THE FAMILY VIEWING HOUR: AN ASSAULT ON THE FIRST AMENDMENT?

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Introduction

In 1975 ninety-seven percent of all American households owned television sets.[1] It is estimated that the average television set stays turned on almost six hours per day.[2] By the time an average American child is old enough to enter the first grade, she will already have spent more hours in front of the television set than she will spend in a college classroom earning a bachelor's degree.[3] By age eighteen that child will have spent more time watching television than doing anything else except sleeping.[4] An average high school graduate will have spent nearly twice as much time in front of the television set as was spent attending school.[5] During that time she will have been exposed to an estimated 350,000 commercials and 18,000 murders.[6] Child psychologist Robert M. Liebert states that television "has changed childhood more than any other social innovation in the history of the world."[7] According to David Pearl, the head of the behavioral sciences research branch of the National Institute of Mental Health, "television is *the* socializing agency" for the majority of children in the country.[8]

The impact of television and, more specifically, the effect of scenes of sex and violence broadcast on television, has become the subject of public debate, psychological studies, congressional hearings, newspaper and mag-

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1. Broadcasting Yearbook 1976 at C-300.

2. *See* Reed, *The Psychological Impact of TV Advertising and the Need for FTC Regulation*, 13 AM. BUS. L.J. 171 (1975).

3. N. JOHNSON, HOW TO TALK BACK TO YOUR TV SET 11 (1970).

4. Lublin, *The Television Era: From Bugs to Batman, Children's TV Shows Produce Adult Anxiety*, Wall St. J., Oct. 19, 1976, at 1, col. 1.

5. *Id.*

6. *Id.* at 37, col. 1.

7. *Id.*

8. *Id.*

azine articles, and television commentary.[9] In an attempt to meet mounting public criticism, as well as pressure from Congress and the Federal Communications Commission (FCC), the National Association of Broadcasters (NAB)[10] adopted the Family Viewing Hour (FVH)[11] policy as an amendment to the NAB Television Code.[12] The purpose of the FVH policy was to

9. The issue of televised sex and violence has a twenty-five year history of attention by Congress, the FCC, and commentators. *See generally Violence on Television: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 2d Sess. (1974); *Review of Policy Matters of Federal Communications Commission and Inquiry into Crime and Violence on Television and a Proposed Study Thereof by the Surgeon General: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 91st Cong., 1st Sess., ser. 91, pt. 6 (1969); *Investigation of Juvenile Delinquency in the United States: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess., pt. 16 (1964); *Investigation of Juvenile Delinquency in the United States: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 87th Cong., 1st & 2d Sess., pt. 10 (1961-62); *Investigation of Juvenile Delinquency in the United States: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess. (1955) and 83d Cong., 2d Sess. (1954); FEDERAL COMMUNICATIONS COMMISSION, CHILDREN'S TELEVISION REPORT AND POLICY STATEMENT, 50 F.C.C.2d 1 (1974); FEDERAL COMMUNICATIONS COMMISSION, EN BANC PROGRAMMING INQUIRY, 44 F.C.C. 2303 (1960); Barrow, *Private Interests*, in FREEDOM AND RESPONSIBILITY IN BROADCASTING 53, 66 (J. Coons ed. 1961); Jaffe, *The Role of Government*, in FREEDOM AND RESPONSIBILITY IN BROADCASTING 35, 37 (J. Coons ed. 1961); Minow, *The Public Interest*, in FREEDOM AND RESPONSIBILITY IN BROADCASTING 15, 31 (J. Coons ed. 1961); Barrow, *The Attainment of Balanced Program Service in Television*, 52 VA. L. REV. 633, 636-38 (1966).

"Broadcasters [have] responded to these concerns in a variety of ways. Attempts were made to reduce gratuitous violence, to schedule particularly violent programs in later hours of the evening, and to use advisories alerting audiences to the presence of disturbing material. These policies were employed as factors in the decisionmaking process rather than as hard and fast rules. They were serious considerations in broadcaster decisionmaking, but were by no means uniformly followed. Many of the broadcasters provided evidence of the fact that broadcasters have used violence as an easy way to raise ratings." Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1094-95 (C.D. Cal. 1976).

10. The NAB was organized in 1923 as a voluntary organization of television and radio stations. NAB membership is comprised of approximately 1000 radio and 410 television stations of which approximately 388 are network owned or affiliated. Complaint at 10, Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976).

11. The FVH Amendment was adopted in April 1975 at the NAB's annual convention and provides in part:

"[E]ntertainment 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 immediate preceding hour. In the occasional case when an entertainment program in this time period is deemed to be inapproporiate for such an audience, advisories should be used to alert viewers. Advisories should also be used when programs in later prime time periods contain material that might be disturbing to significant segments of the audience." NATIONAL ASSOCIATION OF BROADCASTERS, THE TELEVISION CODE 2-3 (18th ed. 1975) [hereinafter cited as TELEVISION CODE].

12. *Id.* at 21. Subscription to the Code has traditionally been voluntary. Any individual or corporation operating a television station or network is eligible to subscribe even if they do not hold membership in the NAB. Independent production and distribution companies may also subscribe to the Code. Since the three networks, American Broadcasting Companies (ABC), Columbia Broadcasting System (CBS), and the National Broadcasting Company (NBC) sub-

prohibit the broadcasting of sex and violence during the hours of 7:00 to 9:00 p.m.[13] All programs broadcast during those two hours were required to be appropriate for general family viewing.[14]

In October 1975 the Writers Guild of America, the Directors Guild of America, the Screen Actors Guild, and a number of independent creators, writers, and producers[15] filed a lawsuit against the three major television networks (ABC, NBC, and CBS), the NAB, the FCC, and the FCC commissioners.[16] In a companion suit,[17] Tandem Productions sought $10,000,000 in damages because "All In The Family" was allegedly moved out of its 8:00 p.m. time slot due to the FVH policy.[18] Although the defendants characterized the FVH policy as the result of self-regulation by the networks, the plaintiffs attacked the policy as a violation of the First Amendment.[19]

The opinion handed down in *Writers Guild of America, West, Inc. v. FCC*[20] focused on the actions taken both by FCC Chairman Wiley and the full Commission that were found to constitute state action and to compromise licensee independence in violation of the First Amendment. The purpose of this note is to review those portions of the FVH opinion pertaining to the doctrines of state action, prior restraints, vagueness, and overbreadth. Part I presents an overview of the historical development of broadcast regulation, with an emphasis on the unique aspects of broadcasting that complicate a First Amendment analysis. Part II presents a summary of the FVH litigation by reviewing the factual findings, the legal liability flowing from these findings, and the available remedies. Part III analyzes the doctrines of state

scribe, the programming supplied by them to their affiliates is presumed to comply with the Code. In January 1974 the NAB Television Board of Directors decided to require all NAB members to subscribe to the Code by April 1976 as a condition of membership in the NAB. Despite a threatened exodus from the NAB, in January 1975 the NAB Board reaffirmed the adoption of mandatory Code membership. Note, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 27 STAN. L. REV. 1527, 1530 & n.16 (1975), *reprinted with revisions in* 28 FED. COMM. B.J. 1 (1975) [hereinafter cited as *Broadcast Self-Regulation*].

13. *See* TELEVISION CODE, *supra* note 11.

14. *Id.*

15. Most notable of the independent producer plaintiffs was Norman Lear, producer of "All In The Family." Other plaintiffs included: Danny Arnold, Allan Burns, Samuel Denoff, Larry Gelbart, Susan Harris, Willian Persby, Paul Witt, and Edwin Weinberger. The shows in which these plaintiffs were involved included "All In The Family," "Phyllis," "The Mary Tyler Moore Show," "Barney Miller," "M*A*S*H," "Rhoda," and "Fay." Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1072 (C.D. Cal. 1976); Writers Guild Complaint at 1-4. *See also* note 75 *infra*.

16. Writers Guild Complaint at 1-4.

17. Tandem Productions, Inc. v. CBS, was consolidated with Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976).

18. Tandem Complaint at 9.

19. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

20. 423 F. Supp. 1064 (C.D. Cal. 1976).

action, prior restraints, vagueness, and overbreadth by reviewing the applicable law and applying it to the facts of the FVH case. Although the court found a First Amendment violation based on state action, this note concludes that the court could also have found that the FVH policy was an impermissible prior restraint of protected speech and that the policy was unconstitutionally vague and overbroad.

I. Historical Development of Broadcast Regulation

The unique characteristics of broadcasting have traditionally necessitated some differences in the application of First Amendment standards. It is useful, therefore, to examine the historical development of broadcast regulation before exploring the issues that arose in the FVH litigation.

Present day television broadcast regulation developed from early regulation of the radio industry. Due to the nature of radio waves and the phenomenon known as "interference,"[21] frequency control and regulation were necessary even in the early stages of broadcasting.[22] Congress responded to this need by enacting the Radio Act of 1912.[23] This attempted regulation was, however, ineffectual. Although the then Secretary of Commerce and Labor, Herbert Hoover, who was entrusted with regulation under the Act, believed he had the power to regulate and control radio frequencies, it was subsequently held in *United States v. Zenith Radio Corporation*[24] that such power was not inherent in the act.[25] The *Zenith* decision seems to have established that although the Secretary of Commerce and Labor was required to issue a license for the operation of the defendant's station, he had not been granted any statutory authority to regulate the frequency and hours of station operation.[26] As a result, it was entirely "possible for several broadcasters to transmit on the *same* frequency at the *same* time, resulting in both poor quality transmission and reception."[27] During the 1920's over two hundred new stations came on the air, using any frequency and any power that they desired.[28] This rapid and chaotic radio boom caused Hoover

21. "Interference is the phenomenom whereby waves of the same or related frequencies overlap, causing distorted radio transmissions." Note, *"Public Interest," "Fairness," and the First Amendment: A Broadcaster's Dilemma*, 4 SUFFOLK U.L. REV. 509, 509 n.5 (1970) [hereinafter cited as *A Broadcaster's Dilemma*].

22. *Id.* at 509.

23. Radio Act of 1912, ch. 287, 37 Stat. 302 (1912). For historical information surrounding this Act, *see generally* Metzger & Burrus, *Radio Frequency Allocation in the Public Interest: Federal Government and Civilian Use*, 4 DUQ. U.L. REV. 1, 3-7 (1965) [hereinafter cited as *Radio Frequency Allocation*].

24. 12 F.2d 614 (N.D. Ill. 1926).

25. *Id.* at 618; *A Broadcaster's Dilemma, supra* note 21, at 509.

26. *See* United States v. Zenith Radio Corp., 12 F.2d 614, 617-18 (N.D. Ill. 1926); *A Broadcaster's Dilemma, supra* note 21, at 510. *See also* F. FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT 16 (1975) [hereinafter cited as FRIENDLY].

27. *A Broadcaster's Dilemma, supra* note 21, at 510 (emphasis added).

28. FRIENDLY, *supra* note 26, at 16.

to advocate regulation.[29] Secretary Hoover was concerned that advertising might so dominate the medium that tremendous public service opportunities would be lost.[30] At the same time, however, he realized the dangers inherent in permitting government control of broadcast content.[31] A subsequent Supreme Court decision commented on the continuing confusion and chaos that existed in the 1920's by observing that "[w]ith everybody on the air, nobody could be heard."[32]

Congress finally recognized the need for action in this area [33] and passed the Radio Act of 1927.[34] This Act created the five-member Federal Radio Commission (FRC) and authorized it to control the allocation and use of radio frequencies.[35] The basic provisions of the Radio Act were later incorporated by Congress in the Communications Act of 1934,[36] in which Congress also replaced the FRC with the present seven-member Federal Communications Commission (FCC).[37] The FCC was created for "the purpose of regulating interstate and foreign commerce in communication by wire and radio"[38] and was given the authority to enforce the Communications Act.[39] To that end, the FCC was granted broad regulatory and licensing powers.[40]

29. *Id.*

30. 1 E. BARNOUW, A HISTORY OF BROADCASTING IN THE UNITED STATES: A TOWER IN BABEL 96 (1966) (citing H. HOOVER, MEMOIRS: THE CABINET AND THE PRESIDENCY 140 (1952)).

31. While calling for extensive controls of this new industry, Hoover testified before the House Committee on the Merchant Marine and Fisheries: "We can not allow any single person or group to place themselves in a position where they can censor the material which shall be broadcasted to the public, nor . . . should [the government] ever be placed in the position of censoring this material." *Hearings on H.R. 7357 Before the House Comm. on the Merchant Marine and Fisheries*, 68th Cong., 1st Sess. 8 (1924) (statement of Secretary of Commerce Herbert Hoover).

32. NBC v. United States, 319 U.S. 190, 212 (1943).

33. *A Broadcaster's Dilemma, supra* note 21, at 510.

34. Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927). *See also Radio Frequency Allocation, supra* note 23, at 9-12.

35. Radio Act of 1927, ch. 169, §§ 3, 4, 44 Stat. 1162 (1927).

36. 47 U.S.C. § 151 *et seq.* (1970 & Supp. V 1975). "By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation . . . of the Communications Commission. But the objectives have remained substantially unaltered since 1927." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940) (footnote omitted). *See also Radio Frequency Allocation, supra* note 23, at 12-14.

37. The FCC also took over certain functions previously exercised by the Interstate Commerce Commission, which up to that time had had jurisdiction over telephonic and telegraphic communication and the FRC. 47 U.S.C. §§ 601, 603 (1970); G. ROBINSON & E. GELLHORN, THE ADMINISTRATIVE PROCESS 148 (1974) [hereinafter cited as ROBINSON & GELLHORN].

38. 47 U.S.C. § 151 (1970).

39. 47 U.S.C. §§ 151, 303 (1970).

40. NBC v. United States, 319 U.S. 190, 214 (1943).

The statutes establish a standard of "public convenience, interest, or necessity" to govern the FCC's exercise of these two powers.[41] From the inception of federal regulation, comparative considerations as to the services to be rendered have governed the application of this standard.[42] In this regard, the FCC has been given a comprehensive mandate to "encourage the larger and more effective use of radio in the public interest."[43]

> Generalities unrelated to the living problems of radio communication of course cannot justify exercises of power by the Commission. Equally so, generalities empty of all concrete considerations of the actual bearing of regulations promulgated by the Commission to the subject matter entrusted to it, cannot strike down exercises of power by the Commission. While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise of the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.[44]

Notwithstanding the broad powers granted to the FCC, Congress did not authorize the FCC to regulate or license broadcasters "upon the basis of their political, economic or social views, or upon any other capricious basis."[45]

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission

41. 47 U.S.C. § 303 (1970 & Supp. V. 1975) (regulatory); 47 U.S.C. § 307 (1970) (licensing). This standard "is as concrete as the complicated factors for judgment in such a field of delegated authority permit . . . ." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940). However, "[t]his criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power." FRC v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933).

42. NBC v. United States, 319 U.S. 190, 217 (1943) (citing FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 n.2 (1940)). "The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." *Id.* (citing 47 U.S.C. § 303(g) (1970)). Thus, an important element of public interest is the ability of the licensee to render the best service practicable to the community reached by his broadcasts. FCC v. Sanders Radio Station, 309 U.S. 470, 475 (1940).

43. 47 U.S.C. § 303(g) (1970).

44. NBC v. United States, 319 U.S. 190, 219-20 (1943).

45. *Id.* at 226.

> which shall interfere with the right of free speech by means of radio communication.[46]

When reviewing FCC actions under the Communications Act, a court is only required to determine whether the action of the FCC "was based upon findings supported by evidence, and was made pursuant to authority granted by Congress."[47] The court may not judge whether the "public interest" will be furthered or retarded by the FCC action because that responsibility belongs to Congress and to the FCC.[48] "So long as there is warrant in the record for the judgment of the expert body it must stand. . . . 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' "[49]

A fundamental concept in the field of broadcast regulation that also influences judicial review is that of scarcity: the number of applicants desiring to use the airwaves exceeds the number of available frequencies.[50] The licensing scheme must, therefore, allocate frequencies among applicants, which in turn will limit the number of potential speakers. Professor Alexander Meiklejohn has observed that "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."[51] Two theories that branch from the concept of scarcity support the basic regulatory scheme of the Communications Act in the face of a First Amendment challenge. The first theory is that the radio spectrum is a " 'public resource' whose use is permitted only if it serves the 'public interest.' "[52] The second theory is that because broadcast frequencies are limited, the users to whom the FCC grants licenses are in effect given a monopoly. "[S]uch a monopoly confers a public trust, which must comport with the public interest."[53]

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46. 47 U.S.C. § 326 (1970).

