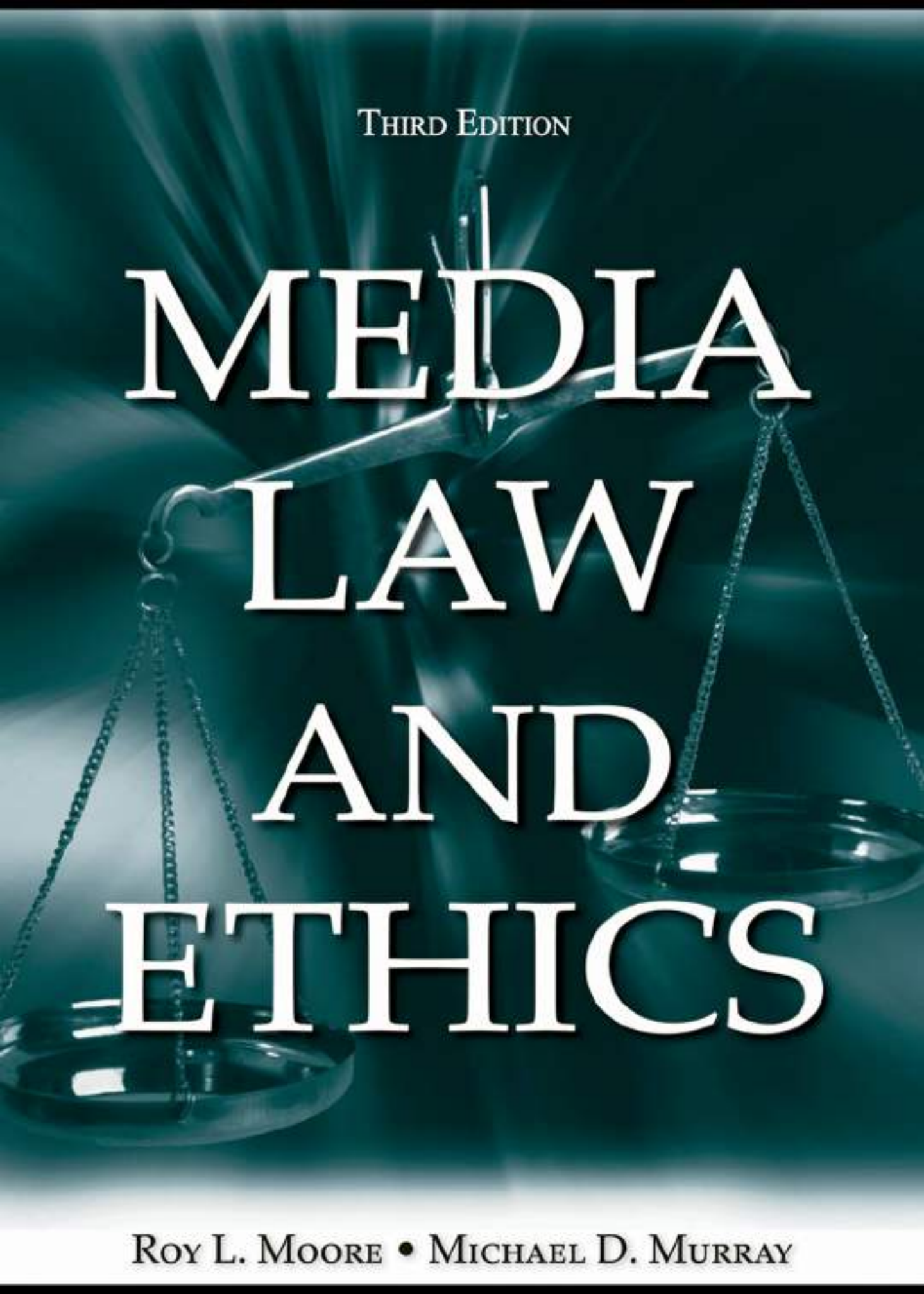
THIRD EDITION
MEDIA LAW AND ETHICS
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CHAPTER
7

Electronic Mass Media and Telecommunications

The resignation of Michael Powell as chair of the Federal Communications Commission (FCC) in 2005 gave some of the agency's harshest critics hope that a new agenda might re-emerge and lessen government attention to content issues, focusing again on emerging technology. While it appears that new technology will continue to attract attention, concerns over content will likely go unabated as the public expresses continuing interest in "decency" and "values" in what is being programmed.

President George W. Bush appointed Kevin Martin to replace Michael Powell as chair of the FCC in March 2005. A conservative like the President, Martin was born in Charlotte, North Carolina. During his undergraduate career at the University of North Carolina at Chapel Hill, he was student government president. He had worked as a lawyer for the Bush 2000 presidential campaign and later as a special assistant for economic issues. His wife, Catherine, was an economic advisor to the White House—first as advisor to Vice President Cheney, then as advisor to the President. Martin has served as a member of the FCC since 2001, entering office as someone regarded as a soft-spoken but thoughtful person.[1]

Martin is known for having taken issue with the other Republicans on the FCC in 2003, namely with Powell himself—and Kathleen Abernathy, especially on the subject of phone competition, including whether states should continue established pricing rules for so-called unbundled networks. Martin sided with the commission's two Democrats on that topic to continue having carriers share part of their networks. FCC rules require local carriers, known as regional Bells, to share parts of their operations. Elements of that decision were eventually struck down in court, but Martin continued re-evaluating elements of deregulation. He supported FCC fines on indecency totaling over $7.7 million in 2004 and championed the idea of tying the delivery of specific types of content to the development of new technologies. During the first year alone of Martin's tenure as FCC chair, the commission approved the sale of AT&T to SBC Communications, the purchase of MCI by Verizon Communications,

and the merger of Sprint with Nextel Communications. The FCC also removed requirements that local phone firms charge lower rates for Internet service providers leasing their high-speed DSL lines and instituted a new rule that voice-over Internet protocol (VoIP) provide subscribers with enhanced 911 service.[2]

Fueling much of the high technology interest are satellite radio systems, primarily XM Satellite Radio Holdings and Sirius Radio, promising to create a new audience, witnessed by the fact that more than 4 million paying subscribers signed up for their services in less than three years. Concern over content and control have come along with the wacky hi-jinx these programmers provide such as "Kawabunga Uber Alles," featuring punk and ska-style surf music over XM and "The Wise Guy Show," featuring Vinnie Pastore ("The Sopranos") with "Dr. Pussy's Love Advice." The battle between satellite radio providers and traditional sources has really just begun, with established names like Eminem, Snoop Dogg, Opie & Anthony, and Howard Stern as initial combatants in the radio space race.[3] In 2007 Sirius and XM announced plans to merge into one company with 14 million subscribers, pending FCC approval.

In this context, content issues should not re-merge with regulatory challenges from the FCC, although there is speculation that without regulators to taunt, Stern and company may find their role more challenging. But it is telling to note that Sirius agreed to pay Stern $600 million over five years. Not to be outdone by Sirius, XM later signed a three-year, $55 million contract with Oprah Winfrey for a new channel called "Oprah & Friends" that includes a variety of programming from self-improvement and fitness to a weekly show with Winfrey herself. By 2006, Sirius had more than 3 million subscribers, and more than 6 million individuals signed with rival XM Satellite Radio. Another developing technology permits Rush Limbaugh listeners to subscribe to "podcasts," homemade digital audio files in MP3 format, a service that began in 2004 at $49.95 a year. By 2005, the Pew Internet and American Life Project reported that almost 22 million Americans owned portable digital players, including iPods. Nearly a third had downloaded podcasts from the Web, so a revolution in individualized media was well underway.[4]

In addition to satellite broadcasting and podcasting, cell phone companies and their entertainment counterparts have also tapped into television. While it would not be too much of a stretch to compare the images from this new technology to over-the-air television's development in the late 1940s as a slow-moving slide show, the potential is there. Companies taking a serious look at this technology include the established major television networks. As this chapter is being written, Fox News programs and soap opera pilots are being delivered to Sprint TV users. One-minute episodes are also being developed using small digital cameras. Given the integrated nature of these delivery systems, the tremendous economic potential, and the prospect for controversy, the instinct to regulate will no doubt present challenging questions for the FCC.

The regulation of electronic mass media and telecommunications took its last sharp turn in 1996 when Bill Clinton signed a Telecommunications Act into law. He did so with an electronic pen at the Library of Congress, symbolizing the beginning of an era destined to change the regulatory scheme—from ownership to technology. The Act signaled the end of a decades-long policy of segregating electronic technologies to shield them from competition with each other and the dawn of new policy allowing

them to compete and merge in ways that would not have even been considered in the past. Prior to that Act, cable companies were not permitted to intrude into the telephone business, and strict limits were imposed on ownership of broadcast stations for fear a few companies would dominate. Cable and telephone firms now more effectively "duke it out" in the marketplace, and, with few still remaining limits on broadcast ownership, restrictions were liberalized.

To appreciate the significance of the Telecommunications Act, we must first understand how we arrived where we are today. Let's begin with a brief history of over-air or "free" broadcasting.

Origins of Broadcasting

Although many electronic media are *privately* owned, the broadcast spectrum is considered a *public* resource or, more specifically, a **limited public resource.** The technical capacity exists for an almost unlimited number of channels, as spectrum divisions are traditionally known. Yet the courts and the federal government—most notably the Federal Communications Commission—cling to a scarcity rationale in justifying restraints on electronic media that would not pass constitutional muster for the print media. There is no better illustration of this than the U.S. Supreme Court decision in *Turner Broadcasting v. FCC* (1997),[5] in which the Court ruled that Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act") did not violate the First Amendment rights of cable operators. Under the "must carry" provisions of the Act, cable operators were required to carry the signals of local broadcast stations on their systems.

Although the decision concerned the First Amendment rights of cable systems rather than those of broadcasters, the majority opinion written by Associate Justice William Kennedy said the government had a substantial interest in preserving "free, over-the-air local broadcast television" to promote the broad "dissemination of information from a multiplicity of sources" and to promote competition. Such restrictions on print media would never be tolerated by the Court, but the electronic media, including cable television producers remain second-class citizens in the eyes of the Court when it comes to First Amendment rights.

The technical elements for broadcasting—electromagnetic waves, air and space—have always existed, but a means of independently creating radio waves and then receiving them was not created until the late 19th century. If technology had existed a century ago to construct a radio receiver that approached the capabilities of those hand-built by amateur radio experimenters in the 1890s, "transmissions"—including magnetic radiation from "hot spots" on the sun and from lightning and other weather phenomena—could have been picked up. Electromagnetic radiation is the end product of a charged particle (electric field) interacting with a magnetic field.[6] Although radio, television, and similar forms of electromagnetic radiation are characterized as media because they travel over the airwaves or "media," radio waves (which would, of course, include television) can travel without material media—that is, in a vacuum. As early as 1865, a Scottish physicist, James Clerk Maxwell, developed a

mathematical theory of electromagnetic radiation that became the first of a series of steps taken by a number of inventors, generally without the knowledge of one another, toward the eventual development of broadcasting as we know it today. Some were scientists, others were visionaries, and a few were opportunists.

The Pioneers

Maxwell's 1873 *A Treatise on Electricity and Magnetism* theorized that electrical and magnetic energy move at the speed of light in transverse waves. Fourteen years later, another physicist—this time a German—conducted experiments involving reflection, refraction, and polarization of magnetic waves. Heinrich Rudolf Hertz confirmed the existence of radio waves, providing the impetus for other experimenters to study how to harness, transmit, and modify waves so they would be capable of transmitting information over long distances.

In 1895, an Italian physicist whose name has become synonymous with the wireless telegraph, Guglielmo Marconi, sent what are known today as *long-wave* radio signals over more than a mile. This was an accomplishment on par with the Wright Brothers' first power-driven airplane flight in 1903. For the first time, a scientist had demonstrated that information could be transmitted and received over long distances without benefit of a wire or cable, as had been required for telegraph. Probably no one at the time, including Marconi himself, could have imagined a world a century later whose communication would be virtually controlled by radio waves. But Marconi and others continued their experimentation and made some remarkable achievements within a relatively short time. By 1901, Marconi had picked up the first transatlantic wireless transmissions and although the sounds were neither voice nor music, simply sparks and crackles, the world was on its way to becoming a "global village," as the late Canadian media theorist Marshall McLuhan would later characterize it.

Historians are still divided over when the first voice broadcast occurred. Some claim that a Murray, Kentucky, farmer named Nathan B. Stubblefield broadcast "Hello, Rainey" to his friend, Rainey T. Wells, in a demonstration in 1892, and other scholars attribute the first broadcast to Reginald A. Fessenden, who transmitted a short, impromptu program from Brant Rock, Massachusetts, in 1906 to nearby ships.[7] In 1991 officials of the Smithsonian Institute in Washington, DC, called Stubblefield's work "interesting and even important" to the development of radio but rejected a petition by the farmer's grandson that Stubblefield be recognized as the inventor of radio. In 1904 the first telegraphic transmission of a photograph was accomplished. Although the reproduction was crude by today's standards, it ushered in a new era—news photos could be sent across distances on a timely basis. In 1906 American Lee De Forest announced his invention of the triode, a vacuum tube that permitted the amplification of radio waves. Until the 1960s when the transistor was mass marketed, all radio receivers (and transmitters as well) required vacuum tubes to function. (The transistor was invented as early as 1948. It did not become commonplace in receivers until years later.) In 1910 De Forest made a live broadcast of

the great Italian opera singer, Enrico Caruso, and five years later the Bell Telephone Company conducted a series of experiments involving voice transmissions across the Atlantic.[8] One year later on November 17, 1916, De Forest made what is recognized as the first newscast in the United States. Using his experimental station at High Bridge, New York, he recited returns from the Wilson–Hughes presidential election to ham radio operators.[9] No one apparently faulted him for the fact that he ended the broadcast with the wrong result.[10]

Origins of Government Regulation

In 1917 the United States entered World War I and the government subsequently prohibited all private broadcasting until the war ended two years later. By 1919 the groundwork was laid for mass broadcasting with the creation of Radio Corporation of America (RCA) by the three communications giants—General Electric, Westinghouse, and American Telephone and Telegraph. Although there was no indication at the time, the conditions were also set for government regulation. First, newspapers became heavily involved in broadcasting, especially in establishing and owning stations. It would be decades later before strict federal rules were enacted regarding cross-media ownership, but newspaper companies established a foothold in the broadcast marketplace. Papers such as the *Atlanta Journal, Louisville Courier-Journal, St. Louis Post-Dispatch, Chicago Daily News,* and *Milwaukee Journal* had the financial clout to keep stations operating and the news gathering resources, including sports, to fill the airtime.

Radio proliferated and prospered, signaling problems with frequency spectrum allocation. In 1910 Congress passed the Wireless Ship Act, which required all ships leaving any U.S. port to have wireless radios and skilled radio operators on board if they carried 50 passengers. Two years later Congress enacted the Radio Act of 1912, which for the first time required all radio stations to have licenses from the Secretary of Commerce and Labor. The statute also set certain technical requirements and allocated radio bands for exclusive government use.[11] The Act did not limit private broadcast stations to particular frequencies, but the Secretary of Commerce selected 750 kilohertz and 833 kilohertz as the bands on which they were to operate.[12] There was no requirement that the broadcasters operate in "the public interest" nor were there any real restrictions on content. Instead, broadcasters were permitted to operate as they wished without any substantial governmental interference. Unfortunately, the interest of private enterprise in radio grew so quickly that the Commerce Secretary was unable to prevent stations from interfering with one another. Even though many more channels were made available, limits on operating power and hours of operation were imposed and channels were separated by 10 kilohertz, as they still are today in the AM portion of the radio spectrum.[13]

The result was utter chaos as the number of stations escalated from a handful around 1920 to several hundred in 1923 to almost 600 toward the end of 1925, with

a backlog of 175 applications for new stations, all wanting to broadcast in essentially the space we call the AM band. As of March 2005 more than 12,700 AM and FM stations were licensed in the United States, with more than 4,700 in the AM band.[14] There is little interference because of strict limits on power, allocated channel space, operating hours, and technical criteria.

With the government giving its *de facto* or tacit approval of private ownership of broadcasting, it was becoming apparent that its role in broadcasting would be as a police officer, not owner. The government did, of course, own and operate certain broadcast facilities for military and security purposes, but these were for private governmental use, not for public dissemination. Because broadcasting did not exist at the time the Constitution was enacted, it contains no provisions specifically dealing with this type of commerce. But it is highly likely that the U.S. Supreme Court would have struck down any constitutional challenges to government ownership of broadcasting, just as it did to government regulation of radio and television. Had the U.S. government or, specifically Congress, chosen not to permit private ownership of the airwaves, our system of broadcasting may have evolved into a system consisting of a mix of private and government ownership—like systems in Great Britain, Japan, and Germany. Other systems exist in which ownership and operations are strictly in the hands of government. The private ownership that we have today was the direct result of a government policy to encourage development of the broadcast system by free enterprise. It was not the product of any *laissez faire* attitude by Congress. The First Amendment clearly prohibits government ownership of the press, which has been interpreted primarily to protect the print media, but no such prohibition applies to the broadcast media. The Supreme Court would probably never allow government takeover of broadcasting today, but the ban would likely be based on public policy and contractual grounds, not on purely constitutional grounds.

Just as debate continues among historians over who made the first voice broadcast, there are conflicting claims as to which station was the first regular broadcasting entity. The first station to be issued a regular (not experimental) broadcasting license, according to official records, was WBZ in Springfield, Massachusetts. The license was granted by the federal government on September 15, 1921.[15] KDKA in Pittsburgh, Pennsylvania, did not receive its license as a regular broadcasting station until several weeks later on November 7, 1921, but mass media historians generally credit KDKA as the first fully licensed commercial broadcast station[16] because it began transmitting news and music on a regular basis beginning in November 1920.

Newspapers and other owners such as the Westinghouse, General Electric, and RCA electronic giants realized rather early the enormous profit potential in broadcasting, although during the early years the income came primarily from the sale of crystal and later vacuum tube radio sets. Newspaper companies generally owned radio stations as a means of promoting the sale of their newspapers. It soon became apparent, however, that the sales of radio sets and newspapers were not the most profitable means of operating radio. Quite simply, the point would be reached at which everyone who could afford a radio receiver would have one, producing revenues only from the sales of second and replacement sets. Instead, broadcasters

turned to advertising, which gave the new medium a substantial boost. This gold mine created such an enormous interest in the broadcast business that by the end of 1925, almost 600 radio stations were already on the air, with 175 applications for stations pending.[17] Chaos reigned on the airwaves with at least one station on every available channel and several stations on most channels.

Passive Roles of the Courts

The courts were of no assistance in resolving the confusion. A U.S. Court of Appeals ruled that the U.S. Secretary of Commerce could not deny a license to any legally qualified applicant even if the proposed radio station would interfere with the private and governmental stations already on the air.[18] Furthermore, an Illinois District Court held that the Secretary of Commerce could not institute frequency, power, or operation hours restrictions, and a station operating on a different frequency than originally assigned was technically not in violation of the Radio Act of 1912.[19] Even the acting U.S. Attorney General got into the act by declaring that the Secretary of Commerce had no authority under the Radio Act of 1912 to regulate power, frequency, or hours of operation.[20] An exasperated Secretary of Commerce, Herbert C. Hoover (inaugurated 31st U.S. President 3 years later), announced on July 9, 1926, the day after the Attorney General's ruling, that he was giving up attempts to regulate radio, urging stations to self-regulate.[21]

Intervention of Congress: The Radio Act of 1927

Self-regulation never materialized, and on February 23, 1927, Congress stepped into the picture with the Radio Act of 1927 after President Calvin Coolidge had appealed to the legislative body for a solution. As a Supreme Court Justice described the situation 16 years later in *National Broadcasting Co. v. the United States* (1943), "The result [of stations operating without regulations] was confusion and chaos. With everybody on the air, nobody could be heard."[22]

One could argue that radio was never given sufficient time to develop an effective system of self-regulation, but the fact remains that even the broadcasters themselves recognized that self-regulation probably would not work in America, at least for the immediate future. With airwaves in such a horrible mess, the potential for profits was substantially reduced because everyone wanted a piece of the spectrum without giving up any privileges.

Federal Radio Commission

The Radio Act of 1927, the first of only three comprehensive broadcast regulatory schemes to be enacted by Congress, was designed to bring order to the chaos and set radio on a path to prosperity. The act created the five-member Federal Radio Commission (FRC) with broad and comprehensive licensing and regulatory authority. The body was granted the authority to issue station licenses and to allocate frequency bands to various services and specific frequencies to individual stations.

The commission also had the authority to limit the amount of power a station could use to transmit its signal. Although he was not directly connected with the FRC, the Secretary of Commerce was assigned the responsibility of inspecting radio stations, testing and licensing station operators, and assigning call letters.

The commission took its tasks seriously and immediately began enforcing the rules created under the Act. Some 150 of the 732 stations operating in 1927 eventually left the air. Today the more than 4,700 commercial AM stations on the air operate in essentially the same frequency space assigned in 1927 but with limits on power and channel separation. This accomplishment can trace its origins to the FRC in 1927, which began the complicated task of reorganizing the broadcast spectrum.

As the FRC progressed in its efforts to administer the Act as "public convenience, interest, or necessity requires," it became apparent that the commission needed expanded regulatory powers and more than simply fine tuning was necessary. Soon after he became President in 1933, Franklin D. Roosevelt asked his recently appointed Commerce Secretary, Daniel C. Roper, to establish an interdepartmental committee to study broadcasting and the FRC. The committee made several recommendations, including creating one federal administrative agency similar to the FRC to regulate all interstate and international communication by wire or broadcasting, not just commercial radio. See Figure 7.1.

Communications Act Of 1934

Congress followed the recommendations and enacted the Federal Communications Act of 1934, the second to deal comprehensively with electronic communications. The Act continued to serve as the primary statute under which the FCC functioned until February 1996 when the Telecommunications Act of 1996 became law. Although there had been changes in the form of various amendments to the 1934 Act, the primary provisions of 1934 remained essentially intact until the new 1996 law thoroughly overhauled the regulation of telecommunications and electronic media in this country.

