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FOREWORD

The revolution in communications technology has raised a host of specific problems in the regulation of broadcasting, and our contributors in this second part of the symposium have addressed themselves to these with great care and skill. On a more general level and at the risk of oversimplification, this Foreword seeks to pose some constitutional questions raised by the new technology which are not directly dealt with in the symposium.

The validity of most economic regulation is now tested against lax principles of substantive due process, under which the courts have tended to accord virtually conclusive weight to legislative judgments. The regulation of broadcasting, however, must also withstand scrutiny under the free speech guarantees of the first amendment, a territory that is much more jealously guarded by the courts against legislative intrusion than is private property itself. The regulators of broadcasting may therefore be playing under a more stringent set of rules than governs the regulators of any other economic activity.

The traditional justification for broadcasting regulation is the radio spectrum's technological limitations, which necessitate the exclusion of some would-be broadcasters in order that others may be heard. The advent of cable television (CATV), however, with its remarkable potential for greatly expanding the number of available channels, devalues the spectrum-scarcity argument to the point of requiring a reappraisal of the compatibility of exclusionary regulation with first amendment principles. FCC policy has been to restrict the growth of CATV for the purpose of protecting the existing broadcast system against economic harm, the premise being that CATV's economic impact would be (a) to disrupt development of the underutilized UHF portion of the spectrum, which the Commission has sought to foster as its solution to the problem of scarcity, (b) to weaken local stations, whose survival the Commission has always considered essential to the public interest, and (c) to deprive all stations of the financial capacity needed to engage in unremunerative broadcasting of a public-service variety. The following paragraphs suggest the constitutional issues that seem to be raised by the FCC's presence in this field.

(1) The *NBC* and *Red Lion* cases, the leading precedents on the first amendment's scope in broadcasting, each involved a conflict between (a) the public's right to hear a diversity of views and voices in broadcasting—a right the FCC was attempting to vindicate by its regulations—and (b) a broadcaster's asserted right to be free of speech-affecting regulation.¹ In any challenge to the FCC's restrictive

¹ *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Red Lion Broadcasting Co. v.*

regulation of CATV, these substantial first amendment rights would not be in conflict but would both be arrayed against the regulators, making the case against any curtailment of channels of communication formidable indeed.²

(2) The Supreme Court has, however, already approved denial of a broadcast license in situations involving no electrical interference but where the economic injury to an existing station would be such that the over-all quality of service to the public would be impaired.³ Would the Court extend this dictum, which was uttered without regard to first amendment implications, to sanction restrictions on CATV growth imposed for the reasons noted above? Can a restrictive policy be defended on the ground that it alone guarantees over-all service quality, or would such a defense be too speculative in a first amendment context? Is the quality which is achieved by enforcing fairness and programming diversity on the part of an artificially limited number of outlets constitutionally comparable to the quality and diversity which would be achieved through permitting a multiplicity of broadcast sources?

(3) The FCC has been in the familiar regulatory position of compelling one segment of the public to bear some of the burden of supporting service to another. Here, however, the discrimination has taken the form not of approval of a discriminatory rate structure but of denying desired communications service to present and potential CATV subscribers in order to uphold the quality of broadcast service to persons lacking financial or geographic access to the cable. Isn't the deprivation of access constitutionally significant under the *Red Lion* case? Is the necessary balancing of access rights to be done finally by the Commission or the courts?

In view of the foregoing, should not the FCC's task be redefined as one primarily of *maximizing the public's access* to communications sources and of resolving the conflicting access claims of various groups *in the manner least restrictive of first amendment rights*?⁴ Some such reformulation of the regulatory mission seems essential if the Communications Act and the first amendment are to work in harmony. Perhaps the Commission's latest tentative proposals would pass muster under such a view.⁵

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FCC, 395 U.S. 367 (1969). In both cases, the government's right to intervene to maximize diversity was upheld, and spectrum scarcity was invoked to justify imposition of special controls in broadcasting. In *Red Lion*, the Court conceded that the scarcity situation was subject to change but indicated that considerations other than technology might warrant imposition of fiduciary-like responsibilities. In *Red Lion*'s emphasis on the paramount rights of audiences, we are seeing the emergence of a "common-carrier-of-ideas" concept which may have equal application to newspapers.

² See *Weaver v. Jordan*, 64 Cal. 2d 235, 411 P.2d 289, 49 Cal. Rptr. 537 (1966), where the California Supreme Court invalidated a restriction on pay-TV on first amendment grounds. While that restriction was more sweeping than the FCC's restrictions on CATV have been, the case underscores the importance of the rights at stake.

³ *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); see also *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958).

⁴ *Cf. Shelton v. Tucker*, 364 U.S. 479 (1960).

⁵ See *New York Times*, May 18, 1970, at 1, col. 1; *Wall Street Journal*, May 19, 1970, at 10, col. 2. For thoughtful regulatory prescriptions and a discussion helpful in applying the suggested standard, see Chazen & Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 HARV. L. REV. 1820 (1970).