Comments on Television and the Law

St. John's Law Review

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation
Available at: https://scholarship.law.stjohns.edu/lawreview/vol25/iss2/5

This Comment is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.
NOTES AND COMMENT

COMMENTS ON TELEVISION AND THE LAW

Introduction

With its advent as a commercial reality, television has inevitably created and will continue to create new and perplexing legal problems—problems which in time will probably touch and concern every segment of domestic law. The solution of these problems will occasionally require the development of new principles approximated to the special nature of visual transmission, but in the main, the legal foundation for TV regulation will be found in that body of substantive rules known as Radio Law.

But if we are to adopt for this new medium the substantive and procedural regulations which have governed the operation and development of our radio industry, it is imperative that we pause and examine the manner and merit in which that law has developed and functioned; and further, it is essential that it be now determined to what extent our radio law, thus evaluated, is properly applicable to the special problems of television broadcasting.

An examination of the whole body of law which has developed with the evolution of radio, or even of the full field of government's radio-video control is not within the intended scope of this writing. Instead, it is proposed to examine the extent and effect of sovereign control in three varying aspects: (1) policy and practice in licensing broadcast transmission stations; (2) censorship powers of government as related to telecasting; and (3) the permissible extent and efficacy of regulating the technological progress of the television industry, with particular reference to the problems of color transmission.

Part I

A Study In Radio Licensing Practice
The Public Interest Concept

The avowed aim of Congress in approving the Communications Act of 1934 was to secure to all the people of the United States the maximum benefits of radio communication. To that end, it established a seven-member commission, and endowed it with broad powers to regulate and encourage the fruitful growth of the radio


245
industry.\(^3\) Of the numerous express powers and duties confided to the Commission, no single provision has been of greater legal moment than that which vests in the agency the authority and duty to allocate and regulate the use of radio frequencies and to prohibit such use except under license.\(^4\)

A careful analysis of the prohibited operations of a radio transmitting apparatus without a license discloses that the section is so all-inclusive that it would require great imaginative faculty to find an instance where the operation of a transmitting apparatus would not be embraced within the provisions of the Act. In fact . . . all the operations of a radio transmitting apparatus fall into one or the other or several subsections of the statute and . . . under the Act, none can operate without a license.\(^5\)

But in the exercise of this comprehensive licensing power, the Commission is not unrestricted.\(^6\) It cannot, for instance, grant a license without written application therefor having been voluntarily submitted,\(^7\) nor can it refuse to issue or renew a license without affording to the applicant a full and fair opportunity to be heard.\(^8\) More important, in considering applications for licenses or renewals thereof, the Commission is required to grant the same if "... public convenience, interest, or necessity will be served thereby, . . ." and if it will contribute to the "... fair, efficient, and equitable distribution of radio service . . ." among the several states and communities.\(^9\) These two qualifications of the Commission's power are the "touchstones" of the whole radio licensing system.\(^10\)

"... public convenience, interest, or necessity . . . ."

**In General**

Although the statutory standard of "public convenience, interest, or necessity" has been held to be not so broad or indefinite as to render it unconstitutional,\(^11\) the term has persistently eluded defini-

---


\(^7\) 48 STAT. 1084 (1934), 47 U. S. C. § 308(a) (1945).


\(^12\) National Broadcasting Co. v. United States, 319 U. S. 190 (1943).
tion, either by the courts or by the Commission. It has been said, however, that the congressional grant of power to the communications agency is not an unlimited one, and that in exercising its authority, the Commission may not act unconstitutionally, arbitrarily, or capriciously. Just what is conduct unconstitutional, arbitrary, or capricious—like the statutory standard it purports to restrict—has never been quite clear. But the courts have willingly recited what it is not. It is not, for example, arbitrary, capricious, or unconstitutional for the Commission to proscribe and enforce rules for the regulation of chain (network) broadcasting. Nor do the commissioners exceed their authority when they inquire into the moral qualifications of a license applicant. Also, it is permissible for the Commission to abandon its own policy as expressed in the decided cases, and, without abusing their discretion, the commissioners may at any time review the action of a licensee in selecting his programs.

But, even though no attempt has been made to measure the standard of “public convenience, interest, or necessity,” there has been some effort at least, to crystallize the policies with which the Commission, itself, has implemented the statutory mandate.

The Commission’s established yardstick for determining public convenience includes a showing of citizenship on the part of the applicant, a need of service at the place in question, the ability of the community to support the station and to furnish what is called “talent,” the ability of the applicant to finance its construction and operation, a finding that an objectionable interference will result to some other operating station, and that the plant and service proposed will comport with the Commission’s rules. Upon an affirmative showing, to the satisfaction of the Commission in these respects . . . the applicant is entitled under the law to the permit.

13 "To be able to arrive at a precise definition of such a phrase which will foresee all eventualities is manifestly impossible." 2 FRC ANN. REP. 166 (1928).
14 See note 6 supra.
16 Occasionally, the courts have branded Commission rulings as arbitrary, capricious or unconstitutional. See Plains Radio Broadcasting Co. v. Federal Communications Commission, 150 F. 2d 359 (D. C. Cir. 1949).
21 "The Commission’s right to grant licenses or to revoke licenses in the public interest, and likewise to make rules and regulations necessary to the carrying out of the provisions of the Act, implies the grant of all means necessary or appropriate to the discharge of the powers expressly granted." Stahlman v. Federal Communications Commission, 126 F. 2d 124, 125 (D. C. Cir. 1942).
Query: what is an affirmative showing to the satisfaction of the Commission?

Legal Qualifications

Persons who are not American citizens are prohibited from receiving or holding station license grants under the provisions of Section 310 of the Communications Act. Corporations which are organized under the laws of a foreign government, or which include on their board of directors or as an officer, any alien, or which are controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens are similarly excluded from becoming licensees. Elsewhere in the Act, it is provided that applications for station licenses "... shall set forth such facts as the Commission by regulations may prescribe as to the citizenship... of the applicant ...". Taken together, these provisions of the Act have been construed to require that applicants offer affirmative proof of American citizenship when filing requests for broadcast permits. And the provisions which relate to corporate applicants have been deemed applicable to unincorporated associations. Generally, the Commission requires direct proof of an applicant's citizenship, but, as an administrative body, it is not limited to strict rules of evidence, and may, at times, allow an application without such direct proof.

On the whole, the congressional mandate in this respect is clear; there would seem to be little opportunity for deviation from the statutory standard, and in fact there has not been.

Other aspects of legal qualification are raised when the applicant, instead of being an individual, is a corporation or other legal entity. Thus, a corporate applicant has been refused a license for failure to "qualify" under the laws of the state where it proposed to do business; and the application of an alleged partnership was similarly denied when it failed to evidence written articles of agreement.

24 Ibid.
26 Re Reorganized Church of Jesus Christ of Latter Day Saints, FCC Docket No. 8870, FCC 50D-63 (December 29, 1950).
27 Ibid.
28 Re Tri-City Broadcasting Co., 7 F. C. C. 80 (1939); Re Voice of Detroit, 6 F. C. C. 363 (1938).
30 See Re Kentucky Broadcasting Corp., 6 F. C. C. 536 (1938).
31 In the reported cases, this aspect of legal qualification is usually disposed of with a simple recitation of the applicant's citizenship.
32 The word "qualify" as here used, means that the corporation is authorized to do an intrastate business within the state in question.
33 Re Pee Dee Broadcasting Co., 7 F. C. C. 394 (1939).
34 Re Carter, 2 F. C. C. 544 (1936).
Financial Qualification

Congress has empowered the Commission to make proof of financial ability a requisite for ownership of a broadcasting permit. 35

The question of financial qualification has at least two aspects: first, has the applicant enough resources to construct the station and to operate it for a brief period of time; and second, is there a reasonable likelihood of financial profit to be expected from the operation of the station or are the applicant's personal resources such that he is able and willing to operate a station for a considerable period of time at a loss. 36

At first blush, the determination of an applicant's financial qualifications would seem to be a comparatively simple procedure involving the more or less mechanical application of fixed minimum standards. In practice, however, this has not been so. Instead, the Commission has adopted a vacillating standard with policy and procedure seeming to vary with each new fact problem. In some reported cases, for example, the Commission has subjected an applicant's financial status to a detailed and exhaustive study, 37 while in others, discussion of the petitioner's pecuniary resources has been confined to a mere recitation of his financial responsibility. 38

A problem which has frequently confronted the Commission in determining an applicant's financial eligibility, arises where the petitioner predicates his financial responsibility on the promise of some third party to advance money if the pending application is approved. In such cases, it is the uniform practice to subject the asserted arrangement to a close scrutiny. Unfortunately, however, there seems to be no such uniformity or continuity of Commission policy when it comes to making a determination in such cases. Thus, in some cases, failure to evidence the financial ability of the third party promisor has resulted in the Commission's refusal to grant the requested license, 39 while in others, no proof of the third party's financial responsibility has been required. 40 In some cases, the fact that the promise to advance money was not in writing has proved fatal to

35 "This application shall set forth such facts as the Commission by regulation may prescribe as to the . . . financial . . . ability of the applicant to construct and operate the station . . ." 48 Stat. 1089 (1934), 47 U. S. C. § 319(a) (1946).

36 Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F. 2d 554, 562 (D. C. Cir. 1938).

37 See Re Caldarone, 7 F. C. C. 212 (1939); Re Casto, 6 F. C. C. 114 (1938); Re Hughes, 5 F. C. C. 120 (1938); Re Times Publishing Co., 4 F. C. C. 400 (1937).


39 Re Smith, 5 F. C. C. 291 (1938); Re Amelung, 1 F. C. C. 181 (1934).

the application, but again, in others, proof of a parol promise has been deemed sufficient evidence of financial worth.

Still another aspect of financial qualification presents itself where the applicant has agreed to form a corporation at a later date, assign his license to such corporation, and issue stock therein as security for a loan to be advanced by some third party. Prior to 1937, it was the policy of the FCC to reject applications which revealed such proposals on the ground that to approve them would deprive the Commission of its right to evaluate the qualifications of "the real party in interest." So grounded, the policy of the Commission was open to severe criticism, for it presupposed the weakness of its own power to regulate station license transfers. An examination of the assignment provisions in the Communications Act discloses the invalidity of any such supposition.