Federal Communications Commission

The 1934 act created a seven-member administrative agency similar to the FRC and renamed it the Federal Communications Commission (FCC). The composition and functions of the FCC were not substantially altered by the 1996 Telecommunications Act, although Congress handed the commission a whole new set of rules and regulations to enforce.

Under Public Law 97-253,[23] enacted in 1982, nearly half a century after the FCC was created, Congress reduced the number of members to five, effective July 1, 1983. Each member is appointed by the President with the advice and consent of the Senate. The President designates one member to serve as chair, who is responsible

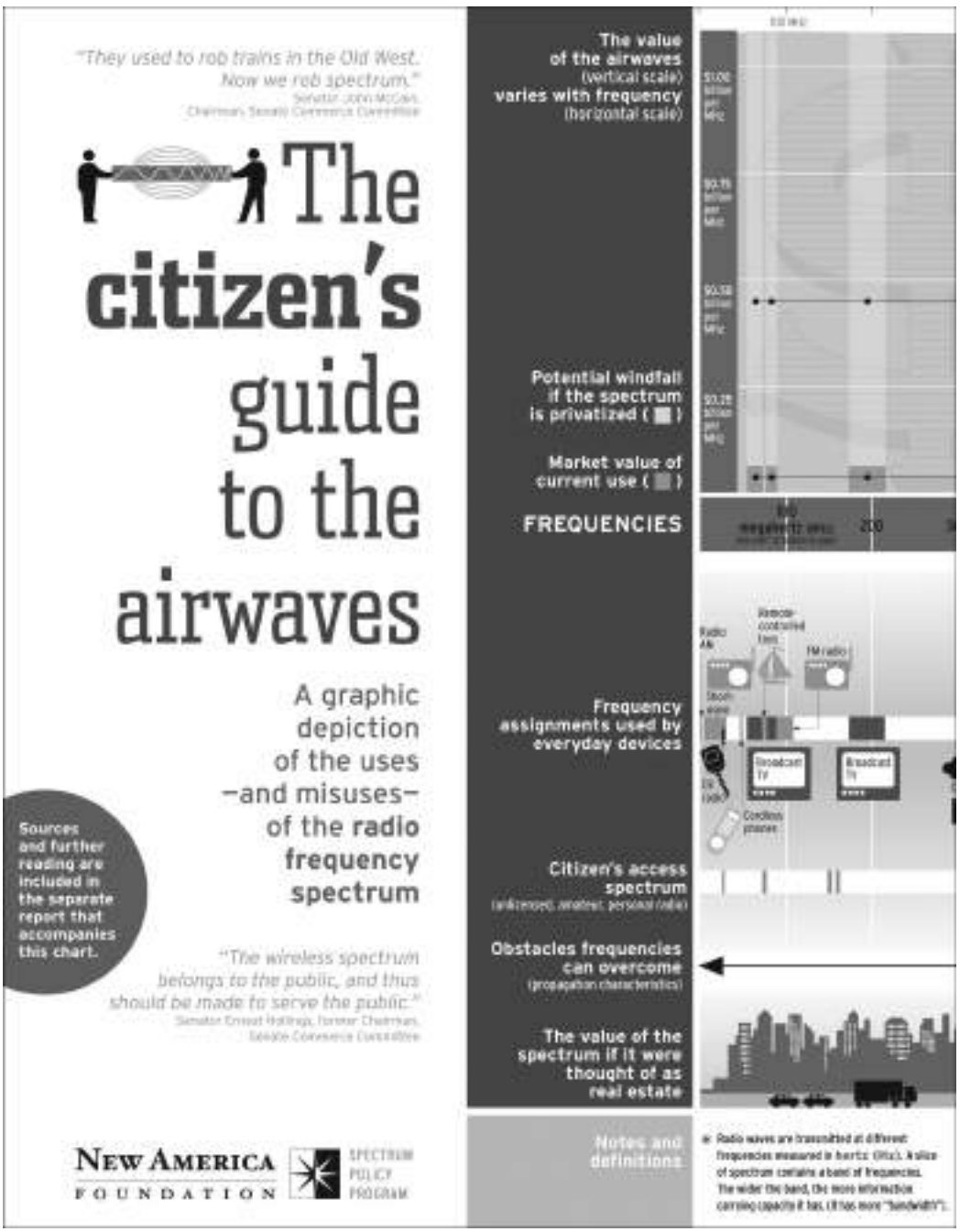


Figure 7.1 "The Citizen's Guide to the Airwaves," reprinted with permission from the New America Foundation, offers background on the government's role in regulating the nation's airwaves and the spectrum debate, including the economic, social and political impacts.

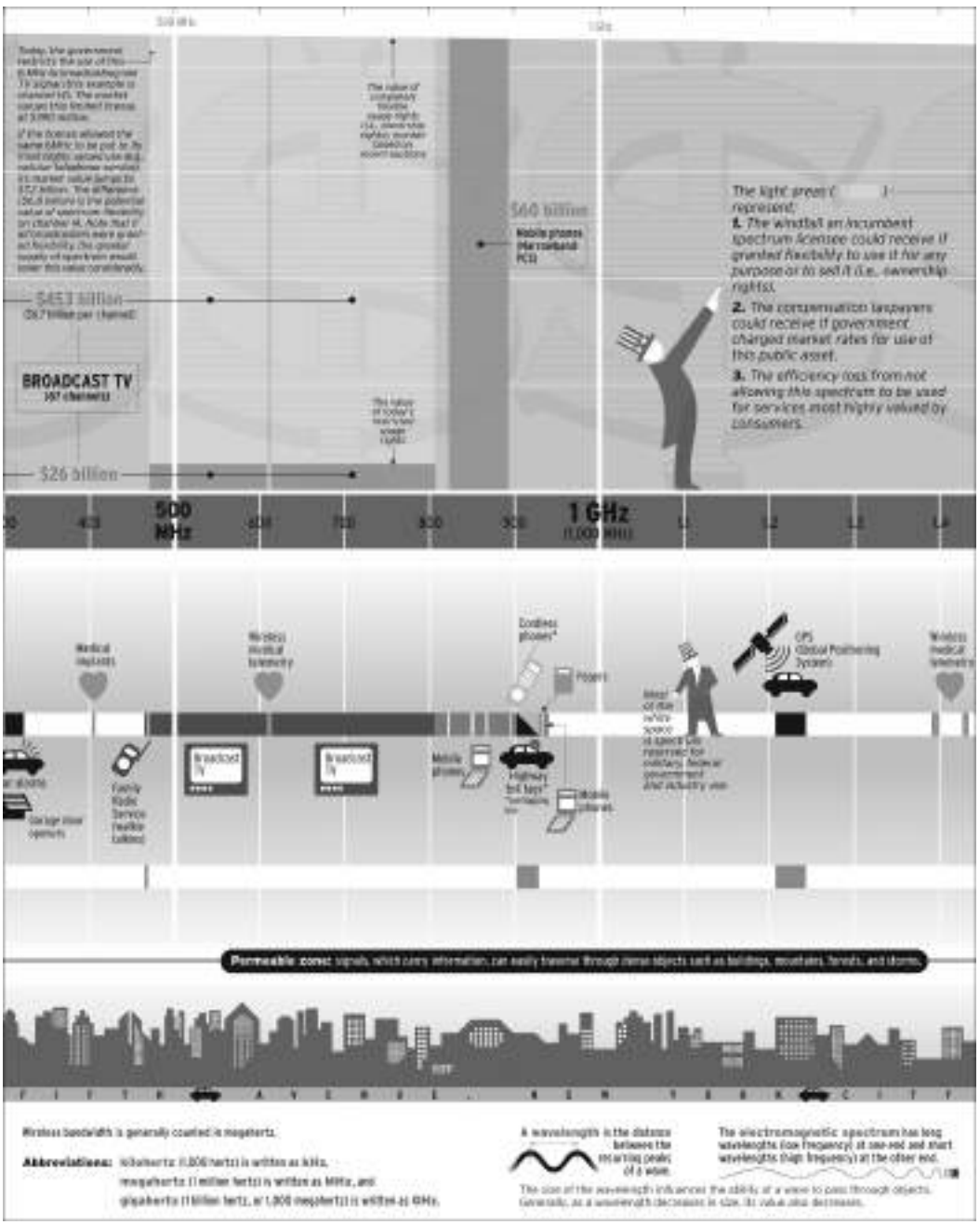
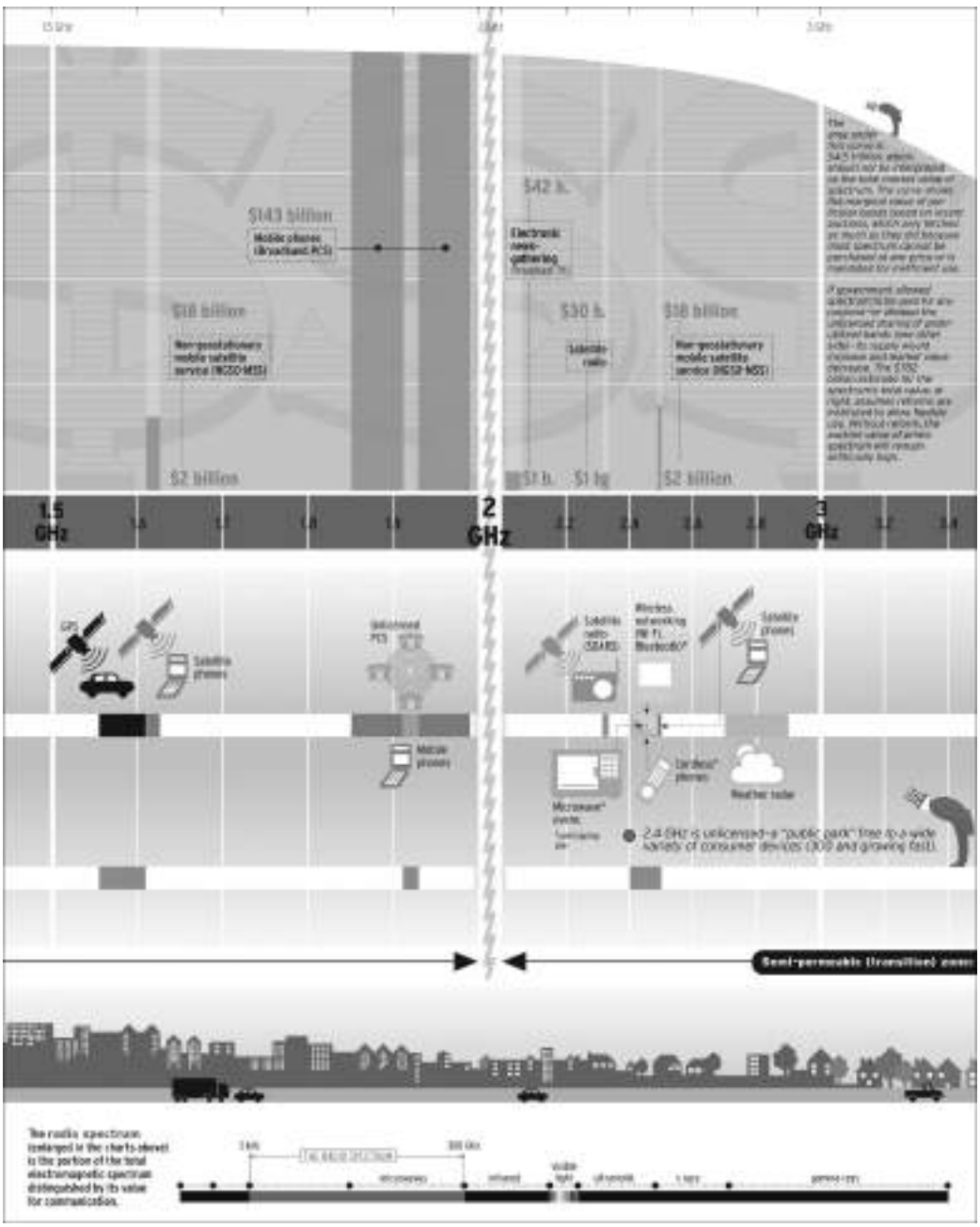


Figure 7.1 (Continued).

for organizing and coordinating the FCC's operations and, as would be expected, presides over commission deliberations. Commission members are appointed for five-year terms, with the terms staggered so that one commissioner's term expires each year. If commissioners leave before their terms expire, replacements serve the rest of the unexpired terms. (Of course, a replacement may be re-appointed for a five-year term at the end of the original.) No more than three members can serve at



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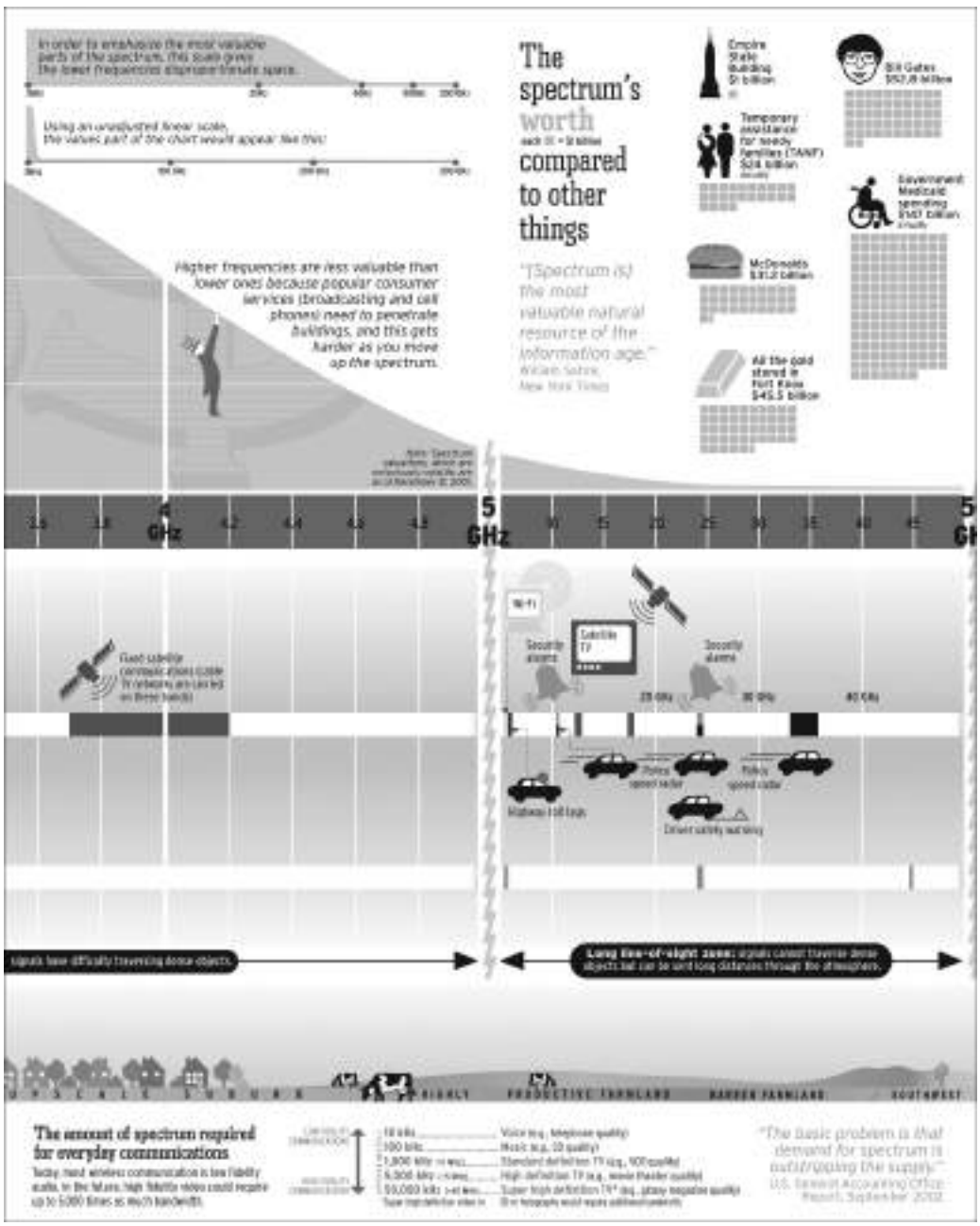
the same time from the same political party. When terms expire or openings occur, presidents typically appoint members of their party until a maximum of three has been reached.

An objective of the 1934 Act was to unify the various statutes and rules and regulations affecting interstate communications and place the authority for enforcing them and setting policy under the umbrella of one independent, quasi-judicial,



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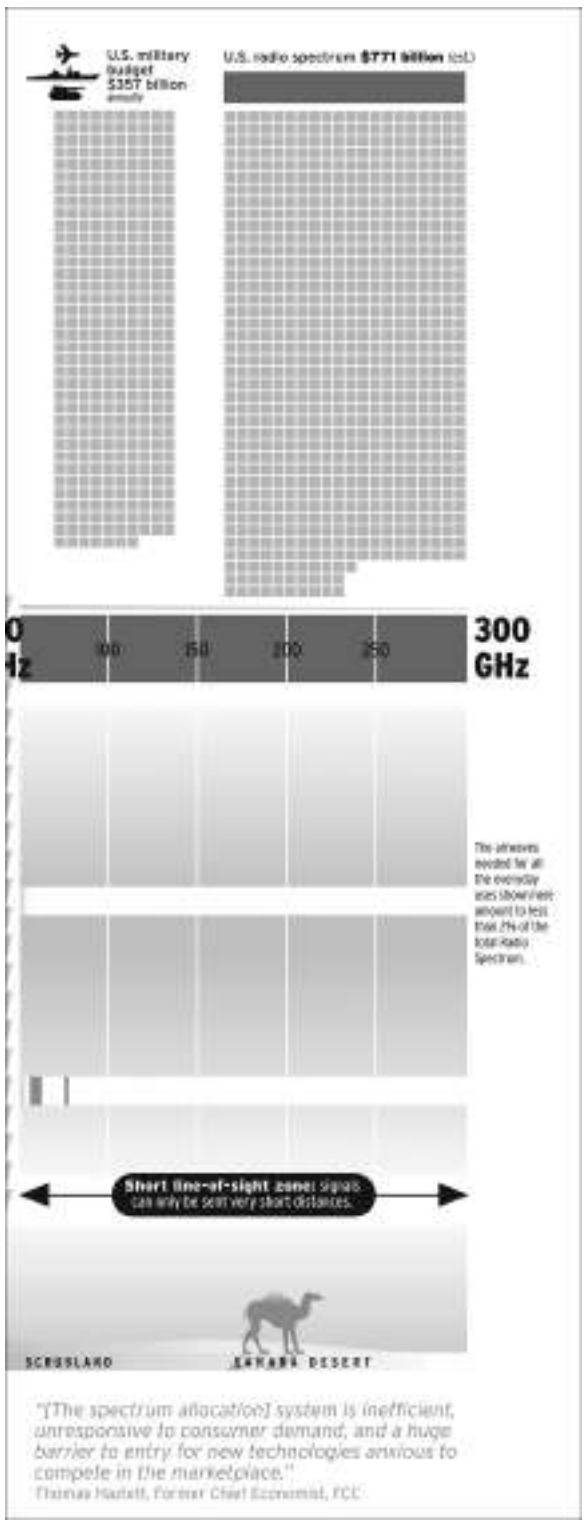
quasi-legislative federal agency. That objective has certainly been accomplished, particularly by the 1996 Act. Nearly every form of electronic communications is now affected by the FCC, including telecommunications, commercial and noncommercial broadcasting, satellite communications, amateur (ham) and citizen's band (CB) radio, cable television, and new technologies such as personal communications services (PCS) and direct broadcast satellite service (DBS). One major exception is



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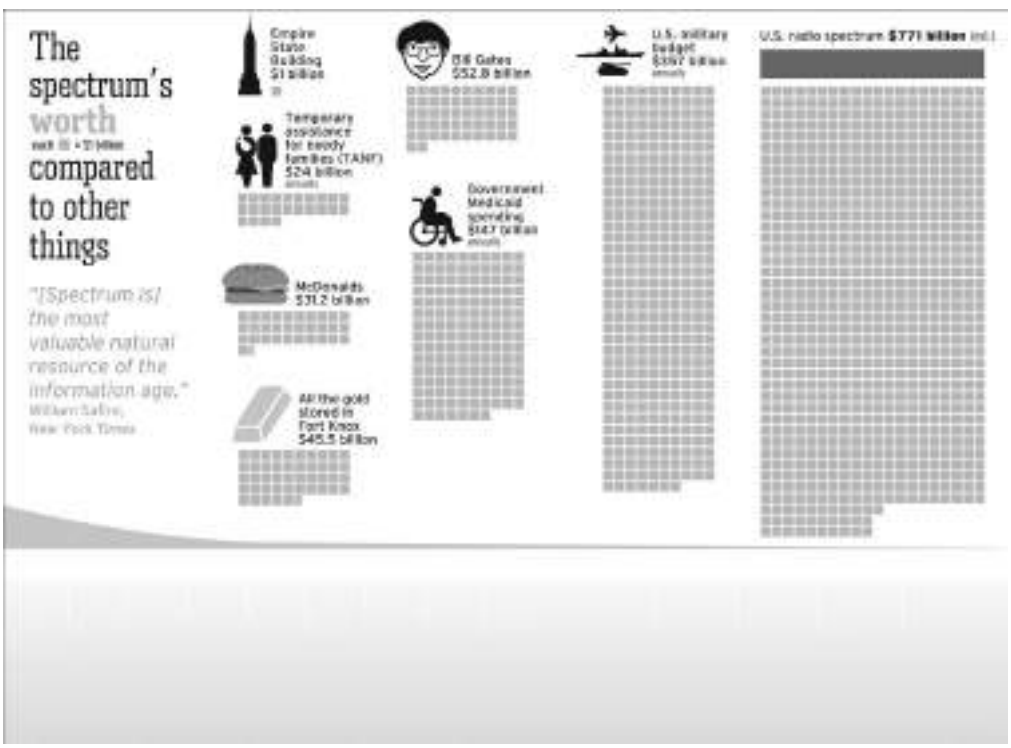

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governmental services, such as military communications and the Voice of America, the international service operated by the Department of State that broadcasts in more than 100 languages throughout the world.

