

NOTES

ERRATUM

In Note, *Contempt by Publication*, 59 YALE L.J. 534 (1950) at 537, it was stated: "The Supreme Court denied certiorari in an unusual opinion disavowing any implication that it approved the Maryland decision [Baltimore Radio Show v. Maryland]." And in Footnote 22, at 538 it was stated: "The opinion was written by Justice Frankfurter, who has been leader of the Court minority seeking a rule more restrictive of press comment. This suggests that the death within the last year of Justices Murphy and Rutledge, strong supporters of newspaper freedom . . . , may have altered the balance of power [on the Court]."

The following corrections, while not bearing on the substance of the Note, are obviously in order: (1) The opinion was that of Justice Frankfurter as an individual justice and should not have been attributed to the Court as a whole. (2) The inference drawn in Footnote 22 was unwarranted. As pointed out by Justice Frankfurter, the only definite conclusion to be drawn from a denial of certiorari is that "fewer than four members of the Court thought it should be granted. . . ." *State v. Baltimore Radio Show*, 70 Sup. Ct. 252, 255 (1950). No suggestion as to views of other members of the Court—new or old—should have been made on the basis of Justice Frankfurter's opinion.

THE MAYFLOWER DOCTRINE SCUTTLED*

FROM 1941 until 1949 the American broadcasting industry fretted at the leash of the so-called *Mayflower Doctrine*¹ which was thought to prohibit radio stations and individual licensees from editorializing over their own facilities.² This doctrine arose from the broadcasters' interpretation of a

* FCC, REPORT OF THE COMMISSION IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES, Docket No. 8516 (June 1, 1949).

1. The title was derived from the name of the case in which the FCC supposedly announced the doctrine. *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1941).

2. As generally understood, the supposed ban on editorializing applied both to the radio station as an institution and to the individual licensee. See, *c.g.*, 12 AIR L. REV. 170, 171 (1941); Note, *Radio Editorials and the Mayflower Doctrine*, 48 COL. L. REV. 785 (1948). However, James L. Fly, FCC chairman at the time of the *Mayflower* decision, recently stated that the Commission intended only to silence the station and not the licensee—the reason for the distinction being that institutional prestige and goodwill inevitably lend unfair weight to views expressed as those of the station, but that no such problem arises where the views are identified as the personal views of the station licensee. Communication to the YALE LAW JOURNAL from James L. Fly, dated April 4, 1950, in Yale Law Library. See also FCC, OFFICIAL REPORT OF PROCEEDINGS IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES 1233-4 (1948). See page 764 *infra*.

cryptic dictum in an FCC license renewal decision.³ Though never specifically enunciated or applied by the Commission,⁴ it became the subject of heated controversy. On the one hand it was vigorously defended as a safeguard of the public;⁵ and on the other, vehemently denounced as an improper restriction on free speech.⁶ The outcome was the formal scuttling of the *Mayflower Doctrine* by the FCC last June.⁷ In retrospect, the turbulence surrounding the doctrine appears to have been a tempest in a teapot. For when viewed in relation to the larger issue, that of securing fair radio treatment of public issues, the *Mayflower Doctrine* played an inconsequential role. Its demise, in practical terms, does not significantly alter either the ability of station owners to advance their views, or the extent to which the public is able to hear all sides of controversial issues.

Fundamental to evaluation of the Commission's action is the principle that in a democratic society there should be maximum opportunity to express diverse viewpoints on controversial issues⁸ and, equally important, maximum opportunity to hear and read the conflicting views of others.⁹

Furthermore, the ban has most commonly been interpreted as applying only to overt expressions of opinion by the station or licensee, or their personal representatives. See Note, 12 AIR L. REV. 170, 171 (1941). The FCC apparently accepted this interpretation as the basis for its "clarification" of the issue of editorializing. FCC, REPORT OF THE COMMISSION IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES 7-8 (1949). Some, however, have construed the ban as extending to any advocacy of a position on a public issue traceable to the licensee. See Note, *Radio Editorials and the Mayflower Doctrine*, 48 COL. L. REV. 785, 792 (1948).

3. *Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 340 (1941): "[T]he broadcaster cannot be an advocate." See page 764 and note 26 *infra*.

