commission, interpreted this public trust to include adherence to the obligations of the fairness doctrine.[28] Full and fair presentation by broadcasters of issues of public importance was seen as essential not only to faithful operation in the public interest but also to successful implementation of the system of free expression inherent in the mandate of the first amendment.[29] Broadcasters are thus charged with the obligation to present adequate coverage of important public issues in order to inform the communities they serve of those issues and problems that are locally important and controversial.[30]

The licensee, however, is not obligated to devote air time to every public issue or even to every controversial issue of public importance within the community it serves.[31] Rather, the FCC obliges the broadcaster to ascertain community needs and interests,[32] with wide discretion given the licensee

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28. *See* Editorializing Report, *supra* note 22; 1974 Fairness Report, *supra* note 2, at 4-7, 9-10. The dual obligations of the doctrine evolved from FCC cases and policy statements involving regulation in the public interest. Congress gave statutory endorsement to the fairness doctrine in amending, in 1959, section 315(a) of the Communications Act of 1934, ch. 652, § 315, 48 Stat. 1088 (1934) (current version at 47 U.S.C. § 315(a)(4) (1970)). *See* H.R. REP. No. 1069, 86th Cong., 1st Sess. 5 (1959). In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), the Court upheld the constitutionality of the fairness doctrine which it found implicit in the public interest standards of the Communications Act of 1934. *Id.* at 375-86. In CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), the Court suggested that the Communications Act of 1934 required strong enforcement of the fairness doctrine. *See* 1976 Fairness Report, *supra* note 19, at 693-94.

29. [I]t is . . . clear that one of the basic elements of any such operation [in the public interest] is the maintenance of radio and television as a medium of freedom of speech and freedom of expression. . . ." Editorializing Report, *supra* note 22, at 1248. It is the right of the public, as guaranteed by required broadcast operation in the public interest and by permissible FCC regulation of broadcasting to promote first amendment expression,

> to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee, or any individual member of the public . . . which is the foundation stone of the American system of broadcasting.

Id. at 1249. *See also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390-94 (1969); Green v. FCC, 447 F.2d 323, 329 (D.C. Cir. 1971); King Broadcasting Co., 23 F.C.C.2d 41, 43-44 (1970); 1974 Fairness Report, *supra* note 2, at 5.

30. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 393-94 (1969). The adequate coverage obligation applies even when state law is to the contrary. *See* State v. University of Me., 266 A.2d 863 (Me. 1970).

31. Public Communication, Inc., 50 F.C.C.2d 395, 397-98 (1974); Editorializing Report, *supra* note 22, at 1251; 1974 Fairness Report, *supra* note 2, at 8-9.

32. Primer on Ascertainment of Community Problems by Broadcast Applicants, 27

regarding the choice and manner of coverage of issues.[33] The broadcast licensee, however, must provide adequate coverage of public issues at his own expense and by his own initiative if sponsorship is unavailable from another source.[34] The Commission reviews broadcasters' decisions, when necessary, to determine whether they are reasonable and in good faith.[35] The FCC has stated that the responsibility to provide adequate coverage cannot be delegated to any national network or other licensee, and if a broadcaster avails himself of substantial network programming he must complement the outside programming with local broadcasts addressing current community issues.[36]

While the adequate coverage obligation has been articulated frequently in FCC decisions and policy statements and has been embellished with fairness doctrine principles, the Commission has not addressed the precise scope of this aspect of the doctrine until relatively recently. The Commission has declared that some issues will be so important to a community that they assume "critical" significance,[37] but these instances of compelled coverage in the face of critical issues have been deemed the "rare" cases.[38] Despite

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F.C.C.2d 650 (1971). The Primer requires applicants to ferret out community needs, interests, and problems by means of personal contacts and interviews with community leaders so that broadcasters will be able to present program schedules that are responsive to the problems of their communities and serve to stimulate the solution of community problems. *Id.* at 656-58.

33. Editorializing Report, *supra* note 22, at 1247, 1251; 1974 Fairness Report, *supra* note 2, at 8-10. This grant of broad discretion serves to achieve vigorous debate while avoiding the "dangers of censorship or pervasive supervision" by the government. Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C. Cir. 1968), *cert. denied sub nom.* Tobacco Inst. v. FCC, 396 U.S. 842 (1969). *See also* 47 U.S.C. § 326 (1970) (proscription of FCC conduct amounting to censorship).

34. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377-78 (1969); Cullman Broadcasting Co., 40 F.C.C. 576 (1963); John J. Dempsey, 6 P & F Radio Reg. 615 (1950).