Section 151 of the Communications Act of 1934 delegated to the FCC the authority to regulate:

> . . . interstate and foreign commerce in communication by wire and radio so as to make available to all the people of the U.S. a rapid, efficient nationwide and world-wide wire and radio communication service with adequate facilities at reasonable charges for the purpose of national defense [and] for the purpose of promoting safety of life and property.[24]

Section 307 established the standard, which remains today, by which the FCC is to license stations: "public interest, convenience, or necessity."[25] This standard has been affirmed by the courts many times, by the U.S. Supreme Court in the 1943 landmark decision in *National Broadcasting Co. v. United States*.[26] The standard is rather vague, but it essentially grants the FCC very broad regulatory powers.

Limits on FCC Authority

Even with such broad authority, certain limits have been placed on the commission by virtue of the fact that the agency can act only within those parameters enunciated by Congress. The FCC has no jurisdiction over broadcast and related services owned and operated by the U.S. government. A large chunk of the frequency spectrum has been allocated to civilian and military governmental services. Most of the authority for regulating these services has been delegated to the Department of Commerce, although the Department of State through the U.S. Information Agency (USIA) operates international broadcast services such as the Voice of America. At least half of the broadcast space allocated under international treaties is not regulated by the FCC.

One area in which the commission also has very limited authority is advertising. The FCC cannot regulate individual commercials because this power falls under the aegis of the Federal Trade Commission and state and local consumer protection agencies. The agency does have the authority to issue guidelines regarding the amount of commercial time allowed in a given hour, but in the early 1980s it began a process of deregulating broadcasting. The commission eliminated its guidelines on commercial limits that had permitted up to 16 minutes of commercials per hour. A station can theoretically carry as much advertising as it wishes. The recourse now to over-commercialization is for the consumer to tune out. It is not unusual for stations and networks to carry as many as a dozen commercials in a row on popular programs whose viewers or listeners are willing to tolerate the clutter. Shorter commercials such as the 10- and 15-second spots add even more to the clutter. The situation has become so bad that many radio stations tout 30- to 60-minute blocks of uninterrupted music in an effort to solve the clutter problem ("ten songs in a row" or "one hour of commercial-free music").

Because the major commercial and noncommercial networks do not broadcast per se, the FCC neither licenses nor directly regulates them. That is not to say, however, that the FCC has no impact on the networks. The parent companies of the major commercial networks and cable network groups—ABC (Walt Disney Company), CBS and UPN (Viacom), Fox Network (News Corp.), NBC and Telemundo (General Electric), CNN and HBO (TimeWarner)—all own and operate radio and television stations licensed by the commission. These owned and operated (O&O) stations must comply with FCC rules and regulations. In addition, the networks are beholden to affiliates (i.e., stations that contract with networks to carry programming for a specified time, usually in exchange for compensation) because affiliates are licensed. Thus a network that provides a program to affiliates violating FCC rules or regulations such as the "Equal Opportunities Rule" (sometimes erroneously referred to as the "Equal Time" rule) would create an uproar among the affiliates who faced the possibilities of FCC citations.

While the network–affiliate relationship has changed dramatically over the years, the networks still attempt to adhere to FCC rules and regulations to avoid causing trouble for affiliates. With network revenues dropping, thanks to the loss of audience shares to competition from cable, satellite television, independent stations (stations with no major network affiliation), video rental stores (such as Blockbuster) and services (such as Netflix) and prerecorded videodiscs (DVDs), the networks scramble to please affiliates. Until Fox began competing in earnest in 1988 by offering its programming to independent television stations, only three major networks were available to split the audience share. The overall influence of the "Big 3" had been a major concern.

Noncommercial networks, such as the Public Broadcasting System (PBS) for television and National Public Radio (NPR), are not licensed by the FCC. PBS and NPR do not own stations and thus are indirectly regulated by the commission. But noncommercial networks must watch their steps, just as the commercial networks do, because survival depends on continued affiliation with local stations. In a speech in 2005, PBS journalist Bill Moyers criticized the complexity of the Corporation for Public Broadcasting (PBS) funding formula and the increased pressure from political quarters. Moyers accused public broadcasters of caving in to partisan political pressures from a Republican White House.

There are also constitutional limits on the FCC, just as there are for other federal agencies. The First Amendment imposes limits on the commission, but a trend throughout the history of broadcast regulation from the 1930s until today has been for the U.S. Supreme Court and other courts to defer to the FCC's perceived expert judgment in determining permissible versus impermissible authority over broadcasting. The U.S. Supreme Court rarely slaps the agency's wrist and even more rarely reverses an FCC decision.

Regulatory Scheme

The concept of *limited public resource* has become synonymous with broadcast regulation and continues to remain the basis on which courts justify considerably stricter government controls over the electronic media than would ever be permitted

for the print media under the First Amendment. There is no doubt the airwaves are limited, just as we have limited supplies of water, air, and other resources. However, unlike water and air, the broadcast spectrum is not an exhaustible resource. The airwaves are not *consumed* but merely *occupied*. For example, if a new technology were developed that made it possible for radio stations to occupy only half of the usual frequency space, potentially twice as many stations could broadcast on the same portion of the spectrum. In other words, the real limits on broadcasting are based on technology, *not* consumption.

One new technology that has literally changed the picture is *digital compression,* in which video and audio signals are digitally processed to compress them so several times as many signals can be transmitted in the same amount of space required for one signal in the past. All of the newer satellites use this technology. Both Direct Broadcast Satellite systems—DirecTV and Dish Network—offer hundreds of channels and have the capacity to offer thousands of channels of movies, sports, variety, news, music, networks, and pay-per-view programs. The typical cable television system converter now has a capacity for more than 1,000 channels as well, and thanks to technologies such as fiber optics and integrated circuits, the capacity is being expanded to thousands of channels.

Why, then, do the courts and often the FCC and Congress cling to the scarcity concept? First, there are still more applicants for the typical broadcast frequency or channel than available frequencies. The demand exceeds the supply, forcing the government to choose among competing applicants. Anyone or any organization can publish a newspaper or magazine without a license (other than the usual business license if the publication is operated as a business). There is no competition for space. Congress chose in 1934 with the Communications Act to adopt a policy of requiring the FCC to grant new and renewal licenses to applicants only "if the public convenience, interest, or necessity will be served thereby."[27] The Telecommunications Act of 1996 did not change that theoretical obligation. The fact remains that in spite of all the new technologies, certain technologies, media, and frequencies are more coveted than others. For example, owning a television station in a major market such as New York or Atlanta can be extremely profitable, especially if the station is a VHF outlet and a major commercial network affiliate. Operating an independent UHF station in a smaller market such as Lexington, Kentucky, or Madison, Wisconsin, even though profitable, would not garner nearly the revenue of the Atlanta or New York stations, for obvious reasons.

Although the courts have never seriously considered alternatives, there are viable options to the current regulatory scheme of awarding licenses on a competing basis, applying the "public interest, convenience, or necessity" standard. In fact, beginning in the early 1980s, the FCC experimented with a lottery program for a relatively new technology[28] known as low-power television (LPTV). In 1982, the commission announced that it would begin accepting applications for a new class of LPTV stations. Those could operate with few program or content restrictions so long as they met technical specifications such as producing no interference with existing full-power television (FPTV) stations and generating a primary signal of no

more than approximately 10 miles in any direction. Under the lottery program, the FCC selected among competing qualified applicants based on a random drawing for allotted frequencies. No attempts would be made to determine whether an applicant was better qualified than another one or whether one would be more likely to serve the public interest, convenience, or necessity better than another.

Unfortunately, the lottery program moved slowly. The commission was overwhelmed with applications and had a small staff to process them. Despite the slowness, dozens of new LPTV stations did go on the air. LPTV stations can operate on either VHF or UHF channels with an effective radiated power of no more than 3 kilowatts on VHF or 150 watts on UHF. Under the 1982 FCC order, LPTV stations have the discretion of operating as full service channels or simply as translators so long as they have permission from the originating station. As part of its effort to deregulate and promote competition in a free marketplace, the FCC imposed virtually no program restrictions on the LPTV stations, other than the usual rules regarding indecency, obscenity, and so forth. In preparation and build-up to the switch to digital television, the FCC made no provision for LPTV until 2004 when it established a set of rules and policies for digital LPTV, television translator, and television booster stations. In early 2006 the agency announced it would begin accepting applications for digital LPTV in May. Under FCC rules, LPTV stations can choose to either (a) convert to digital on the existing analog channel or (b) apply for a second digital companion channel that could be operated simultaneously with the analog channel.[29]

LPTV is a perfect illustration of how the commission addressed new technologies. During his administration (1977 to 1981), President Jimmy Carter established the National Telecommunications and Information Administration (NTIA) in one of many executive reorganization efforts. One of several functions assigned to the new NTIA was telecommunications applications. The agency was also assigned the role of improving mass communication through the development of new technologies and re-tread of older ones. After a fairly comprehensive study of broadcast spectrum allocation, the NTIA concluded that one effective way of increasing the number of television stations on the air, especially for consumers in rural areas, was to lift FCC restrictions permitting low-power TV stations to carry only retransmissions of programming from full-power stations. The FCC somewhat reluctantly accepted the NTIA recommendation in 1982 even though an economic projection from its own staff indicated that LPTV would have an uphill financial battle.

By 1982 President Carter had been replaced by President Ronald Reagan who pushed deregulation among all federal agencies. Thus the FCC (with the "King of Deregulation," Mark Fowler, then at the helm) wisely chose not to impose programming and severe technical restrictions on LPTV. Low-power TV is still not a hot item, but every new technology from radio to satellites had to take risks before gaining a foothold in the mass communication scheme. Cable television, for example, began in the 1940s but did not become a truly mass medium until the 1970s as the nation became wired.

The FCC website includes a discussion of LPTV, noting that such stations "are operated by diverse groups and organizations—high schools and colleges, churches and religious groups, local governments, large and small businesses and individual citizens."[30]

There are no limits on the number of LPTV stations that any one entity can own, including cable companies, newspapers, and commercial and noncommercial TV networks.

Low power FM (LPFM) radio is a similar service approved by the FCC in 2000 that is "designed to create opportunities for new voices to be heard on the radio."[31] Two types of stations operate under the LPFM service—100-watt stations covering a radius of about 3.5 miles and 10-watt stations with a radius of 1 to 2 miles. Licenses are available only to community-based nonprofit and governmental entities, including educational institutions. Individual or commercial entities as well as existing broadcasters, cable TV companies, newspapers and other media entities do not qualify for LPFM licenses.[32]

The Telecommunications Act of 1996 heaped extensive new responsibilities on the commission, and its budget has grown over the years from $245 million in 2002, to $274 million in 2004, with a $302.5 million budget submitted by President George W. Bush for Fiscal Year 2007. This continued growth has raised the ire of some critics.[33]

Federal Communications Commission General Authority

While the FCC, like all federal agencies, has limited authority over the industry it regulates, it clearly plays a major role in both the day-to-day operations and long-term development of telecommunications and broadcasting. The commission regulates a broad range of communications, including broadcast television and radio, cable television, telephone, telegraph, satellites (including direct broadcast satellite services), two-way radio (such as citizens' band and amateur radio), cellular phones, and even certain aspects of the Internet.

Section 326 ("Censorship") of the Communications Act of 1934, still in effect through the Telecommunications Act of 1996, says: "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."[34]

Just as a literal reading of the First Amendment could lead one to conclude that freedom of speech and press are absolute ("Congress shall make no law . . ."), someone unfamiliar with regulatory history could assume after reading Section 326 that the FCC played no role in regulating programming. He might assume at the very least that broadcasters enjoy full First Amendment rights ("no regulation . . . shall interfere with the right of free speech . . ."). Nothing could be further from the truth. The commission is barred from engaging in direct censorship or prior restraint of programs, but a station that persistently flirts with violating FCC rules regarding political broadcasts or indecent and obscene content risks reprimands, fines, and the serious possibility that its license will be revoked or not renewed.

The Telecommunications Act of 1996 delegated considerable authority to the FCC to carry out the primary objective of the legislation—creating a competitive

telecommunications marketplace. The new law directed the commission to conduct 80 different rulemaking proceedings involving hearings and other input from the public and the industry. Some of the new rules were successfully challenged in court, but most survived. Enforcing the Act has taken up much commission time, but the marketplace is becoming more competitive vis-à-vis industry, although media corporations have continued to grow through mergers and buyouts.

FCC Policies Regarding Political Broadcasting

Although indecent programming has been the hot topic into the new millennium and will likely continue to attract attention, the one area of programming that has consistently created the most controversy has been political content. The Fairness Doctrine has also generated considerable heat, but it was dealt a fatal blow by the FCC in August 1987 and appears very unlikely to be resurrected anytime soon.

One of the common misconceptions is that the so-called equal time requirement is a relatively new provision. One reason for this myth may be attributed to the considerable attention the provision received in 1960 when presidential candidates John F. Kennedy and Richard M. Nixon squared off in a live television debate before a national audience. Although it was unclear at the time whether Section 315 applied to presidential debates, Congress nevertheless chose to suspend the provision for the Nixon–Kennedy debates. Two years later, the commission indicated that debates did fall under the rule. Another reason for the myth may be traced to the awareness that Congress has amended the section several times, although the legislative body chose not to tamper with it in the Telecommunications Act of 1996.

The idea for a provision like Section 315 actually originated with the old Radio Act of 1927. Section 18 of the early act required all broadcasters to provide equal time (or more accurately, equal opportunities) to candidates for public office, once one legally qualified candidate had been granted airtime, whether paid or unpaid. Thus a broadcaster could effectively escape the requirement by simply denying access to all candidates for a particular office. Section 18 also prohibited a station from censoring any political candidate's broadcast.

Both ideas were adopted in essentially the same form when Congress enacted the Communications Act of 1934. Section 315 has been amended three times: in 1952, 1959, and 1972. The provision was significantly strengthened in 1972 with amendments to Section 312.

Section 315: Access for Political Candidates

Part (a) of Section 315 (as currently in force) provides:

Candidates for Public Office

(a) Equal opportunities requirement; censorship prohibition; allowance of station use; news appearances exception; public interest; public issues discussion

opportunities. If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[35]

Cable Television and the Equal Opportunities Rules

The equal opportunities rules have the greatest impact on over-the-air broadcasts, but cable companies must also comply with them for *origination cablecasting*, which the FCC defines as being subject to the editorial control of the system operator. Cable operators do not have to be concerned with compliance by broadcast stations they carry or by leased access channels or public, educational, and governmental (PEG) channels over which they do not have editorial control. Under the 1992 Cable Consumer Protection and Competition Act, cable companies may restrict indecent or obscene programming on leased access and PEG channels.

Section 315 and Broadcast Stations

Laws are made to be applied as well as interpreted. The Communications Act of 1934, including Section 315, is no exception. The federal courts, especially the U.S. Court of Appeals for the D.C. Circuit, have spent considerable time attempting to determine the legal meanings of terms such as *legally qualified candidate*, *equal opportunities*, *no power of censorship,* and *public office*. Sometimes the

answers have not been to the FCC's liking, and, as a result, the commission has occasionally altered its rules. For example, in a 1975 case, *Flory v. FCC*,[36] the Seventh Circuit U.S. Court of Appeals ruled, much to the chagrin of the FCC, that a communist party member running as a U.S. Senate candidate in Illinois who had not qualified for inclusion on the ballot was nevertheless a legally qualified candidate because there was the possibility he would be placed on the ballot and, further, he had indicated he planned a write-in candidacy if he did not qualify to be on the ballot.

As it turned out, Ishmael Flory did not gain access to the airwaves because the court held he had not exercised his procedural rights before the commission. The implications of the decision were quite serious. Stations could be forced to grant equal opportunities to candidates based on the probability, or perhaps even only on the possibility that the candidates would run for public office. The commissioners lost little time in responding to the decision by adopting new "Rules Relating to Broadcasts by Legally Qualified Candidates."[37] The rules now define a legally qualified candidate as an individual who has publicly announced his candidacy *and* (not *or*) who "meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate" *and* either has qualified for a place on the ballot *or* "has publicly committed himself to seeking election by the write-in method *and* is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method, *and* makes a substantial showing that he is a bona fide candidate for nomination or office."[38]

In 1999, the FCC acted on a petition from two groups—the Media Access Project and People for the American Way—ruling that candidates for President and Congress should have more flexibility in purchasing ads. The FCC ruled that candidates could not be barred from purchasing ads in lengths of time most useful to them just because broadcasters sell commercial time in shorter increments of 30 and 60 seconds. This reversed an earlier 1994 FCC ruling that broadcasters need not sell legally qualified candidates ads in lengths other than those the station sold to commercial advertisers or programmed during a year period preceding election.

The *ands* and *ors* in the rule can be confusing, but the FCC Political Primer clarifies that a mere announcement by a candidate does not automatically make that person legally qualified. The person must also be eligible to hold the office and either have qualified to be on the ballot or have qualified, as detailed in the rule, as a write-in candidate.[39]

Section 315 has been the subject of substantial litigation over the years, because (a) it is such a sweeping rule and thus affects many political aspirants and all broadcast stations, (b) its language lacks the necessary precision to always make it crystal clear when it applies or does not apply, and (c) it does not stand alone but must instead be interpreted in light of other provisions of the FCC Act, especially Section 312, and sometimes in conjunction with the Fairness Doctrine (when the doctrine was in effect). There have been battles in the courts over who is and is not a candidate, what constitutes a public office, and what is *use* by a station.

FCC Interpretation of Section 315

The FCC has indicated that it takes the publicly announced requirement seriously. During the 1968 presidential campaign, Senator Eugene J. McCarthy, a candidate for the Democratic nomination, requested equal time when President Lyndon Johnson conducted a December 7, 1967 interview with the television networks. At the time, the President had not publicly announced whether he intended to run for re-election. (He later decided not to run.) The commercial networks refused to grant Senator McCarthy equal time. He appealed to the commission which contended that "to attempt to make finding on whether or when the incumbent has become a candidate during the usual, oft-repeated and varying preliminary period would render the statute unworkable," ruling against the senator. The U.S. Court of Appeals affirmed.[40]

The commission has taken a conservative approach in its interpretation of "legally qualified candidate for public office." In 1972, the FCC ruled that the presidential and vice presidential candidates on the Socialist Workers Party ticket were not legally qualified for purposes of Section 315 and Section 312—even though they had filed to be on the ballots in fifteen states, were on the ballots in six, and collected almost a half million signatures on petitions—because neither candidate was at least 35 years old, as required in Article II of the U.S. Constitution.[41] Candidates have the burden of proof in demonstrating they are legally qualified; they must even prove their opponents are legally qualified candidates for the same office. Section 315 technically kicks in only when there are "opposing candidates."[42]

Use of a station has been very broadly construed by the FCC to include broadcasts of old movies and television shows in which a candidate formerly appeared, creating challenges, especially in California with the emergence of Arnold Schwarzenegger as 38th governor of that state. This issue addresses fairness and balance and applies as well to appearances on radio and television that represent part of an individual's regular responsibilities. At the national level, during the 1976 presidential Republican primary campaign, many TV stations were uncertain whether broadcasting old movies in which Ronald Reagan appeared would invite enforcement of Section 315. The FCC moved quickly to relieve any doubt by ruling that when an actor or actress becomes a legally qualified candidate for public office, such appearances constitute use.[43] The equal time to which the opponent would be entitled would be only the amount of time during which the actor appeared, not the entire time the program was broadcast. Similarly, the opponent(s) of a candidate who was a radio or TV personality, host, anchor, or disc jockey would be eligible for time equal only to the amount of time during which the personality was on-air.[44]

Rules regarding broadcasting of debates have changed considerably over the years, beginning with a major overhaul in 1975. Prior to that year, the commission had generally held that debates and press conferences by candidates were not exempt from the equal opportunities rule. The four major exemptions (bona fide newscasts, news interviews, news documentaries, and on-the-spot coverage of bona fide news events) were not added by Congress until 1959, and the FCC has taken a narrow approach in determining what content was exempt from Section 315.

There were no major regulatory hitches for the three 2004 presidential debates between President George W. Bush and Massachusetts Senator John Kerry at the University of Miami in Coral Gables, Florida, Washington University in St. Louis, and Arizona State University in Tempe. The vice presidential debate between Vice President Dick Cheney and North Carolina Senator John Edwards at Case Western Reserve University in Cleveland, Ohio also enjoyed smooth sailing. All four debates were sponsored by the Commission on Presidential Debates (CPD), a non-partisan, non-profit, tax-exempt corporation that has sponsored all presidential and vice presidential debates since 1988.

Aspen Institute Rulings on Political Debates

Until 1975 the FCC had held that debates between political candidates and broadcasts of press conferences conducted by candidates did not fall within any of the exemptions under Section 315. In that year, however, the FCC made some surprising rulings that have become known as the *Aspen Institute* decisions. Federal administrative agencies such as the FCC rarely overrule previous decisions, especially relatively recent ones. However, the commission actually did an about-face in *Aspen Institute*[41] when it held that under some conditions, coverage of debates among political candidates and press conferences of candidates would not invoke the equal opportunities provisions of Section 315. Instead, they would be exempt as on-the-spot coverage of bona fide news events. Indeed, the circumstances required for the exemption were essentially the same as those the FCC had ruled in 1962 precluded an exemption.