Another ratio decidendi for its refusal to issue permits in these cases was announced by the Commission in the now famed Heitmeyer ruling. There the record disclosed that the applicant had intended, in the event that his application was approved, to form a corporation and request the consent of the Commission to assign his franchise to it. In the event that a loan made by one Glassman to the applicant was not repaid according to its terms, the latter was obligated to assign to Glassman 49% of the stock of the proposed corporation. The Commissioners concluded that the applicant was not financially qualified to assume the responsibilities of a broadcast licensee. It reasoned as one of two alternative propositions that to grant the petitioner's request would, in effect, require the Commission to pre-judge an application (for the assignment of license from Heitmeyer to the proposed corporation) which was not before it. This, it concluded, was beyond its power. Consequently, the applicant's financial structure was dependent upon some future unpredictable happening, and was therefore unsound.

41 Re Thomas, 5 F. C. C. 124 (1938); Re Howitt Wood Radio Co., 2 F. C. C. 588 (1936).
42 Re Anderson, 4 F. C. C. 463 (1937).
43 Re Replogle, 1 F. C. C. 256, 257 (1935). Actually, the application in the Replogle case did not reveal an intent to form a corporation subsequent to grant of the requested permit. According to the Commission findings, the applicant was a mere "dummy," the real party in interest being the Boston Herald-Traveler Corporation. We cite the case because its philosophy—the real party in interest concept—became the true basis for the Commission's refusal to grant permits in cases of application prior to incorporation. See Re Porter, 4 F. C. C. 680 (1937); Re Press Democrat Publishing Co., 3 F. C. C. 544 (1936); Re Hughes, 2 F. C. C. 85 (1935).
44 "The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing." 48 STAT. 1086 (1934), 47 U. S. C. § 310(b) (1946). Emphasis supplied.
45 2 F. C. C. 601 (1936).
On appeal, however, the Court of Appeals for the District of Columbia rejected the reasoning advanced by the Commission, and declared that if the refusal to grant the license rested on so tenuous a ground, it verged closely on arbitrary and capricious action. Said the court:

It would seem to be a rather idle and expensive gesture to require the formation of a corporation for such a purpose before the securing of a construction permit, when a refusal to grant the permit would automatically abort the whole occasion and purpose of the corporation. It would seem on its face to be a rather severe restriction upon business enterprise and an unnecessary limitation upon the availability of radio service in a particular community.

The quoted passage appeared in the Heitmeyer case only as dictum, but the tenor of its warning prompted the Commission to alter its policy and adopt a more lenient attitude toward applicants who filed in contemplation of subsequent incorporation. This would seem to be the better course.

A necessary element of financial qualification is the applicant's ability to either personally sustain or to make self-sustaining the continued operation of the proposed station. In most cases, therefore, the Commission very properly requires that a prospective licensee submit evidence that operation of the proposed station will be commercially feasible. Then too, since few stations are self-supporting from their inception, the applicant may also be required to furnish proof that he has sufficient reserve capital with which to finance operation of the station from the time it begins broadcasting to the time it commences to realize a profit. The determination of commercial feasibility and the fixing of an amount necessary to sustain operation during the interim period, are matters dependent on many factors.

---


48 Ibid.

49 Id. at 98. "However, we are not required to decide this question because the first alternative contention of the Commission is not supported by the findings."


52 See Re Pinellas Broadcasting Co., 7 F. C. C. 132 (1939); Re Pacific Radio Corporation, 6 F. C. C. 475 (1938); Re Banks of Wabash, 5 F. C. C. 475 (1938); Re Katzentine, 4 F. C. C. 204 (1937); Re Webb, 1 F. C. C. 267 (1935).

53 See Re Webb, supra note 52 (application granted); Re Kansas City Broadcasting Co., FCC Docket No. 8415, FCC 50D-63 (December 29, 1950) (application denied on other grounds).
These factors will be discussed in the section on community need, infra.

Public Interest in Program Service

It has been frequently and forcefully argued that Congress never intended to vest in the FCC the power to concern itself with the program service of licensees. Instead, it is urged that the primary aim of the lawmaking body in inaugurating radio controls was to so regulate use of the spectrum that one station would not conflict signals physically with another. On the other hand, neither the FCC nor its predecessor, the Radio Commission, ever doubted that the power to regulate radio in the public interest included the right to consider program service in determining what best serves that interest. Indeed, the present Commission has declared that it has not only the authority, but the positive duty to do so. This assertion has been confirmed by the courts.

Congress, itself, has set forth certain requirements and prohibitions relative to program content. Thus, it is prohibited: (1) to utter obscene, indecent or profane language by means of radio communication; or (2) to broadcast any advertising or information concerning a lottery, gift enterprise or similar scheme; or (3) to rebroadcast the programs, or parts thereof, of another broadcasting station without the express authority of the originating station. Affirmatively, it is required that broadcasters afford equal opportunities to all legally qualified candidates for a given political office if time is granted to any candidate for such office. Also, any broadcast for which compensation is paid by any person, must, at the time it is broadcast, be announced as paid for or furnished by such person. Similarly, the recently enacted Subversive Activities Control Law provides that all broadcasts sponsored by Communist organizations, must be preceded by the statement: "The following program is

---

65 Ibid.
sponsored by ———, a Communist organization."  

On the other hand, the power to censor radio broadcasts has been expressly denied to the Commission.  

Quaere: if in enumerating these certain restrictions on program content, Congress did not intend to define the extent of FCC authority in evaluating the program activity of the licensee? 

The courts have answered in the negative, and, as before, they have fixed the limits of Commission power at the illusory border of conduct arbitrary, capricious, or unconstitutional. Within this limit, the Commission has power to scrutinize program content, and fix standards of conduct to which license applicants must subscribe, and licensees adhere, at the risk of being denied use of the airways. 

The programming practices of a given applicant may come under scrutiny in one of three ways: (1) upon an original application for permission to construct and operate proposed broadcast facilities; or (2) upon an application to renew the license of an existing station; or (3) in proceedings to revoke an outstanding license. 

Where the application is one for the grant of a license to operate new or proposed facilities, it is generally required that the prospective licensee set forth in detail his proposals for broadcast service to the community which he plans to serve. The standard practice of applicants, in these cases, is to submit a tentative program schedule, illustrating how well the various facets of the proposed schedule are integrated to the needs of the area in which the station will be located. In addition, testimony may be adduced to show that various civic and religious groups have agreed to accept time on the proposed station and in turn provide it with suitable program material. It may be shown that a contract with a broadcast network, tentative upon the acceptance of the application, will enable the proposed outlet to link the community with program services to which it previously has had no access. Conversely, if the community is already serviced

---

67 See note 58 supra.
69 Bay State Beacon v. Federal Communications Commission, 171 F. 2d 826 (D. C. Cir. 1948).
71 See Re WNAX Broadcasting Co., 6 F. C. C. 397 (1938); Re May Seed and Nursery Co., 2 F. C. C. 559 (1936).
72 Re Scott, 11 F. C. C. 372 (1946).
73 See Re Goldwasser, 4 F. C. C. 223 (1937); Re Union Tribune Publishing Co., 3 F. C. C. 451 (1936); Re Clifford, 2 F. C. C. 573 (1936).
74 See, e.g., Re Citizens Broadcasting Corp., 6 F. C. C. 669 (1938).
75 See Re Voice of Detroit, 6 F. C. C. 363 (1938).
76 See Plains Radio Broadcasting Co. v. Federal Communications Commission, 175 F. 2d 359, 362 (D. C. Cir. 1949). The Commission had granted the application of the intervenor on the ground that its proposed program service
by one or more outlets, it may be shown in support of the application, that network commitments prevent existing stations from adequately serving the local needs of the community.\textsuperscript{77} Of course, in all applications for new facilities, the licensees of existing outlets have the right to challenge the entry of newcomers into the broadcast community.\textsuperscript{78} Such licensees can attack the program proposals of an applicant on the ground that such proposals, if activated, will not serve public interest, convenience or necessity.\textsuperscript{79} Rival applicants have a similar right.\textsuperscript{80}

Where the application is one for the renewal of a license to operate existing facilities, the Commission has served notice that it intends to compare a licensee's performance with his program promises.\textsuperscript{81} This would seem to be the proper course, for, once it be conceded that the Commission has the right to exact performance promises from the station applicant, logic demands that it have the right to see how well those promises have been kept.

Perhaps the most frequent criticism leveled against those who administer our radio controls has been their failure to enunciate and follow a consistent rule of decision principle.\textsuperscript{82} In March, 1946, the Commission attempted to remedy this failing, in part at least, by "codifying" its policies on programming in the now famous report on the Public Service Responsibility of Broadcast Licensees.\textsuperscript{83} The report, popularly known as the Bluebook, was a resume of past practice, and a statement of future policy:

---

was superior to that of the appellant. Intervenor's proposals were based mainly on the possibility of a network affiliation with the Mutual Broadcasting Co. The Commission was reversed when the court found no basis for intervenor's claim to a contract with the Mutual system.

\textsuperscript{77} Re Osborn, Jr., 5 F. C. C. 453 (1938); Re Missouri Broadcasting Corp., 3 F. C. C. 349 (1936).


\textsuperscript{79} Cf. Re Stenger, Jr., 2 F. C. C. 51 (1936). The operators of each of two stations, serving the greater Wilkes-Barre (Pa.) area, applied for construction permits to increase the time of operation of their respective stations. Grant of such permit to either would necessitate the elimination of the other. Each submitted program proposals, and each contended that his respective plan for service justified an award as against the other. The Commission concluded that neither station had shown such proposals for service in the public interest as would justify the grant of a time increase to one, with the consequent elimination of the other.

\textsuperscript{80} See Plains Radio Broadcasting Co. v. Federal Communications Commission, 175 F. 2d 359 (D. C. Cir. 1949).