35. Madalyn Murray, 40 F.C.C. 647, 651 (1965); Editorializing Report, *supra* note 22, at 1251-52. The determination of whether a licensee has acted reasonably in good faith is a question of fact. The Commission considers the facts and competing arguments and determines what would amount to reasonable coverage in the circumstances, given that the fairness doctrine imposes affirmative responsibilities. *See* 1976 Fairness Report, *supra* note 19, at 697.

36. Editorializing Report, *supra* note 22, at 1248; *see, e.g.*, WHEC, Inc., 52 F.C.C.2d 1079, 1085 (1975) (the key is the responsiveness to the community needs and not necessarily the original source of broadcast matter).

37. 1974 Fairness Report, *supra* note 2, at 10.

38. *Id.* These cases are the exception from the general practice of FCC deference to broadcaster discretion. Such deference is due to the limited occurrence of issues that are "critical," the FCC's reluctance to define what constitutes critical issues, and the FCC's hesitance to intrude on a broadcaster's journalistic role. Indeed, the first amendment ramifications of a decision to compel a licensee to cover a particular issue have been the subject of serious dispute. *See, e.g.*, Schenkkan, *Power in the Marketplace of Ideas: The*

their rarity, however, the Commission has found it patently unreasonable for a broadcaster to ignore these critical issues in its programming, to treat them piecemeal or insufficiently, or to delegate programming responsibility to the extent that local aspects of the "critical" issue would not be addressed.[39] Such abuse of programming discretion granted licensees would constitute a violation of the adequate coverage obligation.[40]

Several decisions by the FCC in the last six years have expanded the scope of the first obligation of the fairness doctrine. In one case, *Gary Soucie*,[41] the complainants alleged that a broadcaster, by airing commercials extolling the virtues of large automobiles, became obliged to present views that informed the public of the environmental and health liabilities associated with the glamor of such cars.[42] In dicta to a decision denying the requested relief, the FCC addressed itself to the responsibilities of a broadcaster when confronted with "critical" issues of public importance.[43] The Commission deferred to the discretion of the licensee,[44] but left no doubt that some issues demanded coverage for the purpose of public education.[45] When an issue would "determine the quality of life for a decade or centuries to come," the

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Fairness Doctrine and the First Amendment, 52 TEX. L. REV. 727, 733-40 (1974); Comment, *Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine*, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 137, 142-46 (1975).

39. En Banc Programming Inquiry, 44 F.C.C. 2303, 2313-15 (1960).

40. *See* notes 22-30 & accompanying text *supra*.

41. 24 F.C.C.2d 743 (1970), *rev'd on other grounds sub nom.* Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971).

42. The complainants relied on the second prong of the fairness doctrine: that once a broadcaster presents, in its programming, a view on controversial issues of public importance (i.e., the virtues of large cars), it is compelled to present opposing views. The Commission has compelled such responsive programming on a number of issues. *See, e.g.*, Accuracy in Media, 40 F.C.C.2d 958 (1973) (private pension systems). *But see* Center for Auto. Safety, 32 F.C.C.2d 926 (1972) (automobile air bags); Thomas M. Slaten, 28 F.C.C.2d 315 (1971) (quality of the judiciary); David S. Tillson, 24 F.C.C.2d 297 (1970) (theory of evolution). The rationales and results of these cases are similar to those in situations in which the broadcaster would be compelled to air programming on "critical" issues under the adequate coverage obligation.

43. While we have stressed that the broadcaster has large discretion in choosing and covering controversial issues of public importance, it would be no more reasonable for broadcasting to ignore these burning issues of the seventies [environmental pollution]—which may determine the quality of life for decades or centuries to come—than it would be to ignore the issue of Vietnam or the issue of racial unrest in communities racked by this problem.

24 F.C.C.2d at 750-51.

44. Of course, the broadcast licensee retains discretion as to issues, format, appropriate spokesmen, etc. Thus a broadcaster located in an area with no air pollution issue but a severe water pollution one would clearly focus on the latter . . . . In short, there remain wide areas for judgment by the licensee, based upon the facts of his particular area.

24 F.C.C.2d at 751 n.9.

45. *Id.* at 750-51.

broadcaster would be compelled to air adequate programming on the issue.[46] The decision never explicitly referred to the adequate coverage obligation of the fairness doctrine, but its dicta, that issues such as environmental pollution required suitable coverage, alluded to that obligation.