Why had the earlier decisions been erroneous? According to the FCC, the commissioners had simply misunderstood the legislative history that established Section 315 and Congress had actually intended for broadcasters to cover political news "to the fullest degree" rather than inhibit such coverage. The U.S. Court of Appeals affirmed this reasoning and concluded:

> In creating a broad exemption to the equal time requirements in order to facilitate broadcast coverage of political news, Congress knowingly faced risks of political favoritism by broadcasters, and opted in favor of broader coverage and increased broadcaster discretion. Rather than enumerate specific exempt and nonexempt "uses," Congress opted in favor of legislative generality, preferring to assign that task to the Commission.[46]

Thus a political debate could be considered on-the-spot coverage of a bona fide news event so long as (a) it was arranged by a third party (i.e., someone other than the broadcaster or network), (b) it did not occur in the broadcaster's facilities, (c) it was broadcast live and in its entirety, and (d) the broadcaster's motive in carrying the debate was newsworthiness rather than as a political favor for a particular candidate. In sum, the commissioners gave a blessing for coverage of debates as news events but not as political fodder. Their reasoning was much in line with the contentions in the petitions filed by the Aspen Institute Program on Communications and

Society and CBS, Inc., which had triggered the FCC's reexamination of its earlier decisions.

Expansion of Scope of *Aspen* Decision

The FCC considerably expanded the *Aspen* decision by ruling in 1983 that even debates sponsored by broadcasters themselves would be exempt under Section 315(a)(4) as on-the-spot news coverage.[47] The impact of this decision was felt in many major national and state elections as more and more local and national broadcasters sponsored their own debates. In its ruling, the commission acknowledged that this greater flexibility granted to broadcasters could lead to bias, but opted nevertheless to permit such sponsorship because "Congress intended to permit that risk in order to foster a more informed electorate."[48] According to the FCC, the "common denominator of all exempt programming is bona fide news value."[49] In the same decision, the commissioners killed a previous rule, known as the *one-day rule*, which basically required contemporaneous or near contemporaneous broadcasting to trigger the 315(a)(4) exemption. The *one-day* label came from the fact that the commission generally expected the broadcast coverage of the particular political event to be aired no later than a day after the event.

In lieu of the one-day requirement, the FCC established a "rule of thumb" (the commission's characterization) that a broadcast simply "encompasses news reports of any reasonably recent event intended in good faith by the broadcaster to inform the public and not intended to favor or disfavor any candidate."[50]

The agency has spent considerable time during the last two decades defining *equal opportunities* under Section 315.[51] Some of the examples cited by the FCC of a lack of equal opportunities include (a) unequal audience potential of periods, such as offering candidates the same amount of air time as opponents but at a time when the audience is likely to be smaller, (b) allowing candidates to listen to a recording of an opponent's broadcast before it is aired while denying the opponent the same opportunity, (c) requiring one candidate but not another candidate to submit an advance script, (d) charging unequal rates (a serious *faux pas*), (e) signing an advertising contract with one candidate that effectively excludes opponents from purchasing time, such as selling the candidate most of the available blocks of prime time, and (f) failing to abide by a pre-established interview format.[52] The last example arose in a case in which one candidate had less than 5 minutes of exposure, compared with 16 and 14 minutes for others because a TV station strayed from the format the candidates had agreed to in advance.[53]

FCC's Easing of the Burden of Section 315

Broadcasters generally consider the equal opportunity requirements onerous, at best, and a violation of the First Amendment, at worst, but they have learned to live with them. To its credit, the commission has been lenient with broadcasters who make what it deems good faith efforts to comply with Section 315. The rules themselves have

become less burdensome over the decades, because of liberal interpretations of their meaning by the agency and actual rule modifications. Four points illustrate this trend.

First, the FCC has made it clear that stations do not have to notify candidates of an opponent's time and that stations do not have to offer exactly the same time of day on the same day of the week or accept competing political ads on precisely the same program or series.[54] How will candidates know whether a broadcaster has sold time to their opponents unless they see or hear the ads? Federal regulations require every station to maintain and provide regular public access to a file that contains complete information regarding all requests made for time by candidates or others on their behalf, the disposition of each request, and the charges made, if any.[55] In a 1962 decision, the FCC held that candidates effectively have an affirmative duty to check the file if they want the information.[56] The station must promptly put the information in the file in an easily comprehensible form and retain the files for at least two years for public inspection, but it has no obligation to automatically notify opponents when a candidate appears.

Second, the commission has enacted a requirement that is sometimes overlooked by candidates in exercising their equal-opportunity rights—the so-called *seven-day rule*.[57] According to the rule, political candidates must give timely notice to the licensee in order to qualify for air time when an opposing candidate has made use of the station. *Timely notice* is specified as "within one week of the day on which the first prior use, giving rise to the right of equal opportunities, occurred."[58] The rule applies strictly to individuals who are *legally qualified candidates at the time of the broadcasts*.[59] In adopting the rule, the FCC wanted to ensure that stations could make plans prior to the onslaught of the political campaign and prevent a candidate from waiting until the election was almost over to obtain a large block of time.[60] The FCC has been quite strict in its enforcement of the rule.

Third, the commission has granted stations considerable leeway with news programs under Section 315(a). For example, if a political candidate appears in a bona fide newscast, opponents are not entitled to equal exposure in that newscast nor any other newscast. Technically, they would not be entitled to news coverage, although public outrage would probably prevent a station from covering one candidate in its news to the exclusion of others. Until August 4, 1987, when the FCC announced its decision to end enforcement of the Fairness Doctrine (reaffirmed on March 24, 1988),[61] a broadcaster who did not make a good faith effort to provide balanced election news could have faced repercussions from the commission. Now, with the death of the doctrine, its political communication provisions no longer apply.

Finally, whereas stations have an affirmative duty to provide reasonable access to legally qualified candidates for federal elective office, they always have the option of refusing to sell time in local, county, and state elections. Indeed, Section 315 does not require broadcasters to provide access to candidates in every local, county, and state election, although the FCC, courts, and Congress have indicated that political broadcasting is a significant public service and that stations are expected to devote reasonable time to political races. The decision regarding which elections deserve attention and which can be ignored is left to the discretion of the station.[62]

Section 312: Political Candidates for Federal Offices

In 1972 Congress added Section 312(a)(7):

> (a) The Commission may revoke any station license or construction permit—
>
> (7) for willful or repeated failure to allow reasonable access to or permit the purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.[63]

It should be emphasized that Section 315 and other provisions of the Communications Act of 1934 and the Telecommunications Act of 1996 must generally be interpreted in light of Section 312, which codifies administrative sanctions available to the FCC. Three examples illustrate the flexibility in state and local races. In 1976, the FCC ruled in *Rockefeller for Governor Campaign (WAJR)*[64] that in a state campaign a station is not required to sell air time at all so long as it has offered free reasonable time. In other cases, the commission held that stations cannot be forced to sell a specific time period[65] and a broadcaster does not have to sell time months in advance of an election or sell ad time of a specific length.[66]

An Exception to the Exceptions under Section 315

Nothing is absolute, including Section 315 exceptions, as illustrated by a rather novel case in 1988.[63] Although most First Amendment challenges to Section 315 have been launched by political candidates rather than journalists, a general assignment reporter for a Sacramento, California, TV station became a candidate for a seat on the council of a nearby town. Because the station believed it would have to offer more than 30 hours of free time to comply with Section 315, William Branch was told to take a leave of absence if he wished to pursue politics. Branch requested a ruling from the FCC on whether the equal time provisions applied. Citing the legislative history of Congress' 1959 amendments to the FCC Act, the commissioners ruled against the reporter. On appeal, the U.S. Court of Appeals for the DC Circuit upheld the decision:

> When a broadcaster's employees are sent out to cover a news story involving other persons, therefore the "bona fide news event" is the activity engaged in by those other persons, not the work done by the employees covering the event. The work done by the broadcaster's employees is not a part of the event, for the event would occur without them and they serve only to communicate it to the public.[68]

Branch also challenged Section 315 as a violation of his constitutional rights, including the First Amendment. The court struck down all three grounds, holding the statute did not extinguish his right to seek political office because no individual has a right of access to broadcast media; Section 315 does not violate the First Amendment because "the first amendment's protections for the press do not apply as powerfully to the broadcast

media"; and the provision does not impermissibly limit "the discretion of broadcast stations to select the particular people who will present news on the air to the public."[69]

Two Hypotheticals

Suppose a station decides to keep a reporter on the air despite political ambitions but limits exposure to no more than 10 minutes per week. The reporter consents to the arrangement and the station dutifully offers free air time to his opponents. However, the station considers this election unworthy of news coverage and thus ignores it. Both reporter and opponents complain that the station has written off the campaign simply because it wants to avoid the awkward situation of having a reporter appear as the subject of a story in the same newscast in which he covers a separate story. How would the FCC rule? In line with the previous discussion, the Commission would probably not second guess the station's news judgment so long as it could demonstrate its decision was based on news judgment, not political or other motives.

What if the station kept the reporter on the air, complied with Section 315 by offering time to all candidates but also covered the campaign, including a press conference by the reporter? Could you imagine any Section 315 questions in that instance? Probably not, especially given the reasoning of the Court in *Branch v. FCC*. After all, if employees who were legally qualified candidates invoked Section 315 by covering a story, then would it not follow that employees who become subjects of bona fide news events do not trigger equal opportunities? Otherwise, they would be receiving discriminatory treatment under the law.

A Big Break for Politicians: Lowest Unit Charge

Public awareness of the equal opportunities rule is weak, but one provision is virtually unknown among voters—the *lowest unit charge* obligation. Section 73.1942 of the FCC Rules and Regulations says:

> (a) *Charges for use of stations*. The charges, if any, made for use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his or her campaign for nomination for election, or election, to such office shall not exceed:
>
> (1) During the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period.
>
> (i) A candidate shall be charged no more per unit than the station charges its most favored commercial advertisers for the same classes and amounts of time for the same periods. Any station practices offered to commercial advertisers

> that enhance the value of advertising spots must be disclosed and made available to candidates on equal terms. Such practices include but are not limited to any discount privileges that affect the value of advertising, such as bonus spots, time-sensitive make goods, preemption priorities, or any other factors that enhance the value of the announcement.[70]

Under these rules stations are not required to offer political candidates lowest unit rates outside the 45- to 60-day time frames, but candidates clearly receive substantial discounts during the effective periods, compared to what they would pay if they were traditional advertisers. In enacting Section 315, Congress left the interpretation of *lowest unit charge* to the FCC, which has traditionally tracked industry sales practices. The computations can be fairly complicated. Suffice it to say that candidates receive rates that compare quite well with those of high volume advertisers such as Procter and Gamble, General Motors, and Coca Cola.

Cable television systems and direct broadcast satellite providers such as DirecTV and Dish Network are not required to allow political candidates to use their facilities, but, if they do allow such use, they must provide equal opportunities to all other candidates for that office under rules that are quite similar to those for broadcasting stations, including the usual exceptions, such as bona fide newscasts and on-the-spot coverage of bona fide news events.[71] The Commission leaves interpretation of *reasonable access* in the hands of the broadcasters, but it did not grant the industry full latitude.

In a 1992 Memorandum Opinion and Order (MO&O) the FCC indicated that broadcasting stations can adopt a policy of not selling federal political candidates advertising time during newscasts, but they cannot deny access to candidates during programming adjacent to newscasts unless they do not sell to other advertisers during that time. The time slots before and after news are popular periods for political ads because candidates like having their commercials associated with news and audience ratings traditionally tend to be high, particularly among informed people who vote.

In the MO&O the commission adopted a much more conservative definition of *use* by a political candidate. *Use* now means only those appearances that have the approval of the candidate and does not include spots by organizations and groups such as political action committees (PACs) unless they have the sponsorship or support of the candidate. Prior to this ruling, broadcasters presumably had to offer equal opportunity to opponents when an ad was aired for a candidate even when the person had no direct connection to the commercial. By effectively redefining *use*, the FCC relieved stations of all of the other requirements when such ads appear, including the lowest unit charge and no censorship provisions, as discussed in the next section. Perhaps it is even more significant that the revised definition means that showing a movie, television show, or similar program in which a candidate had previously appeared as an entertainer or corporate head before becoming a candidate will no longer invoke Section 315. No doubt, broadcasters wish this definition had applied in the 1980s when former movie star Ronald Reagan successfully ran for President, an issue revisited in 2007 when TV actor ("Law & Order") and Senator Fred Thompson (R-TN) formed an official presidential exploratory committee.

There is still one potential trap for broadcasters. Because the no-censorship provision no longer applies to ads not approved by a candidate, stations can be held liable for libel and other torts that stem from the airing of PAC and similar ads. Therefore, stations should carefully screen these commercials for defamatory statements, obscenities, and other unprotected content, or they can simply refuse to carry them at all.[72]

Censorship of Political Broadcasting

One of the more interesting provisions of Section 315 is its strong prohibition of censorship. Under Section 315 that prohibition is unequivocal ("such licensee shall have no power of censorship over the material broadcast"), but there are no absolutes in government regulation. Two important FCC cases illustrate this point. The first arose in 1956 when A. C. Townley, a provocative candidate for U.S. Senate in North Dakota, in a speech carried on WDAY-TV in Fargo, charged that his opponents and the Farmers' Educational and Cooperative Union had conspired to "establish a Communist Farmers' Union right here in North Dakota."[73] The station told Townley before the program was aired that his statements could be defamatory, but he did not heed the warning. As a consequence, both the candidate and the station were slapped with a $100,000 libel suit in state district court. The trial court judge granted WDAY's motion to dismiss on the ground that Section 315 made the TV station immune from liability because the statute prohibited censorship so long as a valid use was made by a legally qualified candidate, as in the case at hand.

In a 4 to 1 decision on appeal by the union, the North Dakota Supreme Court affirmed the lower court ruling. On further appeal, the Supreme Court of the U.S. for the first time confronted the question of whether a broadcaster can be held liable for libel when it was expressly forbidden by federal law from censoring the program that carried the potentially libelous statement(s). As discussed in the next chapter, in most states a journalist or media outlet can clearly be held liable for published statements of third parties, depending on the circumstances. But can a plaintiff who has been defamed under these circumstances recover damages from a station?

In a surprisingly close decision in *Farmers' Educational and Cooperative Union of America v. WDAY* (1959),[74] the U.S. Supreme Court affirmed the North Dakota Supreme Court holding. The majority opinion by Justice Hugo L. Black rejected arguments by the union that broadcasters do not need immunity because they can insure themselves or exercise the clause in Section 315 that allows them to deny all political candidates the use of station facilities:

> We have no means of knowing to what extent insurance is available to broadcasting stations, or what it would cost them . . . While denying all candidates use of stations would protect broadcasters from liability, it would effectively withdraw political discussion from the air . . . Certainly Congress knew the obvious—that if a licensee could protect himself from liability in no other way

> but by refusing to broadcast candidates' speeches, the necessary effect would be to hamper the congressional plan to develop broadcasting as a political outlet, rather than to foster it.[75]

The reasoning of the majority in the case was in line with the principle that the marketplace should determine which ideas are accepted and which are rejected. Because radio and television stations have a mandate from Congress to serve the public interest, including the dissemination of political content, under this premise they should not be saddled with unreasonable restrictions. The Court felt it would be unfair to prohibit censorship while holding broadcasters liable for consequences of compliance. In a dissenting opinion, Justice Felix Frankfurter (joined by three other justices) contended that while Section 315 barred censorship, it did not relieve stations of liability under state libel laws. According to Frankfurter, "Section 315 has left to the States the power to determine the nature and extent of the liability, if any, of broadcasters to third persons."[76]

Although this decision answered one major question, a few questions remain. Would this holding apply to all types of content such as national security (especially in light of September 11), invasion of privacy, threats to civil or social order, or obscenity? Does the holding apply in the same way to candidates for federal elective office because there is an affirmative duty to offer reasonable time for these candidates?

Given the usual campaign rhetoric and the visibility of extremists in the political process, it was inevitable that the FCC would confront the issue of whether content that posed a potential threat to society enjoyed immunity from censorship. The WDAY case dealt with an allegedly civil offense against an organization—libel involves personal damages, not social harm. In 1972, the perfect case fell into the commission's lap in the form of self-described "white racist" J. B. Stoner, the same individual who years later was convicted in the bombing of an Alabama church during the 1960s. During his unsuccessful campaign for the Democratic nomination to the U.S. Senate in Georgia, Stoner broadcast the following ad on television and radio:

> I am J. B. Stoner. I am the only candidate for U. S. Senator who is for the white people. I am the only candidate who is against integration. All of the other candidates are race mixers, to one degree or another. I say we must repeal Gambrell's civil rights law. Gambrell's law takes jobs from us whites and gives those jobs to the niggers. The main reason why niggers want integration is because the niggers want our white women. I am for law and order with the knowledge that you cannot have law and order and niggers too. Vote white. This time vote your convictions by voting white racist J. B. Stoner into the run-off election for U.S. Senator. Thank you.[77]

Various civil rights groups, including the NAACP, petitioned the FCC to issue an order to permit stations to refuse to broadcast political ads that present an "imminent and immediate threat" to public safety and security such as creating racial

tension or other social harm. Atlanta TV and radio stations indicated they did not wish to carry the ads but that they were compelled by Section 315. Citing the *Brandenburg v. Ohio* (1969)[78] standard—that even the advocacy of force or of law violation may not be constitutionally prohibited unless "directed to inciting or producing imminent lawless action and is likely to incite or produce such action,"—the Commission refused the request:

> Despite your report of threats of bombing and violence, there does not appear to be that clear and present danger of imminent violence which might warrant interference with speech which does not contain any direct incitement to violence. A contrary conclusion here would permit anyone to prevent a candidate from exercising his rights under Section 315 by threatening a violent reaction. In view of the precise commands of Sections 315 and 326, we are constrained to deny your requests.[79]

The FCC opinion did not make explicit the conditions under which a station could censor political broadcasts invoking the equal opportunities rule because the agency merely cited *Brandenburg* without specifically adopting its precedent. However, "clear and present danger of imminent violence" remains the implicit standard, and the commission has not strayed from it since its invocation in 1972. Some relatively minor forms of censorship have been permitted, but these have had minimal impact on political broadcasting. For instance, although a station may not require candidates to submit copies of their ads or programs in advance, it can review the copy for inaccuracies, potential libel, or other content problems, it can require an advance script or tape if done solely to verify the content is a *use* under the equal opportunities rule, determine length for scheduling purposes, or ascertain that it complies with sponsorship identification rules.[80]

In 1994 the FCC ruled stations could not refuse to carry graphic anti-abortion political advertisements but could confine them to time slots when children were less likely to be in the audience—an action known as "channeling." [81] The ruling came after stations complained to the commission about being forced under the "reasonable access" provisions of the Communications Act of 1934 to carry the explicit ads of candidates such as Michael Bailey, a Republican candidate for Congress from Indiana during the 1992 election.[82] After his television commercials showing graphic images of aborted fetuses appeared, stations were flooded with complaints. Other anti-abortion candidates picked up on the trend, with more than a dozen of them getting permission from Bailey to use his ads. Some viewers even filed lawsuits seeking injunctions to stop the ads.

The stations were in a no-win situation because the FCC's Mass Media Bureau ruled in 1992, based on a complaint about similar ads for Republican Congressional candidate Daniel Becker of Georgia, that political spots did not meet the FCC criteria for indecency. An earlier informal FCC staff opinion said that programming that stations believe in good faith is indecent could be channeled to *safe harbor* hours of 8:00 p.m. to 6:00 a.m. A few stations used the opinion to justify restricting times when ads were broadcast, but it took the 1994 FCC decision to make it official. The ruling did say

that time shifting must be done in good faith based on the nature of the ad and that it could not be done simply because the station disagrees with the message.[83]

Two years after the FCC ruling, the U.S. Court of Appeals for the D.C. Circuit reversed it.[84] The 3 to 0 decision said that nothing in the federal statutes permitted broadcasters "to take the content of a political advertisement into account in determining what constitutes 'reasonable access'" or "to deny a candidate access to adult audiences of his choice simply because significant numbers of children may also be watching television."[85] The court concluded:

> The Commission's Declaratory ruling violates the "reasonable access" requirement section of Section 312(a)(7) by permitting the content-based channeling of non-decent political advertisements, denying qualified candidates the access to the broadcast media envisioned by Congress. The ruling also permits licensees to review the political advertisements and to discriminate against candidates on the basis of their content, in violation of both the 'no censorship' and 'equal opportunities' provisions of Section 315(a).[86]

Section 312(a)(7), as amended by Congress in 2000, specifically exempts "non-commercial educational" broadcast stations, which means public broadcasters do not have to provide airtime to federal candidates. However, they are required to comply with Section 315 for nonfederal candidates, and under Section 399 ("support of political candidates prohibited"), "No noncommercial educational broadcasting station may support or oppose any candidate for public office."

Political Editorials and Personal Attack Rules

Until 2000, the FCC had two allied rules: one regarding political editorials and another regarding personal attacks that often affected how broadcasters treated politicians. Under the political editorial rules, if a station or a cable operator (in the case of *origination cablecasting*) editorially endorsed or opposed a legally qualified candidate, it had to contact the opponent(s) of the candidate who was endorsed or the candidate who was opposed within 24 hours and offer a reasonable time for a response by the candidate or a spokesperson for the candidate. If the editorial was carried within 72 hours prior to the election, the candidate(s) had to be notified "sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion."[87]

Under the personal attack rule, broadcasting stations were required to grant reasonable access to respond for anyone whose character or integrity had been attacked on the air. The Radio–Television News Directors Association (RTNDA) and the National Association of Broadcasters (NAB) sued the FCC in 1999, requesting a writ of mandamus ordering the agency to immediately repeal the rules. The NAB had requested that the FCC repeal the rules as early as 1980, but the commission did nothing for several years other than issuing a notice that it was considering such a

change. A second petition by the NAB, RTNDA, and others filed in 1990 was also essentially ignored. Six years later the U.S. Court of Appeals denied a mandamus petition from RTNDA, but told the commission it had six months to make significant progress toward repealing or modifying the rules. Unfortunately, the commissioners could not agree on what action to take, thanks to a 2 to 2 vote.

