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# The "Public Interest" Standard: The Search for the Holy Grail


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# The “Public Interest” Standard: The Search for the Holy Grail

Erwin G. Krasnow\*

Jack N. Goodman\*\*

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## I. INTRODUCTION

An observer of the federal administrative/regulatory system once stated that government agencies can be divided into two categories: "Deliver the Mail" and "Holy Grail."<sup>1</sup> "Deliver the Mail" agencies perform neutral, mechanical, logistical functions; they send out Social Security checks, procure supplies, or deliver the mail.<sup>2</sup> "Holy Grail" agencies, on the other hand, pursue an often more controversial and difficult mandate to realize some grand, moral, civilizing goal.

The earliest regulator of electronic communications in the United States, the Federal Radio Commission (FRC), came into being primarily to "deliver the mail,"—that is to act as a traffic cop of the airwaves. However, both the FRC and its successor agency, the Federal Communications Commission (FCC or Commission), had a vague but oft-repeated Holy Grail clause written into their charters: the requirement that they uphold the "public interest, convenience and necessity."<sup>3</sup>

Perhaps no single area of communications policy has generated as much scholarly discourse, judicial analysis, and political debate over the course of the last seventy years as has that simple directive to regulate in the "public interest." Critics of this public interest standard have often charged that the phrase "is vague to the point of vacuousness, providing neither guidance nor constraint on the [regulatory] agency's action."<sup>4</sup>

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1. Taylor Branch, *The Culture of Bureaucracy: We're All Working for the Penn Central*, WASH. MONTHLY, Nov. 1970, at 8, 20.

2. *Id.*

3. Glen O. Robinson, *Title I, The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 3, 14 (Max D. Paglin ed., 1989) [hereinafter LEGISLATIVE HISTORY].

4. *Id.*

Moreover, as former FCC Commissioner Ervin Duggan recently observed, "successive regimes at the FCC have oscillated wildly between enthusiasm for the public interest standard and distaste for it."<sup>5</sup> If the history of this elusive regulatory standard makes anything clear, it is the fact that just what constitutes service in the "public interest" has encompassed different things at different times.

This Article identifies the current contours of the public interest standard as they have emerged from statute, regulatory activity, and judicial scrutiny over the last eight decades.<sup>6</sup> First, the Article reviews the historical context of Congress's early efforts at broadcast regulation. Second, it traces the development of the substantive characteristics and elements of the standard through a survey of the pivotal interpretive rulings of the FRC and, later, the FCC concerning the standard. Third, it examines the impact that the United States Supreme Court has had in shaping the standard in a series of important decisions. Finally, the Article offers some general observations about the nature of the public interest standard as a device that: (1) eludes satisfactory definition; (2) remains to a great extent dependent on a consensus that must be repeatedly fashioned anew from among the competing values and interests (economic, social, political, and constitutional) at stake in the decision-making process; and (3) one that, notwithstanding its shortcomings, still enjoys significant support.

## II. ORIGINS OF THE PUBLIC INTEREST STANDARD

At a fundamental level, the public interest standard is rooted in statute. Under sections 307 and 309 of the Communications Act, the FCC may grant the use of a frequency for a limited term to an applicant that demonstrates that the proposed service would serve "the public interest, convenience, and necessity."<sup>7</sup> License renewal applicants are to be evaluated under the same standard.<sup>8</sup> Although the standard has become a keystone of

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5. Ervin S. Duggan, *Congressman Tauzin's Interesting Idea*, BRDCST. & CABLE, Oct. 20, 1997, at S18.

6. This Article draws heavily on ERWIN G. KRASNOW ET AL., *THE POLITICS OF BROADCAST REGULATION* (1982); F. LESLIE SMITH ET AL., *ELECTRONIC MEDIA AND GOVERNMENT, THE REGULATION OF WIRELESS AND WIRED MASS COMMUNICATION IN THE UNITED STATES* (1995); and JONATHAN W. EMORD, *FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT* (1991).

7. Communications Act of 1934, ch. 652, §§ 307, 309, 48 Stat. 1064 (codified as amended at 47 U.S.C.A. §§ 307, 309 (West 1991 & Supp. 1997)).

8. Congress did not uniformly use the phrase "public interest" in the Communications Act. For example, the standard of "public interest" is specified in sections 201(b), 215(a), 319(c), and 315(a); "public convenience and necessity" in section 214(a) and (c); "interest of public convenience and necessity" in section 214(d); "public interest, convenience and necessity" in sections 307(c), 309(a), and 319(d); "public convenience, interest or neces-

contemporary communications regulatory policy, it has not always enjoyed such status. On the contrary, as discussed below, the present contours of the standard, and the concomitant regulatory authority it vests in the FCC, have evolved over the course of time and experience and reflect the changing tapestry of American culture over several generations.

### A. *The Radio Act of 1912 and the Annual Radio Conferences*

The Wireless Ship Act of 1910 applied to the use of radio by ships,<sup>9</sup> but the Radio Act of 1912, enacted in the wake of the Titanic disaster, was the first domestic law for general control of radio.<sup>10</sup> It empowered the Secretary of Commerce and Labor to issue licenses for radio stations to United States citizens upon request and to specify the frequencies to be used by the stations. However, the 1912 Act gave the Secretary no authority to reject applications. Congress had not anticipated the rejection of applications because it presumed that there was sufficient spectrum for all who needed to operate radio stations.

The unregulated growth of radio stations in the early 1920s created intolerable interference. In response, then-Secretary of Commerce Herbert Hoover convened a series of four annual national radio conferences in which representatives of the radio industry and government met to adopt a system of self-regulation. Secretary Hoover first expressed the concept of a public interest in radio communications in a speech before the Fourth Annual Radio Conference in 1925. He stated:

The ether is a public medium, and its use must be for public benefit. The use of a radio channel is justified only if there is public benefit. The dominant element for consideration in the radio field is, and always will be, the great body of the listening public, millions in number, countrywide in distribution. There is no proper line of conflict between the broadcaster and the listener, nor would I attempt to array one against the other. Their interests are mutual, for without the one the other could not exist.<sup>11</sup>

The Conference generally endorsed the public interest concept and rec-

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sity" in section 307(a); and "public interest, convenience *or* necessity" in sections 311(b) and 311(c)(3) (emphases added). On September 17, 1986, the FCC recommended that Congress drop all broadcast-related mentions of "convenience" or "necessity." It called the words "superfluous. . . . To the extent the issues embodied in these terms are relevant to radio regulation, they are subsumed under Commission review of the 'public interest.'" FCC Legislative Proposal, Track I, 25 (Sept. 17, 1981). Congress did not amend the Act as the FCC had proposed.

9. Wireless Ship Act of 1910, Pub. L. No. 61-262, 36 Stat. 629 (1910).

10. Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 (1912).

11. Proceedings of the Fourth National Radio Conference and Recommendations for Regulation of Radio 7 (Nov. 9-11, 1925) (Government Printing Office 1926).

ommended legislation incorporating it. But the delegates ultimately “gridlocked” on the idea, apparently because no one could come up with an acceptable definition.<sup>12</sup>

Congressman Wallace H. White, Jr., one of the co-authors of the Radio Act of 1927, stated that despite the inability of the delegates to the Radio Conference to agree on a definition, the “public interest” was a central concern in writing the 1927 Act:

[The radio conference] recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. . . . If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served.<sup>13</sup>

Former FCC Chairman Newton Minow has commented that, starting with the Radio Act of 1927, the phrase “public interest, convenience and necessity” has provided the battleground for broadcasting’s regulatory debate.<sup>14</sup> Congress’s reason for including such a phrase was clear: the courts, interpreting the Radio Act of 1912 as a narrow statute, had said that the Secretary of Commerce could not create additional rules or regulations beyond that Act’s terms.<sup>15</sup> This left Hoover unable to control the rapidly changing technologies. In the words of Senator Clarence Dill, one of the co-authors of the 1927 Radio Act, Hoover “issued everybody a license who has made application, and that has brought the present chaos.”<sup>16</sup>

The public interest notion in the 1927 and 1934 Acts was intended to enable the regulatory agency to create new rules, regulations, and standards as required to meet new conditions. Congress clearly hoped to create

12. *Broadcasters’ Public Interest Obligations and the Fairness in Broadcasting Act of 1991: Hearing on S. 217 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong. 2-3 (1991) (statement of Alfred C. Sikes, Chairman, FCC).