Radio Station WSNT[47] presented the Commission with a different "critical" issue. In this case, the complainants petitioned the FCC to determine whether a radio station, which alone served a community beset by racial conflict, could refuse to air broadcasts concerning the conflict without failing to serve the "public interest."[48] The FCC declared it to be WSNT's particular obligation as the only station licensed to serve the troubled community "to air major local problems for the benefit of the community."[49] The Commission noted that the record raised serious questions as to whether WSNT had met this obligation and ordered an evidentiary hearing. The ruling left the strong suggestion that the broadcaster's license was in jeopardy unless the racial issue received adequate and full coverage.[50] *WSNT*, decided upon public interest standards, comports with the components of the adequate coverage obligation. Stations, especially those which exclusively serve a particular community, are obligated to air programs addressing significant problems that plague the community.[51]

While the petitioners in *Gary Soucie* and *WSNT* relied on grounds other than the adequate coverage obligation, the complainants in *Public Communi-*

46. *Id.*

47. 27 F.C.C.2d 993 (1971).

48. The Commission expressly framed the issue in public interest terms, made no mention of the first prong of the fairness doctrine, and saw only a tangential fairness doctrine issue. *Id.* at 996. A possible reason for this construction of the issue was that petitioners requested a denial of WSNT's application for license renewal, which required the Commission to determine whether the subject licensee had operated in the public interest. *See* Honorable Orwen Harris, 40 F.C.C. 582, 583 (1963) (explaining the procedural differences between reviewing fairness complaints and considering license renewal applications). Many complainants appear to choose license renewal time to challenge the adequacy of a station's coverage of important public issues. While reiterating the principles of the licensee's obligation to serve the community and to give adequate coverage to local needs and problems, the Commission, in all but a handful of cases, does not deny renewal applications. *See, e.g.*, WHEC, Inc., 52 F.C.C.2d 1079 (1975); La Fiesta Broadcasting Co., 37 P & F Radio Reg. 983 (1976). *See* Comment, *supra* note 38, at 150-55.

49. 27 F.C.C.2d at 995. The licensee could not "simply refrain from taking any action, thereby effectively ignoring the situation." *Id.*

50. *Id.* at 999-1000. Faced with a clearly hostile Commission, WSNT resolved the problem by proposing substantial programming designed to address the racial issues in the community it served. Radio Station WSNT, 31 F.C.C.2d 1080, 1081-82 (1971).

51. A number of cases have affirmatively and broadly cited this principle of *WSNT* in other contexts. *See, e.g.*, Storer Broadcasting Co., 41 F.C.C.2d 792, 811 (1973); Taft Broadcasting Co., 38 F.C.C.2d 770, 790 (1973); Time-Life Broadcast, Inc., 33 F.C.C.2d 1050, 1078 (1972).

cation, Inc.[52] alleged that a broadcast licensee had directly violated that element of the fairness doctrine by failing to cover adequately legislation pending in Congress regarding radio and television license renewals. In rejecting this claim,[53] the Commission further elucidated the adequate coverage obligation. This first obligation of the fairness doctrine, the Commission declared, imposed a "general obligation" on licensees to cover important public issues, but had "a very limited application to the programming of specific issues."[54] The decision indicated that the "critical issue" responsibility of the licensee was to be "invoked sparingly" in a "very limited class of issues" when it would be clearly unreasonable for a broadcaster to ignore the particular issue.[55]

The effect of these decisions is to permit the broadcast licensee wide discretion in choosing which issues to cover in its programming. Other than the specific circumstances considered in a few FCC cases, the broadcaster has been given no yardstick by which to judge what issues are "critical." Given the narrow range of the "critical issue" responsibility of the licensee, it is perhaps understandable why, prior to *Mink v. Radio Station WHAR*, a violation of the adequate coverage obligation had never been found by the FCC, and why the Commission had never imposed sanctions[56] or compelled coverage under the "critical issue" responsibility of the fairness doctrine.[57] Yet many commentators allege that there is a widespread failure of licensees to ade-

52. 50 F.C.C.2d 395 (1974).

53. *Id.* at 400.

54. *Id.* at 399.

55. *Id.* at 400. *See* Council on Children, Media and Merchandizing, 36 P & F Radio Reg. 1422 (1976), and American Broadcasting Co., 56 F.C.C.2d 275 (1975), in which the FCC refused to compel additional programming under the adequate coverage obligation.