In 1998 the court, upon further appeal, remanded the case back to the commission, ordering it to take a formal vote and for the two commissioners voting against a change to indicate their reasons. Once again, there was a 2 to 2 split, with FCC Chair William Kennard not participating. The four voting commissioners issued statements explaining their votes. The drama had not ended, however. Almost two months before the 2000 Presidential election, the agency voted 3 to 2 to suspend the rules for 60 days while conducting a further review. By this time, the U.S. Court of Appeals had had enough. One week later—on July 24, 2000—in *Radio–Television News Directors Association v. FCC*,[88] the court recalled its mandate and issued a writ of mandamus "directing the Commission immediately to repeal the personal attack and political editorial rules."

Fairness Doctrine

Of all the issues in which the FCC has been embroiled, probably none has been more controversial than the Fairness Doctrine, first enunciated by the commission in 1949 in a "Report on Editorializing by Broadcasting Licensees" and clarified *ad infinitum* in numerous rulings since that time. The doctrine essentially explained that stations had an affirmative duty to devote a reasonable percentage of time to "consideration and discussion of public issues in the community." In 1959, Congress amended 315(a), which specifies exemptions under the equal opportunities rule, and *presumably* codified (i.e., incorporated into statutory law) the Fairness Doctrine. Section 315 makes no direct mention of the doctrine but Public Law 86-274, which enacted the amendments stated, "Nothing in the foregoing shall be construed as relieving broadcasters from the obligation imposed upon them by this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[89]

In 1969 the U.S. Supreme Court for the first time chose to determine the constitutionality of the Fairness Doctrine. In *Red Lion Broadcasting v. FCC* (1969),[90] the Court held that the doctrine and its allied personal attack rule were not unconstitutional. In a case decided at the same time, *U.S. v. Radio–Television News Directors' Association* (RTNDA), the Court upheld the political editorializing rules. *Red Lion* was used for almost two decades by the commission to justify enforcement of the Fairness Doctrine.

Red Lion arose when WGCB-AM, a small station in Red Lion, Pennsylvania, broadcast a 15-minute program by Reverend Billy James Hargis, as part of a "Christian Crusade" series. On the show, Hargis discussed a book by Fred J. Cook, *Goldwater—Extremist on the Right*, and claimed the author had been fired by a

newspaper for making false charges against city officials. Hargis also said Cook had worked for a communist-affiliated publication, had defended Alger Hiss, and had attacked FBI Director J. Edgar Hoover and the Central Intelligence Agency. Cook's book, according to the minister, was intended "to smear and destroy Barry Goldwater."[91] The writer requested free air time to respond to the personal attack under the Fairness Doctrine, but the station refused. The FCC ruled in Cook's favor, and the U.S. Court of Appeals for the D.C. Circuit upheld the decision. In a separate case, the RTNDA had challenged the doctrine and its political editorial rules, which the Seventh Circuit U.S. Court of Appeals declared unconstitutional. The Supreme Court upheld the D.C. Circuit and overturned the Seventh Circuit ruling, thus upholding the constitutionality of the doctrine and its allied rules. "In light of the fact that the 'public interest' in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public . . . we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority,"[92] the Court ruled in an 8 to 0 decision written by Justice Byron R. White. The Court emphasized the scarcity of broadcast frequencies and the "legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views" as justification for the doctrine.

In 1984 the commission ruled that WTVH-TV of Syracuse, New York, had violated the Fairness Doctrine after the station aired a series of commercials supporting the construction of New York State's Nine Mile II nuclear power plant. According to the FCC, the station had "failed to afford a reasonable opportunity for the presentation of viewpoints contrasting to those presented in the advertisements and, thus, has failed to assure that the public was not left uninformed."[93] In 1985 the FCC issued a long-awaited "Fairness Report" that raised serious doubts about the constitutionality of the doctrine and concluded that it did not serve the public interest.[94] However, the agency said it probably lacked authority to determine the doctrine's constitutionality and announced that it would continue to enforce the doctrine because Congress expected it to do so.

In 1987, the battle lines began to be drawn with the FCC, the executive branch, broadcasters and strong First Amendment advocates on one side, Congress and some public interest groups on the other side, and the courts generally on the sidelines as referees. In *RTNDA v. FCC* and *Meredith Corp. v. FCC* (1987),[95] the U.S. Court of Appeals for the D.C. Circuit remanded *Meredith* to the commission for further determination of the constitutionality of the Fairness Doctrine and ordered additional briefs and oral arguments in *RTNDA* to determine whether the FCC had acted improperly when it refused earlier to initiate a rule-making proceeding on the doctrine at RTNDA's request. The handwriting was on the wall. On August 4, 1987, the FCC announced that "the set of obligations known as the 'fairness doctrine' violated the First Amendment rights of broadcasters."[96] The action came in response to the remand order of the U.S. Court of Appeals in *Meredith*. The FCC went even further in urging the U.S. Supreme Court to reconsider the scarcity rationale on which it based the 1969 *Red Lion* decision, noting that the number of broadcast stations far

exceeded the number of daily newspapers. The Commission said the Court should instead apply a traditional First Amendment analysis to broadcasters.

Earlier, Congress had acted swiftly to enact the doctrine into federal law, and such a bill passed both the Senate (59 to 31) and House (302 to 102), but President Reagan vetoed it in 1987. Congress failed to get the necessary two-thirds majority to override. In 1988, the FCC rejected petitions for consideration of its previous decision, but reaffirmed that it would no longer enforce the doctrine. The commission reaffirmed it was not abandoning the equal time and reasonable access provisions of the 1934 Communications Act, as amended, including Sections 312 and 315.[97]

Members of Congress have tried to have a measure codifying the Fairness Doctrine attached to various bills but efforts failed in one way or another. The first President Bush made it clear while he was in office that he would veto any bill to which such a measure was attached and any separate bills. The FCC gained support on February 10, 1989, when the U.S. Court of Appeals for the D.C. Circuit upheld the FCC's refusal to enforce the Fairness Doctrine against Meredith Corporation and WTVH-TV. The court did not determine whether the doctrine was constitutional, but instead noted: "Although the Commission somewhat entangled its public interest and constitutional findings, we find that the Commission's public interest determination was an independent basis for its decision and was supported by the record. We upheld that determination without reaching the constitutional issue."[98]

The Fairness Doctrine is dead for now, and its resurrection appears unlikely in spite of the fact that it has considerable support in Congress and in other circles. After decades of application, it appears to have finally met its demise. Nearly all media organizations including the NAB, RTNDA, the Society of Professional Journalists (SPJ), and the American Newspaper Publishers Association (ANPA) strongly support the FCC in its decision to kill the doctrine. During the life of the doctrine, the FCC reportedly received more than 137,000 letters, telephone calls, petitions and other forms of complaint about the doctrine.[99]

Indecency and Obscenity in Broadcasting and Telecommunications

Government concern with obscene and indecent programming heightened considerably during the 1990s and has continued well into our new millennium. It appears unlikely to die anytime soon. Much of this focus can be attributed to increased pressures to ban all forms of indecency and obscenity. The pressures historically came from right-wing groups led by conservative stalwarts such as the late U.S. Senator Jesse Helms of North Carolina and television evangelist Pat Robertson (a former Republican candidate for President). These concerns are now advanced by a group called the Parents' Television Council (PTC). PTC regularly tapes and critiques programs and maintains an Entertainment Tracking System (ETS), targeting smut and

sleaze and challenging the FCC to do something about it. More recently additional attention has focused on the Internet. The issues may be magnified now, but they are almost as old as broadcasting itself.

In the congressional hearings that eventually led to the enactment of the Radio Act of 1927 and its successor, the Communications Act of 1934, there was discussion about the possibility that radio could be used to carry obscene, indecent, or profane programming. Section 29 of the 1927 Radio Act prohibited the airing of "any obscene, indecent, or profane language, by means of radio communication."[100] The same provision was carried over into Section 326 of the 1934 Communications Act, which also barred the FCC from engaging in censorship of radio communications or from interfering with the right of free speech.[101] While the provision regarding obscene and indecent programs was deleted from Section 326 by Congress in 1948 (the censorship provision was not repealed), it was re-codified into section 1464 of the Criminal Code:

> *Broadcasting Obscene Language*. Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.[102]

In comparison with the 21st century's shock radio and R-rated TV, programming in the early decades of radio and television was prudish. However, that did not stop the Federal Radio Commission and its successor, the FCC, from repressing controversial content. Often, the questions raised by the commission were just as effective as legal actions. Even Congress occasionally investigated, at one point holding hearings about certain suggestive Spanish music carried on CBS and the NBC Blue Network during the mid-1930s.[103] The late, great actor Edward G. Robinson, Jr., owned a South Carolina radio station whose license was denied in the 1960s because the commission said it had carried programs considered "coarse, vulgar, suggestive and of indecent double meaning" but not indecent or obscene.[104]

Shock or Topless Radio

By the 1970s, *topless radio* had come into vogue in some places, especially in larger markets such as New York and Los Angeles, as a viable format and, consequently, was the target of FCC and congressional inquiries. Topless radio derived its name from the fact that it consisted of talk shows with a male host discussing explicit sexual matters with listeners, usually females, who were encouraged to call in. For example, in 1973 WGLD-FM of Oak Park, Illinois, was fined $2,000 for discussions about such practices as oral sex during daytime hours when young children could reasonably be expected in the audience. One excerpt of a WGLD broadcast went:

> Female Caller: . . . I have a craving for peanut butter . . . so I spread this on my husband's privates and after awhile, I mean I didn't need the peanut butter anymore.

Male host:	[laughing] Peanut butter, huh?
Caller:	Right. Oh, we can try anything . . . Any of these women that have called and . . . have hangups about this . . . they should try their favorite—you know like—uh . . .
Host:	Whipped cream, marshmallow. . . .[105]

The FCC decided that this case and similar sessions violated both the indecency and obscenity standards of U.S. Criminal Code Section 1464, but the discussion of sex did not automatically risk punishment:

> We are not emphatically saying that sex per se is a forbidden subject on the broadcast medium [*sic*]. We are well aware that sex is a vital human relationship which has concerned humanity over the centuries, and that sex and obscenity are not the same thing. . . . We are . . . confronted . . . [here] with the talk or interview show where clearly the interviewer can readily moderate his handling of the subject matter so as to conform to the basic statutory standards which, as we point out, allow much leeway for provocative material.[106]

The radio station denied any wrongdoing in the case but paid the fine. That did not end the matter, however. Two public interest groups petitioned the commission for reconsideration on the grounds that listeners had a right of access to such controversial programs and then appealed to the U.S. Court of Appeals for the D.C. Circuit when the FCC reaffirmed its decision. The appellate court backed the agency: "We conclude that, where a radio call-in show during daytime hours broadcasts explicit discussions of ultimate sexual acts in a titillating context, the Commission does not unconstitutionally infringe upon the public's right to listening alternatives when it determines that the broadcast is obscene."[107]

About two weeks before the FCC notified WGLD-FM of an apparent violation, the board of directors of the National Association of Broadcasters (NAB), the powerful trade association, unanimously adopted a resolution that "unequivocally deplored and condemned tasteless and vulgar program content, whether explicit or by sexually oriented innuendo."[108]

The debate over indecent programming owes much of its roots to an October 30, 1973, broadcast of comedian George Carlin's recorded monologue, "Filthy Words" on WBAI-FM in New York, owned by the Pacifica Foundation, whose alternative stations have been embroiled in various controversies over content with the FCC. Before the monologue was aired at 2:00 p.m., listeners were warned about its offensive language. Nevertheless, weeks later a listener filed a complaint with the FCC, indicating that he had heard the broadcast while driving with his young son. The commission issued a declaratory order granting the complaint but reserved judgment on whether to impose administrative sanctions while noting that its order would become part of the station's file. The FCC held that the language in Carlin's monologue was indecent within the meaning of Section 1464 of the U.S. Criminal Code

(Title 18). The commission was concerned especially with the time of the program: "The concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."[109]

The commission's decision, which was not rendered until February 1975, 17 months after the broadcast, implied the program could have been played at a different time without incurring the FCC's wrath. "When the number of children is reduced to a minimum, for example during the late evening hours, a different standard might conceivably be used," according to the agency. The FCC did not enunciate a particular standard, nor did it indicate that a lower standard would apply.

Pacifica chose to fight the FCC rather than fold. During the first round of appeals, Pacifica won when the U.S. Court of Appeals for the D.C. Circuit reversed the decision, holding that its actions were tantamount to prior restraint and thus violated the First Amendment. The FCC appealed to the Supreme Court, which reversed the Court of Appeals decision in 1978, siding with the Commission. In a 5 to 4 plurality opinion in *FCC v. Pacifica Foundation* (1978),[110] written by Justice John Paul Stevens, the Court held the FCC could constitutionally prohibit language that was *indecent* even though not *obscene*. (Obscenity involves an appeal to prurient interests or eroticism, whereas indecency does not.) Not surprisingly, the justices split on the decision, leading to the plurality opinion. According to Justice Stevens, whose opinion was supported in part by four other justices:

> The prohibition against censorship [in §326] unequivocally denies the Commission any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves. The prohibition, however, has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties.[111] (footnote omitted)

The opinion also noted that "§326 does not limit the Commission's authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting" and that "of all forms of communication, it is broadcasting that has received the most limited First Amendment Protection." The Court's conclusion is especially troublesome in its rationale for individuals who advocate First Amendment rights for broadcasting on par with those of the print media:

> The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience [footnote omitted] and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a "nuisance may be merely a right thing in the wrong place—like a pig in a parlor instead of the barnyard" [citing a 1926 case]. We simply hold that

> when the Commission finds that when a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.[112]

Pacifica was only the beginning of a growing governmental and public concern with indecent programming, but its holding continues to be frequently invoked by the courts in spite of its plurality status. Indeed, the case became known as the "seven dirty words" decision because Carlin's 12-minute monologue revolved around the seven "words you couldn't say on the public . . . airwaves."[113] One misconception surrounding the FCC and Supreme Court's decision is that the seven specific words have been banned from the airwaves. Both the Court and the commission indicated that the monologue, as a whole, broadcast in the specific context (early afternoon when children could be listening) was indecent, not the individual profanities or vulgarities. Note that the commission did not take any criminal action or pose any sanctions; it simply warned the station that the offense would be noted in its administrative file.

As much as anyone currently on the air, Howard Stern has been the subject of FCC scrutiny. As early as 1995, Howard Stern's broadcasts had already resulted in total FCC fines of $1.885 million against the stations that carried his show. At that time, Stern had been cited seven times, five times more than his nearest competitor. The highest fine up to that date after Stern's was a paltry $40,000. When Stern's then-employer, Infinity Broadcasting, petitioned the commission for permission to buy Los Angeles station KRTH-FM in 1994 for $100 million, a record for a radio station, the FCC balked until Infinity agreed to pay an added fine of $400,000 for Stern's violations. According to the *Washington Post,* Infinity had not paid that fine or any of the other fines, although the sale was consummated.[114]

Stern's antics have even been the subject of speculation regarding political intent. When Stern vowed in 2004 to fight the re-election of President George W. Bush on-air, *New York Post* columnist John Podhoretz warned: "Stern's in danger of making the Lenny Bruce mistake. The great dirty comic spent the last few years of his life boring his audience to tears by lecturing them about injustices done to him. Stern's listeners want to hear him talk to strippers and insult his producer's teeth. They're going to tune him out if he spends too much time blathering about Bush."[115]

The tradition has been to examine the actual words used on the air. The then-FCC Chairman Michael Powell asked commissioners to overturn a decision they had made addressing an expletive ("this is really, really, f-------brilliant") by rock group U-2's lead singer Bono telecast during the NBC broadcast of the 2004 Golden Globe Awards. The initial complaint against the network had been dismissed by the FCC's Enforcement Bureau, which ruled the broadcast of the "F-word" was not obscene because the word was used as an adjective, not to describe a sex act, and constituted a fleeting use that did not warrant liability. However, on appeal, the full commission overturned the bureau's decision, noting "we believe that, given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition." [116] The first prong focuses on the explicitness or graphic nature of the depiction or description of sexual or excretory organs or activities.

On Veteran's Day in 2004 ABC-TV broadcast the movie, "Saving Private Ryan," which won numerous awards, including a 1999 Golden Globes for best motion picture drama. The film, starring Tom Hanks, focuses on the horrors of World War II. The dialogue contains numerous profanities, including the "F-word." ABC affiliates were not given the option of editing out the expletives because of the network's contract with the film's owner, and 66 ABC stations chose not to carry the movie. The film was co-introduced by U.S. Senator John McCain (R-Ariz.), a World War II veteran. The broadcast was clearly marked as "TV MA LV" (a rating indicating it was suitable for a mature audience because of explicit language and violence).

Some of the affiliates who decided not to broadcast the film indicated they feared FCC fines. They pointed to the agency's decision in the Bono case and the furor over Janet Jackson and Justin Timberlake's "Nipplegate" appearance during half time at the Super Bowl XXXVIII game earlier in that same year. The Super Bowl fiasco, in which Jackson's breast was exposed for 19/32 of a second, resulted in a half million complaints to the FCC. In the aftermath, TV networks and other station owners took a more careful view of on-air performance, including tape delays for "live" performances. The fact that Jackson's breast was shown in view of a large national television audience in prime time created a huge public outcry, and the critics on both sides had a heyday.[117]

FCC Chairman Powell urged an increase in the fine for indecency from $27,500 to $275,000, and the FCC fined Viacom and CBS-owned and -operated stations $550,000 for the "Nipplegate" indiscretion, even though the network claimed it was totally blindsided by the incident. CBS challenged the decision. The incident harkened back to an incident the previous year (2003) in which 169 FOX stations were hit with complaints for airing what the commission called a "sexually suggestive" bachelor party scene appearing in a reality show entitled "Married by America."[118] The agency fined Fox and its affiliates $1.183 million or $7,000 for each of the 169 stations that carried the show.

The FCC received complaints about the airing of "Saving Private Ryan," but ultimately ruled in favor of ABC on the grounds that the language in the film, when taken in context, was not indecent.[119] ABC created controversy again when it aired a promotional film for its new series, "Desperate Housewives," with actress Nicollette Sheridan dropping her towel in front of Philadelphia Eagles wide receiver Terrell Owens in his locker room. The promotion showed only her bare back from the waist up. It was aired during a Monday night football game between the Eagles and the Dallas Cowboys. The airing apparently paid off. "Desperate Housewives" became a tremendous ratings hit, and the commission ruled the promotion may have been sexually suggestive, but it was not indecent. [120] The next month NBC stated that it received a request from the FCC for a video of the opening ceremonies of the Olympics after receiving complaints about scantily clad performers.[121]

Clear Channel Radio suspended the Howard Stern program and the company fired a DJ known as "Bubba the Love Sponge," whose show drew a record $755,000 fine for a program the FCC described as "designed to pander to, titillate and shock listeners." This occurred before a congressional hearing in February 2004 on the subject of broadcast indecency. By June 2004, with the news that Mel Karmazin was stepping down as president of Viacom, Inc., Infinity Radio's parent, Howard Stern

predicted his radio days were "really numbered." Stern subsequently made the switch to satellite radio on what he said were First Amendment grounds to avoid further monitoring and further censorship of his program, as noted earlier in this chapter.

In June 2007 the Second Circuit U.S. Court of Appeals held that the FCC's 2003 indecency policy was "arbitrary and capricious" and possibly violated the First Amendment. In *Fox Television Stations, Inc. v. FCC* (2007), a three-judge panel ruled that the commission had not provided a "reasoned analysis" in its justification for the new policy. The court did not specifically strike down the policy but instead sent it back to the FCC for reconsideration.

Some Ethical Considerations

It can be argued that *Pacifica* should have let sleeping dogs lie and should not have appealed the FCC decision because taking the case further could lead to an adverse decision and erosion of the First Amendment. No doubt the foundation felt it could win the case, as it did in federal appellate court, only to be reversed by the Supreme Court. Should the station have appealed the decision?

At the time of the Court's decision in 1975, only about 10 million homes subscribed to cable television and Time Inc. had just begun to distribute its Home Box Office Service via satellite to cable systems. Now more than 96 percent of all U.S. homes with television have access to cable. According to the Television Bureau of Advertising and Nielsen Research, cable penetration has been in flux. It hit a nine-year low in May 2004, falling to 67.1 percent of all TV households from 68.1 percent the year before. Meanwhile, direct broadcast satellite service continues to gain viewers. Direct satellite delivery reaches almost 18 percent of all of American TV households.

A substantial portion of the subscribers also pay for premium services such as HBO, Showtime, Cinemax, the Movie Channel and Playboy Television and purchase pay-per-view movies and events that feature nudity, violence, sex, and strong language. The movies are typically G, PG, PG-13, R and NC-17 rated versions as originally shown. These services carry appropriate warnings, usually in the forms of the MPAA rating and designated symbols in program guides. The cable channels display the same voluntary TV parental guidelines implemented by the industry on October 1, 1997, which include six categories with accompanying symbols for violence (V), sexual situations (S), coarse language (L), and suggestive dialogue (D). The major networks continue to encourage parents to monitor their children's viewing to avoid surprises in what they may regard as objectionable programming.

All of the services, particularly Playboy Television, carry movies and other programs that could be characterized as soft-core pornography. Although HBO and Cinemax have a policy of showing R-rated and NC-17 movies only at night (usually no earlier than 8:00 p.m.), even PG-13 movies sometimes contain profanities and content that could be considered indecent under broadcast standards. Occasionally, there are consumer complaints about offensive content in movies on these channels, but the FCC has specifically asserted as recently as 2005 that it does not have the

authority to fine such video and audio subscription services, including cable, satellite television and satellite radio, for indecent content.[123]

For years, many critics of the television industry urged the FCC to mandate that more effective measures—such as requiring a parental lock system on all cable converters—be taken to prevent children from gaining access to inappropriate content. At one time, a special effort had to be made to get access to cable channels outside the normal tuning range of the TV set; but now cable-originated (i.e., those fed from satellites) channels are interspersed with other over-the-air signals so that all signals are equally accessible. In other words, it is just as easy to tune to Playboy Television (assuming you pay a monthly fee) as it is to get a local TV station.