47. NBC v. United States, 319 U.S. 190, 224 (1943).

48. *Id.*

49. Rochester Tel. Corp. v. United States, 307 U.S. 125, 145-46 (1939).

50. Note, *The First Amendment and the "Abridgeable" Right of Self-Expression*, 72 COLUM. L. REV. 1249, 1251 (1972).

There is, however, a minority view as to whether or not a situation of scarcity really exists. One commentator has noted: "[I]t seems illogical to use outlet scarcity as a basis for differentiating among media while imposing a licensing scheme or fairness doctrine on the more plentiful medium . . . . [W]hatever spectral scarcity does exist technically could be eliminated by conversion to cable television systems." *Broadcast Self-Regulation, supra* note 12, at 1542. "Because a cable system is not limited by a finite number of frequencies, but can be expanded virtually without bound by adding more lines to the coaxial cable, the scarcity rationale loses all vitality." *Broadcast Self-Regulation, supra* note 12, at 1542 n.67. *See also* R. SMITH, THE WIRED NATION 7-8 (1972).

51. A. MEIKLEJOHN, POLITICAL FREEDOM—THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1960).

52. ROBINSON & GELLHORN, *supra* note 37, at 149; *see* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 n.5 (1969); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 46 (1975).

53. ROBINSON & GELLHORN, *supra* note 37, at 149; *see* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 383 (1969); Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 61

The Supreme Court has construed the Act's provisions broadly under these two standards.[54] In *National Broadcasting Co. v. United States*,[55] the Court confronted First Amendment problems in the context of a challenge to the "chain broadcasting" rules.[56] In effect, the Court upheld the FCC's power to regulate practices between the networks and their affiliated stations.[57] Writing for the Court, Justice Frankfurter explained why the rules could not be struck down as a violation of the First Amendment:

> Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation . . . . The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.[58]

The concept of scarcity was reaffirmed in *Red Lion Broadcasting Co. v. FCC*,[59] the Supreme Court's first major pronouncement concerning freedom of expression in broadcasting since *National Broadcasting*.[60] In 1959, Congress had amended the Communications Act,[61] announcing thereby that the phrase "public interest," which had been in the Act and its predecessors since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues.[62] This duty, better known as the fairness

(D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973); FEDERAL COMMUNICATIONS COMMISSION, EDITORIALIZING BY BROADCAST LICENSEES, 13 F.C.C. 1246, 1258 (1949) [hereinafter cited as EDITORIALIZING]; Note, *Federal Regulation of Radio Broadcasting—Are the Prime Time Access Rule and the Family Viewing Hour in the Public Interest?*, 29 RUTGERS L. REV. 902, 904 (1976); Note, *Federal Regulation of Radio Broadcasting—Standards and Procedures for Regulating Format Changes in the Public Interest*, 28 RUTGERS L. REV. 966, 967 (1975).

54. *See* NBC v. United States, 319 U.S. 190, 219-21 (1943).

55. 319 U.S. 190 (1943).

56. "Chain broadcasting" refers to the simultaneous broadcasting of an identical program by two or more connected stations. 47 U.S.C. § 153(p) (1970). The FCC is given authority to make special rules applicable to stations engaging in chain broadcasting. 47 U.S.C. § 303(i) (1970).

57. *Broadcasting Self-Regulation*, *supra* note 12, at 1539.

58. 319 U.S. at 226-27.

59. 395 U.S. 367, 376 (1969).

60. *See* Note, *Reconciling Red Lion and Tornillo: A Consistent Theory of Media Regulation*, 28 STAN. L. REV. 563, 565-66 (1976). "[W]hile the NBC case did establish an expansive view of Commission powers, it still left a great many First Amendment questions unanswered." FCC, Fairness Doctrine and Public Interest Standards, 39 Fed. Reg. 26,372-73 (1974).

61. Act of Sept. 14, 1959, Pub. L. No. 86-274, §1, 73 Stat. 557 (1959) (amending 47 U.S.C. § 315(a) (1958) (currently codified at 47 U.S.C. § 315(a) (1970 & Supp. V 1975))).

62. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 (1969).

This was not an entirely new concept. The FCC (then the FRC) had early expressed the view that the "public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies . . . to all discussions of issues of

doctrine,[63] was upheld by the Court in *Red Lion* as a constitutional exercise of the FCC's authority to promulgate regulations.

> [T]he public interest language of the [Communications] Act authorized the [FCC] to require licensees to use their stations for discussion of public issues, and . . . to implement this requirement by reasonable rules and regulations which fall short of abridgement of the freedom of speech and press, and of the censorhip proscribed by § 326 of the Act.[64]

The *Red Lion* Court reiterated the scarcity concept as the basis for distinguishing First Amendment freedom in broadcasting from traditional First Amendment freedom in speech and publishing: "[W]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."[65] The rationale of the fairness doctrine is that fairness in broadcaster programming should contribute to informed public opinion.

> It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day . . . . It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.[66]

The right of the public to be informed assumes an important role in accommodating the many interests involved in broadcasting.[67] The principle is now established that where competing First Amendment interests are at

importance to the public." Great Lakes Broadcasting Co. v. FRC, 3 F.R.C. Ann. Rep. 32, 33 (1929), *rev'd in part on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. denied*, 281 U.S. 706 (1930).

63. The FCC first articulated the fairness doctrine in its 1949 ruling. EDITORIALIZING, *supra* note 53, at 1257-58. "The Fairness Doctrine requires that television and radio stations devote adequate time to controversial issues of public importance, and that they do so fairly by affording reasonable opportunity for the opposing viewpoint." FRIENDLY, *supra* note 26, at 13. The fairness doctrine also requires that a radio or television station provide reply time to answer personal attacks or political editorials regardless of the willingness or ability of the aggrieved party to pay for that time. For a comprehensive discussion of the fairness doctrine, its history and applicable standards, see FCC, Fairness Doctrine and Public Interest Standards, 39 Fed. Reg. 26,372 (1974).

64. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 382 (1969).

65. *Id.* at 388.

66. EDITORIALIZING, *supra* note 53, at 1249; *accord*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

67. "[I]n broadcasting there must be an accommodation of the interests of listeners and viewers, the licensed broadcasters, and a host of parties desiring access to broadcasting facilities, such as networks, indepedent program producers, syndicators, citizens' groups, and individuals." Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L.J. 659, 668 (1975).

stake, the interests of the listeners are paramount under the First Amendment.[68] In sum, the Communications Act is a regulatory scheme premised on the concept that broadcast frequencies are a limited public resource that must be utilized in a manner compatible with the public interest.[69] Satisfying the public interest standard requires that the interests of viewers be placed in a paramount position when accommodating the various interests involved in broadcasting. The FVH policy affects many interests that must be accommodated when resolving the First Amendment issues raised by the plaintiffs in *Writers Guild*.

II. The Family Viewing Hour Litigation

The FVH litigation began as two separate lawsuits. The first complaint,[70] in *Writers Guild of America, West, Inc. v. FCC*,[71] was filed by the Writers Guild,[72] the Directors Guild,[73] and the Screen Actors Guild,[74] as well as various independent creators, writers, and producers.[75] It alleged that the adoption of the FVH policy as an amendment to the Television Code of the National Association of Broadcasters (NAB) violated plaintiffs' First Amendment rights.[76] The second complaint, in *Tandem Productions, Inc. v.*

68. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

69. "The facilities of radio [and by analogy television] are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest." NBC v. United States, 319 U.S. 190, 216 (1943).

70. Writers Guild Complaint, 423 F. Supp. 1064 (C.D. Cal. 1976).

71. 423 F. Supp. 1064 (C.D. Cal. 1976).

72. The Writers Guild of America, West, Inc. and the Writers Guild of America, East, Inc, "are the recognized and exclusive employee collective bargaining representatives for writers employed in the television industry. The Writers Guild has approximately 5,000 members, many of whom write [television] scripts." Writers Guild Complaint at 2.

73. The Directors Guild of America, Inc. "is the recognized and exclusive employee collective bargaining representative for directors, first and second assistant directors, unit production managers, technical coordinators, and other persons who assist directors employed in the television industry. The Directors Guild has approximately 4,400 members, many of whom direct and work on programs and shows for television." *Id.* at 2.

74. The Screen Actors Guild, Inc. is "the recognized and exclusive employee collective bargaining representative for actors employed in the film industry. The [Screen] Actors Guild has approximately 30,000 members, many of whom appear on television programs." *Id.* at 2-3.

75. In addition to the persons listed in note 15 *supra*, plaintiffs also included Four D Productions, a California corporation that produces and owns rights to the "Barney Miller" show, and Concept Plus II Productions, a partnership that produced and owns the rights to "The Montefuscos." *Id.* at 4. It should also be noted that "[m]any of the plaintiffs are viewers of television, or represent viewers of television, as well as members of the creative segment of the television industry." *Id.*

76. *Id.* at 27-28. For a discussion of the National Association of Broadcasters and its Television Code, see notes 10-12 and accompanying text *supra*.

CBS,[77] named the same defendants[78] and raised similar issues, but focused on the effect of the implementation of the FVH policy on the television program "All In The Family." The two lawsuits were consolidated and tried jointly.

A. Plaintiffs' Allegations

The plaintiffs alleged, in general, that in response to congressional concern over sex and violence in television programming, the FCC pressured the networks to adopt the FVH policy and that the networks coerced the NAB into adding the FVH amendment to its Television Code.[79] Plaintiffs argued that these activities were impermissible and that they violated the First Amendment right of broadcast licensees to program independently. Plaintiffs alleged that the FVH policy constituted a prior restraint under a system that lacked the constitutionally required minimum procedural safeguards.[80] They also alleged that this resulted in protected material being deleted from programs to be broadcast during the FVH period.[81] There were

77. 423 F. Supp. 1064 (C.D. Cal. 1976) (consolidated with Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976)). Tandem Productions, Inc. is a California corporation that produces television programs and licenses the right to broadcast these programs. One of the programs, "All In The Family," is a half-hour series concerning the life of a fictional American family, the Bunkers. Tandem complaint at 1, 3.

78. The named defendants were: the Federal Communications Commission (FCC); FCC Chairman Richard E. Wiley; FCC Commissioners Benjamin C. Hooks, Robert E. Lee, James H. Quello, Charlotte T. Reid, Glen O. Robinson, and Abbott Washburn; the television networks, Columbia Broadcasting System, Inc. (CBS), National Broadcasting Co., Inc. (NBC), American Broadcasting Companies, Inc. (ABC); and the National Association of Broadcasters (NAB). Writers Guild Complaint at 1; Tandem Complaint at 1.

79. Writers Guild Complaint at 12-20; Tandem Complaint at 5-6. *See generally* BROADCASTING, Nov. 3, 1975, at 25; Variety, Nov. 5, 1975, at 10.

Although plaintiffs' primary allegation was a violation of the First Amendment, the *Writers Guild* plaintiffs also alleged violations of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (1970 & Supp. V 1975); the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1970 & Supp. V 1975); and the Sherman Act, 15 U.S.C. § 1 (1970 & Supp. V 1975). Writers Guild Complaint at 1. Tandem Productions also alleged violations of the Communications Act and the Sherman Act. Tandem Complaint at 1. Each of the government defendants was held to have violated the Administrative Procedure Act but the remaining allegations did not form a significant aspect of the court's order in the case. The plaintiffs' action under section 326 of the Communications Act of 1934 did not state a claim upon which relief could be granted. 423 F. Supp. at 1084. The alleged Sherman Act violations were not addressed in the court's order, because the anti-trust issues were bifurcated in an earlier pre-trial order.

80. Writers Guild Complaint at 31; Tandem Complaint at 9.

81. Writers Guild Complaint at 23. *Writers Guild* plaintiffs considered the FVH to be a threat to television's move toward realistic and socially important themes. Writers Guild Complaint at 25. *Tandem* plaintiffs alleged that because of the FVH policy CBS had moved "All In The Family" from its 8:00 p.m. Saturday time slot to a time outside the FVH. Tandem Complaint at 6. *See also* Writers Guild Complaint at 24. *Tandem* plaintiffs also asserted that the FVH deprives the public of diversity in entertainment programming, and with respect to "All In The Family," excluded from the FVH period a program that often deals with issues of serious concern and significance to the American people. Tandem Complaint at 8.

further contentions that the FVH policy was impermissibly overbroad[82] and vague.[83] Plaintiffs also alleged that the FVH policy was not the least restrictive means of achieving the objectives of the FVH,[84] and that there was no compelling governmental necessity or justification for the FVH policy.[85]

B. The Court's Findings

In the introduction to his exhaustive district court opinion,[86] Judge Warren J. Ferguson stated that "[t]he desirability or undesirability of the family viewing policy is not the issue. Rather the question is who should have the right to decide what shall and shall not be broadcast and how and on what basis should these decisions be made."[87] After resolving the jurisdictional issues in the case,[88] the court made extensive factual findings.[89] The court found, *inter alia*, that Chairman Wiley, acting in his official capacity and on behalf of the FCC, had responded to "congressional committee pressure . . . [by launching] a compaign primarily designed to alter the content of entertainment programming in the early evening hours."[90]

In response to this congressional pressure,[91] Wiley instructed his staff to examine possible action the FCC could take to protect children from

82. Writers Guild Complaint at 30; Tandem Complaint at 8.
83. Writers Guild Complaint at 31; Tandem Complaint at 8.
84. Writers Guild Complaint at 30; Tandem Complaint at 9.
85. Writers Guild Complaint at 30; Tandem Complaint at 8.
86. 423 F. Supp. 1064 (C.D. Cal. 1976).
87. *Id.* at 1072.
88. *Id.* at 1074-92.
89. *Id.* at 1092-1128.
90. *Id.* at 1094. *See generally* note 239 *infra*, indicating that Wiley had grave reservations about the constitutionality and propriety of government interference in this area.
91. The court's characterization of congressional committee action as "pressure" may be misleading. In 1974 the Committee on Appropriations of the House of Representatives directed the FCC to submit a report to it outlining FCC actions or plans which were designed to protect children from excessive programming of violence and obscenity. H.R. REP. NO. 1139, 93d Cong., 2d Sess. 15 (1974). This report accompanied a House Appropriations bill for the FCC and other federal agencies. 423 F. Supp. at 1095. A similar directive was issued by the Senate Appropriations Committee. S. REP. NO. 1056, 93d Cong., 2d Sess. 10 (1974); 423 F. Supp. at 1095-96.

The actual language of the House Appropriations Committee report stated that: "The Committee hopes that the Commission will move promptly to resolve the administrative, jurisdictional, and *constitutional* problems associated with this issue." H.R. REP. NO. 1139, 93d Cong., 2d Sess. 15 (1974) (emphasis added), *quoted in* 423 F. Supp. at 1095. Similarly, the Senate Appropriations Committee report stated: "The Committee also joins with the House in urging the Commission to proceed as vigorously and as rapidly as possible—*within Constitutional limitations*—to determine what is its power in the area of program violence and obscenity, particularly as to their effect on children." S. REP. NO. 1056, 93d Cong., 2d Sess. 10 (1974) (emphasis added), *quoted in* 423 F. Supp. at 1095-96.

excessive programming of violence and obscenity.[92] FCC staff proposals[93] were subsequently presented to Wiley, who then took a series of steps designed to bring Commission pressure to bear on the industry.[94] These steps included public speeches calling for industry self-regulation,[95] meetings with network executives,[96] a proposal for a joint statement by the networks on the subject of sex and violence,[97] and a suggestion that the NAB code express a new position on this topic.[98] The court concluded that FCC pressure was a substantial factor in NAB adoption of the FVH policy.[99]

The court found that in December 1974 and January 1975 each of the three networks announced similar proposals concerning the broadcasting of programs suitable for general family viewing.[100] The court also found that Wiley had made it clear that he was aiming at industry-wide acceptance for the FVH scheduling proposal.[101] In April 1975, following more public speeches[102] and additional meetings,[103] the Television Board of the NAB adopted the FVH policy as an amendment to its Television Code.[104] By adopting the FVH policy, the Television Board could prevent deviations from the FVH rule and eliminate any competitive advantage that a network might gain by refusing to comply with the policy.[105] The court's finding on the effect of the Code amendment was that "instead of programming on the

92. 423 F. Supp. at 1095-96. *But see* notes 150-60 and accompanying text *infra*.

93. "[T]he FCC staff presented three proposals to Chairman Wiley which they hoped might serve as appropriate Commission responses to the Congressional directives . . . . The goal of pressuring broadcasters into regulatory efforts was manifest throughout the proposals." 423 F. Supp. at 1096.

94. *Id.* at 1097-98.

95. *Id.* at 1098, 1117-18, 1121.

96. *Id.* at 1098-99, 1122.

97. *Id.* at 1099.