13. 67 CONG. REC. 5479 (1926).

14. NEWTON N. MINOW, *EQUAL TIME, THE PRIVATE BROADCASTER AND THE PUBLIC INTEREST* 8 (1964).

15. See *Hoover v. Intercity Radio Co.*, 283 F. 1003 (D.C. Cir. 1923), writ of error dismissed as moot, 266 U.S.C. 636 (1924), where the Court of Appeals for the District of Columbia Circuit held that Secretary Hoover had the discretion under the Radio Act to select a frequency and set the hours of use, but lacked discretion to deny any application for a license not otherwise specifically barred by the Radio Act of 1912. Two years later, in *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926), the U.S. District Court for the Northern District of Illinois determined that the Radio Act of 1912 did not authorize the Secretary of Commerce to deny the issuance of licenses or to require operation on a precise wavelength or under certain time constraints not specifically provided for in the Act.

16. 68 CONG. REC. 3031 (1927).

an act more durable than the Radio Act of 1912.

### B. *The Radio Act of 1927*

In contrast to the 1912 Radio Act's narrow limits on the power of the Department of Commerce to "traffic control," Congress intended in the Radio Act of 1927 to delegate broad regulatory powers to the FRC, limiting that agency's discretion mainly by the requirement that its actions serve the public interest.<sup>17</sup> The 1927 Act employed a utility regulation model under which broadcasters were deemed "public trustees" who were "privileged" to use a scarce public resource. The FRC explained this public trust model as follows:

[Despite the fact that] [t]he conscience and judgment of a station's management are necessarily personal . . . the station itself must be operated as if owned by the public. . . . It is as if people of a community should own a station and turn it over to the best man in sight with this injunction: 'Manage this station in our interest. . . .' The standing of every station is determined by that conception.<sup>18</sup>

Nevertheless, the origin of the phrase "public interest, convenience, and necessity" is not evident from the legislative history of the Radio Act of 1927. Former FCC Chairman Minow recounted a conversation with then Senator Clarence C. Dill, which shed some light on the question. According to Senator Dill, the drafters had reached an impasse in their attempts to define a standard for the regulation of radio stations. A young lawyer who had been loaned to the Senate by the Interstate Commerce Commission said, "[w]ell, how about 'public interest, convenience and necessity'? That's what we [need] there." Dill replied, "[t]hat sounded pretty good, so we decided we would use it, too."<sup>19</sup> However, while the fortuitous emergence of the public interest standard satisfied the immediate need of the drafters, the difficult work of giving the standard meaning in the context of radio regulation was left unfinished.

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17. J. Roger Wollenberg, *Title III, The FCC as Arbiter of 'The Public Interest, Convenience, and Necessity'*, in LEGISLATIVE HISTORY, *supra* note 3, at 61, 65.

18. *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 FED. COMM. B.J. 5, 14 (1950) (quoting *Schaeffer Radio Co.*, an unpublished 1930 FRC decision).

19. NEWTON N. MINOW & CRAIG L. LAMAY, *ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT* 4 (1995). The phrase came from an 1887 Illinois railroad statute which was adapted into the Federal Transportation Act of 1920. In *Munn v. Illinois*, 94 U.S. 113, 126 (1876), the Supreme Court held that states may regulate the use of private property when the use was "affected with a public interest." In the Transportation Act of 1920, which amended the Interstate Commerce Act, the device of a certificate of convenience and necessity was first applied to the regulation of interstate commerce.

### III. IMPLEMENTATION BY THE FEDERAL RADIO COMMISSION

#### A. *The 1928 Statement*

Following enactment of the 1927 Act, the FRC, in 1928, issued its first comprehensive interpretation of the public interest standard.<sup>20</sup> The Commission indicated that it would apply the standard to programming content as well as technical matters. Broadcasters, the FRC said, should not use their stations for their own private interests, and the interests of the audience should take precedence over those of licensees. The FRC concluded its policy statement with the following observations on the public interest standard:

In conclusion, the commission desires to point out that the test—"public interest convenience or necessity"—becomes a matter of comparative and not an absolute standard when applied to broadcasting stations. Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the commission must determine from among the applicants before it which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser.<sup>21</sup>

Only a year after the release of the policy statement, the FRC expanded upon its new regulatory mandate, providing further guidance on the meaning of the "public interest" in *Great Lakes Broadcasting Co. v. Federal Radio Commission*.<sup>22</sup>

#### B. *The Great Lakes Decision*

*Great Lakes Broadcasting*<sup>23</sup> involved a conflict among three Chicago area stations requesting modification of their technical facilities. In assessing their competing claims, the Commission advanced the following guidelines as a gauge for assessing a licensee's performance under the public interest standard:

- (1) a station should meet the "tastes, needs, and desires of all substantial groups among the listening public . . . in some

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20. 2 FRC ANN. REP. 166 (1928).

21. *Id.* at 169-70.

22. *Great Lakes Brdcast. Co.*, 3 FRC ANN. REP. 32 (1929), *aff'd in part and rev'd in part*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930).

23. *Id.*



fair proportion, by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family find a place;"<sup>24</sup>

- (2) programming would be considered at renewal time in determining whether a station has met public interest requirements;<sup>25</sup>
- (3) where two stations apply for the same frequencies, the station with the longest record of continuous service has the advantage; where there is a substantial difference between the programming service of the two, the station with superior programming will have the advantage;<sup>26</sup> and
- (4) there is no room for operation of "propaganda stations," as opposed to "general public-service stations."<sup>27</sup>

The *Great Lakes Broadcasting* decision has been considered to be the FRC's most important decision because it "contain[ed] the seeds of concepts that would later germinate into significant regulatory policies . . . ."<sup>28</sup> The decision firmly established programming content as a criterion of the public interest, and included notions which later formed the basis for the FCC's requirements governing ascertainment of community needs and the Fairness Doctrine.<sup>29</sup>

### C. Denial of Licenses Based on Program Content

The FRC used its powers under the public interest standard to revoke the licenses of two stations based solely on its review of the licensee's programming practices. These actions, described below, were taken despite the no-censorship provision of section 29 of the 1927 Act, which provided in relevant part:

Nothing in this Act shall be understood or construed to give the li-

24. *Id.* at 34.

25. *Id.* at 32-35.

26. *Id.* at 32.

27. *Id.* at 35. In *Great Lakes Broadcasting*, 37 F.2d 993 (D.C. Cir. 1930), the Court of Appeals upheld the FRC's decision to consider programming as a primary criterion of the public interest standard.

28. F. LESLIE SMITH ET AL., *supra* note 6, at 240.

29. *Id.*

censing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere<sup>30</sup> with the right of free speech by means of radio communications.

## 1. The Brinkley Case

In 1930, the FRC denied renewal of the license of KFKB, Milford, Kansas, on the ground that the station was being controlled and used by Dr. John Brinkley, the "goat-gland doctor," to further his personal interest.<sup>31</sup> The "Medical Question Box," a program aired in three half-hour segments daily, featured Dr. Brinkley answering questions from listeners on health and medicine. In response to listener questions, Dr. Brinkley usually recommended several of his own prescriptions from his own pharmaceutical supply house. The FRC held that Brinkley's practice of diagnosing patients who he had not seen contravened the public health and safety and therefore, the public interest.<sup>32</sup> It also found that he operated KFKB solely for his own private interests.<sup>33</sup>

In affirming the denial of KFKB's renewal, the Court of Appeals rejected Brinkley's argument that the FRC violated the no-censorship prohibition of section 29 of the Radio Act, stating:

This contention is without merit. There has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest, convenience, or necessity will be served by a renewal of appellant's license, the commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship.<sup>34</sup>

The court agreed with the FRC that broadcasting "is impressed with a public interest" and observed that because "the number of available broadcasting frequencies is limited," the FRC has the authority to "consider the character and quality of the service to be rendered."<sup>35</sup>

## 2. The Shuler Case

The FRC also denied the application for renewal of license of KDEF, Los Angeles. That a station was used primarily to broadcast sermons by

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30. 47 U.S.C. § 29 (1927). The no-censorship provision was reenacted as section 326 of the Communications Act of 1934. See 47 U.S.C. 326 (1994).