\textsuperscript{81} F.C.C. MimeoGRAPH No. 81575 (April 10, 1945).

\textsuperscript{82} See Comment, 18 U. of Chi. L. Rev. 78, 91 (1950); Note, 36 Va. L. Rev. 232, 249 (1950). For a more flamboyant criticism of the Commission, see 93 CONC. REC. A4905 (1947). "The Federal Communications Commission is notoriously the most incompetent, quack-brained organization ever devised by the New Deal. From the time it was formed in 1934 down to this very day it has never been out of trouble and what is more, trouble of its own making."

\textsuperscript{83} Hereafter cited as THE BLUEBOOK.
In issuing and in renewing the licenses of broadcast stations the Commission proposes to give particular consideration to four program service factors relevant to the public interest. These are: (1) the carrying of sustaining programs, including network sustaining programs, with particular reference to the retention by licensees of a proper discretion and responsibility for maintaining a well-balanced program structure; (2) the carrying of local live programs; (3) the carrying of programs devoted to the discussion of public issues; and (4) the elimination of advertising excesses.

Sustaining Programs—In weighing the merits of a given application, the Commission has always asserted its right to consider as a factor, the relative amounts of commercial and non-commercial programs featured or proposed to be featured by the licensee applicant. It justifies this policy with the assertion that non-commercial or sustaining programs serve five distinctive and outstanding functions, which commercial programs cannot: (1) they secure for the station a means by which it can achieve a balanced interpretation of public needs; (2) they provide for the broadcast of programs which by their very nature cannot be sponsored with propriety; (3) they provide for the program needs and purposes of non-profit organizations; (4) they provide an opportunity for experiment with new types of programs, and (5) they provide programs which satisfy “significant minority tastes.”

Local Live Programs—in the Bluebook, the Commission announced its intention of lessening the emphasis it had formerly placed on the carrying of local live programs, i.e., local programs which feature live talent exclusively, whether originating in the station's studios or by remote control. As reasons for its change of heart, the FCC assigned the “development of network, transcription, and wire news services.” The Commission, however, did not divest itself of all right to consider “local” programming as a factor in measuring a station's service in the public interest—“Nevertheless, reasonable provision for local self-expression still remains an essential function of a station's operation . . . .”

84 The Bluebook 55 (1946).
85 With some slight variation, the format for the remaining part of this discussion of programming in the public interest will follow closely the outline used in the Bluebook.
86 A commercial program is “. . . any program the time for which is paid for by a sponsor or any program which is interrupted by a spot announcement . . . at intervals of less than 14½ minutes.” FCC Public Notice 95462 (July 2, 1946).
87 The Bluebook 12 (1946).
88 “A sustaining program . . . is any program which is neither paid for by a sponsor nor interrupted by a spot announcement . . . .” FCC Public Notice 95462, p. 2 (July 2, 1946).
89 See note 87 supra.
90 The Bluebook 56 (1946).
92 See note 90 supra.
93 Ibid.
Advertising Practices—While recognizing that advertisers sustain radio, the Commission points out that radio is not the exclusive property of the commercial sponsor, and that his interest must be subordinated to the interest of the general public. Accordingly, the FCC has announced that as a condition precedent to the grant of a station license, the applicant will be required to state how much time he has devoted or proposes to devote to advertising matter in any one hour.94

Programs devoted to the discussion of public issues—As previously noted, the Communications Act requires that broadcasters afford equal opportunities to all candidates for a given political office.95 In addition, Commission rules require that broadcasters afford equal opportunities for discussion of controversial issues.96 The question arises: What is a controversial issue? An interesting example of the complexity which this problem can attain is presented by the case of In re Scott.97 Scott, a west-coast atheist, had petitioned the Commission to revoke the licenses of three California radio stations. He charged that the defendant stations had refused to make time available to him, by sale or otherwise, for the purpose of broadcasting talks advocating atheism. On the other hand, he alleged, they had permitted the use of their stations for direct arguments against atheism, as well as for indirect arguments (church services, prayers, Bible readings, etc.). He contended that the existence or non-existence of a Divine Being was a "controversial issue," and that in refusing to allocate time for arguments in support of atheism, the defendant stations were not presenting all sides of the issue, and therefore were not operating in the public interest.

The Commission concluded that Scott was entirely correct in his complaint, but hastened to add that since practically every station in the country was also "guilty" of the same charge, the petition would have to be denied—"... to do otherwise," the Commission asserted, "... would be to necessitate the revocation of too many licenses."98 In a later case, arising on facts substantially the same, the Commission ventured even farther. Mr. Arthur Cromwell, president of the Rochester Society of Freethinkers and father of Vashti McCollum, demanded that Station WHAM (Rochester, New York) give him time to answer a religious broadcast made over its facilities by a Catholic priest. WHAM declined, and Cromwell complained to the Commission. The FCC entertained his complaint, when WHAM's license came up for renewal in May, 1948. At that time, the Commissioners voted 3 to 2 against granting the station's application for a 3-year renewal, and compromised on a temporary renewal to Sep-
The Commission's dicta in the Scott case and its preliminary decision in the WHAM case have been the object of much serious criticism, and some humorous speculation as to just what is a "controversial issue."

One member of Congress pointed out that this was the same as demanding that a radio station give time to a criminal to reply on the air every time "Mr. District Attorney" or "The Crime Busters" programs were broadcast. Another Congressman likened the decision to the fantastic state of affairs that would exist if radio stations had to allow time to persons who do not believe in medicine and doctors whenever a public health officer took to the air to instruct citizens in the care and prevention of disease. Are vegetarians entitled to reply to radio programs featuring toothsome recipes for cooking meat and poultry? Maybe there are even some sincere believers in opium eating or polygamy who might be entitled to "have their say" under such a doctrine.

Another facet of the Commission's practice relative to station programming was brought into focus by the famed Mayflower decision. Station WAAB of Boston had from time to time, broadcast the editorial views of its owners. On application for renewal of its license, the Commission condemned this practice, saying:

A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.

As in the Scott case, the Commission was speaking only dictum and after the applicant had submitted affidavits to the effect that the station would refrain from further "editorializing," the license was renewed. But broadcasters take notice of what the FCC says as well as what it does, and for nearly eight years thereafter, that dictum stood as a barrier to the licensee's use of his microphone for opinionated self-expression. It was not until June, 1949, after hearings requested by the National Association of Broadcasters, that the Commission modified its prohibition against "editorializing" and concluded that such is permissible if a station's broadcasting policies meet the test of overall fairness.

---

99 The case is discussed in an article by Edward J. Heffron in the July, 1948 issue of Columbia magazine. The article, entitled, Atheism Bids for a Place on the Air, is reprinted in full in 94 Cong. Rec. A5018 (1948) as part of the extension of remarks by the Hon. Charles J. Kersten in the House of Representatives.


102 Mayflower Broadcasting Corp., 8 F. C. C. 333 (1941).

103 Id. at 340.

104 See Warner, op. cit. supra note 96, at 394.

105 FCC REPORT ON EDITORIALIZING (1949).
Community Need

Inexorably interwoven with almost every facet of the public interest concept is the issue of community need for the proposed broadcast service. Thus, this element is an ingredient in the determination of financial and technical qualification; and even weighs as a factor in the evaluation of an applicant's proposed program service. Yet, the determination of need is a difficult process, not readily susceptible to the application of fixed standards, and hence, Commission policy in this respect cannot be easily ascertained. Certain threads of decision principle can, however, be discerned in the pattern of past Commission practice; and, it is these which are offered for consideration.

As noted earlier, an applicant for a broadcast permit is generally required to evidence the commercial feasibility of the proposed undertaking. In establishing this premise, a petitioner may frequently present evidence of community need for an advertising outlet to serve the needs of local retailers and producers. To do so, he may show that at present, the locale in which he proposes to operate is without primary service, or that the service, presently offered, is inadequate. He may evidence the acceptability of his proposals to the residents of the community and establish that its merchants have agreed to utilize his facilities for sales promotion. Of course, his assertions are subject to attack by owners of existing facilities whose economic interest would be adversely affected by the addition

108 See Re Missouri Broadcasting Co., 3 F. C. C. 349 (1936).
109 "The determination of need is a subjective process. There is no yardstick which can be applied against any given set of statistics with the invariable result that the need for another broadcast station is or is not demonstrated. The best the Commission can do is to receive such testimony as is offered and announce its opinion as to the need. The opinion may be dignified by calling it a conclusion or a finding of fact, but nevertheless it remains an opinion, a kind of enlightened and informed guess." Re Roderick, 3 F. C. C. 616, 623 (1936) (dissenting opinion).
110 See note 52 supra.
111 See note 115 infra.
112 See Re Atwood, 7 F. C. C. 72 (1939); Re Galesburg Broadcasting Co., 5 F. C. C. 64 (1938); Re Patrick, 5 F. C. C. 48 (1937).
113 See note 77 supra.
114 "The Commission's Rules and its policy and practice contemplate a receptive consideration of the testimony of members of the public upon matters pertinent to the issue in proceedings of the nature wherein the public interest criterion is so predominant. Interested citizens who file protests or endorsements of pending proposals . . . may express by public testimony upon the record their relevant views upon the matter at issue," Re Kansas City Broadcasting Co., FCC Docket No. 8415, FCC 50D-63, p. 55 (December 29, 1950).
115 See Re Emporia Broadcasting Co., 6 F. C. C. 524 (1938); Re Hedrick, 6 F. C. C. 79 (1938).
of new facilities.\textsuperscript{116} Opposition to the entrance of the applicant newcomer may also be grounded on an assertion that the proposed transmission will result in electrical interference with present operations.\textsuperscript{117}

\textbf{Other Qualifications}

In addition to the foregoing specified categories of licensee qualification, the Commission has asserted its right to consider miscellaneous factors of eligibility, which can be grouped together under the general heading of "Other Qualifications." These will be discussed in brief.