4. See note 27 *infra*.

5. See, e.g., Note, *Radio Editorials and the Mayflower Doctrine*, 48 COL. L. REV. 785 (1948); AMERICAN CIVIL LIBERTIES UNION, SHOULD RADIO HAVE AN EDITORIAL POLICY (1948); Crosby, *Freedom of Speech on the Air*, N.Y. Herald-Tribune, March 9, 1948, p. 19, col. 1.

6. "[P]rohibition of broadcast editorializing, by the Commission, is abridgement of freedom of speech, whether the editorializing be done by a station licensee or otherwise." FCC, OFFICIAL REPORT OF PROCEEDINGS IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES 834 (1948) (statement of Justin Miller, president of the National Association of Broadcasters). See also brief for National Association of Broadcasters (NAB) in the Matter of Editorialization by Broadcast Licensees (1948). When the FCC issued its report, NAB president Miller jubilantly exclaimed that it was "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." Newsweek, June 13, 1949, p. 51, col. 1.

7. FCC, REPORT OF THE COMMISSION IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES (1949). See page 766 *infra*.

8. See, e.g., COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 6-12 (1947); Justice Holmes' classic dissent in *Abrams v. United States*, 250 U.S. 616, 629-31 (1919).

9. See, e.g., COMMISSION ON FREEDOM OF THE PRESS, *op. cit. supra* note 8, at 16-20; Ernst, *Freedom to Read, See, and Hear*, Harper's, July, 1945, p. 51; Fly, *Radio Regulation in the Public Interest*, 213 ANNALS 102, 105 (1941).

Since effective voicing of opinion in the present day generally requires resort to privately owned media of mass communication, the practical implementation of this principle depends upon the manner in which these mass media are managed.¹⁰ With respect to most major media the Federal Government, faced with a strong constitutional interdiction against governmental abridgement of free speech,¹¹ can do virtually nothing to prevent private management from abridging the right of the public to express and be informed of varying opinions on controversial issues. In the case of radio, however, the government claims, and to some extent has exercised, power to promote a balanced presentation of views.

Unlike the private managers of other mass media, radio broadcasters, who must utilize the limited number of publicly-owned transmission frequencies,¹² operate their facilities as "trustees" of the public.¹³ The Federal Communications Commission, with its exclusive power to license broadcasters for operation over these frequencies,¹⁴ is charged with the duty of insuring that broadcasters fulfill their direct obligation to serve the public interest.¹⁵ Since broadcasting affects the public primarily through the

10. "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, which facts, which versions of the facts, and which ideas shall reach the public." COMMISSION ON FREEDOM OF THE PRESS, *op. cit. supra* note 8, at 15-16.

11. U.S. CONST. AMEND. I. Outside of radio, governmental restrictions on the use by private owners of their communications facilities are imposed only where the public is to be protected from some positive harm: *e.g.*, speech which is offensive to mores, such as obscenity; speech which is incident to illegal conduct, such as creation of monopoly, false advertising, disturbance of the peace; speech which creates a "clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent." *Schenck v. United States*, 249 U.S. 47, 52 (1919). This is not, clearly, affirmative regulation directed at enhancing opportunities for expression of opinion.

12. The need for rational allocation of the limited number of broadcasting frequencies, and the necessity for preventing stations from interfering with each other by transmitting simultaneously over the same frequency, have provided the basic justification for direct governmental regulation of this medium. See, *e.g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190, 213, 216 (1943). The finite character of the frequency spectrum is described in TERMAN, *RADIO ENGINEERING* 593 (2d ed. 1937); FCC, *RADIO, A PUBLIC PRIMER* (1940). Public ownership of all broadcast channels is established in § 301 of the Communications Act of 1934, 48 STAT. 1081 (1934), 47 U.S.C. § 301 (1946) (hereinafter cited only as Communications Act).

13. "[A] radio broadcasting station must operate in the public interest and must be deemed to be a 'trustee' for the public." *McIntire v. Wm. Penn. Broadcasting Co.*, 151 F.2d 597, 599 (3d Cir. 1945). See also *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). See generally Fly, *Regulation of Radio Broadcasting in the Public Interest*, 213 ANNALS 120 (1941); Note, *Radio Regulation and Freedom of the Air*, 54 HARV. L. REV. 1220 (1941).

14. Communications Act §§ 307, 309(a), 319. Broadcasters are licensed to operate over assigned channels for three-year periods. 47 CODE FED. REGS. § 3.34 (Supp. 1943).