31. KFKB Brdcst. Ass'n v. FRC, 47 F.2d 670, 672 (D.C. Cir. 1931).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 672.

Trinity Methodist Church's pastor, Reverend Bob ("Fighting Bob") Shuler, who attacked Jews, the Roman Catholic Church, law enforcement officials in Los Angeles, and many others. Shuler based his appeal on constitutional grounds, namely, that the FRC decision violated his First Amendment right to free speech and his Fifth Amendment right to due process of law.

One of the issues before the Court of Appeals was whether the FRC's refusal to renew Shuler's license was a prior restraint under the then recently decided case of *Near v. Minnesota*,<sup>36</sup> or just a post-publication punishment. The court concluded that while a citizen has in the first instance the right to utter or publish his sentiments, it is "upon condition that he is responsible for any abuse of that right."<sup>37</sup> The refusal of the FRC to renew a license "to one who has abused it to broadcast defamatory and untrue matter," the court found, "is not a denial of the freedom of speech, but merely the application of the regulatory power of Congress in a field within the scope of its legislative authority."<sup>38</sup> The court held that Reverend Shuler's broadcasts did not contribute to the "public interest," the test the FRC was "required to apply" in considering renewal applications.<sup>39</sup>

#### IV. IMPLEMENTATION BY THE FEDERAL COMMUNICATIONS COMMISSION

Although the decisions in *Brinkley* and *Shuler* vindicated the FRC's powers to review programming to determine whether or not it was in the "public interest, convenience, and necessity," the FCC used its programming regulatory powers cautiously during the 1930s and early 1940s, with the exception of forcing most of the remaining propaganda stations off the air.<sup>40</sup> However, in the mid-1940s, primarily because of the changing economies of network radio, the FCC decided it was time for another general policy statement and directed its staff to consider the public interest implications of radio programming trends.<sup>41</sup>

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36. *Near*, 283 U.S. 697 (1931).

37. *Trinity Methodist Church S. v. FRC*, 62 F.2d 850, 851 (D.C. Cir.), *cert. denied*, 284 U.S. 685 (1932).

38. *Id.* The Court also held that the refusal to renew a license is not a taking within the Fifth Amendment, stating that "[t]here is a marked difference between the destruction of physical property and the denial of a permit to use the limited channels of the air." *Id.* at 853 (citation omitted).

39. *Id.* at 852.

40. DONALD M. GILLMER ET AL., *MASS COMMUNICATIONS LAW, CASES AND COMMENT* 739 (1990).

41. *Id.*

### A. *The Blue Book*

In 1946, the FCC released the staff report entitled *Public Service Responsibility of Licensees*, which became more popularly known as the “*Blue Book*” because of its blue cover.<sup>42</sup> The *Blue Book* attempted to clarify the Commission’s position on the public interest standard by setting forth programming guidelines for consideration of a licensee’s performance at renewal time. The *Blue Book* treated the public interest as encompassing four requirements: (1) “sustaining” (un-sponsored) programs; (2) local live programs; (3) programming devoted to the discussion of local public issues; and (4) the elimination of advertising excesses.<sup>43</sup> While license renewal forms were revised to make them compatible with the *Blue Book*, the FCC neither adopted the *Blue Book* nor repudiated it. One commentator observed:

Its theme of balanced programming as a necessary component of broadcast service in the public interest coupled with its emphasis on a reasonable ratio of un-sponsored (‘sustaining’) programs posed too serious a threat to the profitability of commercial radio for either the industry, Congress, or the FCC to want to match regulatory promise with performance.”<sup>44</sup>

### B. *1960 Program Policy Statement*

Based on a series of hearings which it conducted in the late 1950s, the FCC concluded that additional clarification of the public interest standard was necessary. In 1960, the FCC adopted a *Report and Statement of Policy (1960 Programming Policy Statement)* which listed the “major elements usually necessary to meet the public interest:”<sup>45</sup>

- |                                          |                                             |
|------------------------------------------|---------------------------------------------|
| 1. Opportunity for Local Self-Expression | 8. Political Broadcasts                     |
| 2. Development and Use of Local Talent   | 9. Agricultural Programs                    |
| 3. Programs for Children                 | 10. News Programs                           |
| 4. Religious Programs                    | 11. Weather and Market Reports              |
| 5. Educational Programs                  | 12. Sports Programs                         |
| 6. Public Affairs Programs               | 13. Service to Minority Groups              |
| 7. Editorialization by Licensees         | 14. Entertainment Programming <sup>46</sup> |

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42. FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946), reprinted in DOCUMENTS OF AMERICAN BROADCASTING 133-231 (Frank J. Kahn ed., 3d ed. 1978).

43. *Id.*

44. DOCUMENTS OF AMERICAN BROADCASTING, *supra* note 42, at 133.

45. Network Programming Inquiry, *Report and Statement of Policy*, 25 Fed. Reg. 7291, 7295 (1960).

46. *Id.*

These types of programs, in some reasonable mix, were considered to be evidence that broadcasters were serving the public interest. The *1960 Programming Policy Statement* also concluded that broadcasters should determine the tastes, needs and desires of the community and design programming to meet those needs. This led to the FCC's adoption of formal ascertainment requirements, which compelled applicants for broadcast licenses to detail the results of interviews conducted by the applicant with community "leaders" in nineteen FCC specified categories ranging from agriculture to religion.<sup>47</sup>

### C. *The Marketplace Approach to Interpreting the Public Interest Standard*

Against this background of detailed regulation, beginning in the late 1970s, the FCC reinterpreted the public interest standard in the light of the "marketplace." Under this approach, regulation is viewed as necessary only when the marketplace clearly fails to protect the public interest, but not when there is only a potential for failure.<sup>48</sup> Early in his administration, FCC Chairman Mark Fowler, made clear that he intended to take a "marketplace approach" to broadcast regulation:

Put simply, I believe that we are at the end of regulating broadcasting under the trusteeship model. Whether you call it "paternalism" or "nannyism," it is "Big Brother," and it must cease.

I believe in a marketplace approach to broadcast regulation. . . . Under the coming marketplace approach, the Commission should, so far as possible, defer to a broadcaster's judgment about how best to compete for viewers and listeners because this serves the public interest.<sup>49</sup>

#### 1. Radio and TV Deregulation

In its *Deregulation of Radio*<sup>50</sup> decision in 1981, the FCC eliminated

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47. Primer on Ascertainment of Community Problems by Brdcast. Applicants, *Report and Order*, 27 F.C.C.2d 650, 21 Rad. Reg. 2d (P & F) 1507 (1971).

48. The rationale for marketplace regulation was presented in a law review article by Chairman Fowler and Daniel Brenner, his legal assistant. See Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982). Critical of the "trusteeship model" and the use of the "vague" public interest standard to impose programming restrictions, they concluded that in light of advances in electronic radio technology, the scarcity rationale was no longer viable and that the marketplace, the listeners and viewers should define the public interest. In their view, the public interest standard abridged broadcasters' First Amendment rights.

49. Mark S. Fowler, *The Public's Interest*, Address at a Meeting of the International Radio and Television Society (Sept. 23, 1981), in COMM. & L., Winter 1982, at 51, 52.

