

The Federal Communications Commission

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1. The Development of Government Regulation

In the United States no one may operate a broadcasting station unless he first obtains a license from the Federal Communications Commission. These licenses are not issued automatically but are granted or withheld at the discretion of the Commission, which is thus in a position to choose those who shall operate radio and television stations. How did the Commission come to acquire this power?

About the turn of the century, radio began to be used commercially, mainly for ship-to-shore and ship-to-ship communication.¹ This led to various proposals for legislation. Some of these were concerned with the promotion of safety at sea, requiring the installation of radio equipment on ships, the employment of skilled operators, and the like. Others, and it is these in which we are interested, were designed to bring about government control of the operations of the industry as a whole.

The reason behind such proposals can be seen from a letter dated March 30, 1910, from the Department of the Navy to the Senate Committee on Commerce, which described, "clearly and succinctly" according to the Committee, the purpose of the bill to regulate radio communication which was then under discussion. The Department of the Navy explained that each radio station

considers itself independent and claims the right to send forth its electric waves through the ether at any time that it may desire, with the result that there exists in many places a state of chaos. Public business is hindered to the great embarrassment of the Navy Department. Calls of distress from vessels in peril on the sea go unheeded or are drowned

¹ This short account of the development of radio regulation does not call for extensive documentation, but sources are given for all quotations and in other cases where they might be difficult to identify. I found the following books and the references contained therein particularly helpful: H. P. Warner, *Radio and Television Law* (1948), and L. F. Schmeckebier, *The Federal Radio Commission* (1932).

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out in the etheric bedlam produced by numerous stations all trying to communicate at once. Mischievous and irresponsible operators seem to take great delight in impersonating other stations and in sending out false calls. It is not putting the case too strongly to state that the situation is intolerable, and is continually growing worse.

The letter went on to point out that the Department of the Navy, in co-operation with other Government departments,

has for years sought the enactment of legislation that would bring some sort of order out of the turbulent condition of radio communication, and while it would favor the passage of a law placing all wireless stations under the control of the Government, at the same time recognizes that such a law passed at the present time might not be acceptable to the people of this country.²

The bill to which this letter referred was passed by the Senate but was not acted upon by the House of Representatives. Toward the end of 1911 the same bill was reintroduced in the Senate. A subcommittee concluded that it "bestowed too great powers upon the departments of Government and gave too great privileges to military and naval stations, while it did not accurately define the limitations and conditions under which commercial enterprises could be conducted."³ In consequence, a substitute bill was introduced, and this secured the approval both of the Senate and of the House of Representatives and became law on August 13, 1912. The Act provided that anyone operating a radio station must have a license issued by the Secretary of Commerce. This license would include details of the ownership and location of the station, the wave length or wave lengths authorized for use, the hours for which the station was licensed for work, etc. Regulations, which could be waived by the Secretary of Commerce, required the station to designate a normal wave length (which had to be less than 600 or more than 1,600 meters), but the station could use other wave lengths, provided that they were outside the limits already indicated. Amateurs were not to use a wave length exceeding 200 meters. Various other technical requirements were included in the Act. The main difference between the bill introduced in 1910 and the Act as passed was that specific regulations were set out in the Act, whereas originally power had been given to the Secretary of Commerce to make regulations and to prevent interference to "signals relating to vessels in distress or of naval and military stations by private and commercial stations"; power to make regulations was also given to the President.⁴

It was not long before attempts were made to change the law. The proposal that the Secretary of Commerce should have power to make regulations was revived. A bill was even introduced to create a Post Office monopoly of electrical communications. In 1917 and 1918, bills were introduced which would have

² S. Rep. No. 659, 61st Cong., 2d Sess. 4 (1910).

³ S. Rep. No. 698, 62d Cong., 2d Sess. 3 (1912).