56. Several sanctions are available to the FCC. *See, e.g.*, 47 U.S.C. §§ 303(m)(1) (suspension of licenses), 307(a) (denial of applications for license renewals), 307(d) (granting of probationary license renewals for a term of less than the usual three years), 312(a) (immediate license revocation), 312(b) (cease and desist orders), 503(b) (imposition of fines and forfeitures) (1970). In reality, most fairness doctrine sanctions take the form of the "lifted eyebrow"—the threat of aetion or of close scrutiny of a licensee's renewal application. *See* Comment, *The Regulation of Competing First Amendment Rights: A New Fairness Doctrine Balance After CBS?*, 122 U. PA. L. REV. 1283, 1293-95 (1974).

57. In fiscal year 1971, there were 2,000 fairness complaints which prompted 168 FCC inquiries. Sixty-nine inquiries resulted in agency rulings with no more than five adverse to the licensee. None of these adverse rulings involved the adequate coverage obligation. *See* Rosenfeld, *The Jurisprudence of Fairness: Freedom Through Regulation in the Marketplace of Ideas*, 44 FORDHAM L. REV. 877, 893 n.77 (1976). Similarly, no adverse findings involving the adequate coverage obligation occurred in 1973-74 when 19 adverse findings were made. *See* 1976 Fairness Report, *supra* note 19, at 709 n.14.

quately cover critical public issues.[58] Such recalcitrance led Judge (now Chief Justice) Burger to comment in 1966 that "[a]fter nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust . . . ."[59] In the face of this failure to cover public issues adequately, constitutional, economic, administrative, and structural barriers have resulted in a "curious neutrality-in-favor-of-the-licensee" on the part of the FCC.[60]

II. THE LAW AWAKES

Mink v. Radio Station WHAR[61] represents the first time the FCC found a violation of and compelled programming under the "critical issue" responsibility of the adequate coverage obligation. The Commission, looking to the Editorializing Report of 1949,[62] relied on established fairness doctrine law,[63] but significantly buttressed and explained the adequate coverage responsibilities of broadcast licensees.

The FCC found two factors in *Mink* to be dispositive of the complaint. The first was the character of the strip mining controversy in the area served by WHAR. This was of the type included in the "very limited

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58. *See* Mallamud, *supra* note 23, at 115-22; Marks, *Broadcasting and Censorship: First Amendment Theory After Red Lion*, 38 GEO. WASH. L. REV. 974, 976-77 (1970); Comment, *supra* note 38, at 148-49, 150-55; Comment, *supra* note 56, at 1294-95. For a brief discussion of the reasons broadcasters avoid coverage of important public issues see Schenkkan, *supra* note 38, at 728-29.

59. Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003 (1966), *rev'd on rehearing*, 425 F.2d 543 (D.C. Cir. 1969).

60. Office of Communication of United Church of Christ v. FCC, 425 F.2d 543, 547 (1969), *rev'g on rehearing* 359 F.2d 994 (D.C. Cir. 1966). *Accord*, Citizens Communications Center v. FCC, 447 F.2d 1201, 1207-08 (D.C. Cir. 1971). The constitutional barriers to the enforcement of the adequate coverage obligation by the FCC include the first amendment prohibition against program regulation that amounts to censorship. *See* note 38 *supra* & authorities cited therein. Economic barriers include the tremendous costs to a broadcaster if his license is revoked. Administrative barriers include the inadequate number of FCC staff personnel and the shortage of staff time that would result if the Commission embarked on a policy of strictly determining whether stations were fulfilling their affirmative responsibilities under the adequate coverage obligation. Additionally, there is the FCC reluctance to have its powers tested in court. Structural barriers include the relatively few adequate coverage complaints heard by the Commission and frequent complainant reliance on public interest standards instead of fairness standards. *See* note 48 & accompanying text *supra*. For a general discussion of the above-mentioned barriers see note 58 *supra* & authorities cited therein.

61. 59 F.C.C.2d 987 (1976).

62. Editorializing Report, *supra* note 22, at 1246.

63. 59 F.C.C.2d at 993-94. The Commission repeated the basic licensee obligations and reasserted the importance of strict conformity to the fairness doctrine. *Id.*

class" of critical and "burning" issues.[64] Relying on *Gary Soucie*[65] and *WSNT*,[66] the FCC deemed the strip mining issue to be a "critical controversial issue of public importance in Clarksburg" that would affect the "quality of life" there "for decades to come."[67]