Talk radio has attracted a lot of attention over the years with the great popularity of conservative talk hosts such as Bill O'Reilly, Sean Hannity, Rush Limbaugh, and former Watergate convict G. Gordon Liddy. Liddy attracted criticism in 1995 when he instructed listeners on his talk show how to effectively shoot federal agents if they invaded one's home. "Use head shots," he said, "because they've got a vest underneath." Liddy once won the annual First Amendment Award from the National Association of Radio Talk Show Hosts.

In March 1995 the syndicated "Jenny Jones" television show taped an episode called "Secret Admirers" about men who had secret crushes on other men. The program was never aired because one of the guests, Jonathan Schmitz, shot another guest, Scott Amedure, three days after Amedure disclosed on the show his crush on the other man. Schmitz received a sexually suggestive note from Amedure and shot him in a confrontation. Court TV covered the case in some detail. Schmitz was ultimately convicted for slaying Amedure and sentenced to 25 years in prison. Jones testified at the trial, and was strongly criticized in the press for her confused testimony, which she blamed on the fact that she had been given only one day's notice. Amedure's family subsequently sued Jones and the owner of her show, Warner Brothers, for wrongful death. In 1999, a Michigan jury found Jones and Warner Brothers liable for more than $29 million in damages, but three years later the state Court of Appeals overturned the verdict, holding that the defendants "had no duty to anticipate and prevent the act of murder committed by Schmitz."[124]

Indecency and Obscenity Continued

The infamous George Carlin "Seven Words You Can't Say" broadcast took place at a time when the FCC was actively involved in regulation. The U.S. Supreme Court decision was handed down just as an era of *deregulation* had begun. That moved from moderation during the late 1970s then accelerated, with an emphasis on market competition beginning in the 1980s. Deregulation never meant complete deregulation. Each commission chose its own areas of emphasis for enforcement, often in line with dictates of Congress in the form of statutes. President Jimmy Carter appointed Charles D. Ferris as chair of the FCC. Ferris coined the term *re-regulation* to characterize the tone of the commission during his tenure. The idea was "to deregulate where markets would work

without regulation" while recognizing that "some markets are not competitive enough to be completely deregulated."[125] Robert E. Lee, who served the shortest term as chair of the FCC (four months in 1981) oversaw continuation of the deregulation, which was substantially accelerated in 1981 when Mark Fowler took the helm.

The Fowler Commission became known as the advocate of "unregulation" as it moved to eliminate as many regulations as possible, especially those involving programming. "Let the marketplace decide" were buzz words of the era as rules and regulations fell, often with the rationale that the competitive marketplace was a more efficient and less expensive means of regulation.

What was the impact of deregulation and unregulation on obscenity and indecency? During the decade after *Pacifica*, the FCC skirted obscenity and indecency issues by announcing that it was limiting application of *Pacifica* to repeated broadcasts of the "seven dirty words" airing earlier than 10:00 p.m.[126] In the entire period from the *Pacifica* decision until the end of the Fowler administration, not one broadcast station was cited for indecency. For example, after *Pacifica*, the FCC turned down a petition from a group of citizens, Morality in Media of Massachusetts, to deny renewal of the license of one of the top public television stations, WGBH, Boston. The group complained that the Public Broadcasting Service (PBS) affiliate carried programs with unacceptable language and nudity. Among programs cited was the acclaimed "Masterpiece Theatre," produced by WGBH and carried nationally over PBS.

The picture changed in 1987. The commission (a) cited three stations and an amateur ("ham") radio operator for broadcasting obscenities and (b) announced that it would issue a public notice enunciating its position on indecency. Almost two weeks later, the FCC issued its public notice that it was no longer confining enforcement of Section 464 to Carlin obscenities, indicating it would "apply the generic definition of indecency advanced in *Pacifica . . . 'Language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs*.'"[127]

Interestingly, even though the commission actually revoked the amateur radio operator's license,[128] it took a more lenient approach to the three broadcast licensees, referring one case to the U.S. Department of Justice (which declined to prosecute),[129] while taking no specific action against the other two.[130] Infinity Broadcasting's station WYSP-FM in Philadelphia simulcast a morning drive-time program from WXRK-FM in New York City, "The Howard Stern Show," hosted, of course, by its namesake. (Only the Philadelphia station was cited, not the originating station in New York.)

The shock radio citation apparently caught by surprise many stations that were generally comfortable with the deregulatory—or, as some critics characterized it, "unregulatory"—stance of the FCC during Ronald Reagan's presidency under FCC Chairs Mark Fowler (1981 to 1987) and Dennis Patrick (1987 to 1989).[131] But the move to stamp out indecency on the air was not abated even with one of industry's own at the helm, Alfred C. Sikes, who indicated on the day before he took over on August 8, 1989, "I hope as chairman of the FCC to help open markets, and I think the competition that results will help people."[132] He said that the aggressive moves against obscenity begun by Chair Dennis Patrick would continue: "I see carrying

forward that vigorous enforcement." In a citation against Philadelphia's WYSP-FM, which moved in audience ratings for that time slot from near the bottom to third place as a direct result of the "shock" show,[133] the FCC included excerpts it considered indecent:

Howard Stern:	Have you ever had sex with an animal?
Caller:	No.
Stern:	Well, don't knock it. I was sodomized by Lambchop, you know that puppet Shari Lewis holds?
Stern:	Baaaaah. That's where I was thinking that Shari Lewis, instead of like sodomizing all the people at the Academy to get that shot on the Emmys she could've had Lambchop do it.[134]

Shortly after the FCC cited WYSP-FM, Stern encouraged his listeners to voice their disagreement with the commission. "I am the last bastion of the First Amendment," he told them.[135] During 1992 and 1993 the FCC issued numerous notices of liability (NALs), including several against stations carrying Stern's show. With an NAL, the FCC cannot force a station to pay a fine unless the station decides not to fight the finding in court or the station loses in court.

Shock radio or its derivations continue on the airwaves, although most of them have toned down since the FCC citations and the aftermath, and some of the most frequently cited individuals such as Howard Stern have moved to satellite radio on grounds that they would have more freedom outside the reach of the FCC. In response to a flood of petitions on both sides of the issue, most from broadcasters and supporters, a request was made in 1987 that the FCC rescind its order and provide clarification of standards of indecency. Among the petitions was one from Morality in Media, asking that specific types of sexually explicit material be banned even if not legally obscene. In its order, the commission called the Morality in Media plan unconstitutional on the ground that the U.S. Supreme Court's holding in *Pacifica* permitted only "reasonable time, place and manner restrictions" on indecent content, not broad restrictions.[135]

In a deft move, the FCC refused to define *patently offensive* from its earlier order and incensed First Amendment advocates by noting that it would not apply *Miller v. California's* (1973)[137] holding that *obscene* material must lack serious literary, artistic, political, or scientific value in evaluating whether broadcast content is *indecent*. According to the FCC, "Merit is simply one of many variables, and it would give this particular variable undue importance if we were to single it out for greater weight or attention than we give other variables. . . . We must, therefore, reject an approach that would hold that if a work has merit, it is *per se* not indecent."[138]

The FCC emphasized that merit must be included among the variables and that the "ultimate determinative factor . . . is whether the material, when examined in context, is patently offensive." The order went on to announce that, for purposes

of evaluating whether material was patently offensive, contemporary community standards (see *Miller*) would be defined as a national standard—an average viewer or listener: "In making the required determination of indecency, Commissioners draw on their knowledge of the views of the average viewer or listener, as well as their general expertise in broadcast matters. The determination reached is thus not one based on a local standard, but one based on a broader standard for broadcasting generally."[139]

Action for Children's Television v. Federal Communications Commission (*ACT I,* 1988)

Further appeals were inevitable, given the potential impact of the original order and the reconsideration order. The culmination of those appeals arrived in the form of a 1988 U.S. Court of Appeals for the D.C. Circuit ruling in *Action for Children's Television v. Federal Communications Commission* (*ACT I*).[140] Before the decision arrived, however, a few skirmishes occurred. On January 12, 1988, the FCC initiated its first enforcement action against a TV station for broadcasting purportedly indecent material by announcing that KZKC-TV of Kansas City, Missouri, may have violated the new indecency standards established earlier in its reconsideration order.[141] The station, owned by Media Central Inc., had shown at 8:00 p.m. the R-rated movie *Private Lessons*, including scenes of a bare-breasted woman seducing a teenage boy. The owner claimed later the movie had been cut by an inexperienced editor and had violated the company's own standards. He said the station should not have been fined because the FCC standards were too vague and were being applied for the first time to a TV station.[142] (The earlier citations were against radio stations.) In June 1988, the FCC voted 2 to 1 (three commissioners were on board) to levy the maximum fine of $2,000 against the station but delayed assessing it because the U.S. Court of Appeals in *Action for Children's Television v. FCC* ordered the commission to conduct a new hearing regarding the times when indecent material may be aired.

Although there was hope at the time that *Action for Children's Television v. FCC* (1988) would at least provide clearer guidelines regarding indecency, the decision of the court and the congressional action that followed muddied the waters even more. The Court of Appeals ruled the FCC's definition of indecency was not substantially too broad because "merit is properly treated as a factor in determining whether material is patently offensive, but it does not render such material *per se* not indecent."[143] The court also reiterated that indecent but not obscene material enjoys First Amendment protection, but children's access to indecent material may be regulated through the use of channeling to protect unsupervised children.

The court was less than satisfied with the ratings data the FCC presented to show that large numbers of children were listening and watching during late hours, calling the evidence used in making channeling decisions "insubstantial . . . and more ritual than real." The midnight or "safe harbor" advice and the FCC's entire position

on channeling "was not adequately thought through," the court said. The judges instructed the commission to establish a safe harbor in a rule-making proceeding so the FCC could "afford broadcasters clear notice of reasonably determined times at which indecent material may be safely aired"[144] and ordered rehearings for two stations.

Within months after the court's decision, Congress, at the urging of conservatives such as the late Senator Jessie Helms (R-N.C.), passed an amendment to an appropriations bill that required the FCC to enforce its indecency policy 24 hours a day, starting January 27, 1989. The commission immediately complied and enacted such a rule. Upon petition, the U.S. Court of Appeals for the D.C. Circuit stayed the FCC rule, pending further review. In the meantime, the Court said, the FCC could gather evidence to support the ban. The Court order did not affect the commission's ability to enforce its safe harbor policy. In 1989 it fined Los Angeles talk radio KFI-AM more than $6,000 for airing indecent remarks during three afternoon programs. Topics discussed with callers included penis size and "sexual secrets." The station chose not to appeal and, acting on complaints, the FCC cited and fined others for indecent programming.[145]

In polling regarding reinstatement of a ban, the agency received almost 90,000 complaints. Critic Ron Powers in *GQ* magazine noted that the confrontation between programmers and the government had been building.[146] He pointed out that NBC-TV "Tonight Show" host Jack Paar was forced off the air in the 1950s for a reference to a "WC" or water closet, a euphemism for bathroom. Powers felt broadcasters brought suppression on themselves.[147] Ironically, a half century later, rocker Tommy Lee was wished a "Happy (expletive) New Year" on a live broadcast of NBC's "Tonight Show with Jay Leno."

Action for Children's Television v. Federal Communications Commission (*ACT II,* 1991)

In 1991 the U.S. Court of Appeals for the D.C. Circuit held in *Action for Children's Television v. Federal Communications Commission* (*ACT II*) that the 24-hour ban was unconstitutional prior restraint because it totally barred indecent speech, which enjoyed First Amendment protection. The court ordered a stay on the ban, directing the commission to initiate a proceeding to determine when indecent content could be broadcast. The appellate court made it clear the FCC could reinstitute a safe harbor period for indecent speech, but it would have to do so after addressing the concerns the court had raised in *ACT I*, including "the appropriate definitions of 'children' and 'reasonable risk' for channeling purposes . . . and the scope of the government's interest in regulating indecent broadcasts." [148] Until the federal appeals court decision, Congress appeared determined to keep a 24-hour ban, as did the FCC. As FCC General Counsel Robert L. Pettit noted before the court's ruling, "Under the Communications Act, the Commission is obliged to enforce an indecency standard; the Commission has consistently articulated a standard for indecency; it has been

upheld by the Supreme Court."[149] Pettit also contended that indecency "is an area where the Commission has been given, by Congress, a statutory responsibility, and what we're doing is carrying out that congressionally mandated responsibility. It's no more and no less."[150]

In *ACT II*, the D.C. Circuit Court cited both *ACT I* and the 1989 U.S. Supreme Court decision in *Sable Communications v. FCC*[151] to justify its decision. In *Sable Communications* the Supreme Court recognized that Congress could protect children from exposure to dial-a-porn messages (sexually oriented phone services), but it said such restrictions must be strictly limited. Accordingly, the Court held that the federal statute's outright ban on both indecent and obscene interstate commercial telephone messages was unconstitutional. The Court upheld a lower court's decision that the statute could not ban indecent messages but could prohibit obscene messages. The Court specifically rejected the 1978 *FCC v. Pacifica Foundation* decision, discussed earlier, as justification for the ban on indecent phone messages. The Court distinguished *Pacifica* by pointing to the narrowness of the *Pacifica* holding and the "uniquely pervasive" nature of broadcasting that "can intrude on the privacy of the home without prior warning as to program content." According to the Court, "Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message." Thus the justices did not directly confront the 24-hour indecent broadcasting ban because this issue arose independent of the case at hand. On appeal, in 1992 the U.S. Supreme Court denied certiorari in *ACT II*.

Rather than wait for the FCC to come up with a new safe harbor period, Congress included a provision in the Public Telecommunications Act of 1992[152] directing the agency to establish regulations banning indecent programming from 6:00 a.m. to midnight. The Act, whose primary purpose was to provide funding for public broadcasting, set the safe harbor hours for public television as 10:00 p.m. to 6:00 a.m. for stations that signed off prior to midnight.

Action for Children's Television v. Federal Communications Commission (*ACT III* and *ACT IV*, 1995)

In *Action for Children's Television v. Federal Communications Commission* (1993),[153] a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit upheld the FCC's new safe harbor regulations. Two years later in *Action for Children's Television v. Federal Communications Commission* (*ACT III*, 1995),[154] an *en banc* court affirmed the panel's decision but expanded the hours for all broadcasters to 10:00 p.m. to 6:00 a.m. so the rules would be uniform for commercial and public television. On appeal, the U.S. Supreme Court denied certiorari. When Action for Children's Television challenged the administrative process the FCC had used in enforcing its indecency rules, including cases the commission had not resolved for years, the U.S. Court of Appeals for the D.C. Circuit ruled in favor of the FCC in what has become known as *ACT IV*.[155] The U.S. Supreme Court denied certiorari

in 1996, presumably bringing closure to the issue of what hours could be set for a safe harbor from indecency.

The Telecommunications Act of 1996 contains a provision dealing with sexually explicit adult video programming requiring cable systems and "multi-channel video program distributors" (MVPDs) to scramble programming when carried on channels such as Playboy and Spice that are devoted primarily to sexually oriented content. The scrambling must include both audio and video to prevent non-subscribers from seeing and hearing the content.[156]

Under the Cable Television Consumer Protection and Competition Act of 1992,[157] cable operators were granted the right to restrict or prohibit indecent programming on leased access channels and public, educational, and governmental (PEG) channels. Leased access channels are leased for commercial use by individuals and organizations not affiliated with the cable company. Most cable systems are required to make such channels available. One section of the Act required cable operators to segregate patently offensive programming to one channel, and block that channel from viewer access unless a subscriber over the age of 18 asked in writing that access be made available. "Patently offensive" programming was defined as obscene under *Miller v. California* (1973) standards and "indecent" was defined as language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs.

Cable companies are not required under federal law to provide PEG channels, but local franchise authorities can require them to offer such channels for use by public, educational, and governmental agencies as a condition for being awarded the local cable franchise.

In *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission* (1996),[158] the U.S. Supreme Court had the opportunity to determine whether cable TV followed a print or broadcast model for First Amendment protection or perhaps a hybrid. The Court failed to seize the opportunity, and instead issued a plurality opinion that elicited six separate opinions. The case concerned the constitutionality of the leased access channel and PEG channel indecency provisions just discussed.

In a 7 to 2 vote, the Court upheld the provision allowing a cable operator to refuse to carry on leased access channels programming that the operator reasonably believed to be patently offensive. Unfortunately, the Court could not agree on the rationale. In a 6 to 3 vote, the Court also struck down the provision requiring cable companies to segregate indecent leased access programming to one channel and to scramble the signal except for subscribers who asked in writing that the channel be unscrambled. A majority of justices did agree that this provision was unconstitutional because it was not narrowly tailored to achieve the government objective of protecting children from patently offensive material. The opinion, written by Justice Breyer, noted that other less obtrusive means were or would be available to accomplish the same result such as the V-chip. In a 5 to 4 vote, the Court struck down a provision that allowed cable operators to ban indecent programming from PEG channels but, again, could not agree on a rationale.

The Ratings Game: From TV-Y to TV-MA

During the mid-1990s the major commercial television networks began voluntarily labeling some shows such as the ABC series "NYPD Blue" with the advisory: "Due to some violent content, parental discretion is advised." In the same year, a *Los Angeles Times* poll showed that more than 54 percent of Americans would support federal guidelines to restrict violence on television.[159] During the next four years, various politicians warned the broadcast industry that legislation might be on the horizon if television violence were not reduced. As a result, the major broadcast and cable networks took steps hailed by some in Congress as significant. The steps included hiring an outside group to monitor TV violence and issue an annual report of results. The cable networks agreed to set up violence ratings systems and install technology that would allow viewers to block certain programs. (Home satellite viewers already had such technology.) In June 1994 the industry announced that UCLA's Center on Communications Policy had been selected as a monitor as part of a $3.3 million, three-year project, beginning that fall. The center studied individual shows rather than making a gross tally, as in some previous studies. Prime time programs, including series, movies, and miniseries, on ABC, CBS, Fox, and NBC, as well as Saturday morning children's shows, were monitored, but sports and news were excluded.[160] In addition, studies were also conducted on cable and other programming at the University of California at Santa Barbara and the University of Texas at Austin. Researchers at the University of North Carolina at Chapel Hill and the University of Wisconsin at Madison looked at TV ratings, program warnings, and educational programming.[161]

In January 1997, the television and cable industry initiated a new program ratings system that was modeled after the ratings system of the Motion Picture Association of America (MPAA). The group responsible for developing the system was headed by Jack Valenti, President of the MPAA. It had the endorsements of the National Cable Television Association (NCTA) and the National Association of Broadcasters (NAB). The advocacy community, including the American Medical Association, the American Psychological Association, the National Education Association, the National PTA, and five other organizations, was also extensively involved in developing the system. Section 551 of the Telecommunications Act of 1996 encouraged, but did not mandate, the industry to "establish voluntary rules for rating video programming that contains sexual, violent or other indecent material about which parents should be informed before it is displayed to children" and display the ratings in the broadcasts.

The Act also required the FCC to consult with public interest groups and members of the public to get their reactions to the voluntary system. Under Section 115, the FCC would have been required to appoint an advisory committee to set up guidelines for a ratings system if the industry had not done so by February 8, 1997—one year after the Telecom Act took effect. Some First Amendment experts questioned whether the system eventually developed could pass constitutional muster because of this provision and political pressures. They reasoned that if a challenger could

demonstrate that the pressures and the provision were tantamount to a government mandate, that provision of the Act could be declared to be unconstitutional prior restraint. However, those concerns never arose once the system was developed.

The six age-based categories established by the industry included two for programs aimed solely at children—**TV-Y All Children** (programming appropriate for all children) and **TV-Y7 Directed to Older Children** (programming for children 7 and older). The remaining four categories—**TV-G General Audience** (suitable all ages), **TV-PG Parental Guidance Suggested** (programming may not be suitable for younger children), **TV-14 Parents Strongly Cautioned** (programming may be unsuitable for children younger than 14) and **TV-MA Mature Audiences Only** (programming designed for adults that may be unsuitable for children under 17).

This initial effort was not entirely successful. All of the major broadcast television networks and all major cable television networks eventually adopted the system, but many media researchers as well as parents were less than enthusiastic about the results. For example, one of the studies that was part of the $3.3 million project mentioned earlier found that the system could actually be attracting children to watch the more violent shows.[162] The research looked at 6,000 programs over two years.

The major criticisms leveled at the system were (a) the ratings gave no indication of the type of content involved—sex, violence, language, etc. and (b) the ratings were confusing, particularly because they were solely age-based. At the urging of the public and members of Congress, the industry eventually revised the system to include violence (V), fantasy violence (FV), coarse language (L), sexual situations (S), and suggestive dialogue (D). The degree of these parameters varied, depending upon the specific rating. For example, a program rated "TV-14 Parents Strongly Cautioned" may contain intense violence, intense sexual situations, strong coarse language or intensely suggestive dialogue, while a "TV-MA Mature Audiences Only" show could have graphic violence, explicit sexual activity or crude, indecent language. The V, FV, L, S, and D symbols indicate the type of content involved. Both the new and the old guidelines apply to all television programming, except news and sports and unedited MPAA-rated movies on premium cable channels such as HBO and Showtime. Premium cable channels carry the MPAA ratings and their own advisories. The rating assigned to a particular program, including the icon and the appropriate content symbols, are shown for at least 15 seconds at the beginnings of all rated programs. Ratings are also included in printed and electronic program guides.

Unlike MPAA ratings assigned by a separate board, the television ratings are chosen by programmers themselves. An advisory board supervises the administration of the ratings system and makes sure the ratings are consistent and accurate, but the board does not assign ratings. All television sets manufactured after February 1998 with 13-inch and larger screens have been required to have technology "designed to enable viewers to block display of all programs with a common rating" (which can be based on the voluntary ratings system or a programmer's own rating system).[163] The so-called V-chip is triggered by a signal transmitted in the television

signal. The Telecommunications Act provision did not require programmers to rate shows, but it did require manufacturers to include technology to block shows that are rated.