15. This obligation arises from the statutory requirement that a license shall be granted or renewed only if "public convenience, interest or necessity will be served

subject-matter transmitted, the Commission has occasionally employed its licensing power to exert control over the programming policies of broadcasters.¹⁶ Statutory authority for such action is found in the requirement that licenses be granted only where the public interest will thereby be served.¹⁷ Control is exercised by testing the program service of license applicants against the Commission's conception of program service in the public interest.¹⁸ The criteria employed in making such evaluations constitute, in effect, a code of program standards to which all broadcasters must conform to guard against possible loss of license.¹⁹ While broadcasters have charged that this technique of program supervision violates the statutory proscription of censorship²⁰ and the constitutional ban against abridgement of free speech,²¹ they have failed for twenty-three years to win judicial or Commission indorsement of their view.²²

A vital facet of program supervision has been the Commission's efforts to secure fair treatment of public issues. To this end, the FCC has declared that broadcasters have an obligation to allot a reasonable amount of time to treatment of controversial issues, and that they have an affirmative duty to seek to provide representative expression of all responsible shades of opinion.²³ This "fairness" formula²⁴ has seldom been challenged except by

thereby." Communications Act §§ 307, 309(a). See Fly, *supra* note 13. For the history of government regulation of radio in this country see WARNER, RADIO AND TELEVISION LAW §§ 92-5 (1948); 1 SOCOLOW, THE LAW OF RADIO BROADCASTING §§ 25-48 (1939).

16. See WARNER, RADIO AND TELEVISION LAW c. III (1948); Segal, *Recent Trends in Censorship of Radiobroadcast Programs*, 20 ROCKY MT. L. REV. 366 (1948); Comment, *Radio Program Controls: A Network of Inadequacy*, 57 YALE L.J. 275 (1947); Note, *Government Control of the Contents of Radio Programs*, 47 COL. L. REV. 1041 (1947).

17. See note 15 *supra*.

18. See materials cited in note 16 *supra*. See also Comment, *Administrative Enforcement of the Lottery Broadcast Provision*, 58 YALE L.J. 1093, 1094-6 (1949).

19. *Id.* at 1109-11. For a full discussion of FCC program standards see WARNER, RADIO AND TELEVISION LAW c. III (1948). See also other materials cited in note 16 *supra*.

20. Communications Act § 326.

21. For an exposition of the broadcasters' arguments on both the statutory and constitutional grounds, see brief of National Association of Broadcasters, *supra* note 6. See also NATIONAL ASSOCIATION OF BROADCASTERS, BROADCASTING AND THE BILL OF RIGHTS (1947).

22. The courts cleared this program control technique of charges of "censorship" in *Trinity Methodist Church, South v. FRC*, 62 F.2d 850 (D.C. Cir. 1932); *KFKB Broadcasting Ass'n v. FRC*, 47 F.2d 670 (D.C. Cir. 1931). See *National Broadcasting Co. v. United States*, 319 U.S. 190, 215-17 (1943). The FCC has consistently maintained that it has not exercised "either a negative or affirmative control of any program or proposed program," *Hearings before Committee on Interstate Commerce on S. 814*, 78th Cong., 1st Sess. 25 (1943), and more specifically that it "exercises no power of censorship over radio communications." 7 FCC ANN. REP. 27 (1941). See *Simmons v. FCC*, 3 PIKE & FISHER RADIO REG. 1029 (1947); FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946). For the FCC's views on freedom of speech in relation to the more precise problem of regulation of radio treatment of public issues, see FCC, REPORT OF THE COMMISSION IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES 11 (1949).

23. The roots of this requirement trace back to the beginning of effective government

those broadcasters who still contend that the Commission has no authority to review program service.²⁵

regulation of radio in 1927. The Radio Act of 1927 required that stations allot equal amounts of time to opposing political candidates for campaign purposes. 44 STAT. 1162, 1170 (1927).

This provision was retained when the act was replaced by the Communications Act of 1934. Communications Act § 315. In 1929 the FRC (Federal Radio Commission) extended this requirement so as to apply "not only to addresses by political candidates but to all discussions of issues of importance to the public." 3 FRC ANN. REP. 33 (1929).