98. *Id.*

99. *Id.* at 1112.

100. *Id.* at 1110. At this time, however, CBS was committed to a FVH policy only if the NAB adopted a Code amendment. *Id.*

101. *Id.* at 1100.

102. *Id.* at 1114-16, 1118.

103. *Id.* at 1117-18.

104. *Id.* at 1119. The court found that from the outset of the official deliberations of the NAB, there was evidence of FCC involvement in and encouragement of NAB enforcement of the FVH policy. *Id.* at 1111.

105. *Id.* at 1094, 1100, 1108 n.63, 1110-11, 1125.

CBS president Arthur Taylor feared that if CBS publicly committed itself to such a policy that the commitment would work to CBS' competitive disadvantage in the absence of a binding enforcement mechanism applicable to the industry at large. Past experience in children's programming had led him to the conviction that broadcasters, more interested in dollars than in the public interest, would use violence as a tool to hike program ratings if they were left free to program in their own discretion. CBS thus prepared to delegate its program discretion to the NAB, but only if its major competitors could be persuaded to do so as well. FCC pressure was necessary to achieve this objective. *Id.* at 1094.

basis of their own independent judgment, broadcasters have been forced to program with a view toward what would be considered unobjectionable by the Television Code Review Board.''[106] The court found evidence of significant self-censorship.[107] In addition to the censorship that resulted from the FVH, the court found that there was significant economic injury.[108] Plaintiffs incurred increased production costs due to the frenzied character of the editing process that occurred as producers attempted to conform to the network censors' interpretation of the FVH policy.[109] The court also found that the syndication value[110] of ''All In The Family'' had been significantly diminished by the defendants' conduct.[111]

C. Legal Liability

In discussing the defendants' legal liability, the court separated them into two groups: the private defendants[112] and the government defendants.[113] With respect to the private defendants, the court held that broadcasters were free to adopt the FVH policy provided their decision to do so was based on their independent judgment that the particular programming policy was best suited to promotion of the public interest.[114] In this case, however, it was clear that the FVH policy was caused substantially by government pressure and that this was not the kind of independent broadcasting decision required by the First Amendment.[115] Because of this governmental intrusion through the FCC and its Chairman, the adoption of the FVH amendment to the NAB Code and the networks' participation in its adoption and subse-

106. *Id.* at 1125.

107. *Id.* at 1126. See text accompanying notes 399-400 *infra*.

108. *Id.*

109. *Id.*

110. Syndication is the licensing of television programs to local television stations, both network affiliates and non-network stations. Syndication for rebroadcast is frequently the most important source of revenue for a successful entertainment series originally broadcast by one of the networks. Tandem Complaint at 9.

The primary market for syndication to independent stations not owned or operated by the networks is the first hour of prime time, referred to as the local access hour. Because programs unacceptable for viewing during the FVH cannot be syndicated for this crucial portion of the syndication market, their "syndication value" is substantially reduced. Writers Guild Complaint at 26-27.

111. 423 F. Supp. at 1127.

112. The private defendants were the three major television networks (ABC, CBS, and NBC) and the NAB. *Id.* at 1072.

113. The government defendants were the FCC and the individual FCC Commissioners, including Chairman Wiley. *Id.* See note 78 *supra*.

114. 423 F. Supp. at 1130. This holding would apply even if "the source of the idea is governmental, and even if government officials have encouraged the policy." *Id.* See notes 236-237 and accompanying text *infra*.

115. 423 F. Supp. at 1140.

quent enforcement constituted state action that violated the First Amendment.[116]

The court stated that its previous discussion of First Amendment principles regarding the private defendants was applicable to the government defendants, but that less stringent standards should be applied to trigger First Amendment liability of the government defendants.[117] The court found that the FCC resorted to informal coercion[118] and stated, "[t]his lawless conduct cannot be tolerated if broadcasters are to enjoy meaningful First Amendment freedoms."[119] The court emphasized that the combination of uncertainty in the FCC relicensing procedure and vagueness in relicensing standards had enabled the Commission to apply pressure effectively.[120]

The court reiterated that Congress had denied the FCC any power to censor broadcasts, including any examination of thought or expression to prevent publication of "objectionable" material.[121] The court rejected "any suggestion that the Commission has the power . . . to screen out 'offensive' material with no more discriminating a lens than the public interest . . . ."[122] "The existence of the threats, and the attempted securing of commitments coupled with the promise to publicize non-compliance in this case constituted *per se* violations of the First Amendment."[123] The court thus found that FCC action had compromised licensee independence in two ways, both of which violated the First Amendment: the FCC pressured the networks to adopt the FVH policy and the FCC participated in a conspiracy with the networks to usurp licensee independence through the vehicle of the NAB.[124]

116. *Id.* at 1140-43. The court explained: "The networks are fully aware that they have a First Amendment and statutory duty to program exclusively on the basis of their independent judgment. They have a duty as public trustees and fiduciaries to resist government intrusions into the programming domain." *Id.* at 1143.

117. *Id.* at 1146. This is because with respect to the government defendants, "considerations of private autonomy cut in the opposite direction. The more that government is permitted to interfere in programming by way of pressure, threats, and intimidation, the less independent broadcasters will be or appear to be. If broadcasters face liability for responding to government pressure (or risk it by appearing to do so), it is critical that appropriate government pressure be terminated." *Id.*

118. *Id.* at 1149.

119. *Id.*

120. *Id.* at 1146.

121. *Id.* at 1148 (quoting Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169, 171 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969) (quoting Farmers Educ. & Coop. Union v. FCC, 360 U.S. 525, 527 (1959))).

122. *Id.* at 1150.

123. *Id.* at 1151.

124. *Id.*

D. Remedies

The court disclaimed any authority to declare an end to the FVH[125] and held that the networks were free to continue or discontinue the FVH policy as long as that decision was based upon their independent conception of the public interest.[126] The court did, however, issue several declarations.[127] It ruled that existing network adoption of the FVH violated the First Amendment because the policy was an impermissible product of governmental action.[128] It also declared that NAB adoption of the FVH amendment involved First Amendment violations by each of the networks, that NAB enforcement of the FVH policy violated the First Amendment, and that the networks were required to program on the basis of their own judgment rather than that of the NAB.[129] In this regard, the court held that "[t]he NAB [had] the right to adopt as part of its code anything that it [wished] but it [had] no First Amendment right to interfere with the rights of the public to independent broadcaster decisionmaking."[130] The court concluded that the networks were liable for any financial damages that Tandem suffered as a result of the adoption of the FVH policy.[131]

As to the government defendants, the court declared that the FCC could not enforce the FVH policy.[132] The court refused, however, "to enjoin the Commission from enforcing the FVH policy or the commitments associated with it."[133] Although Tandem had asked for damages against the government defendants, the court held that Tandem could not escape the doctrine of sovereign immunity and that no exceptions to the doctrine were available.[134]

III. First Amendment Considerations

The problems inherent in any analysis of the application of the First Amendment to broadcasting were well stated by Judge J. Skelly Wright:

125. *Id.* at 1072. For the same reason, the court denied Tandem Production's request that CBS be directed to move "All In The Family" back into the FVH period. *Id.* at 1154.

126. *Id.* at 1153.

127. *Id.* at 1154-55.

128. *Id.* at 1153.

129. *Id.* at 1154-55.

130. *Id.* at 1154.

131. *Id.* at 1162. The *Writers Guild* plaintiffs had not asked for damages. *Id.* at 1157.

132. *Id.* at 1155.

133. *Id.* at 1157.

134. *Id.* at 1158-59. Although the Eleventh Amendment immunized only the states from certain suits in federal court, the Supreme Court early announced the doctrine of sovereign immunity with respect to the federal government: "the government is not liable to be sued, except with its own consent, given by law." United States v. McLemore, 45 U.S. (4 How.) 286, 288 (1846).

> [In] some areas of the law it is easy to tell the good guys from the bad guys . . . . In the current debate over broadcast media and the First Amendment . . . each debator claims to be the real protector of the First Amendment, and the analytical problems are much more difficult than in ordinary constitutional adjudication . . . the answers are not easy.[135]

In a line of cases beginning with *United States v. Paramount Pictures, Inc.*[136] in 1948 and continuing through *Jenkins v. Georgia*[137] in 1974, the Supreme Court has repeatedly applied First Amendment protection not only to speech, but to artistic and entertainment programming as well. In *Paramount*, the Court stated, "[W]e have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."[138] At the same time, the Court has recognized that motion pictures and, by analogy, television "are [not] necessarily subject to the precise rules governing any other particular method of expression. Each method [of communication] tends to present its own peculiar problems."[139] "But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary."[140]

The following sections of this note will review general First Amendment principles in the areas of state action, prior restraints, vagueness, and overbreadth, and will apply these doctrines to the facts of the FVH case. The first section reviews the areas of speech, such as obscenity, that are not granted First Amendment protection and explains the rationale for their unprotected status. The next section discusses the doctrine of state action, a focal point of the decision in the FVH case. The third section discusses prior restraints and the heavy burden of justification that must be met to warrant

135. FRIENDLY, *supra* note 26, at ix. Judge Wright made this statement in a speech given in June 1973 before the National Law Center at George Washington University.

136. 334 U.S. 131 (1948).

137. 418 U.S. 153 (1974).

138. 334 U.S. at 166. *See also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952); American Broadcasting Co. v. United States, 110 F. Supp. 374, 389 (S.D.N.Y. 1953), *aff'd on other grounds*, 347 U.S. 284 (1954); Weaver v. Jordon, 64 Cal. 2d 235, 242, 411 P.2d 289, 294, 49 Cal. Rptr. 537, 542 (1966).

139. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952).

The general issues raised when relatively small scale communication is supplanted by mass media technology as a prime source of national information have been discussed in Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947). *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); M. ERNST, THE FIRST FREEDOM 125-80 (1946); T. ROBINSON, RADIO NETWORKS AND THE FEDERAL GOVERNMENT 75-87 (1943); Kalven, *Broadcasting Public Policy and the First Amendment*, 10 J.L. & ECON. 15 (1967).

140. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952). Justice Douglas reiterated this line of thought in his concurring opinion in Superior Films, Inc. v. Dep't. of Educ., 346 U.S. 587 (1954): "[m]otion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas." *Id.* at 589 (Douglas, J., concurring).

regulation of speech. The fourth section discusses the doctrines of vagueness and overbreadth, including the principle of "least restrictive means" and suggests some less drastic alternatives to the FVH policy.

A. Obscenity and Other Areas of Unprotected Speech

The First Amendment protection given to speech is rooted in a desire to ensure the unfettered exchange of ideas regarding political and social change. While speech is generally accorded First Amendment protection, there are certain specific areas of speech that, in any context, are outside the protection of the First Amendment. Areas of speech defined as incitement,[141] obscenity,[142] libel,[143] solicitation of crime,[144] fraudulent assertion,[145] and fighting words[146] have all been denied First Amendment protection.

> It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly out-weighed by the social interest in order and morality.[147]

The basic concept that certain areas of speech are unprotected was reflected in the Communications Act of 1934[148] and has been recognized by the FCC.

> [The FCC] readily concedes that it is precluded from examining a program for taste or content, unless the recognized exceptions to censorship apply: for example, obscenity, profanity, indecency, programs inciting to riots, programs designed or inducing toward the commission of crime, lotteries, etc. These exceptions, in part, are written into the United States Code and, in part, are recognized in judicial decisions.[149]

Obscenity is one area of speech that is not constitutionally protected.[150] Although declining to give First Amendment protection to obscenity,

141. *E.g.*, Dennis v. United States, 341 U.S. 494 (1951); De Jonge v. Oregon, 299 U.S. 353 (1937); Gitlow v. New York, 268 U.S. 652 (1925); Schenck v. United States, 249 U.S. 47 (1919).

142. *E.g.*, Miller v. California, 413 U.S. 15 (1973); Ginzburg v. United States, 383 U.S. 463 (1966); Roth v. United States, 354 U.S. 476 (1957).

143. *E.g.*, Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

144. *E.g.*, Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1949); Fox v. Washington, 236 U.S. 273 (1915).

145. *E.g.*, Donaldson v. Read Magazine, Inc., 333 U.S. 178 (1948).

146. *E.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

147. *Id.* at 572.

148. "No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication." Communications Act of 1934, ch. 652, tit. III, § 326, 48 Stat. 1091 (repealed 1948) (current version at 18 U.S.C. § 1464 (1970)).

149. FEDERAL COMMUNICATIONS COMMISSION, EN BANC PROGRAMMING INQUIRY, 44 F.C.C. 2303, 2310 (1960).

150. In Roth v. United States, 354 U.S. 476 (1957), the Court stated, "the unconditional

the Court in *Roth v. United States*[151] emphasized the importance of applying the proper standard when judging whether material is obscene. "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth . . . ."[152] With regard to these fundamental freedoms of speech and press, the Court cautioned that "[c]easeless vigilance is the watchword to prevent their erosion by Congress or by the States."[153] In 1973 the Court further refined its obscenity standard in *Miller v. California*,[154] while reaffirming the *Roth* holding that obscene material is not protected by the First Amendment.[155] The Court reasoned that "[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent . . . ."[156] But the Court distinguished "public portrayal of hard core sexual conduct"[157] as not being within the First Amendment assurance of the " 'unfettered interchange of *ideas*.' "[158] At no time has anyone contended that the subject matter to which the FVH policy addresses itself is within an area of unprotected speech. "Here, however, the government defendants have made no attempt to suggest that the government policy is supported by evidence sufficient to permit the court to conclude that exceptions to First Amendment principles justify government regulation."[159] While some might contend that protrayals of violence are "obscene" in the colloquial sense of that word, the material proscribed by the FVH policy does not meet any of the standards for obscenity as set forth in *Miller*,[160] and, therefore,

phrasing of the First Amendment was not intended to protect every utterance," *id.* at 483, and held "that obscenity is not within the area of constitutionally protected speech." *Id.* at 485.

151. 354 U.S. 476 (1957). The standard set forth in *Roth* is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489 (footnote omitted).

152. *Id.* at 488.

153. *Id.*

154. 413 U.S. 15 (1973).

155. *Id.* at 36. The standard set forth in *Miller* is "(a) whether 'the average person, applying contemporary community standards' would find the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24 (citation omitted).

The *Miller* Court specifically rejected the " 'utterly without redeeming social value' " test which it had previously set forth in Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966). 413 U.S. at 23.

156. *Id.* at 34.

157. *Id.* at 35.

158. *Id.* at 34 (citing Roth v. United States, 354 U.S. 476 (1957)).

159. Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1149 (C.D. Cal. 1976).

160. 413 U.S. at 24; see note 155 *supra*.

does not lose its First Amendment protection on that ground. The speech proscribed by the FVH is also not libelous, nor does it fall within the category of fighting words.[161] Therefore, the regulation of speech under the FVH policy, if justifiable at all, would have to be upheld as a permissible regulation of protected speech under a First Amendment standard that is unique to expression in the broadcast media.

B. The State Action Requirement

The decision in *Writers Guild* was not concerned with the validity of the FVH itself, but rather with the constitutionality of the manner in which the policy was adopted.[162] A major portion of the FVH decision was, in fact, devoted to the issue of state action. This subsection analyzes the state action doctrine as well as the holding of the court on this issue.

The speech guarantee of the First Amendment applies to actions taken by Congress[163] and, through the due process clause of the Fourteenth Amendment,[164] to actions taken by states as well. The actions of individuals, private organizations, and associations, unless tainted by government action, are not limited by First Amendment guarantees.[165] The threshold issue to any finding of a First Amendment violation is thus whether or not there has been state action. The doctrine of state action has developed into two different theories: state function and state involvement.[166]

161. Nor is the speech procribed by the FVH claimed to be incitement, solicitation of crime, or fraudulent assertion. *See generally* notes 141, 144-45 *supra*.

162. 423 F. Supp. at 1072. "Much of the energy associated with this case has been generated because the plaintiffs and defendants disagree about the wisdom of the family viewing policy. In the last analysis, however, this is not the family hour case . . . . This court will not evaluate the family viewing policy except to say that individual broadcast licensees have the right and the duty to exercise independent judgment in deciding whether or not to follow that policy." *Id.*

163. See note 19 *supra*.

164. Gitlow v. New York, 268 U.S. 652, 666 (1925).

165. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972).