The TV Parental Guidelines adopted by the cable and broadcast industries are transmitted on line 21 of the Vertical Blanking Interval (VBI). Although programmers do not have to use a ratings system, they are barred under the Telecommunications Act from removing the TV Parental Guidelines signals from the VBI. The ratings icon and information automatically appear on the screen for 15 seconds at the beginning of each program and when activated by remote control action such as changing channels.

The sizzle of competition on the airwaves often drives stations to continue to test the limits of acceptability and to encourage government to aggressively defend some parameters. In 1992 Congress included a provision in its bill authorizing funding for public broadcasting that banned "indecent programming" on both radio and TV between 6:00 a.m. and 10:00 p.m. on public stations and 6:00 a.m. and midnight for all other stations.[164] In 1993, the FCC issued rules implementing the provision.

The NAB had a code of "good practice" from 1929 to 1983, which included standards for programming and advertising as well as regulations and procedures. Television and radio had separate but similar codes. Both the family viewing and advertising provisions were challenged as illegal in the late 1970s, and the NAB, facing a long and expensive battle with writers' groups over family viewing and the Justice Department over ad restrictions, killed both the TV and the radio codes in 1983. The family viewing standards adopted by the three commercial networks on April 21, 1975 included a provision that "entertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour."[165] This essentially restricted TV network programming to family entertainment from 8:00 to 9:00 p.m. during weekdays and 7:00 to 8:00 p.m. on weekends.

It remains to be seen whether the ratings system is actually reducing the amount of objectionable content on television, including violence, but at least the technology is in place and working so viewers, including conscientious parents, can block unsuitable programming from the eyes and ears of children.

Children's Programming

In late 1991 new FCC rules took effect to implement the Children's Television Act (CTA) of 1990, passed by Congress and enacted without the senior President Bush's signature. The statute delegated to the commission the authority to interpret and enforce its provisions, which include a mandate that broadcasters serve the educational needs of children. Under the FCC rules, which have become known as the "Kidvid Rules," the maximum time allocated to commercials during programming directed primarily to children on both commercial and cable television was 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. The rules at that time did not specify any minimum time that broadcasters had to set aside for

children's programming but instead left that decision in the hands of the networks and local stations. Broadcasters, however, had to provide in their files for public inspection summaries of programming that they contended served children. Later, as noted below, the FCC put into place specific programming requirements.

The FCC decided not to clamp down on so-called 30-minute commercials, shows based on characters such as GI Joe, He Man, and Teenage Mutant Ninja Turtles. The commission said this type of program will be considered full commercial time only if the show included paid advertising for the toy of the particular character. However, in March 1993 the FCC announced that these programs and others, "G.I. Joe," "The Jetsons," and "The Flintstones," could no longer count as "educational and informational" programming under the 1990 Act. The commission also adopted a notice of inquiry to identify TV programs that "serve the educational and informational needs of children" and that "further the positive development of children."

In late 1993 Reed Hundt, a telecommunications lawyer, took over as FCC chair. Hundt opened the commission's first hearing on children's programming in over a decade by telling the broadcast industry "the business of educating kids should be part of the TV business," and he called TV a "battleground" for "the hearts and minds of children."[166] In April 1995 his proposal for improved children's television programming got the nod when the commission tentatively approved new rules that strengthen the Children's Television Act of 1990.

After input from various interest groups and the television industry, the commission gave its final approval in August 1996.[167] Among the changes were a more specific definition of educational or informational programming for children and a requirement that stations specifically identify on-the-air programs they consider educational. The commission members could not agree on whether stations should be required to devote a minimum amount of time to children's programming. Instead, they approved a compromise for stations that broadcast an average of at least three hours a week of educational and informational programming oriented to children 16 and under to receive preferential (quick) processing license renewal applications.

The 1996 Telecommunications Act had already made it substantially easier for both radio and television stations to renew their licenses by extending licenses to eight years (from five years for TV and seven years for radio). It also severely limits the FCC's authority to deny renewals, to consider license challenges, and to grant conditional approvals.

In 2004 the FCC significantly enhanced the Kidvid regulations as part of its effort to regulate the transition from analog to digital, high definition television.[168] Interestingly, the new rules apply to both analog and digital television. As with the previous rules, they apply solely to broadcasters. They do not affect cable and satellite television, except for the provisions regarding ads during children's programs. The requirements include three hours of children's programming each week that "further the educational and informational needs of children 16 and under." The shows must be carried between 7:00 a.m. and 10:00 p.m., last at least 30 minutes, and air regularly on a weekly basis. Stations and networks must display a logo

throughout such programs with the designation "E/I," indicating educational and informational content. The purpose of this requirement is to alert parents looking for such programming for their children. Noncommercial broadcasters are also bound by the new policy, except they do not have to comply with detailed reporting requirements imposed on commercial stations.

Another set of provisions under the digital Kidvid rules establishing requirements on the use of Web site addresses during children's programs created considerable controversy, as did the new rule requiring stations that multicast (carry both analog and digital signals) to carry an additional 30 minutes of children's programming for each 28-hour block of free digital broadcasts.[169]

Regulation of New and Newer Technologies

Cable Television

Although radio and television broadcasting preceded it, cable television is actually a relatively old technology, having been first developed in the 1940s as a means of hauling in signals from distant TV stations to rural areas that had no direct access to over-air broadcast. According to the FCC, in 1950 only 70 communities in the whole country had cable systems.[170] By 1990, it had become a $15 billion industry with access to 80 million homes through more than 8,000 cable systems, of which only 32 had any direct competition. The 14 million subscribers in 1980 had grown to 53.9 million or about 58 percent of all homes by 1990.[171]

More than 96 percent of all 110 million American television households now have access to cable, 68 percent actually receive cable, and 22 percent receive DBS signals. Satellite is taking its toll on cable generally and in some localities in particular. By May 2005, for example, Springfield, Missouri, the third largest city in that Midwestern state, became the first TV market in America to have a greater household penetration for satellite TV (39.6 percent) than for cable TV (39.2 percent). Unlike the early cable systems that usually offered no more than three or four VHF signals, to be competitive with emerging television outlets, the typical cable system now offers hundreds of channels. They include local stations, pay-per-view movies and events, public access channels, distant super-stations, and satellite-delivered networks such as USA Network, Lifetime, Black Entertainment Television, the Weather Channel, Home & Garden Television, Spike TV, MTV, Comedy Central, the Scifi Channel, TV Land, and the Cartoon Network. There are now what is commonly known as niche or "within a niche" channels such as Discovery Health Channel and Discovery Home as well as different genres of popular music channels including VH1 Country, VH1 Soul, and VH1 Smooth (jazz). A variety of pay or premium channels is also available from HBO/Cinemax and Showtime/The Movie Channel to adult pay-per-view channels.

Cable has been regulated by the FCC, although not exclusively, since 1965. The 1984 Cable Communications Policy Act, with subsequent amendments, including

those of the Telecommunications Act of 1996, is the current regulatory scheme for cable. The FCC has control over some aspects of the industry but local franchising authorities have jurisdiction over other aspects. The basic scheme is that local governments (city, town, or county) grant *franchises* to cable companies to operate local systems, although there are national standards for rate regulation, franchise renewals, and franchise fees.[172] Cable systems are required to register with the commission, but they are not licensed *per se*, as are broadcast stations. The federal rules are primarily in the areas of cross-media ownership and technical specifications. Cable systems must also comply with Sections 312 and 315. One of the most controversial provisions of the Cable Communications Policy Act of 1984 was Section 622, which kept local governments from charging more than 5 percent of gross revenues for franchising, and Section 623, which prohibited them in most instances from regulating rates for basic and premium services, effective January 1, 1987.[173]

According to a General Accounting Office Report delivered to Congress in 1990, between November 30, 1986 and December 31, 1989, rates for the lowest-priced basic service increased 43 percent from an average per subscriber of $11.14 to $15.95. By today's standards, those prices are low, but they were considered high by consumer groups at that time. The public and organizations such as the NAB called for cable to be regulated again, and in 1992 Congress passed a new cable regulation bill that was vetoed by the senior President Bush. The Senate and the House, however, overrode the veto, and the legislation took effect. The statute was approved despite a multi-million dollar advertising campaign by the cable television industry to defeat the bill by trying to convince consumers that it would substantially increase cable fees.

Under the statute, the Cable Television Consumer Protection and Competition Act of 1992,[174] (a) the FCC had to establish regulations, administered by local governments, to implement "reasonable" rates for basic cable subscriptions, installation fees, and equipment; (b) the FCC was directed to set standards for reception quality and for customer service, including requests for service and complaints; (c) cable programmers such as Time Warner, which then owned and still owns Home Box Office and Cinemax, were required to license their programming to competitors such as microwave and satellite broadcasters; (d) cable companies had to negotiate compensation agreements with over-the-air stations that had not previously been paid for the retransmission of their signals; and (e) cable companies had to carry signals of local ABC, CBS, NBC, Fox, and PBS affiliates as part of the basic package. The latter is known as the *must-carry* rule.

Nearly all cable operators came under the statute because it exempted only those in a market in which there was a competing company available to at least half of the potential customers and in which a minimum of 15 percent of the households actually subscribed to the competing firm. Less than 24 hours after Congress overrode the President's veto, the Turner Broadcasting System (TBS) filed suit in U.S. District Court for the District of Columbia to challenge the must-carry provision of the bill as a violation of the First Amendment. The Turner networks included TBS, the Cable News Networks

(CNN and CNN Headline News), Turner Network Television, and the Cartoon Network. (Turner Broadcasting System is now owned by Time Warner.) In April 1993 the U.S. District Court for the District of Columbia ruled 2 to 1 in a summary judgment for the government that the must-carry provisions were constitutional. According to the court, "[T]o the extent First Amendment speech is affected at all, it is simply a by-product of the fact that video signals have no other function than to convey information.[175]

In upholding the provisions, the trial court applied the intermediate level of scrutiny established in *United States v. O'Brien* (1968).[176] The majority opinion held that the must-carry provisions were content-neutral and narrowly tailored to protect local broadcasting from cable systems and monopoly power. The cable industry appealed directly to the U.S. Supreme Court, as it was permitted under the Act. The Supreme Court upheld the District Court decision in *Turner Broadcasting System v. Federal Communications Commission* (*Turner I*, 1994),[177] one of the most significant telecommunications legal developments of that decade.

Under Sections 4 and 5 of the Act, cable TV systems are required to devote a portion, generally about one-third, of their channels to local commercial and public broadcast stations. Thanks to these must-carry rules, some cable networks were dropped from certain systems. The C-SPAN public affairs network claimed its signal had been dropped or hours reduced in more than 4.2 million homes.[178] In a 5 to 4 decision written by Justice Kennedy, the Court for the first time said cable TV, at least from the perspective of must-carry rules, enjoys First Amendment protection, but not at the same level as the traditional press. According to the majority:

> There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.
>
> . . . Although courts and commentators have criticized the scarcity rationale [for broadcast regulation] since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence. . . .[179]

The majority opinion went on to note that "the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech" and thus are content-neutral. However, the Court said, even a regulation content-neutral on its face may still be content-based if it is designed to regulate speech because of the message it communicates. After further analysis, the Court concluded the provisions were not designed to favor or disfavor any particular content but meant instead "to protect broadcast television from what Congress determined to be unfair competition by cable systems." The opinion rejected the argument of the cable industry that the Court should apply a strict scrutiny test to determine the constitutionality of the provisions. The standard, the Court asserted, should be intermediate level scrutiny of *O'Brien*, as advocated by the district court.

The majority refused to make a final determination on the constitutionality of the provisions because the government had not presented sufficient evidence that the threat to broadcast television—without the rules—was real enough to survive a

First Amendment challenge. There had been no evidence showing that stations had gone bankrupt, given up their licenses, or had serious losses of revenues as a result of being dropped from a cable system. The case was remanded to the district court to determine whether, as a four-justice plurality said, "the economic health of local broadcasting is in genuine jeopardy and need of the protections afforded by must-carry" and whether the provisions burdened more speech than necessary to promote the government's interest in preserving over-the-air television.

After a year and a half of fact finding that included consideration of more documents and more expert testimony, the district court, in another split (2 to 1) decision, held that the must-carry provision was narrowly tailored to promote the legitimate government interests. In addition, there was "substantial evidence before Congress" that local broadcasters whose signals were removed from cable systems were likely to "suffer financial harm and possible ruin." The district court found that must-carry had had little effect on the cable companies. The court cited evidence that only slightly more than one percent of all cable channels that had been added since the rules were adopted were broadcast signals that the rules required to be added. Most systems had not been forced to carry additional broadcast signals.

Once again, cable companies appealed the decision directly to the Supreme Court, only to find the highest court in agreement with the district court once again. In *Turner Broadcasting System, Inc. v. Federal Communications Commission* (*Turner II,* 1997),[180] the Court affirmed the lower court decision in a majority opinion written by Justice Kennedy. The U.S. Supreme Court held, as previously, that "protecting non-cable households from loss of regular television broadcasting service due to competition from cable systems" is a substantial government interest. The court said that regulations promoting such an interest are permissible "even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment."

The Supreme Court cited statistics that were damaging for cable: 94.5 percent of the cable systems did not have to drop programming as a result of must-carry, 40 percent of households did not have cable, and 87 percent of the time cable operators were able to meet the must-carry requirements by adding stations to channels that were not in use.

In 1990 consumers became outraged by another cable regulation but one not initiated by the industry. In 1988, the FCC adopted new syndicated exclusivity ("syndex") rules, similar to those in effect during 1972 to 1980 (when the FCC dropped them). The rules require cable companies to black out syndicated programming available to local viewers from distant television stations such as superstations TBS (Atlanta) and WGN (Chicago) when a local station has signed a contract with a syndicate for exclusive program rights. The syndex rules took effect January 1, 1990, after the D.C. Circuit U.S. Court of Appeals ruled the commission had the authority to enact and enforce them.[181] The rules require that the local station request the blackout, but it is highly unlikely that a station with an exclusive contract with a supplier would not do so because the purpose of the contract is to have exclusive control over the broadcasting of that program in that market, including

cable signals. Consumers were initially upset because popular syndicated programs of that era such as "Cheers" and "Teenage Mutant Ninja Turtles" were excised. Network programs are not affected by the rules, but shows that have been on the networks in the past and that may still be running more recent episodes on the networks or have recently finished a network are affected. For example, older reruns of the "Seinfeld" series were syndicated to local stations even though at one time NBC was still showing original episodes and more recent reruns. The complaints abated, however, as viewers adjusted to the changes and cable systems and superstations substituted alternative programming instead of a black screen.

There are other FCC rules affecting cable television, but the basic approach of the commission and Congress until 1992 had been to maintain minimum control over the industry, especially in the area of programming. Even the courts have occasionally handed the cable companies important victories such as the rulings by the D.C. Circuit U.S. Court of Appeals in 1985[182] and in 1987[183] that the must-carry rule violated the First Amendment. (The U.S. Supreme Court, of course, changed the picture in 1997 in *Turner II*.)

In 1993, however, a U.S. District Court judge upheld the provision in the 1992 Act known as the *retransmission rule* that required cable companies to negotiate compensation agreements with local affiliates. Under the rule, broadcasters could either require cable companies to carry their signals under the must-carry provisions or to request payment under the 1992 Act. In other words, the television broadcaster had a choice. It could either opt for must-carry and receive no payment and be assured that its signal appeared in the cable lineup or it could opt out of must-carry and negotiate with the cable system to try to get the cable company to pay the station to carry its signal. The TV station, of course, could not have it both ways.

In *Daniels Cablevision, Inc. v. United States* (1993),[184] the U.S. District Court held that even though Congress did not amend the Copyright Act of 1976 to make it an infringement of copyright for cable companies to retransmit local broadcast signals without permission, it had the right to accomplish essentially the same result in the Cable Television Consumer Protection and Competition Act of 1992. Stations usually opt for must-carry because that generally results in higher advertising revenues, thanks to the larger cable audience, but some stations have negotiated for payment. The risk for the station in waiving must-carry is that no agreement may be reached regarding payment, and the cable company then has no obligation to carry the station.

In the mid-1990s cable television dominated the headlines in industry trade publications when the FCC outlined new rate regulations in a 700-page document that established a 10-variable formula for calculating consumer rates. The commission set rates that were designed to reduce fees, but its follow-up study found at least one-third of cable's 58 million subscribers had higher bills. A second round of rate setting was designed to reduce prices by at least seven percent and covered all services except premium and pay-per-view channels.

The regulation of cable television rates was considerably changed by the Telecommunications Act of 1996. Under Section 303 of the Act, nearly all rate regulations for cable ended in 1999. Prior to that time, under certain conditions such as

"effective competition" in the market, certain cable companies were not subject to rate regulations. Premium services such as HBO and Showtime were never regulated. Now only the lowest tier of cable known as basic service, which typically includes all local broadcast stations, along with public, educational and government (PEG) access channels, is rate regulated and only by local government franchise authorities that have applied to the FCC and been approved.

The 1996 Telecommunications Act allows cable firms to provide phone service and phone companies to offer cable. For decades, the United States pursued a "two-wire" policy in which video services were to be provided via a cable wire and phone services were restricted to phone lines. Technology now permits both wires to carry both services, thanks especially to fiber optic technology.

After originally setting a deadline of January 1, 2007 for television broadcasting to switch from analog to solely digital, in February 2006 Congress extended the deadline to February 17, 2009.[185] The greatest impact is on the approximately 15 percent of Americans who do not subscribe to cable or satellite television and thus rely upon over-the-air stations for their programming. Cable and satellite viewers could already receive much digital programming. The legislation set up a $990 million program under which eligible consumers receive two $40 coupons to use to purchase digital-to-analog converters that retail for about $60 each. Under the new statute, the FCC is set to auction the analog television spectrum, which, by some estimates, is worth about $10 billion, by January 28, 2008. Some public interest groups and technology companies have pushed the commission to use at least some of the 700-mHz band for Wi-Fi or wireless broadband networks.[186] Some groups had hoped for a "hard date bill" much sooner. When Senator John McCain (R-Ariz.), the bane of broadcasters on Capitol Hill, introduced legislation that would have set the final deadline for the transition as January 1, 2009, he called the process by which broadcasters were assigned the digital spectrum a "$70 billion giveaway." McCain and others were frustrated that so many broadcasters were clearly going to miss the initial deadline.

In spite of delays and uncertainty the move from analog to digital television is now well underway. Fifty-four markets had digital broadcast signals by October of 2000. Satellite television got the jump on broadcasting and cable with DirecTV offering HDTV as early as 1999. Another promising development is the convergence of television and video with the Internet, which has already produced opportunities for over-the-air programs and news segments to be accessible on a computer screen. However, there is still a great deal of speculation about whether viewers are willing to watch video programming on computer screens that are traditionally smaller than regular television sets.

Media Ownership

In June 2003 the FCC issued a report that clarified, updated, and revised its media ownership policies after a nearly two-year-long review process that began under Chair Michael Powell. Powell created a Media Ownership Working Group (MOWG) to assess and provide a factual basis for media ownership policies to address two

federal court decisions that struck down some related rules and called on the FCC to provide justification for its policies. In *Fox Television Stations v. FCC* (2002),[187] the Third Circuit U.S. Court of Appeals held that the commission's decision in 1998 to retain a cap of 35 percent (the combined national share of U.S. homes that one owner could reach with commonly owned stations) was arbitrary and capricious. In that same year, the U.S. Court of Appeals for the D.C. Circuit ruled in *Sinclair Broadcast Group v. FCC* (2002)[188] that the agency had not provided sufficiently strong justification for several of its national and local ownership rules. The result was the most extensive review of these issues since the 1996 Telecommunications Act, which included the proviso that the FCC re-examine this issue every two years. The group commissioned 12 different studies as part of its rulemaking process. As a result, the FCC revised: (a) local TV multiple ownership rules, (b) the definition of local radio market, and (c) the national ownership limit, increasing it from 35 to 45 percent. It also kept a dual network rule and revised the cross-media limits for both radio/TV and newspaper/broadcast holdings.[189]

The day before the new ownership rules were to go into effect, the Third Circuit U.S. Court of Appeals issued an order preventing the FCC from enacting the new rules pending further proceedings. This decision followed public opposition to further consolidation. The stay in the FCC's order had been sought by the Prometheus Radio Project and the Media Access Project. In a setback to both regulators and broadcasters, the U.S. Court of Appeals for the D.C. Circuit barred the FCC from relaxing the ownership rules. Opposition to the new rules was spearheaded by FCC Commissioner Michael J. Copps, a Democrat, who held a number of town hall-type meetings at many universities across the nation. The other Democrat on the commission, Jonathan Adelstein, was also outspoken in his criticism. The opposition also included an unusual alliance of public interest groups including the National Rifle Association and National Organization of Women. These groups flooded the FCC with more than two million letters of criticism. The larger conglomerates such as News Corp. and Viacom were not affected very much by the reversal.

In 2004, Congress entered the picture by amending the 1996 Telecommunications Act to change the national ownership cap from 35 to 39 percent. The legislature had planned to keep the cap at 35 percent but upped it to 39 percent after it discovered that both News Corp. (Fox's owner) and Viacom (which owned CBS and UPN) were already close to the 39 percent cap.[190] The result is that the resolution of the controversial ownership rules remained in flux, with many critics expecting one eventual outcome to be additional reform of FCC rules and policies.

To understand why this approach to policy was even attempted, it is important to understand that prior to the Telecommunications Act of 1996, the FCC and Congress had adopted a series of intricate rules and regulations restricting ownership of stations, cable systems and cross-media ownership and regulating competition in the media marketplace. The Act, however, loosened these restraints and the commission's 2003 order sought even more changes, generally in the direction of making it much easier to own multiple media outlets. Such policy changes reflected the general mood of Congress and the executive branch to leave competition to the

marketplace as much as possible rather than imposing restrictions that limit growth and consolidation. The 2003 order and the subsequent legal maneuvering led to the following general policies.