⁴ Mention should also be made of one bill (S. 5630, 62d Cong. [1912]) which gave the task of regulating radio communication to the Interstate Commerce Commission and another (H.R. 23716, 62d Cong. [1912]) which provided for government ownership of wireless telegraphs.

given control of the radio industry to the Department of the Navy. Indeed, the 1918 bill was described, quite accurately, by Josephus Daniels, the Secretary of the Navy, as one which “would give the Navy Department the ownership, the exclusive ownership, of all wireless communication for commercial purposes.” Mr. Daniels explained that radio was “the only method of communication which must be dominated by one power to prevent interference. . . . The question of interference does not come in at all in the matter of cables or telegraphs but only in wireless.” Some members of the House Committee to which Mr. Daniels was giving evidence asked whether it would not be sufficient to regulate the hours of operation and the wave lengths used by radio stations, while leaving them in private hands. But Mr. Daniels was not to be moved from his position:

My judgment is that in this particular method of communication the government ought to have a monopoly, just like it has with the mails—and even more so because other people could carry the mails on trains without interference, but they cannot use the air without interference.

Later Mr. Daniels explained: “There are only two methods of operating the wireless: either by the government or for it to license one corporation—there is no other safe or possible method of operating the wireless.” That led one of the Committee to ask: “That is because of the interference in the ether, is it?” Mr. Daniels replied: “There is a certain amount of ether, and you cannot divide it up among the people as they choose to use it; one hand must control it.” Later, Commander Hooper, one of Mr. Daniels’ advisers, told the Committee:

. . . radio, by virtue of the interferences, is a natural monopoly; either the government must exercise that monopoly by owning the stations, or it must place the ownership of these stations in the hands of one concern and let the government keep out of it.⁵

The Navy in 1918 was in a much stronger position to press its claim than in the period before the 1912 Act. It had controlled the radio industry during the war and, as a result of building stations and the acquisition by purchase of certain private stations, owned 111 of the 127 existing American commercial shore stations. Nevertheless, the House Committee does not appear to have been convinced by the Navy Department’s argument, and no further action was taken on this bill. Nor was this proposal ever to be raised again. The emergence of the broadcasting industry was to make it impossible in the future to think of the radio industry solely in terms of point-to-point communication and as a matter largely of concern to the Department of the Navy.

The broadcasting industry came into being in the early 1920’s. Some broadcasting stations were operating in 1920 and 1921, but a big increase in the number of stations occurred in 1922. On March 1, 1922, there were 60 broadcasting stations in the United States. By November 1, the number was 564.⁶ Mr. Herbert

⁵ Hearings on H.R. 13159, A Bill to Further Regulate Radio Communication, before the House Committee on the Merchant Marine and Fisheries, 65th Cong., 3d Sess. (1918).

⁶ See Schmeckebier, *op. cit. supra* note 1, at 4.

Hoover, as Secretary of Commerce, was responsible for the administration of the 1912 Act, and he faced the task of preventing the signals of these new stations from interfering with each other and with those of existing stations. In February, 1922, Mr. Hoover invited representatives of various government departments and of the radio industry to the first Radio Conference. The Conference recommended that the powers of the Secretary of Commerce to control the establishment of radio stations should be strengthened and proposed an allocation of wave bands for the various classes of service. Other conferences followed in 1923, 1924, and 1925.⁷ Bills were introduced in Congress embodying the recommendations of these conferences, but none passed into law. The Secretary of Commerce attempted to carry out their recommendations by inserting detailed conditions into the licenses. However, his power to regulate radio stations in this way was destroyed by court decisions interpreting the 1912 Act.

In 1921, Mr. Hoover declined to renew the license of a telegraph company, the Intercity Radio Company, on the ground that its use of any available wave length would interfere with the signals of other stations. The company took legal action, and in February, 1923, a court decision held that the Secretary of Commerce had no discretion to refuse a license.⁸ This meant, of course, that the Secretary had no control over the number of stations that could be established. However, the wording of the court decision seemed to imply that the Secretary had power to choose the wave length which a licensee could use. A later decision was to deny him even this power. In 1925 the Zenith Radio Corporation was assigned the wave length of 332.4 meters, with hours of operation limited from 10:00 to 12:00 P.M. on Thursday and then only when this period was not wanted by the General Electric Company's Denver station. These terms indicate the highly restrictive conditions which Mr. Hoover felt himself obliged to impose at this time. Not unnaturally, the Zenith Company was not happy with what was proposed and, in fact, broadcast on wave lengths and at times not allowed by the license. Criminal proceedings were then taken against the Zenith Company for violation of the 1912 Act. But in a decision rendered in April, 1926, it was held that the Act did not give the Secretary of Commerce power to make regulations and that he was required to issue a license subject only to the regulations in the Act itself.⁹ As we have seen, these merely required that the wave length used should be less than 600 or more than 1,600 meters. The decision in the Zenith case appeared in certain respects to be in conflict with that in the Intercity Radio Company case, and the Secretary of Commerce asked the Attorney General for an opinion. His opinion upheld the decision in the Zenith case.¹⁰ This meant that the Secretary of Commerce was compelled to issue licenses to anyone who applied, and the licensees were then free to decide on the power of their station,