166. The distinction between state function and state involvement was first made by Justice Harlan in his dissenting opinion to the Civil Rights Cases, 109 U.S. 3 (1883). Justice Harlan utilized public conveyances on land and water as examples of state function. "[Railroads] are none the less public highways becaused [sic] controlled and owned by private corporations; that it is a part of the function of government to make and maintain highways for the convenience of the public, that no matter who is the agent, or what is the agency, the function performed is *that of the State.*" *Id.* at 38 (Harlan, J., dissenting). These examples of state functions were contrasted with an example of state involvement through the grant of a license to operate a purely private business. "It may be argued that the managers of such places [of public amusement] have no duties to perform with which the public are, in any legal sense, concerned, or with which the public have any right to interfere . . . . My answer is, that places of public amusement . . . are established and maintained under direct license of the law. The authority to establish and maintain them comes from the public." *Id.* at 41 (Harlan, J., dissenting).

The state function theory is illustrated by the early voting rights cases such as *Smith v. Allright*,[167] in which the Court held that "state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state."[168] The theory of state function is also illustrated by those cases in which private facilities have been found to have the attributes of a town or public facility.[169] Most recently the Court has applied the state function theory when a private entity exercises powers that have traditionally been "exclusively reserved to the State," "associated with sovereignty," or are "the exclusive prerogative of the State."[170] In *Writers Guild* the court did not reach plaintiffs' contentions under the state function theory.[171] In fact,

167. 321 U.S. 649 (1944).

168. *Id.* at 660. In *Smith*, the Court held that the Fifteenth Amendment forbade the exclusion of blacks from primary elections conducted by the Democratic Party in Texas. Relying on the language of United States v. Classic, 313 U.S. 299 (1941), the Court stated that the primary had a recognized place in the electoral scheme and made it clear that delegating power to fix the qualifications in primary elections was delegation of a state function that might constitute state action. 321 U.S. at 660. *See* Terry v. Adams, 345 U.S. 461 (1953), involving the exclusion of blacks from "pre-primary" elections of the Jaybird Democratic Association, an organization of all the white voters in a Texas county. Candidates who won the pre-primary elections usually ran unopposed in the Democratic party primary and won both the primary and general election which followed. *Id.* at 463-65. The Court held that this election was subject to the Fifteenth Amendment. *Id.* at 470. In a concurring opinion Justice Clark stated that "when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play." *Id.* at 484 (Clark, J., concurring).

169. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Marsh v. Alabama, 326 U.S. 501 (1946). In *Marsh* the Court held that a state cannot, consistently with the First and Fourteenth Amendments, impose criminal punishment on persons distributing religious literature on the premises of a company-owned town contrary to the wishes of the town's management. The Court reasoned that a state or municipality could not completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks, and public places. The mere fact that all the property interests in town were held by a single company was not sufficient to give that company the power, enforceable by a state statute, to abridge First Amendment freedoms. 326 U.S. at 504-05. "Whether a corporation or municipality owns or possesses the town the public in either case has an identical interest in that functioning of the community in such a manner that the channels of communication remain free." *Id.* at 507. The Court found that the company-owned town in *Marsh* did not "function any differently from any other town," *id.* at 508, and indirectly analogized it to owners of privately held bridges, ferries, turnpikes, and railroads. *Id.* at 506. Such "facilities are built and operated primarily to benefit the public and since their operation is essentially a public function it is subject to state regulation." *Id.*

170. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-53 (1974).

171. "Nor is it necessary to reach plaintiff's contention that network-NAB domination of the airwaves constitutes the usurpation of and implicit delegation by government of a function exclusively reserved to itself (*i.e.*, regulation of broadcasting) and thus is state action for First Amendment purposes." 423 F. Supp. at 1144 (citations omitted).

the Supreme Court has not clearly indicated whether the broadcast media, because of governmental licensing, regulation, and allocation of the broadcasting spectrum, can be characterized as performing a state function.[172]

The other theory of state action is that of state involvement. When there is evidence of "that degree of state participation and involvement"[173] that the Constitution was designed to prohibit, state action can then be imputed to what would otherwise appear to be private conduct. Regulations and restraints can also result from a combination of private and governmental actions.[174] A comparison of some of these cases is necessary for a clear understanding of the circumstances under which the Court has found state action through state involvement.

NAACP v. Alabama[175] illustrates a state action finding that was based upon a combination of private and governmental action. In that case, the NAACP, in connection with state court litigation, had been ordered to produce a large quantity of its records and papers, including its membership lists. The NAACP contended that such compelled disclosure of its membership lists would abridge the freedom of association of its members.[176] The Court stated that although Alabama had taken no direct action to restrict the freedom of association of NAACP members, the abridgement of such rights "may inevitably follow from varied forms of governmental action."[177] The Court rejected the state's contention that the allegedly repressive effect of such compulsory disclosure was a result of private community pressure

172. *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973). In that case, Chief Justice Burger and Justice Rehnquist clearly thought that a broadcast licensee was neither a "partner" of government nor was it engaged in any "symbiotic relationship" with government. *Id.* at 114-21 (opinion of Burger, C.J.). Justices Douglas and Stewart at least formally agreed there was no "state action" but their views seemed impelled by the conclusion to which they would have been forced by reaching the opposite view. *Id.* at 132 (Stewart, J., concurring); 412 U.S. at 148 (Douglas, J., concurring in the judgment). Justices Brennan and Marshall found the requisite governmental action. *Id.* at 170, 172-81 (Brennan & Marshall, JJ., dissenting). However, at least as to the state function theory of government action, a guess may be hazarded. Six justices appear to have implicitly rejected the state function theory as to broadcast media. Chief Justice Burger and Justices Brennan, Marshall, and Rehnquist discussed the state action issue in terms of the governmental involvement theory. Justices Stewart and Douglas found no government action. The remaining three Justices either expressly refrained from deciding the issue (Blackmun and Powell) or assumed state action, *arguendo*, without specifying the applicable theory (White). Confirmation of the inapplicability of the state function theory may be found in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), wherein the Court rejected a state function argument with regard to an electric utility that was subject to heavy state regulation. 419 U.S. at 352-53; see text accompanying notes 199-216 *infra*.

173. Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961). *See also* Marsh v. Alabama, 326 U.S. 501, 506 (1946).

174. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66-68 (1963); NAACP v. Alabama, 357 U.S. 449, 463 (1958).

175. 357 U.S. 449 (1958).

176. *Id.* at 460.

177. *Id.* at 461.

rather than state action.[178] The Court concluded that "[t]he crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power . . . that private action takes hold."[179]

In *Burton v. Wilmington Parking Authority*,[180] the Court found that a private restaurant owner violated the Fourteenth Amendment by refusing to serve a customer on racial grounds,[181] notwithstanding that amendment's express application to state action only. The restaurant owner leased space in a building owned by a state-created parking authority. The *Burton* Court found that the relationship of the private restaurant to the public parking facility in which it was located was mutually beneficial: guests of the restaurant had a convenient place to park their cars and this convenience probably increased demand for the authority's parking facilities.[182] These mutual benefits, coupled with the authority's activities and responsibilities, made the private restaurant an integral part of a public parking facility; this interrelationship constituted sufficient state involvement and participation in the discriminatory action for the Court to hold that an essentially private act violated the Fourteenth Amendment.[183] The test articulated in *Burton* was that "unless to some significant extent the State in any of its manifestations has been found to have become involved in [private conduct],"[184] there is no state action. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[185]

In *Moose Lodge No. 107 v. Irvis*,[186] a private club operating with a liquor license issued by the Pennsylvania Liquor Control Board refused to serve food and beverages to a guest because he was black.[187] The Court held that, with one exception,[188] the regulatory scheme enforced by the Pennsylvania Liquor Control Board did not sufficiently implicate the state in the discriminatory guest policies of Moose Lodge so as to make the latter "state action" within the ambit of the equal protection clause of the Fourteenth Amendment.[189] The Court distinguished the type of state involvement in

178. *Id.* at 462.
179. *Id.* at 463.
180. 365 U.S. 715 (1961).
181. *Id.* at 726.
182. *Id.* at 724.
183. *Id.*
184. *Id.* at 722.
185. *Id.*
186. 407 U.S. 163 (1972).
187. *Id.*
188. See notes 194-98 and accompanying text *infra*.
189. 407 U.S. at 171-72, 177.

Moose Lodge from that in *Burton v. Wilmington Parking Authority*.[190] In *Moose Lodge*, the Court found "nothing approaching the symbiotic relationship between lessor and lessee that was present in *Burton*."[191] *Moose Lodge*, unlike the restaurant in *Burton*, "quite ostentatiously proclaim[ed] the fact that it [was] not open to the public at large . . . . [Instead,] Moose Lodge is a private social club in a private building."[192] Other than the general effect caused by the allocation of licenses,[193] "the Pennsylvania Liquor Control Board plays absolutely no part in establishing or enforcing the membership or guest policies of the club that it licenses to serve liquor."[194]

The exception to the finding of no state action involved the regulation of the Pennsylvania Liquor Control Board adopted pursuant to a statute, which required that " '[e]very club licensee shall adhere to all the provisions of its Constitution and By-Laws.' "[195] While it was argued that the purpose of this provision was to prevent what was actually a public club from hiding its discriminatory policies behind the private club label, the Court found that the "effect of this particular regulation . . . would be to place state sanctions behind [Moose Lodge's] discriminatory membership rules . . . ."[196] The Liquor Control Board regulation thereby resulted in the

190. *Id.* at 174-76 (distinguishing Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961)). Actions by Moose Lodge were not state action under the state function theory because Moose Lodge did not discharge a function to perform a service that would otherwise be performed by the state.

191. 407 U.S. at 175.

192. *Id.*

193. *Id.* (footnote omitted). "The only effect that the state licensing of Moose Lodge to serve liquor can be said to have on the right of any other Pennsylvanian to buy or be served liquor on premises other than those of Moose Lodge is that for some purposes club licenses are counted in the maximum number of licenses that may be issued in a given municipality. Basically each municipality has a quota of one retail license for each 1,500 inhabitants. Licenses issued to hotels, municipal golf courses, and airport restaurants are not counted in this quota, nor are club licenses until the maximum number of retail licenses is reached. Beyond that point, neither additional retail licenses nor additional club licenses may be issued as long as the number of issued and outstanding retail licenses remains at or above the statutory maximum." *Id.* at 176.

194. *Id.* at 175 (footnote omitted).

195. *Id.* at 177 (quoting Regulations of the Pennsylvania Liquor Control Board § 113.09 (June 1970 ed.)).

196. 407 U.S. at 178. Between the time of the trial at the district court level and the disposition of this case by the Supreme Court, the bylaws of Moose Lodge were altered to apply the same sort of racial restrictions to guests as were applied to members. *Id.* In the district court opinion the applicable section of the constitution and general by-laws of the Supreme Lodge to which the local lodge was bound under its charter, was characterized as "permitting members to invite non-members, apparently without limitatons, to social clubs maintained by a lodge." Irvis v. Scott, 318 F. Supp. 1246, 1247 n.4 (M.D. Pa. 1970). By the time this case reached the Supreme Court, however, the relevant section of the bylaws of the Supreme Lodge permitted guest privileges to be granted only to persons who were eligible for membership. "There shall never at any time be admitted to any social club or home maintained

"sanctions of the State [being invoked] to enforce a discriminatory private rule."[197] The Court found state action in violation of the equal protection clause on this narrow ground.[198]

In *Jackson v. Metropolitan Edison Co.*[199] the Court decided that there was not sufficient state involvement to make Metropolitan Edison's conduct attributable to the state for purposes of the Fourteenth Amendment.[200] In *Jackson*, Metropolitan Edison Co., a privately owned and operated Pennsylvania corporation, held a certificate of public convenience issued by the Pennsylvania Public Utility Commission empowering it to deliver electricity to a service area that included York, Pennsylvania.[201] As a condition of its certification, Metropolitan was subject to extensive regulation by the state utility commission.[202] Under a provision of the general tariff that Metropolitan was required to file with the commission, it had the right to discontinue service to any customer upon reasonable notice for nonpayment of bills.[203] Pursuant to this provision, service to the residence of petitioner Catherine Jackson was terminated.[204] Jackson contended that under state law she was entitled to reasonably continuous electrical service to her home, and that Metropolitan's termination of her service for alleged nonpayment, an action allowed by the provision of the general tariff Metropolitan had filed with the commission, constituted state action depriving her of property in violation of the Fourteenth Amendment due process guarantee.[205]

Since private action is immune from the restrictions of the Fourteenth Amendment,[206] it was necessary for the Court to determine whether Metropolitan's conduct was "private" or "state" action.[207] Here the utility company was privately owned and operated, but many of the details of its business were subject to state regulation.[208] The Court noted that "[t]he mere fact that a business is subject to state regulation does not by itself

or operated by the Lodge, any person who is not a member of some lodge in good standing. The House Committee may grant guest privileges to persons who are eligible for membership in the fraternity consistent with governmental laws and regulations." 407 U.S. at 178 n.6.

197. *Id.* at 179.

198. *Id.*

199. 419 U.S. 345 (1974).

200. *Id.* at 358.

201. *Id.* at 346.

202. *Id.*

203. *Id.*

204. *Id.* at 347.

205. *Id.* at 348. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* at 348-49 (quoting U.S. CONST. amend. XIV).

206. Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (dictum).

207. 419 U.S. at 349-50.

208. *Id.* at 350.

convert its action into that of the state for Fourteenth Amendment purposes."[209] It also stated that the acts of a heavily regulated utility with characteristics of a governmentally protected monopoly may more readily be found to be "state" acts than the acts of an entity lacking these characteristics.[210] The test is whether "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[211]

The Court in *Jackson* found that such a "sufficiently close nexus" did not exist.[212] In response to the argument that state action resulted from the monopoly status allegedly conferred upon Metropolitan by the state, the Court said that even assuming the fact that the state had granted Metropolitan a monopoly, this fact was not determinative in deciding whether Metropolitan's termination of service constituted state action for Fourteenth Amendment purposes.[213] Although petitioner Jackson had also argued that Metropolitan's termination was state action because the state had specifically authorized and approved the termination practice by the commission's approval of a general tariff that included the termination provision, the Court explained that the nature of governmental regulation of private utilities is such that the state regulatory scheme may require a utility to obtain approval for practices that a less regulated business could institute without any approval from a regulatory body.[214] Where the commission has not ordered such a practice, however, approval by the commission of a practice intiated by the utility does not transmute such a practice into state action.[215] The Court concluded that Metropolitan was a heavily regulated, privately owned utility with at least a partial monopoly on providing electrical service within its territory and that it had elected to terminate Jackson's service in a manner in which the Pennsylvania Public Utility Commission found permissible under state law. The Court held, however, that this was not sufficient to connect the state with Metropolitan's actions in terminating the service and to make this conduct state action for Fourteenth Amendment purposes.[216]

209. *Id.*

210. *Id.* at 351.

211. *Id.*

212. *Id.* at 351, 358.

213. *Id.* at 351-52. The Court cited Public Utilities Comm'n v. Pollak, 343 U.S. 451, 462 (1952), where the Court dealt with the activities of the District of Columbia Transit Co., a congressionally established monopoly, but expressly disclaimed reliance on the monopoly status of the transit authority. 419 U.S. at 352.

214. 419 U.S. at 357.

215. *Id.*

216. *Id.* at 358-59.

As previously noted, the Supreme Court has not clearly identified the state action theory that should be applied in the context of broadcasting.[217] In *CBS v. Democratic National Committee*,[218] the Court considered the question whether a broadcast licensee's general policy of not selling advertising time to individuals or groups wishing to speak out on issues they consider important violated the Communications Act of 1934[219] or the First Amendment. This case dealt with two orders announced on the same day in which the FCC had ruled that a broadcaster who meets his obligation to provide full and fair coverage of public issues was not required to accept editorial advertisements.[220] In an opinion written by Judge J. Skelly Wright, a majority of the Court of Appeals for the District of Columbia Circuit reversed the FCC, holding "that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted."[221] The United States Supreme Court later reversed the Court of Appeals, [222] and held that the policies complained of did not constitute governmental action violative of the First Amendment.[223] The Court first reviewed the unique and special problems to which broadcasting is subject due to the scarcity of the resource,[224] and then stated:

> [B]alancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century.[225]

Since the First Amendment, as previously discussed,[226] is a restraint on government action and not a restraint on private persons, the Court had to determine whether the action of a broadcast licensee such as that challenged in *CBS* was "governmental" or "state" action for purposes of the First Amendment.[227]

It appears from the language used in the various opinions in *CBS* that in the area of broadcasting, the test that would be used to determine whether

217. See note 172 and accompanying text *supra*.

218. 412 U.S. 94 (1973).

219. 47 U.S.C. §§ 151 *et seq.* (1970 & Supp. V 1975).

220. Democratic Nat'l Comm., 25 F.C.C. 2d 216, 232-33 (1970); Business Executives Move for Vietnam Peace, 25 F.C.C. 2d 242, 246-47 (1970).

