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Standing Up for Listeners’ Rights: A History of Public Participation at the Federal Communications Commission

by

Amy Lyn Toro

B.A. (University of Virginia) 1988
J.D. (University of California, Berkeley) 1994

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Introduction

The legal doctrine of standing regulates access to the federal courts. In a 1923 case, *Frothingham v. Mellon*, the Supreme Court limited citizen or taxpayer standing.\(^1\) It held that people who claimed an injury based solely on their status as citizens or taxpayers would not be granted a forum in the federal courts, because their grievances were too general and undifferentiated from the populace as a whole. Instead, these citizens and taxpayers should seek redress of their grievances in the political branches of government. Similar doctrines restricted the extent to which citizens could intervene in formal administrative proceedings. Prior to the 1960s, intervention before federal administrative agencies was typically limited to members of the regulated industry. Beginning in the mid-1960s, the federal courts lowered barriers for citizen standing and intervention.\(^2\)

In 1966 the D.C. Circuit ushered in a new era of citizen standing at the Federal Communications Commission ("FCC" or "the Commission") when it extended standing to broadcast viewers and listeners in *United Church of Christ v. FCC*. This case set the stage for the development of a public interest movement in broadcasting that featured specialized public interest law firms located in Washington, D.C. The fortunes of this movement have waxed and waned, but public participants have become a permanent feature of administrative process at the Federal Communications Commission. However,

\(^2\) Except in the rare instance where the distinction is relevant, this dissertation uses the term
social reform groups have been an important part of the interest group landscape for longer than is generally recognized. Prior to 1966, there existed a broadcast reform movement, a precursor to the public interest movement. The leaders of this earlier movement actively participated at the FCC despite their lack of standing to appeal to the courts. Public participants have consistently represented minority interests in broadcasting, have promoted diversity of viewpoint over the airwaves, and have encouraged fairness in broadcasting. Although their substantive agenda has remained fairly constant, public participants over time transformed their procedural strategy. Initially, they sought to legitimate the FCC's regulatory authority. Later, they shifted their priorities and demanded a court-sponsored right to participate in agency proceedings and to challenge agency action.

**Interest Groups and the Politics of the Administrative State**

A prominent theme found in scholarship on regulatory agencies is the ability of industry groups to successfully "capture" an agency, such that the agency simply regulates according to the interests or wishes of the regulated industry. Scholars have taken special note of industry influence over the independent federal agencies prior to the 1960s. Although these studies vary in their conclusions about the degree and causes of capture, they present a bipolar

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"citizen standing" to both standing and intervention.

model focusing on the relationship between the regulator and the regulated industry, or they describe the agency's role in favoring one industry over another competitor. Interest group scholarship on the FCC has been written in this vein, with emphasis on the influence of the broadcast industry. For example, Bernard Schwartz's The Professor and the Commission, provides vivid examples of the influence and power of the broadcast industry over the Commission in the 1950s.4

In contrast, scholars have viewed post-1960s regulation as far more polycentric.5 This "dramatic increase in the interest-representation functions assumed by regulatory agencies since the 1960s"6 is typically attributed, in part, to the inclusion of "formal intervenors and consumer and professional groups" into "traditional areas of . . . regulation."7 Scholars generally credit the federal courts with causing this transformation: when the "courts declared that previous administrative practices had systematically underrepresented some groups in American society," then "consumer, minority, environmental, and women's groups, backed by the force of law, waged political battles in arenas traditionally limited to access by business alone."8 Scholars differ over whether this

4 Bernard Schwartz, The Professor and the Commissions (1959).
7 Id.
8 Id.
transformation in the administrative state is on balance positive or negative.\textsuperscript{9} Yet there has been broad consensus that such a transformation took place during the 1960s and 1970s.

The stark contrast that scholars have presented between these two historical periods emerges from the premise that "the public" was simply not interested in or involved in federal regulation prior to the 1960s. Professor Samuel P. Hays writes, for example, that "the public played little if any direct role in the regulatory system."\textsuperscript{10} Rather, says Hays, the "interested parties who did take part were producers, . . . there were few consumer or other public interest representatives."\textsuperscript{11} Hays' approach simply echoes the assumption made throughout the historical and legal literature that the range of interest groups interested in and involved in the regulatory process was quite narrow prior to the 1960s. As this study will demonstrate, however, this premise does not hold true for the FCC. In a number of regulatory arenas, social reform groups played an important role. Thus, the standard capture story must be revisited.

**The FCC and the Politics of Broadcast Policy**

Professor Thomas McCraw has incisively characterized regulation as "an institution capable of serving diverse, even contradictory, ends, some economic,

\textsuperscript{10} Samuel P. Hays, Political Choice in Regulation, in McCraw, ed., Regulation in Perspective, at 146.
\textsuperscript{11} Id. at 146.
some political, some cultural.”\textsuperscript{12} The Federal Communications Commission's regulation of broadcasting has forced its Commissioners to balance these economic, political and cultural concerns.\textsuperscript{13} The FCC's initial task in broadcast regulation was to allocate the spectrum and assign pieces of it to different users. Radio regulation officially began with the 1912 Radio Act, but Herbert Hoover's Department of Commerce initiated the first substantive federal regulation of the airwaves in the 1920s. In 1927 Congress transferred this responsibility to the Federal Radio Commission, and then, in 1934, to the Federal Communications Commission.

Congress declined to nationalize the airwaves as other nations have done, and adopted a relatively laissez-faire, competitive approach consistent with the structure of commercial broadcasting that had begun to emerge.\textsuperscript{14} Congress established a bipartisan independent commission—the Federal Radio Commission, which was charged with regulating the broadcast spectrum according to the “public interest, convenience and necessity.”\textsuperscript{15} Although the phrase derived from the field of public utility regulation, Congress explicitly rejected a common carrier scheme for broadcast regulation.\textsuperscript{16} However, it made

\textsuperscript{12} Thomas McCraw, Regulation in America: A Review Article,” Business History Review 49 (Summer 1975): 180.
\textsuperscript{14} The military was the party most interested in nationalization, but when the Secretary of the Navy tried in 1918 and 1919 to nationalize the airwaves, his pleas fell on deaf ears. Such an approach was never seriously considered again, although the President was given explicit control over the airwaves during national emergencies. See Ithiel de Sola Pool, Technologies of Freedom 109-12 (1983).
\textsuperscript{16} De Sola Pool, Technologies of Freedom 109-12 (arguing that none of the conditions encouraging national ownership in Europe were present in the United States); id. at 136-38
clear that broadcasters could not develop common-law property rights in the spectrum.\textsuperscript{17} Congress provided little additional guidance to the Commission on how to regulate its licensees. On the one hand, the Commission was charged to regulate according to the public interest. On the other hand, Congress prohibited the Commission from engaging in "censorship" of the airwaves.\textsuperscript{18} The unclear meanings of "censorship" and the "public interest," and the tension between them, would provide debates over the authority of the Commission to the present day. Representatives of the broadcast industry and others argued that the "no-censorship" provision required the FCC to exercise no control over the programming content of stations. Others, such as Professor Zechariah Chafee, Jr., argued that program content was within the Commission's mandate: the statute "does not forbid evaluation of the total performance of a station," and that the censorship provision refers to "the sort . . . which went on in the seventeenth century in England—the deletion of specific items and dictation as to what should go on in particular program."\textsuperscript{19} Despite its lean quality, the Radio Act of 1927 established the basic framework for broadcast regulation for decades. When the Radio Commission began operation in the late 1920s, it took a Hooverian

\textsuperscript{17} Thomas W. Hazlett, The Rationality of U.S. Regulation of the Broadcast Spectrum, 33 J.L. & Econ. 133 (1990), argues that the property rights in spectrum were precisely what Congress feared.
\textsuperscript{18} Pub. L. No. 632, § 29.
\textsuperscript{19} Zechariah Chafee, Jr., Government and Mass Communications 641 (Hamden, CT: Archon Books, 1965) (two volumes in one).
"associationalist" approach, seeking to enlist the industry as its ally, not opponent.\textsuperscript{20}

Much of the recent scholarly debate has analyzed this early history of radio regulation.\textsuperscript{21} The first strand of literature focuses on the question of the "scarcity rationale" for justifying federal control over the allocation of the airwaves. The premise underlying much of this scholarship is that the regulatory apparatus is an inefficient way to allocate the spectrum. Ronald Coase and others have long criticized American broadcast licensing and recommended auctions as a more efficient approach to spectrum allocation.\textsuperscript{22} Thomas Hazlett and others have pointed out that the airwaves could have been allocated through a common law method without the need for a federal regulatory scheme.\textsuperscript{23} Scholars seeking explanations for why such an inefficient system was established have turned to political explanations for the imposition of broadcast regulation.

A second group of scholars, more typically communications scholars, have looked at this early history as a battle between commercial and noncommercial interests. Nonprofit organizations including educational institutions, churches and the Chicago Federation of Labor, were early owners and operators of AM


stations. Some of these stations were durable, but most failed. By the 1940s, nonprofits were largely absent from, or marginalized within, the broadcast industry, and commercial broadcasting dominated the airwaves. These historians focus on how commercial broadcasters manipulated the regulatory process and convinced the FCC assist them in their drive to eliminate noncommercial broadcasting.

Although the much of the literature on the early FCC focuses on the establishment of broadcast regulation and the early allocation of airwaves, the Commission also regulated station programming. Surprisingly, however, there has been little study of the politics of early broadcast content regulation. In The Fairness Doctrine and the Media, Professor Steven J. Simmons provides a doctrinal history of the Commission’s Fairness Doctrine, which required broadcasters to air balanced treatment of controversial issues. He spends little time, however, recounting the political and cultural backdrop of the struggles for and against the Fairness Doctrine. A few works written contemporaneously with the development of broadcast program regulation remind us of the vibrant political struggles over FCC program regulation. This history needs to be resurrected and expanded.

The minimal analysis of the role of interest groups in early FCC program regulation provides a stark contrast to the focus on interest groups in studies of

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24 See Nathan Godfried, WCFL: Chicago’s Voice of Labor, 1926-78 (1997); Lizbeth Cohen, Making a New Deal 133 (1990). These nonprofit broadcasters, including educational institutions, in fact, made up a substantial portion of radio stations in 1925. Id.
25 Noncommercial broadcasting typically meant that not sponsored by advertisers, while non-profit ownership did not imply advertiser-free programming.
26 Steven Simmons, The Fairness Doctrine and the Media (1978).
program regulation after 1960. Erwin Krasnow et al.'s *The Politics of Broadcast Regulation* analyzes the role of different interest groups in broadcast policymaking, and Fred Friendly's *The Good Guys, the Bad Guys and the First Amendment* provides an account of the politics of program regulation, with its discussion of several important cases, including *United Church of Christ v. FCC*, and *Red Lion v. FCC.*28 Similarly, several dissertations on the *UCC* cases provide ample background for understanding the underlying political struggles of that case. However, the lack of political analysis of the origins of broadcast program regulation leaves us with a skewed vision suggesting that the politics surrounding broadcast content were invented only after 1960.29

**Social Reform Groups and the Federal Communications Commission**

An examination of the political struggles over program regulation reveals the continuous presence of social reform groups as participants in the FCC's broadcast policymaking. While historians of public participants in broadcast policy have recognized the presence of public interest groups after 1965, they have fallen short in their examination of the role of social reform groups at the Commission prior to the 1960s.

Most scholars have assumed that in a world without citizen standing, there were few opportunities for public participation. This failure to recognize early

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29 The most comprehensive dissertation on the *United Church of Christ* litigation is Stephen D. Classen, *Broadcast Law and Segregation: A Social History of the WLBT-TV Case* 157 (Ph.D
participation is exacerbated by the tendency of some scholars to equate public participation with spontaneous uprisings of local, "ordinary" citizens, thereby failing to recognize other forms of participatory activity. 30 Scholars searching for the precursors of public participation at the FCC have found them in the radio listening groups and listener councils that existed from the 1920s to the 1940s. Listening groups were akin to today's book groups, however, they were not politically active. The listener council focused on citizen interaction with broadcasters regarding programming issues, and typically included local civic leaders among their membership. These councils could have brought their grievances to the FCC, but, in fact, they did not. They had little or no involvement in challenging broadcasters through the licensing activity of the Commission, and had no noticeable role in policymaking at the Commission. 31 They had no real connection to the later public interest movement in broadcasting.

Listener groups and councils were not the only ones interested in broadcast reform during the 1930s and 1940s. National social reform groups participated in Commission activities during this era, and they laid the groundwork for the development of a judicial model of public participation in a later era. Robert


30 See, e.g., Barry Cole and Mal Oettinger, Reluctant Regulators: The FCC and the Broadcast Audience at 65 (1978). They argue that citizen groups in the 1940s and 1950s generally directed their attention to sponsors, networks and stations, and that while citizen groups occasionally submitted comments in general rulemaking, they took no part in FCC licensing proceedings. The evidence in this chapter undermines this premise. Similarly, Donald L. Guimary, Citizen's Groups and Broadcasting (1975), devotes substantial attention to listener groups and radio councils, with no mention of the cases and groups discussed here.

31 Morris Ernst, First Freedom 179 (1946). In 1946, a time described by scholars as reflecting tail end of these movements, Ernst described the groups as underdeveloped: community radio councils are being formed to serve as forums for persons interested in program content and intellectual use of radio. Parents, educators, . . . and minority groups are particularly active in the functioning forums of Cleveland and Columbus and the newly organized council in New York.
McChesney began to fill the "historical vacuum" which left the "broadcast reform movement... marginalized and distorted beyond recognition."  His history of social reform groups and broadcast policy demonstrates the important role played by the American Civil Liberties Union (ACLU) along with labor, religious, educational and other reform groups in opposing the commercialization of broadcasting. However, his study ends in 1934. McChesney's particular concern about whether the broadcast system would be predominantly commercial, or not, led him to conclude that, by 1940, the broadcast reform movement had died without succeeding in achieving its goal of noncommercial radio. This description of the decline of the broadcast reform movement is misleading.

Some of the groups that McChesney describes as abandoning broadcast reform renewed their efforts to reform the FCC. They continued to try to influence FCC policymaking long after the commercial nature of the airwaves had been established. In addition, new groups that had not participated in the battles of the late 1920s and early 1930s, emerged to fight for broadcast reform. These organizations continued the broadcast reform movement, albeit with more limited objectives. Although McChesney is correct in arguing that social reform groups accepted commercial broadcasting as here to stay, they continued to fight for reform within the system. In doing so, they created the real roots of public participation at the Commission.

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32 McChesney, Telecommunications, Mass Media and Democracy, at 255.
33 For related arguments, Thomas W. Hazlett, The Rationality of U.S. Regulation of the Broadcast Spectrum, 33 J.L. & Econ. 133 (1990) (arguing that nonprofits clearly lost the battle and implying that they were foolish to have argued for federal regulation); Thomas Streeter, Selling the Air: A Critique of the Policy of Commercial Broadcasting in the United States (1996) (echoing's McChesney views).
The Transition from the New Deal State to the Public Interest State

The presence of social reform groups during an earlier era provides the opportunity to examine public participation in two settings: the post-New Deal state of the 1940s and 1950s, and the public interest state of the 1960s and 1970s. Previous studies have examined social reform groups largely in the context of a rights-based approach to law that developed in the 1960s. In this study, I shall also analyze the interaction between social reform groups and administrative agencies in the context of a New Deal ideology that emphasized the importance of supporting agency authority and legitimacy. Despite the strong interest of social reform groups in the business of the Commission, these groups did not seek a right to participate in agency processes prior to the 1950s. Instead, they relied on the Commission’s discretion in permitting them to participate. This deference to the Commission does not suggest that these groups were non-litigious or informal. Rather, they directed their attacks toward the broadcast industry rather than toward the Commission.

Gradually, however, social reform groups transitioned from legitimating the New Deal regulatory state to advocating the right to participate in administrative proceedings. Administrative law scholar Walter Gellhorn astutely observed in 1956 that “the defenders and detractors of the administrative process ha[d] all but exchanged roles, and ha[d] done so with almost unbelievable abruptness.”

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34 See, e.g., Michael McCann, Taking Reform Seriously: Perspectives on Public Interest Liberalism (1986); see also Michael McCann, Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization (1994).
By 1960, social reform groups abandoned their allegiance to the FCC and turned to a rights-based approach. Liberals became increasingly disillusioned with the administrative state as a more conservative FCC abandoned its commitments to social reform and became less responsive to social reformers. Fewer social reform groups participated at the Commission during the 1950s. Yet, those participants who remained active increasingly demanded a right to participate, refusing to rely on the largesse or discretion of the Commission. Although the 1960s brought the return of liberal Commissioners to the Commission, social reform groups had already transitioned to a rights-based approach.

**Social Reform Groups and Broadcast Reform Ideology**

Studying social reform groups at the FCC prior to the 1960s also provides an opportunity to revisit the Supreme Court's 1969 *Red Lion* decision, in which it upheld a public interest model of broadcast regulation on the theory that the broadcast spectrum was scarce.\(^{36}\) This rationale has been widely criticized as either never supportable or no longer supportable. However, examining the views and actions of social reform groups reveals the richer and more complex underpinnings of the *Red Lion* decision and the public interest model of broadcasting. Although the scarcity rationale provided "the core of the 1969 Red Lion decision,"\(^{37}\) the Supreme Court's opinion in *Red Lion* reflects but a narrow slice of the original rationale for regulations such as the Fairness Doctrine.

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\(^{37}\) *De Sola Pool* at 142.
Herbert Hoover was perhaps the first to focus on the rights of radio listeners:

We hear a great deal about freedom of the air, but there are two parties to freedom of the air, and to freedom of speech for that matter. Certainly in radio I believe in freedom for the listener. . . . 38

For Hoover, this meant that radio was “a public medium, and its use must be for the public benefit.” 39 Yet Hoover portrayed listeners’ rights as apolitical: “There is no proper line of conflict between the broadcasters and the listener . . . their interests are mutual.” 40

Liberal social reform groups politicized the idea of listeners’ rights by joining it with a broad economic and social critique of the structure of corporate broadcasting that focused on the problems of concentrated private power. They became the primary proponents of a “listener’s rights” approach to broadcasting that put the listener’s freedom to hear a diversity of voices on par with the broadcast speaker’s right to speak. This non-individualistic approach to the First Amendment was a significant component of their advocacy. It led social reform groups to endorse the public interest model of regulation and the Fairness Doctrine.

The ideological position of social reform groups was closely linked to their institutional and political interests and experiences. The Fairness Doctrine emerged from an interest group struggle in which liberal social reform groups challenged the broadcast industry. Social reform groups politicized “listeners’


39 Id.
rights” by claiming to represent the listeners’ interests, which they perceived as adverse to commercial broadcasters. Liberal social reform groups endorsed the Fairness Doctrine, as well as other speech-regulating methods, in order to minimize the extent and impact of right-wing broadcasting over the airwaves. However, they did not merely advocate doctrine; they targeted stations that they believed were violating principles of fairness, built cases against them, and sought to have the FCC enforce its regulations against those stations. Another driving forces behind the movement for fairness was the desire for access to the airwaves for left-leaning and minority speakers. Thus, the present study provides a corrective to the assertion that the “access” approach to the First Amendment was simply “an aspect of the dissidence of the 1960s.” Rather, Jerome Barron’s idea that “in an era of mass media giantism, the exercise of free speech by media owners while access to the media is denied to others is not a democratic right” was not a new one. Media reformers long before Barron asserted precisely this justification for regulating the speech of broadcasters. Although these early advocates also relied on the scarcity rationale, it was their economic and political concerns that motivated them to challenge the free speech rights asserted by broadcasters. This early history of social reform groups and their involvement in the development of Fairness Doctrine reveals a relationship between the Supreme

\[40\] Id.  
\[41\] De Sola Pool at 131 (summarizing Barron’s argument); see also Jerome A. Barron, Access to the Press, 80 Harv. L. Rev. 1641 (1967); Jerome A. Barron, Freedom of the Press for Whom? (1973).
Court's decision in *Red Lion* and the D.C. Circuit's decision in *United Church of Christ v. FCC*. The first dealt with listener's rights in a substantive context, addressing the extent of the FCC's powers to regulate. The second dealt with listener's rights in a procedural context, addressing the ability of social reform groups to participate in FCC proceedings and appeal their cases to the courts. Yet both reflected a long tradition in which social reform groups used the Fairness Doctrine and "listeners' rights" ideology to oppose right-wing speech. Although the *Red Lion* case involved a challenge to right-wing broadcasting by a political party, the Democratic National Committee, rather than a challenge by a traditional social reform group, this challenge to right-wing broadcasting grew out of the same history as *United Church of Christ v. FCC*.

This study provides a survey of public participation at the Federal Communications Commission, rather than a comprehensive history of broadcast policy. It focuses on the policy arenas of interest to social reform groups. This history reveals a remarkably persistent and constant support for the public interest model of regulation, a listeners' rights approach to broadcasting, and policies designed to increase diversity over the airwaves. Social reform groups repeatedly used these policies to challenge right-wing broadcasting and hate speech over the airwaves. The elimination of these policies through deregulation reduced substantially the arenas for participation by social reform groups.

I have written this introduction without discussing the problem of labeling that emerges in the discussion of "public interest" organizations and "public

\[42\text{ Id.}\]
participants," but the topic deserves mention. Opponents of public interest
groups assert that these groups are simply special interest groups asserting their
interests through "public interest" rhetoric. Thus the question of who represents
the public interest, the broadcast listener, or the consumer is highly contested. I
often use the term "social reform groups" in order to provide a functional label
that is less value laden. Thus, I use this term throughout the dissertation.
However, I also use the terms "public participation," "public participants," "public-
interest movement," and "public-interest law firms," because these terms are
used by the Commission, the courts, the interest groups, and much of the
scholarly community. In doing so, I do not wish to suggest that mere reference to
the "public interest" places one's advocacy on a higher plane. The reader should
judge for himself or herself the merits of the arguments made by the various
interest groups in this study.

This dissertation is structured in the following manner. The first section
describes the role of social reform groups during the post-New Deal era.
Chapter 1 sets the stage for the procedural role of the citizen or consumer in the
New Deal regulatory state. Chapter 2 provides an overview of the substantive
commitments that these groups brought to the regulatory process. The second
section examines the role of social reform groups in educational broadcasting,
the development of the Fairness Doctrine, and in specific enforcement actions
designed to sanction conservative, right-wing broadcasters and newspapers.

See generally, Karen O'Connor and Lee Epstein, Public Interest Law Groups: Institutional
Profiles xi et seq. (1989).
See, e.g., Ralph K. Winter, Jr., The Consumer Advocate Versus the Consumer (1972).
The third section of the dissertation examines the transition from the post-New Deal state to the public-interest state. The Commission's increasing conservatism and anti-communist crusades led social reform groups toward increasingly disillusionment with the regulatory state. Beginning in the 1950s, social reform groups and academic commentators began to see the merits of granting citizens the right to participate in the regulatory process.

The fourth section discusses the UCC litigation itself in depth, and the fifth section deals with the public interest movement in broadcasting that emerged after the D.C. Circuit granted standing to citizen groups. This movement was supported by judicial activism and foundation support. Since the 1980s, deregulation has weakened public participation, but public interest lawyers have retained their function as monitors of agency behavior. A final chapter takes a retrospective approach and examines the way in which the rhetoric of public participation has changed over time.
The New Deal and the Role of Broadcast Consumers

New Deal reformers experimented with institutional structures designed to incorporate the consumer into the regulatory process. Yet the New Deal retained the belief that the government played the predominant role in enforcing the public interest. The FCC encouraged the broadcast consumer, or listener to participate in the regulatory process, but only to the extent that he would support and legitimate the authority of the administrative agency. He was provided the opportunity to participate in FCC proceedings as a complainant or as a witness, but was not afforded full-party status. Liberal social reform groups concurred with this approach, believing it more important to support the authority of regulatory agencies than to stake out a right to participate in the administrative process. Nonetheless, the provision for complaints and witness participation provided opportunities for creative participation by social reform groups.

The Public Interest Model of Regulation

The public interest model of regulation was premised on a bipolar relationship between the regulated industry and the regulator. The regulator was a government agency charged with developing policy and regulations, policing the regulated industry, and where necessary, enforcing its regulations through administrative hearings. The government agency itself was assumed to exercise its expert judgment and act in the public interest. Advocates of the public interest model of regulation saw little need for external reviewers, either courts or
public participants, to push the agency to complete its mission. Rather, external review was premised entirely on a fear that the government regulator would be overzealous, not underachieving. Thus, judicial review of agency decisions typically involved due process considerations, designed to ensure protection for the regulated industry. Supporters of the public interest model of regulation generally sought to limit the extent of this review. Due process considerations required participation by industry in adjudicative proceedings, but no constitutional provision required the inclusion of other interested third parties such as consumers.

The New Deal and the Consumer

Some New Dealers, however, embraced the idea that there should be a positive relationship between agencies and the consumers that they protected. Support for consumer representation came from "the concept of counterorganization," an "idea of using the government to promote the organization of economically weak groups, thus restoring the economic balance, pitting one power concentrate against another."¹ Farmers and laborers were the two most obvious groups that could serve as counter forces against economic concentration during the New Deal, but some identified consumers as an additional counterforce.

Attempts at incorporating the "consumer" interest in regulatory

¹ Ellis W. Hawley, The New Deal and the Problem of Monopoly 187 (1966); see also John Kenneth Galbraith, American Capitalism: The Concept of Countervailing Power (1952) (focusing on the role of chain stores as protectors of the consumer, rather than on direct consumer organizing and representation).
decisionmaking led to experiments in various New Deal agencies. The National Recovery Administration, for example, included a Consumer Advisory Board, designed to provide consumer input into the creation of industry codes and standards. The Agricultural Adjustment Administration sought to incorporate the consumer interest through its Consumers' Counsel, a government official appointed to represent the consumer interest, and Congress established a Consumer's Counsel Office in the National Bituminous Coal Commission.\(^2\) The National Emergency Committee established 150 county-based consumer councils designed to "educate public opinion on what constitutes a fair price, . . . protest against exorbitant prices, and other wise to mobilize and enlighten consumers."\(^3\) These councils acted as "representatives of local consumer in action on local consumer problems" and "at public hearings"; arranged for investigations; and organized consumer economic courses and exhibits.\(^4\) They were envisioned as providing a two-way conversation between the government and the consumer.

Contemporaries and historians alike agree that these New Deal efforts to represent the consumer "turned out to be mostly window dressing" that quickly died out.\(^5\) Yet these experiments represented the first attempts at incorporating consumers as an active participant in the administrative state.

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\(^2\) Hawley, The New Deal, 200; Persia Campbell, Consumer Representation in the New Deal (1940).

\(^3\) Mary W. Williams, Books by Women and about Women, 27 Amer. Assn. Univ. Women J. 100, 104 (January 1934).


\(^5\) Hawley at 200; William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal 87-88 (1963).
The Consumer at the Federal Communications Commission

Consumer representation at the FCC was often called "public" or "listener" input. During the 1940s, liberal FCC Commissioners, particularly Chairman James Fly, Commissioner Clifford Durr and Chairman Wayne Coy advocated for some form of consumer representation and sought ways to enhance the relationship between the Commission and the public. They sought to enlist the public to bolster and legitimate the Commission's regulatory authority. The FCC did not institutionalize consumer representation during the New Deal, however the Commission experimented with incorporating the consumers of broadcasting into the regulatory process. For example, the Commission held hearings in local communities, rather than in Washington, D.C., with the hope of facilitating public input. Yet the Commission discontinued these efforts.

The Commission's ambivalent feeling about the role of the public was captured in its 1946 Blue Book, a document that put forward the public service responsibilities of broadcasters. The Blue Book affirmatively encouraging the public to play a role in improving broadcasting. The public could participate in broadcast reform through "listener" or "radio" councils to "convey...the wishes of the vast but not generally articulate radio audience," to conduct research on public tastes and attitudes, to monitor stations for high quality and non-commercial programming. The Blue Book was an inspiration to social reform

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8 Id.
groups. According to Commissioner Clifford Durr,

the [Blue] book circulated, and people in the local communities, whether it was the Girl Scouts or the Boy Scouts or the PTA, would go [to their stations] armed with the Blue Book.⁹

Yet, it created no legal rights for citizens at the Commission. The Blue Book did not endorse any explicit role for citizen councils at the FCC: "listeners must primarily turn for improved standards of program service" to the stations and networks "rather than to federal regulation."¹⁰

Consumer advocates outside the Commission agreed that the role of broadcast consumers and the public was to support the Commission in its regulatory initiatives. As one commentator noted, the Commission merited "a good deal of confidence," but could benefit from increased awareness by the public of its rights to quality broadcasting.¹¹ In contrast to the attempts made thirty years later to involve consumer groups in the regulatory process, consumer advocates of the New Deal did not advocate a right to participate in agency proceedings that would be supported by a right to appeal to the courts. At the FCC, New Deal consumer advocates viewed their interests as aligned with executive power and the furtherance of the New Deal regulatory state, and thus did not challenge administrative discretion. As such, there were no external pressures on the Commission to expand the legal rights of the public at the Commission. The lack of interest in the rights-based approach was not due to a lack of intellectual creativity, however. The idea of court-enforced public

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⁹ Broadcasting and Government at 15.
¹⁰ FCC, Public Service Responsibility, at 207.
participation was considered, but rejected in favor of a more supportive role for the public. 12

FCC Chairman Wayne Coy once asked whether the members of the public with grievances about broadcast regulation ought to have a "right to the courts." 13 New Republic columnist Saul Carson represented the liberal perspective when he replied in the negative. The idea of establishing some outside authority to oversee the FCC would be undesirable, Carson said:

I would not like to see [the complainant] sent to the courts, nor would I like to see him sent to another government agency which would then become sort of a "snooper agency" snooping into the work of the FCC and probably snafu-ing a lot of its work and becoming just a government pressure group against another government agency. 14

Carson preferred that the FCC establish a consumers' counsel's office on the model of other New Deal agencies or a complaint unit to receive complaints from the public. The consumer's counsel would represent the consumer, but would remain within the regulatory agency, thereby not undermining the New Deal goal of administrative flexibility. The Commission, as a whole, however, found even the idea of an internal consumer advocate as threatening to the agency's authority and legitimacy.

Professor Charles Siepmann participated in the development of the FCC's Blue Book, and he was an active participant in the broadcast reform

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11 Saul Carson, Testimony, Mayflower Hearing Transcript, in FCC Docket 8516.
12 See Associated Industries of New York State v. Ickes, 134 F.2d 694, 703-704 (1943) (finding standing for coal consumers). Associated Industries suggested the possibility of consumer standing but stood alone until the 1960s.
13 Wayne Coy, Mayflower Hearing Transcript, at 378.
14 Saul Carson, id. at 379.
movement. He recognized a role for the public at the FCC. He hoped, however, that the public would support the Commission in its enforcement efforts rather than challenge the Commission:

Without a huge staff of checkers and program analysts the Commission cannot possibly make certain that on every station justice is always done. . . . The Commission can, I think do little more than fight a rearguard action for the public, watching for and sternly eliminating flagrant abuse. Alone, it can do little. Given more adequate support by the public it serves, it can do more.

Reformers advocated public participation in order to enhance the agency's power, not to challenge the agency's decisionmaking.

Even the American Jewish Congress (AJC), which was one of the most assertive social reform groups participating at the FCC during the 1940s, did not seek a general right for social reform groups to participate in Federal Communications Commission hearings or appeal to the courts. Although the AJC was actively interested in participating in FCC proceedings as an official party, it argued not for a right to do so. Rather, the organization argued that participation should be at the Commission's discretion so that the Commission would have sufficient flexibility to perform its job.

The approach of social reformers during this period provides a striking contrast to the relationship between social reform organizations and the FCC during the 1960s when these groups took an adversarial position to the Commission and sought procedural rights to participate as equals with industry,

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15 See Ch. 2 and 4, infra.
16 Charles Siepmann, Mayflower Hearing Transcript, at 584.
17 See Ch. 6, infra.
a strategy which required court enforcement. Yet this non-adversarial approach
does not demonstrate a lack of interest by social reform groups in the 1940s.

Not surprisingly, the broadcast industry was unenthusiastic about public
participation in its regulatory affairs. Yet industry representatives in the 1940s
did not challenge the idea of public participation directly. Rather, the industry
viewed the role of the consumer as subsidiary to a more important issue—the
extent of the Commission's regulatory authority. Industry complained that public
complaints to the Commission pushed the Commission toward increased
regulation in violation of the Commission's statutory mandate.

FCC Commissioner Clifford Durr asked broadcast industry attorney Ted
Pierson to

[s]uppose that in a hearing in a local community a substantial number of
people came in and said, "We would like to have public discussion
programs in this community." Do you think the Commission would be
acting irrationally in considering that . . . ? Could we take that as one
indication of what the people want?18

Pierson responded that the Commission could not take account of public
testimony regarding programming preferences. Durr then asked Pierson to
suppose that a public-spirited citizen had gone out and surveyed ten thousand
people in the community about what they wanted in radio service. Pierson said
that it would be illegal for the Commission to consider such information, because
it intruded on a broadcaster's right to control the program content of his station.

Commissioner Webster then asked Pierson:

Do you think then, we should not ask the public to come into a hearing

18 Clifford Durr, Mayflower Hearing Transcript, at 533.
and voice their opinion of any station? If we are not going to use it, why ask them to come in? 19 Webster thought, after all, that "we all [have] the right of going to our government and saying what we [think] about something." 20 Why then, Webster asked, did the witness think that the evidence could be collected but then had to be put in a corner and ignored? Although the industry did not attack the presence of social reform groups in the regulatory process directly, it did recognize the power that the public could wield before the Commission, even without legal standing to participate.

There was consensus that public participants should not have access to the courts and had no right to "party status" at the Commission. No one put forward any significant challenge to this status quo during the 1940s. Yet, in fact, social reform groups could and did participate in broadcast regulation. The next section examines generally how public participants provided input to the Commission in the absence of formal legal standing.

Types of Participation by Social Reform Organizations

The lack of formal party status did not keep social reform groups away from the FCC. The political and social implications of FCC policymaking encouraged them participated in whatever form they could. Social reform groups participated in formal adjudicatory proceedings as both complainants and witnesses. In addition, they testified as witnesses in the Commission's general

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19 Commissioner Webster, Mayflower Hearing Transcript, at 535.  
20 Id.
policy hearings.

Complaints

Most FCC policymaking took place through the adjudication of station license allocations, renewals and transfers. The starting point for any intervention in this process was to file a complaint against a station. Today we dismiss “mere complaints” filed with administrative agencies. Yet in the early history of the FCC, informal complaints may have had an impact.  

The Commission used complaints against a station in deciding whether or not the station would receive an automatic renewal. Stations with complaints registered against them were more likely to be subjected to a hearing. As scholars have long recognized, legal processes, such as hearings, themselves are often punishments themselves. At the FCC, a hearing designation meant a temporary license and uncertainty for the broadcaster, which may have restricted a broadcaster’s ability to contract and sell or transfer its station. The FCC did not

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21 Commissioner Craven complained in 1938 that the Commission’s procedures needed to be revamped to prevent broadcasters from suffering a hearing solely on the basis of allegations of isolated infractions of the Act. Harry P. Warner, Radio and Television Law 372 (1948).
22 Warner, Radio and Television Law, at 117; H. B. Summers, Radio Censorship 105 (1939) (citing FCC Cites More Stations on Programs, Broadcasting, May 1, 1938). In its first annual report, the FCC noted that it took formal action or designated a hearing in response to complaints for “226 separate objectionable programs broadcast over 152 stations.” FCC, First Annual Report (1935). Not all of the hearing designations actually resulted in hearings, however, because the FCC typically canceled hearings if the station ceased its offending practice. Subsequently, the FCC revised its procedures to require that the Commission investigate the complaints for merit before proceeding to the hearing stage. For examples of stations subject to hearing designations based upon complaints.
24 See, e.g., Warner, Radio and Television Law, at 117 (noting difficulty contracting with advertisers).
typically revoke licenses.25 However, one scholar found that proceedings in which
Commission \textit{did} decline to renew licenses "were normally instigated by private
parties upon complaint to the Commission."26 And in 1938, the Commission
appointed a committee to study the FCC's complaint procedures, apparently
because "the frequency with which the listener complaint ha[d] matured into a
station \textit{bete-noire}."27 As late as 1949, Chairman Clifford Durr indicated that
"[e]very one of those complaints [by listeners] is given considerable attention, not
only by the staff . . . but by the Commission members."28

Of course, the Commission's use of and reliance on complaints
guaranteed no particular person attention to his or her grievance. And over time
the Commission adopted a less enthusiastic embrace of individual party
complaints against stations. Nonetheless, the complaint did serve a function in
the regulatory process, and it provided a form of participation for non-industry
groups and individuals. It was a valuable form of participation for organizations
that were concerned about particular practices of a broadcaster, but that lacked
the desire or resources to pursue formal action against the broadcaster. Most
complainants had little desire to stop stations from broadcasting or deprive them
of their licenses. Rather, they typically wanted stations to alter their

\footnotesize
\begin{itemize}
\item[25] See Abel, Clif & Weiss, Station License Revocation and Denials of Renewals, 1934-69,
14 J. Broadcasting 411 (1970) (prior to 1969, only one television license not renewed over licensee's
objection).
\item[26] See Theodore Kadin, Administrative Censorship: A Study of the Mails, Motion Pictures,
\item[27] Id. at 571 (noting, however, the haphazard manner in which the Commission processed
such complaints). The committee reported that about 10 percent of the 50 complaints per week
received by the Commission merited further investigation. Warner, Radio and Television Law, at
372.
\item[28] Clifford Durr, Mayflower Hearing Transcript, at 377
\end{itemize}

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programming practices or correct other perceived deficiencies. Complaining to the FCC was often sufficient action to attract media attention, to put the station on notice, and to air grievances.

Congressional oversight provided an additional mechanism through which social reform groups conveyed their wishes to the Commission in an informal way. Carl Friedrich and Evelyn Sternberg described the relationship between the FCC and Congressman as follows: “Congressmen have been at the beck and call of millions of constituents [including] . . . educators . . . clergymen . . . big or little business men.”

Not surprisingly, “well-organized pressure groups,” from prohibitionists to anti-obscenity groups, were the most successful at enlisting Congressmen on their behalf. Congressmen argued on behalf of their constituents that there was too little children’s’ programming, too much biased news, and too much advertising. The Commission thus received a cacophony of social reform voices directly and via Congress.

Broadcast industry attorney Louis Caldwell complained that the Commission used public complaints as opportunity for expanding its regulatory authority without the opportunity for judicial review. Public complaints facilitated this type of “raised-eyebrow” regulation, according to Caldwell, by providing

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29 Carl Friedrich and Evelyn Sternberg, Congress and the Control of Radio Broadcasting I, 37 Amer. Pol. Sci. Rev. 797, 797 (1943); see also id. at 807 (citing 1940 Attorney General’s Committee on Administrative Procedure, which noted that the FCC had been “subjected to constant external pressure, particularly by members of Congress.”).

30 Id. at 809; Carl Friedrich and Jeanette Sayre, Development of the Control of Advertising on the Air, Studies in the Control of Radio, No. 1, 37 (1940).

31 Warner, Radio and Television Law, at 797; see also Friedrich and Sternberg, Congress and the Control of Radio Broadcasting I, at 797. Friedrich and Sternberg also pointed out, of course, that Congressmen had their own particular interests as users of the radio as a means of reelection. Id. at 797-98, 808.
opportunities for the FCC to impose strong substantive regulation on broadcasters, while protecting the Commission from court review.\textsuperscript{32} According to Caldwell, the FCC responded to public complaints by issuing statements that frightened broadcasters through threats, rather than on punishment, which would permit broadcasters to challenge the FCC’s decisions through judicial review. Thus, evidence suggests that complaints played an important part in FCC policymaking during the 1930s and 1940s.

\textbf{Witnesses}

Complainants did not automatically receive formal FCC hearings on their claims. As such they were disadvantaged procedurally, as compared with industry complainants, who were often legally entitled to receive a hearing on their complaints. Thus, social reform groups had less influence over the agenda setting at the Commission than industry participants, a fact that necessarily skewed the regulatory process in favor of industry.

Yet participation in hearings did not, as is often assumed, turn on a strict insider/outsider distinction. Rather the FCC permitted different levels of participation. First, the Commission offered party status (as a matter of right and discretionary). Second, and most relevant to public participants, the FCC allowed social reform groups or interested citizens to testify as witnesses in the

Commission's formal hearings. Party status provided for far more extensive participation rights than the lesser status of public witness.\textsuperscript{33} Yet witness status provided an opportunity for social reform groups to alert the Commission to their concerns, and to bring social science evidence into an administrative agency that did not typically have available or consider such data in its proceedings.

The FCC's voluntary recognition of witness status for public participants suggests that the Commission recognized an important role for citizens in the regulatory process. The Commission attempted to channel informal communications into the formal record of an adjudicatory proceeding where it could be effectively used by the Commission.\textsuperscript{34} In theory, the rule would enable the FCC to avoid the dangerous netherworld of \textit{ex parte} communications, which created appearances of improper influence, and instead to focus on formal processes.

In addition, the rule was a positive tool that the Commission could use in its regulatory decisionmaking. FCC Chairman Charles R. Denny explained that the rule was designed
to provide a full opportunity for interested persons or groups in a town or city which is to be served by the proposed station to present any information to the Commission . . . [that] might otherwise not be made available to the Commission.\textsuperscript{35}

The Commission could provide this opportunity without unduly burdening the

\textsuperscript{33} This rule was adopted in the 1939 Rules and Regulations as Paragraph 1.195. It later became Rule 1.723.

\textsuperscript{34} Warner, Radio and Television Law, at 23. The rule also required all communications considered by the Commission to be part of the record. Warner notes that the rule was ineffective in curbing political influence at the Commission.
regulatory process. After all, the hearing examiner would still control the admission of evidence. In addition, in comparative license allocation proceedings, FCC hearings typically lacked a vigorous Commission prosecutor or adversary; Commission counsel did not typically build evidence in the case. Rather, industry applicants competed in the hearing as adversaries, and the hearing officer (followed by the Commission) decided who would be the best applicant. Industry applicants would sometimes put on their own community witnesses who would spout platitudes, but the value of these witnesses was low. Permitting independent community witnesses could create record evidence that could be used to justify Commission decisionmaking. Permitting social reform groups or community leaders to testify would enhance Commission legitimacy when relying on such testimony in its decisionmaking.

The witness rule was not used extensively, yet it was significant enough to generate controversy. Broadcast industry attorney Louis Caldwell complained that “the FCC's rules seem to be that persons having such objections may appear and give testimony on almost anything . . ." The Commission interpreted the rule liberally and social reform groups were able to take advantage of the rule in a number of cases.

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36 Testimony was subject to requirements of relevance, materiality and competence. The admissibility of evidence was in the sound discretion of the hearing officer. Warner, Radio and Television Law, at 65.
Policy Hearings

The problem of who could participate in a particular proceeding was generally limited to the realm of adjudication of station license applications and renewals. In FCC policy hearings, the Commission put no legal restrictions on who could participate. Although social reform groups would not have been able to complain to the courts about FCC policy statements or rules resulting from these hearings, they took the opportunity to participate actively in many of these general forums.38

Conclusion

Social reform groups lacked the same status in FCC adjudications as industry participants during the 1940s. Yet social reform groups took advantage of the opportunities to participate as complainants and witnesses, and to testify at policy hearings. Thus, they were often an important part of the regulatory process. The Commission’s recognition of these groups, even in their lesser status, makes clear that the FCC did not perceive itself as just an expert agency charged with resolving the technical problems of spectrum allocation or as an agency simply beholden to industry wishes. As FCC Chairman James Fly expressed in 1941: “The office of licensing is not solely a job of technical traffic-policing.”39 Rather, as Carl Friedrich and Evelyn Sternberg noted, various

38 See Chs. 3 & 4, infra.
interest groups "played an important role in influencing regulatory policy." Given the agency's political and social role, the demand for participation by social reform groups was unsurprising. Social reform groups, however, did not seek the right to participate in agency proceedings and did not try to establish citizen standing in the courts. Rather, they supported agency discretion and authority.

\footnote{See Friedrich and Stemberg, Congress and the Control of Radio Broadcasting II, 37 Amer. Pol. Sci. Rev. 1014, 1022 (1943) (noting with dismay that interest groups [both industry and non-industry] had brought sufficient pressure upon Congress and the FCC to "have played an important role in influencing regulatory policy").}
Listeners' Rights and Democratic Values

Deliberation over the meaning of the First Amendment as applied to broadcasters has taken place since the medium's inception. In the 1969 case of Red Lion v. FCC, the Supreme Court upheld the FCC's most significant program content regulations, the personal attack rules and the Fairness Doctrine, despite First Amendment considerations.¹ The Court applied a lower level of First Amendment scrutiny of broadcast regulation based upon a public interest rationale that the broadcast airwaves were scarce. Since that time, this rationale has come under increasing criticism. Historically, however, the public interest rationale for broadcast regulation was broader and deeper than suggested by the Supreme Court's decision. The development of a public interest approach to broadcasting took place through the interaction of the Commission with social reform groups, academics and scholars. By the late 1940s this public-interest model of broadcast regulation was fully developed.

Changing Liberal Perspectives on Free Speech

Repression of civil liberties during World War I and the Red Scare alerted liberals to dangers of government repression of speech.² Justices Oliver Wendell Holmes and Louis A. Brandeis began to dissent in Supreme Court cases that

² Harry N. Scheiber, The Wilson Administration and Civil Liberties, 1917-1921 (1960); David Rabban, Free Speech in its Forgotten Years, at Ch. 7 (1997).
upheld government-imposed speech restrictions. Ultimately, the Supreme Court strengthened First Amendment protections for speakers through a series of cases that created modern free speech doctrine. Liberal social reform groups, such as the ACLU, encouraged the courts to expand First Amendment freedoms.

However, the increasing power of the media led liberals in the 1940s to recognize the need to balance First Amendment speech rights in the broadcasting context. Nazi-controlled Germany during World War II alerted liberals to dangerous uses of the media, such as promoting totalitarian regimes and oppressing minorities. In 1947, President Harry Truman’s Committee on Civil Rights criticized the revival of the film Birth of a Nation, which had long been criticized by civil rights groups such as the NAACP on account of its racist portrayals. The Committee also considered whether there should be a federal right to reply to speech that libeled particular groups, an effort that reflected concerns about the treatment of minorities in the media.

Scholars also demonstrated an increased interest in the treatment of minorities by the media. The Bureau of Applied Social Research at Columbia University produced a study of “the treatment accorded white, Protestant Anglo-Saxons in mass media as against the treatment accorded all other elements of the

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6 Memo from the American Jewish Congress to the President’s Committee on Civil Rights, June 1947, at 6, in American Jewish Congress Papers, American Jewish Historical Society, Waltham, MA (“AJC Papers”), Box 40.
American population." Although this report indicated that the radio industry
provided the "fairest treatment of any mass medium," it noted that "some invidious
stereotypes" remained. There was a new concern about the problem of "group
libel," or what we would today think of as "hate speech." This new focus on minorities and the media led some liberals to endorse a
protective role for the federal government to play in promoting First Amendment
free speech rights. It was on this context that the Commission on the Freedom of
the Press produced a number of studies that revisited issues relating to free speech
in the media.

Commission on Freedom of the Press

The Commission on Freedom of the Press, established through grants
from Time, Inc., and Encyclopedia Britannica that were administered through the
University of Chicago, was charged with investigating the freedoms and
responsibilities of the agents of mass communication. Robert M. Hutchins, the
Chancellor of the University of Chicago, headed the Commission, and thus, the

7 "How Writers Perpetuate Stereotypes," a digest of data prepared for the Writers' War
Board by the Bureau of Applied Social Research of Columbia University, 1945 in NAACP Papers,
Group II, Box A237, NAACP 1940-55, General Office File, Discrimination, Entertainment Media,
1943-55.
8 Id.
9 See, e.g., David Riesman, Democracy and Defamation: Control of Group Libel, 42 Col.
L. Rev. 727 (1942); David Riesman, Democracy and Defamation: Fair Game and Fair Comment
II, 42 Col. L. Rev. 1282, 1307 (1942); see also Beauharnais v. Illinois, 343 U.S. 250 (1952).
10 Zechariah Chafee, Jr., Government and Mass Communications IV (Hamden, Connecticut:
Archon Books) (1965) (Two Volumes in One).
Commission became known as the "Hutchins Commission."\textsuperscript{11} Zechariah Chafee, Jr., Harvard Law Professor, served as the Commission's Vice-Chairman.

In 1947 the Hutchins Commission published its report, \textit{A Free & Responsible Press}, which called for the media to exercise increased public service responsibility. The Commission viewed broadcasting as part of the new, modern, powerful mass media capable of influencing public opinion:

These agencies can facilitate thought and discussion. They can stifle it. They can advance the progress of civilization or they can thwart it. They can debase and vulgarize mankind. They can endanger the peace of the world . . . . They can play up or down the news . . . foster and feed emotions, create complacent fictions and blind spots, misuse the great words, and uphold empty slogans.\textsuperscript{12}

The Report emphasized the role of the press in encouraging or stifling public discussion:

\begin{quote}
Public discussion is a necessary condition of a free society and that freedom of expression is a necessary condition of adequate public discussion . . . .
\end{quote}

[I]ntention of the freedom of the press [is] that an idea shall have its chance even if it is not shared by those who own or manage the press. The press is not free [to] behave as though their position conferred on them the privilege of being deaf to ideas which the processes of free speech have brought to public attention.\textsuperscript{13}

With control over public discussion, broadcasters could either promote or hinder the maintenance and development of democracy. The Commission complained

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\textsuperscript{11} See Clay Calvert, The Psychological Conditions for a Socially Significant Free Press: Reconsidering the Hutchins Commission Report Fifty Years Later, 22 Vt. L. Rev. 493 (1998). Other members of the Commission included John M. Clark, Columbia University; John Dickinson, University of Pennsylvania; Harold D. Lasswell, Yale University; Archibald MacLeish, former Assistant Secretary of State; Charles E. Merriam, University of Chicago; Reinhold Niebuhr, Union Theological Seminary; Robert Redfield, University of Chicago; Beardsley Ruml, Federal Reserve Bank of New York; Arthur M. Schlesinger, Harvard University; George Shuster, Hunter College. Id. at n. 2.
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\textsuperscript{12} Commission on Freedom of the Press, \textit{A Free and Responsible Press} (1947).
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that "anybody with something to say has a hard time getting it said by mass
communication if it runs counter to the ideas of [media] owners, editors, opposing
pressure groups, or popular prejudice."\textsuperscript{14}

According to the Hutchins Commission’s Report, the press’ ability to
influence came not simply from spectrum scarcity. Rather, the Commission
focused on the monopolistic nature of the press, generally, and the broadcasting
industry, in particular. It explained that

\[\text{[t]he voice of the press, so far as by a drift toward monopoly[, . . . ] tends}
\text{to become exclusive in its wisdom and observation, deprives other voices}
\text{of a hearing and the public of their contribution.}\textsuperscript{15}\]

The Commission attributed the failures of the media to “the economic structure of
the press, . . ., the industrial organization of modern society, and . . . the failure
of the directors of the press to recognize . . . the needs of a modern nation and to
. . . accept the responsibilities which those needs impose upon them.”\textsuperscript{16} The
Hutchins Commission insisted that the “press must . . . overcome any biases
incident to its own economic position, its concentration, and its pyramidal
organization.”\textsuperscript{17} Others called for the FCC to mandate further decentralization of
the networks and the industry.\textsuperscript{18}

The Hutchins Commission supported the First Amendment rights of
broadcasters. However, they also spoke of the need to recognize the speech
rights of others:

\textsuperscript{13} Id. at 9.
\textsuperscript{14} Id. at viii.
\textsuperscript{15} Id. at 19.
\textsuperscript{16} Id. at 2.
\textsuperscript{17} Id. at 18.
Protection against government is now not enough to guarantee that a man who has something to say shall have a chance to say it. The owners and managers of the press determine which persons . . . and which ideas shall reach the public.19

The Commission called upon the press to "maintain[] the rights of citizens and the almost forgotten rights of speakers who have no press."20 According to the Commission, "the intention of the freedom of the press . . . [is] that an idea shall have its chance even if it is not shared by those who own or manage the press".21

The press is not free if those who operate it behave as though their position conferred on them the privilege of being deaf to ideas which the processes of free speech have brought to public attention.22

Freedom of speech imposed obligations on the press.

The Commission on Freedom of the Press was clear on the problems of the press and broadcasting. It was less certain about how to solve them. It clearly recognized the risks of government regulation or ownership: "government control . . . to break up the greater agencies of mass communication might cure the ills of freedom of the press, but only at the risk of killing the freedom in the process."23 The Commission called upon the media to "control themselves or be controlled by government" and to take on "a new public responsibility."24 The first option, self-regulation, was clearly preferable. Simply stated, if the media "are

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18 See, e.g., Morris Ernst, First Freedom (1946).
20 Id. at 18.
21 Id. at 9.
22 Id. at 9.
23 Id. at 2.
24 Id. at 17.
controlled by government, we lose our chief safeguard against totalitarianism—and at the same time take a long step toward it."\textsuperscript{25}

On the other hand, the Commission believed it an "imperative question whether the performance of the press can any longer be left to the unregulated initiative of the few who manage it."\textsuperscript{26} It concluded that "government has an important part to play in communications."\textsuperscript{27} The "primary protector" of free speech is the government, said the Commission. It "acts by maintaining order and by exercising on behalf of free speech."\textsuperscript{28} Where there are "new categories of abuse" by the press, "the extension of legal sanctions is justified."\textsuperscript{29}

The Commission's division over how First Amendment rights of broadcasters should be balanced against the free speech rights of other speakers over the airwaves was reflected in the two companion works that addressed broadcasting. Llewellyn White's \textit{American Radio} supported the free speech rights of broadcasters against government regulation.\textsuperscript{30} In contrast, Zechariah Chafee's \textit{Government and Mass Communications} justified regulation of broadcast programming. Despite these divisions, however, the Commission's \textit{A Free & Responsible Press} is a benchmark for understanding how 1940s liberals viewed the duties and responsibilities of broadcasters.

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\textsuperscript{25} \textit{Id}. at 5. \\
\textsuperscript{26} \textit{Id}. at 17. \\
\textsuperscript{27} \textit{Id}. at 3. \\
\textsuperscript{28} \textit{Id}. at 7. \\
\textsuperscript{29} \textit{Id}. at 11. \\
\end{flushright}
Zechariah Chafee's Government and Mass Communication

In reaction against the civil liberties violations of World War I, Harvard Law School professor, Zechariah Chafee, Jr., had championed free speech rights in his 1920 book, *Free Speech in America*. His views influenced Justice Oliver Wendell Holmes, Jr., who, along with Justice Louis Brandeis, recognized the need for the Supreme Court to adopt stronger First Amendment speech protections.  

Chafee's 1947 *Government and Mass Communications*, produced for the Commission on Freedom of the Press, however, justified content regulation of broadcasters. His views reflect the new concerns about the power of mass media that had arisen during World War II.

In his discussion of broadcast regulation, Chafee returned to his earlier reliance on Roscoe Pound's "sociological jurisprudence," which emphasized that the "law must balance competing social interests." In particular, the First Amendment had to be balanced against the federal government's Commerce power: the "Amendment should be interpreted so as not to cripple the regular work of government." Chafee endorsed the constitutionality of the "public service theory" of broadcast regulation, complaining that "critics of the FCC are

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33 Rabban, Free Speech in the Forgotten Years, at 303.

34 Chafee, Jr., Government and Mass Communications, at 640.
barking up the wrong tree when they talk about infringement of freedom of the press.”

Chafee agreed with the Hutchins Commission that broadcasters were shirking their duties to the public:

“[t]he mere absence of governmental restrictions will not make newspapers and other instrumentalities of communication play their proper part in the kind of society we desire.”

Indeed, he concluded that “affirmative action” was required by “the government or other persons with power to influence methods and content.” He endorsed the affirmative view of the FCC’s regulatory mission, noting that “[t]he government can lay down rules of the game which will promote rather than restrict free speech.”

A number of factors led Chafee to prefer reliance on the moral and professional duties of the press, rather than on the legal enforcement. First, he acknowledged the importance of the First Amendment for protecting the speech of broadcasters. He recognized that “there are dangers from governmental attempts to encourage mass communications.” Thus, he concluded that “free speech should weigh heavily in the scale” when the FCC made decisions. Finally, he recognized the potential ineffectiveness of law:

law may be able to step in at long intervals to wipe out outrageous types of partiality or set enterprises on the road to impartiality, but that is all.

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35 Id. at 638.
36 Id. at 471.
37 Id.
38 Id.at 474.
39 Id. at 475.
40 Id. at 641.
41 Id. at 643.
Despite his concerns, however, he vigorously endorsed the constitutional legitimacy of broadcast regulation.