50. *Deregulation of Radio*, *Report and Order*, 84 F.C.C.2d 968, 49 Rad. Reg. 2d (P &

rules and policies governing program logs, commercial time limitations, ascertainment of community problems, and non-entertainment programming requirements. The Commission stated that it recognized that its actions "remove the illusory comfort of a specific, quantitative guideline,"<sup>51</sup> but that Congress deliberately placed the public interest standard in the Communications Act to provide the Commission with maximum flexibility in dealing with the ever-changing conditions in the field of broadcasting:

The Commission was not created solely to provide certainty. Rather, Congress established a mandate for the Commission to act in the public interest. We conceive of that interest to require us to regulate where necessary, to deregulate where warranted, and above all, to assure the maximum service to the public at the lowest cost and with the least amount of regulation and paperwork.<sup>52</sup>

In 1984, the Commission adopted decisions generally granting to commercial television, and to non-commercial broadcasters, the degree of deregulation afforded commercial radio stations in 1981.<sup>53</sup>

## 2. "Underbrush" Policies

In repealing a number of policies affecting programming and various commercial practices, the FCC indicated its concern for the First Amendment rights of broadcasters in interpreting the public interest standard:

[P]olicies cautioning broadcasters not to engage in certain programming practices or establishing rigid guidelines relating to such programming raise fundamental questions concerning the constitutional rights of broadcast licensees, and therefore cannot be retained in the absence of a clear and compelling showing that the public interest demands their retention.<sup>54</sup>

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F) 1 (1981), *aff'd in part and remanded in part sub. nom.* Office of Comm. of the United Church of Christ v. FCC, 707 F.2d 1413 (1983).

51. *Id.* para. 10.

52. *Id.*

53. Revision of Programming and Commercialization Policies Ascertainment Requirements, and Program by Requirements for Commercial TV Stations, *Report and Order*, 98 F.C.C.2d 1075, 56 Rad. Reg. 2d (P & F) 1005 (1984); Revision of Program Policies and Reporting Requirements Related to Public Brdcast. Licensees, *Report and Order*, 98 F.C.C.2d 746, 56 Rad. Reg. 2d (P & F) 1157 (1984). In *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987), the Court of Appeals upheld the elimination of program lists mandated by the FCC's TV Deregulation decision, but ruled that the Commission had failed to explain adequately the elimination of commercial guidelines for children's programming.

54. Elimination of Unnecessary Brdcast. Reg. and Inquiry into Subscription Agreements, 54 Rad. Reg. 2d (P & F) 1043 (1983). The FCC eliminated prohibitions against ratings distortion conflicts, of interest of station personnel, promotions of non-broadcasts interests, misleading concert promotions, failure to adhere to sales contracts, and the broadcast of false, misleading, and deceptive commercials.

The United States Court of Appeals for the District of Columbia Circuit affirmed the FCC's elimination of "underbrush" policies in *Telecommunications Research and Action Center v. FCC*,<sup>55</sup> thereby approving the agency's reliance on marketplace forces. The Court held that the public interest standard is best left to the discretion of the FCC, which "may rely upon marketplace forces to control broadcast abuse if the Commission reasonably finds that a market approach offers the best means of controlling the abuse."<sup>56</sup>

### 3. Postcard Renewal Form

The FCC's decision to issue a shortened renewal form (the so-called "postcard renewal") was challenged by Black Citizens for a Fair Media on the ground that the abbreviated renewal form violated the FCC's mandate to determine that the public interest, convenience, and necessity would be served by granting a license.<sup>57</sup> The Court of Appeals affirmed the simplified renewal process, holding that the Communications Act did not require the FCC to ask program-related questions and that the Commission could make public interest determinations using the simplified procedure.<sup>58</sup>

### 4. Fairness Doctrine Repeal

In *Syracuse Peace Council*,<sup>59</sup> the FCC abolished the Fairness Doctrine which imposed a two-fold duty on broadcast licensees to provide coverage of "controversial issues of public importance" and to afford "a reasonable opportunity" for the airing of contrasting points of view.<sup>60</sup> The

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55. *TRAC*, 800 F.2d 1181 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

56. *Id.* at 1185.

57. *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 409 (1983), *cert. denied*, 467 U.S. 1255 (1984).

58. *Id.*

59. Complaint of Syracuse Peace Council against TV Station WTVH, *Memorandum Opinion and Order*, 2 FCC Rcd. 5043, 63 Rad. Reg. 2d (P & F) 541 (1987) [hereinafter *Syracuse Peace Council Opinion and Order*], *reconsideration denied by Memorandum Opinion and Order*, 3 FCC Rcd. 2035, 64 Rad. Reg. 2d (P & F) 1073 (1988). Finding that the Fairness Doctrine inhibited broadcasters from covering controversial issues, the Commission held "that under the constitutional standard established by *Red Lion* and its progeny, the fairness doctrine contravenes the First Amendment and its enforcement is no longer in the public interest." *Id.* para. 61. In *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. 1989), *cert. denied*, 493 U.S. 1019 (1990), the Court of Appeals for the D.C. Circuit upheld the Commission's public interest finding but declined to address the constitutional issues. Judge Starr, in a concurring opinion, stated that he would uphold the FCC's finding that the Fairness Doctrine was unconstitutional.

60. *See, e.g.*, Committee for the Fair Brdcast. of Controversial Issues, *Report and Order*, 25 F.C.C.2d 283, para. 25, 19 Rad. Reg. (P & F) 541 (1973) (stating "strict adherence to the fairness doctrine" was the "single most important requirement of operation in the public interest—the 'sine qua non' for grant of a renewal of license.").

Commission repudiated the spectrum scarcity rationale for those requirements. Although the FCC disavowed any interest in calling into question the validity of the public interest standard or eliminating its public trustee-ship model for broadcast regulation by contending that it "may still impose certain conditions on licensees in furtherance of [the] public interest,"<sup>61</sup> one scholar commented that "it is clear that without spectrum scarcity, there can be little left of the notion that a broadcaster must abide by a pre-ordained federal conception of what constitutes broadcasting in the public interest."<sup>62</sup>

## V. THE SUPREME COURT AND THE PUBLIC INTEREST STANDARD

The agency actions described in the foregoing sections, while unquestionably important to our present understanding of the reach and flexibility of the public interest standard, do not exist in a vacuum. Equally important to the analysis is the contribution of the judiciary in its review of those agency actions. Several decisions of the United States Supreme Court are particularly noteworthy.

### A. *Nelson Brothers v. Federal Radio Commission*

In 1933, the Supreme Court issued its first opinion involving the public interest standard.<sup>63</sup> The FRC had granted full-time operating authority to WJKS, Gary, Indiana, at 560 kilohertz, and revoked the licenses of WIBO and WPCC, stations that shared time on that frequency (the formats of NBC affiliate WIBO, and WPCC, a religious station, were duplicated by other stations serving the Gary market). The Court, in affirming the FRC's decision, held that the Commission was entitled to evaluate and consider programming provided by various stations:

In granting licenses the commission is required to act 'as public convenience, interest, or necessity requires.' . . .

In the instant case the commission was entitled to consider the advantages enjoyed by the people of Illinois under the assignments to that state, the services rendered by the respective stations, the reasonable demands of the people of Indiana, and the special requirements of

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61. *Syracuse Peace Council Opinion and Order*, 2 FCC Rcd. 5043, para. 81, 63 Rad. Reg. 2d (P & F) 541.

62. EMORD, *supra* note 6, at 236. Former FCC General Counsel Henry Geller agreed: "[t]he fairness doctrine flows directly from the public trustee notion, and to eliminate the fairness doctrine one must also eliminate the notion that broadcasters should act as public trustees." Henry Geller, *Broadcasting and the Public Trustee Notion: A Failed Promise*, 10 HARV. J.L. & PUB. POL'Y 8, 87 (1987).