⁷ For details of these conferences, see Schmeckebier, *op. cit. supra* note 1, at 6-12.

⁸ *Hoover v. Intercity Radio Co.*, 286 Fed. 1003 (App. D.C., 1923).

⁹ *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill., 1926).

¹⁰ 35 Ops. Att'y Gen. 126 (1926). The question was submitted on June 4, 1926, and the opinion rendered on July 8, 1926.

its hours of operation, and the wave length they would use (outside the limits mentioned in the Act). The period which followed has often been described as one of "chaos in broadcasting." More than two hundred stations were established in the next nine months. These stations used whatever power or wave length they wished, while many of the existing stations ceased to observe the conditions which the Secretary of Commerce had inserted in their licenses.

For a number of years Congress had been studying various proposals for regulating radio communication. The Zenith decision added very considerably to the pressure for new legislation. In July, 1926, as a stop-gap measure designed to prevent licensees establishing property rights in frequencies, the two houses of Congress passed a joint resolution providing that no license should be granted for more than ninety days for a broadcasting station or for more than two years for any other type of station. Furthermore, no one was to be granted a license unless he executed "a waiver of any right or of any claim to any right, as against the United States, to any wave length or to the use of the ether in radio transmission. . . ." This echoed an earlier Senate resolution (passed in 1925), in which the ether and the use thereof had been declared to be "the inalienable possession of the people of the United States. . . ." When Congress reconvened in December, 1926, the House and Senate quickly agreed on a comprehensive measure for the regulation of the radio industry, which became law in February, 1927.

This Act brought into existence the Federal Radio Commission. The Commission, among other things, was required to classify radio stations, prescribe the nature of the service, assign wave lengths, determine the power and location of the transmitters, regulate the kind of apparatus used, and make regulations to prevent interference. It was provided that those wanting licenses to operate radio stations had to make a written application which was to include such facts as the Commission

may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies or wave lengths and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used, and such other information as it may require.

The Commission was authorized to issue a license if the "public interest, necessity or convenience would be served" by so doing. Once the license was granted, it could not be transferred to anyone else without the approval of the Commission. And, incorporating the sense of the 1926 joint resolution, licensees were required to sign a waiver of any claim to the use of a wave length or the ether.

The Commission was thus provided with massive powers to regulate the radio industry. But it was prohibited from censoring programs:

Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio

station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications.

Nonetheless, the Act did impose some restrictions on a station's programing. Obscene, indecent, or profane language was prohibited. A station was not allowed to rebroadcast programs without the permission of the originating station. The names of people paying for or furnishing programs had to be announced. Finally, it was provided that, if a licensee permitted a legally qualified candidate for public office to broadcast, equal opportunities had to be offered to all other candidates.

The regulatory powers of the Federal Radio Commission did not extend to radio stations operated by the federal government, except when the signals transmitted did not relate to government business. These government stations were subject to the authority of the President. In fact, the allocation of frequencies for government use was carried out under the auspices of the Interdepartment Radio Advisory Committee, which had originally been formed in 1922 but which continued in existence after the establishment of the Federal Radio Commission.