**Social Reform Groups and Broadcast Reform Ideology**

Social reform groups interested in broadcast reform agreed with Chafee and the Commission on Freedom of the Press that the power of the mass media could threaten the free speech rights of others. Many of these groups, however, went further than Chafee and the Commission in advocating for strong regulatory control over broadcasting. For example, Will Maslow, director of the American Jewish Congress’s Commission on Law and Social Action, reviewed Chafee’s book with praise, but concluded that Chafee failed to go far enough. Chafee, according to Maslow, retained an “excessive fear of the risks in affirmative state action” and failed to recognize that “government no longer represents the greatest danger to our mass media.”

During the 1940s, many social reform groups concluded that private censorship was a greater problem than government regulation. They drew their views from their own difficulties gaining access to the airwaves. Morris Ernst and Roger Baldwin of the ACLU complained in 1934 that “Communists, Negroes, striking farmers, or workers would...be ‘lucky to get near a microphone,’” and others expressed similar views throughout the 1930s and 1940s. Because of these access problems, social reform groups relied on a listener’s rights approach to

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broadcast regulation that justified government regulation of broadcasters on behalf of radio listeners.

**The American Civil Liberties Union**

Robert McChesney has chronicled the important role of the American Civil Liberties Union (ACLU) in early years of broadcast reform activism. In his discussion of the 1927 to 1934 period, he concluded that the ACLU Radio Committee was the “last element of the broadcast reform movement to abandon the fight” against commercial broadcasting.\(^44\) He complained, however that after 1938, the organization developed an agenda “focused on protecting commercial broadcasters from government harassment.”\(^45\) James Lawrence Fly, a former FCC Chairman whose views were endorsed in 1947 by Zechariah Chafee, Jr.,\(^46\) joined the ACLU’s Radio Committee and its Board of Directors after retiring from the Commission in 1943. Fly found the situation as McChesney described it:

> With regard to the original notion of free speech, which was simply saying to government, "You shan't interfere," when I went on the Board of Directors of the [ACLU], I regret to say that was pretty much their attitude. It took me about five years in two meetings per month to make the point that restraints occur from many other sources in modern society.\(^47\)


\(^45\) Id. at 238. Although not focused on broadcast reform specifically, Paul Murphy provides a somewhat different interpretation of the ACLU’s changing positions. He argues that by 1936 the ACLU’s “initial jaundiced apprehensions . . . toward Franklin D. Roosevelt’s new government” had been replaced with a view of the administration as “no longer the seat of repression.” Paul Murphy The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR 274-75 (1972). Murphy emphasizes that by the 1940s, the ACLU embraced the federal government’s new protective role over civil liberties that was apparent in La Follette hearings, which investigated violations of labor’s free speech rights; the Wagner Act, which the ACLU viewed as “the most important single step toward the attainment of meaningful freedom of speech in modern times”; and the creation of a civil liberties unit within the Department of Justice. Id. at 275-77.

\(^46\) Chafee, Government and Mass Communications, at 474.

\(^47\) See Broadcasting and Government Regulation in a Free Society (Center for the Study of
Fly and others worked during the 1940s to encourage a listeners’ rights approach to broadcasting at the ACLU. Fly encouraged the ACLU to participate in FCC proceedings in support of regulation, and he appeared on the organization’s behalf. 48

Fly believed that freedom of speech belonged not only to the speaker, but to millions of listeners whose interests were paramount. Listeners’ rights were threatened in the “age of machines, mass production, high-pressure merchandizing, [and] monopolies,” with its “increasing domination of the media of communication by a few economic entities.” 49 Fly complained about that the industry was plagued with bottlenecks, concentration of control, and domination by a few special interests. Technology and big business had lessened “opportunities for the full, free spread of all kinds and shades of opinion.” Fly emphasized the problems of private censorship rather than the dangers of government regulation.

Fly’s vision for broadcasting included free access to news sources, the presentation of opposing points of view and argument, and the absence of bias, prejudice, suppression, or distortion. 50 He supported diversity in the control of both news sources and the mechanisms for news distribution to the public. He

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Democratic Institutions, 1959) at 4.

48 See, e.g., Mayflower Hearings, FCC Docket 8516.
50 Id.
believed that diverse output was a safer route than futile reliance on the
"objective" broadcaster.  

The ACLU institutionalized its interest in broadcasting through its Radio Committee (later, the Radio and Television Committee). Although attentive to free speech concerns, many of the ACLU members active on this committee during the late 1940s endorsed regulation of broadcasting in the public interest. Free speech advocate Morris Ernst, who served on the ACLU’s Radio Committee, criticized the concentrated ownership of the broadcast industry and the monopolistic control that some local stations had over their markets, and called for affirmative government action.  

Erik Barnouw, who also served on the Radio Committee in the late 1940s, supported government regulation of broadcasting. Professor Charles Siepmann had consulted for the FCC in its production of the Commission’s Blue Book, which delineated the public service responsibilities of broadcasters. He supported FCC regulation of broadcasters and was a strong advocate for broadcast reform.

The ACLU did rely on the “present limitations of available frequencies” in formulating its policy. It stated that “if there were no scarcity,” the group would “have an open mind to the argument that . . . regulation of radio need no longer exist.” However, the organization noted that “even when and if unlimited frequencies become available, there are still factors, inhering in the conditions of

51 Id.
52 See Ernst, First Freedom.
54 Charles Siepmann, Radio’s Second Chance (1946).
radio communications" that would "preclude that free and equal competition on which the freedom of the press rests at least in part." In addition, the ACLU encouraged increased access to the airwaves for minorities, arguing that "progress in ideas and art has always begun with minority groups." Fundamentally, the ACLU concluded that "the major interest secured by the first amendment [was] that of the freedom of a democratic people to have unrestricted access to all points of view." The ACLU was committed to the conception of radio "as a public trust which enjoins the broadcaster the duty to subordinate his individual interest and desire to express his views without restraint to the paramount interest of the public to have access through radio, to varied rather than restricted points of view on issues of public controversy."

The CIO

Ernest Goodman, a UAW-CIO's attorney during the 1940s, published an article in the Journal of the Federal Communications Bar Association that embodied the CIO's approach to broadcast regulation. The article's title, "The Air Belongs to the People," was designed to reflect labor's "conception of the responsibility of the radio industry toward labor and other non-profit

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56 Id.  
57 Id.  
58 Address of Judge Thurman Arnold over the CBS Network (6/1/46), in ACLU Papers, Box 916. Broadcasting speculated that Charles Siepmann had written the speech for Arnold. See Richard J. Meyer, Reaction to the "Blue Book," at 597, in Lawrence W. Lichte and Malachi C. Topping, American Broadcasting. This would not be surprising as Charles Siepmann drafted numerous broadcasting-related documents for the ACLU after he finished his assignment as special consultant to the FCC.  
59 Id.
organizations." According to Goodman, Congress had intended that radio broadcasters make available facilities for use by labor and other non-profits, but broadcasters had failed to fulfill this expectation of Congress. Although broadcasters offered free time to some non-profits, Goodman complained that this "'free' time was an illusion," at least for labor.62

The CIO actively promoted a listeners' rights-based approach to broadcasting and advocated for increased access to the airwaves for diverse viewpoints. The organization appeared before the Commission and Congress to complain about how broadcasters treated labor unions. In conjunction with the 1944 election campaign, the CIO produced the handbook on labor rights in radio.63 Although the manual was a "how to" pamphlet on getting airtime for labor unions, the pamphlet emphasized the people's ownership of the airwaves, their "freedom to listen," and their right to hear labor's voice.

The pamphlet began with a statement from Philip Murray, President of the CIO: we must "assure that the radio is used as intended, namely, to serve the best interests of the people."64 It then explained how labor had a right to use the radio: "Labor has a voice. The people have a right to hear it."65 It asserted that [i]f the Constitution . . . were written today, 'freedom to listen' would appear before 'freedom of the press.'66 The CIO's pamphlet became a model for other

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60 Id.
62 Id. at 7.
64 Id. at 2.
65 Id. at 5.
66 Id. at 4.
social reform groups that were planning media reform strategies and creating their own manuals or handbooks. Thus, the CIO spurred other groups to look to broadcast reform as a solution to political and social conflict, and to emphasize a listeners' rights to broadcast regulation.

The CIO and its member unions were particularly concerned about the ability of broadcast station owners to censor the content of programming over the airwaves. Station managers would edit scripts in advance of broadcast and would delete offensive or libelous statements. CIO unions repeatedly argued that the problems of private censorship demanded an affirmative government response.

NAACP

The NAACP was established in 1909, and it was involved in the initial cultural critiques of the new 20th-century media and in the legal struggles for listeners' rights that erupted in the 1960s. Even before the advent of broadcasting, the NAACP had expressed concern about the image of blacks in literature, theater and film. The NAACP encouraged the media to improve its treatment of African-Americans by using traditional forms of protest, such as boycotts. It also provided positive support for African-American entertainers through publicity and encouragement. Finally, the NAACP turned to state and local censorship boards and the courts.

The NAACP's efforts to eliminate racism in the media involved a variety of tactics, including "court action, seeking legislative remedy, requesting
administrative intervention, generating counter-propaganda, launching editorial campaigns, demonstrating against the film, and ignoring the film,"67 because as Mary White Ovington of the NAACP indicated, "[a] method successful in one place has been unsuccessful in another."68

When commercial radio emerged on the scene, the NAACP transferred these critiques to the new medium. The NAACP protested when speakers used derogatory terms to refer to African Americans. In 1935, Walter White complained to NBC when Senator Huey P. Long used the term "nigger" over the airwaves. The NAACP demanded that radio broadcasters use terms of respect such as "Mr." and "Mrs." for both white and black people. African-American ownership and control over radio outlets was unknown during this period, which made NAACP access to radio even more challenging than access to the print media, where there were well-established African-American newspapers, such as the Pittsburgh Courier.

World War II drew greater attention to the role that the media could play in race relations.69 During the late 1940s, the NAACP joined other social reform groups in adopting a listeners' rights approach to broadcast reform. NAACP's Radio Committee referred to the CIO pamphlet as "one of the most effective pamphlets published during the 1944 presidential campaign."70 Although the

68 Mary White Ovington to George H. Woodson, 5 Nov. 1915, NAACP, File C301, quoted in Fleener-Marzec, 94.
NAACP did not have a long-standing Committee on Radio, as did the ACLU,
NAACP's Hope Spingarn's attempts to establish a permanent organization for
radio reform reflect the NAACP's position on radio in the late 1940s. In 1946,
she organized a radio conference in pursuit of this goal. The NAACP invited the
American Federation of Labor, the American Jewish Committee, the Anti-
Defamation League, the CIO, the Federal Council of Churches of Christ, the
ILGWU, the National Education Association, and others. The goal was "to call in
every existing agency working in the field of race relations, religious and
nationality minorities" in order to "tell the radio industry that we represent the
entire field" and to serve as "the coordinating agency for the entire minority
field." 71

This approach was necessary, they said, because broadcasters were "not
meeting the critical responsibilities" in terms of promoting the "fundamental,
democratic ideals" of the nation. 72 Their "lip service to the true principles of
democracy" perpetuated "the prejudices and ignorant attitudes which seriously
affect the welfare of religious and racial minorities in our country." 73 By
coordinating, these social reform groups would be able to "represent millions of
listeners and . . . have enormous power to request, not beg for air time in order to
present out [sic] point of view to listeners." 74 Broadcasters would no longer be

71 Memorandum on Plans for Radio Conference from Hope Spingarn to Walter White,
12/10/46, in NAACP Group II, Box A128, NAACP 1940-55, General Office File, Board of Director
72 Organizational outline prepared by Oliver Harrington, Arnold Perl, and Hope Spingarn, in
NAACP Group II, Box A128, NAACP 1940-55, General Office File, Board of Director Committees—
73 Id.
74 Memorandum on Plans for Radio Conference from Hope Spingarn to Walter White
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able rely on the "old device of 'having to give time to the other organizations in
the field if they give us time.""\(^{75}\) Although the NAACP's efforts in the late 1940s
to create a formal coalition may not have achieved long-standing success, the
NAACP was part of a loose coalition of New York City-based social reform
groups that took a listeners' rights approach to broadcasting.

**Other Social Reform Groups**

During the late 1940s, a number of other social reform groups adopted
this listeners' rights strategy to broadcast reform. In publishing pamphlets, they
often chose authors with expertise from the ranks of former FCC staff. In 1946,
the Public Affairs Committee in New York published a pamphlet by Jerome H.
Spingarn, a former FCC attorney, entitled "Radio is Yours."\(^{76}\) He started off by
alerting listeners that "radio is no gift horse," and that the listener had the "right to
look into the mouth of the loudspeaker."\(^{77}\) After all, "the public owned the
airwaves," \(^{78}\) and the listener had a right to good programming. But that right had
to "be defended, actively, day after day."\(^{79}\) To do so, groups and individuals
displeased with their station's service could ask the FCC to hold a hearing and
appear as witnesses. In a world where the FCC was up against one-sided

\(^{75}\) Id.
\(^{76}\) Radio is Yours, #121 (New York: Public Affairs Committee, 1946).
\(^{77}\) Id. at 2.
\(^{78}\) Id.
\(^{79}\) Id. at 28.
pressure from broadcasters, the Commission needed listener support if it wanted to act in the public interest.80

Another notable pamphlet, entitled "The Radio Listener's Bill of Rights: Democracy, Radio, and You"81 was published in 1948 by the Anti-Defamation League. Charles Siepmann, who had authored the FCC's Blue Book, which delineated the public service responsibilities of broadcasters, wrote the pamphlet. He referred to the Blue Book as "a first, partial draft of a Listener's Bill of Rights."82 He advocated a greater role for citizen groups at the FCC. The FCC was a guardian of the listeners' "rights and needs," according to Siepmann, but could only be effective if the citizen "tell[s] the F.C.C. about your local stations' operations."83 Asking whether readers had "ever written a letter of complaint to a radio station, or to the Federal Communications Commission," Siepmann emphasized the importance of "keeping in close touch with the F.C.C."84 He recommended the establishment of listener councils, not only to facilitate and encourage listening, but also to represent members' views to the Federal Communications Commission, whether with reference to matters of policy raised in public hearings before the F.C.C., or the renewal of a given station's license. (Where a Council is dissatisfied with a station's performance, it would do well to request the F.C.C. to conduct local hearings on license renewal. This brings radio home to the community, as hearings in remote Washington do not).85

80 Id. at 30.
82 Id. at 11.
83 Id. at 9.
84 Id. at 7, 9.
85 Id. at 51.
This strategy would work because nothing would have more effect on broadcasters than "the knowledge [that] there will be included in the docket an accurate and critical appraisal of [their] services compiled by the community and presented by a Listeners’ Council in evidence before the F.C.C."\textsuperscript{86}

The listeners’ rights approach to broadcast regulation dominated the social reform world by the late 1940s. It was in this context that Everett Parker, known as the father of the citizens' movement in broadcasting, obtained his schooling in broadcast reform.

**Everett Parker**

Everett Parker developed his ideas about broadcasting while working with social reform groups during the 1940s and 1950s. Through this process, he developed a strong commitment to a listeners’ rights approach to broadcasting. Parker’s interest in radio began while growing up on the south side of Chicago. He received his bachelor’s degree from the University of Chicago. While an undergraduate, he began working under Harold Lasswell on a doctoral thesis on the Federal Communications Commission. Charles Merriam, the prominent chair of the University of Chicago political science department, however, vetoed Parker’s dissertation topic choice as unworthy of study. Instead, said Merriam, Parker ought to study the important topic of sewage drainage into the Mississippi River! The mere thought of such a topic drove Parker from doctoral research forever.\textsuperscript{87}

\textsuperscript{86} Id. at 52.
\textsuperscript{87} Parker stated that “I was mad as hell at the whole political science department because the chairman, he just didn't consider that radio was anything but a toy.” George E. Korn, Everett C. 56
However, Harold Lasswell’s work on the impact of propaganda on public opinion likely alerted Parker to the power of the media.\textsuperscript{88}\n
Parker turned instead to make his mark in Washington. The prospect of contributing to the New Deal through work at the Works Progress Administration drew him to Washington, D.C., where he worked as the WPA’s Assistant Chief of Radio. When he returned to Chicago, he entered the public relations business, where his biggest client was the Democratic Party’s Cook County Central Committee. While in Chicago, he became increasingly interested in the combined power of religion and radio. On the advice of Arthur Holt, a Christian ethicist, he attended the Chicago Theological Seminary, graduate in 1943, and entered the ministry. When James Roland Angell, former President of Yale, moved to NBC, he called Parker to serve as NBC’s assistant public service and war program manager.\textsuperscript{89}\n
In 1945 Parker began his life-long commitment to broadcast reform. His introduction to broadcast reform came through his work for liberal protestant churches. From 1945-50, he headed the Joint Religious Radio Committee (later the Protestant Radio Commission),\textsuperscript{90} where he appeared on behalf of this group before the FCC. Parker’s work with the Communications Research Project, located

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\textsuperscript{88} See, e.g., Harold D. Lasswell, Propaganda Technique in the World War (1927); Harold D. Lasswell, Public Opinion in War and Peace (1943); Harold D. Lasswell, Psychological Warfare (1951) (on Soviet Union propaganda).

\textsuperscript{89} See George E. Korn, Everett C. Parker and the Citizen Media Reform Movement: A Phenomenological Life History (Ph.D Diss. So. Ill. Univ. at Carbondale 1991); see also UCC’s Parker to Step Down; Everett Parker, 104 Broadcasting 45 (3/14/83).

\textsuperscript{90} The Protestant Radio Commission was affiliated with the Federal Council of the Churches of Christ of American, which later merged with another church organization to become the United

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at Yale University and sponsored by the National Council of Churches, demonstrated to him the power of social scientific evidence as a tool for broadcast reform. In addition, at the project, Parker formed lifelong bonds with scholars in the area of broadcast reform. He worked with Professor Dallas Smythe, who had been the FCC’s Chief Accountant and Economist, on monitoring studies of broadcasters’ commitments to educational programming.

Parker marked these efforts to use social science evidence to establish the need for educational broadcasting as “the beginning of the citizen movement in broadcasting.” The FCC recognized this methodology, thereby setting a precedent for its future use, in cases such as Parker’s United Church of Christ. For Parker, broadcast reform had always been intertwined with participation at the FCC. Prior to his efforts in United Church of Christ, he appeared repeatedly before the FCC and Congress to testify relating to broadcast matters. He appeared before the FCC at the 1947 Mayflower Hearings on behalf of the Federal Council of Churches of Christ of America, and on behalf of the Congregational Christian Churches on the question of television frequencies for educational stations.

The ideals of the 1940s broadcast reform movement informed Parker’s thought. They established a benchmark by which he would measure the quality of broadcasting for decades. Like many in the late 1940s, Parker was wary about the

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91 Korn at 147 (quoting Everett C. Parker).
92 Letter from Everett C. Parker to T.J. Slowie (1/25/48), in FCC Docket 8516. The Mayflower Hearings were held to revisit the FCC’s "no-editorials" rule and led to the Commission’s formal adoption of the "Fairness Doctrine," which required broadcasters to provide balanced
relationship between radio broadcasting and totalitarianism. Yet he was optimistic about radio's potential. Radio was "the most potent force...to unite a community, a nation, a world, in a course of action" and was "a potential agent of democracy."\textsuperscript{93} Democratic radio ideally would involve listener choice; it would spur conversation and thought. It would treat listeners as "grown-up persons,"\textsuperscript{94} "not as objects, but as subjects, not as things to be manipulated and cajoled, but as thinking, willing persons who are in a democratic...relationship with those broadcasting."\textsuperscript{95} Listeners would be "active," not passive.\textsuperscript{96} They needed to be involved. Group study and "grass roots" testimony would bring an "understanding of the needs and interests of the people in the community."\textsuperscript{97} Religious groups could help station managers "build intercommunication between community groups and leaders" and "root stations in the community culture."\textsuperscript{98}

As did many of his generation, Parker viewed Father Coughlin's broadcasts as emblematic of the demagogic dangers of radio. Using broadcasting for demagogic purposes was a perversion of "the natural democratic properties of radio."\textsuperscript{99} The chief danger of radio was "one-way thought [where] there will be no answering thought from the listener, only acceptance."\textsuperscript{100} This would produce "mass man" rather than "communal man."\textsuperscript{101} For Parker, the greatest potential

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\textsuperscript{93} Everett C. Parker et al., Religious Radio; What to Do and How, at ix-x (1948).
\textsuperscript{94} Id. at xiv.
\textsuperscript{95} Id. at 133.
\textsuperscript{96} Id. at 82.
\textsuperscript{97} Id. at 3-4. (emphasis omitted).
\textsuperscript{98} Id. at 57.
\textsuperscript{99} Id. at xii.
\textsuperscript{100} Id. at xiii.
\textsuperscript{101} Id. at xiv.
and dangers of radio were clearest in the arena of race relations. On the one hand, "there are deliberately evil men who seek to gain their own ends by setting group against group, by awakening and feeding our hatreds,"\textsuperscript{102} and "[t]he time ha[d] come...to help people realize the sickness of the soul of the racial bigot."\textsuperscript{103} Yet, if radio were in the hands of the enlightened rather than the bigot; it could be used to improve race relations through education. It could initiate "a new forward leap in mankind's effective intelligence similar to that which occurred with the introduction of printing."\textsuperscript{104}

Parker drew on all of the principles and knowledge that he developed during the 1940s when he initiated the 1966 pivotal case of United Church of Christ v. FCC, in which the D.C. Circuit granted radio and television listeners the right to participate as parties to FCC proceedings and afforded them the opportunity to appeal their claims to the courts.

Conclusion

By the late 1940s, liberal social reform groups shared a listeners' rights approach to broadcast reform. This focus on the listener provided justification for government regulation of broadcasters to require broadcasters to open their airwaves to a diversity of voices. The advocacy of listener's rights by social reform groups was often driven by their own concerns about obtaining access to the airwaves for their own organizations and their liberal compatriots. These

\textsuperscript{102}Id. at 57.
\textsuperscript{103}Id. ("The heart of the white race must be cleansed and made fit to join humanity").
\textsuperscript{104}Id. at xiii.
potential users of the airwaves framed their claims in terms of the rights of listeners to hear a diversity of voices as a political strategy.

These ideas promoted by social reform groups during the 1940s provided the foundation for public participation at the Federal Communications Commission from the 1940s until today. The broadcast reformers of the 1960s drew directly from the ideology of the 1940s. Many of them carried that ideology directly from one era to the next. The most important person making this transfer was Everett Parker who brought the ideals of the 1940s to the 1960s when he embarked on the United Church of Christ litigation.
The Quest for Non-Commercial Broadcasting

One of the earliest initiatives on the broadcast reform agenda was the establishment of noncommercial stations that could serve as a countervailing force to challenge the dominance of commercial broadcasting. Lobbying efforts led to the development of educational radio, then educational television and much later, public television. Broadcast reformers learned through this process, however, that institutional barriers prevented educational stations from effectively counterbalancing the commercial wing of the industry.

Hopes for Noncommercial Radio and Television

A top priority for broadcast reformers in the early years of broadcast regulation was a specific allocation of the broadcast band for nonprofit organizations. They asked to Congress to set aside a portion of the broadcast bandwidth that would be used exclusively by nonprofit broadcasters. The ACLU and others social reformers encouraged Congress to provide preferential treatment for nonprofits interested in receiving broadcast licenses.

Congress rejected preferences for noncommercial broadcasters and failed to reserve any portion of the spectrum for noncommercial use. Early bills leading up to the Radio Act of 1927 included preferences for nonprofit broadcasters, but these provisions were dropped. The Radio Act of 1927 made no specific mention of nonprofit broadcasting.\(^1\) It included only the vague “public interest, convenience

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\(^1\) Robert W. McChesney, Telecommunications, Mass Media, and Democracy: The Battle
and necessity" standard that offered no particular support to noncommercial broadcasting.

When Congress reconsidered its broadcast legislation during the New Deal, broadcast reformers returned to Congress to lobby for noncommercial broadcasting preferences. The most promising proposal was the Wagner-Hatfield amendment, which would have reserved 25% of the radio allocations for non-profit groups, such as educational and labor groups. The campaign for the amendment was spearheaded by religious, farm and labor groups. Their efforts for such preferential treatment failed, however. Again Congress declined to include preferences for noncommercial broadcasters in its Communications Act of 1934. Congress established the Federal Communications Commission, but the statute retained the substantive regulatory principles of the 1927 Act with little modification. The Wagner-Hatfield amendment did not become part of the Act. The efforts for the amendment did lead, however, to a watered-down provision relating to nonprofits. Section 307(c) of the 1934 Act required the Commission to study the question of nonprofit access to the airwaves and report back to Congress. Section 307(c) was a legislative consolation prize for those seeking non-profit allocations of the spectrum.

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2 Id. at 75; see also Erik Barnouw, The Golden Web 22 (1968).
The new FCC held hearings in the Fall of 1934 to assess whether a reservation for noncommercial stations was necessary. Many believed that the merits of the arguments were irrelevant and that the Commission was pre-committed to rejecting a special allocation for non-profits; labor organizations did not even bother to appear before the Commission. Members of the nonprofit community that did testify were unable to overcome the Commission's lack of enthusiasm for a special allocation. Cornell political science professor Robert Cushman criticized the nonprofit participants for failing to "present a united front" and for "present[ing] half-baked irreconcilable proposals" that "had no effect whatsoever on the Commission." The nine groups that were part of the National Committee on Education by Radio ("NCER") each participated individually, because they could not agree on joint testimony.

In contrast, the National Association of Broadcasters ("NAB") made a "consolidated and effective case against the specific proposal." Appearing on behalf of commercial broadcasters, the NAB spokesman argued that commercial broadcasters adequately accommodated the needs of nonprofit organizations. He countered arguments that commercial broadcasters had discriminated against non-profit organizations and labor unions. Broadcast stations had neither censored these groups nor deprived them of their right to free speech. Rather,

[w]ithin such fields as education, religion, agriculture, labor, charity and social service, the record shows that editorial selection [by commercial broadcasters] is commonly limited to the assignment of time to

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5 See McChesney, Telecommunications, Mass Media and Democracy, at 212.
6 Id.
8 See also McChesney, Telecommunications, Mass Media and Democracy, at 211.
9 Cushman, Independent Regulatory Commissions, at 326.
representative organizations or groups and that no restrictions are placed on the subjects to be discussed.\textsuperscript{10}

Thus, said NAB's representative, no special stations were necessary for nonprofits. They could be accommodated within the system of commercial broadcasting.

The Commission's report was the "final interment" of the non-commercial allocation proposal.\textsuperscript{11} The Commission reported to Congress that nonprofit set-asides were unnecessary and it declined to make any special accommodations for non-profit stations. Few were surprised. The Commission relied on NAB's rationale that nonprofit stations were unnecessary, and concluded that nonprofits would be better off if they were granted access to commercial broadcasting facilities than if they established their own stations:

It would appear that the interest of non-profit organizations may be better served by the use of existing facilities, thus giving them access to costly and efficient equipment and to established audiences, than to the establishment of new stations for their peculiar needs.\textsuperscript{12}

The Commission offered supervised cooperation between nonprofits and broadcasters:

In order for non-profit stations [sic] to obtain the maximum service possible, cooperation in good faith by the broadcasters is required. Such cooperation should, therefore, be under the direction and supervision of the Commission.\textsuperscript{13}

With little else upon which to rely, the non-profit community read the statement as a commitment from the FCC to look after their interests.

\textsuperscript{10} Hearing Transcript 472, in FCC Docket 6631.
\textsuperscript{11} Barnouw, Golden Web at 26.
\textsuperscript{12} FCC Mimeograph, No. 11861, 1/22/35, pp. 5-6, quoted in Warner, Radio and Television Law, at 324.
\textsuperscript{13} Id.
Broadcast reformers relied upon this language for decades after the Report's issuance. Charles Siepmann, one of the leading broadcast reformers of the 1940s and 1950s, relied upon the above history to argue that the FCC was obligated to regulate to assist nonprofit organizations in obtaining access to the commercial airwaves:

Congress was concerned to see provision made in broadcasting for "particular types or kinds of non-profit radio programs." It was not clear how this should be done. It instructed the Commission to find an appropriate solution. The Commission did so. The solution... was one which relieved the broadcasters of the embarrassment of having "fixed percentages of radio broadcasting facilities" reserved for the above purpose.... [L]icensees on their own initiative, could and would make room for radio programs of this kind.... [T]he Commission [therefore] became irrevocably committed to concern with program service, at least in so far as it relates to the interests of non-profit organizations.\(^\text{14}\)

The nonprofit community continued to cite the Commission's approach in its 1934 Report well into the 1960s. Everett Parker, the initiator of the *United Church of Christ* litigation, complained in 1968 (even after the development of public radio and television) that "[i]n 1934, broadcasters made sweeping promises to meet the public service needs of the nation.... On the basis of these promises, proposals for reservations... were scrapped."\(^\text{15}\) Commercial broadcasters continued therefore to have obligations to fill the gap. Broadcast reformers felt that they had the moral high ground in lobbying the Commission to protect their interests within the system of commercial broadcasting and were thus unapologetic about their desires to participate in FCC proceedings.

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\(^{14}\) Charles Siepmann, Mayflower Hearing Testimony 576, in FCC Docket 8516.  
The Development of Educational Radio

Later the FCC did create special reservations of the spectrum for educational radio and television stations. These allocations, however, were for educational stations, not noncommercial stations, and thus excluded a broad range of nonprofit and social reform groups. As such, the creation of these stations did not entirely satisfy the demands of nonprofits for access to the airwaves. In addition, broadcast reformers found that educational institutions were not the ideal institutions to actively challenge commercial broadcasters.

Educational radio had a long history beginning when the University of Wisconsin and other universities established some of the earliest radio stations. In the 1920s, there were 200 educational stations on the air, but only 35 survived until 1941.\textsuperscript{16} Attempts to stem the decline began in the 1930s. The FCC took the initiative and invited educators to request special reservations for educational radio and to testify at a range of hearings that were held in the late 1930s.\textsuperscript{17} The U.S. Office of Education took an active role soliciting the views of schools and universities around the nation. Education Commissioner John W. Studebaker drafted a brief and presented testimony before the FCC. Educational institutions and interests testified, but the U.S. Office of Education and the FCC itself were the driving forces behind the initiative. Interested educators provided passive support for these early efforts, but declined the role of an aggressive interest group seeking favors from the regulatory state.

In 1938 the Commission reserved a portion of the AM spectrum for educational broadcasting, channels that were ultimately transferred to the untested FM band. These early stations were typically low-power stations providing in-school broadcasting. By the 1940s broadcast reformers came to view FM radio as a "second chance" for social reform organizations to enter the radio industry.\textsuperscript{18} The Commission began work on a major allocation plan for FM airwaves, which created a new opportunity for special set-asides for educational radio. In 1944 the U.S. Office of Education requested 15 FM channels for education, and FCC Commissioner Clifford Durr encouraged the Commission to set aside 15\% of the new FM allocations, a twenty-channel band from 88 to 92 megacycles, for educational broadcasting.\textsuperscript{19}

The FCC held hearings on the educational radio set-asides. Although there was no serious opposition from industry, the FCC felt a need to demonstrate support for its allocations. To mobilize the educational community, Belmont Farley of the National Educational Association (NEA) worked with the FCC and the U.S. Office of Education to mobilize educational institutions and associations. Resolutions were drafted; testimony was planned; witnesses were lined up and questionnaires circulated. Nearly thirty educators appeared at hearings to present testimony demonstrating the need for additional frequencies.

\textsuperscript{18} See Charles Siepmann, Radio's Second Chance; John A. Salmond, Conscience of a lawyer: Clifford J. Durr and American Civil Liberties, 1899-1975, at 81 et seq (1990). This vision may have been encouraged by commercial FM entrepreneurs that wished to give legitimacy to the FM band. See Gibson, Public Broadcasting, at 51.
\textsuperscript{19} Salmond, Conscience of a Lawyer, at 82.
They came armed with exhibits and evidence. The FCC sitting en banc listened to the educators for a day and a half.\textsuperscript{20}

Yet the educational institutions themselves were hardly outspoken in favor of their interests.\textsuperscript{21} The National Association of Educational Broadcasters (NAEB) declined to present united testimony because they “had nothing to offer in a technical way which would not be presented by others,” and they were confident that they could “operate at any frequencies that the FCC sees fit to assign.”\textsuperscript{22} In addition, they “felt very gratified that the FCC has seen our needs and allocated to us 20 channels.”\textsuperscript{23} This reticence was criticized.\textsuperscript{24} For example, Commissioner Durr bitterly recounted that educational institutions had not been enthusiastic enough about FM broadcasting; he viewed them as reluctant followers at best.\textsuperscript{25}

\textbf{Disappointment with Educational Radio}

By 1952, there were over 90 FM educational stations, but most were low-power stations. The educational institutions had not developed stations as quickly or as successfully as many had hoped. By the late 1940s, broadcast reformers were concerned that the FCC would take away the educational reservation and give the stations to commercial broadcasters eager to expand

\textsuperscript{20} See Memorandum in Novik Papers, Box 9; Folder 1: NAEB, Surveys and Reports, 1943-48, 1959.
\textsuperscript{21} See Gibson, Public Broadcasting, at xi (“with little enthusiasm or interest on the part of educators,” the Commission reserved FM channels for educational radio).
\textsuperscript{22} National Assn. of Educational Broadcasters Newsletter (2/1/45), in Novik Papers, Box 9, Folder 4, NAEB Newsletters, 1944-47.
\textsuperscript{23} Id.
\textsuperscript{24} See Gibson, Public Broadcasting, at Ch. 3. Similar complaints were sometimes made about churches.
\textsuperscript{25} Salmond, Conscience of a Lawyer, at 82.
into FM. Broadcast reformers expressed dismay with the conservative and short-sighted approach of educational institutions and stations.

In 1948, Chairman Wayne Coy of the FCC warned educational authorities to act quickly in establishing their stations because the reservation of spectrum for educational stations would not last forever, and unused spots could be turned over to commercial broadcasters if they remained unused.26 Others warned that the political and social temper of the times was changing and that unused frequencies would be vulnerable if disappointed commercial applicants sought to obtain the reserved FM educational channels.

When a group of Baptists interested in owning broadcast stations challenged the educational reservation, liberal social reform groups allied themselves with the FCC in an attempt to defeat and discredit the petition. In February 1949, the Radio Commission of the Southern Baptist Convention petitioned the FCC to provide reservations for religious groups wishing to operate low-power non-commercial FM radio stations.27 The petition complained that the Commission had paid great attention to the needs for educational broadcasting, but had neglected the needs of religious broadcasting. A grant of the petition by the FCC would enable small rural churches to operate low-power station that would broadcast religious and other programming to its community, providing a service in the public interest.

The Baptist petition asked for any available portion of the spectrum. Yet it argued that the “most feasible” option would be to use the non-commercial

26 Letter from Richard Hull to Graydon Ausmus (5/20/48), in Nævik Papers, Box 8, Folder 3.
educational FM band. After all, there was “sufficient room,” because educational broadcasters had not yet made use of the available spectrum. The Commission had reserved twenty channels for educational radio, more than requested by educational interests, and much of the FM reservation remained unused.

Despite the “heat” that the Baptist petition generated, educational stations were divided on how to react. They decided not to participate formally in the FCC’s proceedings on the petition, preferring to oppose the petition informally through its contacts at the FCC. Their sources suggested that the petition would be rejected in any event.

Formal opposition to the Baptist petition lagged until late 1949 when Everett Parker of the Protestant Radio Commission (PRC) took the lead. The Protestant churches that Parker represented preferred not to encourage the evangelical-style religious broadcasting. Instead, they aligned themselves with the interests of educational radio and television. Parker expressed deep concern about the dire threat that he believed the Baptist petition posed to educational radio:

If this petition is granted, it will mean that the educational band will be broken, and it can well mean the elimination of special frequencies to education.

Even before the PRC took an official position, Parker met with Commissioner Freida Hennock, a liberal Truman appointee, to discuss the petition, and sought her assistance in the mechanics of filing a brief opposing the petition. He explained to Hennock that he was not opposed to FM stations for church groups, but the

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28 Id. at 6.
29 Id.
30 Letter from Everett Parker to Richard Hull (12/5/49), in Novik Papers, Box 10, Folder 8.
educational band should not be invaded, however, despite the slow speed at which educational radio was developing.

After meeting with Hennock, Parker sought to enlist other allies in his campaign, and former FCC Commissioner Clifford Durr agreed to file a brief on the PRC's behalf. Both Parker and Durr were frustrated by the lack of activism by the educational institutions. Parker complained that "I have not been able to find that any educational organization has come forward to oppose the applications of the Southern Baptists Convention." Durr wrote to the head of the National Association of Educational Broadcasters, attacking the educational stations for their lack of initiative:

What the hell happened to the NAEB? ... The Southern Baptists are moving in on the educational FM band, the Catholics are backing them up, and so far as the record shows, there is not a chirp of protest from the [NAEB] or, for that matter, from a single educator or educational institution.

Durr warned that "once the gate is opened, even though the first small opening is made in the name of religion," it would be difficult to hold a place for education on the radio. The matter was too serious to be left to the educational stations themselves. Even if the "academic dodos" were "sitting on their backsides and letting the educational FM band go to waste," others could not sit by quietly, because "[t]he band was not set aside for [the educators'] personal benefit." Durr submitted a brief to the FCC on the PRC's behalf arguing that special allocations or reservations for religious organizations were inappropriate. Religious institutions should be permitted to compete on equal footing with commercial

\[^{31}\text{id.}\]
\[^{32}\text{id.}\]
\[^{33}\text{id.}\]
\[^{34}\text{id.}\]
broadcasters for standard broadcast licenses and should be governed by the same public interest requirements. Any new allocation or reservation should be for noncommercial stations broadly speaking, and should not be limited to religious stations. The existing educational band should remain intact—aspiring religious broadcasters should not be entitled to steal the FM reservations set aside for education. The slow pace of educational radio development did not justify depriving the American people of this unique resource.

In response to the PRC brief, the Baptist group’s attorney, Leonard Marks, submitted a revised petition. To eliminate concerns about the FCC’s ability to make judgments about the validity of religious groups, the petition echoed the PRC’s request that bandwidth be reserved for non-commercial low power FM stations available to any recognized non-profit group. In addition, the petition responded to the PRC’s desire to protect the educational band by asking the FCC to use a portion of the spectrum other than the educational reservation. Marks argued that FM radio was in danger of not getting off the ground because too few people had the incentive to purchase FM radio sets to listen to FM stations. Religious groups could help FM through the development of low-power stations. The petition should be granted in its revised form.

The PRC supported the revised petition. Parker considered the possibility of dropping out of the proceeding at this point, but Chairman Coy discouraged him: “In view of your obvious interest in the proceeding, it would be highly desirable for your organization to participate in the forthcoming oral argument.” Following this

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34 Id.
35 Letter from Wayne Coy to Everett Parker (9/28/50), in FCC Docket 9470.
letter, Parker enlisted a new attorney, Frank Ketcham, and filed a revised brief for the PRC.\textsuperscript{36}

Meanwhile, the FCC sought additional opposition against the idea of an allocation for religious stations. The Commission’s Hilda Shea wrote confidentially to Columbia professor of administrative law, Walter Gellhorn, who worked closely with the ACLU,\textsuperscript{37} encouraging him and his “friends” to participate in the proceeding. She informed him that the Baptist petition raised “serious policy problems” and that the agency would “blanch at the prospect of having to pass on the bona fide religious character of particular applicants.”\textsuperscript{38} A week later she wrote again to Gellhorn to encourage him and his friends to intervene.

After receiving copies of these letters, the ACLU decided to file a brief opposing the original Baptist petition, but endorsing its revision. It expressed concern that religiously-owned stations should be bound by the same public interest requirements and be required to adhere to the Fairness Doctrine. The ACLU so strongly supported the idea of a general reservation for all non-profit organizations wishing to broadcast that it was willing to forego the existing educational reservation.

Once the Commission obtained the desired modification of the Baptist petition, it called for additional briefing and oral argument on the question of whether there was a “substantial demand” among nonprofit organizations for owning and operating stations. The Southern Baptists claimed they were

\textsuperscript{36} Why Durr discontinued participation in the case is unclear. Perhaps he felt that he could not represent the PRC given its changed position.  
\textsuperscript{37} For further details on Professor Gellhorn’s work with the ACLU, see Samuel Walker, In Defense of American Liberties: A History of the ACLU (2d Ed., 1999).
interested, but they did not point to any other interested non-profit groups. Neither
the PRC nor the ACLU demonstrated any demand either. Thus Commission
rejected the Southern Baptists' petition based on the lack of demand for nonprofit
stations.

Broadcast reformers learned several lessons from this experience. First, working with the Commission, rather than against it, was the key to successful
participation before the FCC. The ACLU and the PRC were most successful in
assisting the Commission in achieving its goals, rather than in obtaining their own
substantive policy desires. They legitimated Commission action rather than
challenged it. Without standing, that was all they could achieve.

Second, the Commission continued to make clear that it would not make a
general noncommercial allocation, but it would limit special reservations to
educational institutions. Other challenges to the dominance of commercial
broadcasting would have to be made through direct attack on commercial
broadcasters, if at all. Finally, educational interests were reluctant participants in
broadcast reform activities and in FCC proceedings, even when their own interests
were at stake.

The Development of Educational Television

The FCC had rejected a reservation for educational television during the
1940s because educators had failed to express a demand for the service. By the
1950s, however, the need for educational television became more apparent. In
1950 the National Association of Educational Broadcasters and the American

38 Letter from Hilda Shea to Walter Gellhorn (12/27/49), in ACLU Papers, Box 918.
Council on Education supported the creation of the Joint Committee on Educational Television, an organization that would work toward the development of educational television.

The successful achievement of the educational television reservation, however, is largely attributable to the efforts of President Truman and his nominee Commissioner Freida Hennock, who became the champion of educational television on the Commission. According to Hennock, Truman met with the Commissioners and told them, "I have never asked anything of an administrative agency" and "I am never going to ask another agency for anything." Then he asked the Commission for "one favor and that is to reserve these channels for educational television." Morris Novik, a consultant who worked on the educational television campaign, explained that Truman felt strongly about educational television, because he "basically believed in helping the little people" and was persuaded that educational television could serve the role that land-grant colleges had played in earlier years.

As in the case of educational radio, the educational interests themselves had difficulty organizing and coming to a position. Everett Parker described the situation as follows:

The educators who had the radio stations . . . could not get together and make up their minds what they wanted the Federal Communications Commission to do and the Commission got very impatient with them . . . .

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40 Id.
41 Morris Novik Interview 53, Library of American Broadcasting, University of Maryland, College Park, MD (hereinafter "Novik Interview").
According to Parker, the educational interests were fighting among themselves up until the deadline for filing a petition to request an educational reservation, and so Freida Hennock called Parker and said:

These people are never going to get together and we're going to pass this whole thing if somebody doesn't petition us.43

So Parker borrowed a lawyer from NBC to put together a petition for rulemaking on behalf of the colleges affiliated with the Congregational Christian Churches so that the Commission could hold hearings.44

Once the FCC decided to hold hearings, advocates of educational television orchestrated an impressive roster of supportive witnesses, including Walter Reuther of the CIO and George Meany of the American Federation of Labor. Morris Novik reformer explained his job in coordinating witnesses for the hearings: “my role was to try to bring in people who were liberal.”45 The Joint Committee on Educational Television testified that there was sufficient interest among educators for educational television, and that commercial broadcasters were not meeting educational needs.46 In total, 349 statements were filed on behalf of 838 educational institutions in support of the proposal for educational television.47

The National Association of Educational Broadcasters sponsored content analyses of commercial broadcasting in order to demonstrate the lack of

43 Id.
44 Id.
45 Novik Interview, at 37.
46 The organization consisted of the American Association for School Administrators; the American Council on Education; the Association for Education by Radio-Television; Association of Land-Grant Colleges and Universities; National Association of Educational Broadcasters; National Association of State Universities; National Council of Chief State School Officers; and the National Education Association of the United States.
47 Comments of the Joint Committee on Educational Television at 5, in FCC Docket
educational programming broadcast by commercial stations. These content analyses combined monitoring of station programming with analysis of its content. Everett Parker and Dallas Smythe set up a monitoring study of an NBC affiliate in New Haven which demonstrated that there was no educational programming on that station for an entire week.\textsuperscript{48} The FCC's recognition of this study then led to foundation support from the Ford Foundation, the Carnegie Foundation and others for more extensive monitoring of stations in New York, Chicago and Los Angeles to demonstrate the need for noncommercial television.\textsuperscript{49}

In the Commission's Sixth Report and Order, the FCC established reservations for educational television service. Although initially for only one year, the reservation was later extended indefinitely.\textsuperscript{50} As one reformer stated: "we got a helluva lot more than anybody ever would think that they would do."\textsuperscript{51} The emergence of educational television occurred despite the lack of organization or activism by educational institutions themselves. Other broadcast reformers worked to promote educational television. In fact, Parker describes the participation on behalf of educational television as "probably the beginning of the citizen movement in broadcasting . . . ."\textsuperscript{52}

However, after the educational television allocation, the history of educational and public television took a separate and independent path from the broadcast reform movement generally. Starting in the 1950s, educational television

\begin{footnotesize}
11401, in Novik Papers, Box 6, Folder 2.  
\textsuperscript{48} Korn, Everett C. Parker, at 147.  
\textsuperscript{49} Id.  
\textsuperscript{50} Sterling and Kittross at 331.  
\textsuperscript{51} Novik Interview, at 37.  
\textsuperscript{52} Korn at 147 (quoting Everett C. Parker).
\end{footnotesize}
received substantial private support from the Ford Foundation, and in the 1960s, it was transformed into public television. Broadcast reformers shifted their focus to other causes, and would later challenge the licenses of public television stations.

Conclusion

The early failure of noncommercial radio and television left a scar on the broadcast reform community that did not easily heal. In 1960, Patrick Malin of the ACLU wrote:

Our mouths water . . . when we think how different the situation would be . . . if Congress in 1934 had gone ahead and earmarked twenty-five percent of broadcasting services for educational and other non-profit organizations.  

Malin spoke for many in the social reform community who were dismayed by the commercial nature of broadcasting. The decades from the 1930s until the 1960s were marked by attempts to find second-best solutions to the problem of maximizing diverse voices within a commercial environment.

Educational radio and television were established. However, a variety of factors help explain why educational institutions were relatively weak participants in the regulatory state. Most educational institutions were bureaucracies, often part of and supported by even larger bureaucracies of state and local government. Those interested in educational radio were small voices within slow-moving, conservative institutions. Educational institutions did organize into collective bodies interested in educational radio, but these organizations were strapped for funding. The collective bodies were limited in their ability to lobby by

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53 Letter from Patrick Murphy Malin to Arval Morris (7/22/60) in ACLU Papers, Box 316, Folder 15, Programming: Illinois Affiliate, 1960-62.
their inability to come to consensus on affirmative strategies and goals, a fact also connected to the underlying bureaucratic structure of its members. Their conservatism was exacerbated by the financial and technological uncertainty that these new media brought. Finally, as the Executive Secretary of the National Association of Educational Broadcasters explained, “too many of our boys are babes in the wood and believe that right and justice will automatically triumph.”\(^{54}\)

Another barrier that developed between educational institutions and social reform groups was the former’s status as station owners. They became part of the broadcast industry, albeit not part of commercial broadcasting industry. Once their reservation of FM station claims was firmly established, a split between educational institutions and other nonprofits occurred. Educational institutions were now insiders, recognized by the Commission as part of the regulated industry. They no longer needed to couch their requests as interested members of the public, or as public participants; they would have standing to make requests directly to the agency on their own behalf.

The development of educational radio and television was supported by broadcast reformers, but after its establishment, educational radio and television took a path separate from that of broadcast reform more generally. Broadcast reformers continued to support educational radio and television, but they also turned to other strategies to seek access and obtain diversity. They continued to insist that the Commission had an affirmative obligation to look after nonprofit interests within the system of commercial broadcasting.

\(^{54}\) Letter from Richard B. Hull, Ames to Morris Novik (11/7/47), in Novik Papers, Box 8, Folder 1, NAEB, Executive Secretary, Correspondence, 1946-47.
The Search for Balance: Broadcast Reformers and the Fairness Doctrine

The failure of educational radio and television to counter the power and influence of commercial broadcasting forced broadcast reformers to focus their efforts on regulating the speech of commercial broadcasters in hopes of mandating access for viewpoints that commercial broadcasters would otherwise not provide. The touchstone for access to the airwaves was the Commission’s Fairness Doctrine, which required broadcasters to provide program balance by affording an opportunity for the presentation of opposing viewpoints about public and controversial issues. Social reform groups were advocates for the Fairness Doctrine, and citizen complainants were a primary mechanism for the development and enforcement of fairness concepts.

Fairness concepts emerged from the original legislative history of broadcast regulation. The 1927 Radio Act included a provision that required broadcasters to provide equal treatment for election candidates. At that time, a broader concept of fairness was considered but rejected. The provision in the original Senate bill extended coverage to the discussion of public issues:

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1 Radio Act of 1927, § 18. It later became § 315 of the Federal Communications Act of 1934, which read as follows:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect. Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

If any licensee shall permit a broadcasting station to be used as aforesaid, or by a candidate or candidates for any public office, or for the discussion of any question affecting the public, he shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce. ¹

The final act said nothing about the treatment of public or controversial issues, and Congress did not specify how broadcasters ought to handle the discussion of these issues. Rather, the Commission was simply given authority to regulate broadcasters in the public interest.

The Federal Radio Commission quickly endorsed the principle of fairness in broadcasting:

Insofar as the program consists of discussion of public questions, public interest requires ample play for the fair and free competition of opposing views, and the Commission believes that the principle applies not only to the addresses of political candidates but to discussion of issues of importance to the public. ²

Rather than formalizing this policy into a rule, however, the Commission chose to develop its principles through its treatment of citizen group complaints about broadcasters. Citizen groups often called the Commission’s attention to perceived incidents of unfairness. The Commission relied on these complaints, because it had few other resources to determine whether stations were violating fairness principles.

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In *Trinity Methodist Church* (1932), the Commission denied a license renewal based on fairness principles after receiving citizen complaints.⁴ Numerous citizens complained about a Los Angeles station controlled by the Trinity Methodist Church and its minister, Reverend ("Fighting Bob") Shuler. Based on the testimony of ninety witnesses, the Commission found that Shuler had attacked the Catholic Church, Jews, labor, judges, the bar association and others, had engaged in sensationalist broadcasting, and had used the station in the obstruction of justice.⁵ The D.C. Circuit upheld the Commission’s revocation of the station’s license, agreeing that a broadcaster could not use the airwaves “to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord . . . .”⁶ The court found that the Commission’s revocation did not violate the First Amendment.

During the New Deal period, social reform groups returned the problem of controversial issues programming to the Congressional agenda.⁷ The ACLU took the lead, convincing Representative Scott to introduce three bills that it had drafted.⁸ The first bill would have required licensees to provide nonprofit discussion time for economic, social and political issues and response time for

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⁴ See McChesney at 27.
⁵ See Trinity Methodist Church, South, v. Federal Radio Commission, 62 F.2d 850 (D.C. Cir. 1932) (upholding Commission’s decision). The ACLU represented Shuler in his attempt to get the Supreme Court to hear his case, but this effort failed.
⁶ Id. at 853.
⁷ Attempts to get Congress to codify the Fairness Doctrine have been perennial, especially since the FCC abolished the Doctrine in 1987.
opposing viewpoints. The second proposed bill would have relieved station licensees from liability for defamation. The ACLU encouraged such an exemption in order to prevent broadcasters from using libel and defamation law as an excuse to censor speakers or deny them airtime. The third proposed bill would have required each broadcaster keep a record of all requests for airtime, so that discriminatory allocation of airtime could be detected. All three bills died in committee, and Congress never took action on these subjects. Thus social reform groups returned to the Commission to lobby for similar principles.

The Commission's general principles against propaganda, as expressed in cases such as *Trinity Methodist*, were refined, developed and enhanced during the 1940s. One of the most significant questions that arose in the 1940s was whether broadcasters could editorialize over the airwaves. In the late 1930s, broadcasters assumed that they could broadcast editorials:

> After the broadcast presentation of unbiased news reports, a broadcast station, . . ., may editorialize and assure a position with respect to

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9 Some may be surprised that the ACLU would have favored rather than opposed the Fairness Doctrine. The ACLU vacillated somewhat over the years. In 1949, it complained that the FCC adopted the Fairness Doctrine, preferring that the FCC retain the Mayflower Doctrine no-editorials rule. In 1952, it expressed concern that the Fairness Doctrine might suppress speech, but in 1959, it endorsed the Fairness Doctrine.

10 Other liberal reform groups were sympathetic with this reasoning. For example, the CIO opposed an Illinois libel bill that would hold stations responsible for libelous broadcasts, on the grounds that it provided incentives towards private censorship by broadcasters. Nathan Godfried, *WCFL: Chicago's Voice of Labor*, 1926-78, at 212 (1997). Courts in some states had approved holding broadcasters liable for defamatory broadcasts. The Supreme Court resolved the question, concluding that the 1934 Communications Act immunized broadcasters from liability for the defamatory speeches of election candidates in *Farmers Educational and Cooperative Union of America v. WDAY*, Inc., 360 U.S. 525 (1959). By protecting a wide range of speech against public figures, *New York Times v. Sullivan*, 376 U.S. 254 (1964), made this question largely irrelevant.
controversial issues. It is essential that the station, however, make clear to the audience the fact that the program is an editorial opinion.\textsuperscript{11}

However, the wartime climate and totalitarianism abroad highlighted the dangers of propaganda. The controversial broadcasts of Father Coughlin made the danger seem real here in America. Many became convinced that editorials and broadcasting were an unhealthy mix.

In 1938, FCC Chairman Frank McNinch warned of the dangers that would arise if the intolerant conditions in Europe appeared in the United States. He encouraged broadcasters to avoid programming that encouraged racial or religious strife. McNinch’s commentary was widely interpreted as a criticism of Father Coughlin’s broadcasts. McNinch was criticized by some for crossing the censorship line in even discussing the issue.\textsuperscript{12} Yet prominent figures in the broadcast industry concurred. Many endorsed a “no-editorializing” rule for broadcasting and argued that broadcasting should be non-partisan.\textsuperscript{13}

The National Association of Broadcasters’ (“NAB”) 1939 voluntary code encouraged broadcasters to adopt a no-editorializing policy, and many hoped the code would discourage the broadcast of right-wing commentators such as Father

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\item[	extsuperscript{11}] A. Walter Socolow, The Law of Radio Broadcasting (1939), 813, as quoted in Comment, Federal Communications Commission—Renewal of Licenses—Biased Broadcasts as Ground for Refusal to Renew, 12 Air L. Rev. 170 (1941).
\item[	extsuperscript{12}] Harry P. Warner, Radio and Television Law 384 (1948) (citing a broadcast by McNinch under the auspices of the Federal Council of Churches of Christ). Criticism came from, among others, Roger Baldwin of the ACLU. See McCchesney, Telecommunications, Mass Media and Democracy, at 248 (quoting letter from Roger N. Baldwin to Frank McNinch (2/7/38)).
\item[	extsuperscript{13}] See Harrison B. Summers, Radio Censorship 203 (1939) (noting that networks barred discussion of controversial issues on paid programming on theory that minority groups could not compete for purchase of airtime); see also id. at 205 (excerpting speech of William S. Paley, president of CBS, on the merits of non-partisan broadcasting). Only after the promulgation of the
\end{enumerate}
\end{footnotesize}
Coughlin. The NAB code also contained within it an early version of what came
to be the Fairness Doctrine. It stated that stations had an obligation to "provide
time for the presentation of public questions, including those of a controversial
nature," and that stations should strive to "allot such time with fairness to all
elements in a given controversy." Stations were encouraged to ban the sale of
time for the presentation of controversial issues (unless the materials were
presented in a public forum style program with multiple points of view), and were
encouraged instead to provide such time without charge (that is, as part of its
"sustaining" programming). Finally, the NAB Code discouraged offensive
broadcasting:

Broadcasting that reaches men of all creeds and races simultaneously
may not be used to convey attacks upon another's race or religion.
Rather it should be the purpose of the religious broadcast to promote the
spiritual harmony and understanding of mankind and to administer broadly
to the varied religious needs of the community.