The first timorous implementation of this policy is found in early decisions denying or withdrawing licenses where religious, labor and other special interest groups proposed to use, or had been using, stations as vehicles for expounding their particular views. See, e.g., *Great Lakes Broadcasting Co. v. FRC* (FRC Dec. 17, 1928), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir. 1930); *Chicago Federation of Labor v. FRC* (FRC May 20, 1929), *aff'd*, 41 F.2d 422 (D.C. Cir. 1930); *Norman Baker, FRC Docket No. 967* (June 5, 1931); *Kingshighway Presbyterian Church, FRC Docket No. 1012* (June 12, 1931); *KFKB Broadcasting Ass'n v. FRC*, 47 F.2d 670 (D.C. Cir. 1931); *Trinity Methodist Church, South v. FRC*, 62 F.2d 850 (D.C. Cir. 1932); *Young Peoples' Ass'n for the Propagation of the Gospel*, 6 F.C.C. 178 (1938).

A more affirmative policy was presaged in 1940 by the statement, "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." 6 FCC ANN. REP. 55 (1940). The following year the Mayflower decision was handed down defining this requirement more precisely. See note 26 *infra*. Subsequent cases reiterated and elaborated upon the basic formula. In *United Broadcasting Co.*, 10 F.C.C. 515 (1945), for example, the license renewal applicant, in line with the NAB Code (see *infra*) had a policy of refusing to sell time to labor organizations for presentation of their views on public issues, while permitting a hostile news commentator, *Fulton Lewis, Jr.*, to air views sharply contrary to those of the CIO. When sustaining time was granted to labor speakers, their scripts were strictly censored. *Lewis*, on the other hand, had complete freedom. The FCC, while granting renewal, condemned this policy. See also *Homer P. Rainey*, 3 PIKE & FISHER RADIO REG. 737 (1947) (stations must allot a reasonable amount of time for broadcasts incident to election campaigns in light of the importance of the particular election and issues involved); *Robert Harold Scott*, 3 PIKE & FISHER RADIO REG. 259 (1946) (where the tenets of atheism were directly attacked in broadcasts over a station, a "controversial issue" was raised and, although few members of the community accepted that belief, reasonable time must be granted to permit reply to the attacks). See note 25 *infra*. See also *WBNX*, 4 PIKE & FISHER RADIO REG. 242 (1948); FCC, STATEMENT OF THE COMMISSION IN THE MATTER OF BROADCAST OF PROGRAMS ADVERTISING ALCOHOLIC BEVERAGES, 5 PIKE & FISHER RADIO REG. 593 (1949); FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946). The Commission's recent report on broadcaster editorializing, note 7 *supra*, presents the most complete statement of the "fairness" formula.

Beginning in 1939, the radio industry sought to regulate itself through its own version of the "fairness" formula. The original code forbade the sale of time for discussion of controversial issues except in the case of political broadcasts and forums, and prohibited the "coloring" of news broadcasts, although allowing "analyzing and elucidating news so long as such analysis and elucidation are free from bias." NAB, CODE OF STANDARDS OF BROADCASTING PRACTICE 5 (1939). In a subsequent manual refining the Code, the NAB indicated that foreign policy and birth control generally fall within the category of "controversial," and that "discussion of labor problems on the air is almost always of a controversial nature." NAB, CODE MANUAL (1939). The effect of the Code was to encourage broadcasters to minimize discussion of public issues as suited their preference.

It was in line with this "fairness" formula that the FCC, by way of dictum in its Mayflower decision in 1941, made the now famous statement that "the broadcaster cannot be an advocate."²⁶ While it seems question-

See WHITE, *THE AMERICAN RADIO* 75 (1947); see also United Broadcasting Co., *supra*. Following the *United Broadcasting* case the NAB hastily revamped its code to accord with the FCC's pronouncement. Industry self-regulation proved no substitute for government regulation in protecting the public interest. See WHITE, *op. cit. supra*, at 74-82; COMMISSION ON FREEDOM OF THE PRESS, *A FREE AND RESPONSIBLE PRESS* 72-4 (1947).

24. This phrase does not imply that there is or can be a rigid formula for testing whether the requirements of fairness have been met in any given instance. It merely denotes the general obligation of broadcasters to do their best to provide adequate and balanced treatment of controversial issues of interest to the communities they serve. The Commission has wisely said: "It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view." FCC, *REPORT OF THE COMMISSION IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES* 6 (1949).