\textit{Character:} Section 308 of the Communications Act empowers the Commission to investigate the character of the applicant in determining his qualifications for a radio broadcast license.\textsuperscript{118} In \textit{Mester v. United States},\textsuperscript{119} this power was explained to include the right to examine every facet of an applicant's personality—his behavior, integrity, temperament, consideration, sportsmanship, altruism, etc.\textsuperscript{120} In that case, the Commission had refused to consent to a transfer of stock which would give substantial ownership and control of a radio broadcast station to proposed transferees, who had had previous difficulties with government agencies as to weight-shortages, price-ceiling violations, fraudulent advertising, etc. And, in another case, the communications mentors denied permits to a newspaper for the construction of AM and FM outlets in Mansfield, Ohio, on the ground that the applicant's activities as a publisher had indicated marked propensities for monopolistic practices.\textsuperscript{121} Yet, in still another case, the Commission granted a license despite the fact that the applicant had been a frequent violator of local liquor and gambling control laws.\textsuperscript{122} The dearth of cases dealing with this precise facet of FCC licensing practice makes it difficult—indeed, impossible—to discern any pattern of decision which will serve as an accurate indicator of Commission policy in this respect.

\textit{Personal Ability:} As evidenced in the \textit{Kansas City} decision,\textsuperscript{123} the Commission will not hesitate to pierce the corporate veil and

\begin{footnotes}
\footnote{\textsuperscript{118} 48 Stat. 1084 (1934), 47 U. S. C. \$ 308(b) (1946).}
\footnote{\textsuperscript{120} Mester v. United States, \textit{supra} note 119, at 122.}
\footnote{\textsuperscript{121} Mansfield Journal Co. v. Federal Communications Commission, 180 F. 2d 28 (D. C. Cir. 1950). The case is noted in 50 Col. L. Rev. 849 (1950); 39 \textit{Yale} L. J. 1342 (1950).}
\footnote{\textsuperscript{122} \textit{Re} Jones, 11 F. C. C. 1138 (1947).}
\footnote{\textsuperscript{123} \textit{Re} Kansas City Broadcasting Co., FCC Docket No. 8415, FCC 50D-63 (December 29, 1950).}
\end{footnotes}
examine the personal qualifications of applicants who petition in corporate garb. Assuming the validity of this procedure, the question arises: what elements of personal ability should or does the Commission consider pertinent in passing on an application for broadcast facilities?

In the Kansas City case, the ruling turned on the lack of business acumen displayed by the officers of the corporate applicant. Although the business prowess of the petitioner and his employees has been considered as an element in several cases, this decision would seem to be the only one which turns solely on that point.

Another element of personal ability considered by the agency is the applicant's familiarity with the technical aspects of radio broadcasting. It is not necessary that he personally have a complete understanding of the mechanical operation of broadcast equipment, but it is required that he staff his station with mechanically competent personnel. With the ready supply of war-trained transmission technicians now available on the labor market, this requirement would seem to present no formidable barrier to the acquisition of a radio broadcast permit.

Purpose: By implication, Section 319 of the Communications Act requires that in passing on an application, the Commission determine that the purpose for which it is planned to use the proposed station will serve the public interest. The Reorganized Church case presents an interesting application of this rule. There, the petitioner had stated as one of the purposes for which it planned to use the proposed facilities, the propagation and fostering of its own religious beliefs. Partially on this ground, the application was denied, the examiner expressing the opinion that the powers of the Commission, as an arm of the Federal Government, could not be exercised to find that the public interest would be served by licensing an applicant for such purpose. The reasoning of the examiner

---

124 Id. at 55. "The Kansas City corporate applicant must necessarily be considered as possessing those qualifications and attributes, favorable and unfavorable, which are exhibited by its president . . . ."

125 See Re Joseph Henry Broadcasting Co., 12 F. C. C. 313, 337 (1947) (no experience with broadcasting); Re Delehanty, 11 F. C. C. 1178, 1194 (1947); Re Fall River Broadcasting Co., 10 F. C. C. 398, 399 (1944) (application granted when it appeared licensees would hire "experienced executive of recognized ability").

126 The ruling may be justified on the ground that a financial failure by one licensee may discourage future attempts by others, with a consequent loss of service to the community involved.

127 Re Weil, 5 F. C. C. 369 (1938); Re Pierce, 3 F. C. C. 146 (1936).

128 Re Kindig, 3 F. C. C. 313 (1936).

129 More than 400,000 persons are generally employed for the operation of radio transmitters in the United States. There are more than 700,000 authorized operators. 16 FCC ANN. REP. 125-126 (1950).


131 Re Reorganized Church of Jesus Christ of Latter Day Saints, FCC DOCKET No. 8870, FCC 50D-63 (December 29, 1950).

in this respect appears to be sound.\textsuperscript{133} Moreover, the decision is consistent with the Commission's duty to secure a fair and equitable distribution of available radio frequencies,\textsuperscript{134} and with its policy of rejecting applications for stations proposed to be operated exclusively in the interests of individuals or groups.\textsuperscript{135}

\textit{Summary and Appraisal}

The end and aim of this writing as outlined in the general introduction was threefold: (1) to examine the law which has governed radio broadcasting; (2) to evaluate it; and (3) to consider the merit of extending its application to television broadcasting. The particular task of this segment of the overall assignment was the examination and appraisal of the public interest concept as applied by the Communications Commission in the licensing of radio services.

The record, as revealed by the antecedent review of Commission rulings and court determinations, discloses that on the whole, the administration of our radio law, in this respect, has not been too objectionable. True, the Commission has occasionally left itself open to severe and justifiable criticism by its rulings in particular cases, such as the \textit{Scott} and \textit{Heitmeyer} decisions. But while these errors in judgment have been glaring, it is also true that they have been comparatively infrequent. The only substantial indictment which can be made against the Commission is its failure to have enunciated and followed a clear and consistent licensing policy. It is true that maximum efficiency in administrative regulation requires a policy flexible enough to adapt itself to the exigencies of changing conditions. But fairness demands that applicants and licensees have a guide to which they can look with a degree of certainty when plotting a course of conduct. The \textit{Bluebook} was—in this respect, at least—a forward step.

\textsuperscript{133} The reasoning of the examiner was as follows:

1. Before issuing a license to any applicant, the Commission must affirmatively find that the purpose for which such license will be used, is in the public interest.

2. This applicant proposes to utilize the proposed station for the propagation of its religious beliefs.

3. Therefore, in order to grant this license, the Commission would have to find the propagation of petitioner's faith would be in the public interest.

4. But the Constitution prohibits the Commission from either approving or disapproving of petitioner's religious beliefs.

5. Therefore, the Commission cannot affirmatively find that the proposed station will serve public interest, and the application must be denied.

\textit{But cf.} Evangelical Lutheran Synod v. Federal Communications Commission, 105 F. 2d 793, 795 (D. C. Cir. 1939): "The public interest does not necessarily demand that all stations become commercial, or that none be supported by religious bodies."


\textsuperscript{135} See Caldwell, \textit{Legal Restrictions on the Contents of Broadcast Programs}, 9 Air L. Rev. 229, 240 (1938).
The law under which the Commission functions, however, should be the subject of some serious congressional reflection. The broad licensing powers with which the Commission has been endowed, present grave potentialities for misuse—potentialities which, it is submitted, make undesirable the "as is" continuance of the present law, and especially its extended application to television broadcasting. Particularly is this true with respect to the Commission-assumed and court-confirmed power to regulate the programming practices of broadcast licensees.

The rising importance of television as a vehicle of thought expression must of necessity be accompanied by a comparative decline in the importance of other mediums of communication. It must be understood that all media of mass communication—the newspaper, radio and TV—depend for their existence and support on the advertising dollar. In the future, more and more of these dollars are going to be spent for television advertising, as opposed to radio and newspaper promotion. The reason, of course, is obvious. Television presents to the advertiser for the first time, an opportunity to "show and tell" his message to the buying public. For many types of advertising, therefore, TV will become the dominant, if not the exclusive, medium. The withdrawal of this major advertising support will inevitably effect the economic collapse of many radio and newspaper services. The failure or replacement of radio stations will, for the most part, affect only the economic interests of those who operate them. The loss of a substantial number of newspapers will be more serious.

The Commission's ability to regulate thought expression by administrative suggestion has made it impossible for radio to function as an unfettered vehicle for thought transmission. Until now, the newspapers of the country have served to offset and neutralize the potentiality and effect of this "regulation by raised eyebrow." They will continue to do for some time to come. But as inevitably many newspapers collapse before the economic pressure of television's increased use, the political sway of the printed word will decline in importance. It is imperative, therefore, that the medium which supplants the press as the prime mover of public opinion function with essentially the same freedom from government control which newspapers, themselves, have enjoyed.

True, the limited facilities available for video transmission require that some regulations be imposed upon it which are unnecessary

136 Occasionally the national legislators do worry about the present state of our radio controls. But their apprehension is usually in connection with the activities of the FCC, rather than with the law under which it functions. See 94 Cong. Rec. 9227 (1948).
137 See Smith, Television: There Ought to be a Law, 1180 HARPER'S 34 (Sept. 1948).
138 The phrase was coined by former FCC Chairman, James L. Fly. See Harness, The FCC Still Needs Investigation, 42 P. U. FORR. 835, 839 (1948).
NOTES AND COMMENT

in newspaper publication, but the Congress, and not the Commission, should assume the task of framing them. The substitution of administrative fiat for well-defined legislation can no longer be tolerated in the realm of communication control. Legislation—clear-cut legislation—defining the rights and duties of broadcasters, should be enacted now. Only thus can we obviate the dangers inherent in our present system of radio service licensing.

Part II

GOVERNMENTAL CENSORSHIP OF TELEVISION BROADCASTING

Not too many years ago, American music listeners were concerning themselves with the lyrical difficulties of a mythical hybrid named Alexander. The lyrics described his parentage as "half-Swan" and "half-Goose," and after several bars of mixed beat concluded that Alexander was a "Swoose." Recently, the federal courts in the case of Allen B. Dumont Laboratories, Inc. v. Carroll were presented with a similar problem—the problem of ascertaining the nature of motion picture film transmitted over radio ether waves. But the problem they faced was not so easy of solution as that which confronted Alexander's musical creator. For theirs was the necessary choice between two systems of law—motion picture law and radio law—and their determination was to have far-reaching effects on the legal future of visual broadcasting.