The community of liberal social reform groups viewed the Code as a step forward
and endorsed it. Most of these groups supported the idea that broadcasters

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Blue Book in 1946 would the NAB begin its campaign to gain the right to editorialize.
14 See generally, Alan Brinkley, Voices of Protest; Donald Warren, Radio Priest: Charles
Coughlin, the Father of Hate Radio (1996); Warner, Radio and Television Law, at 385-86. But see,
Warner, Radio and Television Law, at 306 (code promulgated in response to FCC review of program
15 1939 NAB Code.
16 Id. See also Summers, Radio Censorship, at 208, reprinting "Freedom of Speech Defined
by Lohr," Broadcasting, 4/15/38, p. 30 (citing NBC's President Lennox R. Lohr in support of principle
of equal opportunities for discussion of controversial issues). These principles were also endorsed
by the American Civil Liberties Union. See id. at 211.
17 1939 NAB Code.
18 Id. Endorsements of the code came from the American Federation of Labor (praising
creation of open forum in which "all sides—majorities and minorities, rich and poor alike—shall
have free access to the microphone to state their case"); American Civil Liberties Union
(commending no sale of time for controversial issues and grant of time for multiple viewpoints on

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should provide free access to the airwaves for discussion of controversial issues, rather than selling to the highest bidder.\textsuperscript{19}

The FCC supported the NAB Code, and put forward similar views regarding the editorializing and the treatment of controversial issues in its 1941 \textit{Mayflower} decision. In considering a station's renewal application, the FCC criticized the station's editorial policy, stating that stations should not editorialize. Asserting that broadcast editorials benefited only the station's private interest, not the public interest, the FCC stated that:

\begin{quote}
Under the American system of broadcasting . . . [it] is . . . clear that with the limitations in frequencies inherent in the nature of radio, the public interest can never be served by a dedication of any broadcast facility to the support of his own partisan ends. Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.\textsuperscript{20}
\end{quote}

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\footnotesize{controversial issues); Federal Council of Churches of Christ in America (lauding religious freedom, hearing both sides, and unbiased news); National Education Association (praising provisions relating to children's programming); and other groups. Some did complain that the NAB Code presented the danger of private censorship. Arthur Garfield Hays of the ACLU expressed concern that the NAB Code was anti-free speech: “In practice the Code may work out fairly, but by joining together the broadcasters have assumed a power which is a threat to free speech.” Arthur Garfield Hayes, Civic Discussion over the Air, 213 Ann. Amer. Acad. Pol. Soc. Sci. 44 (1941).}

\footnotesize{Broadcasters liked this approach because it permitted them the discretion to choose who would go on the air and who would be given free time. The gift of free time would also provide the broadcasters with substantial goodwill in the community. Most nonprofits were not in the position to purchase time and thus found this solution advantageous. Some, however, as we will see, would have preferred to purchase time, because they felt they were discriminated against in the granting of free time. See Ch. 5, infra.}

\footnotesize{Mayflower Broadcasting Corporation and The Yankee Network, Inc. (WAAB), 8 F.C.C. 333, 338 (1941).}
\end{flushright}
The decision was widely interpreted as banning editorializing over the airwaves.

In addition, the opinion contained fairness language:

> Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in a public domain, the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias.\(^\text{21}\)

The decision provided the FCC’s views on the subject, but the FCC renewed the station’s license. Thus, there was no appeal, and no court challenge to the *Mayflower Doctrine* ever took place. The Supreme Court’s 1943 *National Broadcasting Co. (“NBC”) v. United States* decision made clear, however, that the Commission’s regulatory powers extended beyond that of traffic cop. The FCC was responsible for the “composition” of the traffic, and a denial of a license based on the grounds that it did not satisfy the Commission’s “public interest, convenience, or necessity standard” was not a “denial of free speech.”\(^\text{22}\)

Wartime contributed to a consensus over the desirability of the Mayflower decision. Broadcasters declined to challenge the constitutionality of the decision.\(^\text{23}\)

\(^{21}\) Mayflower Broadcasting, 8 F.C.C., at 340 (1940); see also FCC, 1940 Annual Report 55 (announcing that broadcasters programming in the public interest had fairness obligations: “In carrying out the obligation to render a public service, stations are required to furnish well-rounded rather than one-sided discussions of public questions.”).


\(^{23}\) Note, Government Control of the Contents of Radio Programs, 47 Colum. L. Rev. 1041, 1049 (1947).
The Blue Book

In the post-war period, consensus about *Mayflower* decision eroded. In 1946 the FCC issued its "Public Service Responsibility of Broadcast Licensees." Known as the FCC's "Blue Book," the statement set off a strong negative reaction by industry and led to a broad-based attack on the Commission's authority that would lead to the elimination of the no-editorials rule.

Commissioner Clifford Durr was the driving force behind the Blue Book, and looking back, he considered it his grandest accomplishment.24 The Blue Book set forth the public service obligations for broadcasters. Broadcasters were required to provide several categories of programming: sustaining programs (programs not sponsored by advertisers), live local programming, and public issues programs.25 The FCC would give "particular consideration" to how stations performed in these areas.26 The Commission paid particular attention to the value of sustaining programs. Through sustaining programming, broadcasters should provide program balance, serve minority tastes and interests, service non-profit organizations, and allow for "unfettered artistic self-expression."27 The Commission emphasized the importance of providing discussions of controversial public issues.28

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26 Id.
27 Id.
28 Id. at 39-40.
This detailed approach to programming was a bold step in asserting the FCC's regulatory authority. It used the practices of several stations as examples of what not to do in broadcast programming.\textsuperscript{29} Although the Commission did not bring enforcement proceedings against any of these stations, the Blue Book threatened broadcasters' license security. The Blue Book was promulgated without any outside participation by industry or social reform groups. Rather it was drafted internally with the assistance of a consultant, Charles Siepmann, who, as we have seen, was an important supporter of broadcast reform. The lack of outside participation in formulating the Blue Book likely undermined its legitimacy and made the FCC vulnerable to attack by industry.

In the end, industry pressure won the day. The Blue Book died a still birth at the Commission and was never enforced. As explained by FCC Commissioner Durr, the broadcast renewal process changed little as a result of the Blue Book. Engineering questions continued to dominate the renewal process, and the Commission was unwilling to impose the "death sentence" on broadcasters.\textsuperscript{30} Even if Blue Book issues were raised, the Commission always renewed licenses if the station management and ownership promised to revise station policies and perform better in the future.\textsuperscript{31}

\textsuperscript{29} The Commission stated its preference for "well-rounded" programming, which consisted of: entertainment, consisting of music of both classical and lighter grades, religion, education, and instruction, important public events, discussion of public questions, weather, market reports, and news and matters of interest to all members of the family. \textsuperscript{30} Broadcasting and Government Regulation in a Free Society 7 (Center for the Study of Democratic Institutions, 1959). \textsuperscript{31} Id.
The broadcast industry succeeded not only in undermining the Blue Book's use as a regulatory tool.\textsuperscript{32} NAB organized an industry-wide campaign against the FCC's activism generally. This campaign led to hearings on the \textit{Mayflower} decision.

\textbf{Mayflower Hearings}

After issuance of the Blue Book, consensus about the Mayflower decision broke down. Broadcasters found the no-editorials requirement constraining, and when the Commission issued its Blue Book in 1946, broadcasters came to fear the implications of the Commission's new-found regulatory activism. Social reform groups, on the other hand, had concluded that broadcasters were circumventing the no-editorials rule, and that the FCC was not effectively enforcing fairness. The process of revision began in 1947. The National Association of Broadcasters, along with newspaper publishers and the National Association of Manufacturers, began a campaign to repeal the \textit{Mayflower} rule. That year FCC Commissioner Clifford Durr called for the revision of the policy,\textsuperscript{33} and Cornell University's radio station, WHCU, asked the FCC for a declaratory ruling regarding its ability to editorialize on its own behalf.\textsuperscript{34}

In scheduling hearings on the \textit{Mayflower} doctrine, the FCC solicited

\textsuperscript{32} Richard J. Meyer, Reaction to the "Blue Book," at 589, in Lawrence W. Lichty and Malachi C. Topping, American Broadcasting ("[t]o say that the [Blue Book] created a furor is perhaps an understatement").

\textsuperscript{33} Broadcast over Station WOR (5/2/47), quoted in Note, Government Control of the Contents of Radio Programs, 47 Colum. L. Rev. 1041, 1049 n.54 (1947). Cornell political scientist, Robert Cushman, was involved in this request and subsequent testimony. Given his previous interest in the FCC and questions of free speech, he may have instigated Cornell's efforts.

\textsuperscript{34} Comment, Mayflower Rule—Gone But Not Forgotten, 35 Cornell L. Q. 574 (1950).
participation "various groups and individuals in the country who are interested in
the question of free and full discussion over the radio."\textsuperscript{35} It sent letters to NAB,
other broadcasting interests, and a lengthy list of nonprofits, individuals, and
academics.\textsuperscript{36} Having learned a lesson from the Blue Book experience, the
Commission was sensitive to the need for legitimacy in exercising its regulatory
power. FCC Vice Chairman Paul A. Walker wrote to one labor union that "the
Commission is particularly anxious to have representatives of all points of view
concerning the problem of editorialization" and would be "greatly aided if a
number of persons of varying interests and backgrounds appear at the
hearing."\textsuperscript{37}

The FCC received a substantial response from individuals and social
reform groups. Letters and postcards that flowed into the FCC overwhelmingly
supported the retention of the principles of the \textit{Mayflower} decision. As one letter
writer expressed it: "the Mayflower Decision is actually the corner-stone of free
radio in this country."\textsuperscript{38} Permitting broadcasters to editorialize would create a

\textsuperscript{35} Letter from T. Slowie, FCC to a list of recipients, in FCC Docket 8516.
\textsuperscript{36} The groups, included among others, the ACLU, the American Association of University
Women, Americans for Democratic Action, the American Federation of Labor, the American Jewish
Congress, the American Veterans, the CIO, the Cooperative League of America, the Federal Council
of Churches of Christ in America, the General Federation of Women's Clubs, the League of Women
Voters, the NAACP, the National Assoc. of Farm Cooperatives, the National Catholic Welfare
Conference, the National Conference of Christians and Jews, the National Education Association,
the National Farmers' Union, the National Lawyers Guild, the National Urban League of America,
Progressive Citizens of America, and the YMCA-YWCA. Individuals included among others, Charles
Beard, Zechariah Chafee, Edwin L. Corwin, Morris Ernst, Lloyd Garrison, Robert LaFollette, Harold
Lasswell, Paul Lazarfeld, Charles Merriam, Reinhold Niebuhr, Arthur Schlesinger, and Charles
Siepmann.
\textsuperscript{37} Letter from Paul A. Walker to J.A. Beirne, Communications Workers of America (9/25/47)
in FCC Docket 8516.
\textsuperscript{38} Letter from Mrs. H. Maltun to the FCC (1/26/48), in FCC Docket 8516.
dangerous bias of opinion over the airwaves. As Everett Parker wrote to the Commission on behalf of the Joint Religious Radio Committee:

Should the licensee be granted the power to editorialize in his own name and person (or the persons of his employees), there seems to be grave danger that viewpoints opposed to those of the licensee would be eliminated entirely or, at least, effectively submerged through ability of the licensee to control a disproportionate amount of time for the presentation of his views. 39

Although the no-editorials rule seemed to broadcasters like a blanket ban on their speech, many social reform groups endorsed it.

There was even greater consensus among letter writers about retaining the fairness principles embodied in the Mayflower decision. One theme expressed was the fear of Nazi-style broadcasting. 40 One college student wrote that

There is . . . danger in such a set-up as editorials without restriction, that the listening public be given only one view on a major issue. That's the Nazi method. The public has the right to the truth, not someone's conception of it. Let broadcasters be free to edit—only on condition that they give other points of view equal access to the air over their facilities. 41

A man from Oklahoma also complained about the dangers of "an uncontrolled radio station". 42

That was one of the methods the Germans used to propagandize their own citizens as well as American troops. With no controls on the radio, the same thing could happen here in the U.S. Just imagine what could happen if a

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39 Letter from Everett C. Parker to T. Slowie (1/25/48), in FCC Docket 8516. Parker did recognize some place for the expression of a broadcaster's viewpoints: "if he, or his reps, are to editorialize, it should be done through the medium of forum or other discussion programs where views other than those of the licensee are also expressed."

40 See also James L. Fly, Testimony, Mayflower Hearing Transcript 320, in FCC Docket 8516 ("What did Hitler grab and use most effectively? And Hitler had a lot of free speech. How much did the people have?").


few radicals gained control of some of our radio stations . . . . There is no way we could be sure that they would not abuse that power . . . .

Many writers believed that the Mayflower doctrine best preserved the interests of minorities:

Just think: if a station-owner were anti-Semitic, anti-Negro, or anti-Catholic, he could inject his views into almost everything that went over the air on his station.

Let’s keep the air waves free from bigotry, and racial hatred.  

These sentiments were also reflected by many of the social reform groups that appeared to testify during the Mayflower Hearings.

The FCC held these hearings in March and April 1948. Opinion divided largely along three lines. First, most commercial broadcasters asked the FCC to overturn the entire Mayflower doctrine, both the no-editorial rule and the fairness principles. They endorsed fairness in theory, but asked the FCC to provide at most voluntary guidelines rather than enforceable regulations. They argued that both parts of the Mayflower doctrine violated a broadcasters’ First Amendment right to free speech and the Communications Act’s ban on censorship.

On the other side, many left-leaning social reform groups sought to preserve the Mayflower rule. Supporters of the Mayflower doctrine included the American Jewish Congress, the UAW, the CIO, and the National Lawyers Guild. The ACLU worked carefully on a statement that would be “an answer to the NAB’s attack that [the Mayflower decision] can be used as a means of control of

43 Id.
44 Letter from J.A. McGuire to the FCC (2/16/48), in FCC Docket 8516.

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program content when read together with the Blue Book standards." The ACLU argued that "the major interest secured by the first amendment [is] that of the freedom of a democratic people to have unrestricted access to all points of view." The ACLU argued that broadcasters had an affirmative obligation to present controversial issues: "the role of radio [is to be] impartial, not . . . inactive or unconcerned." Broadcasters should not be permitted to hide behind the Mayflower doctrine and refuse to present controversial issues at all. It argued that "radio should not have an editorial policy in controversial areas. What is to be avoided is the broadcaster's using his facilities to take one-sided attitudes toward controversial issues, without giving comparable time to other points of view." It was particularly important that "the broadcaster be constantly aware that he has no right to ignore any point of view while promoting a contrary one held by substantial elements of the public."

Labor groups pointed to discrimination against unions by broadcasters and the control of broadcasting by big business. The National Lawyers' Guild expressed concern about the danger of "reactionary and conservative news-commentators." Dr. Stephen S. Wise of the American Jewish Congress wrote that he was "chiefly concerned with the danger that the limited airwaves may be

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47 Id.
48 Id.
49 Id.
50 Statement of the National Lawyers Guild on Editorializing by Broadcast Licensees, adopted by the National Convention (2/28/48), in FCC Docket 8516.
used to create religious and racial dissension.\footnote{Milton D. Stewart, Testimony, Mayflower Hearing Transcript 429, in FCC Docket 8516 (including Dr. Wise’s statement).} Others complained about the role of broadcasters in perpetuating discrimination and segregation in the South. These groups called for stricter enforcement of fairness principles.

A middle position was taken by organizations willing to abandon the no-editorials rule, but insistent on the maintenance of enforceable fairness principles. WHCU, Cornell’s station, and WMCA in New York took the position that the fairness concepts should be retained, but that a broadcaster should be permitted to editorialize. The American Federation of Labor agreed that if radio stations editorialized, they should be required to offer equal time for opposing viewpoints. Dr. John W. Studebaker, U.S. Commissioner of Education, argued that educational stations should be permitted to editorialize, but they should continue to abide by fairness principles. Those advocating this position believed that the *Mayflower* doctrine was providing an excuse for broadcasters to avoid discussion of public issues and allowing broadcasters to shirk their responsibilities to their communities.

A number of organizations suggested that if broadcasters were permitted to editorialize, they should have an affirmative obligation to seek out responses to its positions. For example, the Religious Radio Association testified that radio stations desiring to editorialize should be required to offer equal time to representative and responsible organizations or individuals desiring to present
opposing viewpoints, and that broadcasters should have to seek out opposing viewpoints in advance.\textsuperscript{52}

Finally, academics and social reform groups defended the constitutionality of the \textit{Mayflower} doctrine and its fairness principles against industry claims that they violated the First Amendment. Zechariah Chafee, Jr. pointed to his new book that made clear that he had "no doubts about [the FCC's] constitutional and statutory power to make the original Mayflower [doctrine] and equally your power to modify it if you think best."\textsuperscript{53} Professor Robert Cushman, testifying on behalf of Cornell University, sought the repeal of the no-editorials rule, but argued for the maintenance of fairness principles on the ground that "freedom to 'listen' [was] as important as freedom of speech on the air."\textsuperscript{54}

**The Report on Editorializing**

The FCC sought an "equitable solution" to the problem.\textsuperscript{55} In 1949, the FCC adopted a compromise position in its \textit{Report on Editorializing}, the Commission's most important articulation of the Fairness Doctrine. The Report stated that although radio stations had "the responsibility for determining the specific program material to be broadcast," Congress wanted "radio [to] be maintained as a medium of free speech for the general public as a whole rather

\textsuperscript{52} Letter from Willard Johnson to FCC (2/12/48), in FCC Docket 8516.
\textsuperscript{53} Letter from Zechariah Chafee, Jr., to T.J. Sowie (2/28/48), in FCC Docket 8516.
\textsuperscript{54} Robert E. Cushman, Testimony, Mayflower Hearing Transcript 217, in FCC Docket 8516.
\textsuperscript{55} Letter from Paul A. Walker to J.A. Beime (9/25/47), in FCC Docket 8516.
than for the purely personal or private interests of the licensee.\textsuperscript{56} Therefore stations were required to "devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations"\textsuperscript{57} and to provide a "reasonable opportunity" for listeners to hear "different opposing positions" on these public issues.\textsuperscript{58} Licensees could editorialize as "part of the more general presentation of views or comments on the various issues," but not "to achieve a partisan or one-sided presentation of issues."\textsuperscript{59} In sum, broadcasters had an affirmative duty to present public and controversial issues, and they had to provide balanced presentation of these issues.

The Report reflected the Commission's compromise between industry and the social reform groups. The Report required that broadcasters provide access for diverse viewpoints on controversial public questions, but permitted broadcasters to editorialize. The Report reflected a defensive move by the Commission against the industry attacks on the agency's authority. Participation by social reform groups in the process served to legitimate the Commission's retention of the authority to judge the fairness of broadcasting.

\textbf{Response to the Report on Editorializing}

The reaction to the Report was dissatisfaction from all sides. As one

\footnotesize{\textsuperscript{56} Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).  
\textsuperscript{57} Id.  
\textsuperscript{58} Id.  
\textsuperscript{59} Id.}
observer described it, it was "obviously a compromise (and not a good compromise at that)."\textsuperscript{60} Neither industry nor the social reform groups were entirely satisfied.

Justin Miller, president of NAB, praised the Report as "the greatest single victory in behalf of freedom of expression in this nation since the Zenger case confirming the editorial freedom of newspapers over a century ago."\textsuperscript{61} Yet his rhetoric obscured disappointment that the FCC had retained the Fairness Doctrine, which industry had insisted was a violation of their First Amendment rights.

The social reform community was also disappointed. They obtained only one vote for the retention of the no-editorials rule. Commissioner Hennock dissented from the Report on the ground that the Fairness Doctrine was unenforceable. She wrote that:

There would be no inherent evil in the presentation of a licensee's viewpoint if fairness could be guaranteed. In the present circumstances, prohibiting it is our only instrument for insuring the proper use of radio in the public interest.\textsuperscript{62}

Given the Commission's resources, banning editorials was the only satisfactory approach: "The standard . . . is virtually impossible of enforcement . . . with our present lack of policing methods and with the

\textsuperscript{60} Comment, Mayflower Rule—Gone But Not Forgotten, 35 Cornell L. Q. 574, 586 (1950).
\textsuperscript{62} Editorializing by Broadcast Licensees, 13 F.C.C., at 1270 (Hennock, dissenting).
sanctions given us by law."\textsuperscript{63}

The ACLU complained that the Commission had abandoned the no-editorializing policy. It agreed with Commissioner Hennock that the Commission lacked the resources needed to enforce such a doctrine effectively. The result of this would be that no fairness standard would be enforced.\textsuperscript{64} Other social reform groups expressed similar dissatisfaction with the repeal of the \textit{Mayflower} no-editorials rule.

Nonprofit groups and social reformers were displeased with the Commission's decision to permit broadcasters to editorialize. Yet their presence in the process ensured that fairness principles were retained. The Fairness Doctrine remained part of FCC doctrine until 1987 and was the single most important principle upon which social reform groups relied in bringing their concerns to the FCC.

\textbf{Conclusion}

By 1949 the Commission had solidified its position on controversial issues programming. It abolished the no-editorials rule, but clearly annunciated its famous Fairness Doctrine in its \textit{Report on Editorializing}. The Fairness Doctrine required stations to provide a balanced presentation of controversial issues and permitted broadcasters to editorialize. The Commission's \textit{Report} emerged out of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{63} Id.
\item \textsuperscript{64} Memorandum on the [FCC] Decision on Editorializing by Radio Stations, Position of the ACLU (6/49), in ACLU Papers, Box 916.
\end{itemize}
\end{footnotesize}
a lengthy debate and struggle between commercial broadcasters, social reform groups and the Commission. The Fairness Doctrine was a compromise measure designed to appease both the commercial broadcasters and social reform groups. As a compromise, it never fully satisfied either side. Commercial broadcasters called for the repeal of the Fairness Doctrine, while social reform groups argued for the return of the ban on editorializing by station owners. However, the Fairness Doctrine would become an important tool for social reform groups in their efforts to reduced prejudice over the airwaves.
The UAW-CIO Challenges Anti-Labor Programming

As we have seen, policymaking hearings on educational broadcasting and the Fairness Doctrine drew a wide range of social reform groups. A few groups made additional efforts during the 1940s to influence the Commission through participate in FCC adjudications. As the next several chapters reveal, participation in these arenas were more challenging for several reasons. First, the broadcast industry reacted more negatively to the presence of social reform groups in the adjudicative arena than it did to social reform group participation in policy hearings. Second, active participation in adjudications required more resources and sustained commitment than simply preparing testimony for a policy hearing. This chapter examines the first sustained effort in which a social reform group actively challenged a station license as not in the public interest.

During the 1940s, the Congress of Industrial Organizations ("CIO") and its member union, the United Autoworkers of America ("UAW" or "UAW-CIO"), feared that broadcasters discriminated against and censored labor broadcasts, particularly those of CIO unions. They wished to purchase airtime for labor broadcasts that would counter pro-employer messages, get out labor’s viewpoint, and help organize workers. As part of this struggle, the UAW-CIO challenged the license of station WHKC in Columbus, Ohio. Although in form it was an attack on a single station, the challenge was a broader attack on broadcast industry practices. In doing so, the union challenged three significant elements of industry’s approach to broadcast regulation: the efficacy of industry self-
regulation; industry's interpretation of the First Amendment; and the role of the non-industry groups in FCC proceedings.

The CIO took "an explicitly radical stance toward radio and all of the media from its inception."¹ The CIO's approach to the administrative state differed from that of the American Federation of Labor ("AFL"). While the AFL hesitated about the use of federal administrative power in labor relations, the CIO embraced federal power not only in the labor relations area narrowly conceived, but in terms of its broader social agenda. According to Nathan Godfried, "[u]nlike the AFL, which used radio primarily as a public relations tool—a medium for demonstrating organized labor's responsible behavior—the CIO used radio as an organizing tool and as a weapon against recalcitrant employers."² The CIO sought access to the airwaves for its programming and it turned to the FCC to support its efforts to obtain airtime from commercial broadcasters.

The CIO's primary concern during the late 1930s and 1940s was the problem of private censorship by broadcasters.³ It believed that broadcasters discriminated against labor unions,⁴ and that they discriminated against the CIO

² Nathan Godfried, WCFL: Chicago's Voice of Labor, 1926-78, at 197 (1997) ("the CIO made far greater use of radio, and in more innovative ways than the AFL"). But see Robert H. Zieger, The CIO, 1935-1955 (1995) (arguing that by the 1950s the CIO was using radio to demonstrate the CIO's commitments to mainstream American ideals).
³ Liberals had long been concerned with the problem of private censorship. See de Sola Pool 121-23.
⁴ On the strength of these claims, see Godfried, WCFL, at 210 (citing a 1943 poll revealing that 92 percent of the American press was anti-labor). In 1941, the CIO testified in the FCC's Newspaper Owners' shipments that unions faced discrimination when they sought time on the air, particularly from newspaper-owned stations. See FCC Docket 6051. CIO concerns about
in particular. The CIO also believed that broadcasters unfairly censored labor speakers.

Fearing discrimination in the distribution of free airtime, the CIO differed from most liberal nonprofits, which preferred to rely on free time offered by broadcasters. The CIO sought to purchase airtime to take on its corporate opponents. In the 1940s it began a campaign to obtain access to the airwaves for labor programming. Some of its problems were ironed out informally. In 1943 an ABC network official conceded that the Ford Motor Company could put on a commercial program, even if it contained opinionated discussions of public issues, but that a labor union could not buy time to sponsor a symphony orchestra. But that same year, ABC agreed that it would not adopt restrictions which will automatically rule out certain types of programs on the basis of the identity or personality of the individual, corporation, or organization sponsoring or offering them.

ABC became the first network to sell time to unions for controversial issues.

The CIO could not be guaranteed similar access elsewhere, however, because not all broadcasters were as accommodating as the ABC network. A major obstacle was the NAB Code, which prohibited broadcasters from selling time for controversial issues. Although voluntary, the Code may have

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5 Part of the CIO's complaints arose out of competition between the CIO and the AFL. During the 1930s, the older organization had access to forums such as the NBC Advisory Council, where the CIO did not, and it appears that the AFL had greater access to the networks as a general matter. See Godfried, WCFL, at 196-204.
6 Broadcasters did censor labor scripts, arguing fear of liability under the libel laws, and compliance with the NAB Code.
7 Morris Ernst, First Freedom 146 (1946).
8 In addition, local stations were not required to broadcast all network programming, and
discouraged broadcasters from selling time, and the FCC had said nothing to the contrary. The NAB Code itself did not mention the problem of labor broadcasting in its discussion of controversial issues. Yet NAB imposed significant obstacles to labor broadcasting. The Interpretive Manual for the NAB Code began with a fairly neutral statement about labor programming:

Almost every request for a labor program presents a new problem. There are so many variations to both programs and local situations that it is impossible to lay down any rules that would fit every case.\(^9\)

However, the Manual's further discussion of labor programs would have discouraged a code-abiding station manager from accepting labor programming:

LABOR ON THE AIR: Discussion -- or dramatization -- of labor problems on the air is almost always of a controversial nature. Even the so-called facts about labor, such as AFL audited membership figures, are usually challenged. Therefore, the presentation of a labor program usually calls for at least one other program because of the division in the ranks of organized labor. It is not always possible to balance a labor program with an employers' program. The organized labor movement is divided into three principal segments, each bitterly opposing the other [the AFL, the CIO, and unaffiliated unions] . . . . The situation is further complicated by the fact that employers, as a rule, won't discuss their labor problems on the air and are inclined to frown on those stations, especially in smaller communities, which open their facilities to labor leaders.\(^10\)

CIO unions found the Manual to be an obstacle to obtaining access to the airwaves.

When the CIO asked the NAB Code Compliance Committee for a ruling on some proposed CIO programming, the Committee concluded that stations should not grant CIO's request to present its programs on paid time. If stations desired, they could air a public forum broadcast that would provide the

\(^9\) Statement of Fact, in FCC Docket 6631 (quoting the NAB Code Interpretive Manual).
\(^10\) Ernst, First Freedom, at 145 (quoting the NAB Code Interpretive Manual).
opportunity for the CIO and its opponents to air their differences.\textsuperscript{11} The NAB Code served as a shield for broadcasters who preferred not to air labor programs.

The CIO’s concerns about the NAB Code were brought to the FCC by the CIO’s member union, the UAW-CIO, which challenged the license of a NAB member station. The station, WHKC of Columbus, Ohio, owned by United Broadcasting, had an official policy, consistent with the NAB Code, to sell no time for programs discussing controversial subjects, race, religion, or politics. The local UAW union signed a program contract with the station that provided that the union local would provide non-controversial programming, but that the union’s scripts would be subject to advance review by station management. The local union produced and broadcast its programming for several months in the summer of 1943, while WHKC staff routinely made changes to the scripts prior to airtime, apparently without complaint from the local union. Then, in August 1943, Richard Frankensteen, Vice-President of the UAW-CIO, visited from Detroit to give a speech over the WHKC’s airwaves, and matters heated up. Frankensteen was outraged by the station’s censorship of his speech, and he petitioned the FCC for a hearing on WHKC’s censorship practices.\textsuperscript{12}

The FCC agreed that unfair censorship practices by a broadcaster might raise questions about that station’s commitment to well-rounded programming.\textsuperscript{13}

\textsuperscript{11} NAB obtained support for its position from various groups. Thomas R. Carlskodon of the Radio Committee of the Council on Freedom from Censorship agreed with NAB that labor had ample access to radio, as did Roger Baldwin of the ACLU.

\textsuperscript{12} Discussions between the CIO and NAB over the treatment of labor continued while the WHKC conflict was ongoing. For example, a NAB committee met in January 1944 with the AFL, the CIO and the Radio Committee of the ACLU.

\textsuperscript{13} The Commission stated that
However, the Commission rejected the petition, and on May 16, 1944, the FCC renewed WHKC's license without calling for a hearing.

The UAW-CIO was unwilling to give up, so it filed a petition to reconsider. The union argued that the station's censorship was inconsistent with the principles of free speech, and was therefore incompatible with the public interest. The UAW-CIO opposed the station's "no controversy" policy on its face, but complained further that the station discriminated against the UAW-CIO by applying its "no controversy" policy only against those speakers with whom the management of the station disagreed:

WHKC has in the past carried the venomous talks of Colonel Robert R. McCormick of the Chicago Tribune . . . . WHKC similarly carries the daily spoutings of Bake [Boake] Carter and Fulton Lewis, Jr., who routinely discuss controversial issues, race, religion, and politics. The station, while censoring the scripts of the UAW-CIO, freely carries uncensored programs entitled "Freedom of Opportunity" put on by the Junior Chamber of Commerce. At the proposed hearing, petitioners will offer proof that the program content generally of Station WHKC is one-sided and biased, without fairness or objectivity, and that no balance whatever is presented between opposing views.

The union would be willing to prove these allegations if only the Commission would hold a hearing.

The UAW-CIO would have been confident that at least one FCC Commissioner was sympathetic to its position. Its brief quoted heavily from FCC

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The Commission can and does consider the action of station licensees in carrying or refusing particular programs or in censoring portions of the programs in order to ascertain whether the station is presenting a well-rounded rather than a one-sided discussion of public issues.

Petition to Reconsider the Commission's Action, in FCC Docket 6631 (quoting the Commission).

United Broadcasting Co. 10 F.C.C. 515 (1945).

In addition, the UAW-CIO attacked a related aspect of the NAB Code, which prevented on-the-air solicitation by certain groups including labor unions, while exempting other groups, such as the Red Cross, from the ban.

Petition to Reconsider 3, in FCC Docket 6631.
Chairman James L. Fly.\textsuperscript{17} It cited Fly's criticism of NAB's position on the sale of time for discussion of controversial subjects:

Perhaps the prime barrier to free speech on the air is the ban imposed by stations and networks on the sale of time for the discussion of public issues.\textsuperscript{18}

The UAW-CIO also pointed to Fly's opposition to the NAB Code's policy on membership solicitations:

[W]hat Samuel Adams and Tom Paine would have said ... to describe a restraint of free speech which would have prevented them from soliciting members for their libertarian organizations ... what Margaret Fuller and Susan B. Anthony would have said to a ban preventing them from using radio to advocate their cause or even procure members.

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Yet this is the very ban which the Samuel Adamses ... of our generation must suffer on the radio.\textsuperscript{19}

Given Fly's position on the subject, he was likely a significant factor in convincing the other FCC Commissioners to hold a hearing in August 1944 to reconsider the UAW-CIO's position.

During the August 1944 hearing, the UAW-CIO made clear that its primary target was not just a Columbus station, but larger, more powerful entities: the Mutual Broadcasting Network, NAB, and the National Association of

\textsuperscript{17} Fly was not a popular Chairman with the broadcast industry or Congress, and has been called the most "outspoken liberal" on the Commission prior to Nicholas Johnson, who served on the Commission from 1966-73. Robert B. Horwitz, The Irony of Deregulation, at 227; see also id. at 170 (Fly "vilified ... as a demagogue and a Communist").


\textsuperscript{19} Petition to Reconsider, at 2 (quoting James L. Fly). See also James Lawrence Fly, Freedom of Speech and the Press, in Safeguarding Civil Liberty Today (Edward L. Bernays Lectures of 1944 given at Cornell University) (Ithaca: Cornell University Press, 1945), at 74 ("a concern with a cathartic to sell could get on the air to hawk it, but a labor union or a philosophical society could not buy time").
Manufacturers ("NAM"). As explained by the UAW-CIO, the speech problems faced by labor arose from the interactions of the local station, the network and the NAB Code. WHKC adhered to the NAB Code, but its network, Mutual, did not. Mutual was full of right-wing commentary, and provided no outlet for liberal commentary. WHKC, the local affiliate, felt no need to provide response time for programming emanating from the network. Yet the local affiliate adhered to the NAB Code for its local programming, and therefore the union could not buy local time to counter national right-wing commentary. Thus, the UAW-CIO attacked both the bias of the Mutual Network and the theoretically neutral, but functionally biased, NAB Code.

In pursuing its attack, the UAW-CIO sought to bolster and legitimize the authority and power of the FCC to regulate the airwaves in the service of the public. In doing so, it ventured into three contested arenas. The first was the viability of industry self-regulation; the second was the agency’s authority and its limits set by the First Amendment and anti-censorship principles; and last, was the role of the union in the proceeding.

Inadequacy of Self-Regulation

The UAW-CIO began by attacking the efficacy of the broadcast industry’s self-regulation. In doing so, it sought to justify FCC intrusion into the relationship

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20 The UAW-CIO sought to demonstrate that WHKC was unduly influenced by the National Association of Manufacturers, broadcasting pro-employer programming, while censoring the UAW-CIO. Its efforts to implicate NAM itself did not go very far, with the FCC refusing to allow the subpoena of NAM officials.
between broadcasters and the public. The union's attorney argued successfully during the hearing that despite the existence of NAB's voluntary code, neither individual citizens nor organized groups could turn to NAB for redress of their grievances against broadcasters. The UAW-CIO's attorney Ernest Goodman deposed Willard D. Egolf, the Acting Secretary of NAB's Code Compliance Committee, who made clear that NAB's code was voluntary and unenforceable.

NAB's Code Compliance Committee would issue interpretations of the Code at the request of member stations. At best, the Committee would mediate disputes between stations, and protect stations from outside complainants. It would not assist the public directly.

Goodman asked about the role of citizens before the NAB Committee. Egolf assured him that the Committee was in no way opposed to hearing from the public, and that it had been contacted by concerned citizens such as Colston Warne of Consumers Union and Norman Thomas of the Socialist Party. Egolf resisted, however, the idea of turning the NAB Committee into a public forum where listeners or citizens could register complaints. This would simply put too much pressure on member stations. If members of the public had complaints about an unwavering station, the only recourse was to the FCC, conceded Egolf.

The UAW-CIO demonstrated that the NAB Code was not a consumer protection device. The FCC would have to protect consumers, or they would go unprotected. The UAW-CIO's strategy was to encourage regulation by demonstrating that the industry was in fact not policing itself. The Commission was the only viable site for the resolution of conflicts between the public and
broadcasters. The FCC would have to provide a forum for public complaints about broadcasting.

**First Amendment Authority**

The First Amendment was the second contested issue in the UAW-CIO proceeding. The UAW-CIO sought to bolster the authority of the FCC in the First Amendment area, and here it faced the strongest opposition from industry. The UAW-CIO was challenging the "Daddy Warbucks of the First Amendment," Colonel McCormick and his Chicago Tribune station WGN, which provided controversial programming to WHKC through the Mutual Network.\(^{21}\) McCormick was known for his advocacy of an expansive interpretation of the freedom of the press provisions of the First Amendment. He was also known as a bigot, a staunch anti-Communist, an extremist, and a conservative Republican.\(^{22}\) Zechariah Chafee, Jr., had criticized the Chicago Tribune for its conduct during World War II.\(^{23}\)

McCormick relied on the services of Weymouth Kirkland and his Chicago law firm, which had carried out McCormick's First Amendment litigation, and had represented the Chicago Tribune before the FCC. Kirkland attorney, Louis Caldwell, represented WGN and the Mutual Network in the UAW-CIO proceeding where he challenged the entire hearing as a violation of the First Amendment.

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\(^{21}\) See Fred W. Friendly, Minnesota Rag 66 (1981) (chronicling McCormick's financial support on behalf of freedom of the press in the litigation that lead to the Supreme Court's decision in Near v. Minnesota).

\(^{22}\) Id. at 68.

\(^{23}\) See Zechariah Chafee, Jr., Government and Mass Communications 482 (1947) ("the United States had a margin of safety to absorb without too great harm what certain papers produced during this war, e.g., the Chicago Tribune.")
and the 1934 Communications Act. According to Caldwell, the CIO was raising issues of programming content that the FCC was not permitted to consider.

The UAW-CIO did raise programming issues by seeking to demonstrate that WHKC broadcast biased and censored programming.\textsuperscript{24} In order to avoid significant First Amendment implications, however, the union sought to use social science evidence, hoping to minimize the FCC’s need to intrude deeply into questions of content. The union relied on expert witnesses to present evidence of bias in hopes that expertise would eliminate concerns of censorship. To this end, the UAW-CIO enlisted Milton D. Stewart, a research associate at Columbia University’s Bureau of Applied Social Research, to conduct content analyses of scripts broadcast over WHKC.\textsuperscript{25} He analyzed the scripts of one Mutual commentator, Fulton Lewis, and concluded that they were unfavorable toward labor, the CIO and its Political Action Committee.\textsuperscript{26} Such studies, argued the UAW-CIO, could provide objective measures of programming bias that would allow the Commission to make decisions based on such evidence without being accused of attempting to use its regulatory power to control program content in accordance with the Commission’s own personal or political preferences. The

\textsuperscript{24} See Note, Content Analysis—A New Evidentiary Technique, 15 U. Chic. L. Rev. 910 (1948).

\textsuperscript{25} Stewart had a Masters degree in journalism and communications research from Columbia. He had worked for the Office of Radio Research, an organization supported by the Rockefeller Foundation, doing a study on newspaper self-interest in their news. He later worked for the Office of War Information analyzing press and radio. He also had connections to the New School for Social Research, which housed a project on totalitarian communication.

\textsuperscript{26} Harold Lasswell pioneered these techniques. See Note, Content Analysis—A New Evidentiary Technique, 15 U. Chi. L. Rev. 910 (1948). The WHKC case was just the beginning of a long tradition of content analysis by those seeking to discredit a station’s claims to neutral programming, the most important of which was the United Church of Christ litigation. For more recent examples of similar types of studies in the FCC context, and some of the issues surrounding their use, see American Security Council Education Foundation v. FCC, 607 F.2d 438 (D.C. Cir. 1979); Nat’l Citizens Comm. For Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977).
studies presented were rudimentary, but the use of social science evidence would continue as an important technique for later advocates of strong FCC regulation of broadcasters.

**Participation by Social Reform Groups**

The UAW-CIO’s participation in the proceeding also challenged the prevailing model of administrative enforcement—that of the Commission as both prosecutor and judge. It revealed that social reform groups could serve a prosecutorial role if provided the opportunity. During the hearing, the UAW-CIO effectively played the role of prosecutor. Although FCC Counsel Rosel Hyde participated in the hearing, his participation was minimal, as was that of the Commission’s investigator who had gone out to Columbus for a site visit to WHKC. In contrast, the UAW-CIO participated fully in the hearing, cross-examining, calling witnesses, and presenting exhibits and expert testimony.

By serving as the de facto prosecutor, the UAW-CIO added to the Commission’s legitimacy by allowing the Commission to appear neutral in the dispute. The UAW-CIO’s efforts demonstrated the benefits that the FCC could receive from permitting private attorneys general to act as prosecutors in its proceedings. The Commission could regulate the industry without appearing to be an overzealous censor targeting particular broadcasters.

In addition, the manner in which the proceeding concluded added to the FCC’s image of neutrality. The union and the station agreed to settle their dispute through the adoption of a written settlement agreement. Although the
station did not admit guilt, it agreed to follow a range of non-discriminatory practices and to cease script censorship. It agreed to make time available for the full and free discussion of issues of public importance, including controversial issues, and dramatizations thereof, in order that broadcasting may achieve its full possibilities as a significant medium for the dissemination of news, ideas, and opinions. And in doing so, there will be no discrimination between business concerns and nonprofit organizations either in making time available or restricting the use of such time. Nonprofit organizations will have the right to purchase time for solicitation of membership.  

The Commission approved the agreement and dismissed the proceeding. It stated that stations had "to be sensitive to the problems of public concern in the community" and "to make sufficient time available, on a nondiscriminatory basis, for full discussion thereof, without any type of censorship which would undertake to impose the views of the [station]." A station could not have a blanket rule against the sale of time for the discussion of public controversial issues, and it could not discriminate between different groups seeking to solicit memberships over the airwaves. The FCC made this policy through the ratification of a settlement agreement rather than through its draconian enforcement tool—license revocation.

Overall Assessment

The broadcast industry trade journal, Broadcasting, described the CIO's overall campaign against broadcasters as "one that bears watching." The CIO

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27 United Broadcasting, 10 F.C.C. at 516-17.
28 Id. at 517.
29 Broadcasting magazine described the CIO's efforts as follows: It is an organized campaign. The radio handbook of its Political Action Committee is a brazen, impudent effort to pressure broadcasters into yielding free time to CIO unions. Almost every pressure method is trotted out. Complaints to the F.C.C., to newspapers and to union headquarters. A block-buster is dropped upon the NAB Code of [E]thics which has
effort had both short and long term effects. In the short term, the CIO put the
industry on the defensive in the arena of controversial issues programming.
Following the FCC’s decision in *United Broadcasting*, NAB eliminated the Code
provision banning the sale of time for discussion of controversial issues.30
However, the FCC’s pronouncements in *United Broadcasting* exacerbated the
already “confusingly vague scope” of a broadcaster’s fairness obligations.31 This
vagueness and confusion ultimately led the Commission to revisit its *Mayflower*
decision, a story told earlier.32

The CIO disturbed the relationship between the industry and the
Commission. It emphasized to the Commission the disparity between industry
rhetoric and reality. In addition, the CIO went beyond complaint by providing
settlement language that the Commission adopted almost verbatim as its own.
The CIO provided an opportunity for the FCC to engage in informal substantive
regulation. Louis Caldwell, the attorney for the Mutual Network, criticized the role
of social reform groups, such as the CIO, in the process. These groups provided
a too-easy opportunity for the FCC to make doctrinal pronouncements through
dicta, without requiring the FCC to initiate any actual enforcement action against
a broadcaster.33 The Commission’s doctrinal positions were expressed, but
because the FCC inflicted no punishment, no judicial review ensued.

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30 Radio is Yours, #121 (New York: Public Affairs Committee, 1946).
32 See Ch. 4, supra.
33 See also Ch. 1, supra.
Overall, the CIO's broadcast reform campaign was supportive of FCC regulation and was designed to be so. The CIO, like many reform groups of the period viewed themselves as supporters of the Democratic Administration, and as supporters of a strong regulatory state. In addition, the CIO’s efforts have been identified as having lasting doctrinal significance. Steven J. Simmons describes the FCC’s in the WHKC decision as establishing the first "firm roots" of a broadcaster’s affirmative obligations regarding controversial issues. These obligations were further elaborated by the Commission in its Fairness Doctrine, which was a mainstay of Commission policy until 1987.\(^\text{35}\)

The long-lasting doctrinal significance of United Broadcasting lies, however, in its pronouncement of general principles rather than in its specifics. The case has been cited by courts and scholars to support the position that broadcasters have an obligation to cover public issues, to devote adequate time to the coverage of controversial issues, and to provide time for all points of view.\(^\text{36}\) As such, the CIO contributed to the precedent-creating work of the Commission. Once in circulation, cases such as United Broadcasting had rhetorical value that could used by litigants, scholars and Commissioners themselves. Like most Commission decisions, United Broadcasting was not cited frequently by the federal courts. Yet, the Supreme Court cited the case favorably in its Red Lion decision.\(^\text{37}\)

\(^{34}\) Steven J. Simmons, The Fairness Doctrine and the Media 39 (1978).
\(^{35}\) See Ch. 4, supra.
\(^{36}\) Until the FCC abolished the Fairness Doctrine during the 1980s, see Ch. 14, infra.
The CIO’s specific fight over the sale of time for discussion of controversial issues did not have broad or lasting significance, however. The CIO’s work on this particular issue was not followed-up or sustained by later cases. The CIO dropped its strong efforts to influence commercial broadcasting through the FCC, and no other group during the 1940s picked up the sale-of-time issue. The Commission did little to expand or clarify its position and doctrinal development on this issue stagnated.

The issue did resurface decades later in the Supreme Court’s 1973 decision in *Columbia Broadcasting System, Inc. v. Democratic National Committee.* In that case, however, the Court rejected *United Broadcasting* as an applicable precedent. The Court condemned the dissent’s argument that *United Broadcasting* established a right to purchase airtime for the discussion of controversial issues. The lack of doctrinal development was significant, said the Court, referring to *United Broadcasting* as “an isolated statement, made during the period in which the Commission was still working out the problems associated with the discussion of public issues.” According to the Court, the Commission’s language in the case was mere dictum that had not been followed and therefore merited no weight. Thus, the CIO’s doctrinal contribution was that it added to a developing pool of precedents asserting FCC authority over broadcast programming, rather than firmly establishing a specific and particular rule about the sale of time for controversial issues programming.

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39 Id. at 114 n.11.
40 The Court also notes that the Fairness Doctrine had modified the Commission's position on this issue, although the Court does not explain in what manner.
The American Jewish Congress and the Daily News Case

The American Jewish Congress ("AJC") sought to eliminate anti-Semitism and discrimination from the airwaves. When the New York Daily News sought an FM radio license from the FCC, the AJC's Commission on Law and Social Action ("CLSA") participated in the FCC hearing. The CLSA sought to show that the newspaper had produced biased, racist and anti-Semitic editorials, and therefore, that the paper was an unsuitable as a broadcast licensee. In doing so, the organization transformed the FCC's hearing from a technical proceeding into one that addressed political, social and cultural issues through the use of social science evidence.

The Commission on Law and Social Action

The AJC was established in 1918 as an umbrella organization of American Jewish organizations. In 1945 the organization established its Commission on Law and Social Action. The CLSA's mission was to minimize and eliminate discrimination and prejudice across American life. The Commission tackled discrimination in many settings, including the areas of employment, college admissions, housing and public accommodations. ¹ Broadcast reform was part of this larger campaign.

The CLSA adopted a political strategy (inspired by the labor movement) which combined "debate plus pressure, legislation plus picketing, individual

¹ [Norman Redlich], Private Attorneys-General: Group Action in the Fight for Civil Liberties, 58 Yale L.J. 575, 592-98 (1949).
protection plus group action." The CLSA's strategy relied on the combination of "trained sociological research necessary to uncover discrimination and legal skills and community pressure necessary to fight it." The CLSA applied these strategies to combat discrimination and anti-Semitism over the airwaves.

CLSA's approach to broadcast reform was informed by several strands of thought. The first was a concern about "the 'private governments' of America," including commercial broadcasters, that could act as censors of speech. The second was the CLSA's position on group libel (or what we now think of as hate speech). The AJC supported a federal criminal law punishing those engaging in group libel, a position with which some other social reform groups strongly opposed as a violation of the First Amendment. It rejected half-way measures that would have afforded libeled groups a right-of-reply to libelous speech. The organization "reject[ed] the idea that false and misleading propaganda can best be fought with measured statements of the truth." Thus the only solution was to eradicate hateful and libelous speech.

\[Text continued below...\]

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3 Redlich, Private Attorneys-General, at 589.
4 Pekelis, Law and Social Action at 226.
5 Redlich, Private Attorneys-General, at 594 (noting opposition of ACLU); see also Beaufharnais v. Illinois, 343 U.S. 250 (1952); Osmond K. Fraenkel, Our Civil Liberties 88 (1944).
6 Memo from the American Jewish Congress to the President's Committee on Civil Rights 6 (06/47) in American Jewish Congress Papers, American Jewish Historical Society, Waltham, MA ("AJC Papers"), Box 40. The AJC rejected the idea of a federal right-to-reply for group libel as flawed on numerous grounds. First, it misunderstood the nature of propaganda: propaganda is not based on reasoned factual appeals but rather on highly emotional efforts to exploit latent prejudice engendered by the miseducation of our society.
7 Id. at 2. The nature of propaganda made replies ineffective. In addition the requirement of a reply would merely add "governmental respectability" and "official sanction" to the original propaganda, whereas simply banning the propaganda would not. Id. The AJC's second criticism was the workability of a right to reply statute. How would the decisionmaker decide who is entitled to reply? How would the decisionmaker make the prompt decisions necessary to ensure reply effectiveness? If the reply came too late, wouldn't that simply revive the force of the original propaganda?
8 Redlich, Private Attorneys General at 592.
These views led the CLSA to pursue an affirmative interpretation of the First Amendment in the broadcast context:

Where monopolistic power threatens the helpless or unwary consumer, the preservation of ideological symmetry and of a uniform definition of freedom will sacrifice the substance of liberty to its form. Faced with the fact of a natural monopoly, and with the dangers of economic or intellectual exploitation, society, jealous of the substance of its liberty, will choose freedom through, not freedom from, its government.  

To counter the broadcasters' claim of free speech, the CLSA argued that the freedom to listen was an "indispensable counterpart of the freedom to speak."  

Given the CLSA's emphasis on the government's affirmative obligations under the First Amendment, it is not surprising that the CLSA would have looked to the FCC for solutions to the problem of group libel. In 1946, the CLSA began its battle against discrimination in broadcasting. Its strategy was to target particular broadcasters in FCC license proceedings, to develop a record against them by gathering social science evidence demonstrating that their broadcasts were biased, discriminatory and/or anti-Semitic, and then to argue that such broadcasters should not hold broadcast licenses.

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9 Id. at 143.  
10 The AJC's files concerning the FCC's controversial issues policy were typically filed under the heading of "group libel," because the AJC's concerns about broadcasting were really about potentially libelous speech over the airwaves by right-wing commentators. The AJC's approach to the problem of group libel also helps us understand how some intellectuals and advocates of the 1940s could have supported the Mayflower Doctrine, which banned broadcasters from editorializing, as consistent with principles of free speech. See also David Reisman, Democracy and Defamation: Control of Group Libel, 42 Colum. L. Rev. 727, 775 n.205 (1942) (discussing role that defamatory
Will Maslow represented the AJC in the area of broadcast reform at the FCC. The nephew of David Ben-Gurion, Maslow had graduated from Cornell University and the Columbia University School of Law. During the war, he had worked for the President's Commission on Fair Employment Practice. He agreed with the position of the CLSA—an affirmative interpretation of the First Amendment was necessary to secure free and equal speech for all. Despite his opposition to the loyalty oaths and the security hysteria of the late 1940s, he remained optimistic about the government's role in improving the quality of the mass media. He applauded when Zechariah Chafee endorsed the FCC's Blue Book. Yet Maslow argued that Chafee had an "excessive fear of the risks in affirmative state action," and that he failed to recognize that "government no longer represents the greatest danger to our mass media."\(^{11}\) Rather, "the economic bias of the media owners results in a warped view of our social economic problems."\(^{12}\)

**The Daily News Case**

Maslow led one of the AJC's major efforts in the late 1940s, which was to challenge to the New York *Daily News'* application for a FM radio station license in New York City. One of the FCC's most significant duties was to determine, through the use of comparative hearings, which of numerous applicants would receive station licenses. Typically, the Commission relied on a wide range of


\(^{12}\) Id. at 761.
public interest factors to select between stations. The American Jewish Congress participated in the comparative hearing for allocation of FM station licenses in the New York metropolitan area in order to encourage the FCC to take account of past discrimination and prejudice of applicants. In doing so, the group disrupted the traditional model of comparative hearings and created a forum for the discussion of anti-Semitism and news bias.

The AJC argued that the *Daily News* had consistently conveyed a distorted image of American Jews, and was therefore unsuitable as a station licensee.\textsuperscript{13} The AJC complained not only about bias, anti-Semitism and discrimination, but also about the *Daily News*’ treatment of the left generally.\textsuperscript{14} In the end, the *Daily News* did not receive a license for FM radio, and the Commission recognized the relevance of social science evidence relating to editorial bias in FCC proceedings.

The AJC chose the *Daily News*, because the AJC believed that the paper, which was owned by the *Chicago Tribune*, was a conservative, right-wing newspaper. Like the CIO had done in the WHKC case, the AJC went up against attorney Louis Caldwell. The AJC drew its expert witnesses from a community of broadcast reformers and scholars. These experts sought to use social scientific tools to demonstrate bias in the media.

The *Daily News*’ quest for an FM license began as an apolitical, technical proceeding, and was transformed by the AJC into one steeped in social and

\textsuperscript{13} See News Syndicate Co., Inc., FCC Docket 6175.
\textsuperscript{14} For example, the AJC complained about negative treatment given Sidney Hillman, who directed the CIO’s Political Action Committee.
political context. The *Daily News* filed its application in 1941,\(^\text{15}\) providing elaborate technical data on its proposed operations but little else. The FCC’s first hearing certainly bored all involved. The attorneys and managers representing the paper discussed technical topics. The question of programming came up briefly during the hearing, but the *Daily News* felt no need to elaborate on the programming it would provide. It noted only that it sought no profit on the station and did not wish to use the station as a mouthpiece for its editorial point of view (consistent with the then-applicable *Mayflower* Doctrine). No one except *Daily News* officials and FCC staff made a formal appearance at the hearing.

World War II stalled the *Daily News*’ application. When the application was revived in 1945, the *Daily News* found itself in a pool of 17 competitors for five licenses, and it had a new opponent—the American Jewish Congress. The *Daily News* could no longer be confident in the success of its application. The presence of religious and union applicants likely influenced the *Daily News*’ revised application. The new application made affirmative representations to the FCC about the quality of its proposed programming. It promised the FCC that the *Daily News* station would use God’s name with reverence, would avoid profane language and controversial subjects, would present issues with fairness and provide time to reputable persons with differing viewpoints. The numerous communities within the City of New York were entitled to recognition in the programming schedule. Thus, the station would fairly present all races, creeds and colors without prejudice or ridicule.

\(^{15}\) During this phase of the application process, there were at most five other applicants for FM stations in New York, making the *Daily News* a likely winner of a license.
The American Jewish Congress attacked the Daily News’ representations as outrageous in light of its newspaper journalism. The AJC began its efforts by organizing a group of social reform organizations in New York City, including the NAACP, the New York State Citizens Political Action Committee, City-Wide Citizens Committee on Harlem, the Committee of Catholics for Human Rights, and the Methodist Federation for Social Services. These groups all joined in circulating a petition and submitting it to the FCC. 16 The petition complained that “the news, columns and editorials published in the Daily News have incited racial and religious animosities and have often revealed a striking similarity to propaganda emanating from Nazi and Fascist sources.”17

In June 1946, the FCC began its hearings in New York City to determine which of the applicants would be awarded FM radio stations in the New York area. The AJC knew that it was entitled to submit relevant evidence during the hearing as a public witness. 18 However, the AJC wanted a more active role. In March, the AJC filed a petition to intervene in the hearing, arguing that the Daily News lacked the character and qualifications of a licensee and would use its FM facilities “as a means of furthering its hostility to those of the Jewish faith and to

16 Fiorella La Guardia, New York City’s mayor, had also found it “disconcerting” that the Daily News had applied for a station:
Here is something disconcerting. Did you hear that the Daily News of New York has applied for an FM radio station? Of all the people in the world to have a radio station, the dirty, filthy New York Daily News. Can you beat that? I have always said that the Daily News lies. They know they are lying. They lie intentionally and they lie to sell at two cents a copy. Well, that has been confirmed yesterday by no less a party than the President of the United States who nailed the Daily News as a “lying sheet.”

Unidentified news clipping, in FCC Docket 6175.

17 AJC Petition, in FCC Docket 6175. The FCC’s files contain over 1700 people who either signed the petition or sent in their own postcards protesting a license grant to the Daily News. The AJC claimed that it submitted 50,000 signatures. See Bias Charges Against ‘News’ Aired at FCC Radio Hearing, Law and Social Action, Vol. 1, No. 9, October, 1946, p. 33, in AJC Papers.

18 FCC, Rules and Regulations § 1.723 (1946).
other minority groups." With its petition, the AJC submitted exhibits of *Daily News* editorials to demonstrate the merits of its claims.