25. Broadcasters have frequently indicated agreement with the principle of fair treatment of public issues over radio. *E.g.*: "The basis of the American system of broadcasting is not the right of an individual to be heard, but the right of the public to hear." Statement by Neville Miller, then president of NAB, quoted in Timberg, *The Mythology of Broadcasting*, 6 *ANTIOCH REVIEW* 354, 357 (1946). See also COLUMBIA BROADCASTING SYSTEM, *WHAT THE NEW RADIO RULES MEAN* 24 (1941); NAB, *CODE, supra* note 23. A poll of broadcasters by Broadcasting magazine, semi-official organ of the NAB, showed that, of those broadcasters who felt they should have the right to editorialize, 65% felt that there should be an obligation to provide fair opportunity for expression of differing opinions; 29% opposed this view. *Broadcasting*, Dec. 22, 1947, p. 15, col. 1. Disagreement arises primarily over whether the FCC should, or has authority to, enforce fairness. Many broadcasters feel that their sense of "moral" responsibility for fair treatment of public issues should be the sole sanction. *N.Y. Times*, April 20, 1948, p. 54, col. 7. See also NAB, *Brief, supra* note 6; *N.Y. Times*, March 2, 1948, p. 27, col. 1 (statements by presidents of ABC and CBS); *New Republic*, March 15, 1948, p. 26. Others acknowledge FCC responsibility for insuring fairness. See, *e.g.*, *N.Y. Times*, Jan. 18, 1948, § 2, p. 11, col. 4 (statement by T. C. Streibert, president of WOR, key station of Mutual Broadcasting System); *ibid.* (statement by Nathan Straus, president of WMCA).

Congressional concern over the problem of achieving fair radio treatment of public issues was evidenced when the "fairness" formula was embodied in a bill proposing major amendments to the Communications Act of 1934. S. 1333, 80th Cong., 1st Sess. (1947). However, when the FCC upheld the right of an atheist to radio time to defend his creed against attacks (see *Scott* case, *supra* note 23) a House committee sharply rebuked the Commission, stating that "controversial issues" to which the formula applied included only political matters. H.R. REP. NO. 2461, 80th Cong., 2d Sess. (1948).

26. *Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 340 (1941). The case arose in 1939 upon application of the Yankee Network for renewal of the license of its station, WAAB. The Mayflower Broadcasting Company entered the proceedings by submitting an application for grant of a construction permit to operate over the same frequency as WAAB. In considering these competing applications, the FCC found Mayflower unqualified for a license because of a dubious financial structure and because of misrepresen-

able that this dictum was originally intended to do more than reiterate the Commission's policy that the broadcaster must be impartial in his overall presentation of public issues,²⁷ the statement was immediately interpreted

tations of fact to the Commission. With respect to the Yankee Network, question was raised as to whether the network had breached its duty to the public by broadcasting editorials supporting candidates for public office. The Commission found that this practice was inconsistent with the licensee's responsibilities to the public. Its full explanation of its position was as follows:

"[T]he public interest can never be served by a dedication of any broadcast facility to the support of [the licensee's] 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 cause 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.

"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. The public interest—not the private—is paramount. These requirements are inherent in the conception of public interest set up by the Communications Act as the criterion of regulation." *Id.* at 340.

After issuing this rebuke, the FCC, as is its wont, renewed Yankee's license in view of its promise to discontinue the offensive practices. As a consequence, of course, no appeal was taken.

27. Doubt as to whether the *Mayflower* decision actually proscribed broadcaster editorializing is expressed in Heffron, *Should Radio be Free to Editorialize?*, 47 *COMMONWEAL* 466 (1948); FCC, OFFICIAL REPORT ON PROCEEDINGS IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES 633, 637, 640 (1948) (statements of Morris Novik). At least two of the present members of the Commission appear to feel that the decision imposed no ban. In the Commission's recent report on broadcaster editorializing, FCC, REPORT OF THE COMMISSION IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES, Docket No. 8516 (1949), the majority opinion is cast as a "clarification" of the Commission's position in view of "apparent confusion concerning certain of the Commission's previous statements. . . ." *Id.* at 1. Nowhere in the thirteen page majority opinion is there any reference to an existing ban, nor does the opinion in any way suggest that a ban is being lifted. The *Mayflower* case is cited only once, and then with approval as standing for the proposition that "the licensee must operate on a basis of overall fairness. . . ." *Id.* at 5. Even the dissenting opinion states that "we should have such a prohibition [on editorializing]," and makes no mention of an existing ban arising out of the *Mayflower* decision. *Id.*, dissenting opinion.