63. *Nelson Bros. Bond & Mortgage Co. v. FRC*, 289 U.S. 266 (1933).



radio service at Gary.<sup>64</sup>

### B. *FCC v. Pottsville Broadcasting*

The Supreme Court upheld the public interest standard which it described as the "touchstone" of authority for the FCC.<sup>65</sup> It said that "[t]he Commission's responsibility at all times is to measure applications by the standard of 'public convenience, interest, or necessity.'"<sup>66</sup> The public interest standard, the Court said, is "as concrete as the complicated factors for judgment in such a field of delegated authority permit" and the approach is "a supple instrument for the exercise of discretion."<sup>67</sup>

### C. *FCC v. Sanders Brothers Radio*

The Supreme Court in the *Sanders Brothers* case held that the public interest standard did not require the FCC to consider economic injury to existing stations when considering an application for a new broadcast station.<sup>68</sup> The Court offered a narrower interpretation of the public interest standard which suggested that the FCC had no supervisory control over programs, business matters, or station policies:

[T]he Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.<sup>69</sup>

### D. *NBC v. United States*

In the *NBC* case, the Supreme Court upheld the FCC's "chain broadcasting" network rules which were designed to allow network affiliates to select programming free of network constraints.<sup>70</sup> The *NBC* case represents the most sweeping statement ever made by the Supreme Court in support of the FCC's authority to regulate the electronic media because it:

- (1) affirmed the right of the FCC to exercise broad powers over the broadcasting industry;

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64. *Id.* at 285.

65. *FCC v. Pottsville Brdcast. Co.*, 309 U.S. 134, 138 (1940).

66. *Id.* at 145.

67. *Id.* at 138.

68. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

69. *Id.* at 475.

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

- (2) affirmed that the public interest standard is the touchstone of FCC authority to exercise broad regulatory powers;
- (3) held that the public interest standard is not unconstitutionally vague;
- (4) offered a scarcity rationale—the notion that regulation is necessary because the airwaves are limited—as justification for the public interest standard and for content regulation; and,
- (5) ruled that regulations that may result in license revocation or nonrenewal do not violate broadcasters' First Amendment rights.<sup>71</sup>

The following quote from the Supreme Court's majority opinion in *NBC* is the most frequently cited authority for the expansive view of the FCC's regulatory mission:

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic.<sup>72</sup>

### E. *Red Lion Broadcasting Co. v. FCC*

In 1969, the Supreme Court upheld the FCC's Fairness Doctrine as well as its related personal attack and political editorializing rules in its landmark *Red Lion* decision.<sup>73</sup> In unanimously affirming the FCC, the Court emphasized three key principles:

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71. F. LESLIE SMITH ET AL., *supra* note 6, at 250.

72. *NBC*, 319 U.S. at 215-16. One commentator characterized the quote as:

[P]erhaps the most misinterpreted words in the judicial history of broadcasting regulation . . . Many readers of this part of the decision have taken this to mean that the Court was approving FCC dictation of program content. In context, however, these two sentences simply say that the Commission has the authority to select licensees as well as to "supervise" them. "Traffic" in the Court's analogy refers to licensees, not to programs.

DOCUMENTS OF AMERICAN BROADCASTING, *supra* note 42, at 100.

73. *Red Lion*, 395 U.S. 367 (1969).

- (1) *On the uniqueness of broadcasting*: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."<sup>74</sup>
- (2) *On the fiduciary principle*: "There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary . . . ."<sup>75</sup>
- (3) *On the public interest*: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."<sup>76</sup>

The Court added one significant caveat: if experience with broadcast technology post-1969 proved that "the net effect of [administration of the Fairness Doctrine was to reduce] rather than [increase] the volume and quality of coverage, there [would] be time enough to reconsider the constitutional implications."<sup>77</sup>

#### F. *CBS Inc. v. Democratic National Committee*

The Supreme Court has observed in *CBS v. Democratic National Committee* that the FCC must "walk a 'tightrope' to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act."<sup>78</sup> After referring to its *Red Lion* decision, the Court noted that "[t]he problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."<sup>79</sup>

#### G. *FCC v. Pacifica Foundation*

By a five to four vote, the Supreme Court affirmed the decision of the FCC that George Carlin's "filthy words" monologue was "indecent."<sup>80</sup> Justice John Paul Stevens, in the prevailing opinion, explained that Car-

74. *Id.* at 388.

75. *Id.* at 389.

76. *Id.* at 390.

77. *Id.* at 393.

78. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973).

79. *Id.* at 102.

80. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

lin's words might be appropriate on other media, but not over the radio: "[w]e have long recognized that each medium of expression presents special First Amendment problems. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."<sup>81</sup> The opinion pointed out that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans"—since listeners are "constantly tuning in and tuning out," prior warnings would not be effective in protecting the unwilling listeners.<sup>82</sup>

#### H. *FCC v. WNCN Listeners Guild*

In *WNCN Listeners Guild*, the Supreme Court upheld the FCC's decision not to get involved in the regulation of radio station formats in a case involving the decision of the proposed buyer of WNCN to change the format from classical music to rock.<sup>83</sup> The Court found that marketplace regulation was a constitutionally protected means of implementing the public interest standard of the Communications Act.<sup>84</sup>

#### I. *FCC v. League of Women Voters*

In *FCC v. League of Women Voters*,<sup>85</sup> the Supreme Court for the first time found a broadcast regulation unconstitutional, namely, section 309 of the Public Broadcasting Act which forbade editorializing by any noncommercial station receiving funds from the Corporation for Public Broadcasting.

The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC [Mark Fowler], charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of broadcast regulation may be required.<sup>86</sup>

#### J. *Turner Broadcasting System, Inc. v. FCC*

In its initial decision involving the FCC's rules requiring cable systems to carry the signals of local television stations, the Supreme Court, in

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81. *Id.* at 748 (citation omitted).

82. *Id.*

83. *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

84. *Id.* at 604.

85. *League of Women Voters*, 468 U.S. 364 (1984).

86. *Id.* at 376 n.11 (citation omitted).

*Turner Broadcasting System, Inc. v. FCC*,<sup>87</sup> gave only lukewarm support for *Red Lion*<sup>88</sup> and other decisions, noting that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation."<sup>89</sup>

## VI. THE EPHEMERAL YET MALLEABLE PUBLIC INTEREST STANDARD

A precise meaning for the phrase "public interest" is extremely elusive.<sup>90</sup> Avery Leiserson offers a pragmatic but somewhat limited definition, suggesting that "a satisfactory criterion of the public interest is the preponderant acceptance of administrative action by politically influential groups."<sup>91</sup> Such acceptance is expressed, in Leiserson's opinion, through groups that, when affected by administrative requirements, regulations, and decisions, comply without seeking legislative revision, amendment, or repeal.<sup>92</sup> Thus, in order for a policy to be accepted by politically influential groups, it must be relevant to, and must not conflict unacceptably with, their expectations and desires. Defining the interest of the entire general public proves to be considerably more difficult, especially if the general public interest is viewed as more than just the sum of special interests.<sup>93</sup>

Besides providing flexibility to adapt to changing conditions, the concept of the public interest contributes significantly to the regulation of broadcasting in another sense. Even a generalized public belief in an undefined public interest increases the likelihood that policies will be accepted as authoritative. The acceptance of a concept of the public interest may thus engender important support for the regulation of broadcasting and for

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87. *Turner*, 512 U.S. 622 (1994).

88. *Red Lion Brdcast. Co. v. FCC*, 366 U.S. 367 (1969).

89. *Turner*, 512 U.S. at 637 (emphasis added).

90. "'Public interest, convenience or necessity' means about as little as any phrase that the drafters of the [Radio] Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority." Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930).