The "Dumont" Case

Five federally licensed Pennsylvania television stations brought an action for a declaratory judgment to determine the validity of a regulation promulgated by the Pennsylvania State Board of Censors requiring all motion picture film intended to be broadcast by television in Pennsylvania to be submitted to the Board for censorship.

---


2 The use of film in television programming is extensive. Of all the broadcasting conducted by the television stations of the United States at least 25% consists of film projection. More film is used in television than in the motion picture industry. This results from the greater number of programs shown over a television station as compared with a motion picture theatre and also because a television film program is generally given but once over any particular station in contrast with the frequent showings, sometimes "long runs," of the same motion picture in a theatre.

Film is used in television in various ways. An entire program may be broadcast from film. Action and sound recorded on film prior to broadcast may be integrated into an otherwise live program. Film may be employed as background during live programs. Commercial announcements are frequently recorded on films. By the process known as "kinescope recording" or "tele-
purposes. The district court concluded that the regulation was invalid because it impinged a field of interstate commerce which Congress had pre-empted under the Radio Act of 1927 and the Federal Communications Act of 1934, and that the regulation was inconsistent with the national policy adopted by Congress for the regulation and control of radio and television. Briefly, the rationale of the court’s decision was that there had been a complete occupation of the field by the Federal Government. The district court also concluded (1) that the regulation was invalid as constituting an undue and unreasonable burden on interstate commerce in television broadcasting, and (2) that the regulation was violative of the First and the Fourteenth Amendments to the Federal Constitution as an infringement of the freedoms of speech and the press. The case was the first in which the courts have discussed the question of governmental censorship rights over television broadcasts.

A discussion of this aspect of censorship may best be developed by an inquiry into the three grounds of attack propounded by the broadcasters in their briefs and sustained by the district court, viz., (1) that Pennsylvania’s attempt to censor any part of television broadcasting was invalid because it conflicted with federal legislation and because the State was asserting its regulatory power within a field

transcription” live programs frequently are recorded on film at the time of their production to the end that the film can be used for broadcasts of the programs. By a technique known as “bicycling,” a single print of a film may be used successively at different stations.

The complete text of the regulation reads as follows:

"13 Miscellaneous Provisions
"(d) Projection of motion pictures by television. All motion picture films, reels or views intended for projection or broadcast by television in Pennsylvania must first be submitted by the exchange, owner or lessee of the film, reel, or view for censorship purposes, and must not be projected by television in Pennsylvania unless first approved by the Board and a seal issued therefor upon payment of the proper fee, and said proper approval seal displayed upon every showing."

The regulation was issued under authority of a 1915 Pennsylvania statute, P. L. 534, as amended, Purdon's Pa. Stat. Ann. tit. 4, §§ 41-58 (1941). Section 42 of the Act provides: “It shall be unlawful to sell, lease, lend, exhibit, or use any motion-picture film, reel, or view, in Pennsylvania, unless the said film, reel, or view, has been submitted . . . and duly approved by the Pennsylvania State Board of Censors . . . .” Section 43 of the Act provides: “The board shall examine . . . all films, reels, or views to be exhibited or used in Pennsylvania; and shall approve such films, reels, or views which are moral and proper; and shall disapprove such as are sacrilegious, obscene, indecent or immoral, or such as tend, in the judgment of the board, to debase or corrupt morals. This section shall not apply to announcement or advertising slides or to films or reels containing current news events or happenings . . . which are not in violation of the provisions of this section.”

4 44 STAT. 1162-1174 (1927).
6 The Court of Appeals, Third Circuit, did not pass on this point.
7 The conclusion of law in respect to this latter point was not mentioned in the decision of the district court.
fully occupied by the Congress; (2) that the regulation imposed an undue and unreasonable burden on interstate commerce; and (3) that the regulation infringed the freedoms of speech and press guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Occupation of the Field by the Federal Government

A. The Scope of the Federal Communications Act of 1934

There is no doubt that radio broadcasting is in interstate commerce. Congress, therefore, pursuant to the Commerce Clause, has the power to regulate communication by radio, and radio broadcasting in particular. This was done through the enactment of the Federal Communications Act of 1934. The question then arose as to the applicability of the Act to television. Nowhere within the Act is the word "television" mentioned, but today there is little doubt that the provisions of the Act clearly extend to visual as well as to aural radio transmission.

"Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.


9 U. S. Const. Art. I, § 8: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."


11 Report of the Senate Committee on Interstate Commerce, S. Rep. No. 781, 73d Cong., 2d Sess. 1 (1934), discussing Senate Bill S. 3285, which later was enacted as the Federal Communications Act, stated: "The purpose of this bill is to create a communication commission with regulatory power over all forms of electrical communication. . . ." (Italics supplied.) See also Report of the House Committee on Interstate and Foreign Commerce, H. R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934); Oppenheim, Legal Aspects of Television, 8 Air L. Rev. 13, 26 (1937).

12 48 Stat. 1065 (1934), as amended, 47 U. S. C. A. § 153(b) (Supp. 1950). Section 2 of the Act, 48 Stat. 1064 (1934), as amended, 47 U. S. C. A. § 152(a) (Supp. 1950), provides: "The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided. . . ." Section 301 of the Act, 48 Stat. 1081 (1934), as amended, 47
Since 1929 the Federal Radio Commission and its successor, the Federal Communications Commission, have exercised broad jurisdiction over the development of telecasting and reported the exercise of such jurisdiction to Congress. For example, in 1929 the Federal Radio Commission reported the reservation of certain frequencies for experimental work in visual broadcasting and reported that certain technical information had been obtained as a result of experimental work in the field. As expressed by the broadcasters in the Dumont case, "The long acquiescence of the Congress in the exercise of this jurisdiction" would appear to dispel "any doubt that it is proper."

Recognizing the Commission's jurisdiction over television broadcasting, the question now presented is: how extensive and how exclusive is this authority in respect to the regulation of program content? Has there been a complete occupation of the field by the federal government? The Board of Censors in the Dumont case contended that Congress did not occupy the field of censorship of television programs but merely regulated radio with a view to achieving the maximum utilization of radio facilities and assuring that such facilities would not be monopolized by some to the exclusion of others. But the Board relied primarily, as a basis for argument, on an interpretation of Section 326 of the Federal Communications Act. Section 326 of the Act reads as follows:

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

Does Section 326 exclude any possibility of a right in the federal government to regulate censorship of television programs? The Board argued that Congress in Section 326 was limiting only the powers of the Commission and did not attempt to preclude a state from censoring radio communication. The Court of Appeals, Third Circuit, rejecting this contention, pointed out that Section 326 was not intended to give the states censorship rights specifically denied to the federal agency. The court stated: "The Act itself demon-

U. S. C. A. § 301 (Supp. 1950), provides: "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels . . . by persons for limited periods of time, under licenses granted by Federal authority. . . ."

13 FRC ANN. REP. 28 (1929). For supervision over experiments in color television, see I PIKE & FISCHER RADIO REG. 91:261, 91:441 (1950).


16 Query: does it follow that the states were therefore denied those rights? Might those rights have been inherent in the states? See note 25 infra.
strates that Congress was vitally concerned with the nature of the programs broadcast as affecting the public good. It, therefore, dealt directly with the subject matter of the broadcasts. . . . Congress thus set up a species of 'program control' far . . . more effective than the antique method of censorship which Pennsylvania endeavors to effectuate in the instant case."17 Exemplary of this system of "program control"—a system of self-regulation—are the provisions of the Communications Act: (1) providing for a careful check by the Commission as to the character and responsibility of any person seeking to obtain a license to operate a broadcasting station; 18 (2) prohibiting the assignment or transfer of a license without the written consent of the Commission after it has secured full information respecting the responsibility of the assignee or transferee; 19 (3) authorizing the Commission to suspend the license of any operator upon proof that the licensee "... has transmitted ... communications containing profane or obscene words, language, or meaning..."; 20 and (4) dealing with applications for renewal of licenses.21

The question of when the exercise by Congress of a lawfully delegated power precludes action by a state government in the same or closely related fields is a perplexing one, and one that has frequently been considered by the courts.22 From these cases has evolved the principle that even in a field traditionally occupied by the states, the power of the states to act will be deemed to have been superseded by a federal act where such was the "clear and manifest purpose of Congress." Would it be reasonable to say that the tenuous "occupation of the field" doctrine—the rationale of the decision in the Dumont case—was a sound basis for the decision? Or stated differently, was it the "clear and manifest purpose of Congress" that the Federal Communications Act of 1934 supersede all power of the states to act in respect to the censorship of program content? The answer would appear to be in the negative. To say, as did the court of appeals, that to prohibit a power to a federal agency is to prohibit it to the states is a somewhat unique principle, lacking substantial, if any, foundation. Nowhere is the control of the Commission over television broadcasting expressly made exclusive. If the purpose of

17 Allen B. Dumont Laboratories, Inc. v. Carroll, 184 F. 2d 153, 156 (3d Cir. 1950).
Congress was to rule out any state censorship whatsoever, Congress might well have unequivocally so declared. The "occupation" doctrine would appear to be inapplicable in the instant case. 28

Burden on Interstate Commerce

"There is a recognized principle . . . that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens . . . commerce in matters where uniformity is necessary—necessary in the constituted sense of useful in accomplishing a permitted purpose." 24 There is no doubt that television is in interstate commerce. 25 Was, then, the matter attempted to be regulated by the Pennsylvania Board of Censors commerce such as requires uniform regulation?