The *Daily News* argued that the AJC had shown no legally sufficient interest to entitle it to intervene in the hearing. In addition, it argued that the Commission had no authority to consider the *Daily News*’ past activities in newspaper publishing, because such an investigation would violate the freedom of speech and press principles of the First Amendment. Therefore AJC intervention would not have been in the public interest. Commissioner Clifford Durr presided over the hearing, and although he would be the most sympathetic to the AJC’s substantive claims, he denied its petition to intervene in May 1946.

The AJC appealed to the full Commission, arguing that intervention was necessary so the AJC could subpoena and cross-examine witnesses. It would demonstrate that despite the *Daily News*’ avowed "policy of impartiality in its news and editorial treatment of minority groups," the newspaper had a de facto policy of hostility to minorities.

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19 AJC Petition to Intervene (3/14/46), in FCC Docket 6175.
20 The primary target of the AJC’s petition was Daily News columnist John O’Donnell. Controversy began on October 3, 1945 when O’Donnell published an editorial discussing an incident in which General Patton had boxed a soldier’s ears, noting that “[w]hat was not reported at the time was that the soldier . . . was of Jewish descent.” When it was learned that Patton had used the word “Jew,” in reprimanding the soldier, according to O’Donnell, “foreign-born political leaders” such as Justice Felix Frankfurter exerted “secret and astoundingly effective might” that led to the dismissal of Patton. Others mentioned by name in the editorial included “Dave (Devious) Niles alias Neyhus,” a White House aide, and Sidney Hillman, the president of the Amalgamated Clothing Workers of America and Chairman of the CIO’s Political Action Committee, referred to as “the Latvian extrrabbinical student now known as Sidney Hillman.” Id., Exhibit A. On October 4, leaders of Jewish organizations wrote a letter to the News stating that the soldier was not of the Jewish faith, and that those accused in the editorial had issued denials. The *Daily News* printed this letter on October 6, published an editorial in response on October 13, but did not issue a retraction until October 19.
21 AJC, Petition to Review Order of Presiding Officer to Deny Petition to Intervene (5/22/46), in FCC Docket 6175.
The AJC did not see its purpose as establishing the right to participation for social reform groups in the future. Instead, it made a feeble attempt at describing its "interest" in the proceeding: it was in "avoiding [the] injury" that would result from such a broadcast policy. Rather than pursuing a legal right to participate, the AJC addressed its petition primarily "to the discretion of the Commission."\textsuperscript{22} The Commission could issue a discretionary grant of intervention that "would not create a precedent which would result in unduly hampering future hearings."\textsuperscript{23} The Commission need not worry about future "intervention by an excessive number of persons or organizations."\textsuperscript{24} The \textit{Daily News} disagreed; it argued that the AJC had no more interest than any other member of the public. Permitting such intervention would require the Commission to allow labor and farm organizations, industrial and business organizations, patriotic and political organizations, and many others to participate. The Commission affirmed Commissioner Durr's ruling and denied the AJC's petition to intervene.

The hearing of testimony began on July 8, 1946, in New York City. Maslow attended and made clear that he intended to participate as an intervenor, despite the Commission's ruling. Maslow sought to cross-examine the \textit{Daily News}' general manager, but his request was denied. Maslow was not easily defeated and collaborated with several of the \textit{Daily News}' competitors, who asked that they be permitted to appoint Maslow as their co-counsel to cross-

\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
examine the *Daily News* witnesses. Unwilling to rule on whether this type of circumvention of the intervention rules was appropriate, the presiding officer referred the question to the Commission. On July 16, the Commission notified him that Mr. Maslow *could* cross-examine witnesses, although it did not explain why.

In addition to cross-examining the *Daily News*’ witnesses, the AJC submitted its own evidence, which consisted of sample *Daily News* editorials and stories, and a quantitative content analysis designed to compare the *Daily News* with other New York City papers with respect to news stories about Jews and African-Americans. Alexander H. Pekelis, the CLSA’s chief consultant, and Leila Sussman, who had worked on similar studies with Milton H. Stewart, the CIO’s expert in the *United Broadcasting* case, produced the content analysis and testified as to its quality and methodology. The *Daily News* attacked both the quality of the AJC’s data and its appropriateness to a licensing hearing. The AJC responded with a revised content analysis, but continued to be criticized.

At the conclusion of the hearing, the presiding officer was faced with over 3300 pages of transcript, 5600 pages of exhibits and 17 applicants. Almost a third of the transcript, and 46 of the exhibits, was related to AJC charges against the *Daily News*. The Commission’s proposed decision, however, was a defeat for the AJC. A majority of the Commissioners voted to grant the *Daily News* one of the licenses. In a separate opinion, the Commission granted the *Daily News’*

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25 The three applicants were Bernard Fein, The People’s Radio Foundation, and The National Maritime Union.

petition to strike the AJC's evidence.\textsuperscript{27} The evidence was unacceptable. The AJC's collection of twenty-three items from the Daily News was "too sparse a selection . . . to have any probative value" in showing "a 'consistent bias and hostility against Jews and Negroes.'"\textsuperscript{28} None of the items contained expressly hostile statements. The AJC's content analyses were methodologically flawed. It was based on "personal and inexpert opinion."\textsuperscript{29} Dissenting Commissioner Durr found the evidence relevant and admissible. He criticized his fellow Commissioners for defeating the purpose of having public witnesses testify, and for imposing "procedures of medieval rigidity" on public witnesses.\textsuperscript{30} But his view did not prevail.

The Commission permitted the AJC to file exceptions to the proposed decision despite its lack of party status. The AJC hailed this decision as an "unusual ruling, unprecedented in an administrative proceeding."\textsuperscript{31} After various changes in Commissioners and intermediate decisions, the Commission scheduled additional oral argument at which the AJC appeared to complain about the omission of its evidence.

In its final decision, issued on April 7, 1948, the Commission reversed its previous positions. The Commission issued two opinions on that day. The

\begin{itemize}
  \item \textsuperscript{27} WBNX Broadcasting Co., Inc., 43 F.C.C.2d 113 (1947).
  \item \textsuperscript{28} Id. at 114.
  \item \textsuperscript{29} Id. at 115.
  \item \textsuperscript{30} Id. at 117. Examples of relevant evidence to which Durr pointed included statements attacking the Jewish origins of CIO's Sidney Hillman and statements such as: "Plenty of people just now are exercising their rights to dislike the Jews,"; "we do not maintain that what racial faults the Old World Jews have displayed are disappearing in the American melting pot; "the old time charge that the Jews were slick at a trade . . . has now been pretty well washed up . . . ." Quoted in id. at 118.
  \item \textsuperscript{31} Brief Defends FCC Power to Rule on Bias in Radio, 4 Law and Social Action 116 (11-12/69), in AJC Papers.
\end{itemize}
Commission denied the Daily News’ motion to strike the AJC’s evidence.\textsuperscript{32}

Instead it endorsed the use of social science evidence to show evidence of bias. How a station owner conducted itself vis-à-vis racial and religious groups was a substantial aspect of operating in the public interest and was therefore relevant to the proceeding. The Commission would not condemn an applicant based on expressions of viewpoints alone, but it would take into account evidence of unfairness. According to the Commission, a fair station was one that granted requests from persons seeking to reply to attacks against particular groups or viewpoints. Thus the AJC won a victory on its general approach and on the admissibility of social science evidence.

The AJC fared less well on the implementation of its social science methodology. The AJC had introduced into evidence 23 editorials published by the Daily News over a period of 8 years that were designed to show the anti-Semitic slant of the paper. It also presented two content analyses of news stories relating to Jews and African-Americans, which compared the Daily News to other New York papers and found that the Daily News had a high percentage of unfavorable stories. The Commission found that the 23 “scattered . . . items . . . over an 8-year period” did not demonstrate unfairness or prejudice,\textsuperscript{33} and concluded that the Daily News would “live up to its pledge to treat all racial and religious groups fairly and equally.”\textsuperscript{34} The content analysis, said the

\textsuperscript{32} WBNX Broadcasting Co., 12 F.C.C. 837 (1948).
\textsuperscript{33} WBNX Broadcasting Co., Inc., 12 F.C.C. 805, 829 (1948).
\textsuperscript{34} Id.
Commission, was so "technically deficien[t] in its construction" that the evidence lacked any probative value.\textsuperscript{35}

Although the Commission discredited the AJC's evidence and did not cite the AJC's efforts as relevant to its decision, the AJC did achieve its goal of keeping the \textit{Daily News} out of FM broadcasting. The Commission denied the \textit{Daily News} a license and gave it instead to Unity Broadcasting,\textsuperscript{36} a corporation organized by the International Ladies Garment Workers Union.\textsuperscript{37} The Commission argued that Unity was preferable to the \textit{Daily News}, because it would have a stronger commitment to public service as a licensee, and had more detailed plans for working with civic-minded groups. The \textit{Daily News}, said the Commission, was generally unfamiliar with radio broadcasting, and its owners lived outside the New York area. These factors were available when the Commission first decided the case, but the Commission had not seen them as decisive in its earlier rulings.\textsuperscript{38} It is clear that even though the Commission did not \textit{legally} rely on the AJC's evidence, at least some of the individual Commissioners were influenced by the AJC's involvement in the proceeding.\textsuperscript{39} The AJC's sustained interest in the proceeding clearly influenced its outcome.

\textsuperscript{35} Id.
\textsuperscript{36} Unity already had construction permits for stations in Tennessee and St. Louis, and had pending applications for stations in Boston and Philadelphia.
\textsuperscript{38} The Commission became notorious by the 1960s for its inconsistent application of its comparative hearing factors.
\textsuperscript{39} New Jersey operations received two of the licenses. The remaining two licenses for New York City went to American Broadcasting Co., Inc. (ABC Network), and WMCA, Inc. The latter two were preferred to the Daily News, said the Commission, because they had high-quality public service programming on their AM stations, and because they were more experienced in radio. Interestingly, ABC and WMCA were the two broadcasters in addition to WHKC, according to Morris Ernst, that had vowed to enforce an impartial policy regarding the same of time for discussion of controversial
Given the vigorous arguments made by the *Daily News* before the FCC, one might have expected that the paper would have appealed. Had it done so, it might have provided an early opportunity for the courts to address both the participation rights of social reform groups and the Commission's controversial issues policy. But it did not, and the AJC as victor had no reason to do so.

**Overall Assessment**

The AJC's efforts had "tangible, if hidden, results."\(^{40}\) The FCC had recognized the use of content analysis to demonstrate bias, and social reform groups would continue to use this social science evidence to try to demonstrate discriminatory broadcasting. Yet the AJC did not provide a methodological model for others to follow. The Commission had rejected its methodology as flawed, a fact that the AJC itself recognized.\(^{41}\) And the long-term impact of the AJC's efforts was minimal and indirect.

In the short term, the AJC kept the *Daily News* out of FM radio in New York. But it did not keep the *Daily News* out of television. In fact, the *Daily News*’ application for a television license was pending at the very same time. The AJC was aware of this, but it chose to pursue the radio license case, and not the television license case. Midway through the radio case, the *Daily News* was awarded a television construction permit. As an afterthought, the AJC asked the FCC to incorporate the evidence from the radio proceeding into the television

\(^{40}\) Note, Radio Program Controls: A Network of Inadequacy, 57 Yale L. J. 273, 285 (1947).
\(^{41}\) See Redlich, Private Attorneys-General, at 595 & n.142.
proceeding and reopen the case. The FCC declined to do so when it initially rejected the AJC evidence, and the AJC never pursued it further.

Television was the future, but it was largely ignored by the AJC. This suggests several possibilities. Perhaps the AJC prioritized short-term benefits over long-term strategy. Or as a social reform group, the AJC may simply have lacked the expertise to make technological forecasts that would have enabled it to exercise greater influence on the future of mass media. On the other hand, perhaps the AJC made a wise strategic choice. By preventing the Daily News from obtaining an FM license, it created the possibility for other more reform-oriented applicants to obtain a radio station. Television was clearly too expensive for all but the most well-capitalized applicants, and preventing the Daily News from owning a television station might have simply left the New York City area with less television service without any corresponding benefits.
Decline of Social Reform at the FCC

Social reform activism at the FCC began to decline during the late 1940s. The commencement of the cold war in 1947 created a political climate of anti-communism that was less hospitable to social reform goals.¹ By 1952, FCC Commissioners had become less ambitious in their regulatory goals and expressed less interest in hearing from social reform groups. Lacking an activist agenda, FCC Commissioners had little need to seek the support of social reform groups. In the early 1950s, the FCC instituted loyalty oaths for radio operators, which alienated previously supportive social reform groups from the Commission.

Social reform activists realized that they could expect fewer "reform returns" from the FCC, and so they redirected their efforts and resources to other social reform activities that looked like more profitable avenues for progress. The decreasing interest of reform groups in the FCC was encouraged further as the federal courts began opening their doors to social reform litigation, creating a new instrument for social progress. Thus broadcast reform dropped lower on the social reform agenda.

To the extent they remained interested in broadcast reform, these groups narrowed their agendas to politically safer territories, seeking the maintenance of educational radio reservations and the expansion of educational television,² and

² See Ch. 3, supra.
they turned away from direct conflicts with commercial broadcasters over the nature of broadcast programming. New initiatives by the American Civil Liberties Union ("ACLU") were designed not to improve the quality of broadcasting, but to promote due process protections for those who were subject to loyalty oaths by the FCC and blacklisting by the broadcasting industry.

**The George Richards Cases**

The FCC began a proceeding against the George Richards stations in the late 1940s. It began as an effort to discourage right-wing, anti-Semitic broadcasting. However, it revealed the increasing influence of the cold war and the anti-communism crusade from 1948 to 1952. Social reform groups challenged the broadcast licenses of George Richards as part of a broader campaign to challenge right-wing bias over the airwaves in what was called at the time the "longest and most expensive series of investigations and hearings in radio history." Yet the effort ended with a fizzle that would reflect the FCC's declining activism and social reformers' increasing frustration with the Commission.

George A. "Dick" Richards owned three stations: KMPC, Los Angeles' "Station of the Stars"; WJR, Detroit's "Good Will Station"; and WGAR of Cleveland. Richards established his first interests in radio in Detroit with WJR, which became a powerful mid-western station and a key CBS affiliate. Here, Richards had given

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3 Edmund Lawrence, Radio and the Richards Case, 205 Harper's Mag. 82, 82 (Jul. 152); see also, Evidence of Slanting on Radio Presented in FCC KMPC Hearing, Law and Social Action, Vol. 5, No. 2, March-April, 1950, p. 123, in AJC Papers (describing Richards case as "one of the most important cases to come before the FCC.").

Father Coughlin his start in radio. In 1937 Richards purchased KMPC in Los Angeles and boosted its power from 10,000 watts to 50,000 watts. Richards was a man with a strong personality, strong right-wing views, and strong transmitters.

The case against Richards began in February 1948 during the Commission's Mayflower hearings. Former KMPC employees and the Radio News Club of Southern California (an association of professional radio newsmen) accused Richards of using his broadcast license for the dissemination of his personal, political viewpoint. They prepared affidavits for submission to the FCC. The affidavits pointed to particular incidents where Richards had instructed his employees to air biased, anti-Semitic, and anti-New Deal programming. Based on the Radio News Club complaint, the FCC launched an investigation of KMPC and the other Richards stations and ordered local hearings.

The American Jewish Congress, which spearheaded a coalition of Jewish organizations against Richards, and other national organizations, including the ACLU, the CIO, the Anti-Defamation League, the American Jewish Committee, and the ADA, took interest in the proceeding. National figures such as Roger Baldwin, Lloyd Garrison, Edward H. Levi, Algernon Black, Paul Freund, Horace Kallen, Max Lerner, Thurgood Marshall, James Roosevelt and others signed onto various petitions submitted to the FCC.

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7 Charge Richards Ordered News Slated to Promote Own Political Beliefs," Billboard, 3/6/48, p. 1, in ACLU Papers, Box 916; Edmund Lawrence, Radio and the Richards Case, 205 Harpers Mag. 82 (1952).
9 A simultaneous attack on WJR was made by the UAW-CIO, which filed a complaint.
Richards’s attorneys included Horace Lohnes, who was regarded as one of the best broadcast attorneys in Washington; Louis Caldwell, who had represented the Chicago Tribune and the Daily News in earlier proceedings alleging right-wing bias; Burton Wheeler, former Senator; and Hugh Fulton. Richards spared no expense in defending his station licenses. Richards relied on various strategies and defenses to protect his interests. Because the case against Richards was a formal administrative proceeding, the FCC’s general counsel was responsible for building the case against Richards and answering Richards’ legal arguments. Social reform groups did not, however, leave the matter in the hands of the FCC. They played two roles: first, they tried to maintain public and FCC interest in the proceeding by publicizing the case; and second, they tried to provide support for the FCC’s general counsel by submitting briefs and petitions to counter Richards’ arguments. The proceeding extended over several years, and included voluminous testimony, exhibits and legal argumentation.

Stations Not Biased

Richards’ initial strategy was to demonstrate that his stations had not broadcast biased programming. Richards confessed that he was opinionated, occasionally misinformed, and prone to prejudice. However, he argued that his staff of newscasters were professionals committed to neutral journalism. The FCC had no evidence to demonstrate that his biases and prejudices had influenced them. KPMC did not editorialize; station personnel were required to follow the

acusing WJR of failing to make time available for the discussion of the 1950 strike against Chrysler. The FCC ruled on April 21, 1950, that WWJ of Detroit could not refuse the UAW an opportunity to present its side of the Chrysler strike. See Evidence of Slanting on Radio Presented in FCC

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KMPC's station manual and the fairness requirements of the NAB Code. To
demonstrate his future commitment to unbiased programming, Richards appointed
Frank E. Mullen, a former NBC executive, as president of the stations, although
Mullen remained in this position for fewer than six months.

Turning the broadcast reformers' social science tools on their head,
Richards commissioned a content analysis of KMPC’s programming. It was
performed not by a social scientist, but by a newsman, E.Z. Dimitman. The
Dimitman analysis concluded that the station had broadcast neutral, unbiased
programming. The study was, however, really a refutation of the use of content
analysis as a technique for demonstrating bias. Dimitman offered “a nod to the
social scientists and their content analysis,” but only a nod. He wrote of his "effort
... to follow in some form the content analysis used by the American Jewish
Congress” in the Daily News case, but found that the method was “useless.”
Instead, he relied on the inherent neutrality of news broadcasting, quoting a rather
tautological analysis from an industry witness in the earlier Daily News case:

The very essence of a news story is that it is objective and that it is
neutral. That is the very essence of news. And to try to measure it in
a form to show bias one way or another is almost beyond human
possibility.\textsuperscript{11}

Richards sought to undermine the methodology upon which social reform groups
had hinged their hopes for convincing the FCC to take account of program content.

In response, the AJC submitted a 15-page critique of the study. The fate of
this critique demonstrates the problematic nature of public participation in

\textsuperscript{10} E.Z. Dimitman, Study of Newcast Scripts of Station KMPC 12, in FCC Docket 9193.
\textsuperscript{11} Id. at 14.
judicative proceedings without party status. First, like many adjudicatory
proceedings, the record for the Richards' cases fills hundreds of volumes and is
filed under numerous docket numbers. The present author was unable to even
locate a copy of this critique, although many other of the AJC submissions were
located. Second, given the voluminous nature of the record, it is unclear who, if
any one, ever read the critique. Perhaps only the file clerk ever touched the
submission. Submitting to the record, however, was the only formal way in which to
convey information to the Commission, and informal contacts were officially
prohibited. Third, the shifting nature of the proceeding made it difficult for social
reform groups to keep up. The AJC's critique became irrelevant as Richards
shifted his strategy. Richards abandoned the Dimitman study, and he turned his
focus to other defenses. The fact, however, that Richards commissioned the
"content analysis" purely as a preemptive strike reveals the fear of the damage that
social reform groups could cause commercial broadcasters by combining social
science evidence with publicity and persistence. Richards abandoned reliance on
the study when it became apparent that the AJC would demonstrate the
inadequacy of the Dimitman study.

First Amendment

Richards argued that even if his stations had transmitted biased
programming at KMPC, he was protected by the First Amendment and the no-
censorship provision of the Communications Act. Richards argued that the FCC
was not authorized to investigate programming practices, and thus the Commission
ought to remove all issues relating to past program policies. The FCC should limit its inquiries to the renewal applicant's technical and financial qualifications.

The AJC and a group of other Jewish organizations filed a brief in opposition to Richards' argument. The brief reminded the FCC of its authority under the Supreme Court's 1943 decision in *NBC v. United States*. The AJC argued that affirmative FCC review of past programming was necessary if the Commission were to regulate in the public interest. In addition, the AJC argued that permitting discriminatory broadcasting was bad for the country. Richards' "fraudulent news reports" were designed to "stir up racial and religious hatred." If the FCC failed to consider this type of past programming, its decision would be patently absurd and against the public interest:

[[If Goebbels were to come to life and apply for a license, the Commission would be barred from examining his previous record as a broadcaster and from denying him a license because of his open adherence to the policy of 'The Big Lie,' his practice of suppressing opposition views and this inability to serve the public interest. An American Goebbels would have the same immunity.

Neither the Communications Act nor the First Amendment compels such outrageous consequences.]

How could the FCC be deprived of the opportunity to devote attention "to the aspect of broadcasting which chiefly interests the public, namely, program content"? The FCC rejected Richards' argument that it should not consider past programming practices. Instead it cited previous D.C. Circuit cases upholding the

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12 319 U.S. 190 (1943).
14 Id.
15 Id.
Commission's authority and to its own Report on Editorialization. The Commission made no note of the AJC's participation on these issues (or any other for that matter), so we do not know whether the Commission was influenced by the AJC's brief.

Patriotism and Anti-Communism

Another theme in Richards' defense was his patriotism. He highlighted the contrast between his Americanism and the "un-American" ideals of the social reform groups challenging his stations. Richards described himself as a true American. Through hard work, he had achieved success within America's system of free enterprise. His patriotism had led him to condemn Communism when and where he saw it. He was prejudiced not against Jews, just Communists. He portrayed his support of Americanism over the airwaves as admirable, not offensive. Perhaps he had been misinformed about who was or was not a Communist, and perhaps he had been overzealous in his patriotism, but his views deserved praise, not punishment.

Richards impugned the motives of the Radio News Club and the other groups opposing to him, waging his campaign against them not only at the FCC but in the trade press. He ran an advertisement in the major broadcast industry press that called into question the ideals of his opponents. Juxtaposing the American principles of Free Speech and the "foreign" ideas of his opponents, his free speech ad campaign featured a cute cartoon figure named "Free Speech Mike" who was being targeted by "strange philosophies born overseas":

This is Free Speech Mike — symbol of America's most vital freedom. He was conceived with the Declaration of Independence and is a unique
figure in a world in which dictatorships have thrived only through the absence of free speech. Even in America, Free Speech Mike is unpopular with certain groups — folks who have a distorted idea of their own greatness or who have been swayed by strange philosophies born overseas — men and women who would destroy American liberty to further their own selfish ends. . . . 17

The trade press was largely sympathetic to Richards. Rumors flourished alleging that Communists had instigated the proceeding against Richards. When a group of eighteen prominent leaders petitioned the FCC in opposition to Richards, Radio Daily compared the list of signatories to the House Committee on Un-American Activities’ list, and found that fourteen had been linked with left-wing groups and “known” communist groups. The ACLU insisted that the group of signatories were solidly anti-Communist, and criticized the stigmatization of “American liberals as fellow-travelers.” 18 The Radio News Club issued a multi-page statement refuting various rumors about the case, and denied allegations of Communist influence.

A west-coast, anti-communist newsletter, Alert, contacted the FCC’s general counsel, Benedict Cottone, to present background material on the social reform groups participating in the proceeding. One of Alert’s publishers, Norman I. Jacoby, reported that some of the groups protesting Richards case were “American,” including the Radio News Club, the CIO, and the National Community Advisory Council. 19 Others, however, were “Communists, Stalinists, or their friends.” 20 Jacoby targeted in particular the American Jewish Congress and the American Jewish Labor Council. He explained that the AJC was not technically a

17 Ad ran by WJR in Broadcasting, Ad Age, Printer’s Ink and other industry publications, in FCC Docket 9193.
18 Letter from Patrick Murphy Malin to Frank Burke (9/13/51), in FCC Docket 9405.
19 Memo from Norman I. Jacoby to the FCC 2 (4/14/49), in FCC Docket 9193.
20 Id. at 2.
“Communist front,” and had been founded by well-meaning rabbis and Jewish leaders.\textsuperscript{21} Yet of late, it had begun “espousing Communist causes,” and was guilty by association with the American Jewish Labor Council.\textsuperscript{22} These anti-Communist attacks took their toll and reduced the legitimacy and effectiveness of social reform groups.

\textbf{Delay and Avoidance}

Richards and the social reform groups were pitted against one another on the necessity and importance of a local, public hearing. None of Richards’ substantive defenses persuaded the FCC to cancel the hearings.\textsuperscript{23} Thus, Richards tried other procedural devices to avoid or delay a hearing.\textsuperscript{24} Richards complained that he had already been irreparably harmed by the FCC’s investigation of his stations. Such harm would be magnified by local hearings with witnesses making accusations. Recognizing the power of public hearings, Richards stated that he would rather confess in front of the Commission \textit{en banc} than be subjected to a local hearing. He would eagerly appear and seek the Commission’s advice on how to be a better broadcaster. Anything but a hearing! The FCC denied Richards’ request.

Richards made various attempts to transfer ownership of the stations in order to avoid a hearing.\textsuperscript{25} In April 1949 he proposed to transfer the stock to

\begin{itemize}
\item[\textsuperscript{21}] Id. at 3.
\item[\textsuperscript{22}] Id. at 3. The relations between the AJC and the AJLC had been tense, and one month later, the AJC ousted the AJLC.
\item[\textsuperscript{23}] G.A. Richards, 5 R.R. 1292 (1950).
\item[\textsuperscript{24}] See, e.g., G.A. Richards, 6 R.R. 386 (1950) (denying Richards' request for a bill of particulars on the hearing issues).
\item[\textsuperscript{25}] See G.A. Richards, 5 R.R. at 1292 (denying request to transfer and dismiss hearing).
\end{itemize}
trustees, but he met with opposition from the coalition of Jewish organizations. The
coalition brief argued that to permit such a transfer without inquiry into past
programming practices should be rejected because the FCC should not tolerate
“hasty and ill-conceived plans to evade correction of challenged abuses.”26 The
proposed trustees had no knowledge of broadcasting, Richards could replace them
at will, and Richards would ultimately hold the purse strings. The long-overdue
hearing on the need to remove Richards from the management of the stations
should not be evaded.

Richards also put forward a proposal to sell a controlling interest of the
stations to NBC. The California Division of the Americans for Democratic Action
argued that even in that event, public hearings should be held because “the
groups of people he has affronted deserve to be heard” and a hearing would
serve to warn others that might broadcast biased programming.27 The national
ADA expressed interest in participating in hearings in order to support the
“expression of all points of view on public questions.”28

The AJC, the ACLU and others complained that Richards was filing all of
these motions simply to delay the proceeding, that a hearing had to be held, and
that they wanted to participate. The FCC apparently never acknowledged their
requests, but it did accede to their wishes and rebuffed Richards’ attempts at
avoidance. Yet Richards had achieved delay. By the time the first hearing was
held, two years had passed.

26 Brief in Opposition to Petitioners’ Motion Challenging the Commission’s Jurisdiction to
Investigate Program Policies 7 (12/21/49), in FCC Docket 9405.
27 Letter from Esther Murray and Howard Green to FCC (11/1/49), in FCC Docket 9405.
Hearings

The hearings began on March 13, 1950 in Los Angeles. The first hearing came to nothing after the presentation of 21 witnesses when the hearing examiner, Judge Frederick Johnson, passed away. The second hearing began in June 1950 and lasted for over three months, including 113 hearing days. By this time, North Korean troops had invaded South Korean, and "the cold war became a shooting war."29 The hearings revealed some of the political weakness of the FCC’s case against Richards. A few Senators protested the proceeding in remarks published in the Congressional Record. Others complained directly to the Commission. Congressmen attacked the FCC’s star witness, Clete Roberts, accusing him of being anti-Italian.30 Senator Bricker accused the FCC of political censorship.

Although the Commission could not technically take account of these communications in its formal decision making as they were “off-the-record,” the Commission was well aware of these communications. Chairman Coy expressed surprise at these negative reactions to the Commission’s investigation and complained that some people may have received a one-sided perspective on the case.31

Richards marshaled support from others as well. NAB adopted a resolution protesting the FCC’s inquiry into the Richards’ stations. During the hearing, Richards put forward an illustrious slate of witnesses to testify as to his good character: the Mayor of Los Angeles, the Lieutenant Governor of California,

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31 See, e.g., Letter from Wayne Coy to Harley M. Kilgore (5/5/50), in FCC Docket 9402.
various Democrats, American Legionaires, advertisers, university presidents and public celebrities. One notable was Ty Cobb of baseball fame. Another was Captain Eddie Rickenbacker, famed World War I flier, automobile racer and president of Eastern Air Lines. He drew “quite an audience” to the hearing.\(^{32}\) Rickenbacker testified as to Richards’ character: there was no American better than George Richards, who provide a pleasant contrast to the “subversive[s]” and “foreigners” that believed that America should be “converted to the Communist element.”\(^{33}\) Rickenbacker’s remarks were not admitted into evidence by the hearing examiner, but they were covered by the media. The FCC put forward a strong case but had a less impressive roster of witnesses. The Commission relied primarily on the testimony of former Richards employees who testified that Richards misused broadcast facilities by targeting (among others) the Roosevelts, Howard Hughes, Justice Frankfurter, Sidney Hillman, Henry Kaiser and the CIO.\(^{34}\) In addition, they claimed that Richards had used his broadcast facilities as an outlet for his anti-Semitic beliefs. The FCC staff also put forward substantial documentary evidence that Richards had attempted to influence his newscasters according to his personal political views.

Social reform groups had expressed strong interest in the proceeding, but they were noticeably absent from the hearing. The AJC reported hearing events in its Law & Social Action Newsletter, but the social reform landscape was noticeably

\(^{32}\) FCC Inquiry Hears Capt. Rickenbacker, Los Angeles Times II:2 (7/13/50), in FCC Docket 9402.

\(^{33}\) Id.

\(^{34}\) Phil Baum, Prejudice on the Air, 18 Cong. Weekly 7 (June 4, 1951), in ACLU Papers; see also Edmund Lawrence, Radio and the Richards Case, 205 Harpers Mag. 82, 84-85 (1952).
tranquil. Some social reform groups were perhaps waiting for "the conclusion of the factual testimony to weigh in with their opinions. If so, that opportunity never arose.

An Unexpected Turn of Events

Richards had been complaining to the Commission about his poor health for years, hoping to receive a postponement of the hearings. The FCC had turned a deaf ear to these complaints, but upon Richards' death on May 27, 1951, the FCC terminated the proceeding as moot. Against the wishes of the FCC's General Counsel, the Commission renewed the Richards licenses. Soon thereafter, the FCC permitted Richards' heirs to transfer the stations to new owners.

This sudden turn of events briefly re-energized the social reform groups. The Radio News Club of Southern California, which had begun the efforts against Richards, addressed a letter in July 1951 to the FCC Chairman. It complained about rumors that the Commission planned to drop the case before it even made findings of fact. The Radio News Club argued that the FCC ought to make a decision in the case because in "no time in history had it been more important that the integrity of news . . . be protected in order that the people of the United States be truthfully informed . . . ." Journalists and their managers needed "a definite code of news standards which insures impartial news reporting." The Club complained that its members had made "considerable economic sacrifices," "jeopardized [their] economic future," and had been "subjected to the most malicious kind of criticism" in their effort to "defend the American tradition of

35 Letter from David M. Anderson to "Chairman Albert WaynCoy" (7/17/51), in FCC Docket 9405.
36 Id.
responsible news reporting. Despite the News Club's protestations, however, it is clear that the group had lost interest in the matter and were out of touch with the Commission; the organization did not even get FCC Chairman Wayne Coy's name right.

Other groups expressed their dismay with the Commission's action but to no avail. Clare Logan of the National Association for Better Radio and Television called for findings in the Richards case, complaining that the FCC was withholding information from the American public. The American Jewish Congress continued its efforts to the very end. In August 1951 Will Maslow filed a seven-page motion to support the Chief of the Broadcasting Bureau and the General Counsel in their efforts to keep open the proceeding against the Richards' estate. The motion listed the names of supporters: Roger Baldwin, Algernon Black, Paul Freund, Lloyd Garrison, Earl Harrison, Horace Kallen, Freda Kirchway, Milton R. Konvitz, Edward H. Levi, Max Lerner, Patrick Murphy Malin, Thurgood Marshall, Jerome Michael, David W. Petegorsky, Shad Polier, David A. Reisman, Harry Shulman and Harold Taylor. The ACLU also protested the dismissal of the proceedings. The ACLU complained that the new management proposed no operation changes and that existing personnel might continue the Richards' approach to programming. If so,

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37 Id.
38 Id.
39 Even after FCC issued its the opinion, the American Jewish Congress continued its interest and concern, complaining the Commission had gratuitously referred to George Richards' widow and heirs as "native born" citizens, thereby condemning "naturalized Americans [as] somehow less desirable." Letter from Shad Polier to T.J. Slowie (12/12/51), in FCC Docket 9405. These efforts were clearly rebuffed by the Commission, which showed no interest in issuing a more politically-correct version of its opinion.
40 See Letter from Patrick Malin to Wayne Coy (9/7/51), in FCC Docket 9405.
the station would still fail to serve the public interest. \(^{41}\) None of the post-decision complaints from social reform groups yielded any positive responses from the Commission.

**Assessment**

Perhaps the Commissioners felt that they had driven Richards to his grave and chose to show mercy upon his widow. Regardless, the death provided an opportunity to escape a troubling regulatory problem. As one commentator speculated:

> If Richards had lived, the Commission would have been in a tough spot. For the very fact that the direction of Richards' bias was against—among other things—the Administration of which the FCC was a part would have invited attack; the temptation to charge that the Administration was muzzling its critics would have been much too strong for many politicians and commentators to resist. The members of the Commission must from time to time have wished that the most flagrant case of news distortion to come before them had involved pro-Administration slanting. Richards' death released them from their predicament... \(^ {42}\)

Richards' death should not obscure the reality that the Commission simply had become less interested in pursuing these types of cases. The Richards proceeding was a carry-over from an earlier era when the Commission was eager to maintain and enhance its regulatory authority, but the Commission was no longer interested in asserting that authority.

Would more active efforts by social reform groups have changed this trend? The AJC blamed the other nonprofits for failing to take a strong enough stand on the case, thereby permitting the FCC to duck the issue. It complained that the participation by other groups had been characterized by reluctance and retreat.

\(^{41}\) Id.
One factor was indeed the decreasing interest and enthusiasm among social reform groups. The ACLU did not join onto briefs with other organizations, and would have needed to forge its own strategy.\textsuperscript{43} It lacked confidence about how to proceed. The ACLU’s decisionmakers hemmed and hawed. They had disagreed with the FCC in its abandonment of the Mayflower Doctrine in 1949, and had expressed free speech concerns that would arise in the enforcement of the Fairness Doctrine. Their confusion over the Richards case likely grew in part about their dissatisfaction with the FCC’s general approach to controversial issues. Yet practical concerns arose as well. Initially they wanted to present testimony, but then they wondered about strategy. Would the Commission accept ACLU testimony? Did the organization have any factual testimony to offer? Should the ACLU wait until after the presentation of testimony by others to make its legal points? In the end, the ACLU left the presentation of factual testimony to others, instead waiting to chime in with its legal opinions at an appropriate time. Similarly, the ADA decided to wait to see how the hearing proceeded before deciding whether it would testify. And as is often the case, those who waited were never heard.

A final factor was the effects of a changing political climate that social reform groups came to feel. After the Richards case, social reform groups that had been involved in broadcast reform largely lost their interest. Those that remained narrowed their focus. They turned their focus away from problem of fairness in broadcast programming. Instead, they focused on the politically safer arena of

\textsuperscript{42} Lawrence, Radio and the Richards Case, at 87.
\textsuperscript{43} On the ACLU’s policing regarding joining briefs with other organizations, see Walker, In
educational broadcasting, an effort discussed earlier. The other significant area of reformer activity at the FCC came in reaction to anti-communism activities. The ACLU, and others, challenged the FCC’s establishment of loyalty oaths and broadcast-industry blacklisting. These efforts were, of course, part of a broader reaction by social reform groups against government loyalty oaths and congressional anti-communism investigations.

Yet even if the social reform had retained their level of enthusiasm and energy, the Richards case reveals some of the perils that social reform groups face—with or without the right to appeal to the courts. They are almost always out-manned and out-gunned. In the end the FCC could fail to respond to their claims. Even if groups had appealed the Richards case to the courts, it is unclear how successful they would have been. The issue would have been a narrowly-framed legal one: was the FCC arbitrary in its decision that the death of George Richards mooted the case against his stations? Frankly, the hearing had turned on the personal behavior of George Richards and whether it had any impact on his employees.

Despite the participation by these groups, there is little evidence that the Commissioners noticed their contributions. The written opinions that the FCC did issue in regards to the Richards matter made little or no note of participation by social reform groups. The bureaucratic and legal structure of the Commission may have precluded these groups from actually being heard at all. Court review could only have changed this environment if the Commission had disregarded a relevant argument or contribution made by the social reformers. The Richards case

Defense of American Liberties, at 186.

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demonstrates the ease with which the Commission could make decisions on grounds largely immune from successful court appeal. Even if standing could have helped their case, these groups notably expressed no interest whatsoever in obtaining standing to improve their strategic position at the Commission. And in contrast to the Daily News case, active participation was not even attempted. Rather than pushing harder or seeking alternative means of influencing Commission policy, they simply retreated.

The Richards proceeding was the last of a series of 1940s FCC proceedings that pitted social reform groups against conservative broadcasters on the question of controversial issues programming. Similar cases would not be brought again until the 1960s. Rather, social reform groups retrenched and narrowed their goals.

Anti-Communism, Loyalty Oaths and the ACLU

The ACLU struggled during the cold war with anti-communism issues. As Samuel Walker explains, the “balance of power in the ACLU was held by a group of liberal centrists. They were genuinely confused and uncertain about both Communism and the escalating anti-Communist witch hunt.”44 The ACLU’s “internal disputes” over these issues lead the ACLU to be “at times . . . hesitant during the cold war.”45 In 1948 the organization began including a statement of anti-communism in its briefs, and adopted a policy of not allowing other organizations to join its briefs.46 In addition, a special ACLU committee, chaired by

44 See Walker, In Defense of American Liberties, at 175 et seq.
45 Id. at 176.
46 Id. at 186. Walker notes, however, that the ACLU was not consistent in the
Walter Gellhorn, recommended that the ACLU retreat somewhat from "litigation in favor of public education."\textsuperscript{47} Finally, Roger Baldwin stepped down as executive director of the ACLU, and his replacement, Patrick Malin, "failed to project an inspiring vision of civil liberties during his tenure from 1950 to 1962.\textsuperscript{48} Despite these changes, the ACLU was one of the most active observers of the FCC during the 1950s. However, the organization retreated from a broadcast reform agenda and focused on due process protections for those subject to FCC loyalty oaths and on problems of blacklisting in the radio and television industries.

As early as 1941, the House Un-American Activities Committee ("HUAC") Chairman Dies was seeing the colors pink and red at the FCC. Chairman Fly and Commissioner Clifford Durr actively opposed the efforts of HUAC, and the Commission stood fast when HUAC targeted Commission employees.\textsuperscript{49} In 1943 Congressman Eugene E. Cox called the FCC a "nest of Reds" and the House established a Select Committee to Investigate the Federal Communications Commission.\textsuperscript{50} These efforts were tamished, however, when Cox resigned for accepting a bribe in connection with the grant of a radio license to the Hearst Publishing Company.\textsuperscript{51} In the late 1940s, J. Edgar Hoover sent the FCC unsolicited information from FBI files on the Communist ties of broadcast license applicants. Commissioner Clifford Durr complained publicly about these

\textsuperscript{47} Id. at 204. Walker notes that this recommendation, particularly in retrospect, seems "curious." Id. He attributes it to "Gellhorn's view that the Court would be a weak reed in the cold war and that the crucial battle was in the area of public opinion." Id.
\textsuperscript{48} Id. at 206.
\textsuperscript{49} See Salmond at 100-01; see also Barnouw, Golden Web, at 176.
\textsuperscript{50} Quoted in id. at 106.
\textsuperscript{51} Id. at 109.
unsolicited, confidential and off-the-record communications. The Commission, however, apologized to Hoover and assured him that such information was indeed desired.\textsuperscript{52} This apology marked the Commission's increasing difficulty in resisting anti-communism, and it starkly contrasted with the Commission's earlier, more assertive positions against the anti-communism crusade.

By the 1950s, the FCC had succumbed to the general tenor of the nation in supporting the fight against Communism. The Commission began to institute its own loyalty oath programs for those persons holding broadcast operator licenses.\textsuperscript{53} The establishment of these programs placed the FCC in conflict with its long-time supporters, social reform organizations.

**Loyalty Oaths**

In the 1950s the FCC began to institute a loyalty oath program for radio operators. The FCC began its loyalty oath effort with a rulemaking proceeding. FCC proposed to bar as radio operators any members of the Communist Party or other organization advocating the violent overthrow of the government. Only persons of good moral character would be permitted to hold operator licenses, and one factor would be whether the person had been a member of these subversive organizations. Thus applicants would be require to state their affiliations.\textsuperscript{54}

\begin{footnotes}
\item[52] Later Durr refused reappointment as a Commissioner to protest Truman's loyalty-security program.
\item[53] Operator licenses were for engineers who actually operated radio equipment, not for station owners. Station owners were not subject to loyalty oaths, but their station licenses would be assessed under the usual public interest standard.
\item[54] See FCC Dockets 11060-61.
\end{footnotes}
The ACLU opposed government employment loyalty oaths and Taft-Hartley loyalty oaths for labor unions. However, they were tentative, accepting "the federal loyalty program in principle, for example, but objected to its lack of procedural protections." The ACLU applied these same principles when the FCC began to implement radio operator loyalty oaths. In June 1954, the ACLU’s radio committee concluded that while it did not like the FCC’s rule, it preferred not to oppose the rule directly because of its "sensitive nature." Rather it recommended that the ACLU should generally oppose the expansion of loyalty oath programs, while the Radio Committee would ask for a public hearing on the FCC’s proposed rule. At the July ACLU Board meeting, a motion to oppose the requirement outright was rejected. The prevailing motion authorized the ACLU office to inform the FCC that the ACLU believed that the rule would do more harm than good, but that the ACLU was sensitive to the government’s right to police the backgrounds of those holding sensitive positions.

The letter sent to the FCC was indeed deferential to security concerns, but stated that if the FCC chose loyalty as requirement for holding a license, that applicants should receive a full hearing including all factors relevant to that persons’ security risk. Members of Communist organizations should not automatically be barred from holding a license. To do so would be a violation of due process and would inhibit free speech and association.

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56 Id. at 175.
57 ACLU Radio Committee Minutes (6/28/54), in ACLU Papers, Box 924, Folder 21.
58 Letter from Patrick Malin to Rosel Hyde (7/16/54), in FCC Docket 11060.
The American Communications Association ("ACA"), a labor union in the communications field, took a stronger stance, opposing the rule and expressing concern that the FCC would institute the new rules without a public hearing. The ACA pointed out to the FCC that over 800,000 persons held radio operators' licenses, that the Commission lacked the authority and the budget to enforce these rules while granting hearing rights to the licensees. Privately, former Commissioner Durr agreed.59 The Commission would be taking on a task that it could not complete, and the Commission would open itself up for attack.

The National Association of Broadcast Employees and Technicians, a CIO Union, complained that the FCC was seeking to mimic the loyalty oath inequities present in the Taft-Hartley Act, which required anti-communist affidavits from union officials but not from employers.60 The union sought to become an "interested party" to the proceeding, and it requested the right to either appear at hearings or submit briefs if no hearings were held.

Oral argument on the rules was held in 1955. Those appearing included Victor Rabinowitz of the ACA, Herbert Monte Levy of the ACLU, Vitalis L. Chalif of the anti-communist publication AWARE; and Morris Harvey Strichartz, appearing for the Conference of American Maritime Unions. Oral argument was lively, but the FCC chose not to adopt loyalty oath rules. Rather the FCC shifted strategies, deciding to implement the policy through adjudication rather than rulemaking. The FCC chose a test case for its proposed loyalty oath questions: radio repairman Travis Lafferty. Despite the ACLU's somewhat deferential stance toward loyalty

59 Letter from Clifford Durr to Aubrey Williams, Southern Farm and Home (9/9/54), in ACLU Papers, Box 924.
oahts, it represented Lafferty when he refused to answer a set of loyalty questions posed by the FCC.61 Lafferty claimed that "inquires by the Commission about my political beliefs and associations have no logical relation to whether I am qualified for a radio operator's license."62 The Commission held a hearing on Lafferty's arguments. In the end, the Commission found it had authority to ask such questions, it revised a few of the vaguer questions, and denied Lafferty's license renewal. Until Lafferty answered them, his license would not be reinstated.63 The ACLU did not appeal this decision, choosing to wait for other cases. In later cases, the D.C. Circuit court upheld the Commission's power to require these loyalty oaths.64 This ruling was consistent with the general tenor of the federal courts, which typically upheld loyalty oath requirements during the 1950s.65

**Blacklisting**

In the late 1940s, the American Business Consultants, "a professional red-hunting organization" published its Red Channels, which listed 151 "alleged subversives" within the broadcasting industry.66 After Jean Muir was dismissed

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60 Letter from George Maher to Mary Jane Morris (6/17/54), in FCC Docket 11060.  
61 The questions were:  
1. Are you now a member of the Communist Party or Communist organization?  
2. Have you ever been a member of the Communist Party or Communist organization?  
3. Are you now a member of an organization or group which advocates or teaches the overthrow of the Government of the United States?  
4. Have you ever been a member of any organization or group which advocated or taught the overthrow of the Government of the United States . . . by force or violence?  
Travis Lafferty, 23 F.C.C. 761, 762 (1957).  
62 Id.  
63 Id.  
65 Walker, In Defense of American Liberties, at 188.  
66 Id. at 183.
from the “popular television series” *The Aldrich Family*, Ernest Angell and Patrick Malin of the ACLU expressed the organization’s “concern[] about radio-television blacklisting.”

Because of this concern, the ACLU appointed Merle Miller, a correspondent, novelist and ACLU Board of Directors member, to study the problem of blacklisting. The ACLU published the results of this investigation in Miller’s 1952 *The Judges and the Judged*. The ACLU recommended that “everyone connected with [radio and television] should promote scrupulous observance of . . . free speech, due process and non-discrimination.”

In addition, in conjunction with the publication of Miller’s book, the ACLU urged the FCC to “demand that [] licensees – to fulfill the requirement of public interest – refrain from making use of any black list . . . .” The ACLU viewed the problem as one of private censorship and looked to the FCC to intervene.

The Authors League of America first petitioned the FCC for an investigation into radio-television blacklisting. The Commission rejected this petition, but Wayne Coy hinted that perhaps a specific case targeting a specific station would be more effective. The ACLU picked up the initiative, but it agreed to forego action until it had met with FCC personnel. The FCC was apparently interested and concerned about the upcoming release of Merle Miller’s book on blacklisting.

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67 Id.
69 Id.
70 Id. at 25.
71 The Authors League was established in 1912 “to protect the copyright, contract, free expression, and tax interests of creators of literary property.” Karen O’Connor and Lee Epstein, *Public Interest Groups: Institutional Profiles* 28 (1989).
72 Letter from Wayne Coy to Rex Stout (2/8/52), in ACLU Papers, Box 919.
Herbert Levy of the ACLU's Radio-Television Committee met with FCC General Counsel Benedict Cottone. Following this meeting, Levy reported that the ACLU could argue against blacklisting either by pointing to the improper delegation by broadcasters to advertisers or by demonstrating that advertisers were denying access to the airwaves based on beliefs or affiliations. Levy argued against the ACLU requesting a general investigation of the blacklisting issue, because it would be too easy for the FCC to sidestep the issue. There would be only one or two Commissioners that would support a general investigation.

The ACLU contemplated finding a test case for the FCC, and Levy and Cottone apparently agreed that a case involving the dismissal of Philip Loeb from NBC's comedy program, "The Goldbergs," might make for a good test case. If Levy provided Cottone with an advance copy of Merle Miller’s The Judges and the Judged. Cottone agreed to review the ACLU's complaint and brief with Levy before it was filed.  

In the end, the ACLU pursued a different strategy that coincided with its release of Merle Miller's book. It wisely avoided the request for a general hearing. Instead, in the spring of 1952, the organization challenged the license renewal of a number of network-owned stations, mostly owned by networks). It did not, however, choose a particular incident demonstrating the evils of blacklisting, a decision that may have been influenced by the ACLU's hesitancy to use the FCC to redress grievances relating to particular incidents of programming discretion.

73 Attached Memo to Files from Herbert M. Levy Re: Radio and TV Blacklisting—Petition to the FCC (2/19/52), in ACLU Papers, Box 919, Folder 5. Although crossed out in pencil and not appearing in later accounts of the meeting, Levy's initial report to the files indicates this agreement.
Instead the ACLU’s complaint requested that the FCC not renew these licenses until they ceased their involvement in blacklisting discrimination. The licenses were due to expire on June 1, but the FCC deferred renewal of the licenses to allow the stations to respond to the allegations. It also requested that the ACLU submit its briefs by June 16. The Commission, however, by-passed the ACLU, and renewed the licenses on June 11.\textsuperscript{74}

The ACLU was clearly displeased with the FCC’s rude treatment of its complaint and asked the Commission to clarify or revoke its June 11\textsuperscript{th} order. Commission’s attitude toward the ACLU contrasted starkly with the 1940s when, for example, Chairman Wayne Coy had praised the “vigilance” of the ACLU as “a major force in keeping American radio free in these troubled times.”\textsuperscript{75} The ACLU prepared an affidavit for former FCC Chairman James Lawrence Fly in which Fly criticized the Commission for violating the Constitution, the APA, and Commission practice.\textsuperscript{76} Despite the ACLU’s protests, the FCC refused to reopen the matter, and the ACLU did not file an appeal.

The ACLU was the most active social reform group participating at the FCC during the 1950s. During the 1940s it had been consistently interested in and active in broadcast programming reform. In the 1950s it retreated into a

\textsuperscript{74} See American Broadcasting Co., 8 R.R. 259 (1952).
\textsuperscript{75} Letter from Wayne Coy to Rev. John Haynes Holmes (11/23/48), in ACLU Papers, Box 916, Folder 11, Town Meeting of the Air, 1948.
\textsuperscript{76} On this entire incident, see Karen Sue Foley, The Political Blacklist in the Broadcast Industry: The Decade of the 1950s, Ch. 6 (1979). Former FCC Chairman Fly was personally familiar with the perils of blacklisting. Martin Dies, chairman of the House committee on un-American Activities, and Representative Eugene Cox of Georgia, had harassed both him and members of the FCC staff during his Chairmanship. Erik Barnouw, The Golden Web, 173-81 (1968).
defensive posture that emphasized due process protections rather than regulatory activism. During the 1950s the national ACLU viewed its broadcast reform mission as confined to “studying problems and issuing policy statements.” Such an approach had limited effect where FCC policymaking was made primarily through the license renewal process. The ACLU was constrained by limited resources. Broadcast reform was but a small subset of the wide range of civil liberties issues in which the ACLU was interested. ACLU staff did not possess adequate personnel to pursue radio and television issues in depth. Activities such as monitoring stations for adequate public service programming were rejected in the face of more pressing budgetary demands.

In the 1950s, the national ACLU organization found that it could not obtain sufficient technical expertise to participate effectively in FCC proceedings. It believed that lawyers and others with up-to-date knowledge of the broadcasting field were typically too closely aligned with the interests of the broadcast industry. This was a significant change from the 1940s, when the ACLU was able to draw on the talents of former FCC Commissioners and staff.

Conclusion

The retreat of the ACLU and the disappointment of the AJC reflected the political climate of the 1950s, the conservatism of the Commission and the

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76 Letter from Alan Reitman to Thomas Evan Wright (12/29/59), in ACLU Papers, Box 930, Folder 18, Misc. 1959.
redirection of resources toward other social reform goals. The ACLU returned to support affirmative broadcast regulations in the late 1950s and early 1960s when public opinion and national leadership shifted again and broadcast reform returned an important item on the national agenda.
Early Efforts for Citizen Standing

The Richards case demonstrated the reformers' increasing disillusionment with the Commission by the early 1950s. That case itself did not lead social reform groups to demand standing from the Commission. Rather, the initial requests for standing emerged from later cases in which social reform groups sought to participate in FCC proceedings. These groups became frustrated with the Commission's failure to provide adequate fora for participation by non-industry groups. In addition, they reacted negatively to the Commission's lack of interest in their concerns. Thus, they began to ask the FCC and Congress for a right to participate in FCC proceedings.

The Transitcasting Case

A controversy over the desirability of a new use for radio broadcasting led to the first efforts to expand the traditional standing doctrines to include broadcast listeners. During the 1950s television began to overtake radio as the primary broadcast medium. To maintain financial viability, radio station owners began to experiment with other uses of radio other than general broadcasting. One idea was "transitcasting," in which urban transit companies agreed that for a fee they would broadcast radio station programming into transit cars, thereby increasing the station's ability to attract advertising revenue. Many people, including Justice Felix Frankfurter, former FCC Chairman James Lawrence Fly, and the eminent radio newscaster Edward Murrow, thought the idea an appalling one. Some were concerned about creating noise that would offend transit passengers, while others
were concerned about the dangers of "coerced listening," which could lead to persuasion by propaganda. The ACLU, for example, was concerned that transitcasting infringed upon the civil liberties of transit riders, who were captive listeners.

In 1950, AFL-CIO counsel Arthur J. Goldberg, who later became a U.S. Supreme Court Justice, filed a petition on behalf of the AFL-CIO complaining to the FCC about transitcasting. Little came of this effort. Then, in 1952, a group called the Transit Riders Association of Washington, D.C., protested the renewal of Capital Broadcasting Company's WWDC-FM license, arguing that the Commission should have ordered a hearing on the station's practice of transitcasting. The Transit Riders represented those offended "taxpaying members of the public who necessarily travel on vehicles of the Capital Transit Company which are equipped with loud speakers over which are heard programs and advertising messages broadcast via the facilities of licensee WWDC-FM." "Transitcasting," argued the Transit Riders, was "commercial exploitation of the captive audiences on transit vehicles," in violation of various provisions of the 1934 Act and Commission rules.

The attack on this "special class of involuntary listeners" was "injurious to the health of protestant's members."  

For the first time in a published opinion, the Commission directly addressed the question of broadcast listener standing before the Commission. Transit Riders

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1 For an eloquent discussion of "coerced listening," see Charles Black, He Cannot Choose But Hear: The Plight of the Captive Auditor, 53 Colum. L. Rev. 960 (1953).
3 Capital Broadcasting, 8 R.R., at 229.
4 Id.
was not an interested party, said the FCC's opinion. The organization stood on equal footing with all members of the listening public; the group's allegations of health injuries were insufficient to distinguish them from the general public. The opinion noted that the Transit Riders could, like everyone else, file complaints and participate in hearings as witnesses.\(^5\) It failed to note the obvious fact that since the FCC had declined to hold a hearing, there would be no opportunity for Transit Riders to participate in one.\(^6\)

At one level, the decision can be interpreted as merely the application of a widely-accepted formula for determining who had standing as a "party-in-interest." The Transit Rider case is notable, however, for several reasons. First, the Transit Riders argued that they were entitled to participate as a matter of right, rather than requesting participation at the Commission's discretion. Second, the Commission made no attempt to provide an alternative forum for participation on the transit casting issue. It simply denied standing to the Transit Riders and concluded the proceeding. Finally, the decision was not unanimous. Commissioner Webster

\(^5\)Commission Rule 1.723 provided as follows:
Request by nonparties to participate in hearings: communications relating to applications—(a) There will be maintained in the office of the Secretary of the Commission a record of all communications received by the Commission relating to the merits of any application pending before the Commission. . . . When the date of hearing has been set, if the matter is designated for hearing, the Secretary shall notify all [such] persons . . . in order that such persons will have an opportunity to appear and give evidence at such hearing. . . . (b) No such person shall be precluded from giving any relevant material and competent testimony at such hearing because he lacks a sufficient interest to justify his intervention as a party in the matter. . . .

Quoted in Amendment to Section 3.606, 23 F.C.C. 686, 687-88 & n.1 (1957) (denying intervention to Evansville Chamber of Commerce, but pointing to this rule as an option, noting that under this rule public witnesses could be advised by counsel throughout the course of testimony). See also Rule 1.727.