Commissioner Jones, however, in his separate concurring opinion, states that the *Mayflower* decision "fully and completely suppressed and prohibited the licensee from speaking in the future over his facilities in behalf of any cause," and insists that that decision must be reversed if, as both he and the majority intend, editorializing is to be permitted. *Id.*, Separate Views of Commissioner Jones, 1.

These doubts that the *Mayflower* decision banned editorializing seem fairly well grounded. See quotation from opinion, note 26 *supra*. Assuming that the second paragraph modifies and clarifies the first, it is no more than a restatement of the proposition that the broadcaster may not use his station as a personal instrument to serve his own interests rather than the public interest. This is merely the "fairness" formula phrased in the negative. If the Commission had intended so novel an action as imposing an edi-

as establishing a new corollary to the "fairness" formula.²⁸ Concerted broadcaster protests against the supposed ban on licensee editorializing finally induced the FCC to hold hearings on the question in the Spring of 1948,²⁹ and one year later to issue a "clarifying" statement of policy. In its statement the Commission confirmed the right of licensees to editorialize, but firmly reminded them of their basic responsibility to insure overall balance in discussion of public issues.³⁰

The Commission's decision seems a wise one. Broadcaster editorializing does not appear to raise a threat of unfairness so distinct from that involved in other forms of partisan broadcasting as to warrant an attempt to gag that particular source of opinion. It has been urged that the prestige of the station and licensee almost inevitably lends such weight to their open expressions of opinion as to make them unfair *per se*.³¹ Factually, this seems to be an unwarranted fear. Labelling an opinion as that of station WOR, for example, would scarcely appear to give it distinctively more force than tagging it as the view of United States Steel, or expounding it as the objective news analysis of Edward R. Murrow. And whatever the reputation of the broadcaster, this reputation is a factor which appropriately weighs in public evaluation of competing viewpoints. It has been further contended that a broadcaster, once he has taken an open stand on an issue, will find it impossible to

torial ban, it would seem that far more precise language would have been employed. Aside from the wording of the decision, there is no contemporary evidence as to the Commission's intent. Former chairman Fly recently maintained, however, that the decision was calculated to ban station, but not licensee, editorializing. Communication to the YALE LAW JOURNAL from James L. Fly, dated April 4, 1950, in the Yale Law Library. See note 2 *supra*.

28. See note 2 *supra*. Prior to the *Mayflower* decision broadcaster editorializing was apparently assumed to be permissible. See 2 SOCOLOW, LAW OF RADIO BROADCASTING § 448 (1939).

29. FCC, OFFICIAL REPORT IN THE PROCEEDINGS IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES (1948). Hearings were held for eight days during March and April, 1948.

30. FCC, REPORT IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES (1949). Chairman Coy and Commissioner Walker did not take part in the decision. The majority opinion presented the views of Commissioners Hyde and Sterling. Commissioner Webster adopted the majority opinion and submitted an additional statement summarizing his version of the essential points in that opinion. Commissioner Jones, while concurring with the majority in permitting editorializing, offered a separate opinion sternly chastising the majority for failing to revoke the *Mayflower* decision and acknowledging that it had abridged the First Amendment. Commissioner Hennock dissented, arguing that editorializing should be forbidden "in the absence of some method of policing and enforcing the requirement that the public trust granted a licensee be exercised in an impartial manner."

31. See, *e.g.*, FCC, OFFICIAL REPORT OF THE PROCEEDINGS IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES 616 (1948) (statement on behalf of CIO). The primary objection appears to be directed against institutional editorializing by the station, rather than against editorializing by the licensee in his personal capacity. See *id.* at 591 (statement on behalf of Radio Writers Guild), 622-4 (statement on behalf of CIO), 1233-4 (statement on behalf of American Civil Liberties Union).

afford fair opportunity for expressions of opposing views.³² But where a broadcaster is inclined to tip the scales in favor of one side, he will do so whether or not he has taken an open stand. In fact, there may well be less likelihood of abuse when the broadcaster is an open advocate, since unfairness in that case would be more readily perceptible to both the public and the FCC.³³

An arbitrary ban does not operate to advance the fundamental aim of the "fairness" formula—adequate and representative treatment of public issues. It does not stop the licensee from expressing his views, nor prevent unfair tactics which distort the overall presentation of controversial matters. Even when free to do so, broadcasters have seldom made a practice of airing their stands on public questions by means of overt editorials.³⁴ When they have sought to influence public opinion on controversial issues, they have apparently considered it much more effective to rely upon indirect means—either "slanting" ostensibly impartial programs such as news reports and analyses, or presenting partisan programs reflecting the views of the broadcaster but not identifying him as their source.³⁵ A ban on edi-

32. See FCC, REPORT OF THE COMMISSION IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES 8 (1949).

33. See, e.g., FCC, OFFICIAL REPORT OF PROCEEDINGS IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES 627-8 (1948) (testimony on behalf of CIO).