221. Business Executives Move for Vietnam Peace v. FCC, 450 F.2d 642, 646 (D.C. Cir. 1971).

222. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 132 (1973).

223. *Id.* at 121.

224. *Id.* at 101-03 (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)). *See generally* notes 128-47 and accompanying text *supra*.

225. 412 U.S. at 102.

226. See notes 163-65 and accompanying text *supra*.

227. 412 U.S. at 114-15 (citing Public Utilities Comm'n v. Pollak, 343 U.S. 451, 461 (1952)).

or not there was state action with respect to the First Amendment is that of state involvement rather than state function.[228] Four justices discussed the state action issue using language from the state involvement theory.[229] Although Justice Stewart's concurring opinion agreed that there was no governmental involvement, it also indicated a reluctance ever to find state action due to a fear that broadcasters would lose their own First Amendment rights as a result.[230] Justice Douglas concluded that the philosophy of the First Amendment required that television and radio stand in the same protected position as do newspapers and magazines but that there was no governmental action.[231] Justice White believed that government action was present.[232] Justices Blackmun and Powell, concluding that the governmental action issue did not affect the case, expressly refrained from deciding it.[233] In his separate opinion, Chief Justice Burger explained one important reason for his conclusion that there was not state action:

> [W]ere we to read the First Amendment to spell out governmental action in the circumstances presented here, few licensee decisions on the content of broadcasts or the processes of editorial evaluation would escape constitutional scrutiny. In this sensitive area so sweeping a concept of governmental action would go far in practical effect to undermine nearly a half century of unmistakable congressional purpose to maintain—no matter how difficult the task—essentially private broadcast journalism held only broadly accountable to public interest standards. To do this Congress, and the Commission as its agent, must remain in a posture of flexibility to chart a workable "middle course" in its quest to preserve a

228. See note 172 *supra*.

229. After sifting the facts and weighing the circumstances, Chief Justice Burger and Justice Rehnquist concluded that "the Commission [had] not fostered the licensee policy," that the Government was not "a 'partner' to the action of the broadcast licensee," and that the Government had not "engaged in a 'symbiotic relationship' with the licensee, profiting from the invidious discrimination of its proxy." *Id.* at 118-19 (citing Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)). They then concluded that the licensee policies complained of did not constitute government action violative of the First Amendment. *Id.* at 119.

Dissenting Justices Brennan and Marshall identified several indicia of governmental involvement: first, "public 'ownership' of an essential element in the operations of a private enterprise"; second, "direct dependence of broadcasters upon the Federal Government for their 'right' to operate broadcast frequencies"; third, "extensive governmental control over the broadcast industry"; fourth, "*specific* governmental involvement in the broadcaster policy." *Id.* at 174-77 (Brennan & Marshall, JJ., dissenting). They then concluded that the government " '[had] so far insinuated itself into a position' of participation in this policy that [broadcast licensee action] must be subjected to the restraints of the First Amendment." *Id.* at 181 (Brennan & Marshall, JJ., dissenting).

230. *Id.* at 139 (Stewart, J., concurring). Justice Stewart's views closely approach those expressed by Justice Douglas.

231. *Id.* at 149 (Douglas, J., concurring in the judgment).

232. *Id.* at 146-47 (White, J., concurring).

233. *Id.* at 148 (Blackmun & Powell, JJ., concurring).

> balance between the essentially public accountability and the desired private control of the media.[234]

In *Writers Guild*, the court made a division between defendants in order to analyze the state action issue. The first group, the private defendants, consisted of the three networks and the NAB. As to these defendants, the court stated that the right and the duty to make broadcasting decisions reside with the individual licensees.[235] Thus, a network decision to adopt an FVH policy would be constitutional, even if it involved state action, if it was an "independent" decision.[236] The court also held that this principle would control a situation where the government "influenced" licensee action but the licensee decision was made independent of that influence.[237] In the instant case, however, the court found that governmental action went beyond mere influence and constituted governmental pressure.[238]

The court found that the series of steps taken by FCC Chairman Wiley were "designed to bring Commission pressure to bear on the industry."[239]

234. 412 U.S. at 120 (opinion of Burger, C.J.).

235. 423 F. Supp. at 1134. "The right and the duty to make independent and final decisions as to who shall and shall not get access to the media resides not with the networks (except in their capacity as owners of local stations), not with the NAB, not with the FCC, not with the screen writers, director or actors, not with Norman Lear or Tandem Productions and not with this or any other court. The constitutionality of the broadcasting system depends on the conclusion that the right and duty to make these decisions reside in hundreds of different licensees." *Id.*

236. *Id.*

237. *Id.* at 1135. In dictum, the court addressed plaintiffs' contention that government influence was a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 1135 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)). The court refused to accept this contention on two grounds: first, mere FCC influence was not the type of "highly offensive conduct" (sex or racial discrimination) that would permit a less exacting state action standard; second, the importance of preserving a private sector free from the constitutional requirements applicable to government institutions militated against a state action finding for mere influence. 423 F. Supp. at 1135-38. But the court went on to hold that "even if governmental encouragement were sufficient to make out a state action showing in this context, there would be no First Amendment violation. . . . If the licensee has in good faith adopted a policy which it reasonably believes to conform with the public interest and applicable regulations and if it has adopted it not because of government pressure, but because it believes it to be wise policy, the First Amendment not only permits the decision, but secures it from judicial restraint." *Id.* at 1140.

238. The court held that FCC actions in this case constituted governmental pressure sufficient to establish state action. *Id.* at 1140-42. For a discussion of the state action concept as applied to the government defendants, see notes 261-75 and accompanying text *infra*.

239. 423 F. Supp. at 1097. The court noted, however, that Wiley was responding reluctantly to political pressure created by the House Report. *Id.* at 1096; see note 91 and accompanying text *supra*. "Chairman Wiley's reluctance to enter into the field had not been caused by a lack of concern for the problem [of the effects of violence and other questionable programming on children] as a private citizen and parent. Instead it stemmed from a deep belief that constituional, statutory and prudential considerations dictated that government had no proper role to play." *Id.* at 1096. The court made several other references to Wiley's personal concern about

> Essentially the theory was that since the FCC was required to determine whether relicensing of a station was in the "public interest" it could identify in advance those matters which it considered to be outside of the public interest. Thus, Commission statements clothed in the language of "public interest" would warn broadcasters of consequences in the relicensing process. Moreover, although the Commission could not directly censor programming content, it could achieve the same result by "public interest" jawboning.[240]

This "jawboning" took the form of speeches such as the one Wiley made in Chicago to the Illinois Broadcasters Association. In this speech Chairman Wiley concentrated on the question of violence and obscenity on television, emphasizing the effect that such programming might have on children. Broadcasters were reminded of their "public accountability" and "special responsibilities as licensees."[241] Wiley stated, " 'I am frankly optimistic that the combined effect of government encouragement and enlightened self-regulation will bring about constructive change in this very important aspect of public service.' "[242] The court found that the meaning of this speech was unmistakable and noted that the industry press was quick to pick it up.[243]

Wiley and his staff had numberous meetings with network officials.[244] During one of these meetings Wiley was interviewed over the telephone by Les Brown, a reporter for the *New York Times*. In response to questions

Commission action: "Chairman Wiley was convinced that formal Commission action was unwise policy. Moreover he believed that the staff proposals for formal Commission action presented severe First Amendment and section 326 problems. Instead of moving ahead with formal proceedings, he decided to do something 'more quick and more dramatic.' Despite grave reservations about the viability of formal Commission actions, Wiley permitted the staff to continue working on proposed notices of rulemaking and inquiry." *Id.* at 1097 (footnotes omitted). At a meeting with the FCC staff and the Washington vice-presidents of ABC, CBS, and NBC, Chairman Wiley proposed that each network issue a statement of policy on violence and obscenity, that the policy include cautionary warnings, and that the programs requiring warnings be scheduled later in the evening. *Id.* at 1099. The court stated that Wiley made it clear that if the networks were unable to agree on an approach along these general lines, he would urge the Commission to take alternative action. *Id.* The court commented that "[t]his is not to say that Wiley had somehow changed his mind about the constitutionality of formal Commission action. He explicitly reaffirmed his doubts about its propriety." *Id.*

240. *Id.* at 1097.

241. *Id.* at 1098.

242. *Id.* (quoting Chairman Wiley).

243. *Id.* BROADCASTING, the major industry journal, stated that: "Chairman Wiley, who is loathe to delve into the area of program content under any conditions, appeared in his Illinois speech to be embarking on the same course that proved successful in connection with children's television progamming. A tough speech in Atlanta in May resulted several months later in the bind of self-regulation . . . ." *Id.* (quoting BROADCASTING, Oct. 21, 1974, at 41). Witnesses at the trial "uniformly testified that network executives and FCC officials religiously read the trade press." 423 F. Supp. at 1098.

244. *See, e.g., id.* at 1098-99, 1101, 1103.

from Brown, Chairman Wiley indicated that public hearings on the question of sex and violence on television were always a possibility, and one that the networks would not like.[245] The next day an article appeared in the *New York Times* stating "that Wiley 'made no secret of the fact that he might use the prospect of hearings as negotiating leverage to spur the networks into adopting policies on their own to protect the young from adult-oriented programs.' "[246]

By yielding to this pressure, the networks did not exercise the kind of independent decisionmaking required by the First Amendment.[247] The network adoption of the FVH policy violated the First Amendment, then, not because government pressure was present, but because the networks did not fulfill their fiduciary duty to program independently and in the public interest.[248] A second First Amendment violation resulted from the networks' agreement to compromise the right of licensees to make independent programming decisions.[249] The court found that the FVH amendment to the NAB Television Code was a device used to undermine such independent decisionmaking.[250] The joint actions of the government and the networks constituted impermissible state action.

The state action in this case, like that in *NAACP v. Alabama*,[251] consisted of a combination of private and governmental action. The court found that the combination of "[b]roadcasters . . . join[ing] forces with governmental officials [brought] about industry-wide adherence to a government plan to suppress offensive materials in the early evening hours . . . ."[252] In *NAACP* the Court noted that an abridgment of rights may follow "from varied forms of governmental action"[253] including those in

245. *Id.* at 1105.

246. *Id.* (quoting Brown, *Head of F.C.C. Weighing Hearings on T.V. Violence*, N.Y. Times, Dec. 18, 1974, at 91, col. 3).

The court stated that Wiley was quite concerned about the article, both because he thought it imported a threatening tone to his remarks that he did not believe was present and because it would appear that he was deliberately using the press to put additional public pressure on the networks. 423 F. Supp. at 1105. The article was received as an exhibit at trial exclusively as evidence of the fact that the statements in the article were made and were read and discussed by the defendants. *Id.* at 1105 n.53.

247. *Id.* at 1140.

248. *Id.* at 1143.

249. *Id.*

250. *Id.* "[T]he First Amendment is not concerned with what broadcasters decide to program; it rather requires that the decision as to what should be broadcast be independently arrived at by the licensee. If the licensee has in good faith adopted a policy which it reasonably believes to conform with the public interest and applicable regulations and if it has adopted it not because of government pressure, but because it believes it to be wise policy, the First Amendment not only permits the decision, but secures it from judicial restraint." *Id.* at 1140.

251. 357 U.S. 449 (1958).

252. 423 F. Supp. at 1145.

253. NAACP v. Alabama, 357 U.S. 449, 461 (1958).

which the state has taken no direct action.[254] In the FVH case it was likewise observed that direct action in the form of formal regulation was not required for a First Amendment violation: "[N]othing whatever turns upon whether governmental abridgments of First Amendment rights are achieved through formal regulation or backroom bludgeoning."[255] In *NAACP* the Court stated that the "interplay of governmental and private action" was the "crucial factor"[256] because "it is only after the *initial exertion of state power* . . . that private action takes hold."[257] In the FVH case the initial exertion of state power took the form of Wiley's "suggestions" that the industry undertake self-regulation; the combined network-NAB adoption of the FVH amendment that resulted thus became state action under the *NAACP* formulation. Only "by sifting facts and weighing circumstances"[258] could the conduct of Wiley in the network-NAB adoption of the FVH policy be "attributed its true significance."[259] The court concluded that:

> [T]he Commission's pressure in this case was persistent, pronounced, and unmistakable. *Chairman Wiley's actions were the direct cause* of the implementation of the family viewing policy: *were it not for the pressure he exerted*, it would not have been adopted by any of the networks nor by the NAB. The threat of regulatory action was not only a substantial factor leading to its adoption but a *crucial*, *necessary*, and *indispensable cause*.[260]

As to the second group of defendants, the government defendants,[261] governmental involvement in the development and implementation of the FVH amendment to the NAB Television Code was necessary to the court's finding that First Amendment rights were violated. The court found such governmental involvement in the actions of Chairman Wiley. "Chairman Wiley admitted at trial that all of his actions throughout the campaign were made in his official capacity as Chairman of the FCC."[262] Therefore, when Chairman Wiley made speeches before trade associations and met on various occasions with representatives of the networks and the NAB, his official actions in pressuring private network officials to adopt a FVH policy were imputed to the federal government. The court found that Chairman Wiley "threatened the industry with regulatory action if it did not adopt the essence of his scheduling proposals."[263]

254. *Id.* See text accompanying notes 175-79 *supra*.
255. 423 F. Supp. at 1142.
256. 357 U.S. 449, 463 (1958).
257. *Id.* (emphasis added).
258. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).
259. *Id.*
260. 423 F. Supp. at 1094 (emphasis added).
261. See note 113 *supra*.
262. 423 F. Supp. at 1140.
263. *Id.* at 1094.

> [T]he Commission has no right to accompany its suggestions with vague or explicit threats of regulatory action should broadcasters consider and reject them . . . . Particularly when Commissioners make recommendations in areas where formal regulation would be questionable, it is vital that any suggestion of pressure or the appearance of pressure be scrupulously avoided.[264]

The court then held that Commission actions impermissibly compromised licensee independence by pressuring the networks to adopt the FVH policy and by participating "in a conspiracy to usurp licensee independence through the vehicle of the NAB."[265]

In *Moose Lodge No. 107 v. Irvis*[266] the Court found that the regulatory scheme enforced by the Pennsylvania Liquor Control Board and the board's allocation of licenses was not in itself enough to attribute to the state the racially discriminatory policies of Moose Lodge, a private club. Similary, in *Writers Guild* the regulatory scheme imposed by the Communications Act and FCC allocation of broadcast licenses alone would not be sufficient to find state action in broadcaster adoption of the FVH policy. In *Moose Lodge*, however, the Court emphasized the "symbiotic relationship"[267] found in *Burton* between the restaurant owner and the public parking facility "where the private lessee obtained the benefit of locating in a building owned by the state-created parking authority, and the parking authority was *enabled to carry out its primary public purpose* of furnishing parking space . . . ."[268] Chairman Wiley was concerned that any direct action by the FCC in the area of program content would be unconstitutional; he needed the cooperation of the networks in order to meet congressional demands for action in this area of programming. The networks, being sensitive to the FCC licensing power, implemented "self-regulation" through the NAB Code Amendment, thereby enabling Wiley to carry out his primary objective: the implementation of a FVH policy through industry self-regulation.

Moose Lodge found state action based upon the state's enforcement of the discriminatory membership rules of the private club. In *Moose Lodge* this "sanctioning" occured through the Pennsylvania Liquor Control Board's regulation that required all private clubs licensed by the Board to adhere to their constitution and bylaws. In the case of *Moose Lodge*, this meant adherence to a racially discriminatory policy and constituted state action. In *Writers Guild*, although the state action was not in the form of a formal FCC regulation, the FCC nevertheless, through the informal actions

264. *Id.* at 1150.
265. *Id.* at 1151.
266. 407 U.S. 163 (1972).
267. *Id.* at 175.
268. *Id.* (emphasis added).

of its Chairman, in effect "sanctioned" broadcaster adoption of the FVH policy. Through his "campaign" Chairman Wiley made it quite clear that he was encouraging and approving broadcaster adoption of such a policy. Notwithstanding the fact that no formal regulation of the FCC was involved in approving the adoption of the FVH policy, the informal power of the FCC that arose from its renewal of broadcaster's licenses under the elusive public interest standard was implicit throughout.

In *Jackson v. Metropolitan Edison Co.*[269] the test applied by the Court was whether there was a "sufficiently close nexus between the State and the challenged action so that the action of the latter [could] be fairly treated as that of the State itself."[270] The Court noted that the private utility was heavily regulated by the state and enjoyed quasi-monopoly status with respect to its service area, but these factors were not decisive in considering whether Metropolitan's termination of service constituted state action.[271] In finding that the requisite "sufficiently close nexus"[272] did not exist in this case, the Court rejected the argument that because the tariff that included the termination provision had been filed with the state utility commission, the commission approved or sanctioned the practice and thereby transmuted it into state action.