\(^6\)See also, Paul A. Brandt, 8 R.R. 409 (1952) (member of the public is not a party-in-interest); Kansas State College of Agriculture and Applied Science, 8 R.R. 261 (1952) (Association of Radio and Television Broadcasters protest grant to noncommercial station; standing denied).
dissented. He argued that Transit Riders had shown a sufficient interest to qualify it
as a “party in interest.” Webster, however, did not expand on why the Commission
should have granted Transit Riders standing.

The anti-transitcasting group had lost their battle at the FCC. Without
standing or a hearing, there was no way to influence the Commission further. They did get a ruling on the constitutionality of transitcasting, however, by
bypassing the FCC through the use of a different forum. Complaining to the District
of Columbia Public Utilities Commission ("PUC") turned out to be a better strategy
for both obtaining a hearing and a ruling on the constitutionality of transitcasting.
The PUC agreed to investigate the problem of transitcasting, ordered a hearing and
permitted individual transit riders and organizations to intervene in the hearings.

During these hearings on transitcasting, Dr. Winfred Overholser,
Superintendent of St. Elizabeth's Hospital in DC and the former president of the
American Psychiatric Association, testified that compulsory subjection to
transitcasting was likely to cause mental and physical injury. Her testimony was
insufficient to sway the PUC, which found no problem with transitcasting. The
District Court dismissed an appeal on the grounds that no legal right was invaded.
The riders appealed their case to the D.C. Circuit and received the amicus support
of the ACLU. The D.C. Circuit concluded that the due process rights of transit
listeners were violated by transitcasting. The Supreme Court agreed to hear the
PUC's appeal and reversed the D.C. Circuit, finding that transitcasting was

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8 Petition of the CIO with Regard to Transit Radio before the FCC (6/5/50), in ACLU
Papers, Box 917, Folder 4, Forced Listening, 1950.
constitutionally acceptable.\textsuperscript{10} The transit riders did not prevail, but at least they had their day in court, which was something they were not able to achieve by bringing their concerns to the FCC.\textsuperscript{11}

The transitcasting proceedings demonstrate the increasing difficulty that social reform groups had in gaining the ear of the Commission during the 1950s. They were unable to obtain a ruling from the FCC on the validity of transitcasting under the Communications Act or the Constitution. When given various fora in which to bring their claims, social reform groups did not find the FCC to be the best option. Although one Commissioner believed that the Transit Riders should have been granted standing to participate, he did not articulate the rationale for his dissent and does not appear to have made any additional attempts to assist social reform groups in obtaining citizen standing.

**The Friends of Good Music**

Another attack on the existing doctrines of standing arose in an FCC proceeding involving a conflict over the sale of a Washington, D.C., FM station. The owners of the "Good Music Station" sought permission from the FCC to transfer their radio licenses to RKO. The Commission treated the transfer application in typical fashion; it issued a pro forma approval without a hearing.

\textsuperscript{11} In the end, the law mattered little. By 1953, transitcasting was on the decline; the number of cities with transitcasting had dropped from 14 to three, which the ACLU attributed to the continuing opposition and negative public reaction to transitcasting. See ACLU Weekly Bulletin #1609 (8/31/53), in ACLU Papers, Box 922, Folder 14, Misc. 1953.
Lawrence Smith, a minority shareholder of the transferee, Good Music Station, Inc., however, protested and complained of fraud in the station sale contract.\textsuperscript{12}

As a hearing on the matter was beginning, an ad hoc public interest group joined Lawrence Smith in arguing that the station should not be transferred to RKO, because "good music" should be preserved in the D.C. area. This group called itself "Friends of Good Music" and sought to participate in the proceeding as a representative of classical music lovers in the Washington, D.C. area. The transfer, it argued, would deprive D.C. listeners of good classical music.

Seeking to participate, Friends of Good Music made explicit arguments that traditional rules of intervention were outdated, anachronistic and unjust. It was prepared to take advantage of the Commission's rule permitting it to present relevant evidence during hearings. Yet presenting testimony was not enough, said the organization. It was a "demi-appearance" that would remove any "sting" from its protest.\textsuperscript{13} Delicately avoiding direct criticism of FCC staff, the group pointed out that it "might have a slightly different approach" from Commission staff, because its members "might feel slightly stronger about" the matter.\textsuperscript{14} Friends of Good Music asked permission to be represented by its own counsel, not the FCC staff. Its counsel should have the right to participate in examining of the group's witnesses and its opponent's witnesses. It should have the right and opportunity to subpoena documents and testimony.

\textsuperscript{12} Smith v. FCC, 247 F.2d 100 (D.C. Cir. 1957) (describing the procedural history of the proceeding).
\textsuperscript{13} Memorandum of the Friends of Good Music in Support of Petitions for Review 2 n.* (1/31/57) (hereinafter Friends of Good Music Memorandum), in FCC Docket 11821.
\textsuperscript{14} Transcript of Oral Argument on the Petition to Intervene 10 (1/11/57), in FCC Docket 11821.
Friends of Good Music claimed that the rule barring the public from intervening in FCC proceedings was wrong in theory and fact, in principle and practice. Its claim drew on principles of administrative fairness, rather than on statutes or case law. The FCC permitted intervention by numerous parties that argued the public interest as a "shield for their own ends," but it denied intervention to the public itself.\textsuperscript{15} Such an approach was simply "so arbitrary as to violate due process."\textsuperscript{16} It argued from pragmatism as well. Permitting intervention would not burden administrative efficiency, because the FCC permitted voluntarily the most burdensome aspect of public participation, that of permitting additional testimony. Permitting counsel to direct, shape and verify testimony was but a small additional burden. Thus, argued Friends of Good Music, the FCC should grant the organization standing.\textsuperscript{17}

The hearing examiner was courteous, but he was unsympathetic to the Friends’ strategy, which was to demonstrate an “outpouring of public interest” in the outcome of the proceeding.\textsuperscript{18} The hearing examiner saw little merit in testimony about how local citizens felt about the proposed changes:

I am willing to assume that good music is an important factor in the community’s cultural life and that there are many people who are interested in good music and others to whom good music . . . is anathema . . . [W]hy do we need to enlarge this record by getting testimony from all these these

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\textsuperscript{15} Friends of Good Music Memorandum at 5, in FCC Docket 11821.

\textsuperscript{16} Id.

\textsuperscript{17} The Friends’ second strategy was to argue for discretionary intervention. The absence of a right to intervention did not automatically preclude Friends from intervening in the proceeding. FCC rules permitted the Commission to grant discretionary intervention where would contribute to the proceeding. The burden was on Friends, however, to demonstrate their usefulness. The Friends faced a serious uphill battle in convincing the hearing examiner that it would be useful to the proceeding.

\textsuperscript{18} Edward Wynne, Transcript of Oral Argument on the Petition to Intervene 11, in FCC Docket 11821.
people. We can assume that that is so.\textsuperscript{19} 

The testimony of activists was of little value, according to the examiner: “[W]e are going to get a lot of zealots . . . who are going to plug for a good music station. That is not going to help us in the decision in this case.”\textsuperscript{20} According to the hearing examiner, activists were not experts. They would offer their subjective opinions about the case, and that was all.

In response to the examiner’s lack of enthusiasm, Friends proposed to put forward public opinion experts, who would testify not to the “obvious—that some people like good music,”\textsuperscript{21} but that “in a legal sense, enough people want this type of radio program to entitle them to particular consideration from this Commission.”\textsuperscript{22} Friends argued that the Commission must hear how “the tools of modern Social Science” have measured the “public interest.”\textsuperscript{23} The Commission declined to permit discretionary intervention, and saw no reason to revise its rules on intervention to grant citizen groups a right to intervene.\textsuperscript{24}

However, as with the Transit Riders case, the Friends of Good Music never challenged the denial of standing in the courts. The case settled, and the organizations’ grievances were redressed. RKO promised to continue programming of “good music,” and the proceeding was concluded.

\textsuperscript{19} Hearing Examiner, Transcript of Further Prehearing Conference 87-88 (1/7/57), in FCC Docket 11821.
\textsuperscript{20} Id. at 91.
\textsuperscript{21} Letter from the Friends of Good Music to the Commissioners and the Secretary of the Federal Communications Commission 2 (1/10/57) in FCC Docket 11821.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} The Good Music Station, Inc. 6 Ad. L. 2d 930 (F.C.C. 1957).
American Federation of Musicians

The American Federation of Musicians ("AFM"), a labor union representing performance musicians, also became frustrated with the Commission's response to its interests. Thus it turned to advocate the expansion of standing to include broadcast listeners. Labor unions had long been interested in radio, but the AFM, like other unions with workers in the broadcast industry, had a more direct interest in FCC proceedings. The AFM had been concerned as early as the 1940s about the impact of broadcasting on the demand for live musical performances. The union had taken various steps to encourage broadcasters to use live musicians over the airwaves. During the 1940s, the union resolved that union members should not participate in the making of recordings, it barred its musicians from appearing on television shows, and it made other attempts to retain demand for its musician members. In 1946 Congress responded to the AFM's tactics with the Lea Act, which amended the Communications Act to criminalize these attempts at "feather bedding."\(^\text{25}\)

The AFM continued, however, to encourage the broadcast of live, rather than recorded or "canned" music. The union argued to the FCC in 1956 that the Commission should retain its rule requiring stations to inform listeners that they were broadcasting recorded, rather than live, music. It protested the renewal of

licenses for stations specializing in canned music or news (at the expense of local live programming) and those stations that had failed to live up to promises about live music made in license hearings.

On April 23, 1961, the AFM filed a petition to deny the application of Loyola University for renewal of station WWL-TV in New Orleans, on the grounds that it failed to broadcast live music. As union members and workers in the broadcast industry, the AFM had a stronger argument for standing than the average citizen. After all, FCC rules on local live programming would effect the economic opportunities of performing artists. The Commission, however, denied standing to the AFM on the ground that it did not meet the "party in interest" requirement. Members of the union had no greater interest than any others "desiring to do business with the station." 26 The opinion argued that the FCC's decision whether to renew a broadcast license would not directly or substantially harm the members of the union or the union itself.

The Commission's denial of standing for the AFM made clear that the union could not count on the Commission's largess to obtain a right to participate in Commission proceedings. Thus, the AFM had begun to argue for a broader right for listener standing at the FCC. Although the AFM's interest in live music was clearly an economic one, by requesting a broad right for the public to participate, they made their argument more politically palatable.

26 Loyola University, 5 R.R.2d 239 (1965). The Commission did not completely ban standing for labor unions. See Rockford Broadcasters, Inc., 1 R.R.2d 405 (1963) (granting standing where the assignment of a license would directly affect collective bargaining or pension rights).
In 1960, Stanley Ballard, the Secretary of the AFM, asked a Senate Commerce subcommittee for revisions to the law that would "explicitly provide for intervention by any person or by the public, so that recognition can be given in these matters to interests other than economic."\(^{27}\) Rather than permitting only economic, commercial or competitive interests, "any responsible citizen or group of citizens" ought to heard at application hearings, because the hearings were "civil, community" matters in which the "listening public" ought to be involved.\(^{28}\) The problem with the broadcast industry was that the FCC had "operated in a vacuum in its day-to-day affairs" oblivious to the fact that the "granting or withholding of a license is a civic community matter."\(^{29}\)

Ballard's argument to Congress in 1960 was a striking precursor to the D.C. Circuit's language in establishing citizen standing in its 1966 *United Church of Christ* decision.

**Conclusion**

During the 1950s social reform groups began to ask the Commission for a right to participate in its proceedings. In response, the Commission solidified its commitment to the position that listeners did not have standing. In addition, it provided fewer other outlets for participation as compared with the Commission in the 1940s. Once social reform groups found that their views had

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\(^{27}\)Proposed Amendments to the FCC Act of 1934, Hearings before the Communications Subcomm. of the Committee on Interstate and Foreign Commerce, U.S. Senate, 86th Cong., 2d Sess. on S. 1898, Aug. 10, 1960, at 84.

\(^{28}\)Id. at 84–85. At the same hearing, the ACLU appeared to argue for hearings to be held in the broadcasters' local community. Id. at 103.
no place in Commission proceedings, it was only a matter of time before social reform groups would challenge traditional standing doctrines. However, these activist efforts must be understood in the context of a broader shift in liberal thinking about standing doctrines.

29 Id.
Administrative Law Scholars and Citizen Standing

One of the major post-New Deal developments in liberal thought was a new emphasis on rights.\footnote{1} Brown v. Board of Education marked the beginning of a long development of substantive constitutional rights.\footnote{2} However, New Deal liberals also came to recognize the value of administrative procedures.\footnote{3} As liberals became decreasingly optimistic about the promise of the administrative state as a source of social progress, they embraced the use of more extensive administrative procedures, thereby co-opting devices which had previously been used by conservatives and industry as protections against the administrative state. In the area of public interest regulation, however, liberals used additional procedures, not as tools to dismantle or undermine the federal administrative state, but rather to invigorate it. The new liberal solution to the administrative state borrowed procedural rights concepts, but joined them with the enforcement of public rights rather than private rights, thereby seeking to reinforce a substantive commitment to public interest regulation. Liberal reformers thereby attempted to transform administrative procedures from defensive weapons against the regulatory state into offensive weapons designed to further a pro-regulatory agenda. One of the most important procedures gradually endorsed by liberals was citizen standing.

\footnote{1}{Walter Gellhorn, Individual Freedom and Governmental Restraints (1956).}
\footnote{2}{347 U.S. 483 (1954).}
\footnote{3}{See Gellhorn, Individual Freedom and Governmental Restraints.}
Liberals and Expansion of Standing

Traditionally, the Supreme Court endorsed a "legal wrong" test for standing in the federal courts. As administrative agencies expanded, industry groups found that they were harmed in economic ways even though they were not legally harmed. Thus, they asked the Supreme Court to expand standing beyond the legal wrong test. The Court began to erode the legal wrong test in a series of FCC cases during the 1940s. This expansion eventually set the stage for expansion of standing to citizen groups in the 1960s. Yet, during the 1940s, liberals resisted the expansion of standing for fear that it would be used by industry to undermine agency effectiveness. Committed to regulatory philosophy of the New Deal, liberal administrative law scholars were slow to welcome the expansion of standing.

The Supreme Court's 1940 decision in Sanders v. FCC began the elimination of the legal wrong test for standing. Standing was granted to those with economic injury, albeit not to defend their own rights (for they had none), but to defend the public interest. As Justice Frankfurter elaborated in Scripps-Howard Radio, Inc. v. FCC:

The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. . . . [T]hese private litigants have standing only as representatives of the public interest. . . .

Later, liberals would use this "public interest" language as precedent for citizen standing. However, in the 1940s, liberals did not necessarily perceive the expansion of standing to additional third parties in a positive light. Liberal

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5 FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940).
Justices William O. Douglas and Frank Murphy dissented in *Scripps-Howard* on the ground that the legal wrong test should apply. Since the station had no right to be free from competition, it should not be permitted to interfere with the judicial process.\(^7\)

Justice Frankfurter had joined the majority when it expanded standing in *Sanders* and *Scripps-Howard*. However, he was hesitant about the Supreme Court's 1943 decision in *FCC v. NBC*,\(^8\) in which the Court held that a station alleging electrical interference had a right to participate as a party in an FCC proceeding. Justice Frankfurter dissented, finding that an agency's interest in controlling its own proceedings outweighed any interest of the station. Administrative agencies had to be given flexibility unhampered by court-like procedures.

Justice Frankfurter took issue with the majority's position that the Commission could not require the petitioner to set forward facts demonstrating that his intervention was in the public interest. Frankfurter argued that

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\text{[o]therwise anyone who asserts generally that the grant of another's application will affect his license may become a party to a proceeding before the Commission and may, to the extent to which a party can shape and distort the direction of a proceeding, gain all the opportunities that a party has to affect a litigation although he has not even made a preliminary showing that his intervention will be in the public interest.}^9
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\(^6\) 316 U.S. 4, 14 (1942).

\(^7\) The dissent explained:

Unless [a competing station] can show that [its] individual interest has been unlawfully invaded, there is merely damnum absque injuria and no cause of action on the merits. Congress could have said that the holder of a radio license has an individual substantive right to be free of competition resulting from the issuance of another license and causing injury. . . .

Id. (citations omitted).

\(^8\) 319 U.S. 239 (1943).

\(^9\) Id. at 263.
To do so was to “fasten upon the Commission’s administrative process the technical requirements evolved by courts.”10 According to Frankfurter, we “must assume that an agency which Congress has trusted is worthy of the trust.”11

Justice Douglas supported regulatory power and discretion for administrative agencies.12 Thus, it is not surprising that he expressed substantial agreement with Frankfurter’s dissent. He reiterated his displeasure with the developing doctrine. He advised caution in permitting those with “no individual substantive right” to intervene in Commission proceedings:

we must be exceedingly scrupulous to see to it that his interest in the matter is substantial and immediate. Otherwise we will not only permit the administrative process to be clogged by judicial review; we will most assuredly run afoul of the constitutional requirement of case or controversy.13

Justice Douglas was concerned that broadcast stations would interfere with agency processes.

The FCC itself echoed similar concerns in the 1950s. Commissioner Doerfer testified to Congress that the agency spent 28% of its time addressing protests filed against station license grants. Most of these protests, said Doerfer, were filed by competitors seeking to delay the emergence of new stations.

Allowing protests, said Doerfer, unnecessarily “create[d] two attorneys general to protect the public interest, the FCC and private parties.”14 The agency did not need an “official kibitzer.”15 The FCC complained that to deny it discretion to

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10 Id. at 264.
11 Id. at 264.
13 NBC v. FCC, 319 U.S. at 265.
14 Pike & Fischer, Radio Regulation 2d (Finding Aids—Citation Table—1934 Act as Amended) 10:280 (1994).
15 Id.
control its own docket would be to “impose a strangling restriction upon the functioning of the administrative process by extending to those most interested in delay for self-serving economic reasons and automatic invitation to delay.”\textsuperscript{16} Similarly, a 1956 House bill recognized the problem of “the abuse of the protest procedure . . . by persons who are primarily concerned with the furtherance of their own private economic interest.”\textsuperscript{17}

In the 1940s and the early 1950s, industry competitors were the only ones seeking to expand the standing doctrine, a fact which made most New Deal liberals uncomfortable with expanding standing and intervention. They argued that an expansion would interfere with the business of government and would undermine the power of the New Deal state.

\textbf{An Early Precedent for Consumer Standing}

Judge Jerome Frank of the Second Circuit Court of Appeals had been “one of the consumer-minded New Dealers.”\textsuperscript{18} He was also a strong defender of administrative agencies.\textsuperscript{19} However, he thought that consumers could serve an important role in the enforcement of the law as private attorneys general. In \textit{Associated Industries of New York State v. Ickes}, Judge Frank recognized standing for consumers. His decision in \textit{Associated Industries} was an application


\textsuperscript{17} House Report on 1956 Amendment to Sec. 309(c), House Report No. 1051, 84th Cong., 1st Sess., submitted 7/1/55 to accompany H.R. 5614, quoted in Pike & Fischer, Radio Regulation 2d (Finding Aids—Citation Table—1934 Act as Amended) 10:361 (1994).
of the Sanders doctrine, which recognized economic injury. The petitioner, Associated Industries of New York, Inc., was an organization of industrial and commercial firms, many of which were substantial consumers of coal, and Frank concluded that these firms had standing as consumers. He held that


Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers. Finding no constitutional violation, Frank rejected the notion that consumer standing would "open up the 'possibilities of separate law suits by hundreds of thousands of consumers." Additional procedural requirements would keep private attorney generals from running rampant through the administrative state.

Frank was correct in predicting that his decision would not open the floodgates. The Associated Industries holding was not adopted by the Supreme Court, and therefore had little impact at the appellate court level during the 1940s and 1950s. No mention of the Associated Industries case is found in discussions of standing at the FCC during this period, and it had no impact on those interested in listeners' rights at the FCC during the 1940s. Until the 1950s, social reform groups interested in participating at the Commission simply assumed that standing was limited to those demonstrating electrical interference or economic

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19 See Jerome Frank, If Men were Angels (1942).
20 Associated Industries of New York State v. Ickes, 134 F.2d 694 (1943) (applying Scripps-Howard and Sanders).
21 Id. at 704.
22 Id. at 707.
23 Id. at 707.
injury. However, the Associated Industries case was an interesting outlier and administrative law scholars placed the case into casebooks and treatises.

Administrative Law Scholars

Most scholars of the administrative process did not view citizen standing as a solution to ineffective federal agencies prior to the 1960s. Only gradually did liberals come to embrace citizen standing as a solution to the ills of the regulatory state.

In 1962, Second Circuit Judge Henry Friendly published a critique of federal administrative agencies, The Federal Administrative Agencies: The Need for Better Definitions of Standards. He concluded that "to draw a bill of particulars against the regulatory agencies was easy enough," but that finding a solution was quite challenging. His list of then-current proposals for fixing the administrative state included appointing better men, extending terms of appointment, creating a tradition of reappointment, providing more time for agency heads to study and reflect by freeing them from routine tasks, and creating individual responsibility for written opinions. Friendly's own solution was to encourage agencies to set clearer standards. Absent from Friendly's list was any mention of encouraging the public to participate in the process.

Administrative law professor Bernard Schwartz, who had served as counsel to the House Committee on Legislative Oversight and worked on investigations into the roots of the quiz show scandals in the broadcast industry,

was intimately familiar with the problems of capture and corruption at the FCC in the late 1950s. In his 1959 *The Professor and the Commissions*, he recommended various solutions to the ills of the administrative state. However, he made no mention of public participation or citizen standing. Instead, he recommended political independence and a legally-binding code of ethics for Commissioners; and the transfer of non-judicial functions from an independent commission to the executive branch. There was no mention of empowering citizen groups to serve as private attorneys-general, to bring complaints to the courts, and thereby to improve the operation of the administrative state.²⁶

Harvard Law School Dean James Landis, who served the nation as a Commissioner of both the Federal Trade Commission and the Securities and Exchange Commission during the New Deal, was the nation's “outstanding theoretician of American regulation.”²⁷ His 1938 book *Administrative Process* established Landis as a significant scholarly advocate for the legitimacy of federal administrative agencies.²⁸ However, in 1960, he produced a “landmark critique” of the administrative state, which he produced as a report on federal administrative agencies for President John F. Kennedy.²⁹ The report reflected a “bitter sense of the historical betrayal of the regulatory ideal.”³⁰ Landis viewed the FCC as a "somewhat extraordinary spectacle."³¹ It was unable to "make up its

²⁵ Henry Friendly, Federal Administrative Agencies, at 142.
³⁰ Id. at 206.
³¹ Report on Regulatory Agencies to the President-Elect, submitted by the Chairman of the Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary of
mind on some of the broad issues that face it." The Commission had "drifted, vacillated and stalled in almost every major area." It suffered from a lack of planning, delay, and inadequate procedures. Landis expressed concern about how "susceptible" the Commission was to ex parte influence by the political branches and industry. It was too subservient to congressional subcommittees and their members. The networks had too much control over the Commission.

Landis was not optimistic about the FCC:

No patent solution for this situation exists other than the incubation of vigor and courage in the Commission by giving it strong and competent leadership, and thereby evolving sensible procedures for the disposition of its business.

However, his experience in government suggested the importance of high-quality personnel and giving administrative heads the capacity and time to exercise a planning function. In addition, he recommended the development of reorganization plans, the enhancement of the power of a Commission's chairman, delegation within an agency, and the curbing of ex parte contacts. His greatest hope was in the creation of an Administrative Conference of the United States, which he thought more likely to improve administrative procedures and practices than anything else "on the horizon."

Landis recognized that an agency should not be shut off from "a grass roots exploration of what the needs of any segment of the public are." He noted that

the U.S. Senate, 86th Cong., 2d Sess., December, 1960, at 53.

32 Id. at 8.
33 Id. at 53.
34 Id. at 1.
35 Id. at 54.
36 Id. at 74.
37 Id. at 15.
"contacts with the public" were rare, and complained that those that did occur were "generally unproductive of anything except complaint." He supported the role of public counsel, which existed in some agencies, whose job it was to "irritate the agency members." Landis believed that the public counsel should "be granted the right of seeking review from the decisions of trial examiners to the agency itself." However, Landis was unwilling to abandon his commitment to executive branch power, finding that "a right to seek judicial review of decisions that have achieved finality should naturally be denied [the public counsel] since the public interest has presumably by that time coagulated in the agency's decision." Landis made no mention of empowering citizens to challenge inadequate agencies. Despite Landis' disillusionment with the regulatory state, he retained a commitment to executive power that many New Dealers had difficulty shedding.

**Clark Byse**

In 1952 Clark Byse, an administrative law professor, was one of the earliest scholars to explicitly recognize the role that formal public or citizen actions could play in improving the administrative state. Byse developed his ideas when studying state regulation of the retail sale of alcoholic beverages. He noticed that the licensing proceedings for alcoholic beverage establishments often included third parties motivated by temperance ideals. These third parties, opposed to license issuance on broad social or personal grounds (i.e. opposition to alcoholic beverage delivery of alcohol to minors),

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38 Id. at 71.
39 Id. at 72.
40 Id. at 72.
41 Id. at 72.
42 Clark Byse, Opportunity to be Heard in License Issuance, 101 U. Pa. L. Rev. 57
consumption) included not only local officials, but also the heads of public or charitable institutions near the proposed establishment, and local residents or taxpayers. More generous in the area of citizen standing than the federal government, several states had enacted statutes that explicitly permitted this kind of participation.

Byse expressed initial puzzlement that states would grant such broad participation. He believed that incorporation of community sentiment could be more cheaply and expeditiously obtained in ways other than by allowing members of the community an opportunity to be heard. However, Byse did find that these third-party protesters could play some useful functions. First, he recommended broad participation rules where “agency staff would be less able or less diligent in developing the case against [license] issuance than would be private counsel retained by the protesters.”

Second, where an agency was subject to undue influence from the regulated industry, protesters could “counteract [these] undesirable political or pressure group influences on the licensing agency.” This effect would be enhanced if protesters were also accorded a right to judicial review. Third, protesters should be heard where the data or information at issue could best be tested in an adversary procedure through cross-examination. In sum, public participants could counterbalance some of the ills of bureaucratic administration.

Two important concerns about public participants, however, limited his endorsement of citizen standing at the federal level. First, Byse examined these

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43 Id. at 90.
actions in the state context without any suggestion that they could be useful in the federal regulatory context. In fact, Byse viewed these solutions as most appropriate to apply to local agencies, rather than state agencies, because local governmental entities would be least likely to have adequate staff and more likely to be subject to undesirable corrupt or unduly political influences.

Second, Byse was torn between the value of third-party participation and the importance of agency discretion. He saw the value of judicial review or an appeal to a state agency overseeing the local agency. Yet, he also spoke in terms of an agency’s judgment about whether third party participants would be helpful: the decision to offer an opportunity to be heard should depend upon “the agency’s judgment as to the capacity of its staff...”45 Agencies with able staff would be wise to limit protestants to filing oral or written statements of objection rather than granting them participation rights, said Byse.

**Louis Jaffe**

Professor Louis Jaffe echoed the sentiments of Professor Byse. Jaffe was an administrative law professor who had begun his career as an “ardent New Dealer.”46 By 1954, however, he had diverged from the “Landis model” and experienced disillusionsment with the regulatory state.47 According to Morton Horwitz, Jaffe was the “first New Dealer” to identify “a tendency toward ‘industry-orientation’ as a ‘condition endemic in any agency.”48

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44 Id. at 91.
45 Id. at 90.
46 Morton Horwitz, Transformations in American Law II, at 237.
47 Id. at 239.
48 Id. at 240.
Jaffe retained the New Deal view against the expansion for members of the regulated industry. He responded negatively to the D.C. Circuit’s 1958 case *Philco v. FCC*, in which the court expanded standing at the FCC to include a manufacturer of radio and television receivers.\(^4\) He began by quoting Felix Frankfurter’s statement on the importance of preserving the flexibility of agency processes:

> To no small degree administrative agencies for the enforcement of public rights were established by Congress because more flexible and less traditional procedures were called for than those evolved by the courts. It is therefore essential to the vitality of the administrative process that the procedural powers given to these administrative agencies not be confined within the conventional modes by which business is done in courts.\(^5\)

Jaffe eloquently criticized continued intrusive court review of agency practices:

> The judges have been notably adept in the past at removing the hide of an administrative agency. If in these more enlightened times they have, with elaborate pronouncements of virtuous self-denial, relinquished the butcher knife, the glint of the scalpel is still detectable in the voluminous folds of their robes.\(^6\)

He complained that the D.C. Circuit had gone the furthest “in emptying the requirement of injury of significant content and in its insistence on the absolute right of the affected individual to intervene, to appeal or to require a hearing.”\(^7\)

He complained that persons without a right should only be permitted judicial review as a matter of discretion. He agreed with Judge Madden who dissented in the *Philco* case that the court’s decision was “an act of generosity with regard to the time and energy of the Federal Communications Commission (FCC),

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\(^4\) *Philco Corp. v. FCC*, 257 F.2d 656 (D.C. Cir. 1958).


\(^6\) Id. at 661.

\(^7\) Id. at 669.
which is completely unjustified."\textsuperscript{53} Where the question of industry standing was at issue, Jaffe was hesitant to extend standing beyond the legal wrong test.

Yet, Jaffe distinguished between the "private action," which was brought by an individual seeking to defend his rights, and the "public action," in which an individual brought a case to defend the public interest. By 1961, Jaffe had become a champion of the public action, which permitted citizens to challenge administrative action in the courts, as a remedy to improve the administrative state. Jaffe provided evidence of a long history of public actions in American state courts in order to establish their legitimacy. Although it might challenge majority rule, the public action was still justified under the principles of self-government:

\begin{quote}
[\textit{E}ven a well-run and responsible government gains from the energetic intervention of the individual and . . . inefficient and corrupt governments, however, democratic, stand in particular need of the "aroused citizen."}\textsuperscript{54}
\end{quote}

Jaffe recognized that there were dangers in the public action: "they strain the judicial function and distort the political process."\textsuperscript{55} Nonetheless, he believed the public action was sometimes "useful, even necessary":\textsuperscript{56}

\begin{quote}
they provide a modest measure of control of official action; there are probably better ways, but we have not yet seen fit to adopt them, and it may be that public actions are a valuable supplement to even the best system of control. They are, at the least, not inconsistent with our democratic premises, and arguably they reinforce them.\textsuperscript{57}
\end{quote}

Despite his caveats, Jaffe championed the public action.

\textsuperscript{53} Jaffe, Judicial Review of Procedural Decisions, 50 Geo. L. Rev. at 673 (quoting Philco, 257 F.2d at 660 (Madden, J., dissenting).
\textsuperscript{54} Louis L. Jaffe, Judicial Control of Administrative Action 479 (1965).
\textsuperscript{55} Id. at 483.
\textsuperscript{56} Id. at 525.
\textsuperscript{57} Id. at 483.
Notably, however, Louis Jaffe’s 1961 standing articles and his 1965 publication of *Judicial Control of Administrative Action* were hesitant about extending this principle to the federal government and emphasized the importance of making the public action subject to discretion rather than creating a right in the citizen.58 Apparently, Jaffe initially believed that the public action had a significant place in policing federal agencies. However, perhaps due to pressure from other administrative or constitutional law scholars, he made clear that he had "retreated from my espousal of a general federal public action."59 He stated that the device was much more valuable at the state and local level, where public officials were "less responsive to the electorate and to the law"60 than federal officials. The federal government was "more susceptible to the pressures of public exposure."61 It was subject to more systematic monitoring than state and local governments, and was therefore less in need of the public action.

Jaffe declined to recommend overruling the Supreme Court’s 1928 decision in *Frothingham v. Mellon*, which prevented taxpayer standing at the federal level in most instances. Instead of recommending a general rule permitting public actions, Jaffe simply provided that Congress ought to be able to establish public actions "in connection with particular programs" where it felt it

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59 Id. at 530.
60 Id. at 484.
61 Id. at 499.
needed "public champions." Thus, Jaffe did not endorse a general public action at the federal level.

In addition, Jaffe sought to minimize the impact of the public action on government operations by emphasizing the importance of judicial discretion. Jaffe believed that the plaintiff in a public action need not show personal injury. However, he argued that the courts should only grant standing to plaintiffs that could demonstrate that their participation implicated the public interest:

It is indeed one of the characteristics which distinguish the public from the private action that in the former the plaintiff must convince the court that the dereliction of law has real public significance, involves a "public right." Jaffe also emphasized that the remedy in a public action should be discretionary, in contrast to the private action, in which a prevailing plaintiff would have a right to a remedy.

Jaffe recognized that standing to protecting listener interests at the FCC might be appropriate, but emphasized that it should be recognized as a "public action and not a private remedy," which "would allow us to introduce the notion of discretion at both the administrative and judicial levels." It is because discretionary jurisdiction is more appropriate where no "legal right" is at stake that I wish to avoid the notion that a grant of standing necessarily implies a substantive right in the standee.

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62 Id. at 499, 524.  
63 Id. at 490 (italics omitted).  
64 Id. at 524.  
65 Id. at 525.  
66 Id. at 525-26 (italics omitted).
Discretion was critical because Jaffe recognized the "grave threat to the administrative effectiveness of the FCC if any remotely concerned person" could cause the agency to try a particular issue.\(^67\)

**Kenneth Culp Davis**

Law professor Kenneth Culp Davis, the author of the major treatise in administrative law, advocated broader standing as his ideas developed during the 1950s. By 1949 Davis had rejected the legal wrong test for standing.\(^68\) He believed that even though a person might have no legal right, it was often "practically desirable" for "those who have interests to protect" to enforce the law where "law enforcement through public authority is thought inadequate," if legislation so provided.\(^69\) Thus he supported the *Sanders* decision which extended standing for competitors, and he advocated an "injury-in-fact" test for standing. He believed that Frank's *Ickes* opinion was an "outstanding opinion on standing of a consumer" that had "solidly supported" reasoning.\(^70\) As the 1950s progressed, Davis came to increasingly praise the idea of citizen standing.

In 1959 Davis called Judge Frank's opinion "[p]erhaps the most comprehensive and penetrating opinion" on the problem of standing and concluding that it was "unanswerable and of broad applicability."\(^71\) He increasingly praised the wisdom of state courts that had created a "simpler, less artificial, and more

\(^{67}\) Id. at 526.  
\(^{68}\) Kenneth C. Davis, Standing to Challenge and to Enforce Administrative Action, 49 Colum. L. Rev. 759 (1949).  
\(^{69}\) Id.  
\(^{70}\) Kenneth C. Davis, Administrative Law 715 (1951).  
\(^{71}\) Id.  
Kenneth C. Davis, Administrative Law Text 404 (1959) (hereinafter "1959 Administrative Law Text"); see also Kenneth C. Davis, Standing to Challenge Governmental
satisfactory idea that anyone who is in fact substantially injured by administrative action has standing to challenge it.\textsuperscript{72}

Davis criticized the \textit{Frothingham v. Mellon} decision by pointing to the "almost uniformly adverse reaction of state courts to the doctrine of the case."\textsuperscript{73} He agreed with state courts that had recognized the standing of citizens or taxpayers even on \textit{non-fiscal issues}: "[t]he effect of this batch of cases is to say that one who has status as a member of the public has standing to challenge the administrative action."\textsuperscript{74} Davis endorsed the "very old" concept of the "private Attorney General" that could "vindicate the public interest"\textsuperscript{75} and thought it "provide[d] great potentiality for movement in the right direction."\textsuperscript{76}

Davis dismissed concerns that expanding federal court standing would open the floodgates and excessive litigation would ensue:

the experience with state courts raises the question--and even goes far toward answering the question--whether the federal courts have too readily assumed that opening the judicial doors to those who are earnestly trying to prevent illegal official action is dangerous to the integrity of judicial process. If any special evils flower from the extreme liberality of these state courts on the question of standing, the evils are not apparent in the reported opinions. The courts are not flooded by cases brought by officious intermeddlers, and no sign appears that the adversary system has been either destroyed or impaired.\textsuperscript{77}

Davis believed that fears about the dangers of expanded standing were overstated. In 1965, he asked "Does it make practical sense to make judicial review a cornerstone of our governmental system, and then, without anyone's

\begin{footnotes}
\textsuperscript{72} 1959 Administrative Law Text at 398.
\textsuperscript{73} Id. at 408.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 404.
\textsuperscript{76} Id. at 418.
\textsuperscript{77} Id. at 409.
\end{footnotes}
planning, to exempt from judicial review more than half of all the federal
government does?”

Standing for Broadcast Listeners

As liberals began to expand their ideas about standing and to endorse its
application to citizens, the idea that broadcast listeners should have standing
emerged. A 1959 Yale Law Journal student note called for the expansion of FCC
standing to any citizen suffering any sort of injury. It asserted that existing
standing doctrines had led to “the exploitation of the nation’s limited broadcasting
frequencies without regard for the views of groups other than the exploiters,” and
it advocated expanded standing so that the Commission would be exposed “to a
variety of points of view.”

More significantly, the Administrative Conference of the United States
(“ACUS”) began to encourage increased public participation in the administrative
process. William K. Jones, who served as Report to the ACUS’s Committee on
Licenses and Authorizations, produced a 1962 critique of broadcast regulation in
1962, in which he found that “the principal deficiency in Commission procedures,
as they relate to programming” was “the lack of effective Commission contact
with the local communities its various broadcast licensees are authorized to
serve.” The Commission lacked “first-hand knowledge of the extent to which a
broadcaster is fulfilling its regulatory obligations, especially in scheduling minority

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78 Kenneth C. Davis, Administrative Law Cases 436 (1965).
79 Note, Standing to Protest and Appeal the Issuance of Broadcasting Licenses: A
80 Id. at 796.
81 William K. Jones, Licensing of Major Broadcast Facilities by the Federal
Communications Commission, Administrative Conference of the United States, Committee on
interest programs." He also complained that the Commission lacked grassroots support. Thus he recommended that the Commission "encourage local groups to participate in the renewal process." These groups should be permitted to "precipitate renewal hearings upon a prima facie showing that the broadcaster had not met" his obligations.

Jones, however, recognized the "risk of local censorship" that might come with participation by local organizations. Thus he recommended that the Commission define clearly broadcasters' obligations and "local organizations should be expressly precluded from passing on the quality of mass audience programming or the merits of a particular program." 

Conclusion

Liberals were slow in their embrace of expanded standing because of their commitment to upholding the legitimacy of federal regulatory authority. So long as expanded standing was associated with industry's ability to undermine agency effectiveness, liberals did not endorse it. Rather, they sought other ways to improve the administrative state. By the early 1960s, however, there were increasing calls for public participation and citizen standing. The FCC would be one of the first places that activists would seek citizen standing.

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Footnotes:
82 Id. at 219.
83 Id. at 220.
84 Id. at 220.
85 Id. at 222.
Citizen Standing and *United Church of Christ*

In 1963 Everett Parker began litigation that would result in citizen standing for broadcast listeners. This effort reflected the long-standing interests of broadcast reformers in fairness and protecting minorities on the airwaves. However, when the case, *United Church of Christ v. FCC*, reached the D.C. Circuit, that court altered the traditional relationship between broadcast reformers and the Commission by inserting itself as an intermediary between the Commission and the reformers. The court quickly learned that it could not ensure public participation solely through the creation of procedural rights. Rather, it needed to join procedural protections with substantive judicial review in order to ensure effective citizen participation.

**The Development of the UCC Litigation**

Everett Parker headed the Office of Communications of the United Church of Christ, which would become the most famous public petitioner against the FCC. Parker had been part of the broadcast reform movement since the 1940s and suffered from the disillusionment shared by many broadcast reformers. He found that the realities of the broadcast industry reflected few of his ideals and by the 1960s he had lost faith that the FCC would ever do anything about it—at least voluntarily. In response, Parker ushered in a new participatory era at the FCC.
Although not a lawyer, Parker's concern and interest in broadcast reform led to significant advancement in the legal rights of citizen groups in FCC proceedings. By the 1960s Parker's critique of commercial broadcasting was fully developed. Although he had some praise for television—it had begun to take its news reporting responsibilities seriously, Parker criticized television as an influential part of our culture that failed to reach its potential and instead led to a mind-numbing homogeneity. Parker believed that television should redirect its persuasive power to reorient societal values in a positive way. In particular, Parker felt that broadcasters should promote diversity, provide ample discussion of public issues, provide outlets for self-expression, and serve minority groups as well the majority population. In Parker's view, the Communications Act of 1934 required these commitments, but the FCC failed to hold broadcasters to these obligations.

Instead, the Commission had become "almost completely subservient to the industry it is supposed to regulate."\(^1\) Parker agreed with the criticisms of James Landis. In his book, *Religious Television*, Parker cites Landis heavily, agreeing that the FCC was ""a somewhat extraordinary spectacle""\(^2\) that ""drifted, vacillated and

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\(^2\) Parker, Religious Television at 212 (citing Report on Regulatory Agencies to the President-Elect, submitted by the Chairman of the Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary of the U.S. Senate, 86th Cong., 2d Sess., December 1960, at 53).
stalled in almost every area." The Commission seemed "incapable of policy planning," and it suffered an inordinate "susceptibility to ex parte presentations" by Congress and the networks.\textsuperscript{4}

Parker proposed a wide range of solutions, again drawing on Landis' report. Congressional committeemen could divest their broadcast stock. The networks could be licensed. Publicly-supported television could be expanded. The FCC could define meaningful criteria for determining the public interest.\textsuperscript{5} In the end, however, Parker's most important contribution came from his belief that public hearings could improve the process. He championed the broadcast listener's right to standing to promote the consumer's right to be heard. He did so by initiating the \textit{United Church of Christ v. FCC} litigation, which highlighted the ineffectiveness of the FCC through a timely focus on the problems of civil rights and the media.

Parker sought a test case that would allow him to file a petition against a pro-segregation media outlet in the South.\textsuperscript{6} He traveled through the South in 1963 searching for a good case and found one in Jackson, Mississippi.\textsuperscript{7} Jackson civil rights leaders had been complaining to the FCC about Jackson television

\footnotesize{\textsuperscript{3} Id.  
\textsuperscript{4} Id.  
\textsuperscript{5} Id. at 215-18.  
\textsuperscript{6} Dr. Aaron Shirley of Jackson explained the contribution of Everett Parker as follows: 
It took resources to make things change... It's not as if Everett Parker made us aware that we were unhappy [Laughter]. But that was a resource that came. 
\textsuperscript{7} Id. at 81.}
broadcasting practically since its inception in the early 1950s. The NAACP had attempted during the 1950s and 1960s to have the FCC deny the broadcast license of Jackson station WLBT, owned by Lamar Broadcasting. It was not until Parker came along, however, that a sustained and successful effort was made.

**NAACP and the Southern Media**

The struggle to end segregation in the South was fought on many fronts, including the broadcast airwaves. The NAACP had long been working to reduce racism in the broadcast industry. On the other side, southern segregationists of the 1950s had taken an increasingly assertive approach towards the media. In early 1952, Governor Herman Talmadge of Georgia demanded that African-American performers be banned from television. He attacked the integration of white and African-American performers on the same screen and called for Southerners to boycott the sponsors of integrated programs. And in 1960, Louisiana Congressman Overton Brooks complained to the FCC that CBS had broadcast blacks and whites dancing together; he called it a "disgusting portrayal of race mongrelism."\(^9\)

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\(^8\) See Ch. 2, supra.
\(^9\) Letter from Overton Brooks to Edward F. Kennehan (4/9/60), in FCC Office of Executive Director Files, General Correspondence 1957-66, Box 42B, Record Group 173, National Archives.
Mississippi may have been the state with the most organized and aggressive campaign to use of the media to support segregation. The state was sued for donating public funds to the White Citizens Council, which produced a program called "Forum" that featured public officials committed to the maintenance of segregation. In late 1957, the Mississippi State Sovereignty Commission, the official state authority established to maintain segregation, directed a campaign designed to achieve a more sympathetic media portrayal of the pro-segregation position. The Commission contacted the major networks and mailed over 200,000 pieces of direct mail to non-Southern newspapers, radio stations, and television stations seeking a "less slanted treatment of the South."

Simultaneously, complained the NAACP, the Sovereignty Commission was using the local media to reduce the effectiveness of the civil rights movement in Mississippi. In the 1950s Medgar Evers complained that the Sovereignty Commission had assisted in staging a meeting of the "Mutual Association of Colored People South" to compete with an NAACP branch meeting in order to "draw as much attention from [the NAACP meeting] as

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10 See generally, Classen, Broadcast Law & Segregation, at 4-5.
12 Jackson Daily News (12/2/57), in NAACP Papers, Group III, Box C-246, NAACP Branch Dept., 1956-65, General Dept. File, Evers, Medgar, Field Secretary, 1957.
possible."\textsuperscript{13} This competing meeting, according to Evers, "was given public service television, radio and newspaper time, with very frequent spot announcements."\textsuperscript{14} Mississippi state efforts to use the media to support segregation were supplemented by private organizations, which used their own funds to encourage segregation over the airwaves.

The President of Morehouse College, writing to NAACP Executive Secretary Roy Wilkins, expressed a sentiment widespread among civil rights activists: "It is too bad that we can only get a peep in here and there when these boys in the South get their views aired 100 per cent in the press, over the radio and on TV."\textsuperscript{15} The NAACP hoped that the FCC's Fairness Doctrine would correct the imbalance in Southern broadcasting by providing the NAACP airtime to counter segregationist broadcasting and thereby enhance the nationwide discussion of the civil rights movement.

The national NAACP encouraged its local branches to appear on local radio and television, because they were often the only local organizations qualified and prepared to present a pro-integration perspective in the South. Local branches were encouraged to "request time to answer any views that are

\textsuperscript{13} Letter from Medgar W. Evers to Roy Wilkins (12/4/57), in Group III, Box A-114, Medgar Evers, Corr. 1956-63.
\textsuperscript{14} Id.
\textsuperscript{15} Letter from Benjamin E. Mays to Roy Wilkins (8/8/56), in NAACP Papers, Group 3, Box A320, NAACP Administration, General Office File, Staff, Wilkins, Roy, Radio and Television, Meet the Press, 8/25/56 appearance.
presented in broadcasts that are contrary to those of the NAACP,″¹⁶ and if
denied, "a complaint could be made" to the FCC.¹⁷

Local branches took advantage of this strategy with varying success.
When radio station WILD of Birmingham, Alabama, broadcast a program
sponsored by the "American States Rights Association," the NAACP complained
to the FCC about commentator Ace Carter's consistent attempts to link the
desegregation movement with communism. Less than two months later, the
station discontinued the show. On the other hand, when a NAACP youth
secretary from Shreveport complained about the segregated programming on a
local television station, apparently nothing happened. The FCC responded that it
had no regulation addressing the broadcast of interracial programs.

The NAACP's public relations director, Henry Lee Moon, also encouraged
the local branches to "[take] advantage of free public service time" to "answer
anti-NAACP propaganda on the local level."¹⁸ Offering help from the national
NAACP office, Moon urged the branches to "make immediate contacts" with their
respective stations and to contact the national office if broadcasters refused to
grant airtime. In addition, Moon asked the branches to report broadcasts critical
of the NAACP or African-Americans.

¹⁶ Letter from J. Francis Pohlhaus to Kelly Alexander (10/27/54), in NAACP Papers, Group
II, Box H8, NAACP 1940-55, Radio & Television, 1954-55,
¹⁷ Id.
¹⁸ Letter from Henry L. Moon to "Branch President" (1/26/60), in NAACP Papers, Group IIIA
During the 1950s, the NAACP became involved in FCC license proceedings to keep segregationists from gaining new stations, and to discourage stations from engaging in racial stereotyping. These attempts to enlist the FCC on its side were part of the NAACP overall strategy for combating segregation. It was one tool among many. NAACP's driving force behind its FCC participation was not a vague concern about reforming the media, but its imminent political struggles over segregation in which the media was a powerful tool.

Television arrived in Jackson in 1953. The new Jackson TV station WLBT was one of two stations, and quickly a thorn in Medgar Evers' side. As field secretary for the NAACP team in Mississippi, Medgar Evers found that he could not avoid conflict with the radio and television stations in Mississippi.\(^{19}\) At a personal level, his brother, Charles Evers, had lost his job in 1954 as a radio disc jockey after supporting voting rights for African-Americans.\(^{20}\) But the struggle was not just personal. In 1955, Evers wrote to the FCC that WLBT-TV cut off an interview with Thurgood Marshall on an NBC network program. He complained that station manager, Fred Beard, had deliberately cut the interview and substituted a sign reading "Sorry, Cable Trouble." Believing it would be "a good

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Box 252, NAACP Administration 1956-65, General Office File, Public Relations, Black issues and the media; Radio, 1959-61.
\(^{19}\) On Evers and the media generally, see Classen, Broadcast Law and Segregation, at 7.
\(^{20}\) See id. at 6.
case to present to the FCC," the NAACP wrote to George C. McConnaughey, the FCC Chairman, to request further information so that the NAACP might "take appropriate action to oppose [the] renewal[] of [WLBT's license]."

The tension between the station and Jackson civil rights activists heated up again in 1957 during the Little Rock crisis in Arkansas. When WLBT-TV broadcast a public service program on the crisis, it featured pro-segregation officials of Mississippi, including Governor J.P. Coleman, Senator James O. Eastland, and Congressman John Bell Williams. Medgar Evers requested time for the NAACP to respond to this unbalanced panel. WLBT refused. Evers complained to the FCC, but was told that the equal time doctrine did not apply because no candidates for office were involved, that the FCC had no authority to censor broadcasters, and that the Fairness Doctrine left wide discretion to the station.

When WLBT applied for a license renewal in 1958, the FCC's Broadcast Bureau deferred action on the renewal and requested additional information from WLBT about its policy on controversial issues. The FCC expressed concern about WLBT's practices, warning that the station must not be "used to misinform

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the viewing public." It rejected the station's argument that no response time was required for opinions expressed by elected officials: "the fact that the proponents of one particular position...are elected officials does not in any way alter the nature of the program or remove the applicability of our fair presentation policy." But the Commission granted renewal nonetheless, noting its policy that isolated violations of the Fairness Doctrine were not grounds for license revocations.

The situation in Jackson broadcasting had not changed significantly by the early 1960s. In 1959, Variety magazine reported that Senator Eastland and Representative John Bell Williams were assisting the White Citizens' Council Forum of Jackson to produce pro-segregation television films and radio tape for distribution throughout the South by providing access to the congressional recording studios at low congressional rates. Locally, Medgar Evers complained about the media's coverage of the 1960 Jackson Easter boycott of local segregated establishments, stating that "the radio, television and newspapers have been told to play down the movement and consequently we have not been getting the accurate and unbiased coverage normally given." When Congressional-aspirant Reverend R.L.T. Smith wanted to purchase time to

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24 Id.
encourage Jackson African-Americans to pay their poll taxes and to register to vote in the 1962 elections, he appeared on one Jackson station, but he was denied the opportunity to purchase time on WLBT.

When James Meredith attempted to enroll at the University of Mississippi in the Fall of 1962, violence erupted. Civil rights activists criticized Jackson broadcasting stations—including WLBT—for providing only pro-segregation accounts of these events. Medgar Evers wrote the FCC in hopes that WLBT could be convinced to provide time for the NAACP to respond to the Citizens' Council broadcasts regarding the Meredith incident.

Thus, the FCC was clearly aware of the problems of segregationist broadcasting in Mississippi. In the early 1960s the Broadcast Bureau investigated a number of Mississippi broadcast stations. The Bureau’s Kenneth Cox sent out letters to stations seeking to persuade them to produce local prime-time discussion shows designed for minority groups. And in 1963, the Commission issued a statement making clear that the Fairness Doctrine applied to the segregation struggle. Broadcasting magazine was not excited by this more aggressive trend at the FCC. On December 3, 1962, it revealed the Bureau's "shocking" letter writing campaign to Southern stations. Commissioner Ford, whose main supporter was Senator Eastland of Mississippi, challenged Cox to

File, Mississippi Pressures, Jackson, 1956-65.
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demonstrate that the Commission had authorized such actions. Although FCC Chairman Minow supported Cox, the Bureau's policy was reversed; no more letters were sent. Later Cox was appointed to be one of the Commissioners, but not without strong opposition from Senator Eastland.27

By 1963, civil rights activists could point to some positive trends in Southern broadcasting. WLBT granted time to Medgar Evers to respond to Jackson Mayor Thompson's broadcast during one of the NAACP's drives to desegregate downtown Jackson. Yet there were still problems with WLBT and other Southern stations. One prominent Jackson citizen complained that after the death of Medgar Evers, WLBT had reverted to its old ways, interrupting NBC's coverage of Evers' murder with statements that the opinions expressed did not reflect those of the station. Thus, when Everett Parker began the UCC litigation in 1964, there was still cause for concern about the role of the Southern broadcast media in opposing the civil rights movement.

27 Broadcasting magazine also protested Cox's possible elevation to a Commission seat. Cox obtained his seat on the Commission thanks to Senator Magnuson's efforts to overcome the delaying strategy of Strom Thurmond. See Appointments to the Regulatory Agencies: The Federal Communications Commission and the Federal Trade Commission, 94th Congress, 2nd Sess., printed at the direction of Hon. Warren G. Magnuson, Chairman, for the use of the Committee on Congress, Committee Print (1976) (a study written by James M. Graham and Victor H. Kramer, under the auspices of the Institute for Public Interest Representation, Georgetown University Law Center).
Developing the UCC's Case Against WLBT

Liberal protestant churches had become increasingly interested in the FCC in the early 1960s. The National Council of the Churches appointed Reverend William Fore as the new Executive Director for the Council's Broadcasting and Film Commission. Fore encouraged and supported regulatory activism at the FCC. The National Council of Churches testified in the early 1960s in support of the FCC's proposed revision of its broadcast renewal and application forms, in the face of industry opposition. It issued a critical report of television network broadcasting, which Everett Parker and Orrin Judd had produced. Both these men then became involved in the UCC litigation against WLBT and the FCC.

Parker launched his efforts against WLBT not through the National Council, but through the UCC's Office of Communication, which he ran. The UCC and its predecessor organizations had long been interested in both the role of the media and in the civil rights movement. In 1963, the General Synod of the UCC expressed its commitment to programs that furthered racial justice.28 That same year, the Office of Communications surveyed Southern broadcast programming and concluded that discrimination was practiced against African-Americans both as performers and in news broadcasts. After a coalition of

churches unsuccessfully approached the National Association of Broadcasters about the treatment of African Americans by the Southern media, the leadership of the UCC "decided that something drastic needed to be done and that we were going to do it."\textsuperscript{29}

In 1964 Southern television stations were coming up for FCC renewal, so the time for a challenge was right. After speaking with civil rights leaders in the South, Parker chose WLBT in Jackson as his test case.\textsuperscript{30} His goal was not only to improve the Southern media's treatment of African-Americans and the integration. He thought that Northern stations could certainly improve as well. In addition, he had a broader goal: "to have standing for the whole public before the FCC or any other federal regulatory agencies."\textsuperscript{31}

One of Parker's first choices for an attorney was James L. Fly, who had served as FCC Chairman in the early 1940s. Fly and other broadcast lawyers declined, however, and Parker relied on the Office of Communication's general legal counsel, Orrin Judd, despite Judd's lack of experience as a broadcasting lawyer. Ann Aldrich, who had worked as an attorney at the FCC, worked with Judd throughout the case and provided the FCC expertise. Later Earle K. Moore, another attorney without broadcast experience, became extensively

\textsuperscript{29} Kor, Everett C. Parker, at 165.
\textsuperscript{30} Actually Parker initially targeted both TV stations in Jackson, but WJTV, the other station, agreed to modify programming practices, and Parker narrowed his attack to WLBT alone. The FCC renewed WJTV's license based upon improved programming filed after the UCC's petition was filed.
involved in the case. Parker's difficulty in enlisting a prominent FCC attorney stemmed not only from conflicts of interest, but apparently from the belief that the case could not be won.\textsuperscript{32}

The UCC began by accumulating data. In March 1964 Parker enlisted help from local Jackson television viewers who monitored and coded WLBT programming for racial bias and discrimination.\textsuperscript{33} Parker then met with FCC personnel, including FCC Chairman Henry, and filed a formal "petition to intervene and deny application for renewal" against WLBT. The Mississippi AFL-CIO also filed a petition and Tougaloo College later joined in the action.\textsuperscript{34} Two civil rights leaders from Mississippi, Dr. Aaron Henry, president of the Mississippi NAACP, and Robert L.T. Smith, the candidate who had been denied time on WLBT in 1962, joined the case as individuals.\textsuperscript{35} In reaction to the filing of the petitions, the Mississippi State Legislature passed a concurrent resolution in support of WLBT.\textsuperscript{36}

\begin{itemize}
\item\textsuperscript{31} Quoted in Korn, Everett C. Parker, at 167.
\item\textsuperscript{32} Classen, Broadcast Law and Segregation, at 92.
\item\textsuperscript{33} The twenty-one volunteers were mostly white liberals from Mississippi. Id. at 81.
\item\textsuperscript{34} On the relationship between the AFL-CIO and civil rights advocates, see generally, Robert H. Zieger, American Workers, American Unions 186 (2d ed. 1994).
\item\textsuperscript{35} Parker initially thought that the dangerous climate in Mississippi would have made it too difficult for "local people" to participate "for obvious reasons." Quoted in Memo to the Files from Ashbrook P. Bryant, Chief, FCC Office of Network Study (3/24/64), in Henry Papers, Box 52, National Council of Churches, etc. However, the importance of having local petitioners from Jackson likely convinced Smith and Henry to participate. Other local people participated \textsuperscript{\textsuperscript{36}} in the FCC hearing.
\item\textsuperscript{36} Clift, The WLBT-TV Case, at 23.
\end{itemize}
The UCC petition transformed a number of individual disputes with WLBT into an "administrative class action." The petition drew heavily on the NAACP's bad experiences with WLBT, and pointed to the station's unwillingness to grant response time to counter segregationist viewpoints, its unwillingness to sell time to integrationist candidates for office, and its alleged blocking of network programming regarding integration. But, the UCC went beyond individual Fairness Doctrine violations that had affected the NAACP and civil rights leaders, and beyond the station's support of segregation. The UCC complained that the station failed to recognize the needs and interests of a large segment of its service area population: the 45% of station's viewers who were African-American.