The second dispositive factor in *Mink* was the Commission's belief that WHAR had not acted reasonably and had abused its programming discretion by delegating coverage of the strip mining issue to outside network programming. The network programming broadcast by WHAR had not specifically addressed the strip mining issue and, in any event, did not deal with the nature and impact of the issue in Clarksburg. Furthermore, the station licensee had no idea what particular programs or items were provided its listeners.[68] The Commission found this delegation and WHAR's ignorance of what was aired to be violative of the long-established prohibition against delegation of coverage responsibility,[69] the requirement of tailoring outside programming to local needs and problems,[70] and the requirement of diligent efforts by the licensee to inform its listeners of critical public issues.[71] The FCC found that WHAR had acted unreasonably in failing to provide adequate coverage of the critical issue of strip mining[72] and that WHAR had therefore violated the fairness doctrine.[73]

The *Mink* decision resulted in three important gains for fairness doctrine law. First, it reaffirmed the viability of the adequate coverage obligation[74]

64. 59 F.C.C.2d at 995, 997. The Commission used congressional testimony, newspaper and periodical articles, and research studies to demonstrate the enormous impact of the strip mining controversy on air and water quality and on the economic and social prospects of the Clarksburg area.

65. 24 F.C.C.2d 743 (1970), *rev'd on other grounds sub nom.* Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971).

66. 27 F.C.C.2d 993 (1971).

67. 59 F.C.C.2d at 995, 997.

68. *Id.* at 995-97.

69. *See* note 36 and accompanying text *supra.*

70. *Id.*

71. *See* note 32 & accompanying text *supra.*

72. Where, as in the present case, an issue has significant and possibly unique impact on the licensee's service area, it will not be sufficient for the licensee as an indication of compliance with the fairness doctrine to show that it may have broadcast an unknown amount of news touching on a general topic related to the issue cited in a complaint. Rather it must be shown that there has been some attempt to inform the public of the nature of the controversy, not only that such controversy exists.

59 F.C.C.2d at 997.

73. WHAR was directed to submit for consideration programming designed to meet the station licensee's fairness doctrine responsibilities. *Id. See* note 18 *supra.*

74. The Commission declared that "[w]ithout licensee compliance with the responsibility to cover adequately vital public issues, the obligation to present contrasting views

and reasserted the enforceability of the "critical issue" responsibility against reluctant broadcasters.[75] Second, the decision articulated criteria for defining those issues within the rare class of "critical" public issues. It is now established that complainants may utilize media information and research studies to advocate the critical importance of a particular issue.[76] In addition, the Commission's statement that violation of the fairness doctrine arises when a licensee fails to cover an issue "which has tremendous impact within the local service area" may possibly serve to expand the critical issue class beyond wars, local racial conflict, and environmental pollution.[77] Finally, the *Mink* case obliges broadcasters to maintain a higher degree of performance in the public interest. When critical issues of public importance are concerned, licensees must monitor the substance of the broadcasts covering those issues. Also, the practically unbridled discretion given licensees in choosing which issues to cover will be restricted by their obligation to provide substantive and informative programming on issues critically important to the community they serve.

There are, however, several possible limitations on the force of the *Mink* holding. The case dealt with a "traditional" critical issue—environmental damage that would affect the quality of life in a particular community for many years. Consequently, *Mink* may be limited to this recognized interpretation of the rare critical issue rather than extended to embrace more general issues of "tremendous impact" and "vital concern" in a particular community.

[the second prong of the doctrine] would have little success as a means to inform the listening public." 59 F.C.C.2d at 993.

75. The enforceability may be seen in two respects: direct sanctions against broadcasters for violation of the rule of *Mink* or, perhaps more importantly, use of the rule of *Mink* as a threat to hesitant broadcasters without actual imposition of sanctions. *See* note 56 *supra.*

76. The FCC relied on congressional testimony, "front-page" news stories, journal articles, and research studies, as well as physical and sociological data, to establish its finding that the strip mining issue was a critical public issue. In addition, the Commission looked at the physical, environmental, sociological, economic, and aesthetic impact of strip mining on the area served by the station licensee. 59 F.C.C.2d at 995. It seems that the FCC allowed the consideration of the above resources and data even though some of them did not address the local impact of strip mining in and around Clarksburg and even though some of the sources were taken from areas outside WHAR's service area. *Id.* at 991.

77. *Id.* at 997. The Commission's holding and rationale were not based solely upon the environmental nature of the critical issue. *See* note 76 *supra.* The decision indicates a critical public issue to be one that "has tremendous impact within the local service area," one that has a "significant and possibly unique impact" on a service area, or one that may "determine the quality of life" in a service area "for years to come." *Id.* at 997. The FCC, in determining the nature of the problem before it, stated that "[i]f the fairness doctrine is to have any meaningful impact, broadcasters must cover, at the very least, those topics which are of *vital concern* to their listeners." *Id.* at 993 (emphasis added).