Cross-Ownership

For decades, both FCC rules and federal legislation generally prohibited one entity (corporation, individual, or group) from owning both a radio and a television station or both a commercial broadcast station and a daily newspaper in the same market. The commission gradually began easing the first restriction (both a radio and TV station) through various exceptions, and the 1996 Telecommunications Act directed the FCC to be even more liberal. Although the policies are certainly subject to change, broadcast networks can now own cable companies and cable companies can own networks. The rule restricting such ownership was eliminated by the 1996 Act that also eliminated the rule prohibiting cross-ownership of cable television and telephone service. The rule generally restricting one entity from owning both a commercial radio or television station and a daily newspaper in the same market remained in effect.

When the original ban was enacted, already existing radio, TV, and newspaper combinations were grandfathered in (i.e., allowed to continue). The FCC would clearly like to ultimately eliminate this ban, but the courts so far have not been cooperative in accepting the agency's demonstrated justification for accomplishing this. Interestingly, the Telecommunications Act did not specifically eliminate the FCC's own cross-ownership rules but instead directed the commission to review the rules over two years to determine whether they should be liberalized or simply eliminated. The agency may eventually win this battle, most likely by establishing different rules for different scenarios, as it proposed in its 2003 order, including banning all cross-ownership among radio stations, TV stations, and daily newspapers in markets with less than four stations. In larger markets the FCC proposed allowing one entity to own up to two TV stations and multiple radio stations within certain limits but no daily newspaper.

Duopoly

This rule, which was not eliminated by the 1996 Telecommunications Act, barred any entity from ownership of two TV stations whose Grade B service contours (i.e., secondary signals) overlap. In 1999 the commission changed the rule so one entity could own up to two TV stations in the same market so long as one of the stations was not among the top four most popular stations in that market and at least eight independently owned full-power stations remained after the consolidation.

National Ownership Rules

There are now more than 1,500 television and 12,000 radio stations in the country. The rules originally restricted ownership to 1 TV, 1 AM, and 1 FM station in the whole country, but they were later eased to include an ownership limit of 12 television stations, 20 FM, and 20 AM radio stations. The 1996 Telecommunications Act

substituted the 12-station limit on TV stations for an "audience reach" limit of no more than 35 percent of national television households. As noted earlier, thanks to the 1994 amendment to the Telecommunications Act, the limit is now 39 percent. The Act killed the limit on the number of radio stations that can be owned nationally and now allows one entity to own five to eight radio stations in the same market, depending upon the size of the local market. Now in the top markets, up to eight radio stations can have the same owner so long as no more than five are either AM or FM stations. The largest radio station chain in the country, Clear Channel Communications, the former home of shock jocks Howard Stern and Bubba the Love Sponge, went from 43 stations in the 1990s to 1,376 by 2004.[191] Radio ads accounted for 45 percent of the company's revenues in 2003 out of a total of $8.6 billion that included revenue from billboards and entertainment.[192]

In the year following the enactment of the Telecommunications Act, a multitude of media mergers and buyouts included: (a) the $6.8 billion Time Warner merger with Turner Broadcasting, resulting in the world's largest media corporation,[193] (b) the purchase of Bell Atlantic by Nynex for $22.1 billion, forming the largest regional telephone company in the country, and (c) the $3.9 billion merger of Westinghouse Electric Corp. and Infinity Broadcasting Corp.[194] Prior to the Act, Walt Disney Co. had bought Capital Cities/ABC for $18.5 billion and Westinghouse had acquired CBS Inc. for $5.4 billion.[195] Capital Cities/ABC owned the ABC television and radio networks and also several TV and radio stations, magazines, and newspapers. Disney already owned part of the ESPN and the A&E cable networks, and produced two of the most popular programs on ABC-TV at that time, "Home Improvement" and "Ellen." The merger created one of the largest media and entertainment conglomerates in the world.

Local and Long Distance Telephone Services

After the 1984 breakup of the old American Telephone and Telegraph Co. monopoly by a consent decree (known as the Modified Final Judgment or MFJ), seven regional phone companies ("Baby Bells" or Bell Operating Companies—BOCs) emerged. These Baby Bells were restricted primarily to providing local and intrastate telephone service. Under the 1996 Telecommunications Act, they were also permitted to offer long distance service and to offer video services with local telephone companies.[196]

In a $67 billion buyout in 2006, AT&T acquired BellSouth with few regulatory hurdles, illustrating that the once strong concern one company could monopolize an entire industry—which led to the forced breakup of AT&T in 1984—has given way to the idea that bigger may actually be better or at least create more competition. Two years prior to AT&T's purchase of BellSouth, Cingular Wireless had purchased AT&T Wireless for $41 billion, and a year later SBC bought AT&T (not AT&T Wireless) for $16 billion, with the merged company adopting AT&T rather than SBC as its new name.[197] The new AT&T has about 70 million land-line subscribers and 10 million broadband customers and clearly plans to compete with cable and satellite companies in providing video programming.[198]

Satellite Television Rules

Under the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA),[199] DBS companies (Dish Network and DirecTV) are allowed to retransmit local broadcast stations in local markets, just as cable companies have been able to do for decades. This is known as *local-into-local service*. The Act also requires DBS providers to make it possible for subscribers to receive local stations on the same antenna dish as other signals and thus no longer have to erect two antennas, as some subscribers formerly had to do. This Act and other changes in FCC rules have definitely leveled the playing field for cable and DBS, although cable subscribers still far outnumber DBS subscribers.

Technological Developments

The broadcast regulation picture is in a state of flux in many areas as new technologies are developed and new forms of content are introduced. For several years, Europe and Japan experimented with high-definition television (HDTV), including over-the-air broadcasts. This revolutionary technology, which is also known as advanced television (ATV), is available and still growing in popularity in the United States, thanks to the 1996 Telecommunications Act and the February 17, 2009 deadline now facing television broadcasters to switch completely from analog to digital, as discussed earlier.

Digital television and high-definition are not the same, although they are intertwined in the U.S. system. Digital television is a means of sending television signals and has actually been available for some time in the U.S. through satellite TV services such as DirecTV and Dish Network. The traditional means of transmission is analog, which is what you see when you currently watch over-the-air and cable programs.[200]

The U.S. has been behind many other countries in offering digital television because the FCC decided in 1990 that HDTV broadcasts would be "simulcast" so that current television sets that use analog transmission would not become obsolete, or at least not immediately. Under this arrangement, stations would broadcast two signals—one analog and the other digital—for consumers with HDTV receivers. Today's analog color TV sets have only 525 lines per inch rather than the 700-plus lines of systems in many other countries. This is because the Commission chose to restrict the color system to a technology that was compatible with existing black-and-white sets rather than choose a system with superior color and picture quality that would render black-and-white sets obsolete. This two-channel format would prevent the newer HDTV technology from being held back by the older format. Only in 1997 did the FCC finally, after some delay, finalize the specific digital standard for television broadcasts.

The big question is what happens to the old analog space when the broadcasters finally turn their old channels over to the commission for reassignment. Among

the proposed ideas is an open spectrum or spectrum commons, in which "cognitive" or "smart" radio receivers operating like computers would "hop around on the spectrum to find quiet bands for transmission, to encode digital information in new wave forms, or to analyze incoming noise and pick out only the relevant signal."[201] (These radios are also sometimes known as software-defined radios.) The FCC has already flirted with this idea in its 2002 Spectrum Task Force Report and in a 2005 report and order that pointed to the technology's ability "to change its operating frequency to optimize use under certain conditions" and to "incorporate a mechanism that would enable sharing of spectrum under the terms of a prearranged agreement between a licensee and a third party. Cognitive radios may eventually enable parties to negotiate for spectrum use on an ad hoc or real-time basis, without the need for prior agreements between all parties."[202] If such an approach were adopted, it could revolutionize the delivery of audio and perhaps eventually video services, making traditional broadcast content regulations obsolete and transforming broadcasting as we currently know it into a system more like the Internet. The scarcity rationale would fade into the sunset, with broadcasting claiming full First Amendment protection.

The first step in this direction may have begun in 1991 when United States Satellite Broadcasting (USSB) and Hughes Electronics agreed to build and operate the first direct broadcast satellite (DBS) system, using an 18-inch dish and offering more than 100 channels. Thomson Consumer Electronics agreed to manufacture and sell the satellite receivers. Two years later, DirecTV signed agreements with major cable TV services such as Turner Broadcasting, USA Network, and Disney to offer a line-up similar to cable. USSB and DirecTV, although separately owned, offered complementary rather than competing services using the same two satellites. (USSB was eventually sold to DirecTV.) In 1994 the new high-power direct satellite services began offering 150 channels of digital television to consumers who purchased $700 systems. The system included a pizza-sized fixed dish mounted on a window sill, deck, chimney, or other location. The first system was sold on June 17, 1994 in Jackson, Mississippi.[203] Today the same system is typically offered for free, including installation, with an agreement to purchase a year's programming.

DirecTV Group provides digital television for both residential and commercial customers in both the United States and Latin America. It operates DirecTV U.S., DirecTV Latin America (DTVLA), and Network Systems. By the end of 2004, DirecTV U.S. had almost 14 million subscribers. DTVLA had approximately 1.6 million subscribers in 28 countries. The Network Systems component of the group provides private business satellite-based use and broadband consumer access.[204]

At the outset, DBS became the fastest growing consumer electronics product in history, having sold more than 3 million receivers by 1997.[205] DBS services have continued to broaden, including the availability of Internet access. With DSL providers such as Alltel and AT&T offering discount bundles that include DBS, local and long distance telephone, and broadband access—all in one package for one price that is less than the total of all of the services purchased separately—DBS is set to grow even further. Cable companies are offering similar packages, which may temper some of the growth.

One FCC decision that has particularly boosted DBS prospects is its implementation of a provision in the 1996 Telecommunications Act that prohibits unreasonable restrictions by state and local laws. These include zoning, land use, building regulations, private covenants, homeowner association rules, and similar restrictions when an individual has a direct or indirect property ownership interest. Government agencies and homeowner associations are allowed to impose guidelines on the placement of antennas. But the guidelines must allow the owner to be able to receive direct broadcast satellite service and video programming services such as wireless cable with a dish of up to 1 meter (39 inches) in diameter. In other words, even private homeowner associations can no longer prohibit the placement of smaller satellite antennas. Such bans, which were once common, are now generally preempted by the Act and the FCC rules.

Two new broadcast television networks went on the air in the 1990s—Warner Brothers Television Network (WB) and the United Paramount Network (UPN). UPN initially broadcast only two days a week and WB only one night, but both expanded to several nights. UPN was owned by CBS Corporation (which is owned by parent Viacom), and WB was owned by Warner Brothers Entertainment (which is owned by parent Time Warner). In January 2006 CBS and Warner Brothers announced that the UPN and WB networks would operate under a joint venture between the two companies that would be known as the CW Network. It began broadcasting in September 2006.

As with the airline industry when it was deregulated, some telecommunications and mass media companies did go under in the scramble to compete, and the large conglomerates continued to gain an even more substantial piece of the pie. No one could have seriously predicted the specific impact of the reform wrought by the 1996 Telecommunications Act, but the changes so far have been enormous, with a new age of telecommunications clearly underway. Except for astute academic observers such as Ben Bagdikian and Robert McChesney who have offered critical explanations regarding the impact of these changes on democracy, the broader picture is seldom reported, except in the context of business news. The issue of vertical integration did attract national press attention following Janet Jackson's Super Bowl moment, with questions raised about how much control Viacom (the CBS parent firm) had over content on its subsidiaries. Similar objections were raised about product placement and lewd themes presented regularly on popular programs like "Desperate Housewives" as well as in commercials, including Paris Hilton's (soggy) car wash appearance, bumping and grinding, in a Carl's Jr. Hamburger commercial.

Indecent or edgy content is one of myriad regulatory challenges facing the FCC as new technologies proliferate. Each new technology brings its own issues. When the agency approved satellite radio (then known as digital audio service or DAR), it probably never envisioned that this subscription service would become the new home of Howard Stern. When the shock jock—one of the most visible "talents" on over-the-air radio—announced he was abandoning his traditional home of more than 30 years in favor of a subscription plan, he talked about his move in First Amendment terms—pitching the new service as a means for listeners to avoid government intrusion on their listening habits.[206]

Such a move is not cheap for listeners, who typically pay a monthly fee of about $15 to receive a package of music channels, talk, sports, and news, including networks such as the BBC. Decoders are being built in automobile radios. Major manufacturers such as Toyota, General Motors, and Honda now offer one or both of the services—XM and Sirius—as factory-installed options in most of their vehicle lines. The day may be coming soon when personal vehicles will include dual band radios with both over-the-air and satellite services as standard equipment.

Summary and Conclusions

For nearly ten decades, broadcasting has been regulated as a limited public resource. Space on the broadcast spectrum has been occupied by those required to serve "the public interest, convenience and necessity." The governing body in this regulatory scheme has been the Federal Communications Commission since the Communications Act of 1934. The commission has taken different approaches at different times toward regulating broadcasting and telecommunications from extensive regulation to deregulation. Much of the movement, however, has been in the direction of providing marketplace incentives for competition. The Telecommunications Act of 1996 provided such incentives by allowing various forms of broadcasting and telecommunications to begin to compete on a level playing field.

Broadcast programming is another area where deregulation took hold, as reflected in the FCC's abandonment of the Fairness Doctrine, which Congress sometimes threatens to revive through codification, so far to no avail. It appears that for the future, the agency will continue to enforce the equal opportunity rules and political programming regulations unless the U.S. Supreme Court declares the scarcity rationale invalid for imposing greater First Amendment restrictions on broadcasting. That scenario appears unlikely although breaches of good taste in over-air network programming and resultant public fall-out have encouraged a re-casting of the FCC's position.

The one area of programming for both cable and broadcasting where the FCC has tightened the reins is indecency, whose regulation has support from Congress, the executive branch, and especially the public. Although the *ACLU v. Reno* (1997)[207] decision, as discussed later in Chapter 9, struck down the indecency provisions of the Communications Decency Act of 1996 as they applied to the Internet, the U.S. Supreme Court decision by no means affected the regulation of indecency in broadcasting and other forms of telecommunications.

Newer technologies such as direct broadcast satellite (DBS) services, satellite radio, and high-definition TV are changing not only the technology of broadcast and telecommunications, but also forcing a rethinking of the entire regulatory scheme. "Cognitive" or "smart" radio could also force us to rethink our approach to assigning the radio frequency spectrum. For the short term, the FCC will continue to be challenged by the public's unhappiness with what it sees and hears as the agency expands its efforts to target areas for evaluation. Interestingly, according to

a 2005 cover story in *Time* magazine, viewers are more offended by bad language on television than by depictions of bad behavior including drug abuse, nudity, and violence.[208] Such concerns can continue to be addressed so long as the scarcity rationale receives the blessing of the FCC, the courts, and the executive branch, but new regulatory models that mirror the Internet and print media are likely to emerge in the long term.

Endnotes

1. Regarding changes at the FCC, *see* Dave Seyler, *FCC in Flux*, Radio & Television Business Report, Apr. 2005, at 8; Frank Beacham, *Broadcasting Comes To a Crossroads,* TV Technology, Mar. 28, 2005, at 10; Jesse Sunenblick, *Into the Great Wide Open,* Columbia Journalism Review, Mar./Apr. 2005, at 45; and Jonathan S. Adelstein, Remarks of the FCC Commissioner before the Media Institute, *Big Macs and Big Media: The Decision to Supersize* (May 20, 2003), also at: http://www.fcc.gov/commissioners/adelstein/speeches2003.html.
2. *See FCC Chairman Proves Adept at Consensus*, Atlanta Journal-Constitution (Washington Post), Dec. 24, 2005, at F3.
3. *See* Anna Marie Cox, *Howard Stern and the Satellite Wars*, Wired, Mar. 2005, at 133; Betsy Streisand, *Radio Shock Waves: Satellite Versions Hope to Attract Listeners with High-Voltage, Distinctive Line-up,* U.S. News & World Report, Feb. 14, 2005, at 50.
4. *See More TV Coming to Your Cell Phone,* Las Vegas (Nev.) Review-Journal (Orange County Register), May 14, 2005, at B10; *Space Race*, Fortune, May 16, 2005, at 42; and David Sheets, *Limbaugh Joins the Ranks of the Podcasters*, St. Louis (Mo.) Post-Dispatch, May 18, 2005, at A28.
5. *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 520 U.S. 180, 117 S.Ct. 1174, 137 L.Ed. 369, 25 Med.L.Rptr. 1449 (1997).
6. *See* Jerry Kang, *Communications Law and Policy: Cases and Materials*, 8–10 (2nd ed., 2005) for an explanation of electro-magnetic waves.
7. *See* W.D. Sloan and J.D. Startt, *The Media in America: A History*, 417–418 (6th ed., 2005).
8. *Id*.
9. J.E. Kraft, Frederic R. Leigh, and D. Godfrey, *Electronic Media*, 21 (2001).
10. *Id*.
11. *National Broadcasting Co. (NBC) v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344, 1 Med.L.Rptr. 1965 (1943).
12. *Id*.
13. Broadcast frequencies are now measured in hertz (kilo-, mega-, giga-, etc.), the international unit for cycles per second, in honor of Heinrich Hertz, discussed earlier in this chapter. Until the early 1990s, the designation was simply cycles per second (kilocycles, megacycles, etc.).
14. *See World Radio and TV Handbook 2006*, 406 (60th ed., 2005).
15. *See* D. Copeland and D. Hatcher, *Mass Communication in the Global Age*, 188 (2004).
16. J.E. Kraft, Frederic R. Leigh, and D. Godfrey, *Electronic Media*, 21 (2001).
17. *NBC v. U.S.*
18. *Hoover v. Intercity Radio Co.,* 52 App.D.C. 339, 286 F. 1003 (1925), cited in *NBC v. U.S.*
19. *United States v. Zenith Radio Corp.,* 12 F.2d 614 (1926), cited in *NBC v. U.S.*
20. 35 Ops. Atty. Gen. 126 (1926), cited in *NBC v. U.S.*
21. *NBC v. U.S.*
22. *Id*.
23. 47 U.S.C. §154(a).
24. 47 U.S.C. §151(a).
25. 47 U.S.C. §307.

26. *NBC v. U.S.*
27. 47 U.S.C. §307(a). *See also NBC v. U.S.*
28. Low-power television has actually been available since 1956 but under the guise of satellite or translator stations that simply re-transmitted the signal of an existing full-power station to increase or improve the coverage area of the originating station.
29. FCC Public Notice DA 06-123 (Jan. 26, 2006), Announcement of Filing Window for LPTV and TV Translator Digital Companion Channel Applications from May 1, 2006 through May 12, 2006 (Report AUC-06-85-A, Auction 85).
30. *See Low Power Television (LPTV) Service* on the FCC Web site at: http://www.fcc.gov/cgb/consumerfacts/lptv.html.
31. *See Low Power FM Radio (LPFM)* on the FCC Web site at: http://www.fcc.gov/cgb/consumerfacts/lpfm.html.
32. *Id.*
33. Mathew Rodriquez, *Moyers Articulates His Growing Concern with Less Access to Government Records*, Quill, Oct./Nov. 2004, at 10.
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35. 47 U.S.C. §315(9).
36. *Flory v. FCC,* 528 F.2d 124 (7th Cir. 1975).
37. 60 F.C.C.2d 615 (1976).
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39. *Id.* at 7.
40. *Sen. Eugene J. McCarthy,* 11 F.C.C. 2d 511, 1 Med.L.Rptr. 2205 (1968); *aff'd,* 390 F.2d 471 (D.C. Cir. 1968).
41. *Socialist Workers Party,* 39 F.C.C.2d 89 (1972).
42. *Red Lion Broadcasting v. FCC* and *U.S. v. Radio Television News Directors' Association*, 395 U.S. 367, 89 S.Ct.1794, 23 L.Ed.2d 371, 1 Med.L.Rptr. 2053 (1969) upholding limits on broadcaster's First Amendment rights.
43. *Adrian Weiss* (Ronald Reagan Films), 58 F.C.C.2d 342 (1976); *review denied,* 58 F.C.C.2d 1389 (1976).
44. *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230, 35 S.Ct. 387, 59 L.Ed. 552 (1915); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).
45. *Petition of Aspen Institute and CBS, Inc.,* 55 F.C.C. 2d 697 (1975); *aff'd sub nom., Chisholm et al. v. FCC,* 538 F.2d 349 (D.C. Cir., 1976), 1 Med.L.Rptr. 2207; *cert. denied*, 429 U.S. 890, 97 S.Ct. 247, 50 L.Ed.2d 173 (1976).
46. *Chisholm et al. v. FCC,* 1 Med.L.Rptr. 2220.
47. *Henry Geller,* 95 F.C.C.2d 1236 (1983); *aff'd sub nom., League of Women Voters v. FCC,* 731 F.2d 995 (1984).
48. *Id.*
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51. *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).
52. *Meredith Corp. v. FCC*, 809 F.2d 63 (D.C. Cir. 1987).
53. *Socialist Workers Party,* 26 F.C.C.2d 485 (1970).
54. FCC, *1984 Primer,* at 36.
55. 47 C.F.R. §73.1940(d).
56. *Norman William Seemann, Esq.,* 40 F.C.C. 341 (1962).
57. 47 C.F.R. §73.1940(e).
58. *Id.*

59. *Syracuse Peace Council v. FCC*, 867 F. 2d 654 (D.C. Cir., 1989); *cert. denied*, 493 U.S. 1019 (1990). *See also Kansas AFL-CIO v. FCC*, 11 F.3d 1430 (8th Cir. 1993).
60. *Id.*
61. FCC Report MM-319, *Mass Media Action,* Mar. 24, 1988.
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72. Codification of the Commission's Political Programming Policies, 7 F.C.C.R. 678 (1991); Gross, *New Political Programming Policies of the FCC,* 10 Com. Law 3 (Fall 1992).
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74. *Id.*
75. *Id.*
76. *Id.*
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101. Communications Act of 1934, §326.
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