Time is an important factor in the production of television programs. The outstanding appeal of television to the advertiser (upon

28 For an able discussion of governmental regulation of the program content of television broadcasting, see Note, 19 Geo. Wash. L. Rev. 312 (1951). Therein the author notes—and it would appear that the point is well taken—that nowhere in the Dumont case was Section 414 of the Federal Communications Act raised. The section reads: "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

The author states in respect to Section 414: "At first blush, it might seem that Congress thereby intended to pre-empt the entire field of communication except for a limited number of specifically indicated exceptions, viz., . . . remedies now existing at common law or by statute . . . . But what are these remedies if not the entire body of law encompassed in the private rights under the common law and the public rights reserved to the States under the Constitution? The word 'remedies' is not to be given a restricted meaning: it refers not only to the enforcement of private rights, but also to the enforcement of public rights . . . not only to redress and compensation for violation of those rights, but also to the prevention of violations. There is no federal common law. The administration of the common law is to be found in the courts established by the state governments, and in the federal courts applying substantive state law. The states may abolish or modify rights existing under the common law where such action constitutes a reasonable exercise of its police or other regulatory powers. Thus the section must refer to nothing less than the totality of reserved powers. Nor is the phrase 'now existing' to be given a narrow interpretation. It cannot be contemplated that Congress thereby sought to ossify completely the existing state public and private law relating to radio communication. Rather, the import of the section is that the full range of activity for the exercise of state powers is to remain unimpaired, neither augmented nor restricted . . . . Careful consideration of this section thus impels the conclusion that what was contemplated was not an occupation of the field, but concurrent jurisdiction over those aspects of the field not otherwise denied to the states." Id. at 322-3.

25 Television programs broadcast in Pennsylvania are received by persons possessing television sets not only in Pennsylvania but also, depending upon the location and power of the broadcasting station, in Delaware, Maryland, New Jersey, New York, West Virginia and Ohio. There is no way to confine television broadcasts to receipt only by persons of the state in which the transmitting station is located.
whom the industry largely depends for economic support) grows out of the effects of immediacy, spontaneity, and flexibility in programming. It is the practice, therefore, of television broadcasters and advertisers to prepare programs, frequently on film, as close to the time of broadcast as possible in order to take full advantage of the opportunity to have the program “up to the minute.” The Pennsylvania regulation would undoubtedly require the rental of films for a longer period of time in order to afford the Board of Censors an opportunity to review the same. In addition, enforcement of such censorship would have the effect of imposing the standards of the Pennsylvania Board of Censors upon the people of neighboring states. It is doubtful that all states establishing regulations similar to the regulation involved in the *Dumont* case would have identical censorship standards. If each state making use of film for programming, or receiving film programs from other states, may censor the material transmitted, censorship would extend beyond state boundaries. The state maintaining the most rigid censorship standards would determine the norm of censorship standards to be adhered to by all the other states. To require a network to submit its program content for censorship purposes to any state through which the program will be relayed would appear to be an unreasonable burden. The burden upon commerce would be one resulting not merely from a regulation proposed by one state, as in the *Dumont* case, but from potential regulation by every state in the Union. The conclusion seems inevitable that the matter sought to be regulated by the Board of Censors in the *Dumont* case was such as requires uniformity of regulation, and hence, that the Pennsylvania regulation was invalid as constituting an undue burden on interstate commerce. It is submitted that the “restraint of commerce” argument is the proper basis for the decision in the *Dumont* case.

**Freedom of Speech and Press**

Recognizing state censorship of film intended for television broadcast to be invalid as constituting an unreasonable burden on interstate commerce, the problem remains to be determined: is the matter subject to any censorship? The broadcasters contended that the regulation was an infringement upon constitutional guarantees of freedom of speech and the press. Both the district court and the court of

---

26 The broadcasters in the *Dumont* case argued that the increase in the cost of operation of each television station would be increased beyond its revenue potential. The Supreme Court gave little acknowledgment to an argument based on economic hardship in Mutual Film Corp. v. Hodges, 236 U. S. 248 (1915). However, in view of the infant state of the television industry, perhaps some weight should be given to the economic hardship aspect. See Bergson, *State Censorship of Television*, 19 Fed. B. J. 151, 155 (1949).

27 See Luraschi, *Censorship at Home and Abroad*, 254 Annals 147, 148-9 (1947), detailing the varying standards to which the motion picture industry must conform in order to meet the standards of different censors.
appeals avoided discussion of this constitutional issue. A brief survey of the law of censorship in respect to the motion picture industry and the radio industry would seem pertinent in view of the analogy of film intended for television broadcast to both motion pictures exhibited in a theatre and radio broadcasting.

At the present time, censorship of motion pictures by official state boards is authorized by statute in six states. Such statutes have been sustained as constitutional in the case of Mutual Film Corp. v. Industrial Commission. Although the case has been the subject of much adverse criticism, the federal courts as late as 1950 have sustained the holding. The Court stated in the Mutual

---

28 The tendency to avoid decision on such a constitutional issue is not without respectable authority to substantiate it. The Supreme Court said in Parker v. Los Angeles, 338 U. S. 327, 333 (1949), “The best teaching of the Court’s experience admonishes us not to entertain constitutional questions in advance of the strictest necessity.” See also United Artists Corp. v. Board of Censors, 189 Tenn. 397, 225 S. W. 2d 550, cert. denied, 339 U. S. 952 (1950), where the Memphis Board of Censors banned “Curley,” an “Our Gang” type of picture, upon the ground that the south does not permit Negroes in white schools “nor recognize social equality between the races even in children.” The picture showed white and colored children attending school and playing together. The case was dismissed on the ground that the distributor had no standing to bring the cause of action.

29 Kansas (1913), Maryland (1916), New York (1921), Ohio (1913), Pennsylvania (1911) and Virginia (1922). Massachusetts censors films shown on Sunday (which would encompass practically all films). Connecticut’s statute was repealed; Florida held such a statute unconstitutional; and Louisiana’s statute has never been given effect.

236 U. S. 230 (1915). The case involved an Ohio statute which established a censorship board whose duty it was to examine and censor motion picture films to be publicly exhibited and displayed in Ohio, and pass and approve “only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character.” Id. at 240. See also Mutual Film Corp. v. Hodges, 236 U. S. 248 (1915).

51 See, e.g., Chafee, Free Speech in the United States 540-8, n. 6 (1941); Chafee, Government and Mass Communications 235-241 (1947); Ernst, The First Freedom 182, 268 (1946); Kadin, Administrative Censorship: A Study of the Mails, Motion Pictures and Radio Broadcasting, 19 B. U. L. Rev. 533, 548-61 (1939); Kupferman and O'Brien, Motion Picture Censorship — The Memphis Blues, 36 CORNELL L. Q. 288, 299 (1951); Note, Film Censorship: An Administrative Analysis, 39 Col. L. Rev. 1383 (1939); Note, Censorship of Motion Pictures, 49 YALE L. J. 87, 97 (1939). It is submitted that the adverse criticism is well founded.

32 RD-DR Corp. v. Smith, 89 F. Supp. 596, aff'd, 183 F. 2d 562 (5th Cir.), cert. denied, 340 U. S. 853 (1950). The case involved the film “Lost Boundaries,” the story of a Negro physician and his family who “passed” for white. The Atlanta, Georgia, Board of Censors banned the picture on the ground that “the exhibition of said picture would adversely affect the peace, morals and good order” in that city. The picture had been shown in several southern cities without any disorder. The denial of certiorari leaves the Mutual decision as the law. A similar issue arose in respect to the picture “No Way Out” which relates the prejudices met by a Negro physician in the practice of his profession. A Chicago board refused a permit for the picture because it (1) would “create unrest among the colored people,” (2) did not “show a true picturization of the white-colored situation” in Chicago, and (3) offered no solution to the problem. A scene showing the population arming for a
decision that “It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit . . . not to be regarded . . . as part of the press of the country, or as organs of public opinion.” 33 The Supreme Court subsequently, by way of obiter dicta, expressed itself to the contrary and included motion pictures in the press category. 34 Today it is recognized that freedom of speech and press includes communications which entertain 35 as well as those which inform and applies to business activities as well. 36 The distinction made between motion pictures and other means of communication in terms of use or benefit to be derived therefrom appears weak.

In the Mutual case the Court directed itself solely to the issue of freedom of speech and the press as embodied in the Ohio Constitution. The federal rights were not considered. It was “not until 1925, with the decision in Gitlow v. New York . . .” that the Court recognized “in the Fourteenth Amendment the application to the states of the same standards of freedom of expression as, under the First Amendment, are applicable to the federal government.” 37 It would seem that talking pictures are within the protection of the Fourteenth Amendment against state abridgment of fundamental freedoms. 38 If so, previous restraint by means of censorship would be unconstitutional. It is submitted that the motion picture should be considered and dealt with as an effective and intelligent medium for the presentation of ideas.

In respect to radio communication and freedom of speech and the press, a leading case is KFKB Broadcasting Ass'n, Inc. v. Federal Radio Commission. 39 The Court of Appeals of the District of Columbia stated therein (in construing a provision of the Radio Act of 1927
similar to Section 326 of the Federal Communications Act): “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.” 40 No decision of the Supreme Court has conclusively established that radio communication comes within the protection of the First Amendment. Mr. Justice Frankfurter said in National Broadcasting Co. v. United States that “... freedom of utterance is abridged to many who wish to use the limited facilities of radio. ... Because it cannot be used by all, some who wish to use it must be denied. ... The standard it [The Federal Communications Act of 1934] provided for the licensing of stations was the ‘public interest, convenience, or necessity.’ Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.” 41 Section 326 of the Federal Communications Act may have denied the Commission censorship rights not only because Congress intended thereby to abridge the scope of the Commission’s activities, but also because Congress believed that it was not within its power to grant such rights in view of the prohibitions of the First Amendment. It is doubtful that any attempt by the Commission to censor portions of a proposed broadcast could be upheld as valid under any circumstances.

Motion picture film intended for television broadcast is analogous to both motion pictures exhibited in a theatre and to radio communication. If deemed more akin to the former, the regulation in the Dumont case might have been sustained on the basis of the much criticized Mutual decision. If deemed more akin to radio, any attempt at suppression by censorship would be abhorrent to our ideas of freedom, as a restriction on the dissemination of ideas. When recognized that film intended for television broadcast combines the characteristics of both the motion picture and radio communication, the conclusion that the Pennsylvania regulation would be an unconstitutional infringement upon freedom of speech and the press seems unavoidable.