In *CBS v. Democratic National Committee*[273] the Court explained that the process of balancing the First Amendment interests involved in broadcasting had to be undertaken within the framework of the regulatory scheme.[274] CBS, like the private utility company in *Jackson*, was subject to extensive governmental regulation, but this alone did not make the practice of a radio or television broadcaster in refusing to sell editorial advertising time to various groups attributable to the government. In *CBS* it was argued that because of the licensing of the broadcaster and the general regulatory scheme under which it operated, the FCC had, in effect, approved the challenged policy and thereby transmuted it into state action. In both *Jackson* and *CBS*, the distinguishing factor was that the challenged policies, regardless of the extent to which they had been sanctioned or approved by virtue of the governmental regulatory scheme, were initiated by the private entity and not by the government; whatever "approval" followed was, therefore, insufficient to make the conduct attributable to the state. In contrast, the impetus for the FVH policy *was* governmental.

269. 419 U.S. 345 (1974).
270. *Id.* at 351.
271. *Id.* at 351-52.
272. *Id.* at 351.
273. 412 U.S. 94 (1973).
274. *Id.* at 102.

> Here there is not mere inaction; the Commission itself has participated in an unprecedented joint venture, a transaction in which it has joined with the most powerful forces in broadcasting to permit a national board to dictate what may be heard, to implement a policy *developed and conceived* by government.[275]

Wiley initiated the discussions that eventually led to adoption of the FVH. In this case, therefore, the activities initiated by Chairman Wiley in his official capacity on behalf of the FCC constituted sufficient governmental involvement in essentially private acts to satisfy the state action requirement.

C. Prohibitions Against Prior Restraints

A prior restraint is an official restriction imposed upon speech or other forms of expression in advance of communciation, as opposed to a subsequent punishment that is imposed after the communication has been made.[276] "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."[277] Although it is recognized that the prohibition against prior restraints is "not absolutely unlimited,"[278] "[a]ny system of prior restraints of expression comes [into court] bearing a heavy presumption against its constitutional validity"[279] and carries with it "a heavy burden of showing justification for the imposition of such a restraint" that must be met by the party desiring to restrain the speech.[280]

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275. 423 F. Supp. at 1145 (emphasis added).

276. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955) [hereinafter cited as Emerson]. *See also* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 503-07 (1970) [hereinafter cited as FREEDOM OF EXPRESSION]. In a long line of decisions, the Supreme Court has considered certain official actions and identified them as prior restraints. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969); Staub v. City of Baxley, 355 U.S. 313, 322 (1958); Kunz v. New York, 340 U.S. 290, 293-94 (1951); Schneider v. State, 308 U.S. 147, 161-62 (1939); Near v. Minnesota, 283 U.S. 697, 713-15 (1931). Prior restraints may take a variety of forms, with officials exercising control over different kinds of public spaces under the authority of particular statutes. "All [prior restraints found by the Court], however, . . . [have given] public officials the power to deny use of a forum in advance of actual expression." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975).

277. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973).

278. "No one would question but that a government might prevent . . . publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of community life may be protected against incitements to acts of violence and the overthrow by force of orderly government." Near v. Minnesota, 283 U.S. 697, 716 (1931).

279. Bantam Books, Inc. v. Sullivan, 372 U.S. 57, 70 (1963).

280. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). *See also* New York Times v. United States, 403 U.S. 713 (1971).

Prior restraints have historically been viewed as preventing communication from occurring at all,[281] but a system need not effect total suppression in order to create a prior restraint.[282] In *Interstate Circuit, Inc. v. City of Dallas*,[283] a Dallas ordinance established a nine-member Motion Picture Classifications Board and required that prior to showing a film the exhibitor had to file a plot summary and a proposed classification of the film with the Board. Films were then classified by the Board as "suitable for young persons" or "not suitable for young persons."[284] If a film was classified as "not suitable" then an exhibitor was required to be specially licensed to show the film.[285] The ordinance was enforced chiefly by subjecting the exhibitor to a misdemeanor penalty. The exhibitor could be fined up to $200 for exhibiting a film that was classified as "not suitable for young persons" without advertisements clearly stating its classification or without the classification being clearly posted, for exhibiting a "suitable" and a "not suitable" film on the same program, for knowingly admitting a youth under age 16 to a "not suitable" film without his guardian or spouse accompanying him, for making any false or misleading statement in submitting a film for classification, or for exhibiting a "not suitable" film without having a valid license for doing so.[286] After observing that the evils attendant to prior restraints were "not rendered less objectional because the regulation of expression is one of classification rather than direct suppression," the Court held that the system created a prior restraint.[287] Likewise, in *Bantam Books, Inc. v. Sullivan*,[288] Rhode Island had established a commission that was charged with educating the public regarding any material classified as "manifestly tending to the corruption of the youth." The commission did not regulate or suppress these materials, but, rather, they coerced, persuaded, and intimidated with the objective of suppressing, and succeeded in doing so.[289] The Court held that these activities were an unconstitutional prior restraint.[290] Similarly, in *Southeastern Promotions, Ltd. v. Conrad*,[291] the directors of a municipal theater rejected an application to present the musical "Hair" in the theater.[292] Although none of the directors of the theatre had either seen the play or read the script, they had heard from

281. Emerson, *supra* note 276, at 648.
282. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975).
283. 390 U.S. 676 (1968).
284. *Id.* at 678.
285. *Id.*
286. *Id.* at 680.
287. *Id.* at 688-89.
288. 372 U.S. 58 (1963).
289. *Id.* at 59, 66-67.
290. *Id.* at 64.
291. 420 U.S. 546 (1975).
292. *Id.* at 548.

outside reports that the play, as produced in other places, involved nudity and obscenity on stage.[293] Despite the fact that there was no conflicting engagement scheduled for the theater, the directors classified the production as not "in the best interest of the community"[294] and thereby rejected Southeastern's application to use the theater. The Court considered the classification involved in the director's decision to be important and likened it to the prior restraint found in *Interstate Circuit* and *Bantam Books*.[295] Again, the fact that a classificatory decision did not have the effect of total suppression did not prevent a finding of prior restraint. Moreover, it was irrelevant that speech restrained in one forum could be presented in another because "[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[296] In *Southeastern*, the Court stated that it was of "no consequence" that some other privately owned theater in the city could have been used for the production; even if another forum is available, that fact alone does not justify an otherwise impermissible prior restraint.[297]

The FVH policy at issue in *Writers Guild* contained classificatory elements similar to those previously found objectionable by the Supreme Court. The FVH amendment to the NAB code gave the Television Code Review Board the "power to control the early evening programming of most television stations in the United States."[298] Like the classification of films in *Interstate*, as "suitable" or "not suitable" for young persons, the Television Code Review Board and network censors classified programs to determine which ones were "inappropriate for viewing by a general family audience."[299] The FVH policy, like the policy in *Bantam Books*, had the objective of suppressing protected speech by coercion, persuasion, and intimidation, and was effective in suppressing protected speech during the FVH period.[300] The classificatory aspects and the less than total suppression resulting from the implementation of this policy were, however, sufficient to establish an unconstitutional prior restraint, which was objectionable because it restrained protected speech from being presented in the television forum during the FVH period. The restraint did not become less objectionable merely because it was less than total or because the same speech could have been presented in the television forum during a time other than the FVH period.

293. *Id.*
294. *Id.*
295. *Id.* at 556 n.8.
296. *Id.* at 556 (quoting Schneider v. State, 308 U.S. 147, 163 (1939)).
297. 420 U.S. at 556.
298. 423 F. Supp. at 1143.
299. *Id.* at 1072.
300. *See id.* at 1123-26.

The FVH policy was also an unconstitutional prior restraint because it lacked adequate procedural safeguards. A court need not decide whether the standard for establishing a prior restraint is sufficiently precise or substantially correct if the *procedure* for implementing the restraint is defective. In *Southeastern*, for example, the Court based its holding on the "procedural shortcomings"[301] of the system under which the musical was restrained.

> Whatever the reasons may have been for the board's exclusion of the musical, it could not escape the obligation to afford appropriate procedural safeguards . . . . The standard, whatever it may be, must be implemented under a system that assures prompt judicial review with a minimum restriction of First Amendment rights necessary under the circumstances.[302]

In *Freedman v. Maryland*,[303] the Court was confronted by a challenge to the constitutionality of a Maryland motion picture censorship statute. The theater owner challenging the statute had been convicted for exhibiting a film without first submitting the film to the State Board of Censors.[304] The Court held that "a noncriminal process which requires the prior submission . . . to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system."[305] In *Southeastern Promotions, Ltd. v. Conrad*,[306] the Court addressed the distinguishing characteristics of a live stage production. "By its nature, theater usually is the acting out—or singing out—of the written word, and frequently mixes speech with live action or conduct."[307] The Court expressly reaffirmed the holding of *Freedman* and set forth three procedural safeguards necessary to protect this medium of expression.

> [A] system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.[308]

301. 420 U.S. at 562.

302. *Id.*

303. 380 U.S. 51 (1965).

304. *Id.* at 52-53. The state conceded that the picture did not violate the statutory standards and would have received a license if it had been properly submitted.

305. *Id.* at 58.

306. 420 U.S. 546 (1975).

307. *Id.* at 557-58.

308. *Id.* at 560. The *Freedman* Court essentially set forth the same procedural safeguards using a somewhat different organization. The test in *Freedman* consisted of two basic safeguards: the burden of proving the film is unprotected expression must rest on the censor and only a judicial determination in an adversary proceeding is sufficient to impose a valid final restraint. Freedman v. Maryland, 380 U.S. 51, 58 (1965). In discussing the second safeguard, the Court recognized that the state may require advance submission of all films in order to

Testimony at trial established that, at best, the FVH policy was applied under an informal system of discussion, decision, and appeal to higher levels of executives within the networks.[309] The court found that "the NAB function[ed] as an effective enforcement mechanism [for the FVH provisions of the NAB Code]."[310] In addition to creating a system that would allow challenges from any source to be considered by the Code Authority, the Code Authority itself undertook an extensive monitoring process.[311] This "monitoring [process was] 'complicated by the fact that the Television Code Review Board [had] not established criteria designed to help determine whether or not a program, or part thereof, . . . conform[ed] to the "family viewing concept." ' "[312] "The definition of family viewing propriety thus turned on interaction between the networks, other broadcasters, and the Code Authority, with the touchstone being what [Code Authority Director] Helffrich and ultimately the Code Board would think was appropriate."[313] Such a scheme "runs afoul of the First Amendment" because it lacks the required procedural safeguards. First, the burden of proving that the material was protected and of appealing decisions under the FVH policy was on the producers, directors, and writers, rather than on the censors.[314] Second, the restraint was for an indefinite period of time that altered the status quo, rather than for a brief period that preserved the status quo pending judicial review.[315] Third, there was no assurance of a final *judicial* determination of any kind, prompt or otherwise.

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proceed effectively to bar all showings of unprotected films. In accommodating this state interest consistent with the second safeguard, the Court established three requirements. First, the exhibitor must be assured by statute or authoritative judicial construction that within a specified brief period the censor will either issue a license or go to court to restrain the showing of the film. Second, any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Third, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license. *Id.* at 58-59.

309. Plaintiffs' Opening Post-Trial Brief at 84, Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976). This brief cited testimony of Richard Kirschner (at Reporter's Transcript 3127-30) and Norman Lear (at Reporter's Transcript 2461-62, 2527-28).

310. 423 F. Supp. at 1123. For a detailed explanation of the procedures for the enforcement of the FVH discussed at the October 6-8, 1975 meeting of the Code Board, see *id.* at 1124.

311. *Id.* at 1124.

312. *Id.* (quoting an Aug. 25, 1975 memorandum from Code Authority Director Helffrich).

313. *Id.* at 1124.

314. "If the challenger disagrees with the response of the network or station, the [NAB] Code Authority Director, upon receipt of a request from the challenger will review the matter. If the [NAB] Code Authority Director agrees with the challenger [to a prime time family viewing program], the network or station may seek review of the issue by the Programs Standard Committee of the Board." *Id.*

315. Mr. Lear testified that "I made the show because I believed in it . . . and then had to wait the weeks to find out if the show would ever be aired, would they ever pay for it, what was going to happen." *Id.* at 1126.

Both the substantive and procedural safeguards discussed are important because freedom of speech, along with freedom of the press, is characterized as a fundamental personal right and liberty, reflecting "the belief that the exercise of the rights lies at the foundation of free government by free men."[316] In cases where freedom of speech has been abridged, the courts "weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation" of the right to freedom of expression.[317] Since there is also a heavy presumption against the constitutional validity of any system of prior restraints, the party desiring to restrain the speech carries a heavy burden of justifying the imposition of the restraining regulation. *Writers Guild*, however, is illustrative of a situation in which a prior restraint was imposed without meeting the necessary burden of justification. The *Writers Guild* defendants did not attempt to suggest that the government policy was supported by sufficient evidence to overcome the presumption against the constitutional validity of the restraint imposed on protected speech by the FVH.[318]

Although the court in *Writers Guild* did not reach this issue, the alleged harmful effects on youthful viewers is the rationale most frequently asserted for the regulation of televised violence.

> If parents could buy packaged psychological influences to administer in regular doses to their children, I doubt that many would deliberately select Western gunslingers, hopped-up psychopaths, deranged sadists, slapstick buffoons and the like, unless they entertained rather peculiar ambitions for their growing offspring. Yet such examples of behavior are delivered in quantity, with no direct charge, to millions of households daily. Harried parents can easily turn off demanding children by turning on a television set; as a result, today's youth is being raised on a heavy dosage of televised aggression and violence.[319]

Conversely, a justification that has been asserted as a rationale for the presentation of violence on television is the cathartic or abreaction hypothesis. The basis of this hypothesis is that viewing aggressive scenes reduces the aggressive drives of the viewer, that children get rid of hostility in an innocuous way by watching violent television programs, and that this is a harmless outlet for latent hostility and relieving pent-up aggression. It is gradually becoming clear, however, that the bulk of the social scientific evidence available does not lend support to the cathartic argument.[320] Some

316. Schneider v. State, 308 U.S. 147, 161 (1939).

317. *Id.*

318. 423 F. Supp. at 1149. See text accompanying note 159 *supra*.

319. Bandura, *What TV Violence Can Do To Your Child*, LOOK, Oct. 22, 1963, at 46, *reprinted in* VIOLENCE AND THE MASS MEDIA (O. Larsen ed. 1968) [hereinafter cited as Larsen].

320. Halloran, *Television and Violence*, THE TWENTIETH CENTURY, Winter 1964-65, at 61, *reprinted in* Larsen, *supra* note 319, at 143-54; M. Gunther, *All That TV Violence: Is It Really*

of the studies that attempt to assess the effect of television violence on children will be reviewed to evaluate the substantiality of these claims and the validity of governmental regulation of program content to protect children.[321]

The study of the Media Task Force[322] by the National Commission on the Causes and Prevention of Violence (the Eisenhower Commission) found that a high level of violence exists in television entertainment programming.[323] Based on the work of sociologist William R. Catton and communications expert George Gerbner, the Task Force concluded that television conveys "[t]he overall impression . . . that violence, employed as a means of conflict resolution or acquisition of personal goals, is a predominant characteristic of life. Cooperation, compromise, debate and other non-violent means of conflict resolution are notable for their relative lac [*sic*] of prominence."[324] Although the Media Task Force found less than adequate support for the proposition that television violence will cause viewers to act aggressively toward other people, it did issue the following summary statement: "While the evidence is incomplete, we can . . . assert the probability that mass media portrayals of violence are one major contributory factor which *must* be considered in attempts to explain the many forms of violent behavior that mark American society today."[325] Dr. Gerbner[326] has concluded that three years of tests he directed have established that heavy television watchers[327] tend to exaggerate and overestimate the danger of violence in their own lives, creating what he calls a "mean-world syndrome."[328] He reports that for children " 'the pattern is exactly the

So Harmful?, pt. 2, TV GUIDE, Nov. 13, 1976, at 38 [hereinafter cited as M. Gunther, pt. 2]; Wilson, *Violence, Pornography and Social Science*, THE PUBLIC INTEREST, Winter 1971, at 45, 51-52 [hereinafter cited as Wilson].