The Mississippi AFL-CIO's petition complained that WLBT had tried to discredit the union and interfere with a NLRB election. The union attacked the bias of WLBT generally, accusing it of being a forum for "radical right" viewpoints, including those of the John Birch Society, the White Citizens Councils and "other extremists." The Mississippi AFL-CIO was not as active in the litigation as the UCC's Office of Communications. However, the national AFL-CIO was very

37 The petition was filed on behalf of themselves and "all other TV viewers in the State of Mississippi." I call it a class action, not in the procedural sense in which the federal courts certify a case as a class action. Rather, I refer to a mindset that drives the litigation—one in which the particular and individual grievances are secondary to the achievement of social reform through the development of favorable outcomes and precedent. It could also be called public interest litigation within the administrative context.

38 AFL-CIO press release (6/2/64), in Henry Papers, Box 45, Lee, Robert E., Commissioner, 209
interested in the problem of right-wing programming and contributed financially to the Office of Communications’ attempts to “bring about better compliance with the Fairness Doctrine on the part of local television and radio stations.”\textsuperscript{39} The ACLU also supported the UCC, calling upon the FCC to hold a hearing in Jackson on the UCC’s allegations.

**WLBT’s Response**

WLBT opposed the UCC’s petition to intervene on the grounds that the UCC was effectively an outside agitator that did not represent the local community or even a majority of African-Americans in Jackson. Legally, the station argued that the UCC could not intervene, because the UCC lacked sufficient standing to file its petition. WLBT argued that there was no UCC-affiliated church in Mississippi that would demonstrate that the UCC represented a segment of local Jackson listeners.

WLBT was not apologetic about station manager Fred Beard’s behavior or its broadcast programming. Rather the station complained that the UCC’s petition merely reflected the opinion of the United Church of Christ that there should be “more and different Negro programming . . .”\textsuperscript{40} It argued that a station had to decide for itself whether broadcasting discussions of an issue as

\textsuperscript{39} Letter from Everett C. Parker to George Meany (12/1/66), in Novik Papers, Box 10, Folder 8.

\textsuperscript{40}
inflammatory as integration was in the public interest. Discussing certain issues might not be in the public interest, said WLBT. To support its contention that the individual petitioners in the case reflected only a small minority opinion within the Jackson area, WLBT submitted letters of praise from African-Americans in the Jackson area.\(^{41}\) In response, the UCC complained that the station should consult a cross-section of community leaders, not just those "who deal with questions of race relations in a manner which is acceptable to the licensee."\(^{42}\)

The FCC's First Decision

The Commission could not have ignored the political significance of the civil rights claims being made by the petitioners in the WLBT case. Yet the license renewal decision was one that the Commission faced routinely. Every year, the Commission renewed nearly all broadcast licenses up for renewal that year.\(^{43}\) Although legally every license renewal required that the Commission make an affirmative finding that the renewal would serve the public interest, the Commission typically presumed stations were operating in the public interest. Most of the time, the Commissioners voted unanimously to renew licenses.

\(^{40}\) Opposition to Petition to Intervene (5/15/64), in FCC Docket 16663.
\(^{41}\) Not surprisingly, a letter-writing battle began. By July 1965, the FCC had received 324 letters against renewal and 269 letters in favor of renewal. Although WLBT had fewer letters of support, they contained more signatures (2,179 compared to 423). See Memorandum from William B. Ray to E. William Henry (7/15/65), in Henry Papers, Box 44, Jackson MS, 1965-66.
\(^{42}\) Reply to Opposition to Intervene 18, in FCC Docket 16663.
\(^{43}\) Abel, Clift & Weiss, Station License Revocation and Denials of Renewals, 1934-69, 14 J. Broadcasting 411 (1970).
without a hearing. Hearings were reserved for those renewals about which the FCC had serious concerns whether the licensee was acting in the public interest. What made this case different from most was that a citizen group had gathered evidence to demonstrate that the station was not operating in the public interest, because it was systematically biased as to race relations.

The Preliminary Question of Standing

The threshold question was whether the United Church of Christ had standing to intervene in WLBT's license renewal. Citizen groups were presumed to lack standing, and thus the FCC paid little attention to the issue, resolving it in a footnote. The Commission assumed that the rules against citizen standing were well established and relied on the principle that "members of the general public who do not show a direct causal relationship between the action being protested and some injury of a tangible and substantial nature" did not have standing. The Commission then simply stated that "members of a minority group, can assert no greater interest or claim of injury than members of the general public." Otherwise, said the Commission's opinion, "any minority group based on race, creed, color, or national origin could gain standing as a represent of the public interest despite the lack of an individual substantive right." The

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45 Id.
46 Id.

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majority's opinion was not a model of reasoning or analysis; it simply relied on
precedent, and what it believed was irrefutable logic.

Two of the liberal Commissioners, Chairman Henry and Commissioner
Cox, did not see the obviousness of the Commission's position. Henry pointed to
a "basic concept of Commission policy," which was "to stimulate the public's
interest in the responsiveness of broadcasters to the needs of their communities."47
He challenged the Commission to explain why it treated members of the public
differently from licensees: "The licensee is entitled to such a hearing as a matter
of right on the question of license renewal; to deny the same right to complaining
members of the public is, in this instance, a clear abuse of discretion."48 The
reasoning of the dissenting opinion would ultimately prevail in the Court of
Appeals.

The Fundamental Question: Would the Commission Hold a Hearing?

At the time, however, the standing question was not the most important
issue of inquiry. The question that dominated the attention of the Commissioners
was whether the allegations against WLBT were serious enough to merit a
hearing. The Commission answered this question as it answered hundreds or
thousands of similar questions each year: no, a hearing was not required.

47 Id. at 1159 (Henry, dissenting).
48 Id. at 1158 (Henry, dissenting).
The Communications Act required that a hearing be held where there was "any substantial or material issues of fact bearing upon the question of whether a grant of renewal would serve the public interest." The opinion reviewed the evidence as presented by the UCC and found that "substantial questions [were] raised as to whether the licensee's operation can be said to have conformed fully to the public interest standard of the Communications Act of 1934." The opinion reiterated that "serious issues are presented," and concluded that "[c]learly, serious questions [were] raised" about the public interest of renewing WLBT's license. Oddly, however, instead of granting a hearing, the opinion announced that it was a "close question" whether or not to hold a hearing.

Given that the evidence against WLBT was strong enough to raise the possible need for a hearing, the majority then went on to examine other factors. First, the opinion asserted that no hearing was necessary, because the station promised that it would perform better in the future. The FCC often relied on such promises and the decision was not unusual in that regard. Second, the opinion explained that renewal was justified without a hearing because the "particular area" where WLBT was located was "entering a critical period in race relations." Stations such as WLBT could "make a most worthwhile contribution to the

50 Lamar Life Broadcasting, 38 F.C.C., at 1153.
51 Id. at 1148.
52 Id. at 1153.
resolutions of problems arising in this respect.⁵⁴ Such a contribution was “needed now—and should not be put off for the future.”⁵⁵ Yet the Commission failed to explain how it was that a station accused of racism and neglect of the African-American population would add, rather than detract, from the resolution of conflicts over civil rights.

The Commission’s failure to produce a strong and well-reasoned opinion was due to the structure of the Commission and the way in which the Commission produced its written opinions. At the FCC, the majority opinion is not typically authored and signed by a particular Commissioner, in contrast to the typical signed federal court opinion. As such, there is less accountability for opinion writing. The opinions were written not by the Commissioners themselves, nor by their direct staff, but by the general counsel’s office. Given the volume and typical insignificance of renewal decisions, Commissioners had little incentive or opportunity to personally involve themselves in the production of opinions. Typically, delegation was an efficient way of justifying the Commission’s typically routine decisions.

In a contested case such as WLBT, however, this practice led to a weak and conflicted majority opinion. Henry Geller was the general counsel of the FCC at the time of the WLBT decision and was responsible for producing both

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⁵³ Id. at 1154.
⁵⁴ Id.
the majority and the dissenting opinions. Although he was not deliberately
disloyal to the Commission majority, he thought that the evidence against WLBT
raised serious concerns and made that clear in both the majority and dissenting
opinions.56 Yet at the same time, he had to conclude that no hearing was
justified, a position with which he disagreed.

Sitting alongside this weak majority opinion, Chairman Henry's minority
opinion cried out for court review of the decision and provided a blueprint for the
D.C. Circuit to follow in overturning the majority's decision. It alerted the court
that "[t]his [was] a case of unusual importance."57 The decision represented the
Commission's "first . . . consideration of a possible long-continuing pattern . . . of
failure to comply with the fairness doctrine."58 The minority opinion accused the
majority of "ignor[ing] or leav[ing] unanswered substantial issues of fact in areas
bearing most directly on our public interest judgment."59 The list of unresolved
issues meriting a hearing was a "formidable" one.60 The unresolved facts related
to licensee misrepresentation, "a most serious offense,"61 compliance with the

55 Id.
56 According to Classen, Geller characterized the evidence in the WLBT case as "the
clearest call for an evidentiary hearing that he had seen." Classen, Broadcast Law and Segregation,
at 103.
57 Lamar Life Broadcasting, 38 F.C.C., at 1158 (Henry, dissenting).
58 Id.
59 Id.
60 Id.
61 Id. at 1161.
fairness doctrine, "an important facet of operation in the public interest,"62 and other issues relating to the public interest.

On the question of whether a hearing should be held, the minority opinion was more thorough and analytical than the majority opinion. On the question of whether a hearing was required, the majority opinion contained fewer than ten citations to the Communications Act, FCC cases, rules or policy statements. None of these citations appeared in its "evaluation" section. In contrast, the dissenting opinion made over twenty citations to relevant authorities.

The Sanction

Although the Commission renewed WLBT's license, it did treat the WLBT license differently from most others by granting the station only a one-year temporary renewal instead of a full three-year renewal. This "short-term renewal" effectively placed WLBT on probation. Although it was really only a slap on the wrist with no immediate consequences, it sent a message that the Commission would not simply look away in such matters. Licensees rarely, if ever, challenge the imposition of a short-term renewal; they simply try to improve their behavior and obtain a full-term renewal next time around. The appearance of citizen groups created the possibility that there would be a court challenge in the context of a short-term renewal. However, court review would only happen if the UCC

62 Id.
appealed the decision and obtained standing to challenge the FCC’s decision on the merits. This decision would lie in the lap of Everett Parker.

Parker’s reaction

Parker expressed some satisfaction with the FCC’s decision. The station was on notice that its past practices were unacceptable; it had been told to consult with minority leaders in the community about programming; and it had been told to set an example for other stations. Other stations would take notice.\(^{63}\) Parker’s major complaint was the lack of a hearing. He wrote that “[t]he refusal of the Commission to hold a hearing is crucial.”\(^{64}\) The licenses had been renewed “without public examination of the charges or their refutation.”\(^{65}\)

Parker also complained that the Commission denied standing to members of the general public while granting it to self-interested industry competitors seeking to obtain the station’s license. Ought not the public have “a better right to protest?”\(^{66}\) And, said Parker, even if standing for the general public was not recognized, the Commission ought to recognize the particular harms demonstrated by those from Jackson who had been attacked on the air and denied the opportunity to respond.

\(^{63}\) Everett Parker, The Mississippi Television Station Cases 3 (June 8, 1965), in Ford Papers, Box 17, Religious Broadcasting, 1957-58, State Historical Society of Wisconsin, Madison, WI.

\(^{64}\) Id.

\(^{65}\) Id. at 4.

\(^{66}\) Id. at 5.
The AFL-CIO agreed that the outcome was somewhat satisfactory. In response to AFL-CIO President George Meany, Morris Novik, the union's radio consultant, wrote "I agree. It is a step in the right direction." The Jackson station had brought about a "partial victory" that had "brought about vast program improvement in the southern TV station." Novik suggested that if "the same test could be applied to a non-southern radio-TV station, it would scare many that are overloaded with right-wing programming . . .".

Although Parker and others expressed partial satisfaction with the FCC's decision, Parker decided to appeal the FCC's WLBT decision in search of total victory. On appeal, the ACLU joined as a friend of the court to argue in support of both standing for the petitioners and for an administrative hearing on the merits.

The D.C. Circuit's First Decision

In *United Church of Christ v. FCC (UCC I)*, the D.C. Circuit proclaimed that "consumers are generally among the best vindicators of the public interest." The court granted standing to broadcast listeners and ordered the

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68 Id.
69 Id.
70 United Church of Christ v. Federal Communications Commission, 359 F.2d 994, 1005 219
FCC to hold a hearing on the allegations brought forward by the UCC. The D.C. Circuit was not the first appeals court in the 1960s to broaden standing to public participants. The Second Circuit's decision in Scenic Hudson Preservation Conference v. Federal Power Commission, preceded the D.C. Circuit's UCC I decision.\footnote{Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965) (granting standing for conservation associations complaining of aesthetic, conservational, and recreational injuries).} However, the special role of the D.C. Circuit in deciding most administrative law cases made the UCC I decision significant. UCC I was a watershed case that remains a standard citation in discussions of citizen standing.

**Standing**

The court's standing decision did not follow the dominant legal tradition. Rather, it took the strands of an alternative tradition and elevated them to the status of mainstream doctrine. The court shifted from the previous doctrinal focus on the particularized interests of the litigants toward a stronger public interest focus. Previously, the interests put forward by the UCC would likely have been classified as too general to merit standing. Traditional standing doctrine favored particular interests over general ones (leaving, for the example, the
federal taxpayer without standing).\textsuperscript{72} This traditional approach had prevailed at the FCC and in the D.C. Circuit.

The standing tradition, however, was not entirely consistent. Thus, there were precedents that provided an opening for a broader interpretation of standing. The court relied on \textit{Sanders v. FCC} (1943), which spoke broadly of the need for litigants that could challenge agencies on public interest grounds. It also cited, Judge Jerome Frank's 1943 opinion in \textit{Associated Industries v. Ickes},\textsuperscript{73} which recognized the need for consumer standing to serve a private attorney-general function.

The D.C. Circuit's 1966 opinion cited this alternate tradition for support. However, it also chose an evolutionary approach to the questions of standing and intervention than independently justified the court's authority to expand standing to citizen groups. According to the opinion, the Communications Act of 1934 and its subsequent revisions delegated to the courts evolutionary lawmaking authority over standing and intervention. Congress intended to leave such authority to the courts, and there was "no reason to believe...that [Congress] intended to limit participation of the listening public to writing letters to the Complaints Division of the Commission," said the D.C. Circuit opinion.\textsuperscript{74}

\textsuperscript{72} \textit{Frothingham v. Mellon}, 262 U.S. 447 (1923).
\textsuperscript{73} \textit{Associated Industries of New York State v. Ickes}, 134 F.2d 694 (1943).
\textsuperscript{74} \textit{United Church of Christ v. FCC}, 359 F.2d 994, 1001-02 (1966).
Congress may have intended to leave the precise outlines of standing and intervention to the courts, but the court went out on a limb in implying that Congress had supported the possibility of standing for broadcast listeners. Congress had repeatedly reviewed and revised the procedures for third-party participation at the Commission and never did it seriously consider providing for citizen standing although the subject was mentioned. It is more likely that Congress intended the intervention provisions to reflect Commission practice as it was. Nonetheless, relying on the alternative tradition of consumer standing and on a dynamic method of statutory interpretation (which it suggested Congress intended), the UCC I opinion expanded standing to broadcast listeners.

The decision did not radically assert a right for public participants. Rather, it emphasized Louis Jaffe's distinctions between public participants and those with traditional legal rights to participate. In a footnote, the court's opinion did discuss the particularized injuries of the petitioners:

[The specific complaints of discrimination were that Negro individuals and institutions are given very much less television exposure than others are given and that programs are generally disrespectful to Negroes. The allegations were particularized and accompanied by a detailed presentation of the results of Appellants' monitoring of a typical week's programming.]

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75 When Congress adopted the petition-to-denay process in 1960, the House Report stated that this "pre-grant" procedures . . . [was] not intended to preclude any person who is interest from filing formal or informal pleadings with the Commission," but noted that such persons would not be entitled to the procedural rights given parties-in-interest. Pike & Fischer, Radio Regulation 2d (Finding Aids—Citation Table—1934 Act as Amended) 10:415 (1994).

76 United Church of Christ, 359 F.2d at 998 n.4.

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Yet the language of the opinion suggested that standing for broadcast listeners was based on the ability of broadcast listeners to represent the public interest rather than on their particularized injuries.

To counter arguments that expanding standing would lead to abuse and administrative burdens, the court emphasized the need for public participants to be legitimate and responsible. "Legitimate listener representatives" had a responsibility to monitor the quality of their television:

Individual citizens and the communities they compose owe a duty to themselves and their peers to take an active interest in the scope and quality of [their] television service [which] has a vast impact on their lives and the lives of their children . . . . [T]heir interest . . . is direct and their responsibilities important. They are the owners of the channels of television—indeed of all broadcasting.\(^7\)

The court's focus on the ability of citizen participants to help the Commission was not part of the traditional law of standing. Industry had never been required to be helpful. However, this helpfulness idea reflected Louis Jaffe's vision of the public action, in which the court would judge the contribution made by public participants.

Instead of making clear that public participants had the right to intervene, the court seemed to suggest that intervention rights were at least to some degree in the discretion of the Commission. Since the court recognized that "private

\(^7\) Id. at 1003.
interests may sometimes cloak themselves [as] public interest advocates," it
authorized the Commission to grant standing to "one or more" as "responsible
representatives." It need not admit "hosts' of protestors," but could limit
participation to helpful spokespeople. The Commission would have discretion in
admitting citizen participants.

The court was unwilling to make a list of "responsible and representative
groups," but it made clear its preference for broad-based groups over specialized
ones:

The responsible and representative groups eligible to intervene
cannot here be enumerated or categorized specifically; such community
organizations as civic associations, professional societies, unions,
churches, and educational institutions or associations might be helpful to
the Commission. . . . [T]hey usually concern themselves with a wide
range of community problems and tend to be representatives of broad as
distinguished from narrow interests . . . .

According to the court, the value of public participation was at its highest when it
transcended narrow interests. Thus, the court turned the Frothingham v. Mellon
formulation on its head: generality was suddenly preferable to specificity. The
only specificity that the court suggested was required was that only those within

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78 UCC I, 359 F.2d at 1005.
79 Id. at 1006.
80 Id. at 1005.
the geographic range of the station’s signal would have standing, and only those owning radios or televisions.\textsuperscript{81}

The court in \textit{UCC I} was not bold enough to simply create a blanket right for citizen standing at the FCC, yet in the end, the case came to stand for such a right without the qualifications provided by the court. However, the Supreme Court later developed additional doctrines that would limit, but not eliminate, the ability of citizen groups to obtain standing.

\textbf{The Hearing Question}

The court then turned to the question of whether the FCC was required to hold a hearing. This question was equally important for the citizen groups, because if there were no hearing, the UCC would have no opportunity to present evidence demonstrating the need to revoke WLBT’s license.

The court found several flaws in the Commission’s reasoning justifying its decision not to hold a hearing. First, court found that the evidence against WLBT would normally have justified a hearing. It pointed to the fact that the Commission in 1959 had concluded that WLBT’s behavior would have precluded renewal if there had been more than isolated violations of the Fairness Doctrine. WLBT’s similar, and repeated, conduct alleged by UCC would, if proved, be serious enough to deny renewal.

\textsuperscript{81} Id. at 1002 ("listeners . . . collectively have a huge aggregate investment in receiving
Since the court found that substantial questions had been raised, the court examined the Commission’s other stated reasons for declining to hold a hearing. The court rejected the Commission’s reliance on the “urgent need at the time for a properly run station in Jackson,” criticizing the Commission for concluding that “the need was so great as to warrant the risk that WLBT might continue its improper conduct.” The court was much less confident that WLBT would behave better in the future. After all, WLBT had denied it had engaged in misconduct to begin with, and thus having shown no remorse, was unlikely to voluntarily mend its ways. The court concluded that, in fact, Jackson might be better off if the Commission revoked WLBT’s license, because then the only remaining television station in Jackson would be “acutely conscious that adherence to the Fairness Doctrine is a sine qua non of every licensee.”

Overall, the court found the Commission’s attempt to justify a one-year conditional renewal “labored.” It ordered the FCC to hold a hearing and grant intervention to at least some of the public interest groups involved in the proceeding.

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82 Id. at 1007.
83 Id. at 1009.
84 Id. at 1007.
Reaction to the D.C. Circuit Decision

*UCC I* attracted the attention of legal scholars. Most commentators viewed the decision as "a significant departure from traditional thinking" on the subject, but endorsed it. As one commentator explained, "an important step has been taken to insure that the interests of the public are reflected in a licensee's programming . . ." Some hoped that the decision would "go far toward irrigating television's 'vast wasteland.'" Others agreed with the court that no one "can better assert [the public] interest than responsible members of the public." Most recognized that the decision would place an added administrative burden upon the FCC, but concluded that the additional burden was well worth it.

Commentators immediately recognized that the court's discussion of FCC discretion to choose which public litigants should be admitted into the proceeding was anomalous in light of the Sanders precedent, which had granted industry representatives standing as a matter of right. One commentator remarked that the court's "reliance upon 'responsibility' and 'representativeness' as the primary

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87 Comment, Standing of Television Viewers, 66 Colum. L. Rev., at 1522. Newton Minow coined the phrase the "vast wasteland," which he used to describe the dismal quality of television in the early 1960s. See Newton Minow, Equal Time (1964) (reprinting the Minow's Vast Wasteland speech).
criteria for determining standing to intervene” was problematic. Another, however, found the grant of discretion to the Commission a “necessary correlative to the broadened basis for standing,” or, in other words, a compromise solution.

Louis Jaffe’s “The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff,” written in 1968, reflects an abandonment of Jaffe’s hesitations toward the public action in the administrative context. He indicated that “[o]nly recently has the large and basic significance of Sanders begun to appear.” He asserted that the ideological nature of a litigant’s complaints should have “no bearing” on the question of whether a case or controversy arises under the Constitution.

In addition, Jaffe found new justifications for various benefits of citizen standing. First, “the individual citizen in our mass, multitudinous complexes feels excluded from government,” and the “feeling of helplessness and exclusion is in itself an evil.” Citizen standing recognized the “importance of the individual’s conscience” and was a “vehicle for minority” protection. It was also a

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Rev. 135 (1967).
89 Recent Developments, 65 Mich. L. Rev. at 526.
90 Comment, Standing of Television Viewers, 66 Colum. L. Rev. at 1525.
92 Id. at 1047.
93 Id. at 1044
94 Id. at 1047.
95 Id. at 1044.
"creative element in government and lawmaking" as individuals and groups provided "information, experience, and wisdom." Thus, Jaffe's endorsement of citizen standing was even greater than his previous endorsement of the public action.

Following the UCC I decision, the D.C. Circuit continued to expand standing at a wide range of agencies, including the Interstate Commerce Commission, the Federal Power Commission, the Atomic Energy Commission, and the Civil Aeronautics Board. The Supreme Court later stepped in to impose limits on the ability of citizens to obtain standing, and it rejected general taxpayer or citizen standing. Instead, it set forth a three-part for all standing inquiries that focused on injury, causation and redressibility. Citizen groups sometimes have difficult establishing these three prongs. Nonetheless, the general principle that citizens and citizen groups are eligible to establish standing remains part of the federal law of standing. Notably, the Supreme Court's emphasis on "injury-in-fact" is more similar to Kenneth C. Davis'
position on standing, while the D.C. Circuit adopted Louis Jaffe’s vision of the public action.

The court’s requirement that the FCC hold a hearing drew much less note. One commentator was critical of the court’s challenge to the short-term renewal, concluding that policy determinations should lie in the discretion of the Commission. Yet in light of the subsequent history of the D.C. Circuit and administrative law, it is clear that the court’s order to hold a hearing was but an early example of the hard-look style of administrative review. This development was as significant as the courts’ expansion of procedural rights to public participants.

Conclusion

The UCC I decision reveals the breadth and depth of judicial activism at the D.C. Circuit as early as 1966. Chief Judge Warren Burger, later Supreme Court Chief Justice, authored the UCC I decision. He was hardly one of the staunch liberal activists found on the D.C. Circuit during the 1960s and 1970s, but the opinion is truly condemnatory of the agency’s actions in the case. However, the UCC I also reveals that the responsibility for judicial activism cannot be placed solely on the court’s doorstep. The Commission was internally divided, which resulted in inadequate defenses against court review. As the next

102 Recent Developments, 65 Mich. L. Rev. at 524.
chapter will reveal, the Commission was unable to overcome its internal divisions in the *UCC* litigation and thus remained unable to protect itself from judicial review.

The standing decision is the best known portion of the *UCC* I case, but the willingness of the D.C. Circuit to order the FCC to hold a hearing based upon the evidence that the UCC put forward was as significant. Without adding this more intrusive form of review of administrative agencies, the court's creation of a right to participate alone would have simply allowed the agency to change avoidance strategies by declining to hold hearings even in cases in which citizen groups made allegations of egregious behavior. The later history of the UCC litigation, as chronicled in the next chapter, demonstrates that even further court activism was required in order to guarantee effective participation by citizen groups.
Hearing from the Public: *United Church of Christ II*

The D.C. Circuit's decision in *UCC I* initiated an experiment in public participation. The participation by the United Church of Christ's Office of Communication in a federal agency proceeding under court sponsorship was the first of its kind.¹ In an ideal world, the court's decision in *UCC I* would have paved a smooth path for public participation at the FCC. The UCC and its witnesses found participation in the hearing frustrating, however, because of the structure of the administrative proceeding and the hostility of the Commission and its hearing examiner. However, the UCC once again found support from the D.C. Circuit, which forced the Commission to take away WLBT's license.

**Prehearing Negotiations**

The FCC recognized that keeping out the UCC would no longer provide a solution to the WLBT matter. The FCC took seriously the court's demand that it permit the UCC to participate. It declined to take advantage of the court's grant of discretion to choose between the different public interest intervenors in search of the most responsible and representative. It simply recognized all of them. Yet many obstacles remained to effective public participation. The path was rocky.

Prior to the hearing, parties considered settlement. A month before the scheduled FCC hearing, the UCC's Everett Parker and Earle Moore met with

¹ Although the Second Circuit's *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965) preceded the *UCC decision*, that case involved an administrative proceeding in which the hearings had already been conducted and the issue was standing to appeal.
WLBT's counsel to discuss settling the case. They asked for improved station practices including children's programming to improve racial understanding, racial integration of at least some of WLBT's local programming, special programming for African Americans, and public members on the station's Board of Directors. They also sought reimbursement of their expenses. The FCC's Broadcast Bureau and General Counsel's office were supportive of settlement between the parties. No agreement, however, was reached, and the various parties blamed one another for the failed negotiation.

The UCC began its preparations for a hearing, but it immediately found the process to be burdensome. The FCC declined to share with the UCC its documents relating to the investigations of WLBT. The Commission did grant the UCC access to WLBT station records relating to the issues in the hearing, but the UCC had to struggle to obtain access to documents prior to May 1, 1965, the very time period in which the UCC alleged improper conduct by WLBT.

The UCC's initial strategy was to rely in part on written materials rather than to embark immediately on a full-fledged oral hearing. UCC attorney Earle K. Moore sought to streamline the process by having the case initially presented in written form. He argued that a full oral presentation would create a very lengthy proceeding that would be contrary to the public interest. The hearing examiner agreed with Moore that written submissions would be preferable. However, WLBT's attorney jumped on this expression of weakness. In response to Moore's

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3 Id.
request, he conceded that he had often agreed to written submissions but that he would demand oral presentation in this case. Since party attorneys were permitted to demand oral testimony, WLBT's wishes prevailed.

Moore was also concerned about fitting witness testimony into the court-like evidentiary rules. He explained that

If, members of the public coming in to question the renewal of a license are required to say that on April 8th, 1963 at 8:30, there was a program that was defective in the following respect, then it seems to me that the right of members of the public to participate in renewal proceedings is frustrated. It's denied. ⁵

He hoped that public witnesses could be held to a lower evidentiary standard. Not surprisingly, however, the hearing examiner demanded adherence to the usual rules of evidence. The public intervenors would be required to conform their testimony to the traditional court-like paradigm of adjudication.

The Hearing

The WLBT hearing was one designed to test the proof of specific allegations relating to the conduct of WLBT on specific FCC-related issues. Four issues relating to WLBT's conduct were "designated" for the hearing:

(a) Whether station WLBT has afforded reasonable opportunity for the discussion of conflicting views on issues of public importance;
(b) Whether [it] has afforded reasonable opportunity for the use of its broadcasting facilities by the significant groups comprising the community of its service area;

⁵ Earle K. Moore, Hearing Transcript 302 (5/1/67), in FCC Docket 16663.
(c) Whether [it] has acted in good faith with respect to presentation of programs dealing with the issue of racial discrimination, and particularly, whether it has misrepresented to the public or the Commission with respect to the presentation of such programming; and

(d) Whether in light of all the evidence a grant of the application for renewal of license of station WLBT would serve the public interest, convenience or necessity.6

This designation shaped the topics that the witnesses could discuss.

**Civil Rights versus Regulatory Requirements**

Despite this designation, the WLBT hearing reflected a serious tension about what was really at issue in the proceeding. The intervenors and their witnesses viewed the issue as one of civil rights. A statement issued by the UCC stated that “[o]ur sole purpose is to assure fair treatment for the Negro,”7 and during oral argument at the Commission, UCC attorney Moore placed the case in the context of civil rights:

> It is incongruous to us that a Federal licensee should be permitted not only to ignore the rule of Brown . . . which requires an absence of segregation, but shouldn’t even comply with the rule of Plessy . . . which required separate but equal facilities.8

The FCC rejected the classification of the case as a civil rights matter. The hearing examiner repeatedly stated that “this is not a forum for civil rights.”9

The intervenors could not turn the proceeding into something it was not. Yet their testimony emphasized the problems of civil rights. A critical piece of the UCC’s evidence was its monitoring study designed to demonstrate the

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7 Statement of the Office of Communications of the United Church of Christ (c. 5/17/67), in FCC Docket 16663.
8 Earle K. Moore, Oral Argument Transcript 1713, in FCC Docket 16663.

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discriminatory nature of WLBT's programming. Everett Parker and the monitoring supervisor testified about the methodology used to assess the content of programming on WLBT. The monitors used forms that classified programs into the following categories: news, entertainment, religion, public affairs, information, education, and children’s. In addition, they had a race sheet where they noted programs that dealt with race relations.

Local civil rights activists also testified. As political outsiders in Jackson, Mississippi, where WLBT's station was located, they felt denied access to the airwaves, and they viewed their participation in the hearing as part of their search for "respect and dignity."\(^9\) Charles Evers, the State Field Director for the NAACP, complained about one of the WLBT newscasters: "we had a beef... because [he] had an arrogant distorting attitude toward the progress of Negroes."\(^10\) He complained that the newscaster repeatedly used the term "nigger" over the airwaves. He painted a portrait of a segregationist station:

I noticed on the station practically every prominent racist who came through the state would somehow be able to get on and voice his opinion about the progress or his dissatisfaction with the civil rights movement. I called [WLBT] and asked if Dr. [Ralph] Bunche could be permitted to be interviewed. . . . He was not permitted to be interviewed. Jackie Robinson came down for our state conference and I called or wrote a letter and asked that he be interviewed and he was not interviewed.

I also asked that Bill Russell be interviewed when he came. . . . they informed me that Mr. Russell was not down as an athlete, that he was down more or less as a civil righter and they didn't feel they should give him any time to be interviewed because of his civil rights activities because he was down to participate in civil rights and not as an athlete.\(^11\)

\(^9\) Hearing Examiner, Hearing Transcript 448 (5/1/67), in FCC Docket 16663.
\(^10\) Classen, Broadcast Law and Segregation, at 101.
\(^12\) Charles Evers, Hearing Transcript 1478-79, in FCC Docket 16663.
Evers went as far as to blame WLBT in part for his brother’s death: "I personally feel this is part of the hate that was built up through this particular station at this time that may possibly have contributed to the death of my brother."\(^\text{13}\)

Other local witnesses testified that a WLBT news commentator failed to use courtesy titles such as “Mr.” and “Mrs.” when speaking about African Americans in the community. William Hodding Carter III, a pro-civil rights newspaper editor from Mississippi, testified that he had never seen any religious programming that included African-Americans. Similarly, he had observed that several children’s shows, including Romper Room, included no African-American children.

Reverend Robert L.T. Smith and Aaron Henry testified about difficulties they had purchasing time for political broadcasts from WLBT when running for office. Reverend R. Edwin King of Tougaloo College testified that WLBT’s general manager had received an award from the white citizens’ council for “outstanding work in preserving racial segregation and fighting integration.”\(^\text{14}\) King also testified that Channel 3 had unfairly characterized him as the leaders of a riot, which “caused me great difficulty in trying to work with the White community in Mississippi.”\(^\text{15}\)

The public intervenors were affected by the fact that their case developed in the context of the civil rights struggle.\(^\text{16}\) Everett Parker had solicited local monitors from the community of Jackson, but promised them confidentiality. As UCC

\(^{13}\) Id. at 1497.
\(^{14}\) Lamar Life Insurance, 14 F.C.C.2d 495, 521 (1967).
\(^{15}\) Robert L.T. Smith, Hearing Transcript 719, in FCC Docket 16663.
\(^{16}\) See also Classen, Broadcast Law and Segregation, at 92-93 (concern about obtaining testimony from Jackson witnesses).
attorney Moore explained: “the names of the individual monitors are not relevant” and “we have morally committed ourselves not to disclose [their] names . . ., because of the fear, on their part, that harassment would result if their identities became known.\footnote{17}{Everett C. Parker, Hearing Transcript 129, in FCC Docket 16663.} The hearing examiner, however, had no sympathy for these claims: “there’s not going to be anything like that. He’s going to give us the names of those monitors. . . . I want them in the record . . . . I want to know who they are.”\footnote{18}{Id.} On this point, however, the opposing counsel agreed to permit the monitoring evidence without testimony by the individual monitors.

To the public intervenors, the case against WLBT was all about the battle between civil rights activists and segregationists. For the FCC, the question was whether or not WLBT had committed particular violations that would suggest that it would not broadcast in the public interest in the future.

The Question of Evidence

The rules of evidence conflicted with the UCC’s attempts to use the proceedings as a vehicle for minority empowerment. Although rules of evidence in an administrative proceeding are less formal than in a criminal trial (or even a civil jury trial), the citizen witnesses found the rules unfamiliar and intimidating. One allegation in the case involved the use of a “Sorry, Cable Trouble” sign during a network television interview with Thurgood Marshall. Local civil rights activists in

\footnote{17}{Everett C. Parker, Hearing Transcript 129, in FCC Docket 16663.}
\footnote{18}{Id.}
Mississippi were confident that WLBT had deliberately blocked the program and such a practice was common in the South:

when a person speaks out against the oppression of the Negro in Mississippi [on network programming], he is often very conveniently interrupted. If such a presentation is not canceled, there are so many interruptions during it that one is forced to guess what the presentation was about. 19

The hearing examiner, however, described the allegations that Fred Beard, WLBT station manager, had deliberately blocked the interview as "double hearsay." 20 He concluded that the story was a "myth," because the intervenors relied only on a newspaper article quoting the station manager as saying that he deliberately blocked the interview, and no additional evidence was put forward. 21 This conclusion was ironic in light of the fact that the Federal Communications Commission also had a letter on file from WLBT's station manager admitting that Marshall's television appearance had not been broadcast

as it has been our policy not to permit local or network propaganda on either side to be broadcast or telecast, Thurgood Marshall's interview on the NBC-TV program, "HOME," was not telecast. If it had been telecast then we would have been obligated to make equal time available to the other side. 22

In spite of the existence of this document, however, the hearing examiner concluded that the intervenors had failed to put forward sufficient proof that the station had not broadcast the Thurgood Marshall interview.

Similarly, the Commission found that the intervenors had failed to demonstrate that WLBT had violated the Fairness Doctrine when it broadcast a

19 Quoted in Classen at 97. See also id. at 98 (citing testimony that "there seems to have been a policy of blocking out most programs that dealt with Negroes in their struggle for civil rights.").
21 Id.
22 Letter from Fred Beard to Mary Jane Morris (12/8/55), in NAACP Papers, Group III-A, Box 265.
program on the Little Rock school desegregation crisis. WLBT had broadcast a program featuring the Governor of Mississippi, J.P. Coleman, Senator James O. Eastland, Congressman John Bell Williams and other panelists. The public intervenors alleged that the forum was an unbalanced endorsement of segregation, while the station alleged that it was a "report to the people by elected public officials." The Commission found that

the record is devoid of any evidence as to the content of the program, other than the unsubstantiated allegation that it discussed the maintenance of segregation. The hearing examiner and the Commission insisted on concrete facts rather than impressionistic testimony. They excluded material deemed irrelevant or immaterial. In the end, they were judges of materiality, not the witnesses themselves.

**The Nature of the Proceeding**

A third obstacle to minority empowerment was the adversarial nature of the proceeding. The UCC's witnesses did not thrive in a combative environment. One witness complained that the opposing attorneys were trying to portray her as a liar. Other witnesses seemed disappointed that their testimony was constantly challenged, and that the opposing attorneys attempted to undermine their credibility. FCC staff attorneys contributed to the adversarial environment, as they challenged rather than supported the testimony of the public interest intervenors.

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24 Id.
25 For examples, see Classen, Broadcast Law and Segregation.
26 Id. at 112.

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A Disempowering Experience with the Hearing Examiner

In theory, a hearing examiner conducts a neutral proceeding, not favoring any of the parties. Yet the WLBT hearing examiner led the intervenors to doubt his objectivity. At least one witness felt that the hearing examiner had already decided the outcome of the case and therefore, that no one was even listening to the intervenors’ testimony.\(^27\) The public intervenors perceived that the hearing examiner treated their witnesses more roughly than the WLBT witnesses.\(^28\)

The hearing examiner revealed his impatience with the intervenors in his initial decision, which the Commission would adopt in large part. He emphasized that the UCC and many of its witnesses were outsiders to Jackson. For example, he complained that one woman from New York who worked on the monitoring studies was “making the determination in her opinion of what would be of interest to the Negro community in Jackson without being familiar with the city.”\(^29\) He noted that the “intervenors produced only six witnesses from Jackson.”\(^30\) Aaron Henry “admitted that station WLBT did not serve Clarksdale, his hometown”,\(^31\) and other witnesses, such as Charles Evers, did not live in the WLBT service area.

The hearing examiner complained that the UCC’s “so-called” monitoring study took up two days of evidentiary hearings, but had “little, if any, probative

\(^{27}\) Classen, Broadcast Law and Segregation, at 169.
\(^{28}\) For example, he said in regard to an intervenor witness “I think he had better specify the broadcast, the hour, and who was making the broadcast. If he remembers having seen it, he certainly ought to remember who was a giving it.” In contrast, he said the following regarding a WLBT witness: “I am disturbed about asking the witness this type of questions [sic] when he...has not had access to these records for some [time] and asking him when he made certain broadcasts...” Quoted in Lamar Life Broadcasting Co., 14 F.C.C.2d 431, 470 n.37 (Cox and Johnson, dissenting).
\(^{29}\) Lamar Life Insurance, Co., 14 F.C.C.2d 495, 504.
\(^{30}\) Id. at 540.
value." He found that the classifications used by the UCC "did not correspond with those of the Commission and have doubtful value." The study was "worthless," and the UCC's allegations "unsupported."

In contrast, the hearing examiner's opinion favored WLBT. He minimized the conflicts between the intervenor witnesses and station manager Fred Beard as "personal differences" that were minor compared to the station's overall record of balanced programming. The examiner relied on Fred Beard's description of the Citizens Council as a "moderate segregational group" that had worked to reduce civil rights violence. He credited the station's creation of a "Community Leader Advisory Group" and testimony about meetings between the station and community leaders. He relied upon the station's policy statement, which promised to bring public issues to the attention of its viewers in a balanced way and to contribute to "a unified and well-informed community." The opinion's appendices included documents submitted by WLBT, but included none supporting the UCC's position.

The hearing examiner concluded, based on his reading of the evidence, that a full, unconditional renewal of WLBT's license would be appropriate. In doing so, he refused to recognize any value that the public participants had brought to the administrative process.

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31 Id. at 502.
32 Id. at 504, 543.
33 Id. at 502.
34 Id. at 543.
35 Id.
36 Id. at 548.
37 Id. at 507.
38 Id. at 553 (App. E).
Assistance to the Commission: FCC Decision

The Commission adopted the examiner's decision almost in its entirety. However, it expressed less enthusiasm toward WLBT than did the hearing examiner, finding that the licensee's history of Fairness Doctrine compliance was less than exemplary. It found a single instance of fairness doctrine violation: during 1962, the Jackson Citizens Council purchased spot announcements urging support of the Council and asserting that Communists were behind the racial agitation in Mississippi, and the station had not presented an opposing viewpoint. However, the Commission held that one violation was insufficient for license revocation.

The opinion concluded that African-American participation in WLBT's local programming from 1961 to 1964 had been quite limited. However, the Commission found that WLBT had improved this factor since 1964. In the end, the Commission agreed with the hearing examiner that the intervenors had failed to prove their case. It concluded that WLBT had "consistently afforded the right of expression over its facilities to persons of contrasting views" and there was no evidence that WLBT had failed to act in good faith in presenting racially-related programming.

The Commission recognized the contribution of the UCC and thanked it for its efforts:

we sincerely appreciate the strenuous efforts exerted by the United Church of Christ and the other intervenors to ascertain the nature of the programming of WLBT and to bring it to our attention. They have performed a valuable public service, and they can be sure that the recent marked improvement in WLBT's local programming which this record discloses is due in no small part to their efforts.

40 Id. at 433.
41 Id. at 438.
In the end, however, the Commission’s “thank you” was all the UCC received from the Commission, which renewed WLBT’s license for a full three years, a decision even more generous than its 1965 one-year renewal.

Dissenting Commissioners Cox and Johnson thought that the Commission’s “thank you” was not enough. In their 70-page dissent, they complained that the Commission had merely “rubber-stamped” the renewal with “all-out indifference.” They complained that “[w]hat was once an unfortunate—though understandable and corrigeable—attempt by the agency to ease its administrative chores has now become a discredit to the administrative process.” According to Cox and Johnson, the Commission decision stood as an “obstruction to participatory democracy” and “the efforts of American government to establish confidence among Negro and other citizens who have been victimized by discrimination.” In particular, the dissent accused the majority of “recast[ing] procedural standards to favor the renewal applicant,” and of disregarding and misreading the evidence in the case. The dissent said the case was “a classic caricature of the FCC at its worst.” It was so bad that “[e]ven Kafka would blanche at this vignette of bureaucratic justice.”

The dissent criticized the majority for their “positive efforts to prevent public participation . . . at any cost” and noted that the majority’s “obstruction and procedural harassment” could only “discourage and defeat citizen intruders so bold

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42 Id. at 443 (Cox and Johnson, dissenting).
43 Id. at 443–44.
44 Id. at 444.
45 Id.
46 Id. at 453.
as to venture to exercise rights guaranteed to them by law."

After the majority's decision, said the dissent, it was clear that "the only way in which members of the public can prevent renewal of an unworthy station's license is to steal the document from the wall of the station's study in the dead of night." The dissent warned that the majority's decision would "give rise to renewed attacks upon the agency."

The dissent agreed with the majority that the best solution was for matters to be worked out in a local community. Cox and Johnson stated that they would "prefer meaningful local participation . . . to decisions by seven FCC Commissioners." They emphasized, however, the need for "meaningful" participation, which required the FCC to take affirmative steps to encourage public participation so that the public would know of its rights and how to exercise them.

The dissent did not convince the majority to change its mind, however. Instead it provoked the Commissioners in the majority to take a firmer stand in favor of WLBT, and further statements were issued in the case. Chairman Hyde, along with Commissioners Lee and Wadsworth, accused the dissent of "inaccuracies, errors, and misinterpretations." They wrote that "[t]he more we study the voluminous record in this case, the greater our certainty and conviction of the propriety of our conclusion." They concluded that to deny license renewal would be "a gross miscarriage of justice and an abuse of agency

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47 Id. at 467.
48 Id. at 467.
49 Id. at 463.
50 Id. at 466.
51 Id. at 484 (Further Statement of Hyde et al). See also id. (Statement by Commissioner Robert T. Bartley) (referring to the dissents "vituperations and self-serving characterizations").
52 Id.
discretion." This heated battle between the Commissioners set the stage for a second appeal to the D.C. Circuit.

The UCC and other intervenors clearly had offered assistance to the Commission. They drew attention to a particular licensee that was perceived to be deficient. They gathered data and witnesses to present to the Commission, and they made legal arguments as to why WLBT was not serving the public interest. Although the data was not perfect and the witnesses not always precise, the Commission was clearly more informed than it otherwise would have been. The Commission's lack of resources and lack of enthusiasm for investigation and prosecution left the Commission typically unable to build very many strong cases; public participation created the possibility for more rigorous regulatory enforcement. However, a majority of Commissioners, in fact, did not want this type of regulatory assistance.

After the FCC issued its decision, Rev. Everett Parker issued a press release. He expressed disappointment in the results of "four long and wearying years." He reluctantly announced the need for an appeal:

[W]e do not look forward to continued litigation. But there is no choice left open to us in conscience. Thus, the Office of Communications of the UCC filed a second appeal to the D.C. Circuit.

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53 Id.
55 Id.
Assistance to the Court: Facilitating Substantive Review

The UCC's appeal to the D.C. Circuit facilitated court review of a renewal grant, an action that, prior to citizen standing, would have gone unreviewed. Chief Judge Warren Burger wrote the 1969 United Church of Christ v. FCC (UCC II) as his last decision before he was elevated to the Supreme Court. Burger's opinion in UCC II expressed "profound concern" about the Commission. It criticized the Commission for its hostility toward the public intervenors and the hearing examiner for his "impatience" with the intervenors. It criticized the hearing examiner's "curious neutrality-in-favor-of the licensee."

The court refused to allow the FCC to relinquish its role as prosecutor. It concluded that the Commission had incorrectly placed the burden of proof on the intervenors. It made clear that the UCC bore only the burden of producing evidence, not the ultimate burden of proof. The public intervenor was to be treated as

a complaining witness who presents evidence to police or a prosecutor whose duty it is to conduct an affirmative and objective investigation of all the facts and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred.

The Commission was not to just "sit back and simply provide a forum for the intervenors," but had duties that began when the UCC had intervened. The Commission was to act as an "ally" for the intervenors.

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57 Id. at 548.
58 Id. at 547.
59 Id. at 546.
60 Id.
The court concluded that the Commission had not met the standard of review, which required that the Commission's decision be supported by substantial evidence on the record as a whole. Typically where a hearing examiner and the Commission agreed on the evidence, as they did in *UCC II*, the court would accept those evidentiary findings and simply assess the application of the law by the Commission. Here, however, the court's suspicion toward the Commission compelled it to delve into the Commission record carefully. Several factors likely led the court in this direction. First, the majority and the dissent at the Commission level had argued vehemently over the meaning of the evidence, and the dissent called to the court's attention possible problems in the majority's reading of the evidence. Second, the court likely felt that public participants were vulnerable in the administrative process and sought to buttress their participation with substantive review in order to ensure effective participation.

The court took a hard look at the evidence itself. On its own motion, it requested a copy of the record. It rejected the hearing examiner's conclusion that the monitoring study was "worthless." The court criticized the examiner for disregarding evidence in assessing whether WLBT had committed Fairness Doctrine violations, and it quoted directly from the record to demonstrate the examiner's unfairness. It criticized the examiner for "belitt[ing]" intervenor testimony. It also faulted the Commission for failing to consider its earlier 1965 memorandum, which contained condemnatory language about WLBT. Thus, the court overturned the Commission's decision.

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61 Id. at 549.
The court took an additional unusual step that characterized its activist mood and its anger at the Commission. The usual response a flawed renewal hearing would have been to issue a remand for further proceedings on the renewal with the assumption that the FCC would hold another hearing on the question of whether WLBT would act in the public interest in the future. The court recognized, however, that this usual response would lead to further delay, which would simply benefit WLBT, as the station would continue to hold a license in the interim. Thus, the court boldly ordered the FCC to strip WLBT of its license and to begin a new competitive application process for Channel 3 in Jackson. WLBT would not have another chance to defend its license.

Not surprisingly, WLBT was very unhappy about this outcome, and it petitioned for the full D.C. Circuit to hear the case en banc. The court denied this request. However, Judges McGowan and Tamm, who had served on the panel with Chief Judge Burger, took en banc determination as an opportunity to reiterate their support for the decision. They conceded that the opinion reflected "some impatience" with the Commission, but remained committed to revoking WLBT's license:

It is doubtful if Congress intended that a licensee should be able to remain in possession [of a license] indefinitely merely because the Commission proves unable or unwilling to conduct proceedings which will survive judicial scrutiny.\(^{63}\)

These judges viewed their role not merely as protecting due process rights of station owners, but as general monitors of agency behavior.

\(^{62}\) Id. at 548.
\(^{63}\) Id. at 551.
The UCC’s challenge to WLBT led to the rare action of a revoked license. Even more novel was the court’s role in mandating agency action. The court’s careful substantive analysis and its strong oversight over the Commission combined with public participation to create an entirely new regulatory environment.

**Reaction to UCC II**

The general legal literature did not pay UCC II as much attention as UCC I. It was not a landmark case, as it put forward no new legal principles. The outcome of the case would have attracted a lot of attention from the broadcast community. However, the effect of the decision was dulled by earlier decisions that had already put fear into the hearts of broadcasters. By the time of the D.C. Circuit’s decision in UCC II, the Commission had denied renewal to Boston station WHDH and awarded the license instead to a competing applicant.\(^{64}\) Professor Louis Jaffe described the WHDH decision as a “desperate and spasmodic lurch toward ‘the left’,\(^ {65}\) and Broadcasting magazine went wild in its opposition to the WHDH decision. As Krasnow et al. have chronicled, the decision spurred “widespread controversy” and triggered a long political struggle over the competitive renewal process, and the security of broadcast licenses more broadly.\(^ {66}\)

The WHDH decision involved a competitive renewal rather than a challenge by public participants. However, the connection to the UCC cases was expressed

\(^{64}\) See Krasnow et al., Politics of Broadcast Regulation, at 206 et seq.

\(^{65}\) Louis Jaffe, WHDH: The FCC and Broadcast License Renewals, 82 Harv. L. Rev. 1693, 1700 (1969).

\(^{66}\) Krasnow et al., Politics of Broadcast Regulation, at 209.
by Commissioner Nicholas Johnson, who announced in his concurring opinion in the case that

[t]he door is thus opened for local citizens to challenge media giants in their local community at renewal time with some hope for success before the licensing agency where previously the only response had been a blind affirmation of the present license holder.\textsuperscript{67}

The \textit{WHDH} decision increased the number of petitions to deny filed.\textsuperscript{68} The \textit{UCC II} decision, thus, added fuel to a fire that was already burning.

The effect of \textit{UCC II} was also dulled by the Supreme Court's decision in \textit{Red Lion}, decided less than 2 weeks before \textit{UCC II}. In \textit{Red Lion}, the Supreme Court upheld, for the first time, the Commission's personal attack rules and Fairness Doctrine as constitutional, rebuffing industry arguments that the policies violated the First Amendment of the U.S. Constitution.\textsuperscript{69} Had \textit{Red Lion} not been decided, \textit{UCC II} would likely have provided an alternative vehicle for the Court's consideration of the constitutionality of the Fairness Doctrine.

\textbf{Reassigning the WLBT License: Another Lengthy Proceeding}

The litigation over the WLBT license would continue for another eleven years. Pursuant to the D.C. Circuit's order, the FCC revoked the license of WLBT. In terms of achieving social change in Jackson, however, the revocation was only the beginning. The FCC could have let Channel 3 "go dark," but such an action would have left Jackson viewers with only one TV station and would

\textsuperscript{67} WHDH, Inc., 16 F.C.C.2d 1, 28 (1969) (Johnson, concurring).
\textsuperscript{69} For further discussion of \textit{Red Lion}, see Ch. 14, infra.
have left the station's capital unutilized. Instead the Commission allowed the
existing owners to continue to operate WLBT until an interim operator was
chosen. The interim operator, Communications Improvement Inc., a non-profit
organization, began operating in 1971 and continued for almost 10 years.70

Meanwhile, the FCC considered applicants for WLBT's license. Had there
been only one applicant, that applicant would have been awarded the station.
However, VHF television licenses are valuable, and so, not surprisingly, more than
one competitor sought the WLBT license. Thus the FCC had to schedule a
comparative hearing on the license. Holding a comparative license hearing is
hardly the quickest route to social change. The public interest rationale behind the
Commission's long-standing practice of holding comparative hearings was that
applicants would compete by demonstrating their commitment to the public interest,
and the Commission would choose the best-qualified applicant that put forward the
most evidence that it would best serve the public interest.71

Yet scholars familiar with the FCC had been complaining about the
comparative hearing process for years. Judge Henry Friendly, for example,
criticized the FCC for failing to develop coherent standards for choosing between
applicants, a concern expressed by others as well.72 Yale law professor Charles

70 For details on the interim operations, see Civic Communications Corporation v. FCC, 462
F.2d 309 (D. C. Cir. 1972).
71 Legally, these hearings were required by the Supreme Court's decision in Ashbacker
72 Henry Friendly, The Federal Administrative Agencies: The Need for Better Definition of
Standards 53-73 (1962). On the comparative process generally, see Stephen G. Breyer et al,
Reich, an advocate of hearings for people dependent on social service programs, found that the FCC’s comparative hearing process was horrible:

The hearings drag on and on, with almost every conceivable type of evidence admitted, until a vast record has been built up. Sometimes the record will run to thousands of pages. A comparative hearing in a television case might last for one hundred hearing days. In addition, there are all sorts of procedural delays, so that a case may take months or years to reach a conclusion.73

Thus the process of selecting a new applicant for WLBT was not an easy one.

As scholars would have predicted, the Channel 3 selection process took a long time.

The delay had the effect of keeping the license in non-commercial hands for almost ten years. The interim operator was run by a bi-racial board of 18 prominent citizens. Although the station was reported to be a “fairly typical NBC affiliate carrying the standard commercial fare,” there were “hints of unorthodoxy” in the local programming.74 The station was run by the then only black general manager in American television, William H. Dilday, Jr.75 About forty percent of the station’s staff were black. The station increased its audience share and annual profits over and above what Lamar Broadcasting had achieved, and these profits were donated to educational projects benefitting black residents of the state.76

The administrative law judge (“ALJ”) assigned to the hearing made an initial decision in 1973 proposing to assign the license to Dixie National Broadcasting Corp., which had only four percent black ownership. The license assignment was

75 Id.
never made, however, because one of the principals of Dixie National was convicted of forgery in a $40 million stock swindle. Another applicant was effectively disqualified after one of its principals, Charles Evers, revealed in his biography that he had previously engaged in illegal activities.\footnote{77}

Not until 1979 did the FCC assign the license, and it never did choose between the remaining applicants. As the FCC's Chief ALJ Ehrig stated, "it was a case crying out to be settled,"\footnote{78} and it ultimately did settle. The applicants remaining in 1979 agreed that some would drop out and have their expenses reimbursed (a practice typical in comparative hearings), while the remaining applicants would join together as a single applicant called TV-3, thereby eliminating the need for the FCC to choose between applicants. The UCC and the Community Coalition for Better Broadcasting in Jackson argued against this merger because they believed that one of the stockholders was a segregationist, and they complained that the percentage of minority ownership was too low. Their petitions were unsuccessful, and Ehrig approved the TV-3 agreement.