34. See, e.g., WHITE, *THE AMERICAN RADIO* 213 (1947). In the hearings before the FCC, the presidents of ABC and NBC both testified that their networks never had exercised, and did not now contemplate exercising, the right of editorializing; they merely wished to establish the fact that they had that right. *N.Y. Times*, March 2, 1948, p. 27, col. 1. CBS' president indicated that his network was prepared to present editorial programs if the FCC acknowledged the right of editorializing. The network, however, has presented no such programs since the FCC issued its report in June, 1949. Communication to the *YALE LAW JOURNAL* from William Ackerman of CBS, dated March 8, 1950, in Yale Law Library. Although no precise data is available as to the extent to which local stations editorialize, it has been felt that in general they have made little use of this mode of expression, and that the supposed ban imposed by the *Mayflower* decision had little to do with this reluctance. See WHITE, *op. cit. supra*, at 176-8, 189-90, 213-15. See also SIEPMANN, *RADIO'S SECOND CHANCE* 126-7 (1947).

35. See Note, *Radio Editorials and the Mayflower Doctrine*, 48 *COL. L. REV.* 785, 792 (1948); Stewart, *Radio Commentators and Free Speech*, *Common Sense*, Aug., 1945, p. 32; Sussmann, *How Radio Treated Labor in the Elections*, *Common Sense*, March, 1945, p. 34; Howe, *Policing the Commentator*, *Atlantic Monthly*, Nov., 1943, p. 46. It is impossible, of course, to determine with any precision the extent to which licensees shape the views expressed over their stations. But one authority found frequent cases of gross abuse by local stations, while judging the record of the networks to be "fair to good." Wecter, *Hearing is Believing*, *Atlantic Monthly*, June, 1945, pp. 54, 56-7. In the selection of commentators and speakers, licensees are inclined to choose men whose views roughly coincide with their own. In this respect they are no different from commercial sponsors. See Howe, *Policing the Commentator, supra*, at 47. Some insight may be gained from the surprisingly frank comment of Lyle Van, WOR news commentator, immediately after the FCC issued its report confirming the right of editorializing. "Whereas others may have stayed away from controversial matters, WOR has continually used this program to express its own editorial viewpoints. . . . We will continue [to do so], only now with the

torializing, by stilling open partisanship, merely compels complete reliance on this oblique mode of propagandizing. In addition, the various "unfair" tactics by which broadcasters favor particular views—whether more patent abuses such as unequal allotment of time, or subtler abuses such as discriminatory use of production resources and selection of unrepresentative spokesmen for opposing views—may as readily be employed in connection with covert propagandizing as with open editorializing.

A ban not only fails to accomplish what it sets out to do; it actually undermines the "fairness" formula. By fostering veiled rather than open partisanship, it further exposes the public to a form of propaganda less amenable to intelligent appraisal. Moreover, rather than compensating for weak administration of the discretionary "fairness" formula,³⁶ a ban on broadcaster editorializing makes enforcement more difficult. The more vexing problem in administering the formula is identification of partisan expressions of opinion rather than application of the formula once such expressions have been discerned.³⁷ By preventing only the labelling rather than the expression of broadcasters' opinions, a ban on editorializing accentuates this problem. Furthermore, if a ban were in effect, the FCC might well place unjustified reliance on this supposedly automatic device, diluting the force behind the general formula and deflecting attention from more important sources of abuse.³⁸ Finally, this type of measure is almost certain to stifle

bleasing of the FCC." *Newsweek*, June 13, 1949, p. 51, col. 1. The pending KMPC case, involving charges that the majority stockholder in the station ordered the news manager to "Keep hammering away at the Jews . . . [who are] all Communists," presents what is presumably an unusual case of abuse. *N.Y. Herald-Tribune*, March 9, 1948, p. 19, col. 1.