321. For a more complete and extensive review of the literature in this area, *see generally* Note, *Violence On Television*, 6 COLUM. J.L. & SOC. PROB. 303, 303-08 (1970) [hereinafter cited as *Violence On Television*]; Note, *The Regulation of Televised Violence*, 26 STAN. L. REV. 1291, 1291-1303, 1323-25 (1974) [hereinafter cited as *Regulation of Televised Violence*]; Wilson, *supra* note 320, at 45.

322. TASK FORCE ON MASS MEDIA AND VIOLENCE, 11 NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, MASS MEDIA AND VIOLENCE (1969) (staff report) [hereinafter cited as TASK FORCE].

323. *Violence On Television*, *supra* note 321, at 304.

324. TASK FORCE, *supra* note 322, at 336.

325. *Id.* at 375.

326. See note 347 *infra*.

327. "Heavy viewing" was defined as four or more hours per day. M. Gunther, pt. 2, *supra* note 320, at 40.

328. Waters, *What TV Does to Kids*, NEWSWEEK, Feb. 21, 1977, at 69 [hereinafter cited as Waters]. *See also* Gerbner & Gross, *The Scary World of TV's Heavy Viewer*, PSYCHOLOGY TODAY, April, 1976, at 41, 45, 89; Rothenberg, *Effect of Television Violence on Youth*, 234 J.A.M.A. 1044 (1975); O'Brien, *Childhood Fear of Violence*, San Francisco Examiner, March 2, 1977, at 20, col. 1.

same, only more so, and that the prevailing message of TV is to generate fear.' "[329] It has also been asserted that children can acquire new techniques of aggression merely by observing aggressive acts performed by filmed cartoon characters and that aggressive behavior learned by observation can be retained by children for as long as eight months.[330] More recently, on the basis of numerous additional studies, it has been asserted that televised violence can instigate viewers to acts of specific physical aggression and can teach viewers a general aggressive strategy.[331] The National Citizens Committee for Broadcasting (NCCB) has called television a "college of criminal instruction" and has cited several cases of apparent translation from screen to real life.[332]

A 1972 report by the Surgeon General[333] is perhaps the most exhaustive study of the subject to date. The Surgeon General took the position that the report indicates television violence does have an adverse effect on certain members of our society and that the causal relationship between televised violence and antisocial behavior is sufficient to warrant immediate action.[334]

The Surgeon General's conclusions, however, have not gone unquestioned.[335] More recent studies have produced contrary results. Dr. Stanley Milgram, a professor of psychology at the City University of New York, has been trying to find a connection between violence on television and violence in the community. Stating "I personally find the prevalence of violence on TV repugnant," he notes that thus far the evidence of a connection between television violence and community violence has not been compelling.[336] One study has concluded that "television is unlikely to cause aggressive behavior except perhaps 'in those few children who are emotionally disturbed.' "[337] Other studies have produced results that show that televised violence cannot instigate viewers to acts of specific physical aggression and cannot teach viewers a general aggressive strategy.[338] Although the National Citizens Committee for Broadcasting (NCCB) examples of apparent translation from screen to real life would seem to suggest a direct cause-and-effect

329. Waters, *supra* note 328, at 69. *See also* M. Gunther, pt. 2, *supra* note 320, at 40.

330. *Violence On Television*, *supra* note 321, at 306 (citing TASK FORCE, *supra* note 322, at 399-400).

331. *Regulation of Televised Violence*, *supra* note 321, at 1293.

332. M. Gunther, pt. 2, *supra* note 320, at 37. *See also* Waters, *supra* note 328, at 67.

333. TELEVISION AND SOCIAL BEHAVIOR: A TECHNICAL REPORT TO THE SURGEON GENERAL'S SCIENTIFIC ADVISORY COMMITTEE ON TELEVISION AND SOCIAL BEHAVIOR (1972).

334. *See* Note, *The FCC As Fairy Godmother: Improving Children's Television*, 21 U.C.L.A L. REV. 1290, 1297 n.39 (1974) [hereinafter cited as *FCC As Fairy Godmother*].

335. *See id.* at nn. 82-84 and accompanying text *supra*.

336. M. Gunther, pt. 2, *supra* note 320, at 35.

337. *Violence On Television*, *supra* note 321, at 306 (quoting H. HIMMELWERT, A. OPPENHEIM, & P. VINCE, TELEVISION AND THE CHILD 20 (reprint of Chapters 1-4 of book of same title published in 1958)).

338. *Regulation of Televised Violence, supra* note 321, at 1297 n.33.

relationship, not all scientists have felt that the relationship has been proven, even in cases of direct imitation.[339] Psychiatrist Melvin Heller and psychologist Samuel Polsky studied video violence for years with funds from ABC. This included research projects aimed at determining what factors may bear on a child's "inclination toward aggression" as well as attempting to correlate violence on television to actual behavior.[340] In a study of 100 young men in prison for violent crimes, Heller and Polsky could not find a single case in which television violence was a "causal" or "motivational" factor in the young man's violent behavior; they did, however, find cases in which a television show had affected the "style or technique" of a crime, like those cases cited by the NCCB. But in all these cases, the young man was already working himself up to a violent act; the television show merely affected the form of an act that allegedly would have occurred anyway.[341]

The laboratory experiments, however, have been qualified by the experimentors themselves as well as by others.[342] Bandura, for example, has cautioned that the aggressive behavior found in his experiments was not directed toward people.[343] Another qualification on the implications of the experiments with respect to length of retention is the fact that the retained responses were practiced at least once. Practicing immediately after observation in the experiment may distort the results of the study because in an uncontrolled environment such practicing immediately after observation is not likely to occur.[344]

The number and variety of studies that have been conducted are probably better evidence of the increasing public concern abut violence than they are evidence of any sort of consensus on the effect of televised violence. One major obstacle to finding significant results from the studies undertaken to date has been an inability to duplicate the child's actual

339. M. Gunther, pt. 2, *supra* note 320, at 37.

340. BROADCASTING, March 22, 1976, at 109-11.

341. M. Gunther, pt. 2, *supra* note 320, at 37.

342. *Violence On Television, supra* note 321, at 307 (footnotes omitted).

343. *Id.* (citing TV GUIDE, Nov. 15, 1969, at 35).

344. *Violence on Television*, *supra* note 321, at 307.

Other limitations on laboratory findings suggested are as follows: "the findings [may be] purely hypothetical because they were based on studies conducted under highly specialized conditions . . . . [T]he validity of drawing parallels between laboratory reactions to violent stimuli and the effects of television violence [have been questioned] because the reactions were measured in highly artificial ways such as preference for aggressive toys, verbal aggression directed at toys or physical aggression directed at bobo dolls." *Id.* at 307 (footnote omitted) (citing R. HARTLEY, THE IMPACT OF VIEWING AGRESSION: STUDIES AND PROBLEMS OF EXTRAPOLATION 12 (1964)). It should also be noted, however, that "Dr. Hartley's study was written for the industry-sponsored Joint Committee [for Research on Television and Children, formed in 1962] and was funded by CBS, casting some doubt on the absolute objectivity of her findings." *Violence on Television*, *supra* note 321, at 307 n.29.

experience with the television in his home and the many variables that may effect his reactions.[345] Another obstacle in these studies is that "violence cannot be measured like potatoes."[346] While several "violence indexes" have been developed, their developers often disagree sharply.[347] Although the studies have turned up a variety of interesting findings, the conclusions continue to be varied and, due to their very nature, imprecise.

Such nebulous, contradictory, and inconclusive findings do not establish a substantial or compelling governmental interest to the degree necessary to permit an invasion of First Amendment freedoms. This conclusion is reinforced by the Supreme Court's mandate that a system of prior restraints comes into court bearing a heavy presumption *against* its constitutional validity. The inconsistent and inconclusive findings of studies conducted to date on television sex and violence are insufficient to overcome this presumption and do not justfy infringement of First Amendment guarantees. The Court's decisions have firmly established that mere public intolerance or animosity cannot be the basis for abridgement of First Amendment Constitutional freedoms.[348] "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression."[349]

D. Vagueness and Overbreadth

1. *Vagueness*

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."[350] The doctrine of vagueness concerns the uncertainty or ambiguity of the terms of a challenged statute and is important for several reasons. First, the law must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. Vague laws do not give fair warning and may trap the innocent.

345. *Violence on Television*, *supra* note 321, at 307.

346. M. Gunther, pt. 2, *supra* note 320, at 7.

347. M. Gunther, *All That TV Violence: Why Do We Love/Hate It?*, pt. 1, TV GUIDE, Nov. 6, 1976, at 6 [hereinafter cited as M. Gunther, pt. 1].

One of the longest-running and best known indexes was developed by Professor George Gerbner, dean of the Annenberg School of Communications at the University of Pennsylvania. One week in the fall and one week in the spring are picked as samples and during the week 12 to 18 "coders" count the bits of violent material according to a complicated formula. From an analysis of these findings Gerbner and his colleagues produce a "Violence Profile" issued once a year. Gerbner's index, however, makes no distinction between humorous and serious depictions of violence. Other indexes have criticized this failure to distinguish situational violence. *Id.* at 7-8. *See also* Bergreen, *How Do You Measure Violence*, TV GUIDE, Nov. 5, 1977, at 6.

348. *See* Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971), and cases cited therein.

349. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 508 (1969).

350. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). *See generally* Note, *The Void-for-Vagueness Doctrine*, 109 U. PA. L. REV. 67 (1960).

Second, in order to prevent arbitrary and discriminatory enforcement, laws must provide explicit standards for those who apply and enforce them. Third, a vague statute can inhibit the exercise of First Amendment freedoms. Statutory terms with uncertain meanings can lead persons to avoid the boundaries of forbidden areas and thus have a chilling effect on speech, an effect that would be avoided by explicit limitations on the scope of the statute.[351] "[S]tandards of permissible statutory vagueness are strict in the area of free expression,"[352] and the prohibition against vagueness applies "with particular force in review of laws dealing with speech."[353] Not only may a vague law harm an individual, but it may also harm society as a whole due to the loss of free dissemination of ideas. The potential for self-censorship that arises from vague statutes has been a central concern of the Court, reflected by the fact that individuals have traditionally been allowed to assert First Amendment vagueness claims of third parties.[354] Thus, defendants whose own speech was unprotected have been allowed to challenge the constitutionality of a statute that either purported to prohibit or arguably inhibited the protected speech of third parties. In non-speech cases, however, the Court has usually insisted that a statute be evaluated in the context of the conduct with which an individual is charged.[355] Recently, however, the Court has limited the assertion of such claims to situations where " 'men of common intelligence must necessarily guess at its meaning' "[356] and the statute is not "readily subject to a narrowing construction by the state courts."[357]

In *Keyishian v. Board of Regents*,[358] the Court addressed a provision of New York's Education Law that made "treasonable or seditious" utterances or acts by teachers grounds for dismissal from the public school system. While an amendment to the statute defined "treasonable word or

351. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Baggett v. Bullitt, 377 U.S. 360, 372 (1964); Speiser v. Randall, 357 U.S. 513, 526 (1958). *See also* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

352. NAACP v. Button, 371 U.S. 415, 432 (1963). *See also* Note, *The Void-for-Vagueness Doctrine*, 109 U. PA. L. REV. 67, 75-85 (1960).

353. Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976). *See also* Smith v. California, 361 U.S. 147, 151 (1959); Winters v. New York, 333 U.S. 507, 509-10, 517-18 (1948).

354. *See* Gooding v. Wilson, 405 U.S. 518 (1972). *See also* Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); Street v. New York, 394 U.S. 576 (1969).

355. United States v. National Dairy Prod. Corp., 372 U.S. 29, 33 (1963).

356. Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). Vagueness claims may also be permitted in situations where the punished activity does not fall squarely within the statute's proscriptions. *See* Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973).

357. Dombrowski v. Pfister, 380 U.S. 479, 490-91 (1965). *See also* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 578-79 (1973).

358. 385 U.S. 589 (1967).

act'' and ''seditious word or act'' by reference to the New York Penal Law, the court found that the possible scope of ''seditious'' utterances or acts was virtually unlimited, and held that the statute was defective for vagueness.[359]

Likewise, the Court in *Interstate Circuit v. City of Dallas*[360] struck down as unconstitutionally vague an ordinance classifying films as ''not suitable for young persons'' if in describing or portraying criminal violence or depravity or in describing or portraying nudity, promiscuity, or extramarital or abnormal sexual relations, it was likely to incite or encourage delinquency or sexual promiscuity, or appeal to the prurient interest of young persons.[361] Justice Marshall stated:

> [It is not] an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children.[362]

On the same day that *Interstate Circuit* was decided, the Court upheld a statute in *Ginsberg v. New York*[363] that prohibited a person from knowingly selling to a minor under the age of seventeen any picture that depicted nudity in a manner defined in detail in the statute and that was considered ''harmful to minors'' in that it '' 'predominantly appeals to the prurient, shameful or morbid interest of minors, . . . is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and . . . is utterly without redeeming social importance for minors.' ''[364] The Court in *Ginsberg* noted that the ''girlie'' magazines involved in the sales were not obscene for adults[365] but that '' 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.' ''[366] The Court found two interests that formed a rational basis for the legislature's determination to limit the exposure of this material to minors.[367] First, parents, teachers, and others primarily responsible for children's well-being were entitled to the support of laws designed to help them discharge their responsibilities. Second, the prohibition against sales to minors did not bar parents who desired to do so from purchasing the magazines for their children.[368] The

359. *Id.* at 599-604.
360. 390 U.S. 676 (1968).
361. *Id.* at 681.
362. *Id.* at 689.
363. 390 U.S. 629 (1968).
364. *Id.* at 633.
365. *Id.* at 634. *See also id.* at 635; see notes 150-55 and accompanying text *supra*.
366. Ginsberg v. New York, 390 U.S. 629, 638 (1968) (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)) (footnote omitted).
367. 390 U.S. at 639.
368. *Id.*

Court also noted the state's independent interest in the well-being of its youth.[369]

The Court has thus recognized that the exercise of particular First Amendment rights may fly in the face of the public interest in the health of children.[370] The Court has also acknowledged the existence of a special societal interest in protecting children from sexually explicit materials.[371] These special interests may well be reinforced by the fact that a television broadcast intrudes into the privacy of the home. The Court has held that the individual's right of privacy is entitled to greater protection in his home than the right may command outside of his home.[372] But the Court has also held that an individual's right to possession of even obscene materials in his home is protected.[373] Although the right to privacy and the right to possession would seem to be in tension when applied to television broadcasts into the home, the tension is relieved once an individual decides which right to exercise.

These First Amendment guarantees presuppose, however, that the individual making the choice is possessed of full capacity for individual choice.[374] The obvious concern underlying the FVH policy is that children are not possessed of the full capacity to exercise individual choice due to their age. The policy is, however, misguided because the power of decision as to what is "inappropriate for viewing by a general family audience" is vested with the Code Board rather than with the parents. As the Court noted in *Ginsberg*, the parents have primary responsibility for their children's well-being. Although the interests of some parents in discharging that responsibility may be supported by the FVH policy, the interests of other parents may well be preempted by the policy. In *Ginsberg* the Court also observed that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."[375] The Court commented favorably that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children."[376] The FVH policy, however, constitutes an absolute prohibition against par-

369. *Id.* at 640.

370. Prince v. Massachusetts, 321 U.S. 158, 169-70 (1944) (mentioning emotional excitement and psychological or physical injury).

371. Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975); Miller v. California, 413 U.S. 15, 18-19 (1973); Ginsberg v. New York, 390 U.S. 629, 638-39 (1968).

372. *See* Rowan v. United States Post Office Dep't, 397 U.S. 728, 737-38 (1970).

373. Stanley v. Georgia, 394 U.S. 557, 559 (1969). "The right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." *Id.* at 564.

374. Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).

375. 390 U.S. at 639.

376. *Id.* (footnote omitted).

ents who desire their children to view the type of programs proscribed during the FVH period.

The FVH policy's method of "protecting" children is also objectionable because it is overprotective. Notwithstanding the *Ginsberg* recognition of permissible protection exceeding the adult standard, the Court has held that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [children]."[377] Children may not be regarded as passive recipients of only that which the state chooses to communicate and they may not be confined to only those sentiments that are officially approved.[378] "In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors."[379] The fact that the FVH was purportedly adopted to protect children from harmful programming does not, therefore, provide a defense to its vagueness. The same standards of precision of regulation apply whether the policy is designed to protect children or adults.