TV-3 took over as licensee on February 1, 1980, eleven years after the D.C. Circuit took away Lamar's license. TV-3 was a 51% black-owned corporation headed by Aaron Henry, one of the petitioners in the original WLBT case. The station's value at the time was around $18 million. After paying just over $3 million

\footnote{77} Id.
\footnote{78} Lone Ehrig: The Lady is the FCC's top ALJ, Broadcasting (5/12/80), in WLBT Station Clipping File, Library of American Broadcasting.
for the station equipment, plus legal fees, TV-3 made a hefty profit in obtaining the license.\textsuperscript{79}

In 1984 the station was sold to a new company, the Texas-based Civic Communications Corporation. The new corporation claimed minority ownership over 50%, again including Aaron Henry among its owners and directors. The station remained a political target, however. The Coalition for Better Broadcasting complained that these minority ownership claims were a sham, and that the corporation was in fact white-controlled. Jackson activists started a boycott of WLBT, and they ousted Henry from his position as a Mississippi member of the Democratic National Committee because of his involvement with the Texas company.\textsuperscript{80} The station angered some Jackson locals for firing the station’s anchor and general manager, and it became involved in labor disputes that led to a citation for unfair labor practices from the NLRB.

In 1986, the station changed hands again. The new group included Aaron Henry, Frank Melton (who had taken over as the station manager under Civic Communications), and other businessmen. They purchased Civic Communications and claimed 95% black ownership. These repeated transfers of ownership demonstrate that even if the courts or the FCC make a determination about who they think will best operate a station in the public interest, subsequent transfers can quickly alter the status established by the regulatory apparatus.

\textsuperscript{79} Case Closes After Eleven Years, Broadcasting (2/18/80), in WLBT Station Clipping File, Library of American Broadcasting.

\textsuperscript{80} Blacks Boycott TV Station, New York Times A-11 (5/29/84), in WLBT Station Clipping File,
Conclusion

The failure of the 1969 WLBT hearing to provide an outlet for the empowerment of minority groups was due to the structure of administrative practice and to the attitude of the Commission and its hearing examiner. The FCC’s mission to determine the “public interest” in each license renewal case might have been compatible with providing an opportunity for open-ended discussions about the practices of station licensees and their relationship to the community. After all, one of the main complaints against the Commission was its failure to set forward precise standards for judgment.\textsuperscript{81}

However, the FCC required specific proof of particular incidents or patterns of activity that constituted violations of the Communications Act or its public interest standard. Complaints against stations had to be channeled into narrow legal categories such as Fairness Doctrine violations or misrepresentation to the Commission.\textsuperscript{82} Due process protections required a level of formality often incompatible with empowerment of witnesses more interested in presenting a narrative account of a civil rights struggle than in conforming their testimony to the rules of evidence.

An administrative forum designed to protect the economic interests of the licensees could not easily be adapted to one designed to promote minority empowerment of citizen groups through the use of procedural rights. Such an adaptation would not occur without the strong support of both the hearing examiner

\textsuperscript{81} See Henry Friendly, Federal Administrative Agencies.
\textsuperscript{82} See Classen, Broadcast Law and Segregation, at 104, 111.
and the Commission, neither of which was present in this case. The FCC was uninterested or unable to modify the administrative process to accommodate citizen groups. Rather than facilitate public participation, the FCC and its staff contributed to the negative experience of the intervenor witnesses.

*UCC II* demonstrated an important function of public participation: to assist the court in policing the decisionmaking of the Commission. Yet public participation alone was insufficient as a Commission-policing tool. The court was only able to control the agency with strict substantive review and draconian sanctions. Even then, the structure of the comparative hearing process delayed complete reallocation of WLBT's license for eleven years. In addition, the ability of licensees to easily transfer their licenses once acquired undermines the control that the Commission could exercise over the choice of station operators.
Developing a Public Interest Movement

The *United Church of Christ (UCC)* litigation had been an attempt to present a perfect social reform case to the FCC. The case presented an important political and social issue that directly related to the Commission's regulatory doctrines. The UCC's witnesses were civil rights advocates attempting to speak over hostile Southern airwaves. The UCC relied on social science evidence and pointed to specific violations of FCC law and policy. The case combined grassroots participation, national policy concerns and concerns about a lethargic agency captured by the broadcast industry. The FCC's actions in the case made the clients and their claims appear more sympathetic. The D.C. Circuit used the *UCC* litigation to demand "maximum feasible participation" at the FCC. The D.C. Circuit legitimated a model of public participation that provided the opportunity for citizen groups to influence broadcast regulation through participation and appellate review. This action encouraged further public participation and led to the development of public interest law firms specializing in broadcast reform.

Prior to the *UCC* litigation, public participants were primarily national social reform organizations, such as the American Jewish Congress and the ACLU, that participated at the Commission without outside legal assistance. In embarking on the *UCC* litigation, the UCC's Office of Communications
established a new organizational structure. Following the traditional model, the office began by representing itself in the initial UCC litigation, and it continued to do so. However, in seeking a test case in Jackson, it worked with local community groups and activists to put together a successful case.

After the initial UCC litigation, public interest organizations that specialized in broadcast reform began to develop. The UCC itself took on this role for a while, as it began to assist local groups in challenging broadcast licenses. In addition, public interest entrepreneurs established new national Washington-based public interest law firms designed to represent groups interested in broadcast reform. These lawyers worked with local groups to put together petitions-to-deny station licenses and later branched out into a range of broadcast reform work.

Foundation support was critical to the establishment of these organizations, as the client base had few resources to pay fees. In addition, the practice of asking broadcasters during settlement negotiations to reimburse the public interest groups for their legal fees helped to sustain the movement. Although foundation support declined in the late 1970s, these public interest groups became long-standing watchdogs over FCC policymaking. Through these organizations, a small number of lawyers have leveraged publicity, negotiation and court review to keep a vision of broadcast reform alive.
The UCC's Role in the Broadcast Reform Public Interest Movement

The 1966 grant of standing did not immediately spur the development of a public interest movement. The number of citizen petitions remained quite small until 1969 when WLBT's license was taken away. Between 1969 and 1973, however, there was a steady increase in citizen petitions. In 1973, 50 petitions to deny were filed against 150 stations. The lack of a more immediate response can be explained by a number of factors. First, the UCC itself played an important role in the development of the public interest movement, and its resources prior to 1969 were taken up with the core UCC cases. Second, the procedural rights granted in 1966 alone were not as enticing as the possibility of substantive results offered by the D.C. Circuit in 1969. Finally, organizational efforts required start-up time.

The UCC's Office of Communication needed funding to support its efforts. The UCC paid for the salaries of Everett Parker, other staff and overhead. Parker raised additional project funds from a range of different organizations. Initial support came from the AFL-CIO, which participated in the UCC litigation, and assisted the UCC's efforts to target "right-wing programming." After the UCC decisions, foundations supported the public interest movement. The Ford

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1 See Ch. 13, infra.
2 Joseph A. Grundfest, Citizen Participation in Broadcast Licensing before the FCC 58 (1976). This was a small fraction of the 3500 stations that renewed their licenses that year.
3 It contributed $35,000 during a two-year period in the mid-1960s.
4 Memo from M.S. Novik to President Meany (11/10/66), in Novik Papers, Box 1, Library of American Broadcasting (noting that if efforts applied to the WLBT case could be applied to a
Foundation contributed the largest sums to the citizens' movement in broadcasting. It gave $990,000 to the UCC's Office of Communications in grants designed to support "technical assistance and litigation that threatened the licenses of radio and television stations that were discriminating against minorities in programming and employment." The Field Foundation, along with an anonymous donor, contributed $85,000 to the UCC to attack extremist programming and to work on replacing it with balanced programming. The Markle Foundation also supported the broadcast reform movement.

The Office of Communication of the United Church of Christ was critical to the further development of citizen participation at the FCC. It worked with local groups, helping them to file petitions. The UCC's initial strategy, consistent with the image of public participation described by the D.C. Circuit, was to create broad-based local coalitions so that the FCC petitioners would reflect the "community as a whole," rather than narrow local interests. Thus, many of the petitioners before the FCC were coalitions of local community groups. The UCC saw as its objective to "foster change by means of consultation between

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"non-southern radio-TV station, it would scare many that are overloaded with right-wing programming.")

7 In Defense of Fairness, conducted under grants from the Field Foundation and the AFL-CIO by the Office of Communication, United Church of Christ, in Novik Papers, Box 10, Folder 8, n.d. [c. 1969].

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community leaders and station personnel."\textsuperscript{8} Citizen groups were encouraged to develop an ongoing relationship with the broadcaster that would go beyond the resolution of the instant problem.

The demand for the UCC's assistance outstripped its available funds and personnel, which required the UCC to prioritize projects. The UCC identified locations where "there was an unusually large amount of extremist propaganda being aired" or where "there were discriminatory programs against blacks,"\textsuperscript{9} and it supported projects in those locations. For example, the UCC worked with local groups to challenge KAYE in Tacoma, Washington, because "[t]he station has been openly and blatantly anti-labor, anti-black, anti-Semitic and anti-liberal. It is typical of hundreds of right-wing stations throughout the country."\textsuperscript{10} The UCC also worked with the AFL-CIO to encourage local labor councils to challenge stations that presented "extremist views."\textsuperscript{11}

\textbf{The Creation of New Public Interest Law Firms}

Initially, the public interest movement in the broadcast area took the UCC litigation as its model, but developed specialized media reform organizations comprised of public interest lawyers.\textsuperscript{12} National public interest law firms

\begin{footnotesize}
\begin{enumerate}
\item Id. at 6.
\item Id. at 7.
\item Letter from Everett C. Parker to Albert Zack (6/17/71), in Novik Papers, Box 10, Folder 8: Parker, Everett C., 1949-1971.
\item Id.
\end{enumerate}
\end{footnotesize}
represented local groups interested in improving broadcasting in their locality.

The citizen petition process reflected the joint effort of local and national groups. Local groups brought to the table particular grievances regarding broadcasters, a familiarity with the problems of the community, and an interest in the improvement of broadcasting in that community. The public interest law firms brought expertise, capacity and strategies for financing the litigation, and a reform vision of the citizen petition process. The cooperation between local and national groups was necessary to make the citizen petition process work.

The Citizens Communications Center ("CCC") was established in 1969 by Albert Kramer. Its initial funding came from the Midas International Foundation, with additional funding coming from the Stern Foundation and the Playboy Foundation. With the assistance of people at the Robert F. Kennedy Memorial Foundation, Kramer received an initial 2-year grant from the Ford Foundation of $200,000 per year. Throughout the mid-1970s, the organization continued to receive most of its $300,000 budget from the Ford Foundation. The group represented a range of clients, including civil rights groups. Its staff in the 1970s consisted of about 4-5 lawyers. By 1976, it had filed more petitions-to-den
gainst over 200 stations.

One of the CCC's "most prominent cases" was Citizens Communication Center v. FCC, in which the organization challenged an FCC policy that

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14 Citizens Communication Center, 447 F.2d 1201 (D.C. Cir. 1971).

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provided an automatic preference for incumbent broadcasters in competitive challenges.\textsuperscript{15} In this case and others, the CCC litigated on its own behalf.\textsuperscript{16} However, the CCC’s primary focus was representing other broadcast reform organizations.

The Media Access Project ("MAP") was established in 1972 by Thomas Asher.\textsuperscript{17} This organization specialized in Fairness Doctrine issues rather than petitions-to-deny. MAP started with about 3 lawyers and a budget of about $100,000, almost all from foundation sources. Asher, working with Albert Kramer, represented clients such as the Business Executives’ Move for Vietnam Peace before the Supreme Court in \textit{CBS v. DNC}.\textsuperscript{18} He and Kramer also participated in \textit{Miami Herald Pub. Co. v. Tomillo}, in which the Supreme Court rejected a mandatory right of reply for the newspaper press.\textsuperscript{19}

Andrew Jay Schwartzman has served as Executive Director MAP since June 1978. He began his interest in media reform when he was staff counsel to the Office of Communication of the United Church of Christ during the early 1970s. He has participated in Supreme Court cases such as \textit{Metro Broadcasting v. FCC}, and \textit{Denver Area Educ. Telecom. Consortium v. FCC}.\textsuperscript{20}

\textsuperscript{15} Id.; see also O’Connor & Epstein, Public Interest Law Groups, at 53; Ch. 14 infra.

\textsuperscript{16} See, e.g., WNCN and Citizens Communications Center v. FCC, 610 F.2d 838 (D.C. Cir.), reversed and remanded, FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981); see also Ch. 14, infra.

\textsuperscript{17} See generally Barry Cole and Mal Oettinger, Reluctant Regulators: The FCC and the Broadcast Audience 88 (1978).

\textsuperscript{18} CBS v. DNC, 412 U.S. 94 (1973).

\textsuperscript{19} 418 U.S. 241 (1974).

A few conservative media reform groups, such as Accuracy in Media, Inc. (AIM), emerged, but the leanings of the public interest movement were decidedly liberal or left-leaning.\textsuperscript{21} Although MAP and CCC (and its successor organization) are the most established and long-standing public interest law firms, there have been numerous other national broadcast reform advocacy groups as well, including the National Citizens Committee for Broadcasting, the Stern Community Law Firm, National Black Media Coalition, Action for Children's Television and the Center for Media Education.

\textbf{Decline of the Movement?}

The public interest movement's heavy dependence on foundation support made it vulnerable when a movement to defund the left began in the late 1970s. The broadcast reform movement was particularly hard hit when the Ford Foundation withdrew its support.

Everett Parker believed that specific broadcast industry members played a role in slowing funding:

What really griped me was the way in which foundation support . . . dried up . . . . A former official of the Ford Foundation . . . told me what may really have happened was that Paley went to Ford and said, 'Look, do I send people out to Detroit to denigrate your product? Why do you send people to denigrate me?' . . . . And, of course, Markle [Foundation funding] dried up when the CBS guy got to be president . . . . \textsuperscript{22}

\begin{footnotes}
\end{footnotes}
Despite the slowdown in funding, however, the media reform movement has never disappeared. Foundations such as the Annenberg Foundation, the Markle Foundation, and the Aspen Institute continue to support work in the broadcast reform arena. However, the focus has shifted away from citizen access to the administrative process and more toward policy development.

The movement also suffered from the inability to develop a grassroots constituency. Early efforts at energizing local groups were not sustained. Parker explains that the small size of the broadcast reform movement resulted because:

this isn’t an issue with the public in general. And if you come right down to it, you take any poll . . . and ask them [the public] how they feel about television. Well, the majority of them like it and they don’t think about how it’s denigrating them and what kind of moral value it’s putting out or anything.\(^{23}\)

In addition, a number of public interest lawyers involved in the movement departed to serve in the Carter Administration.

The public interest movement candidly admits its decline. For example, MAP states that:

Although challenges to broadcast licenses, filing of fairness doctrine complaints and advocacy for EEO rules and minority ownership were staples of the civil rights agenda from the 1950's through the 1970's, participation in telecommunications policy matters diminished greatly during the deregulatory fervor of the 1980's, and has been nearly non-existent in the 1990's.\(^{24}\)

Nonetheless, the movement continues to exist and survives.

\(^{23}\) Id. at 141.
\(^{24}\) See http://www.mediaaccess.org.
**Adaptation**

To adapt, public interest groups have expanded their missions and their efforts to include a wider range of new media. MAP remains in existence today as a non-profit, public interest law firm that "promotes the public's First Amendment right to hear and be heard on the electronic media of today and tomorrow."\(^{25}\) It has adapted its program to reflect the increasing importance of telecommunications over broadcasting: it "has led efforts to insure that broad and affordable public access is provided in the deployment of advanced telecommunications networks."\(^{26}\)

In 1981 the CCC became part of Georgetown University Law Center's Institute for Public Representation ("IPR"), and Angela Campbell continues the CCC legacy through IPR, Georgetown's clinical program. As part of IPR, the organization combines the expertise of lawyers such as Campbell with the energy of law students and graduate fellows in a clinical setting.

The organization's current approach reveals the ability of public interest groups to adapt to the development of new media while retaining the same values. Its mission reflect[s] an attempt to harness the benefits of new technologies, such as the Internet, digital television, and advanced telecommunications services, for the public. At the same time, due to the continuing importance of broadcasting, cable television, and basic telephone service, other projects

\(^{25}\) Id.

\(^{26}\) Id.
are oriented to ensuring access, limiting excessive concentrations of power, and promoting diversity. Many of the projects are concerned with ensuring adequate service for segments of the public, such as children, minorities, and people with disabilities, that have traditionally been underserved or may require special protections.\(^{27}\)

The organization's new focus on emerging media allows the organization to retain influence in an era when broadcasting has been substantially deregulated.\(^{28}\)

Campbell has represented broadcast reform organizations in briefs to the Supreme Court, in the D.C. Circuit, and at the Commission. She and Andrew Schwartzmann filed a brief on behalf of a coalition of social reform organizations, including the American Jewish Committee, in *Metro Broadcasting*, in which the Supreme Court upheld the FCC's minority ownership policies.\(^{29}\) And she and David Honig represented the Minority Media and Telecommunications Council in *Adarand v. Pena*, the Supreme Court case that struck down affirmative action in federal contracting, and substantially undermined *Metro Broadcasting*.\(^{30}\) She and other public interest lawyers remain active in trying to defend the last vestiges of the public interest model of broadcast regulation.\(^{31}\)

Over time, emphasis on the petition-to-deny has declined, and public interest law firms have become increasingly involved in major policy initiatives. Today, public interest groups have been very involved in the initiative to establish

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\(^{27}\) See http://www.law.georgetown.edu/clinics/ipp/telecom.html  
\(^{28}\) See Ch. 14, infra.  
low-power FM radio and unsuccessfully trying to block the AOL-Time Warner merger. Other activities include advocating for better treatment of children, minorities and the disabled in all of the media. Local grass-roots involvement has substantially diminished since the 1960s and 1970s.

Conclusion

The *UCC* litigation established a new institutional structure that supported the expansion of public participation at the Commission. Although various factors diminished the movement's strength, it continues to exist today through a few, small, Washington-based, public interest organizations.

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The Public Interest Movement “Settles In”

The UCC litigation was test-case litigation; the opportunities to put together such an exemplary case were rare. Repeating the original UCC litigation on a regular basis was simply impossible given the resources available for broadcast reform litigation. Extensive hearings along the lines of the UCC litigation would have quickly drained the resources of public participants. Both industry and the Commission were also opposed to numerous protracted hearings. As is typical when litigation is costly and resources are limited, settlement became an important alternative. In the broadcast licensing context, parties had incentives to avoid the administrative hearing for which the litigants in UCC had fought so hard. Ironically, citizen standing, which the D.C. Circuit and scholars envisioned would improve the regulatory process, quickly led to a new legal process largely outside the purview of the court (and often the Commission). This settlement process was part of the new institutional structure for public participation at the FCC that emerged after the UCC litigation.

Most citizen petitions never resulted in a hearing on the challenged station’s license.\(^1\) Compiling substantial data of broadcaster impropriety or malfeasance with limited information and small budgets was simply impossible from a resource standpoint. During the early 1970s, only a handful of petitions

\(^1\) Joseph A. Grundfest, Citizen Participation in Broadcast Licensing before the FCC 63 (1976). (Two petitions out of 156 led to a hearing from 1971-73).
triggered a hearing,\textsuperscript{2} and settlement became a common resolution of citizen complaints.

***Establishing Settlements: The KCMC Cases***

The *KCMC* case initiated the settlement process.\textsuperscript{3} After the grant of standing in *UCC I*, the UCC's Office of Communications encouraged local groups to take advantage of the new standing rights afforded by the D.C. Circuit. With the UCC's support, a coalition of local minority groups, including the NAACP, the Negro Community Leaders Committee, churches, fraternities and others, filed a petition to deny the license of KCMC in Texarkana. A settlement agreement was reached a few weeks before the D.C. Circuit's 1969 decision in *UCC II*. The agreement contained some broad provisions relating to the community as a whole (e.g., the station would establish a toll-free number and focus more on local public affairs). The remainder of the agreement addressed the specific problems of blacks and the poor. It provided that programs addressing controversial issues would include both black and white participants; religious programs would include ministers of all faiths and all races. The station's

\textsuperscript{2} Id. at 62. According to Thomas J. Schneyer, An Overview of Public Interest Law Activity in the Communications Field, 1977 Wisc. L. Rev. 619, 647 (1977), only one of 116 petitions disposed of by the Commission between 1970 and Sept. 1974 was designated for hearing. For an example of a case that led to a hearing designation, see WSNT, 27 F.C.C.2d 993 (1971).

\textsuperscript{3} On this case generally, see Note, The Texarkana Agreement as a Model Strategy for Citizen Participation in FCC License Renewals, 7 Harv. J. Leg. 627 (1970).
affirmative action efforts would include hiring two full time African-American reporters to appear regularly on camera. The station would avoid unnecessary references to a person's race. It would inform the poor people of their right to services. And the station committed to ongoing dialogue with these community groups through the establishment of a committee designated by the petitioners. In exchange, the citizen group would drop its complaint at the FCC.

In order for the agreement to be effective, Commission approval was required. The Commission sanctioned the agreement on the ground that the Commission “should encourage licensees to meet with community oriented groups to settle complaints of local broadcast service.” It preferred settlement over litigation and hearings, because “cooperation at the community level should prove to be more effective in improving local service than would be the imposition of strict guidelines by the Commission.”

Interestingly, the least enthusiastic Commissioner in this case was Nicholas Johnson, one of the most liberal members of the Commission and a strong supporter of public participation. While he approved of the KCMC settlement as an experiment, he was skeptical about the use of settlements in

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4 For a copy of the agreement, see KCMC, Inc., 19 F.C.C.2d 109, 120 (1969) (“Exhibit A”).
5 Id. at 109.
6 Id. The Commission did indicate that the station's license would be "carefully examined" at the end of the license term "to determine whether [the station had] made an affirmative and diligent effort to serve the needs and interests" of Texarkana. Id. at 110. However, there is no evidence that the FCC ever followed up in such a way in this or any other license renewal involving a settlement agreement.
7 Commissioner H. Rex Lee also concurred, but arguing that the Commission should carefully examine any concentration of control questions even where parties settle.
the regulatory process. According to Johnson, an effective regulatory Commission needed actively-involved public participants:

The Commission can utilize the services of volunteer local groups. Indeed, it is so woefully understaffed that any thorough review of broadcaster performance simply must depend upon an aroused and involved citizenry.\(^8\)

Settlement compromised the contribution that public participants could make to the regulatory process. Johnson believed that the Commission should not simply renew the questioned licenses just because the complaining citizens had been satisfied. The Commission should not grant license renewal "automatically because a certain group of once-protesting citizens has for some reason withdrawn its objections."\(^9\) The Commission had to pay attention to "all the people in the community."\(^10\) A settlement agreement could not excuse poor past performance by a broadcaster. According to Johnson's vision, public participation should further the public interest, not the particular interests of the petitioners. Johnson believed that excessive use of the settlement process would permit the FCC to disregard its public duty to judge the public interest. Later, Johnson confirmed his support for citizen group settlements,\(^11\) but continued to express his concern that the FCC not abdicate responsibility for regulating broadcasters to citizen groups.\(^12\)

\(^8\) Id. at 110 (1969) (Johnson, concurring).
\(^9\) Id.
\(^10\) Id.
\(^12\) Radio Station WSNT, 27 F.C.C.2d 993 (1971) (Johnson, concurring).
The FCC's first KCMC decision legitimated citizen group settlements, but the inclusion of reimbursement provisions remained controversial. The parties to the KCMC agreement adopted a subsequent agreement under which the station would reimburse the United Church of Christ for its expenses in filing the petition against the station, contingent on acceptance of the agreement by the Commission. The Commission rejected the reimbursement agreement. According to the Commission, allowing reimbursement would encourage an atmosphere of "strife and suspicion" and would discourage development of "generous cooperation" and "an effective, good faith working relationship" between citizen groups and broadcasters. Reimbursement agreements were unnecessary, according to the Commission, and they created the potential for abuse through overpayment of inflated fees and opportunistic filing of petitions to garner fees. The Commission found that the availability of monetary settlements might influence settlements on the merits of the petitions, which should be the focus for settling citizen complaints. Thus, although the Commission would encourage settlement between broadcasters and public participants, it would not approve petition-to-deny settlements that included reimbursement of expenses.

President Nixon's Chairman Dean Burch opposed the Commission decision. He agreed that there was a "very real possibility of abuse in this area" by "unscrupulous persons" seeking to extort money from broadcasters.

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13 The total amount of expenses was $15,137.11.
15 Id. at 605.
argued, however, that this risk was already present in cases where broadcasters reimbursed one another during comparative hearings, a long-standing practice that had been recognized by Congress.16 Burch called for a compromise position that permitted citizen group reimbursement, but with “strict measures to guard against such abuses.”17 Commissioner Johnson agreed with Chairman Burch, but issued his own statement stating that the decision would have “significant -- perhaps devastating -- negative effects” on citizen groups who were “private attorney generals” trying to do “what the FCC is unable or unwilling to do: improve licensee performance.”18 He complained that the Commission’s decision made it look “anti-consumer and anti-citizen.”19

Commissioner Cox also dissented, recognizing that the availability of reimbursement would determine the level of funding for public interest groups, and therefore the amount of public participation before the Commission. The denial of reimbursement would have “significant adverse implications” for public groups seeking to improve licensee performance.20 Public participation was necessary and desirable, because the Commission lacked the resources (and the inclination) to review station performance and to encourage improved service. Cox accused the majority of having an inappropriate “distaste for public

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17 KCMC, 25 F.C.C.2d at 605. His strict measures included Review Board assessment that (1) the petition had been filed in good faith by a responsible organization that raised substantial issues, (2) that the settlement entailed solid, substantial results and (3) that expenses were legitimately and prudently made. Id. at 605-06.
18 Id. at 613.
19 Id.
intervention in the renewal process” and complained that the Commission was not “really willing to encourage broad public participation” in the renewal process.\textsuperscript{21} He described the majority’s argument about abuse as “sheer rot” that was “based on anticipation of imagined abuses which have not thus far occurred.”\textsuperscript{22} Nonetheless, a majority of Commissioners refused to recognize reimbursement agreements.

With the support of the U.S. Department of Justice, the United Church of Christ appealed this decision to the D.C. Circuit. The court agreed that the Commission’s decision was an attempt to hinder public participation. The court held that the Commission must allow reimbursement in the petition-to-deny context, at least where a “public group seeking to withdraw is bona fide” and “the terms of its settlement with the local broadcaster serve the public interest.”\textsuperscript{23} The court recognized the reimbursement process as a possible funding mechanism for public participants, noting that reimbursement would further “the goal of facilitating public participation,” because it would “encourage[] the participation of groups like the [United Church of Christ] in subsequent proceedings.”\textsuperscript{24} However, reimbursement remained voluntary. The D.C. Circuit was unwilling to find that the FCC should order broadcasters to reimburse the expenses of public

\textsuperscript{20} Id. at 606.
\textsuperscript{21} Id. at 609.
\textsuperscript{22} Id. at 611.
\textsuperscript{23} United Church of Christ v. Federal Communications Commission, 465 F.2d 519, 527 (D.C. Cir. 1972).
\textsuperscript{24} Id.
participants.\textsuperscript{25} Nor would the FCC itself provide funding for public participants. Thus, reimbursement agreements became an important part of funding for the public interest movement, although foundation support comprised a more substantial portion of funding.

**Proliferation of Agreements**

Following the KCMC decision, citizen group settlements proliferated.\textsuperscript{26} Subsequent agreements built on the structure and content of the KCMC agreement, but many groups added new provisions. For example, a citizen agreement with KDFW-TV in Dallas-Fort Worth contained minority hiring goals, minority scholarships and internships, and minority programming requirements.\textsuperscript{27} Settlements began in the South, but gradually, challenges and settlements fanned out. The largest monetary settlement occurred in 1971. Capital Cities, faced with a challenge by minority groups to license transfers in Los Angeles, Fresno and Philadelphia, agreed to provide $1 million in settlement provisions. The provisions included minority programming, employment goals for blacks and

\textsuperscript{25} Turner v. FCC, 514 F.2d 1354 (D.C. Cir. 1975).
\textsuperscript{26} For the most comprehensive survey of the settlement process, see Grundfest, Citizen Participation.
Hispanics, and minority group advisory councils that would provide input on programming. Most settlements, however, involved smaller sums of money.

Settlement agreements were the predominant affirmative resolution of the citizen petition. Thus, although standing did not guarantee substantive results or trigger hearings, it did provide leverage to those who sought to participate. Most local groups chose to settle their grievances through private agreement and not wait for a hearing. They were able to do this because they had the right to participate. Thus, ironically, by creating standing and the leverage that it carries with it, the D.C. Circuit undermined its stated purpose—that of creating assistants to the regulatory process.

Citizen groups settled their cases for a variety of reasons. The FCC was slow and inefficient in processing citizen complaints. Although the FCC rejected most petitions as not requiring a hearing, broadcasters disliked uncertainty. Citizen groups and their lawyers lacked the resources to take even a small fraction of the petitions through the hearing process. National groups

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28 See Grundfest, Citizen Participation, at 43-47; see also Schneyer, An Overview of Public Interest Law Activity, at 646.
29 See generally, Richard Stewart, The Discontents of Legalism: Interest Group Relations in Administrative Regulation, 1985 Wisc. L. Rev 655, 669 ("once their power to impose delay costs is established, they can and will bargain in the shadow of the law, exchanging the right to impose delay for substantive concessions. The traditional pattern of bargaining and accommodation among regulators and the regulated will expand to include these new players.").
32 The resources of public participants were generally small, and it became difficult to "pretend[] that members of the general public have a right to be heard when in fact this right is purely mythical for all but the wealth and powerful." Hale v. FCC, 425 F.2d 556, 565 (D.C. Cir. 1970) (Tamm, J, concurring). The existence of participation was largely attributable to foundation
were strapped for resources and supported principles of local empowerment and control. Albert Kramer, a public interest lawyer, summed up the situation as follows:

Public intervenors have sought to avoid prolonged litigation by reaching informal accommodations with their local broadcasters, partly because they are generally without the resources to sustain a protracted administrative proceeding, and partly because their first priority is to increase responsiveness from the incumbent broadcasters rather than to take away his license.\(^\text{33}\)

Since the ultimate target was typically broadcasters, not the Commission itself, a direct approach may have seemed preferable. Participants also settled their cases because the FCC’s goals and the goals of the citizen groups diverged.

FCC remedies, which were punitive sanctions designed to deter bad behavior and to punish past bad behavior, were ill-suited to the claims of public participants, who were often seeking prospective relief rather than license revocation. As CBS explained

the groups do not seek license denials following evidentiary hearing so much as they seek prospective changes . . . in actual station operation. It is not surprising, therefore, that this citizen group participation frequently results in negotiations between the citizen group and the licensee.\(^\text{34}\)

In addition, the FCC could not legally redress all of the petitioners' grievances.

As the Commission explained to one citizen group:


\(^{34}\) Comments of CBS, at 2, in FCC Docket 19518.
we note that some of the matters raised in your various petitions concern questions with which the Commission cannot become involved. The Commission . . . could not legally require broadcast licensees to channel money into the black community or business firms, provide scholarships for minority group youngsters, or employ minority group members on their board of directors. Such matters are obviously extraneous to the Commission's regulatory functions and, thus, we could not lawfully impose such requirements on broadcast licensees . . . .  

Settlement provided remedies that the Commission itself could not grant.

**Settlement Incentives: An Example**

The 1976 case of New South Radio demonstrates how the divergent interests of the citizen petitioners and the Commission made it unlikely that the Commission would be a direct source for social change.  

The petitioners in the case included Alabama civil rights activists and the Civil Liberties Union of Alabama, represented by the Citizens Communications Center. In 1973 the petitioners complained that, despite the fact that blacks comprised 24% of the station's listeners, the station provided no news coverage of African Americans (except to report criminal acts allegedly committed), provided no forum for African Americans, and provided no programming featuring African Americans. They alleged that the station deliberately avoided programming for African Americans, failed to properly ascertain its community's needs (traffic control was the most pressing issue according to the station), and failed to ensure equal employment opportunities, having no blacks on its staff of nine. Finally, but more

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tangentially, the petitioners pointed to the excessive commercialism of the station, and as an after thought, complained about the commercial nature of a gardening show featuring a local garden shop. This last issue was clearly not petitioners' primary concern. 37

The petition did get the FCC's attention, and in 1975, the Commission took the unusual step of calling for a hearing. But the divergence between the concerns of the FCC and the concerns of the petitioners was immediately obvious. The petitioners complained that the station's community leader survey included only 9% blacks, significantly less than that group's percentage of the population. In contrast, the FCC found the station's survey of minorities adequate, but criticized the station for its failure to survey leaders of the agricultural community. In assessing whether the station demonstrated that its programming satisfied the needs of the community, the FCC accepted the station's assessment that "traffic control" was Tuscaloosa's most pressing community need in the early 1970s. The civil rights activists did not agree. The FCC's greatest concern about the station's practices related to the commercial nature of a garden show, which was tangential to the concerns of the petitioners.

The petitioners were probably excited that the FCC acted on their petition; they were probably less excited by the prospect of presenting testimony on station commercials and the garden show, topics that likely had little importance

37 This strategy was typical. Although a group might be primarily concerned with minority access to the media, it was strategic to point to other weaknesses in station operations in order to
to activist members of a civil liberties organization. Such an exercise would be unlikely to justify the resources required to testify. If the petitioners were victorious at the hearing, the station might be fined or lose its license, and might alter its practices in the future. But there would be no direct remedy for the petitioners' complaints about discrimination. On the other side, the station was obviously happy to avoid a hearing, so the petitioners and the station reached an agreement.

The agreement was reached within two months of the Commission's hearing designation. The agreement was similar to the KCMC agreement. The parties agreed to establish an advisory council with an African-American majority selected initially by the petitioners, that would be involved in the development of local programming and recommend program topics, formats, talent sources, and public service announcements. The station agreed to hold periodic meetings with community leaders, including black and poor people with controversial points of view, and to accept at least 80% of the council's recommendations for programming that the station believed to be in the public interest. It also set a hiring goal for African Americans of 20% of station employees. It would encourage minority enterprise and would refuse to transact with discriminatory businesses. Finally, it would pay the expenses incurred by the petitioners for the petition, which totaled $6,150.\(^{38}\)

\(^{38}\) Most of the expenses were attorneys' fees ranging from $30-50 per hour.

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The agreement was contingent on the petitioner's dropping its complaint with the FCC, and on the FCC's grant of the station's renewal application. Having agreed, both petitioners and the station argued that no hearing should be held. Attorney for the public participants, Ellen Agress argued that a hearing was unnecessary:

"My clients' position is that a lengthy and expensive [hearing] in this case might not best serve the community. It is—we're not dealing with a large radio station. And a hearing... may disrupt..."³⁹

Yet the FCC's Broadcast Bureau wished to pursue further its concern about the commercial practices of the station. Thus in 1976 the Commission declined to cancel the hearing,⁴⁰ in effect delaying the resolution of the meaningful disagreements between the petitioners and the station.

Ultimately, the Bureau satisfied itself that the station deserved renewal, the license was renewed and the agreement took effect.⁴¹ Nonetheless, the Bureau's desire to hold on to the case despite the agreement of the parties, further demonstrated the divergent concerns of the FCC and the petitioners. The FCC was concerned with violations of its regulations, and with misrepresentations to the Commission. Misrepresentation regarding commercials had placed the station's license in jeopardy. On the issues of particular concern to petitioners—that of minorities and community needs, the

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³⁹ Prehearing Conference 5 (6/20/75) in New South Radio, Docket 20463.
⁴¹ See Petitions for Special Relief of Citizens Communications Center, 70 F.C.C.2d 1672 (1978) (citing unpublished ALJ decision in the case).

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FCC's policies were too general, and left too much discretion to the station, to be helpful to petitioners. So while the FCC worried about the commercial nature of gardening advice, the private parties negotiated a settlement that addressed civil rights issues.\textsuperscript{42}

**Other Types of Agreements**

The success of minority groups in obtaining agreements encouraged other groups to try their hand. During the early 1970s, National Organization of Women (NOW) chapters, for example, embarked on negotiations with stations in a number of cities. One proposed agreement with WJBK-TV in the Detroit area reflects their aims.\textsuperscript{43} The drafter sought a wide range of employment-related provisions for women, including the hiring of a female co-anchor, a female newswoman, a female news editor, with the ultimate goal of having women hold 40\% of the non-secretarial/clerical positions.\textsuperscript{44} She also sought a feminist Program Director; twelve half-hour prime time public affairs programs on the status of women; a daily half-hour program on the problems and needs of women; a weekly five-minute news segment on the women's rights movement or

\begin{footnotes}
\item[42] The Citizens Communications Center (CCC) did not actually obtain the reimbursement funds from this settlement and others until 1979. Despite the D.C. Circuit's legitimation of reimbursement agreements in the KCMC decision, these agreements remained controversial. The IRS, however, ruled that reimbursement would jeopardize the CCC's tax-exempt status unless the reimbursement was specifically approved by the Commission, and the funds were placed in escrow. See Petitions for Special Relief of Citizens Communications Center, 70 F.C.C.2d 1672 (1978).
\item[43] Letter from Denise Hoffman to Lawrence Carino (7/12/73), in FCC Docket 19518.
\item[44] NOW also sought equality for men in the secretarial and clerical areas, where they were under represented.
\end{footnotes}
on the changing roles of women; a minimum number of seconds for public
service announcements for women's rights organizations; the elimination of
irrelevant gender humor; respectful portrayal of women's rights groups; a
women's advisory council, made up of women's rights organizations; and
participation by station management in community functions relating to feminist
issues.

WJBK-TV did not accept this agreement. Nonetheless, NOW was
successful in obtaining much of what it requested from other stations. Its
agreement with Detroit station KPRC-TV included the establishment of a
women's advisory council that could submit offensive commercials to the station
for review; increased coverage of the women's rights movement and the
problems of women, including programming on sexism in education, child care,
the legal rights of women and women in prison; efforts to use women as
interviewers; and hiring of women for three positions within 90 days. Detroit
station, WXYZ-TV, agreed (among other things) to consider sensitivity training for
its managers, to provide 90 minutes of special programming per year; to provide
public service announcements for NOW; and to establish a women's advisory
council selected by NOW.45

For another example, see Deirdre Carmody, Challenging Media Monopolies, New York Times
Magazine, 7/31/77, at 21 (When challenged by Feminists for Media Rights, Lancaster,
Pennsylvania, station agreed (among other things) to weekly half-hour programs on women's
issues, increased coverage of women's sports, more investigative reports and news stories about
women, and a $150,000 grant to establish a nonprofit women's news service).

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In many cities, different interests abounded. Some stations made multiple agreements with different organizations. Some agreements elicited a conservative backlash. The NOW agreements were attacked by conservative opponents, including groups such as Happiness of Women (HOW), StopERA, and the National Council of Catholic Women. Similarly, when sixteen leaders of the Washington, D.C. black community challenged station WMAL for failing to attend to the needs of the black community, a counter group of white citizens also challenged the station.  

Fairness Doctrine Agreements

The agreements specifically relating to fairness doctrine complaints were also made. Settlement agreements involving fairness doctrine complaints followed a similar pattern. As with pursuing a petition to deny, filing and following through with a fairness complaint against a broadcaster was expensive and time-consuming. Ford Rowan found that of the fairness doctrine complaints filed, the most seriously pursued were filed by "well-organized interest groups" seeking "to pressure broadcasters into providing access so their representatives can get on the air." And, as with the petition to deny, most of these struggles were fought in localities rather than at the national level. As Rowan explains:

Single-issue pressure groups are apparently the most frequent and successful users of the Fairness Doctrine. Small, local groups, or local chapters of national organizations, approach broadcasters for a chance to

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air their views. Local groups can easily monitor stations and ... jump when something airs ... 48

The goal of those pursuing Fairness complaints was to present their views over the air and to "speak with their own unedited voices." 49

Rowan found that the doctrine's importance was not in its impact on formal FCC processes, but rather through its informal usage. As Andrew Jay Schwartzmann explained:

It is dangerous to try and measure the success of the Fairness Doctrine by what happens at the FCC ... Most of the dealings with the Fairness Doctrine are informal, the more informal the better so that the local groups get to establish an ongoing relationship with the news people or local station. 50

Most "cases" were "settled" long before they even reached the FCC. The incentives to avoid the FCC were the same as with the petition to deny: "Nobody really wants to deal with the FCC." 51 But if they did reach the FCC, the local groups turned to national public interest law firms for assistance.

Conclusion

The UCC model of citizen standing and participation in hearings was a process that could not be replicated on a repeated basis. Neither industry nor the Commission desired extensive hearings, and public participants did not have the resources to participate in numerous hearings. Thus settlement, rather than

48 Id. at 73.
49 Id. at 74 (quoting interview with Andrew Jay Schwartzmann).
50 Quoted in id. at 72.
51 Id. at 77.
administrative proceedings, became the primary mechanism for resolving
disputes between broadcasters and local citizen groups. While the settlement
process may have increased broadcaster responsiveness to minorities within
their communities, it did not further the deliberate processes of the Commission
or the courts, as the litigation process was circumvented.
Deregulating the Participatory State

After 1969, calls for deregulation of broadcasting came swiftly. By 1979 the Commission had modified or eliminated over 800 broadcast rules.\(^1\) This “rising tide of deregulation” quickly became “a tidal wave.”\(^2\) In contrast to the deregulation of other industries, much of FCC deregulation was supported by the broadcast industry, and the Commission itself was “one of the most foremost advocates of across-the-board deregulation for the entire broadcast industry.”\(^3\) Scholars have explained deregulation as arising from new intellectual ideas, from political realignments and from changing economics and technology.\(^4\) Too little attention has been paid, however, to the connection between deregulation and the D.C. Circuit’s institution of a new administrative state, which included public participation as one of its defining elements. Deregulation of broadcasting by the FCC reflected broad intellectual currents in American politics and policymaking. However, the specifics of broadcast deregulation also reflected a response to burdens imposed by public participants and the D.C. Circuit. Public participants actively opposed deregulation, but with little long-term success.

Public participation encouraged deregulation, although largely indirectly and inadvertently. Public participation increased the costs of regulation to the broadcast industry. During the years immediately following the UCC litigation,

\[\text{\(1\) United Church of Christ v. FCC, 707 F.2d 1413, 1419 n.1 (D.C. Cir. 1983).}\]
\[\text{\(2\) Id. at 1443.}\]
\[\text{\(3\) Id.}\]
public participation brought uncertainty and imposed procedural costs on both the industry and the Commission. In addition, by appealing their cases to the D.C. Circuit, public participants encouraged activists on the D.C. Circuit to prod the Commission toward more pro-regulatory activities.

Format Changes and Station Transfers: An Example

The changing history of the Commission's policy on format changes demonstrates the challenge that public participation posed to broadcasters and the existing regulatory structure. Broadcasters had long since bought and sold their stations, a practice that required approval from the Commission for the transfer. The Commission had routinely approved these transfers with little scrutiny, although, technically, it had to make a determination that the transfer was in the public interest. One effect of station sales was that unprofitable stations that served minority listeners, e.g., classical music lovers, were sold to new owners who sought to improve the station financials by changing the format to a more popular one. Citizen groups interested in preserving particular radio formats turned to the Commission during the transfer process. The FCC preferred to retain its traditional practice of pro forma approval of transfers.\(^5\) However, citizen groups repeatedly asked the D.C. Circuit to require the FCC to consider whether the proposed format changes were in the public interest.

The D.C. Circuit repeatedly resisted the FCC's efforts to avoid consideration of format changes. It required the FCC to conduct traditional public

\(^5\) For extensive discussion of the politics of format changes, see Erwin G. Krasnow et al., The Politics of Broadcast Regulation 145 et seq. (1982).
interest inquiries, even in the case of station transfers. It held that, at least where
a particular format would become extinct in a particular city and where citizens
expressed concern through public outcry, the FCC could not disregard format
changes. The D.C. Circuit remained committed to this position throughout the
1970s. It rejected FCC arguments that market forces adequately reflected
listener preferences, and refused to recognize consideration of format changes
as an administrative burden. Instead, it continued to insist that FCC analyze
proposed programming.

The Supreme Court sat quietly while the D.C. Circuit demanded that the
FCC adhere to the traditional public interest model of decisionmaking. Following
its 1978 decision in Vermont Yankee, however, the Court stepped in. In FCC v.
WNCN Listeners Guild, the Supreme Court chastised the D.C. Circuit for
substituting its own policy preferences for those of the Commission. The Court
held that the Communications Act did not require the FCC to consider format
changes and that the FCC had acted within its discretion in concluding that
market forces would best resolve the public interest question. Kenneth Culp
Davis commented on the case as follows:

the main significant of the WNCN case may lie in the Supreme Court's
disapproval of the D.C. Circuit's substitution of its conception of "public
interest" for that of the Commission.

Broadcasting magazine agreed, delighting in the fact that the Supreme Court had
scolded the D.C. Circuit for "insinuating itself in[to] the formulation of regulatory

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7 WNCN Listeners Guild v. FCC, 610 F.2d 838 (D.C. Cir. 1979).

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policy."10 Yet, by the time the Supreme Court acted in 1978, broadcasters had already begun to advocate deregulation.

The Move Toward Deregulation

The issue of format changes presented just one instance in which industry and public participants battled over the appropriate level of judicial scrutiny over the FCC. Beginning in the early 1970s, the broadcast industry began to seek deregulation of broadcast regulations in order to decrease the power of public participants and the D.C. Circuit. In addition, the FCC itself began to endorse deregulation.11

The following types of deregulation were supported by broadcasters.12

1. changes designed to give broadcast licensees greater certainty through longer license terms and presumptions of renewal;
2. deregulation of administrative requirements such as paperwork and filing regulations;
3. deregulation of broadcast programming regulations; and
4. deregulation of structural regulations governing the economic organization of the industry.

Public participants opposed all of these forms of deregulation.13 In some cases, their opposition emerged solely from their belief that the public interest model of

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11 President Ronald Reagan's FCC Chairman Mark Fowler was the most vigorous advocate of deregulation at the Commission. His views are contained in Mark S. Fowler & Daniel L. Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207 (1982). However, President Nixon's FCC Chairman Richard "Dick" Wiley and President Carter's Chairman Ferris were also sympathetic to deregulating the broadcast industry.
13 In part, this opposition may have emerged because public participants were often "political and activist groups whose interests were served by forcing radio stations to air their messages." Noll & Owen
regulation was the most appropriate. However, in most cases, their opposition was a response to what they perceived as attacks on their ability to successfully participate in the administrative process and their ability to successfully challenge the performance of broadcast stations. They often stood alone in their opposition to the Commission's efforts to dismantle the public interest model of broadcast regulation: "Deregulation seems drastic to citizen groups, but it has gained the support of major segments of the FCC and the Congress."14 Public participants engaged in both political and legal campaigns to oppose deregulation in each of these regulatory areas.

**License Security**

The most consistent theme reflected in the demands of broadcasters for deregulation was a desire for greater license security. Broadcasters had never owned their frequencies; their licenses had always been subject to renewal and revocation. Prior to 1969, however, the FCC had rarely revoked a station license. Thus, broadcasters had grown accustomed to treating their station licenses as property. They preferred to keep it that way.

Unfortunately for broadcasters, by the late 1960s, license security had been compromised. Two significant cases in 1969 reflected the potential dangers. The FCC declined to award a license to an incumbent and chose a competitor applicant in the WHDH case, and the D.C. Circuit required the

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14 Krasnow et al., Politics of Broadcast Regulation, at 284.
Commission to not renew the license of WLBT in \textit{UCC II}. When the industry reacted so strongly to the \textit{WHDH} case, the Commission quickly tried to make clear that it had not intended to threaten the security of broadcast licenses. However, the existence of public participants combined with an activist D.C. Circuit to make broadcasters continually worried.

Broadcasters immediately began to lobby for longer license terms and for guarantees that incumbents would be favored in comparative hearings. A successful quest for longer license terms would reduce the opportunities for license challenges and for court review. It would lead to greater security and stability for broadcasters. Proposals to lengthen license terms were designed to reduce government oversight and were viewed as deregulatory initiatives. In contrast to some other forms of deregulation, however, they were not pro-competitive initiatives. Rather, broadcasters sought to reduce competition for FCC licenses and retain them in the hands of the incumbents. Broadcasters were the advocates, not opponents, of these "deregulatory" initiatives.

Contemporaries recognized the broadcasters' bid for longer license terms as a reaction, at least in part, against public participants and their values. One public interest publication observed:

\begin{quote}
[\text{The possibilities for reform through citizen activism in the licensing process are so substantial that broadcasters, with the Nixon Administration's assistance, have been pushing hard for legislative change to extend license duration to five years, and thus avoid the threat of citizen opposition to their lucrative operations every three years.}^{15}\]
\end{quote}

They also recognized the implications of longer license terms for public participants. The entire citizen petition-to-den[y] strategy was premised on frequent renewal requirements. The seriousness of the threat to public participants was clearly recognized by Albert H. Kramer, the director of the Citizens Communications Center, who left his position and spent 1974 lobbying against legislation designed to enhance certainty during license renewal.\textsuperscript{16}

The FCC could not grant longer license terms; a statutory amendment was required. It took broadcasters a long time to achieve this legislative agenda. From 1969 to 1974, various Congressmen proposed legislation that would have protected broadcasters from license challenges by lengthening the license period or providing incumbent advantages. Bills actually passed both houses of Congress, but no law was enacted because of deadlock over how long the license terms should be. In 1981, Congress did lengthen broadcast licenses from three to five years for television and from three to seven for radio.\textsuperscript{17} In 1996 Congress again lengthened license terms, this time to eight years for both media.\textsuperscript{18}

\textbf{Presumption of Renewal}

While waiting for Congress to enact longer license terms, broadcasters also sought a presumption of renewal for existing broadcast licenses. Such a presumption would enhance license security by discouraging competitive challenges and petitions-to-den[y]. It was therefore part of the broadcasters'


deregulatory program. In 1969, Senator Pastore introduced a bill requiring a two-stage hearing during the renewal process, which would have created a presumption of renewal. ¹⁹ The Commission would first make a decision whether to renew a license, and only afterwards would competitors be permitted to challenge the license. This would have effectively eliminated the comparative renewal process. Citizen groups attacked the bill in the Senate as racist (the theory being that creating a presumption of renewal and longer license terms would leave broadcasting stations in the hands of the white majority without providing opportunities for black ownership of the airwaves). The bill was not enacted.²⁰

After Congress failed to enact such a presumption, the FCC tried to implement one. The FCC wanted to make clear that the licenses of existing broadcasters were not threatened by the WHDH decision. In 1970 the Commission issued a policy statement providing that it would not consider challengers to a license unless a licensee’s performance was first determined to be inadequate. The D.C. Circuit rejected this approach in Citizens Communications Center v. FCC.²¹ The court permitted the FCC to grant existing licensees a substantial plus for superior past performance during a comparative renewal proceeding. However, it would not permit the Commission to deviate from its traditional public interest inquiry, which required consideration of all applicants and the balancing of all factors. The FCC’s continuing efforts to

²⁰ See Cole and Oettinger at 67 (they shouted “Racist! Racist!” after testimony of which they disapproved).
enhance incumbent preferences were resisted by the D.C. Circuit. In Central Florida Enterprises, Inc. v. FCC, the court again criticized the Commission for trying to create a presumption of renewal, but permitted the Commission to consider renewal expectancy as one factor in the comparative inquiry.22

Eventually, the Telecommunications Act of 1996 gave broadcasters a stronger legal presumption of renewal and also limited competitor license challenges.23 As Thomas Krattenmaker explains, the Act “grant[s] virtually perpetual licenses to all radio and television stations.”24 If the FCC wishes to deny renewal to a station, the Commission must show a pattern of abuse or a serious violation.25 This difficult burden of proof reduces the effectiveness of the public participants’ petition-to-deny.

**Streamlined Renewal**

A number of deregulatory initiatives involved reductions in administrative or paperwork burdens. Broadcasters came to criticize the extensive renewal applications that they had to file with the Commission. These applications had always created administrative burdens. After 1966, they also provided information about station performance that public participants used in their challenges to broadcast stations. In response to broadcaster complaints, the

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21 Citizens Communications Center v. FCC, 447 F.2d 1201 (1971).
22 Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37 (D.C. Cir. 1978) (renewal expectancy confined to the “likelihood” that the incumbent would prevail in a comparative hearing).
24 Krattenmaker, The Telecommunications Act, at 133.
25 Id. at 133.
FCC streamlined the renewal process by instituting a "postcard" renewal process for radio stations. Renewal applicants could simply send in a short postcard that provided answers to a few important questions. Only a select number of applicants would then be asked further questions. Public participants opposed this form of deregulation, because they believed that streamlined renewal would reduce their effectiveness.

The Commission recognized that public participants relied on station renewal applications in order to gather evidence for their petitions to deny renewal. However, the Commission devised a brilliant strategy for justifying deregulation. It argued that the new presence of public participants provided an opportunity for the FCC to alter its regulatory model. Under the FCC's rationale, the old regulatory regime involved the FCC as the primary enforcer of its regulatory policies. This regime required an extensive information transfer from the regulated to the regulator. The FCC's new regulatory model relied upon public participants to alert the Commission to violations of its rules and policies, and to notify the Commission when a station failed to program in the public interest. An ironic consequence for public participants was that they unwittingly served as a justification for deregulation, a policy they opposed.

The FCC's strategy put the public participants in the odd position of arguing that the FCC was giving them too much power. They argued that the "FCC's reliance on the public constitutes an impermissible shift of the FCC's statutory duty onto the public."26 One D.C. Circuit judge agreed:

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Reliance on public participation to ensure that most violators of the programming obligation are caught is only valid if it can be shown that the public complains about most violators. The Commission has not even attempted to make such a showing. And it is unlikely that it could do so. The high cost of participation, in time and money, exerts a strong constraining pressure on the public.\footnote{Id. at 434 (Wright, dissenting).}

Judge Bork, however, commanded a majority in permitting the FCC to reduce its regulatory programs on the rationale that public participation provided a substitute regulatory enforcement tool.\footnote{See generally, id.}

**Elimination of the Ascertainment Policy**

Another regulatory burden on the broadcaster that came under scrutiny was the Commission's ascertainment requirement. Beginning in 1960, the FCC had developed what was called an "ascertainment policy." It required broadcasters (with varying degrees of specificity) to go out into the community and talk to broadcast listeners and community leaders in order to determine the community's needs and important public issues. At its height, the policy required broadcasters to submit detailed statistical reports as well as reports of interviews between community leaders and high-level station officials. Broadcasters were then required to explain how their programming fulfilled the community needs that they had ascertained.

The ascertainment policy, like many broadcast regulations, had its silly aspects. The reality of ascertainment was that broadcasters did the required surveys and then stuck them in a drawer, relying instead on ratings to determine what to put on the air. However, ascertainment played an important role to public
participants. Ascertainment was a regulatory requirement that public participants could use in challenging the station license through the petition-to-deny process. Public participants challenged stations on grounds that important people had been excluded from the interviews, that the station inaccurately assessed the important issues facing the community, and that the station failed to provide programming responsive to the concerns of the community. Public participants had pushed the FCC to make the ascertainment policy more strict and more detailed, and they had used the ascertainment studies in challenging licenses. In doing so, they converted the typical “paperwork headache” into a more serious burden.

Broadcasters found the ascertainment requirements to be an inconvenience. The ascertainment requirements became more burdensome when combined with public participants and their petitions-to-deny. Broadcasters attempted to eliminate the FCC’s ascertainment requirements not only because they were administratively burdensome, but also because they provided information and leverage to public participants.

Broadcasters succeeded in convincing the FCC to scale down the ascertainment requirements. The FCC eliminated the requirements of interviews and statistical studies, again relying on the efforts of public participants to justify deregulation. The FCC’s decision was reviewed in another case entitled United Church of Christ v. FCC. This case, which involved the reduction of ascertainment requirements for radio, drew an impressive roster of public
participants who opposed this deregulation. Earle K. Moore of the original UCC litigation represented the UCC, along with Andrew Jay Schwartzmann, who later became the head of the Media Access Project. Henry Geller, former General Counsel for the FCC and attorney active in the public interest movement, appeared pro se. Angela Campbell, who currently runs the communications public interest group housed out of the Georgetown University Law Center, represented the NAACP. Charles M. Firestone appeared for National Citizens Committee for Broadcasting (NCCB). They argued that the Commission’s decision to eliminate ascertainment was an unexplained departure from past practices and was lacked the necessary evidentiary support. Similarly, in National Black Media Coalition (NBMC) v. FCC, the NBMC argued the FCC’s elimination of ascertainment requirements for television stations. The NBMC complained that the FCC had relied on the dubious assumption that “a significant absence of formal protest against the licensees’ [sic] meant that the goals of formal ascertainment were still being achieved.”