91. AVERY LEISELSON, *ADMINISTRATIVE REGULATION: A STUDY IN REPRESENTATION OF INTERESTS* 16 (1942).

92. *Id.*

93. Ayn Rand has characterized the "public interest" as the "intellectual knife of collectivism's sacrificial guillotine." "Since there is no such thing as the 'public interest' (other than the sum of the individual interests of individual citizens), since that collectivist catchphrase has never been and can never be defined, it amounted to a blank check on totalitarian power over the broadcasting industry, granted to whatever bureaucrats happened to be appointed to the Commission." AYN RAND, *CAPITALISM: THE UNKNOWN IDEAL* 126 (1967).

the making of authoritative rules and policies toward this end.<sup>94</sup> For this reason the courts traditionally have given the FCC wide latitude in determining what constitutes the public interest. As the Supreme Court noted in 1981:

Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference. . . . The Commission's implementation of the public-interest standard, when based on a rational weighing of competing policies, is not to be set aside . . . for "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance."<sup>95</sup>

Judge E. Barrett Prettyman expanded upon the reasons for such deference:

[I]t is also true that the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes. Two diametrically opposite schools of thought in respect to the public welfare may both be rational; e.g., both free trade and protective tariff are rational positions. All such matters are for the Congress and the executive and their agencies. They are political, in the high sense of that abused term.<sup>96</sup>

Despite the usefulness of the public interest concept in keeping up with changing means of communication and the general tendency of the courts to defer to the FCC's decisions, conflicts over the meaning of the public interest have been recurrent in broadcast history. On occasion, the vague statutory mandate to look out for the public interest has hampered the development of coherent public policy because Congress (or influential members of Congress) can always declare, "that is not what we meant by the public interest."

Few independent regulatory commissions have had to operate under such a broad grant of power with so few substantive guidelines. Rather than encouraging greater freedom of action, vagueness in delegated power may serve to limit an agency's independence and freedom to act as it sees fit. As Pendleton Herring put it, "[a]dministrators cannot be given the responsibilities of statesmen without incurring likewise the tribulations of politicians."<sup>97</sup>

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94. See VIRGINIA HELD, THE PUBLIC INTEREST AND INDIVIDUAL INTERESTS 163-202 (1970).

95. FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981) (quoting FCC v. Nat'l Citizens Comm. for Brdcast., 436 U.S. 775, 810 (1978)).

96. Pinellas Brdcast. Co. v. FCC, 230 F.2d 204, 206 (D.C. Cir.), cert. denied, 350 U.S. 1007 (1956).

97. PENDLETON HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST 138 (Russell & Russell 1967) (1936). Vagueness, however, may also serve to protect the agency

Judge Henry Friendly, in his classic work *The Federal Administrative Agencies*, offered the following comment on how the origin of the “public interest, convenience and necessity” standard serves to confuse, not enlighten:

The only guideline supplied by Congress in the Communications Act of 1934 was “public convenience, interest, or necessity.” The standard of public convenience and necessity, introduced into the federal statute book by [the] Transportation Act, 1920, conveyed a fair degree of meaning when the issue was whether new or duplicating railroad construction should be authorized or an existing line abandoned. It was to convey less when, as under the Motor Carrier Act of 1935, or the Civil Aeronautics Act of 1938, there would be the added issue of selecting the applicant to render a service found to be needed; but under those statutes there would usually be some demonstrable factors, such as, in air route cases, ability to render superior one-plane or one-carrier service because of junction of the new route with existing ones, lower costs due to other operations, or historical connection with the traffic, that ought to have enabled the agency to develop intelligible criteria for selection. The standard was almost drained of meaning under section 307 of the Communications Act, where the issue was almost never the need for broadcasting service but rather who should render it.<sup>98</sup>

Since Congress has found it inadvisable or impossible to define specifically for future situations exactly what constitutes the public interest, the political problem of achieving consensus as to the case-by-case application of this standard has been passed on to the FCC. The flexibility inherent in this elusive public interest concept can be enormously significant to the FCC not only as a means of modifying policies to meet changed conditions and to obtain special support but also as a source of continuing and sometimes hard-to-resolve controversy.

Disputes concerning legal prescriptions imposed by the Communications Act often have centered on recurring value conflicts—assumptions about what ought or ought not to be done. One such question is the extent to which broadcasting should pursue social as well as economic and technical goals. The emphasis on the social responsibilities of licensees rests on the view that “the air belongs to the public, not to the industry” since Congress provided in section 301 of the Communications Act that “no . . . license shall be construed to create any right, beyond the terms, conditions, and periods of the license.”<sup>99</sup> For example, the FCC has adopted rules and

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when its decisions are challenged in the courts, since the judiciary may be loath to overturn actions protected by a broad statutory mandate.

98. HENRY FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 54-55 (1962) (footnotes omitted).

99. Communications Act of 1934, ch. 652, § 301, 48 Stat. 1064 (codified at 47 U.S.C. § 301 (1994)).

policies designed to make broadcasters meet social responsibilities by requiring them to implement equal employment opportunity programs for women and minorities and to provide programming responsive to community needs and interests.

Some of these rules and policies require broadcasters to present, or refrain from presenting, content contrary to what they would choose to do on their own. How far the FCC may go in the direct, or indirect, regulation of content without violating either the Communications Act's own prohibition in section 326 against censorship, or the First Amendment to the U.S. Constitution, remains unsettled.<sup>100</sup>

However, in the Communications Act Congress also directs the Commission to regulate "in the public interest, convenience and necessity."<sup>101</sup> Using that standard, the Commission has promulgated many rules and policies governing broadcast programming that could be regarded by the courts as unlawful censorship of the print media. As noted earlier, court cases involving Dr. Brinkley and Reverend Shuler held that the FRC did not have to ignore content, that it could consider it without necessarily engaging in censorship; later court cases have perpetuated the view that government supervision of broadcast content is somehow more acceptable than review of print. Clearly broadcasting continues to be plagued by divergent views of how to balance freedom with achieving socially desired and responsible service, while still not engaging in censorship.

Complicating this controversy is the conflict between First Amendment provisions guaranteeing the right of broadcasters, like other media owners and operators, to be free of government control over the content of programming, and First Amendment theories developed exclusively for broadcasting holding that the rights of listeners and viewers to receive information to be "paramount" over the rights of broadcasters. The theory is that in the "scarce" medium of broadcasting, some affirmative government intervention concerning content may be needed to ensure that the public

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100. Equally troubling is the risk of self-censorship by broadcasters as a consequence of indirect content regulations. Judge David Bazelon noted that while the main threat to broadcasters remains that the government can put a licensee out of business, "the more pervasive threat lies in the *sub rosa* bureaucratic hassling which the Commission can impose on the licensee, *i.e.*, responding to FCC inquiries, forcing expensive consultation with counsel, immense record-keeping and the various attendant inconveniences." *Illinois Citizens Comm. for Brdcast. v. FCC*, 515 F.2d 397, 407 (D.C. Cir. 1975). He further observed that "licensee political or artistic expression is particularly vulnerable to the 'raised eyebrow' of the FCC; faced with the threat of economic injury, the licensee will choose in many cases to avoid controversial speech in order to forestall that injury." *Id.* For examples of raised-eyebrow regulation, see ERWIN G. KRASNOW ET AL., FCC REGULATION AND OTHER OXYMORONS: SEVEN AXIOMS TO GRIND, 5 COMM/ENT L.J. 759, 770-72 (1983).

101. See generally *supra* note 8.



hears diverse ideas and viewpoints.<sup>102</sup> J. Skelly Wright, a judge of the United States Court of Appeals for the District of Columbia, has commented:

[I]n some areas of the law it is easy to tell the good guys from the bad guys . . . . In the current debate over the broadcast media and the First Amendment . . . each debator claims to be the real protector of the First Amendment, and the analytical problems are much more difficult than in ordinary constitutional adjudication . . . the answers are not easy.<sup>103</sup>

These colliding statutory ground rules governing the freedom and obligations of broadcasters have been melded into one of the law's most elastic conceptions—the notion of a “public trustee.”<sup>104</sup> The FCC views a broadcast license as a “trust,” with the public as “beneficiary” and the broadcaster as “public trustee.”<sup>105</sup> The public trustee concept naturally flows from the conflicting statutory goals of private use and regulated allocation of spectrum space. Congress gave the FCC the right to choose among various candidates for commercial broadcast licenses and left it up to the Commission to find a justification for providing a fortunate few with the use of a valuable scarce resource at no cost. Legal scholar Benno Schmidt, Jr., thinks the public trustee concept was designed to dull the horns of the FCC's dilemma: to give away valuable spectrum space, with no strings attached, would pose stubborn problems of justification.<sup>106</sup>

However, as noted above, some of the strings attached—especially those, like the FCC's Fairness Doctrine, that are content-related—have been determined to violate the First Amendment. One option exercised by the FCC to reduce controversy over its activities has been to substitute its “content-neutral” or “structural” policies for policies that involve direct review of content. Many FCC rules and policies—for example, the regulation of station ownership patterns—have been of this type. They do not, on their surface, look normative but are in fact examples of content-neutral means of achieving social objectives.