Conclusion

It is submitted that the result in the Dumont case was correct. Eliminating censorship will not ipso facto open the door to iniquity.

40KFKB Broadcasting Ass'n, Inc. v. Federal Radio Commission, 47 F. 2d 670, 672 (D. C. Cir. 1931). This case was decided the same year as Near v. Minnesota, supra note 38, wherein the Supreme Court held that a state may not enjoin a newspaper from future publication because it had in the past printed matter which was scandalous, malicious, defamatory, or obscene. The majority said that this amounted to censorship, a previous restraint of publication. Thus, that which is deemed censorship in the newspaper field, as defined by Near v. Minnesota, was held by the court in the KFKB case not to constitute censorship in the radio communication field.

42319 U. S. 190, 226-7 (1943).
Obscenity statutes will be available. The system of "program control" now employed under the Federal Communications Act of 1934 may well prove an adequate deterrent. Various groups such as the Legion of Decency and the National Board of Review will continue to exercise a constant surveillance.

Part III

COLOR TELEVISION

A COMMENT ON ADMINISTRATIVE CONTROL

Words alone cannot fully convey the story of the tremendous growth of the television industry and its impact upon the American economy. Although the commercial development of the industry was delayed until late 1946 by World War II, on January 1, 1947 there were an estimated 15,000 television sets in the public hands. On January 1, 1948 the number was estimated at 200,000; on January 1, 1949, at 1,000,000; on January 1, 1950, at 4,000,000; and at the present time estimates indicate that there are nearly 12,000,000 sets in the hands of the public. This represents an investment of nearly $3,000,000,000, and a total television audience of 45,000,000 people.

Fortunately, this miracle of engineering, production, and marketing genius was spared the chaos and confusion which accompanied, and almost ruined, the rise of its counterpart and predecessor, radio. The Communications Act of 1934\(^1\) had already provided the industry with a strong and substantial statutory system of federal regulation. The basic problems of control of television had long since been resolved and a body of substantive law and administrative rules and procedure, administered by the Federal Communications Commission, had met and solved each controversy. Now for the first time this authority over television is challenged, and the Supreme Court of the United States has been asked to review the regulatory powers of the Commission over the technical development of this new and great industry.\(^2\)

In order to fully understand the nature and scope of the problem involved it is necessary first to consider the controversial order\(^3\) of the Federal Communications Commission in conjunction with its technical and historical background.

\(^2\)Radio Corporation of America v. United States and Federal Communications Commission, argued before the United States Supreme Court, March 26, 1951, Docket No. 565.
\(^3\)FCC 50-1224 (Oct. 10, 1950).
Commercial television has until the present time been carried on under technical transmission standards established in 1941 after extensive hearings. These standards were set up in order to provide the greatest achievable performance within a six-megacycle channel. This single set of high quality long range standards has provided the public with a black and white television system which has met with widespread acceptance. These technical standards set the limits of performance which can be achieved by existing television apparatus, and in fact have not as yet been fully utilized, there still being room for improvement in black and white broadcasting and reception. The picture provided for by these standards at the present time has 525 lines and 60 fields per second, the image which appears on the receiver being comprised of approximately 200,000 picture elements.

With black and white television permanently established and the public demand constantly growing, the skills of the industry turned toward a still more ambitious project—color television. Accordingly, on July 11, 1949, the Commission issued its Notice of Further Proposed Rule Making. The Commission proposed in this notice to consider color television systems, provided that the proposed color systems met two basic criteria: first, that they operate in a six-megacycle channel (the same frequency space as allotted to black and white television systems); and second, that the pictures produced could be received on existing television receivers “... simply by making relatively minor modifications in such existing receivers.”

The notice also provided that after full hearing and oral argument, the Commission would, based on all the evidence and all available information, adopt such rules, regulations and procedures as would best serve the public interest, convenience, or necessity.

During the course of the hearings three color television systems were proposed, all of which can operate in a six-megacycle channel. For non-technical reference purposes, they may be described as follows:

1. C.B.S. proposed a “field sequential” system employing a single tube only, using a mechanical filter in front of the tube as a means of producing color. The system is wholly incompatible, that...
is, existing receivers are unable to receive a black and white picture from C.B.S. color transmissions. Also, due to the size of the filter, the direct view tube is, as a practical matter, limited to 10" or 12½".

(2) R.C.A. proposed a “dot sequential” system which scans each line in a series of dots rather than continuously. This system is all electronic and completely compatible, that is, all existing receivers can receive color T.V. transmissions of the system as a black and white picture without making any change whatever in the receiver.

(3) C.T.I. proposed a “line sequential” system which also is completely compatible.¹¹

On September 1, 1950, the Commission issued its first report setting forth detailed findings and conclusions concerning the proposed color systems,¹² and setting minimum criteria which would have to be met in order to be eligible for adoption.¹³ In this report the Commission declined to adopt any of the proposed systems, but concurrently suggested the adoption of “bracket standards”¹⁴ in the ex-

¹¹ Inasmuch as the present controversy mainly involves the comparative merits of the RCA and CBS systems, CTI will be eliminated from further consideration.
¹² FCC 50-1064 (Sept. 1, 1950).
¹³ “In order for a color system to be considered eligible for adoption, it must meet the following minimum criteria:

a. It must be capable of operating within a 6-megacycle channel allocation structure.

b. It must be capable of producing a color picture which has a high quality of color fidelity, has adequate apparent definition, has good picture texture, and is not marred by such defects as misregistration, line crawl, jitter or unduly prominent dot or other structure.

c. The color picture must be sufficiently bright so as to permit an adequate contrast range and so as to be capable of being viewed under normal home conditions without objectionable flicker.

d. It must be capable of operating through receiver apparatus that is simple to operate in the home, does not have critical misregistration or color controls, and is cheap enough in price to be available to the great mass of the American purchasing public.

e. It must be capable of operating through apparatus at the station that is technically within the competence of the type of trained personnel hired by a station owner who does not have an extensive research or engineering staff at his disposal and the costs of purchase, operation, and maintenance of such equipment must not be so high as unduly to restrict the class of persons who can afford to operate a television station.

f. It must not be unduly susceptible to interference as compared with the present monochrome system.

g. It must be capable of transmitting color programs over inter-city relay facilities presently in existence or which may be developed in the foreseeable future.”

¹⁴ The incorporation of bracket standards would permit such receivers to receive black and white pictures from present transmissions, CBS color transmissions, and any other transmissions within a range of 15,000 to 32,000 lines per second and 50 to 150 fields per second. FCC 50-1064 (Sept. 1, 1950).
isting monochrome television system. The stated purpose of such standards was to preserve the status quo on compatibility.\textsuperscript{15} In comments received on the proposal, it was the almost unanimous opinion of the industry that such bracket standards were impractical and moreover not capable of being produced within the time limits fixed.\textsuperscript{16}

R.C.A. subsequently requested the Commission to view the improvements made in its system and to view further experimental broadcasts, which request was denied. No testimony, oral or written, was received after the issuance of the first report, but on October 10, 1950, the Commission issued its second report,\textsuperscript{17} which concluded that the field sequential or C.B.S. system was the most satisfactory and should be adopted. The effective date of the order is November 20, 1950. To this report, R.C.A. objected. Accordingly, suit was filed in the United States District Court to enjoin, set aside, annul and suspend the order.\textsuperscript{18}

The court, by a two to one decision, allowed summary judgment for the defendants, United States and Federal Communications Commission, but continued in effect a temporary injunction restraining and suspending the promulgation, operation and execution of the order. The District Court held that it had only limited scope in review, and that the controversy badly needed the finality of a decision of the United States Supreme Court. It was also decided that the evidence sought to be introduced by plaintiffs was outside of the record, and that a hearing of such would amount to a trial \textit{de novo}. The temporary restraining order was allowed to stand pending review by the Supreme Court because of the public interest involved and the irreparable injury which would result to plaintiffs from the promulgation of the order.

On March 5, the F.C.C. motion in the Supreme Court to affirm the decision of the District Court was denied, and the case was argued before the Supreme Court on March 26, 1951. While it would be presumptuous to attempt to predict the decision which will be rendered, it is well to briefly review the communication law on the questions which will doubtlessly be raised in connection with the facts of the instant controversy and the decision of the District Court.

\section{Public Interest}

The guiding statutory standard for the Commission as set forth in the Communications Act of 1934 is the "public interest, convenience, or necessity."\textsuperscript{19} This statutory standard is not without specific

\begin{itemize}
  \item \textsuperscript{15}FCC 50-1064 (Sept. 1, 1950).
  \item \textsuperscript{16}FCC 50-1224 (Oct. 10, 1950).
  \item \textsuperscript{17}Ibid.
\end{itemize}
meaning and limitations. The Supreme Court has stated, quoting with approval from earlier decisions:

The touchstone provided by Congress was the "public interest, convenience, or necessity," . . . . "This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. . . . "

The "public interest" to be served under the Communications Act is thus the interest of the listening public in the "larger and more effective use of radio" . . . .20

That private litigants have standing to sue only as representatives of this larger and more important public interest, and that a court has the same power to protect public as well as private rights was held in Scripps-Howard Radio, Inc. v. Federal Communications Commission.21 "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." 22 An action to set aside an order of an administrative agency on the ground of public interest is a "plenary suit in equity." 23

The guide post given to the Commission as a measure of the public interest is "the larger and more effective use of radio." 24 The Commission in its Report of May 28, 1940 25 found that in the public interest television transmission standards must (a) permit all receivers to obtain all pictures,26 (b) permit the best possible performance but still leave room for all foreseeable improvements,27 and (c) be adopted only after full research and after industry is in agreement upon them.28

One question therefore is whether or not the adoption of the C.B.S. system is in the furtherance of the public interest, convenience,
or necessity inasmuch as it (1) involves a change in and violates the standards previously adopted and stated to be for "the larger and more effective use of radio," (2) deprives the public of compatible color even though the Commission itself as well as the leaders of the industry have declared a compatible system to be most desirable, and (3) entails the expenditure by the public of millions of dollars in converting their sets in order to receive such color telecasts in ordinary black and white, and many more millions to receive them in color.