Additionally, the unprecedented enforcement of the adequate coverage obligation may be reserved for future application only in cases in which licensees exhibit the kind of programming conduct practiced by WHAR—failure to originate programming addressed to a critical public issue, failure to tailor network programming to this issue, and ignorance of the content of network programming actually aired.[78]

Mink does not signal the emergence of strong FCC enforcement of the first element of the fairness doctrine. The Commission's written opinion was limited to discussion of the rare "critical issue" responsibility of licensees. Moreover, the opinion was silent regarding the general fairness doctrine obligation to provide coverage of more common public issues. This obligation, given the pervasiveness of general public issues, is perhaps more crucial to the purposes of the fairness doctrine but has yet to be enforced strictly by the FCC. While critical issues must now be covered suitably, issues of lesser importance to the community might never be broadcast.

Another limitation to the significance of *Mink*'s explicit enforcement of the first prong of the fairness doctrine may well be the reaction to the concept of the FCC forcing a broadcaster to cover a particular issue.[79] Although the *Mink* rationale is deeply embedded in fairness doctrine law, the constitutional ramifications of the decision may lead to increasing pressure to modify or totally eliminate the doctrine.[80]

78. *See* note 17 *supra*. Further, the import of *Mink* may be vitiated by the Commission's traditional deference to the licensee's discretion in choosing and covering issues. WHAR was found to be patently unreasonable in its programming conduct, but the criteria for FCC intervention in licensee discretion continues to be the reasonableness and good faith of the broadcaster. WHAR's compliance with the *Mink* decision underlines the frailty of the decision itself. *See* note 18 *supra*. Despite the strong and unprecedented rule of *Mink*, WHAR was allowed to fulfill its adequate coverage obligations with a weekly, half-hour, telephone-talk program on which the moderator raised the strip mining issue. The failure of the original complainants to appeal the WHAR compliance report and the FCC's traditional deference to licensee discretion in this matter explains the allowance of WHAR's lackluster compliance. Had the original complainants appealed the compliance report, the FCC response might have been different. The fact remains, however, that licensees are compelled to give adequate coverage to critical issues; but the FCC cannot issue fairness doctrine inquiries and decisions on its own motion—it is up to private individuals to initiate such actions.

79. Such a reaction may well center on the first amendment aspects of this compulsion, an issue not addressed by the FCC in *Mink* although requested by WHAR to do so. 59 F.C.C.2d at 989-90. For initial reaction to the *Mink* decision, see 122 CONG. REC. S10297 (daily ed. June 23, 1976) (remarks of Sen. Proxmire); 122 CONG. REC. H6470-71 (daily ed. June 22, 1976) (remarks of Rep. Mink); 122 CONG. REC. S8919-20 (daily ed. June 10, 1976) (remarks of Sen. Proxmire); Fitzpatrick, *Federal News Editors*, Wash. Star, June 24, 1976, at 18, col. 1; 10 Press Censorship Newsletter of the Reporters' Committee for Freedom of the Press, 112-14 (Sept.-Oct. 1976); Resolution of the Bd. of Directors, Nat'l Ass'n of Broadcasters, June 14-17, 1976.

80. 59 F.C.C.2d at 998-99 (Comm'r Robinson, concurring).

III. CONCLUSION

Mink v. Radio Station WHAR marks a bold move on the part of the Federal Communications Commission—the unprecedented enforcement of the adequate coverage responsibilities of the fairness doctrine. The true impact of *Mink*, however, will depend on how the Commission applies it in the future. The decision could well have laid the groundwork for expanded enforcement of the adequate coverage obligation on the common public issue level or it could be restricted to the confines of its particular facts. It would seem that the first amendment considerations inherent in *Mink*'s holding, as well as its extreme factual setting, make unlikely a broad application of the decision.

In any event, radio and television broadcasters must now give appropriate air time to the "burning issues of the seventies."[81] Additionally, those concerned with responsive broadcast media will find in *Mink* substantive bases for fairness doctrine complaints. Moreover, as Commissioner Robinson suggested in his concurrence in *Mink*, the decision portends serious consideration of the continued efficacy and purpose of the fairness doctrine itself.[82]

P. Michael Nugent, Jr.

81. 24 F.C.C.2d at 750-51.
82. 59 F.C.C.2d at 998-99.