For some years, however, there was hesitation over the substitution of content-neutral, “structural” regulations for content regulation. Broad-

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102. See *Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367, 390 (1969). For further discussion, see *supra* Part V.E.

103. Judge J. Skelly Wright, Speech Before the National Law Center, George Washington University (June 3, 1973), reprinted in FRED W. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING* ix (1975).

104. This discussion is based on a theme developed by Benno C. Schmidt, Jr. BENNO C. SCHMIDT, JR., *FREEDOM OF THE PRESS VS. PUBLIC ACCESS* 157-58 (1976). The phrase “public trustee,” however, does not appear in the Communications Act.

105. *Id.*

106. *Id.*

casting was thought to be a scarce medium in which structural regulation could not accomplish enough. Beginning in the mid-1970s, however, arguments began to be made more forcefully that FCC review of content should be reduced and structural regulation preferred. Broadcasters tended to argue that, at least in some instances, even structural regulation was unjustified due to what they believed was reliance on an invalid premise: scarcity. Behind many of these criticisms and controversies were changes in electronic communications technology.

Although many correctly argue that the 1970s, the 1980s and the 1990s have been (and will be) particularly active decades in the development and expansion of communications technology, the fact is that there have long been two complementary and determinative features of American broadcasting: spectrum space scarcity and technological innovation. Scarcity, of course, has always been the underlying *raison d'être* for broadcast regulation. Because one person's transmission is another's interference, Congress concluded that the federal government has the duty both to select who may and who may not broadcast and to regulate the use of the electromagnetic spectrum to serve the public.

Broadcasters argue that there is little justification for rigid government regulation of ten or twenty or more competing radio stations in a market while monopoly newspapers operate freely. As scarcity decreases, they have argued, so should regulation. Former FCC Chairman Mark Fowler has noted that "[s]carcity, to my mind, is a condition affecting all industries. Land, capital, labor, and oil, are all scarce. In our society, we allow the marketplace to allocate such goods. In this process, consumers' interests and society's interests are well served."<sup>107</sup> From this analysis of the "myth" of scarcity, plus a review of traditional First Amendment theory, Chairman Fowler concluded that in broadcasting, "[e]conomic freedom and freedom of speech go hand in hand," and advocated reliance on minimally regulated marketplace forces rather than content regulation.<sup>108</sup>

The foregoing discussion highlights some of the issues which have attended attempts to apply the public interest standard in particular regulatory circumstances. As is evident from the recitation of the origins and development of the phrase "public interest, convenience, and necessity," the task of formulating a standard for the digital television is a formidable one. Despite the many criticisms of the standard, there is much support for its retention in any legislation governing the regulation of broadcasters. Former FCC Chairman Newton Minow has written that the words "public interest" are "at the heart of what Congress did in 1934, and they remain at

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107. Fowler, *supra* note 49, at 53.

108. *Id.* at 6.

the heart of our tomorrows.”<sup>109</sup>

The heart of the Communications Act is its clear emphasis on the public interest. Whatever the temptations to abandon this notion—and they are many—the stakes are too high. Without commitment to the public interest, all government action vis-à-vis communications would be without meaning.<sup>110</sup>

## VII. THE PUBLIC INTEREST STANDARD IN THE DIGITAL AGE

As television broadcasters begin the transition from analog to much more flexible digital technology, there have been calls for reexamination of the public interest standard. The FCC told digital broadcasters that it would consider changes to its public interest requirements,<sup>111</sup> and President Clinton appointed a Presidential Advisory Committee to determine whether digital broadcasters should be given new public interest responsibilities.<sup>112</sup>

An examination of the history of the public interest standard and its application by the FCC and the courts, however, reveals no need for an abrupt change in the evolving meaning of the public interest standard. The genius of the public interest standard is its breadth and flexibility. The public interest standard has steadily changed as the electronic media have grown from a few AM radio stations to the vast panoply of broadcasting stations, multichannel video programming providers, satellite services, and Internet services that Americans enjoy today. Digital television readily fits into this framework.

Justice Stewart once remarked that “[t]here is never a paucity of arguments in favor of limiting the freedom of the press.”<sup>113</sup> In deciding how to regulate broadcasting, however, Congress rejected a vision of government control. “Long before the impact and potential of the [broadcast] medium was realized, Congress opted for a system of private broadcasters licensed and regulated by Government.”<sup>114</sup> Congress made clear in section 326 of the Communications Act that the FCC possesses no power to control the content of broadcast speech. While the Act explicitly reserves “ownership” of the broadcast spectrum to the Government, this property

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109. NEWTON N. MINOW, *Commemorative Message*, in LEGISLATIVE HISTORY, *supra* note 3, at xvi.

110. *Id.*

111. *Advanced TV Sys., and Their Impact Upon the Existing TV Brdcast. Serv., Fifth Report and Order*, 12 FCC Rcd. 12,809, para. 50, 7 Comm. Reg. (P & F) 863 (1997).

112. Exec. Order No. 13,038, 62 Fed. Reg. 12,065 (March 11, 1997).

113. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 144 (1973) (Stewart, J., concurring).

114. *Id.* at 116.

interest has not been viewed as a significant alteration in the Act's basic premise of licensing privately owned and controlled broadcasters.<sup>115</sup>

The tension between the Government's role in licensing broadcasters and the First Amendment principles that Congress clearly sought to protect in the Communications Act resulted in the "tightrope" that the Court described in *CBS v. Democratic National Committee*. While the path has neither always been clear, nor followed one direction, the history of the FCC's interpretation of the public interest standard exhibits a definite pattern of decreasing regulation in the face of an increasing number of information sources.

In the early years of broadcast regulation, relatively few stations existed. Most markets had only one or two stations, and there had not yet been time for a culture to develop within the broadcasting industry. The regulators opted for specific and intrusive regulation of this new service. The Radio Commission rejected Dr. Brinkley's application because he used a station to advance only his own private interests without regard to the needs of the public. The FCC later expanded this information, taking the view that each station must serve a whole spectrum of interests. Even as late as 1960, the Commission's *Program Policy Statement*<sup>116</sup> strongly encouraged stations in large urban areas to include agricultural programs among the subjects in their program mix.

During these years, the broadcasting industry matured and the number of broadcast outlets steadily multiplied. FM service began slowly, but ultimately eclipsed AM as the dominant radio service. The number of radio stations grew from the few hundred when the FCC began regulation to more than 12,000 today.<sup>117</sup> Television service began and spread across the country.

During the 1960s, the FCC undertook a campaign to encourage the development of competitors to established broadcasters from both within the broadcast industry and from without. In the industry, the Commission worked to increase the number of radio and television stations by, among other things, removing barriers to UHF television service and dramatically increasing the number of FM radio stations. It also adopted rules to prevent the national networks from dominating the television programming market, and rules that helped to develop independent television stations.

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115. See *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 727 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc) ("There is, perhaps, good reason for the [Supreme] Court to have hesitated to give great weight to the government's property interest in the spectrum.").

116. See *supra* Part IV.B.

117. FCC News Release, *Broadcast Station Totals as of Dec. 31, 1997* (Jan. 23, 1998) <[http://www.fcc.gov/bureaus/Mass\\_Media/News\\_Releases/1998/nrmm8002.txt](http://www.fcc.gov/bureaus/Mass_Media/News_Releases/1998/nrmm8002.txt)>.