II. Authority of the Commission

The authority of the Commission to set television transmission standards has never been before the courts. No express authority to do such is to be found in the Communications Act. The only specific statutory authority from which such a power can be inferred is Section 303(e) which authorizes the Commission to:

Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein.

To infer from this language the broad jurisdiction to set transmission standards would seem to be at best a doubtful inference. No one heretofore challenged the Commission's authority, however, since the industry fully appreciated the desirability of standards which would provide "a fair degree of efficiency and assure to the public in basic outline a single uniform system of broadcasting which will enable every transmitting station to serve every receiver within its range." Therefore, though no express authority was to be found in the statutes, the power was acquiesced in by the industry from practical necessity. But whether or not it is within this power to abandon the decade old policy of uniform single standards, to set bracket standards to adopt an incompatible system, and to prohibit compatible systems which would not interfere with the present service and reception is the question presented to the Supreme Court. The District Court did not pass upon the power of the Commission to adopt standards, and it would appear that the plaintiff is entitled to a judicial determination of this question.

---

29 See notes 25, 26, 27 and 28 supra.
30 See note 24 supra.
31 FCC 50-1064 (Sept. 1, 1950).
35 Ibid.
36 Ibid.
37 See note 18 supra.
NOTES AND COMMENT

III. Violation of Duty by Commission—Arbitrary and Capricious

The Administrative Procedure Act, in its sections dealing with rule making proceedings, provides:

After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose.38

The Commission itself has recognized this proscription and stated that in making "rules and regulations, and engineering standards, . . . it must conform to the Administrative Procedure Act which prescribes uniform rule-making practices for Federal agencies to follow."39 The Supreme Court likewise has held that Section 303 of the Communications Act40 imposes a "comprehensive mandate."41 This mandate would seem to include the duty to seek out and consider all relevant information. With regard to this mandate the Commission has recognized that it would be a violation of its statutory duties to disregard any relevant facts in fixing transmission standards.42

The discretion allowed to a federal agency is not without limits.43 The Commission in this case issued its second report44 adopting the C.B.S. system without considering any new evidence in the interim period since its first report45 in which it stated that none of the proposed systems was ready for use by the public. The findings were therefore based on evidence and demonstrations from an early part of the hearing. Inasmuch as during this interim period the Commission refused to view the R.C.A. improvements and Progress Reports46 or the report of the Condon Committee47 there is a serious question as to whether this action constituted such an abuse of discretion as to be arbitrary and capricious.

45 FCC 50-1064 (Sept. 1, 1950).
The Supreme Court has held that:

... the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not ... abandoned the principle of free competition. ...48

And in the same case it was stated that:

Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.49

The effect of the present order of the Commission 50 is to prohibit competition between compatible and non-compatible color telecasts, even though there would be no electrical interference between them,51 whereas the general policy of the Act has been to encourage competition.52

There is therefore presented to the Court for decision the very important and substantial question of the power of the Commission to suppress competition in color television. And if this should be decided in the affirmative, there is the further question of whether, in this particular case, the power was validly exercised since there are no findings in either the first 53 or second 54 reports that such was necessary to the public interest, and indeed, no evidence to show that the problem was considered.

V. The Opinion of the District Court

The decision of the District Court 55 was predicated on the fact that any determination made by them was appealable as a matter of right to the Supreme Court. The majority concluded that the action was a mere "practice session" 56 for the "big battle" 57 before the Supreme Court. The issue cannot therefore be said to have been litigated since little more was done than to refer the parties to the Supreme Court for decision.

49 Id. at 475.
51 FCC 50-1064 (Sept. 1, 1950).
52 Federal Communications Commission v. Sanders Brothers Radio Station, 309 U. S. 470 (1940); Mansfield Journal Co. v. Federal Communications Commission, 180 F. 2d (D. C. Cir. 1950).
53 See note 51 supra.
54 See note 50 supra.
56 Id. at 664.
57 Ibid.
It was held, however, that the court could not substitute its discretion for that of a federal agency acting within the bounds of its power, and that error or unwisdom did not amount to an abuse of discretion.\(^5\) And further that the judgment of an administrative agency, if based on substantial evidence and within the limitations of its statutory power, could not be disturbed by the courts even if on the same record the court would have arrived at a different conclusion.\(^5\) These, however, are established principles, controverted by no one, and approved in the leading case, National Broadcasting Co. v. United States, in which the court stated:

Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. . . . The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.\(^6\)

This limited scope of the court is not challenged. What the Court must decide is whether, within the scope of judicial review, the evidence presented will support a finding that the Commission acted outside of its power and did in fact abuse its discretion. This the opinion of the lower court failed to decide.

The Commission has taken the position that it was legally precluded from considering evidence presented in the interim period between its first and second reports.\(^6\) The District Court likewise decided that it (the court) could not consider any evidence outside of the record of the Commission.\(^6\) If such is the law, then there is in effect no provision for judicial review. If the reviewing court may not hear the evidence upon which the charge of abuse of discretion is predicated, how can any order of a federal agency be successfully challenged? Judicial review of orders of the Commission is specifically provided for by Section 402 of the Communications Act of 1934.\(^6\) The scope of this review is defined in Section 10 of the Administrative Procedure Act,\(^6\) and includes the right to set aside orders on the ground that they are unsupported by substantial evidence, are arbitrary and capricious, or are an abuse of discretion. It is submitted that evidence ignored by the Commission may be heard by the court in order to determine if the Commission has or has not violated its statutory duty to consider all relevant evidence.\(^6\)

\(^6\) 319 U. S. 190, 244 (1943).
\(^6\) FCC 50-1224 (Oct. 10, 1950).
\(^6\) See note 55 supra.
VI. Conclusion

There are, therefore, presented to the Court four basic questions:

(1) Has the Commission the power to set transmission standards?

(2) Granting the power, has the Commission exercised it in the "public interest, convenience, or necessity"?

(3) By refusing to hear evidence on the most recent developments has the Commission violated its duty and acted arbitrarily?

(4) Has the Commission the right to restrict competition in color television broadcasting where there is no electrical interference?

It would be presumptuous in this article to indicate what the Supreme Court will or should rule. However, the impact of the decision will so affect the public that a few observations are in order.

The Federal Communications Commission and the leaders of the industry are in unanimous agreement that a compatible system of color television is the most desirable. The acceptance of an incompatible system at this time was stated to be primarily for the very purpose of not further aggravating the compatibility problem. If, however, there is in fact on the horizon a truly compatible system which will completely solve the problem, instead of merely abating the damage, it would seem most reasonable to allow that system every opportunity to prove its acceptability. For ten years the Commission has held back acceptance of a non-compatible system because of its recognized shortcomings. The interest of the millions who now own television receivers and who will be harmed by the promulgation of the order constitutes a very large and very tangible portion of the public interest. If it is in their interest to postpone promulgation of the order until the very latest information is considered then it is clearly in the public interest to do so.

The trend in recent years has admittedly been to enlarge, not diminish, the power and discretion of administrative agencies. The courts are slow to declare that the bounds of statutory authority have been overstepped. Especially is this true where technical knowledge and skill are the dominant factors in the decision. It is, however, still the correct function and duty of the court to see that, in arriving at a decision and in applying the specialized knowledge of experts, there is no abuse of this discretion and that there is a strict adherence to duty.

Still another important consideration is the principle of free competition in the market, and public choice. Along with civil liberties, this portion of the American heritage has been jealously guarded and protected. Only when a clear public need for uniformity and suppression of waste, as in the case of public utilities, has been demonstrated, has this principle been abandoned. Radio broadcast-
ing has never been held to be in this category. The choice of program and set and the failure or success of a broadcaster has been left to the public. The approval or rejection of the Commission's decision will decide whether or not these same principles will apply to color telecasts.

Whatever the decision of the court, and whichever system of color television broadcasting is finally approved, the controversy will at last have the finality of a decision of the United States Supreme Court. There will have been a substantial contribution to a new field of law—television law. Under this law the industry will grow and perfect itself. In this way there will best be served the "public interest, convenience, or necessity."

**MUST THE REMEDY AT LAW BE INADEQUATE BEFORE A CONSTRUCTIVE TRUST WILL BE IMPRESSED?**

**Introduction**

Generally speaking, a constructive trust is a trust by operation of law, which arises contrary to intention against one, who by fraud, commission of wrong, abuse of confidential relationship or by any form of unconscionable conduct, or who in any way against the rules of equity and good conscience has either obtained or holds and enjoys the legal title to property, which in justice he ought not hold and enjoy. It is a procedural device raised by equity in order to administer complete justice between the parties.  

---

1. In an illuminating article classifying trusts according to intent, the "in invitum" quality of constructive trusts is employed as grounds for labeling such trusts "fraud-rectifying" as distinguished from "intention enforcing" express and resulting trusts. Costigan, *The Classification of Trusts as Express, Resulting, and Constructive*, 27 *Harv. L. Rev.* 437, 462 (1914).

2. "A constructive trust bears much the same relation to an express trust that a quasi-contractual obligation bears to a contract. In the case of a constructive trust, as in the case of quasi-contract, an obligation is imposed not because of the intention of the parties but in order to prevent unjust enrichment." 3 *Scott on Trusts* § 462.1 (1939) (hereafter cited as *Scott*). *Restatement, Restitution* § 160, comment b (1937) (hereafter cited as *Restatement*), makes the same analogy.

3. "Generally speaking, the *constructive trusts* ... are not trusts at all in the strict and proper signification of the word 'trusts'; but ... courts are agreed in administering the same remedy in a certain class of frauds as are administered in fraudulent breaches of trusts, and ... courts and the profession have concurred in calling such frauds constructive trusts ... ." 1 *Perry on Trusts and Trustees* § 166 (6th ed. 1911) (hereafter cited as *Perry*).

Cardozo, J., in his customary aphoristic manner, expresses the same thought in the following ways: "A constructive trust is, then, the remedial device through which preference of self is made subordinate to loyalty to others."