Finally, it should be noted that a distinguishing feature of the statute upheld in *Ginsberg*, which was lacking in the ordinance struck down in *Interstate Circuit*, was that in *Ginsberg* the statute contained very specific and detailed definitional sections. The *Ginsberg* statute provided a definitional standard to its proscriptions, whereas the *Interstate Circuit* ordinance did not, and was, therefore, unconstitutionally vague. Like the ordinance in *Interstate Circuit*, and the unconstitutional system of classification that it established, the FVH policy appears unconstitutionally vague. Its interpretation and enforcement depend on the subjective judgment of the individual editor or censor applying the policy.[380] When Richard Kirschner, CBS' Vice President of Program Practices—Hollywood, was asked by Allan Burns, the producer of "Rhoda," for his definition of "suitable for family viewing," Kirschner replied that the best definition he could give was the one offered by Tom Stafford, CBS Vice President of Program Practices, " 'We'll know it when we see it.' "[381] Indeed, common sense dictates that what is deemed

377. Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975).

378. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 511 (1969).

379. Erznoznik v. City of Jacksonville, 422 U.S. 205, 214 (1975) (footnote omitted).

380. 423 F. Supp. at 1124-26.

381. Plainiffs' Opening Post-Trial Brief at 76 (citing Reporter's Transcript at 3520, Writer's Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976)). This language is very similar to that of Justice Stewart in his concurring opinion in Jacobellis v. Ohio, 378 U.S. 184 (1964). Commenting on a French film called "*Les Amants*" and what constitutes hardcore pornography, Justice Stewart wrote: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that." 378 U.S. at 197 (Stewart, J., concurring) (emphasis added).

"suitable for general family viewing" can have as many variations as there are persons involved in making the determination. The FVH test of "inappropriate for viewing by a general family audience" is itself virtually unlimited and provides little in the way of guidance toward an ascertainable standard as to what can and cannot be shown during the FVH period. The statutory scheme struck down in *Interstate Circuit*[382] included an exhaustive list of definitions, whereas the FVH amendment to the NAB Television Code includes no definitions by which network censors are to determine what is and what is not "inappropriate for viewing by a general family audience."[383] Such an absence of standards is at least as objectionable, if not more so, than the vague standards that the Court struck down in *Interstate Circuit*. Thus, even if the FVH were to survive other constitutional requirements, it would still fail under a vagueness analysis.

2. *Overbreadth*

When a statute or ordinance regulates too broadly, it sweeps within it not only conduct that can be constitutionally prohibited but also conduct or speech that is constitutionally protected. The focus of the overbreadth concept is the possibility that the regulation may proscribe protected speech; it is the challenged statute's potential for chilling such speech that is the dispositive factor.[384] A statute need not be vague in order to be overbroad. "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct."[385] "[The] Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[386]

The Court strikes down overbroad statutes in order to defuse this deterrent or chilling effect on protected activity.[387] "Broad prophylactic

382. 390 U.S. 676 (1968).

383. TELEVISION CODE, *supra* note 11, at 2-3. See text accompanying note 313 *supra*.

384. In Broadrick v. Oklahoma, 413 U.S. 601 (1973), the potential application of the doctrine in the area of facial overbreadth was narrowed to exceptional cases in which the overbreadth was both real and substantial, *id.* at 615, and in which a limiting construction had not been or could not be placed on the statute by a state court, *id.* at 613. The Court recognized the continuing importance of this doctrine for the protection of speech, however, by finding that the case for striking down a law on overbreadth grounds was most weak when conduct rather than pure speech was at stake. *Id.* at 615. The *Broadrick* concept was reiterated in Arnett v. Kennedy, 416 U.S. 134 (1974), in which the overbreadth claims of the plaintiffs were dismissed because the challenged law was "not directed at speech as such, but at employee behavior, including speech, which is detrimental to the efficiency of the employing agency." *Id.* at 162. *But cf.* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).

385. Grayned v. City of Rockford, 408 U.S. 104, 114 (1972).

386. NAACP v. Alabama, 377 U.S. 288, 307 (1964).

387. Gooding v. Wilson, 405 U.S. 518, 521-22 (1972). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

rules in the area of free expression are suspect. Precision or regulation must be the touchstone in an area so closely touching our most precious freedoms."[388] Precise regulation is essential; "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[389] A statute that burdens free speech must thus employ the least restrictive alternative.

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.[390]

It is the power of censorship inherent in an overbroad statute that triggers this close examination by the judiciary.[391] In *Keyishian v. Board of Regents*,[392] for example, the Court held that the statutes involved were impermissibly overbroad. By proscribing mere knowing membership in the Communist Party without any showing of a specific intent to further unlawful aims, the statutes barred both association that could be proscribed and association that could not be proscribed consistently with First Amendment rights.[393] In effect, the challenged statute swept so broadly that it inhibited the exercise of constitutionally protected rights.[394]

The FVH policy is overbroad as well as vague. Even if it were an appropriate suppression of some speech, because of its overly broad character the FVH policy is virtually certain to suppress other speech that would be subject to constitutional protection. Such suppression of protected speech due to a vague or overly broad proscription is unacceptable. As courts have noted, the doctrines of vagueness and overbreadth are applied "quite rigorously when a statute is directed at 'pure speech,' . . . or its expressive content."[395]

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388. NAACP v. Button, 371 U.S. 415, 438 (1963) (citations omitted).

389. *Id.* at 433.

390. Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnote omitted). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). *See also* United States v. Robel, 389 U.S. 258 (1967); Talley v. California, 362 U.S. 60 (1960).

391. *See* Saia v. New York, 334 U.S. 558, 562 (1948).

392. 385 U.S. 589 (1967).

393. *Id.* at 609.

394. *See* Shelton v. Tucker, 364 U.S. 479 (1960). In that case the Court invalidated a statute that required all public school teachers to file annual lists of every organization to which he or she belonged or gave money during the previous five years. "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.* at 488. "The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry . . . ." *Id.* at 490 (footnote omitted).

395. Adamian v. Jacobsen, 523 F.2d 929, 933 (9th Cir. 1975).

The defendants in *Writers Guild* contended that the only "harm" that the plaintiffs suffered was that the FVH policy "caused them some irritation, [consumption of] time in discussions with network standards and practices people and, perhaps, to expend a bit more creativity and ingenuity in developing their product."[396] The court stated, however, that "[t]he plaintiffs have introduced evidence which shows harm not to show that harm but to demonstrate the effectiveness of the NAB as a vehicle and to demonstrate the vagueness of the family viewing policy."[397] Danny Arnold, the producer of "Barney Miller," testified that following the inception of the FVH the potential for reasoned compromise in his negotiations with network censors was gone and that the atmosphere became one of "tension and fear and pressure and self-censorship."[398] Larry Gelbart, a former co-producer of "M*A*S*H," also testified that despite every effort to avoid it, in the family viewing regime, "[t]here's a self-censorship that goes on no matter how much you are trying to bolster the other guy. When you get a call that attacks four out of ten ideas that you've submitted, you begin to see any new ideas you're getting in light of that."[399] The court concluded that "[s]ignificant self-censorship was evident. Characters were not developed, themes were not explored, language was deleted—all in response to network adherence to family viewing principles."[400]

In this regard, David W. Rintels, President of Writers Guild of America, West, and Larry Gelbart, former co-producer of "M*A*S*H" and a member of the Writers Guild Board of Directors, testified as follows before the Communications Subcommittee of the House of Representatives:

> [T]here is explicit violence on TV. There is not explicit sex. We are all at least somewhat clear about what we mean by violence. But by sex on TV we mean so much, and the least of it seems to be the sex act itself. Sex on television means, to a large extent, talk. Talk about homesexuality, talk about abortion, talk about birth control and prostitution and premarital or post-marital relationships. It means jokes and discussions. It means a whole vast area of important human concern.
>
> . . . .
>
> We want the right, not just in our own interest, but in the country's, to be able to discuss mature themes on television, to illuminate our concerns and yours. We think more freedom, freedom with responsibility, is the answer, instead of more censorship.[401]

396. 423 F. Supp. at 1125.

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.* at 1126 (footnote omitted).

401. *Hearings of the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 140-41 (Aug. 17, 1976) (joint statement of Larry

Not only do the concepts of vagueness and overbreadth often overlap in the same case, but they also appear in conjunction with the doctrine of least restrictive means. The requirement that a statute restricting speech must be limited to the least restrictive means is an alternative formulation of the rule that such a statute cannot be overbroad.[402] Thus, statutes that impinge on the right of free speech are subject to close judicial scrutiny to insure that they are in fact narrowly tailored and that they further a substantial state interest.[403]

A unique consideration when applying a least restrictive means analysis to the broadcasting of sex and violence is that "[r]adio and television . . . do not readily yield to an analysis that for constitutional purposes separates children from the adult audience."[404] While magazine and book sellers can be prohibited from selling to a person under a certain age and a movie theatre owner can likewise be prohibited from admitting young persons, the broadcast media enter directly into the living room.[405] This dimension of the problem is illustrated by the holding in *Butler v. Michigan*[406] that a statute that prohibited adult sales of books containing immoral or lewd language or pictures tending to corrupt the morals of children was unconstitutional. The Court found that the result of the statute was to "reduce the adult population of Michigan to reading only what is fit for children,"[407] thereby curtailing an individual liberty that is one of the "indispensable conditions for the maintenance and progress of a free society."[408] The Court reasoned that the state's use of its power to quarantine reading material from adults in order to protect the innocence of children was analogous to "burn[ing] the house to roast the pig."[409] Similarly, the

Gelbart and David Rintels with the unanimous endorsement of Writers Guild of America, West's board of directors).

402. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 489 (1960); Schneider v. State, 308 U.S. 147, 161 (1939).

403. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) ("the incidental restriction on . . . First Amendment freedoms is *no greater than is essential* to the furtherance of that interest") (emphasis added); Dennis v. United States, 341 U.S. 494, 510 (1951) (" 'justifies such invasion of free speech *as is necessary* to avoid the danger' ") (emphasis added) (quoting United States v. Dennis, 183 F.2d 201, 212 (1950)). *See also* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 98-99 (1972): "Any 'time, place and manner' restriction that selectively excludes speakers from a public forum must survive careful judicial scrutiny to ensure that the exclusion is the *minimum necessary to further a significant government interest*;" Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 28 (1975) (emphasis added).

404. Note, *Morality and Broadcast Media: A Constitutional Analysis of FCC Regulatory Practices*, 84 HARV. L. REV. 664, 682 (1971).

405. *Id.* at 682-83.

406. 352 U.S. 380 (1957).

407. *Id.* at 383.

408. *Id.* at 384.

409. *Id.* at 383.

consequence of the FVH on the type of programming available to the adult population during the FVH seems to be a severe and unacceptable solution to the problem of minimizing adverse effects of television on children.

Several alternatives have been suggested to provide a method of protecting the programs that children watch without limiting adults to the same choice of programs. In testimony before the Communications Subcommittee of the House of Representatives,[410] Geoffrey Cowan, a specialist in communications law, presented two means of government action that would be less restrictive than the FVH policy but that would properly make and enforce meaningful choices in what children could watch on television. First, he suggested that government could adopt rules that would assure that at least one program designed for children would be available to viewers at all times during the hours between 7:00 and 9:00 p.m. Cowan explained that the government could require each broadcaster to air a minimum number of hours of prime-time programming specifically designed for a younger audience. The rule would be written in such a way that there would be at least one children's show available each night between the hours of 7:00 and 9:00 p.m.

Another method of increasing the volume of children's programming that Cowan feels would present even fewer constitutional problems, but would be more strenuously resisted by the commercial television industry is to create a non-commercial Children's Television Network that would utilize channels now assigned to commercial users. Under this plan the FCC, instead of just allocating frequencies, would set aside *hours* for the presentation of non-commercial children's programming. Present licensees would have their licenses renewed for their assigned frequency but only for twenty-two or twenty-three hours per day. Private grants and governmental subsidy could establish the Children's Television Network that would send shows to individual licensees.[411]

Another approach that could be implemented are technological or safety devices that are analogous to the safety caps on aspirin bottles or safety locks on automobiles. Noting that a child of two or three has full mastery of a television and can turn the switch on and watch and hear a program designed for people at least ten times his age, Cowan suggested that a lock on the on-off switch would be the easiest way to put control back in the hands of the parents. A more technically complex type of lock would be a lock on specific channels. This would allow a child to turn the set on or off but restrict him to a certain station or stations. This device would be

410. *Hearings of the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 148 (Aug. 17, 1976) (testimony of Geoffrey Cowan).

411. For a more detailed discussion of this plan, see *FCC As Fairy Godmother, supra* note 333, at 1332-38.

particularly desirable if the government assured that a children's program was always available on at least one network during the early evening hours.[412]

Although these alternatives do not purport to be an exhaustive list, they certainly suggest that alternatives probably exist that are less severe in form than the FVH policy but that address themselves to the same problems the FVH was designed to remedy.

Conclusion

It is evident that the public is quite concerned about the amount of violence in our television diet. Recent manifestations of this concern include: an attempted week-long boycott sponsored by Build the Earth, a San Francisco Bay area group, aimed at demonstrating the public's increasing opposition to TV violence,[413] a campaign against violent programming by the National Parent Teacher Association (PTA),[414] and a statement by the president of the American Medical Association (AMA) that "TV violence is both a mental health problem and an environmental issue"[415] as well as an announcement that the AMA has asked ten major corporations to review their policies about sponsoring excessively gory shows.[416] Among other groups mobilized against violent programming are the NCCB, the National Council of Churches, and the Southern Baptist Convention.[417] Advertising agency J. Walter Thompson Co. has been encouraging its clients to avoid placing advertising spots in shows perceived to be violent.[418] J. Walter Thompson believes that negative viewer reaction to violent programs takes away from the advertisement's selling power, despite what the gross rating points may indicate.[419] While many groups are undoubtably concerned about the amount of violence on television and its effect on our society,

412. *Hearings of the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 152 (Aug. 17, 1976) (testimony of Geoffrey Cowan).

413. San Francisco Chronicle, Feb. 26, 1977, at 16, col. 1. *See Advertisers Take Aim on TV Violence*, MEDIA DECISIONS, Feb. 1977, at 65 [hereinafter cited as MEDIA DECISIONS].

414. Waters, *supra* note 328, at 64. The 6.6 million member organization has begun a series of regional forums designed to arouse public indignation over television carnage. If that campaign is unsuccessful, the PTA is considering organizing station-license challenges and national boycotts of products advertised on offending programs. *Id.*; MEDIA DECISIONS, *supra* note 413, at 65; Torgerson, *Violence Takes a Beating*, TV GUIDE, June 4, 1977, at 6 [hereinafter cited as Torgerson].

415. Waters, *supra* note 328, at 64. *See also* Henninger, *Violence on Television*, THE NATIONAL OBSERVER, Feb. 22, 1977, at 12, col. 2 [hereinafter cited as Henninger]; BROADCASTING, July 5, 1976, at 35.

416. Waters, *supra* note 328, at 64; Torgerson, *supra* note 414, at 6.

417. Henninger, *supra* note 415, at 12, col. 1.

418. BROADCASTING, Aug. 30, 1976, at 24; MEDIA DECISIONS, *supra* note 413, at 66.

419. BROADCASTING, Oct. 18, 1976, at 44; BROADCASTING, Aug. 30, 1974, at 24; MEDIA DECISIONS, *supra* note 413, at 66.

"[c]ivil libertarians have always argued that the significance of the First Amendment is that it protects even the least attractive forms of expression—and that includes . . . portrayals of violence. However, the public's right to protect its common good is always in tension with an absolutist intrepretation of the First Amendment . . . ."[420]

It is clear *only* that a variety of competing interests are involved in considerations of what shall and shall not be broadcast: the right of access to disseminate ideas, the right of the viewer to a well-balanced and diverse programming diet, the right of an individual to privacy in his home—both to receive and not to receive material that may be offensive to some, the interest of society in protecting children from potentially harmful materials, and the rights of the broadcasters to be free from government interference, to name just a few. In light of these substantial and competing interests it is important to bear in mind the reason speech is afforded constitutional protection: "[It] is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . ."[421] Because of the high value traditionally placed upon free expression and its interrelationship with a democratic society,[422] only a serious and compelling societal interest should be permitted to override the First Amendment guarantee of free speech;[423] even if a compelling interest should be established, the least restrictive means of achieving this interest must be employed.

While the evidence does seem to support some correlation between violence on television and aggressive behavior *in some people, under some circumstances*, the question is whether or not this is the sort of compelling governmental interest necessary to override a fundamental interest such as that of freedom of expression. Until a more precise and substantial body of evidence exists proving that televised violence affects a significant portion of the population adversely, the government cannot and should not interfere with or regulate broadcast content.

420. Wall, *Violent Movies on TV Risk Censorship Move*, L.A. Times, Jan. 2, 1977, Part VIII, at 2, col. 1.

421. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

422. See text accompanying note 316 *supra*.

423. *See* Martin v. City of Struthers, 319 U.S. 141 (1943).