36. One of the arguments most often advanced by proponents of a ban is that the "fairness" formula cannot be enforced effectively, and that an arbitrary ban on editorializing is an expedient means of compensating for this deficiency and enhancing fairness. See, e.g., FCC, *REPORT OF THE COMMISSION IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES* (1949) (dissent by Commissioner Hennock); Note, *Radio Editorials and the Mayflower Doctrine*, 48 *COL. L. REV.* 785, 792 (1948); FCC, *OFFICIAL REPORT OF PROCEEDINGS IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES 625* (1948) (testimony on behalf of CIO).

37. See, e.g., Note, *Radio Editorials and the Mayflower Doctrine*, 48 *COL. L. REV.* 785, 792 (1948).

38. Overt advocacy by licensees does not pose the greatest threat to fairness. Broadcasters have widely eschewed the particular role of open partisan, and have been predominantly apathetic in bringing views on controversial issues before the public. See, e.g., WHITE, *THE AMERICAN RADIO*, 176-8, 189-90, 213-15, 223 (1947); SIEPMANN, *RADIO'S SECOND CHANCE* 125-7 (1947). A greater threat to fairness may be found in the hold of sponsors and their advertising agents over program content. See *COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS* 63-4, 72-4 (1947); WHITE, *op. cit. supra*, at 55-67, 213. Broadcasters have on occasion been frank to concede such control. E.g., a statement of the president of NBC: "The argument is now advanced that business control of broadcasting operations has nothing to do with program control. This is to forget that 'he who controls the pocketbook controls the man.' Business control means complete control and there is no use arguing to the contrary." Quoted in SIEPMANN, *RADIO'S SECOND CHANCE* 190-1 (1947). Here, it would seem, lies the primary impulse toward

rather than stimulate the increased open discussion of controversial issues which is a basic goal of the "fairness" formula. Prohibited from airing their own views openly, broadcasters will be even more inclined than at present to avoid offering open discussions of controversial matters.³⁹

Thus the FCC's rejection of the *Mayflower* ban seems amply justified—not because the ban unduly shackled broadcasters, but because it failed to promote, and indeed may have jeopardized, representative discussion of public issues on the air.

Fair treatment of public issues over radio will not be achieved by muzzling broadcasters, but by more vigorous enforcement of the general "fairness" formula. The FCC, as the agency directly responsible for implementing public policy with respect to radio, seems unduly hesitant in securing for the public adequate and balanced discussion of controversial issues. While the Commission has been active in defining the standards of performance required under the "fairness" formula, it has been notably passive in enforcing them.⁴⁰ In the past the FCC has appraised the manner in which broadcasters have presented public issues only when some question has been raised in a license proceeding by a competing applicant or by a person who has been refused broadcasting time by a station. Furthermore, the Commission has done virtually nothing to identify the apparently large volume of partisan propaganda which now escapes scrutiny under the "fairness" formula because it has not been labelled at the source as "opinion."

A more effective plan of enforcement might embody the following suggestions. First, the FCC could require all applicants for license renewal to make and substantiate an affirmative claim that they have allotted a reasonable amount of time to discussion of controversial issues, and that such discussion has, in the overall, been presented in a fair and representative manner. Second, in line with this suggestion, the Commission could specifically require all such applicants to enumerate and summarize all partisan expressions emanating from their stations, whether formally tagged "opinion" or not.⁴¹ Finally, if more direct measures prove necessary, the Commission might establish a permanent impartial body to analyze the contents of broadcast programs on a random sampling basis. The purpose would not

bias in radio—an impulse which can be regulated and restrained only through the "fairness" formula. To impose an ineffectual but controversial ban on editorializing by the less aggressive and often subservient licensee, and thus involve the FCC in a running debate similar to the one surrounding the *Mayflower Doctrine*, might well impede positive action against propagandizing by advertisers and sponsors.

39. See, e.g., FCC, OFFICIAL REPORT, *supra* note 36, at 636, 650 (testimony of Morris Novik).

40. See WHITE, *op. cit. supra* note 38; SIEMANN, *op. cit. supra* note 38, at 125-7.

41. A comprehensive audit of the "controversial" content of broadcast programs is essential to consistent enforcement of the "fairness" formula. The difficulty of this task is far outweighed by the importance of securing fair treatment of public issues over radio. It would not seem unreasonable to impose the task of making an initial "tabulation" on the broadcasters.