Outside of broadcast service, the Commission worked to develop competitors to broadcasting such as cable television and satellite broadcasting. These efforts have borne more fruit than their proponents could have even imagined.

The deregulation that began in the 1970s and resulted in the removal of much of the FCC's detailed broadcasting rules in the 1980s appropriately reflected these developments. With a multiplicity of broadcast stations and other communications providers available to the public, the need for each station to serve the interests of all listeners and viewers seemed less crucial. Instead, the FCC reasoned that as stations competed with each other, particular stations would look to meet the needs of segments of the audience that other stations overlooked, thereby increasing the value of broadcasting to the entire community.

Further, the public service role of broadcasting had become part of the industry's culture, as well as expected by the audience. Broadcast stations were and remain the dominant source of news, and broadcasters have been the "glue" holding communities together in times of crisis or natural disaster. The FCC found that the tradition of broadcasting and the demands of the audience would ensure that broadcasters continued to serve the public without the spur of detailed content regulations. Despite the absence of FCC mandates, the time and resources devoted by local stations to news programming has steadily increased.<sup>118</sup>

The FCC also recognized that the marketplace could more efficiently determine the audience's needs and interests than could the government. On that basis, the FCC rejected calls that it regulate radio stations' program formats—a decision that was upheld by the Supreme Court in *WNCN Listeners Guild*.<sup>119</sup> While critics at the time believed such regulation necessary to preserve and protect format diversity, their fears have proven unjustified and the range of radio formats has never been greater.

As the number of broadcast stations increased, and competing electronic media emerged, the FCC shifted the focus of its public interest analysis from detailed prescription of broadcasting content to a reliance on marketplace forces to ensure high quality broadcasting. Only in the case of a perceived market failure—such as children's television—have Congress and the FCC felt the need to return to particularized content regulation.<sup>120</sup>

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118. See generally Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279 (1997) (observing an increase in informational radio programming after the repeal of the Fairness Doctrine).

119. *WNCN Listeners Guild*, 450 U.S. 582 (1981).

120. See Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (1990) (codified in scattered sections of 47 U.S.C. (1994)).

Moreover, the constitutional foundation for renewed extensive content regulation of broadcasting has become increasingly uncertain. At a time when broadcast outlets were few, one station's refusal to include a particular point of view in its coverage might have prevented advocates of that view from communicating to the public.<sup>121</sup> However, even as the Supreme Court was articulating this "scarcity doctrine" in *Red Lion*, the emergence of more stations and competing media began to sow the seeds of the doctrine's demise. The FCC itself recognized by 1987 when it repealed the Fairness Doctrine that scarcity could no longer justify content regulation.<sup>122</sup> While the Supreme Court has yet to overrule *Red Lion*, it has repeatedly noted the widespread criticism of that decision and announced itself ready to reconsider it in an appropriate case.<sup>123</sup>

Even where content regulation has been permitted, the Court has retreated from treating broadcasting differently than competing media. The "intrusiveness" rationale announced in *Pacifica*<sup>124</sup> was long thought to be limited to broadcasting. Two years ago, however, the Supreme Court extended it to cable in *Denver Area Educational Telecommunications Consortium v. FCC* with virtually no discussion.<sup>125</sup>

In the absence of scarcity, justifying renewed regulation of broadcast content becomes problematical. Professor Sunstein argues in favor of a "Madisonian" approach to the First Amendment, suggesting that the government may intervene in broadcasting to promote certain democratic values.<sup>126</sup> Others, however, contend that such an approach gives the government far too much power, and far too little guidance, to determine which speech is acceptable and which not.<sup>127</sup>

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121. *Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367 (1969).

122. *Syracuse Peace Council Opinion and Order*, 2 FCC Rcd. 5043, 63 Rad. Reg. 2d (P & F) 541 (1987), *reconsideration denied by Memorandum Opinion and Order*, 3 FCC Rcd. 2035, 64 Rad. Reg. 2d (P & F) 1073 (1988), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

123. *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984); *see also Turner Brdcast. Sys. v. FCC*, 512 U.S. 622, 638 (1994) (recognizing that "courts and commentators have criticized the scarcity rationale since its inception"). Last year, five judges of the D.C. Circuit opined that the time had long come for a reexamination of *Red Lion*. *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc); *see also Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (en banc) ("[D]evelopments subsequent to *Red Lion* appear at least to raise a significant possibility that the First Amendment balance struck in *Red Lion* would look different today.").

124. *Pacifica*, 438 U.S. 726 (1978).

125. *Denver Area*, 116 S. Ct. 2374, 2386 (1996).

126. *See* CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 95 (1993).

127. *See* Burt Neuborne, *Blues for the Left Hand: A Critique of Cass Sunstein's Democracy and the Problem of Free Speech*, 62 U. CHI. L. REV. 423 (1995).

The Supreme Court's recent First Amendment cases provide little support for an interventionist view of the First Amendment. Even without formally rejecting *Red Lion*, strong majorities of the Court have embraced a Holmesian view where ideas compete in the marketplace free of government. In the first *Turner* case, the Court noted that its "cases have recognized that Government regulation over the content of broadcast programming must be narrow . . ." <sup>128</sup> It emphasized that "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations." <sup>129</sup> In *Hurley*, relying on its opinion in *Turner*, the Court went further: "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." <sup>130</sup> Thus, the courts are moving away from any approval of government control over the content of broadcast speech.

In light of these judicial trends, the advent of digital television should not be an occasion for increasing the FCC's public interest mandates on broadcasters. It may be that digital television will not in the end be substantially different from television today and that most broadcasters will provide viewers with programming on one high quality digital signal. In that event, there would be no cause for a change in the FCC's interpretation of the public interest standard. The broadcast audience, however, may instead demand that digital television be used, at least in part, for multiple programs or for data transmission. Rather than justifying new and intrusive public interest requirements, an increase in broadcasters' capabilities would support a decrease in FCC regulations.

If digital broadcasters offer multiple channels or data services in addition to traditional broadcasts, the number of program services available in a community will increase, carrying the potential to serve an even greater range of diverse and unique interests. More channels and available services should give the FCC confidence that a wide variety of needs and points of view would be served. The agency would then have less reason to require each station to provide particular types of service because competition among stations would likely ensure that a need not met by one station or service would be addressed by another seeking to gain a position in the market.

Even if broadcasters benefit from the possibilities offered by digital

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128. *Turner Brdcast. Sys. v. FCC*, 512 U.S. 622, 651 (1994).

129. *Id.*

130. *Hurley v. Irish Am. Gay, Lesbian, and Bisexual Group*, 515 U.S. 557, 579 (1995).

television, the Communications Act's public interest requirement has not been viewed so much as a *quid pro quo* for broadcasters obtaining spectrum than as a means of ensuring that the system of private broadcasting will respond to public needs. The FCC has also historically viewed licensees' efforts to develop more efficient technologies as a public interest benefit, rather than as a justification for imposing increased responsibilities. The advent of digital technology in other services, such as cellular telephones, has not resulted in any change in those licensees' relationship with the FCC.

This is not to say that the public interest mandate of the FCC should disappear. Broadcast licensees should be responsible for establishing that they have served the public, and have done so with all services they provide. The spectrum flexibility provisions of the 1996 Telecommunications Act so provide.<sup>131</sup> Under the public interest standard of the Act, the FCC and broadcasters have worked together to provide the most diverse system of broadcasting in the world. But the FCC has recognized that as the number of competing electronic "voices" has gone up, there is less need for the government to ensure that individual broadcast stations serve particular functions. The possibilities created by digital television technology comfortably fit within this history and justify, if anything, even greater reliance on broadcasters and the market to ensure service to the public. As in the past, broadcasters should be afforded the latitude to develop and offer programming best calculated to meet the needs of the communities they serve.

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131. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.A. (West 1991 & Supp. 1997)).