The D.C. Circuit upheld the FCC’s decisions to deregulate the ascertainment requirements. By the early 1980s, the D.C. Circuit’s activism had begun to wane. The court expressed some initial concerns that the FCC’s reasoning was “unscientific.” Ultimately, however, the court found that the

29 United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983).
30 National Black Media Coalition (NBMC) v. FCC, 706 F.2d 1224 (D.C. Cir. 1982) (exempting small radio and television license renewal applicants from ascertainment surveys).
31 Id. at 1227.
32 Id.; UCC v. FCC, 707 F.2d at 1413.
33 Id.
Commission had broad policy discretion and was permitted to change its policies based on past experiences.\textsuperscript{34} It accepted the Commission’s argument that market forces would encourage broadcasters to pay attention to the interests of minorities.

\textbf{Programming Logs and the Public File}

The FCC had required broadcasters to keep a “public file” at their stations so that interested citizens could learn more about the station. The public file contained various information. The component most helpful to public participants were programming logs indicating the programs that had been shown on the air. Public participants used the programming logs to help determine whether the broadcaster was conforming to the Commission’s programming requirements, and to determine whether the broadcaster was meeting the community needs as assessed during the ascertainment process.

As part of its deregulatory initiatives, the Commission proposed to reduce the contents of the public file by eliminating the program log requirement. Rather, broadcasters could comply by listing sample programs that addressed important community issues. Public participants complained that the elimination of program logs would hinder their ability to assess a station’s overall program balance without monitoring the station for a period of time.

\textsuperscript{34} See UCC v. FCC, 707 F.2d at 1436.
Again, the FCC relied on the role of public participants in the process to justify the reduction in ascertainment requirements. As we saw in the ascertainment area, the D.C. Circuit was largely sympathetic to the FCC's attempts to reduce paperwork burdens on licensees. It accepted the FCC's arguments that public participation had rendered many of its regulations unnecessary. The court, however, used its review of the elimination of programming logs as an opportunity to remind the Commission that there were limits to deregulation.

The court made clear that the Commission's new model of regulation that relied upon public participation for enforcement had to be plausible. The court found the FCC's decision to eliminate program logs “seriously disturbing in light of” the Commission's other deregulatory policies.\(^{35}\) Here, the court agreed that the public participants had “presented a strong case that . . . the concerned citizen . . . will find the issues/programs list to be a woefully insufficient substitute for program logs.”\(^{36}\) The Commission's modification would undermine the public's right to participate in the administrative process that the court had established in *UCC*! The court criticized the Commission's “near-total reliance on petitions to deny as the means to identify licensees that are not fulfilling their public interest obligations,”\(^{37}\) while the Commission simultaneously sought to eliminate the information vital to successful public participation.

\(^{35}\) Id. at 1441.

\(^{36}\) Id.

\(^{37}\) Id.
The FCC reconsidered the programming log requirement, and again it decided to eliminate it. The D.C. Circuit again cautioned the FCC about being too enthusiastic about deregulation. It found that “the FCC’s latest effort provides only cosmetic improvements on its previous design.” 38 It reminded the Commission that “the FCC’s new faith in voluntary public participation could only function effectively if the public were assured an adequate flow of information.” 39 The court rejected as unrealistic the FCC’s contention that public participants could rely on their own station monitoring to determine which stations were failing to act in the public interest.

In the end, however, the court let the FCC scale back the programming log requirement. It accepted an escape-hatch argument that industry had provided for the FCC. During the FCC’s comment period, ABC had suggested that the FCC consider a “significant treatment” approach which required broadcasters to list programs that provided significant treatment of community issues. The court concluded that this alternative would be preferable to the FCC’s “illustrative list” approach if the Commission chose to adopt it, despite the fact that it would provide only a marginal increase in information. By 1986, the D.C. Circuit was clearly no longer interested in imposing administrative burdens on the Commission.

The FCC thereafter adopted the “significant treatment” approach and alleviated broadcasters from their duty to keep a comprehensive program log. 40 For public participants, the “significant treatment” approach was really no better

38 United Church of Christ v. FCC, 779 F.2d 702, 704 (D.C. Cir. 1985).
than the "illustrative list," because the programming logs provided detailed information that was no longer available.

In relying on public participation in the license renewal process, the Commission abandoned the old public interest model and substituted a new regulatory model that relied on public participation for successful enforcement of broadcast regulation. Ironically, public participants had unwittingly created a justification for the deregulation that they so seriously opposed. Despite the opposition of public participants, the D.C. Circuit increasingly permitted the elimination of many of the administrative burdens placed upon broadcasters. In the next category, programming deregulation, the D.C. Circuit actively encouraged deregulation.

**Programming Deregulation**

Deregulation included the elimination or scaling back of FCC regulations of broadcast programming, most notably, the Fairness Doctrine. The Fairness Doctrine had existed since 1949, yet broadcasters had not challenged its legitimacy in the courts, most likely because the doctrine was not effectively enforced by the Commission and thus posed little threat to broadcasters. A number of changes in the 1960s altered the Fairness Doctrine landscape. Until the 1960s, the Commission had only a single-sanction: license revocation, which made the Commission very reluctant to formally enforce its regulations at all. Early in the 1960s, Congress granted the Commission a fuller range of

\[39\] Id. at 705.

\[40\] See id.; Deregulation of Radio, 104 F.C.C.2d 505 (1986).
enforcement powers, which increased the chances that the Commission would take some enforcement action. In the context of the Fairness Doctrine, the Commission changed its policy from reviewing Fairness violations only at renewal time and began to consider and respond to Fairness complaints as they arose. Finally, the UCC litigation and other citizen fairness complaints made clear the effective use that citizen groups could make of the Fairness Doctrine.  

The insertion of public participants into the regulatory process created uncertainty for broadcasters as the FCC expanded and contracted these requirements. Similarly, public participants, by demanding more stringent enforcement of these doctrines, created concern about the stability of station licenses. Thus broadcasters sought the elimination of the Fairness Doctrine and other substantive regulations.

The first challenge to the Fairness Doctrine came in the 1969 case of Red Lion. The title case involved an aspect of the fairness rules called the personal attack rules. A station owned by Red Lion Broadcasting aired an attack on journalist Fred Cook. During the 1964 presidential campaign, the Democratic National Committee used Cook's request for response time as "a way to intimidate broadcasting stations from carrying [right-wing] attacks." The FCC found that Cook was entitled to a right of reply. The D.C. Circuit upheld the FCC's decision. However, broadcasters challenged the FCC's personal attack

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41 See e.g. John F. Banzhaf, III v. FCC, 405 F.2d 1082 (D.C. Cir. 1968).
rules in the Seventh Circuit and that court found that the rules violated the First Amendment.44 The two cases were consolidated for Supreme Court review.

The UCC and the NCCB, along with other social reform groups, filed amicus briefs at both the court of appeals and the U.S. Supreme Court levels. They defended the constitutionality of the Commission’s personal attack rules and fairness doctrine. Apparently, the UCC’s arguments were quite powerful, because Solicitor General Erwin N. Griswold referred the Supreme Court to their brief: "The United Church of Christ has filed a brief ... which is a very excellent brief, if the court should find our brief too long I would hope they would read that because it is a very fine presentation of our position."45

The Supreme Court upheld the personal attack rules and the fairness doctrine in the Red Lion decision. In the decision, the Court endorsed the listeners' rights approach to broadcasting: "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."46 In addition, the Court adopted a scarcity rationale to justify imposing a lesser degree of scrutiny on broadcast regulations than it typically accorded First Amendment free speech claims: "where 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

44 Radio Television News Directors Association, 400 F.2d 1002 (7th Cir. 1968).
45 In Defense of Fairness, conducted under grants from the Field Foundation and the AFL-CIO by the Office of Communication, United Church of Christ, at 12 (c. 1969), in Novik Papers.
46 Red Lion, 395 U.S. at 390.
Thus, after more than 20 years in existence, the Fairness Doctrine was upheld by the Supreme Court.

Despite the Court's decision in *Red Lion*, broadcasters increased their cries for elimination of the doctrine. As Donald Jung explains, the demands for elimination of the Fairness Doctrine were part of a "backlash" by commercial broadcasters that were "rallying against what they saw as a growing effort on the part of the courts and public-interest groups to restrict their discretion (both editorial and economic)."

**The FCC Changes Its Mind**

During the late 1960s, the FCC was enthusiastic about its Fairness Doctrine and defended it before the Court in *Red Lion v. FCC*. However, the Court's decision to uphold the doctrine combined with the development of the public interest movement in broadcasting resulted in a drastic increase in fairness complaints beginning in 1969. Henry Geller reports the following statistics regarding the filing of fairness complaints:

<table>
<thead>
<tr>
<th>Year</th>
<th>Complaints</th>
</tr>
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<tbody>
<tr>
<td>1965</td>
<td>359</td>
</tr>
<tr>
<td>1966</td>
<td>409</td>
</tr>
<tr>
<td>1969</td>
<td>1689</td>
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<tr>
<td>1970</td>
<td>1491</td>
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<tr>
<td>1971</td>
<td>1683</td>
</tr>
</tbody>
</table>

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47 Id. at 388.
Eventually, the Fairness Doctrine became part of the FCC's deregulatory program.\(^{50}\) The attempt to eliminate the Fairness Doctrine came largely from conservative quarters.\(^{51}\) However, liberals were also becoming disillusioned with the Doctrine. For example, Judge David Bazelon of the D.C. Circuit began to express concerns about the doctrine as early as 1972.\(^{52}\)

In 1984, the Supreme Court affirmed the Fairness Doctrine in *FCC v. League of Women Voters of California*.\(^{53}\) However, Justice Brennan indicated that the Court would have to reconsider the constitutionality of the Fairness Doctrine if the Commission showed that the Doctrine reduced speech rather than enhancing it. In response, the Commission reconsidered the doctrine in its 1985 Fairness Report, and concluded that the doctrine did suppress speech and that it was no longer necessary because of the increasing number of radio and television stations.\(^{54}\)

Public interest groups stood in favor of the Fairness Doctrine. A 1985 coalition supporting retention of the doctrine included, among others, the League of United Latin American citizens, the National Education Association, the League of Women Voters, the Telecommunications Research Action Center, the

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\(^{50}\) See generally, id.


\(^{54}\) See *Inquiry into Section 73.1910 (1985 Fairness Report)*, 102 F.C.C.2d 145, 146 (1985); see
Media Access Project, the American Civil Liberties Union, Black Citizens for a Fair Media, Consumers Union, the Consumer Federation of America, the National Organization for Women Legal Defense and Educational Fund, the United Auto Workers, the United Church of Christ, and the U.S. Public Interest Research Group. Many of these groups had been public participants before the Commission and had used the Fairness Doctrine in attempting to challenge station licenses and to increase the diversity of voices over the airwaves.

When the FCC declined to extend the Fairness Doctrine to a new technology, teletext, used by the newspaper industry, two public interest groups disagreed and challenged the FCC's decision by appealing to the D.C. Circuit. This case, TRAC v. FCC, provided an opportunity for the D.C. Circuit, in an opinion written by Judge Bork, to hold that the Fairness Doctrine was not required by Congressional statute. Since the Commission had created the doctrine, it could eliminate it so long as it complied with general principles of administrative law.

In 1987 the FCC took the TRAC case as an invitation to a full-scale elimination of the Fairness Doctrine. It concluded that the doctrine was no longer

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also Radio-Television News Directors Association v. FCC, 809 F.2d 860 (D.C. Cir. 1987), vacated 831 F.2d 1148 (D.C. Cir. 1987).

56 Telecommunications Research and Action Center v. Federal Communications Commission, 801 F.2d 501 (D.C. Cir. 1986). The debate over whether the Fairness Doctrine was required by statute turned on two questions: (1) whether the Fairness Doctrine was inherent in the Commission's public interest standard and (2) whether Section 315 contained implicit congressional recognition of the Fairness Doctrine. When Section 315 was amended in 1959, Congress expressed the following:

Nothing in the foregoing sentence shall be construed as relieving broadcasters . . . . from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

necessary and that it impinged upon the First Amendment rights of broadcasters. Not surprisingly, many public interest groups appealed this decision to the D.C. Circuit, arguing that the Commission should not be permitted to eliminate the doctrine. They failed in their efforts, and the D.C. Circuit upheld the decision in *Syracuse Peace Council v. FCC.*

In reaction, the Democrats who controlled Congress successfully passed bills containing the Fairness Doctrine, but Republican Presidents Reagan and Bush vetoed (or threatened to veto) these efforts. Public interest groups remain interested in reviving the Fairness Doctrine. MAP has repeatedly asked the FCC to reconsider its decision and has asked the Commission to reinstate the doctrine. Efforts to revive the Fairness Doctrine are designed, at least in part, to challenge right-wing radio commentators such as Rush Limbaugh.

**Economic Deregulation**

During the 1960s, the FCC developed a number of rules that limited how many stations one entity could control nationally and locally. The FCC also restricted the extent to which one owner could control both a newspaper and a broadcast station in the same locale. The FCC's justification for these rules and policies was to reduce the risk of monopoly power, reduce concentration in the industry, and thereby increase diversity over the airwaves. These

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57 867 F.2d 654, 660 (D.C. Cir. 1989).
requirements were designed to make stations reactive to local communities rather than national markets. Overall, these limits left some would-be buyers ineligible to purchase certain stations.

Seeking deregulation, the FCC tried to relax these restrictions to allow the market greater control over station ownership and control, arguing that monopoly concerns had been reduced through changes in the industry. Structural deregulation at the FCC consisted of eliminating various regulations that inhibited the ability of the market to determine the economic structure of the industry. This type of deregulation was most similar to the general deregulatory trend seen in other agencies and in Congress. Public participants believed that deregulating this area would reduce competition because it would permit already-large corporations to further concentrate the industry.

Public participants opposed the Commission, retaining traditional concerns about monopoly control and concentration of the industry. They argued that these problems were still real. For example, UCC, the Telecommunications Research Action Center ("TRAC"), and the League of United Latin American Citizens argued that raising of the national ownership limits for radio stations would threaten the diversity of viewpoints over the airwaves\textsuperscript{61} and would decrease opportunities for minority ownership of broadcasting facilities, because smaller operators would be unable to compete with larger conglomerates.

Public participants did not convince the FCC to abandon its deregulatory efforts. Occasionally, they were partially appeased by the inclusion of some

\textsuperscript{60} Id.
minority preference in the context of deregulation. For example, the FCC made an exception to ownership limitations for investment in minority-owned stations; national conglomerates could exceed the national limits to take non-controlling interests in minority-owned stations (and small business stations). The justification for this waiver was to provide needed capital for new (minority) entrants. 62

Public participants were unable to convince the D.C. Circuit to stop economic deregulation. As deregulation proceeded, the composition of the D.C. Circuit moved toward the right, but political affiliation was not particularly significant in this area. Even the most liberal court was not a reliable ally in the arena of economic deregulation. The more liberal D.C. Circuit was skeptical of economic deregulation but acquiesced, deferring to the Commission. The more conservative D.C. Circuit simply embraced the FCC’s approach without handwringing.

Public participants challenged the economic data provided by the industry and relied upon by the Commission. However, they were unsuccessful, because they were unable to independently produce data demonstrating either the harm of deregulation or the inaccuracy of the Commission’s data. Their lack of control over data and information substantially hampered their efforts. In one deregulation case, the court criticized the National Black Media Coalition and the NAACP for failing to submit “testimony of experts on the impact of the [p]olicy,”

62 id.; see also Amendment of § 73.3555, 100 F.C.C.2d 74 (1985) (Black Citizens for a Fair Media, the NAACP, the National Association for Better Broadcasting and TRAC, among others,
where the FCC had specifically requested information on the subject. The court expressed frustration with the one-sided nature of the data, but declined to do anything about it. Rather, it granted substantial deference to the Commission on its use of economic and statistical data and its use of predictive techniques. The court typically found that the Commission had provided substantial enough economic data to support its contention that the economic structure of broadcasting had changed.  

Despite their efforts, public participants were ineffective in the area of economic deregulation. Multiple ownership policies were high profile and high stakes. Eventually, Congress took control of the ownership issue. The 1996 Communications Act eliminated nationwide ownership limits for radio. It also increased the number of stations that could be owned in any market.

**Regulatory Innovations and Recent Developments**

Ideas about the use of incentive-based regulation, lotteries and auctions, have informed many recent developments at the FCC. Public participants have had mixed responses to these new regulatory tools. However, they have generally remained committed to three principles of broadcast reform: the

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63 NAACP v. FCC, 682 F.2d 993, 1001 (D.C. Cir. 1982). The inability to put forward evidence was not limited to the realm of economic deregulation; it was a general problem. See, e.g., BCFM v. FCC, 719 F.2d at 415 n.20 ("the Commission made a specific finding that the [public service] announcement did not generate public participation. Petitioners offer nothing other than their own opinion to contradict this finding.").

64 See, e.g., UCC v. FCC, 707 F.2d 1413.


66 Id. at 131.
protection of minorities, non-commercial broadcasting, and the public interest model of regulation. Thus, they typically support programs that further minority interests. For example, the Media Access Project is currently involved in a
general effort to reengage civil rights and minority organizations in telecommunications policy...[by] advising the "Civil Rights Project," which has taken on the task of setting a telecommunications policy agenda for civil rights organizations and of convincing these organizations that participation in these matters is essential to empowering their members.67

However, they are cognizant that minority ownership policies may permit minority "fronts" to buy stations that are almost completely financed and controlled by non-minorities.68 They have resisted changes, including the Telecommunications Act of 1996, that reduce the ability of the FCC to continue to impose public interest obligations on broadcasters. In part, opposition to the Telecommunication Act of 1996 turns on the perceived harm to minorities.69 Finally, a broad coalition of organizations have endorsed the Commission's recent efforts to create new low-power FM stations for noncommercial broadcasters, another effort that public participants hope will improve minority access to broadcasting.70

Conclusion

Professor Thomas Krattenmaker predicted that deregulation would have a significant negative impact on the future participation by citizen groups:

67 See http://www.mediaaccess.org
69 See, e.g., Stephen Labaton, Deregulation Called Blow to Minorities, New York Times (12/12/00).
The future of citizen groups and of the citizen movement is murky. Regulatory tools they have used for years may become unavailable in a climate of deregulation.\textsuperscript{71}

Deregulation did indeed impact citizen groups in a range of administrative settings.\textsuperscript{72} Deregulation had substantial impacts on the nature and structure of public participation in the regulatory process. Deregulation provided fewer opportunities for public participation. Advocates of public participation complained that deregulation eliminated opportunities for public influence. Because deregulation transferred decisionmaking from the government to private parties, deregulation rendered the public participants' usual channels of influence less useful. Thus, it is not surprising that public participants vigorously opposed deregulation at the Commission, in Congress and in the courts.

The decline of public participation was not merely an unanticipated by product of deregulation. Much of broadcast deregulation at the Federal Communications Commission can be attributed to the strong reaction that the broadcast industry and the Commission had to the new "public participation era." Ironically, the FCC used public participation as a justification for the elimination of regulations that public participants thought it so important to enforce. The Commission argued that it no longer needed so many regulations, because it could rely on citizens to monitor broadcasters and report problems to the Commission.

The D.C. Circuit was somewhat reluctant to permit deregulation. It recognized that the FCC "ha[d] pushed hard against the inherent limitations and

\textsuperscript{71} Krattenmaker, Telecommunications Law & Policy, at 61.
\textsuperscript{72} See Susan J. Tolchin and Martin Tolchin, Dismantling America: The Rush to Deregulation
natural reading of the Communications Act in its efforts to deregulate. However, the structure of administrative law combined with the increasingly conservative personnel on the court to minimize the judicial barriers erected against deregulation. Thus, the impact of the United Church of Christ litigation was substantially minimized, and the Commission did not experience the full transformation that would have been caused by citizen standing.

(1983) 73 UCC v. FCC, 707 F.2d at 1443.
Changing the Rhetoric of Public Participation

The creation of standing in UCC I allowed for a transformation in the rhetoric of public participation. Prior to UCC I, industry complained that public participants were merely special interests, but consumer groups and their advocates sought to characterize the consumer as a neutral, disinterested party, above the political fray. After 1966, public participants themselves adopted a more pluralistic vision of their role, arguing that their special interests deserved recognition by the FCC.

Industry's Vision of the Public Participant

Industry had long complained that citizen complainants were simply special interests veiling their arguments with consumer rhetoric and language of the public interest. In 1963 an official from New York radio station, WMCA, complained that broadcasting was under increasing attack from critics, a "growing and dangerous gang of in-laws," "a whole raft of newly spawned citizens' groups...looking as though they had been weaned on a pickle," and "a battalion of vigilantes from the local ladies' uplift society."¹ The Commission, he said, was encouraging these groups and taking their viewpoints as the word of the people rather than as the views of special interests. Similarly, the National Association of Broadcasters complained in 1962 that

Busy, modest, fine citizens (or rank-and-file citizens for that matter) are simply not going to participate unless they have some special axe to grind. They may come to give vent to some special peeve or special desire to favor a broadcaster, but few will come for love of community.²


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It was unfair to require the broadcaster to "satisfy the particular type of citizen whom he will be confronted as an antagonist in such a hearing."³

The Disinterested Consumer Model

In contrast, liberal Commissioners sought the assistance of the public in search for the public interest. During the 1940s and 1950s, Commissioners including James Fly and Wayne Coy, were interested in a positive role for the public. Coy explained that "The time has come for the listener to make himself heard - not in sporadic, exasperated outburst, but in an intelligent, rational, organized fashion."⁴ However, the ideology of the public interest standard was as Commissioner Hyde explained: "You must remember that the basic principle...is to place the interests of the community as a whole above that of any individual or group."⁵

In 1961 Newton Minow, President Kennedy's FCC Chairman, explained his vision of broadcast regulation in a speech to the National Association of Broadcasters. In that speech, he described television as a "vast wasteland."⁶ He believed that the contacting the public was an ideal course of action to remedy the vast wasteland. Thus, he announced that he would encourage the FCC to hold a well-advertised public hearing, right in the community you have promised to serve. I want the people who own the air... to

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⁴ Id.
⁵ Quoted in Television is Yours, National Association for Better Radio and Television (c. 1956).
⁶ Broadcasting and Government Regulation in a Free Society 27 (Center for the Study of Democratic Institutions, 1959).
tell you and the FCC what's been going on. . . . I hope that these hearings will arouse no little interest.\textsuperscript{7}

The public would assist the Commission through serious study:

I want the people—if they are truly interested in the service you give them—to make notes, document cases, tell us the facts.\textsuperscript{8}

This call for responsible representatives of the public was an important component of Minow's approach to public participation.

Minow took seriously how to best obtain the "aid of an informed public."\textsuperscript{9}

As Minow's assistant explained in 1961: "Right now we are studying carefully the fairest and best use of our special staff of monitors: the genuinely interested public."\textsuperscript{10} He and others hoped they would find the broadcast consumer as an ideal type—a neutral, uplifting force for improving broadcasting. Minow hoped that disinterested, "responsible groups" would devote "more serious study to the tasks assigned the FCC and its limitations as well as its powers"\textsuperscript{11} and would impose "intelligent, factual scrutiny" on broadcasters, effectively serving as "audit group[s]."\textsuperscript{12} These groups would provide a pleasant alternative to unwelcome "pressure groups." From the latter, said Minow, broadcasters would be protected.\textsuperscript{13}

\begin{footnotes}
\item \textsuperscript{7} Id. at 57-58.
\item \textsuperscript{8} Id. at 58.
\item \textsuperscript{10} Letter from Tedson J. Meyers, to Mrs. John F. Gigax (6/20/61), Minow Papers, Box 44, Volunteers, 1961-May-June.
\item \textsuperscript{11} Newton Minow, draft article, National Congress of Parents and Teachers (c. 1961), p. 10, in Minow Papers, Box 8, Correspondence.
\item \textsuperscript{12} Robert Lewis Shayon, Chairman Minow Unperturbed, Saturday Review (c. 1961), p. 42, in Minow Papers, Box 67, Correspondence, Saturday Review, 1961-May, 1963.
\item \textsuperscript{13} Address before the NAB Public Affairs/Editorializing Conference, Washington, D.C., March 1, 1962, in Equal Time, at 152-53; Address to the International Radio and Television Society, New York, New York (9/27/62), in Minow, Equal Time, at 207; Paper Prepared for Delivery Before
\end{footnotes}
Minow and his staff looked to broad-based civic organizations to serve the role of disinterested monitors of broadcasting. In writing to Newton Minow in 1961, the FCC’s Chief of the Complaints Bureau\textsuperscript{14} expressed hope that a meeting with a local PTA could launch a campaign for the support of citizen groups. He hoped that other local and national civic organizations, such as the American Association of University Women, would work with local stations to improve broadcasting.\textsuperscript{15} A broad-based organization like the PTA seemed the model public participant. Minow’s Administrative Assistant wrote that "we can think of no group in a better position to express the public’s interest in television" than the National Congress of Parents and Teachers.\textsuperscript{16} Minow concurred, writing in 1962 that the views of the PTAs represented a "broad cross-section" of Americans and that their views "should carry considerable weight with those responsible for what is broadcast over the airwaves."\textsuperscript{17} He bemoaned the fact that "the P.T.A.’s, the church groups, the League of Women Voters and other civic organizations are mainly conspicuous for their silence."\textsuperscript{18}

Chairman E. William Henry, who replaced Minow, continued Minow’s interest in the public. However, William B. Ray, Chief of the Complaints and

\textsuperscript{14} The Chief of the Complaints Bureau, Richard Saul, had established and had run his own Philadelphia-based non-profit, the Educational Television Council, a "citizen-sponsored" organization "dedicated to greater use of TV and radio as instruments of education and public service." He had himself participated in FCC proceedings, submitting briefs and presenting testimony. Resume of Richard M. Saul, in Minow Papers, Box 8.

\textsuperscript{15} Memorandum from Richard M. Saul to Newton Minow (9/29/61), in Minow Papers, Box 13, FCC Complaints and Compliance Division, December 1960 - August, 1962.

\textsuperscript{16} Letter from Tedson J. Meyers to Eva Grant (8/23/61), in Minow Papers, Box 8, Correspondence.

\textsuperscript{17} Letter from Newton Minow to Mrs. Ralph W. Frost (9/17/62), in Minow Papers, Box 28.

\textsuperscript{18} Minow, Equal Time, at 36; see also Minow, Address Before the Commonwealth Club, in
Compliance Division, was having difficulty locating the disinterested viewer. He complained that the laudatory mail that the FCC received praising stations, although apparently from "the public," often came from vested interests; i.e., from organizations or government agencies which wish to express their gratitude to the stations for having broadcast spot announcements or other material on behalf of the organizations or agencies.\(^{19}\)

This was

of course . . . something quite different from an endorsement by a disinterested listener or viewer.\(^{20}\)

Thus, Ray promised the Chairman Henry that he would keep an eye on the problem of laudatory mail that reflected self-interest or an intent to "repay an imagined debt to the licensees for public service spots."\(^{21}\)

In contrast to these self-interested organizations, Chairman Henry spoke of broadcast listeners as an unorganized majority distinct from the politics of special interest. While public administration was the "coordination and control of special interest groups,"\(^{22}\)

groups such as the consumer, the customer, and the listener, are not fully aware of what is going on within an industry and do not effectively present their views to the regulatory body. Their interests must therefore be assiduously protected, and the Commission must achieve a working compromise between the claims of various special interest groups, both to protect the

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\(^{19}\) Letter from William Ray to E. William Henry (12/16/64), in Henry Papers, Box 27, Correspondence, 1963-66.

\(^{20}\) Id.

\(^{21}\) Id.

unorganized, inarticulate majority, and to prevent "haphazard shifts in power relations among such groups.\textsuperscript{23}

Like Minow, Henry focused on the inarticulate majority.

**A Test of These Ideas: Public Hearings in Chicago**

Minow believed that seeking the views of the public and encouraging public participation in Commission proceedings would improve broadcast regulation. These ideas were tested when the FCC held hearings in Chicago designed to elicit the views of the public. The FCC ordered a public inquiry to examine how well Chicago TV broadcasters were doing in producing local programming after receiving complaints that Chicago viewers were "victims of the TV wasteland."\textsuperscript{24} The Commission asked whether broadcasters were taking seriously their duty to "inform themselves of the real needs and interests of the areas they serve, and to provide programming which in fact constitutes a diligent effort, in good faith, to provide for those needs and interests."\textsuperscript{25} A general forum for the city would allow "civic leaders and responsible and knowledgeable organizations and residents" to provide information and express their views.\textsuperscript{26}

The hearing drew a large number of representatives from church, labor, educational, arts, charitable, ethnic, government, legal and business organizations, as well as unaffiliated witnesses. The 100-plus witnesses generated 1,775 pages of transcript over three days. Yet generally speaking,


\textsuperscript{24} Letter from Frank McCallister to Newton Minow (2/13/62), in Minow Papers, Box 36, Renewals for Licenses. Another significant backdrop for the hearings involved labor disputes. The Chicago local of AFTRA, AFL-CIO, had petitioned the FCC to deny the licenses of several Chicago stations.

\textsuperscript{25} Notice of Inquiry, in FCC Docket 14546.

\textsuperscript{26} Id.
they did not speak for a general consumer, listener, or viewer interest. As James Baughman explains,

The Catholic Church representatives protested the poor studio facilities and less desirable air time available to them, and AFTRA [an entertainers' union] sought not more local programs, per se, but shows that would require the employment of more union members. Italian-Americans disliked the characterizations of their ethnic group and Chicago on ABC's "The Untouchables." Civil rights associations objected to the invisibility of blacks on television. 27

The gardening advocate argued for more gardening; the senior citizen advocate argued for more attention to the aged.

Although the FCC did hear some voices expressing a vision of the general interest, the letters that organizations sent seeking appearances made clear that they sought to do so primarily to further their own cause, rather than to provide disinterested advice and information to the FCC. Their cause usually involved greater access to commercial broadcasting, or claims of discriminatory treatment by broadcasters.

Reverend John S. Banahan of the Archdiocese of Chicago explained his reason for wishing to testify rather frankly:

My philosophy of communications is as utilitarian as that of General Motors or Proctor and Gamble. My interest is furthering the cause of the Archdiocese of Chicago. . . . To a certain extent I have been severely limited in my work by the stations. 28

The Northern Christian Leadership Conference wrote that its spokesman wished "to discuss the possibility of Public Service time on various Television Channels, directed toward raising the image of various minority groups." 29 Organizations

27 Baughman, Television’s Guardians, at 110.
sometimes sent the heads of their organizations, but often sent their radio and television liaison, their public relations director, or their media specialist. One witness sought to distance himself from this general tenor of the hearings:

I do not testify today in order to plead for TV time for my own organization. . . . [T]he needs of Chicago’s viewing audience will not be satisfied even if [the broadcasters] should graciously offer me six hours of prime time.\textsuperscript{30}

In doing so, he pointed to an important issue for many of the groups participating.

The FCC’s hearing was about the quality of local programming, and one aspect of that was certainly the stations’ responsiveness to community organizations. Thus, self-interested testimony was not inappropriate. But it is significant that the testimony was framed in terms of particular interests, and that it focused heavily on the access of different groups to the airwaves. This was not precisely what Minow envisioned from his public monitors of broadcasting.

The critics at the hearing were matched by public participants supportive of the broadcasters. These supporters included representatives of local foundations, societies, and government departments—even the IRS, which expressed gratitude for television time during tax filing season. The Chicago Daily News reported that at least some of these witnesses were recruited as favorable witnesses by the television stations.\textsuperscript{31} Yet these witnesses (regardless of whether they had been solicited by the broadcasters) had something in common with their critical counterparts. They represented organizations that valued access to the public via the airwaves. How they differed from the critics

\textsuperscript{30} Russell Barta, Testimony, in FCC Docket 14546.

was that they felt had received ample assistance from broadcasters, usually in the form of free public service time, but also through other forms of programming, coverage, equipment use, etc. They were satisfied, but they were as self-interested in access to the airwaves.

The Anti-Cruelty Society wrote of its indebtedness to Chicago broadcasters for their public service programming. The Chicago Art Institute reported that the broadcasters had offered more time than they could accept. The Executive Director of the United Cerebral Palsy Association of Greater Chicago testified that the radio and television industry was the most generous of all in contributing to the success of its organization and those like it, offering time, service, cooperation and monetary support. The list of Praising witnesses went on in this vein.

Even the groups for which Newton Minow had such great hopes as citizen participants did not come through as disinterested critics. The PTA representative pointed out that the world could do without the Three Stooges, but that was her harshest criticism. She praised the local educational television station, was thankful for access to the airwaves for her organization, and wished for more such opportunities. Rather than calling on the FCC for stricter regulation, she pointed to parents as the appropriate source for regulating children’s viewing, and called on broadcasters to reread their industry’s voluntary Television Code.\(^{32}\)

\(^{32}\) For more critical, but equally self-interested, testimony, see Mrs. Joseph P. Hector, Testimony, in FCC Docket 14546 (describing as a “distinct blow to volunteer workers” the cancellation of a program featuring women participating in the volunteer efforts of the Illinois Federation of Women’s Clubs, Garden Clubs of Chicagoland, Illinois Club for Catholic Women, local
Presiding Commissioner Lee captured the dynamics underlying the hearing. He distinguished between those groups satisfied with broadcasters, and those not, based on the type of organization that they represented:

In general, the civil and charitable organizations are happy with the treatment they receive, as are the educators, and local, state, and Federal Government organizations. The areas of controversy center, in the main, about the treatment accorded local religious groups, racial and social problems, and local talent.  

And his comments suggest why broadcasters may have favored some organizations over others. The stations' efforts at tapping into the community's interests, concerns and needs, he said,

are effected by the station executives and higher echelon personnel through their membership in many community organizations. Great reliance is placed upon the contacts so achieved . . . .

Thus, it was not surprising that certain groups felt a need to complain to the FCC, and others did not. Some already had the ear of broadcasters, some did not. But most brought forward the interest of their institutions in access to the airwaves, rather than the perspective of a "disinterested viewer." Notably Commissioner Lee found the hearings useful not so much because of the information gained by the FCC, but because the hearings had cleared the air in Chicago by allowing the cacophony of Chicago interest groups a forum for their differences with broadcasters.

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34 Id.
35 Notably, NBC's local community lunches included public officials, those concerned about traffic, university officials, public education officials and arts leaders. It is thus not surprising that these groups were more contented with NBC than those not included.
Prior to the creation of standing, the theory of citizen participation at the FCC was that of the disinterested assistant to the regulating agency. This model failed to capture what local participants were really seeking—typically, equal access to the airwaves, equal attention by broadcasters to their needs, and equality in employment. The Chicago Hearings reflected the reality of public participation before the Commission.

Changing Rhetoric after United Church of Christ I

In UCC I, the D.C. Circuit created procedural equality for citizen groups, it relied on the traditional model of public participants as disinterested assistants to the Commission. However, after the right to participate was established, the rhetoric underlying public participation changed. Public participants made claims for substantive equality without having to couch their claims solely in terms of the public interest.

As public participation expanded, the participants became more comfortable speaking out on their own behalf, seeking to pursue their particular interests. They abandoned the traditional "consumer interest as public interest" rhetoric that was prominent prior to the UCC litigation and notably present in the UCC I decision.

Albert H. Kramer, a public interest lawyer practicing during the 1970s, best described this new "me-generation" approach:

We refer to them as "public intervenors" not because they seek to serve only the common weal; for generally, they come to the regulatory processes asserting their own special interests.36

Kramer was not bashful about the interests of the public participants he represented. He argued that their particular interests were their strength, not their weakness. The fact that their interests were special justified a special role in the regulatory process. Kramer explained that they bring to the regulatory processes a social rather than an economic perspective. They open the regulatory processes to a new and different kind of voice.\textsuperscript{37}

In doing so, Kramer expressed a pluralistic model of public participation rather than the disinterested, idealized model of the consumer that had been often put forward as a justification for the consumer's role in the regulatory process. He emphasized the clashing of interests, not an idealized consumer. The focus was not on the mobilization of the majority, the mass consumer, but on the empowerment of minority groups through participation.\textsuperscript{38}

The UCC, although it had emphasized the importance of coalition building as a legal and political strategy, it rejected the premise that public participants should represent the entire community or some abstract "viewer interest." The

\textsuperscript{37} Id. at 432-33.

\textsuperscript{38} See Comments of National Citizens Committee for Broadcasting ("NCCB") at 15, in FCC Docket 19154:

While broadcasters may respond to market demand for specialized programming for farmers, there is rarely a similar reaction to demands from "non-establishment" groups, who have been long without the economic or political power to demand and receive broadcasting responsive to their needs.

The NCCB recommended that the FCC adopt standards requiring programming standards for population subgroups based on their percentage of their population. Id. Concerns such as these led to a range of programs beyond the scope of this paper, including minority preferences in comparative license hearings, and other incentive programs to encourage minority ownership in broadcasting. Programs of this sort were upheld in \textit{Metro Broadcasting v. FCC}, 497 U.S. 547 (1990), but have since been called into question by \textit{Adarand v. Pena}, 115 S. Ct. 2097 (1995), and \textit{Lutheran Church - Missouri Synod v. FCC}, 141 F.3d 344, (D.C. Cir.), reh'g denied, 154 F.3d 487 (D.C. Cir.), reh'g en banc denied, 154 F.3d 494 (D.C. Cir. 1998).
FCC should not require that public participants present credentials demonstrating that they represented the community generally:

The Commission should be particularly careful not to let its own political and social views intrude into its definition of responsibility. . . [G]roups whose tactics and styles are unconventional and even distressing to the Commission and its staff may nevertheless have an important function in representing emerging groups and views in broadcast service.  

Not all public participants would conform to an image of the ideal consumer, but they could still contribute to the regulatory process.

Standing facilitated an openness about the diverse interests of broadcast viewers. The earlier disinterested consumer model placed the consumer on a pedestal and in doing so created legitimacy for representatives of a consumer interest as above the rough and tumble of politics. Legal standing, by creating a right, created a new type of legitimacy, which recognized these groups' equal right to participate in the regulatory process. It allowed the rhetoric of the disinterested consumer to be stripped away.

The disinterested consumer model did not die in the scholarly or advocacy community. Some continued to point to view the public "as a competent and trustworthy party with a special ability to gauge and measure the dimensions of public interest." Commissioner Nicholas Johnson continued to hope for the day that we would "build a true 'citizens' lobby'--concerned not with the advancement of special interests but with the well-being of the nation."  

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39 Comments of United Church of Christ 15, in FCC Docket 19518.
Yet the world of participation by local groups contradicted the model of the disinterested consumer. It was full of conflicting interests with specialized claims, claims for minority access, and requests for equality. New public interest lawyers emerged to represent these new interests. Once the interests of public participants became clear, the parties began to find ways to accommodate these interests.
Conclusion

This study began as an examination of the role that procedure played in structuring the nature of public participation by social reform groups interested in the FCC's broadcast policy. Initially, I accepted the traditional view that largely equated "citizen group standing" with "public participation." Under this view, prior to standing, social reform groups had no avenue for participation, and therefore did not participate in the process. Thus, the creation of standing for citizen groups has been viewed as admitting new players into the regulatory process. In the case of broadcast reform, most scholars have viewed the period prior to 1960 as devoid of activism by social reform groups.

Gradually, I realized that this characterization was inaccurate. Social reform groups had been interested in and had actively participated in the development of broadcast policy since the Commission's inception. The ACLU, the American Jewish Congress, the CIO, church groups and labor unions championed listeners' rights and sought to protect the interest of minorities over the airwaves from the Federal Communications Commission.

Procedural rules alone did not determine the level or nature of public participation in the administrative process at the FCC. Procedural rules and substantive regulations worked in tandem to structure public participation. Citizen standing, when combined with substantive regulations, could provide a powerful tool for social reform groups interested in influencing FCC policy and the behavior of broadcast stations. However, it was a brief moment in the FCC's history that both the procedural and substantive rules were on the side of the
social reformers. The period prior to 1965 reflected substantive law without the procedural enforcement tools. The period after 1985 reflected procedural rights with little substantive law. Only during the period from 1966 to 1985 did social reform groups have access to both procedural rights and strong substantive regulations upon which to hang their claims. The UCC litigation reflected this marriage of claims for procedural rights with reliance on the Commission's substantive Fairness-Doctrine. However, even during the heyday of public participation, the Commission's discretion to enforce the substantive law impaired the effectiveness of social reform groups.

This conclusion examines the transitions and continuities of public participation from the New Deal through the Public Interest era.

The Transition from the New Deal State to the Public Interest State

Social reform groups did not try to obtain the right to participate in FCC proceedings prior to the 1950s. Their approach can be explained by their liberal commitment to supporting the New Deal state combined with their general satisfaction with the Commission's activities. The legal doctrine of standing was associated with anti-New Deal attitudes, including protecting economic rights. Thus standing had connotations of the Lochner era and substantive due process.

Social reform groups active at the FCC, such as the CIO, were committed to insuring the legitimacy of the New Deal regulatory state. Even the ACLU, which one might think of as more rights-oriented, was, in the context of broadcast
regulation, highly supportive of the FCC's powers and challenged broadcasters' arguments that FCC regulatory power infringed on their Free Speech rights.

These groups, however, were not blindly committed to the Commission. Had they been unsatisfied with the Commission's performance, they would not have so vigorously supported the Commission's authority. The Commission, until the late 1940s, was solicitous of the interests of social reform groups and welcomed their participation. The 1940s marked a relatively good relationship between social reform groups and the Commission. Thus these groups used participation at the Commission to bolster the agency's authority rather than to condemn its activities.

Gradually, the New Deal liberal commitment to federal regulatory agencies eroded. In particular, at the FCC, the Commission became unresponsive to social reform groups and scaled back its regulatory initiatives, and social reform groups lost their allegiance and enthusiasm toward the Commission. Gradually, social reform groups began asking for a right to participate. In several cases in the 1950s, citizen groups asked for the right to participate, arguing that it was inconsistent to provide participation for industry but not for the public. By the early 1960s, organizations such as the American Federation of Musicians began asking Congress to create a right to participate for the public.

The UCC's Office of Communications made the first sustained effort to demand standing for citizen groups. Their 1966 appeal to the D.C. Circuit in UCC I led to standing for broadcast listeners in FCC proceedings and in the courts. The
opinion reflected the new liberal belief that expanded standing could be consistent with supporting the “public interest” and “regulatory activism.”

The UCC decision, which established citizen standing, should be understood not as creating public participation at the FCC, but rather as altering the form and structure of public participation and creating different types of participatory opportunities. Court review provided an additional opportunity for success for public participants. The creation of citizen standing legitimated participation. It led to the emergence of a public interest movement with specialized broadcast reform lawyers. Citizen standing also provided leverage for local citizen groups to settle their grievances with broadcasters.

Citizen standing expanded the number of private attorneys-general that could monitor the agency. However, a number of factors undermined the extent to which citizen groups contributed to the deliberative processes of agency decisionmaking. Limited resources and other incentives led to settlements, which took public participants out of the realm of FCC policymaking and into a world of private negotiation. In addition, the creation of citizen standing altered the regulatory playing field such that industry and the Commission obtained new incentives to eliminate or minimize a wide range of broadcast regulations. This deregulatory effort then minimized the extent to which citizen standing would impact the agency’s processes.

Continuities in Public Participation

Despite the transformation in the legal status of citizen groups at the FCC, the history of public participation reveals some remarkable continuities. Social
reform groups decided whether to participate in Commission proceedings not simply based on whether they had a legal entitlement to participate. They were driven as much by how important they thought the substantive policy issues. The level of participation also varied based on how social reform groups assessed their chances of success. Court review could increase the public participant's likelihood of success, but only an extremely activist court could guarantee results. Other important factors were the degree of sympathy held by the Commission or particular Commissioners, the overall political climate and the extent to which the desired outcomes threatened First Amendment values. Public participation flourished most when the interests of social reform groups were closely aligned with the Commission or particular Commissioners, rather than when the Commission was hostile to the interests and values of public participants.

Public participation often served less to check agency behavior or industry capture, and more to legitimate the regulatory state. Public participants have overwhelmingly supported more regulation rather than less regulation, both in terms of the development of substantive policies and the implementation of these policies through rigorous enforcement. Their efforts and writings contributed to the defense of regulation, providing an institutional home for alternative policy ideas that would not find a place in an industry setting.

From the Commission's perspective, public participation can legitimate regulatory efforts in the face of industry opposition; it can substantiate claims that the Commission needs to regulate; and it can make the Commission appear
responsive. Social reform groups served as a constituency for liberal Commissioners, who historically have sought out public participation in order to provide support for their policy initiatives and enforcement efforts.

Social reform groups have tended to serve as niche participants in narrow policy areas, rather than as general policy watchdogs over the agency. They have participated when they believed important political, social and cultural values were at issue. Thus public participation has been concentrated on questions of minority rights, access to the airwaves, and noncommercial broadcasting.

Issues of technology and economic structure have received shorter shrift despite the recognition by social reform groups that these areas have social and political consequences. Their efforts at data collection have focused on social science evidence rather than on engineering or technical details. The current struggle at the Commission over low-power television reflects this conflict, with social reform groups arguing for the cultural and political importance of creating new nonprofit broadcasting stations, while the National Association of Broadcasters argues that these proposed stations will create electrical interference with already existing stations. In part, the choice of issues is determined by the interest of social reform groups. In addition, the resources and expertise of public interest lawyers leave them less likely to pursue technical matters.

During the late 1960s and early 1970s, it appeared that one of the primary contributions that formal public participation could make to broadcast policy was
connecting broadcasters to their local communities in a world otherwise dominated by network programming. However, even at the height of local participation, these participants were funded and encouraged by more centralized institutions with a national focus. Organizational and free-rider problems at the local level are intense in the broadcast context, because an individual's stake in what is produced on television or radio is typically miniscule. Those involved in broadcast reform typically have a national orientation, an ideological agenda, and enjoy economies of scale as monitors of FCC policy.

Public participation at the Commission has almost always had a close connection to the protection of minority rights. In this regard, the UCC litigation was not novel, but reflected the long relationship between broadcast reform and the portrayal of minorities over the airwaves. Minorities and disadvantaged groups, including African-Americans, Latinos, Jews, women, and the disabled, have used public participation to encourage the FCC to impose national liberal norms on American broadcasters, and to enforce these norms against deviant stations. The participation of minority groups creates a legitimate environment in which the federal government can impose these norms without appearing to be engaging in heavy-handed statist regulation, a method particularly problematic in the context of the regulation of speech. Through public participation, minority groups have also had some success in redirecting the FCC toward priorities other than those that the agency itself would have chosen. In contrast, where public participants have tried to undermine predominant national norms,
nationally-dominant ideologies, or attack large institutions such as the national networks, they have seen extremely limited success.

The presence of social reform groups during this earlier period requires us to reassess earlier conclusions about the players in the administrative system prior to the 1960s. The Commission has been subject to influence by multiple interest groups. The multi-member, bipartisan character of the Commission provides entry points for a range of different groups, including social reformers. The political leanings of the Chairman are particularly important. The ability of different groups to influence the process depends less on their legal status, and more on their political access and influence. However, most important is the presence or absence of substantive law, because this variable determines which groups will participate and how successful they will be in achieving their ends.

Implications for Administrative Law

The courts created citizen standing, but the influence that social reform groups could wield simply by “force of law” was limited. This study confirms that citizen standing is neither a necessary, nor a sufficient factor, for success in the regulatory. Social reform groups needed more than procedural rights. They needed for the courts to support affirmative regulation, to carefully monitor agency behavior through hard-look substantive review, and to be willing to impose harsh sanctions on agencies for failure to enforce their own regulations. However, even public participation combined with strong substantive review could not overcome the political power of the broadcasting industry. When citizen groups successfully used the courts to push the Commission toward more
stringent regulation, they hastened the arrival of a deregulatory mentality that ultimately undermined the effectiveness of the public interest movement.

A variety of factors suggest that public participation is an ineffective counter to industry capture. Although public interest groups do engage in some general monitoring of FCC policymaking, they tend to focus on niche areas: educational or noncommercial broadcasting, broadcast content regulation, children's broadcasting, and policies relating to minorities and broadcasting. Thus, they tend to serve as additional special interest groups, rather than as private attorneys general that police the regulatory state.

**Interest Groups and Administrative Agencies**

What conclusions can we draw from this study about the nature of public participation and administrative agencies more generally? It is possible that the Federal Communications Commission is an exceptional agency, and that we would not find participation prior to the 1960s in other agencies by social reform groups or other representatives of the "public." This is an empirical question that merits further study of individual agencies. However, there is some evidence suggesting that some parallels to the FCC might be found in other agencies. Intervention at the Interstate Commerce Commission appears to have been fairly liberal, extending to any person adversely affecting, including cities and "mere user[s] of rail service."¹ Civil rights advocates turned to the ICC in an attempt to stop segregation on interstate rail cars in the South as early as 1941.²

¹ Boros, Intervention in the Civil Aeronautics Board Proceedings, 17 Ad. L. Rev. 5, 9 (1964).
Similarly, the Civil Aeronautics Board’s ("CAB") statute provided that "[a]ny person may appear before the Board or Agency and be heard in person or by attorney."\(^3\) Apparently, participation was so liberal that the CAB amended its rules in 1961 to eliminate participation by nonparties in order to "prevent Congressmen, Senators and state officials from arguing orally to the Board."\(^4\) Finally, it can be noted that the Second Circuit case of *Scenic Hudson*, which first established citizen standing in 1965, involved a proceeding in which an environmental citizens' group had *already* participated before the Federal Power Commission.\(^5\) The only dispute was whether they could bring their complaints to the court. This evidence is suggestive only, but supports the need for further research as to the role of citizen or civic intervenors at other agencies prior to the 1960s.

If the FCC turns out to be exceptional, I believe it can be explained by the nature of the broadcast regulation. We have seen in this study the close connection between public participation and certain substantive regulations, such as the Fairness Doctrine. Social reform groups advocated for these regulations because they offered to these groups real world benefits outside the regulatory structure. If social reform groups perceive opportunities for influence or benefit, they will lobby the relevant agency to maintain or develop their favored programs. Thus, until recently, social reform groups put almost all of their efforts into influencing broadcast and cable policies and largely ignored telecommunications policy. As broadcasting regulation has diminished through deregulation,

\(^3\) Boros, Intervention, at 14 (quoting the CAB's statute).
\(^4\) Id. at 16.
however, these groups have turned to other "hotter" regulatory arenas including telecommunications and the internet. If social reform groups participated more at the FCC than at other federal agencies, it is likely that they avoided agencies with less interesting agendas, rather than that they found procedural hurdles to participation.

Similarly, social reform groups gravitated to the Commission when there were Commissioners interested in interacting with and obtaining the support of public participants. The presence of multiple Commissioners may ultimately have made it harder for social reform groups to obtain their goals, but this structure increased the chances that at least someone at the Commission would be interested in hearing the voices of social reformers. When there were liberal Commissioners at the FCC, they encouraged relationships with social reform groups. If other agencies have had less public participation, it may be in part because there are fewer points of access connecting the social reform community to these agencies.

Social Reform Groups, Free Speech and Broadcasting

This study reveals striking continuity in the substantive interests of public participants at the Commission from the 1940s to the present. Public participants were typically unsympathetic to the First Amendment arguments for broadcaster's free speech, and far more concerned about the rights of other speakers and the problem of private censorship by broadcasters. Social reform groups were the predominant depositories for ideas supporting the public interest.

\footnote{Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965).}
model of broadcast regulation outside the Commission. They emphasized the importance of listener's rights and the need for regulating broadcasters.

One of the predominant interests of public participants has been the reduction of right-wing broadcasting over the airwaves. Social reform groups repeatedly brought challenges to the FCC to undermine conservative commentators and the stations that broadcast them. Concerns about right-wing broadcasting led to strong efforts to reject the market as an appropriate method for allocating broadcast speech and to endorse the importance of balance and fairness over the airwaves. These interests, more than any abstract notion about the scarcity of the airwaves, drove their support of the public interest model of broadcasting. Social reform groups found scarcity problematic because of fears about the content of viewpoints, not about the mere quantity of viewpoints.

The activities of social reform groups in the broadcast reform arena may require us to revisit the relationship between liberal social reform groups and the fight for free speech. Scholars have made the notable connection between the development of free speech rights and the advocacy of the social reform community, including labor unions. In the broadcasting context, social reform groups, however, took a different approach, minimizing the significance of the First Amendment. Scholars have often brushed aside this difference believing that these groups simply wrongly believed that spectrum scarcity justified a different approach to the First Amendment. Yet the rhetoric and rationales used by social reform groups in justifying the public interest model of broadcast

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regulation belies this simple dichotomy. Thus, future scholars may wish to reexamine the relationship between free speech and social reform groups with greater attention to their positions in the broadcast context.

A particularly tricky topic that needs further attention is the role of the ACLU in supporting the Fairness Doctrine and the public interest model of regulation. Broadcast regulation scholar Thomas Hazlett condemns the ACLU for "succumb[ing] to the urge" to be part of the "content-control loop." This study confirms the ACLU's role in supporting affirmative broadcast regulation. Given this evidence, scholars focusing on the ACLU as a promoter of free speech rights will have to reconcile the ACLU's policies on broadcast regulation without simple reference to the organization's acceptance of the scarcity rationale. This dissertation reveals the ACLU and other social reform groups were concerned during the 1940s about the problem of private censorship in the radio industry, and not just government censorship. Recognition of this concerns helps explain otherwise somewhat mysterious actions by and positions of social reform groups during this period. For example, Samuel Walker described the strong reaction that the ACLU took against blacklisting during the early 1950s as "surprising": "the ACLU could easily have ducked the issue on the grounds that it involved no state action." However, given the organization's concern about private censorship in radio and television, its reaction is relatively unsurprising.

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9 Id.
Finally, we can recognize that when the Democratic National Committee's attempt to silence its political opponents in *Red Lion v. FCC*, its effort was part of a long-standing tradition of using the Fairness Doctrine to try to quiet political opponents.\(^\text{10}\) This study reveals the critically important role of social reform groups in arguing for the maintenance and enforcement of the Fairness Doctrine and in targeting right-wing broadcasting.

\(^{10}\) See Hazlett, *The Fairness Doctrine*, at 112. Hazlett focuses on the role of elected officials in quieting conservative commentators, quoting, for example, Bill Ruder, Assistant Secretary of Commerce in the Kennedy administration as admitting that:

> Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue.

*Id.*
Bibliographic Note on Primary Sources

The private papers of FCC Commissioners are spread around the country. One primary depository is State Historical Society of Wisconsin, Madison, Wisconsin, which houses the papers of Newton Minow, E. William Henry, Frederick Ford, and others. James L. Fly’s papers are available at Columbia University, which also houses a variety of oral history interviews with those prominent in the world of broadcasting. Commissioner Freida Hennock’s papers are at Radcliffe College, Harvard University. Other collections are scattered.

Many of the social reform groups in the study have manuscript collections. The papers of the NAACP are located at the Library of Congress. The American Civil Liberties Union has its original papers at Princeton University, although many of the documents are available through its microfilm collection. The American Jewish Congress papers are at American Jewish Historical Society, in Waltham, MA (on the Brandeis University campus). The papers and interview of Morris Novik are at the Library of American Broadcasting, University of Maryland, are particularly helpful for their correspondence relating to educational broadcasting and the AFL-CIO. Morris Ernst’s papers are available at the University of Texas, Austin.

The National Archives II, in College Park, Maryland, houses the archived FCC proceedings cited in this work. Matters are filed by docket numbers in Record Group 173. The following docket numbers are cited in this work:

- Newspaper Ownership Hearings 6051
- United Broadcasting (The CIO/WHKC Case) 6631
- 1945 Noncommercial Allocation(Educational Radio) 6651
Daily News Radio Case (American Jewish Congress) 6175
Mayflower Hearings 8516
Richards Case 9193, 9402-05
Baptist Petition 9470
Loyalty Oath 11060-61
Educational Television 11401
Friends of Good Music Case 11821
Chicago Public Hearings 14546
United Church of Christ 16663
Citizen Group Reimbursement 19158
Radio Station WSNT, Inc. 19167
New South Radio 20463

The published documents of the FCC are available in three official chronological sets: FCC Reports (F.C.C.), FCC Reports, 2nd Series (F.C.C.2d), and the FCC Record (FCC Rec.). Note that Vol. 40 of the FCC Reports is a special compilation of previously unpublished opinions prior to July 1, 1965 that includes a special section on the Fairness Doctrine. In addition, Pike and Fischer publishes two sets: Radio Regulation (R.R.) and Radio Regulation 2nd Series (R.R.2d). The Pike and Fischer collections also include useful indices, digests, finding aids, and legislative history. Decisions after 1965 are also available on Lexis and Westlaw.
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