In 1934 the powers exercised by the Federal Radio Commission were transferred to the Federal Communications Commission, which was also made responsible for the regulation of the telephone and telegraph industries. This change in the administrative machinery made little difference to the relations between the regulatory authority and the radio industry. Indeed, the sections of the 1934 Act dealing with the radio industry very largely reproduced the 1927 Act.¹¹ Amendments have been made to the 1934 Act from time to time, but these have related mainly to procedural matters, and the main structure has been unaffected.¹² In all essentials, the system as it exists today is that established in 1927.

2. The Clash with the Doctrine of Freedom of the Press

The situation in the American broadcasting industry is not essentially different in character from that which would be found if a commission appointed by the federal government had the task of selecting those who were to be allowed to publish newspapers and periodicals in each city, town, and village of the United States. A proposal to do this would, of course, be rejected out of hand as inconsistent with the doctrine of freedom of the press. But the broadcasting

¹¹ The main difference between these two acts was the insertion in the 1934 Act of two new provisions. One was a prohibition against the advertisement or conduct of lotteries (Section 316, presently Title 18, U.S.C. § 1304). The other required anyone maintaining studios to supply programs (whether by wire or otherwise) for foreign stations which could be heard in the United States to obtain a permit from the Commission (Section 325(b)).

¹² The Davis Amendment of 1928 which directed the Commission to make an equal allocation of broadcasting facilities among five zones of the United States and an equitable distribution, according to population, among the states in each zone was incorporated in the 1934 Act. But in 1936 the original wording of the 1927 Act, which merely required the Commission to make "a fair, efficient and equitable distribution," was reinstated.

industry is a source of news and opinion of comparable importance with newspapers or books and, in fact, nowadays is commonly included with the press, so far as the doctrine of freedom of the press is concerned. The Commission on Freedom of the Press, under the chairmanship of Mr. Robert M. Hutchins, used the term “press” to include “all means of communicating to the public news and opinions, emotions and beliefs, whether by newspapers, magazines, or books, by radio broadcasts, by television, or by films.”¹³ Professor Zechariah Chafee had little doubt that the broadcasting industry came within the protection of the First Amendment.¹⁴ A dictum in the Supreme Court expressed a similar view: “We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”¹⁵ Yet, as Mr. Louis G. Caldwell has pointed out, a

broadcasting station can be put out of existence and its owner deprived of his investment and means of livelihood, for the oral dissemination of language which, if printed in a newspaper, is protected by the First Amendment to the Constitution against exactly the same sort of repression.¹⁶

In the discussions preceding the formation of the Federal Radio Commission, Mr. Hoover distinguished between two problems: the prevention of interference and the choice of those who would operate the stations:

. . . the ideal situation, as I view it, would be traffic regulation by Federal Government to the extent of the allotment of wave lengths and control of power and the policing of interference, leaving to each community a large voice in determining who are to occupy the wave lengths assigned to that community.¹⁷

But, as we have seen, both of these tasks were given to the Federal Radio Commission. Some interpreted the fact that the Commission was denied the power of censorship as meaning that it would not concern itself with programing but would simply act as “the traffic policeman of the ether.” But the Commission maintained—and in this it has been sustained by the courts—that, to decide whether the “public interest, convenience or necessity” would be served by granting or renewing a license, it had to take into account proposed or past programing. One commentator remarked that, by 1949, the “Commission had travelled far from its original role of airwaves traffic policeman. Control over radio had become more than regulation based on technological necessity; it had become regulation of conduct, and the basis was but emerging.”¹⁸

The Commission is instructed to grant or renew a license if this would serve

¹³ The Commission on Freedom of the Press, *A Free and Responsible Press* 109 (1947).

¹⁴ Z. Chafee, *Government and Mass Communications* 235–41 (1947).

¹⁵ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

¹⁶ Caldwell, *Freedom of Speech and Radio Broadcasting*, 177 *Annals* 179, 203 (1935).

¹⁷ Opening Address of Herbert Hoover before the Fourth Annual Radio Conference (1925). Reproduced in *Hearings on S. 1 and S. 1754, Radio Control*, before the Senate Committee on Interstate Commerce, 69th Cong., 1st Sess. 50, 57–58 (1926).

¹⁸ *Old Standards in New Context: A Comparative Analysis of FCC Regulation*, *U. of Chi. L. Rev.* 78, 83 (1950).

the “public interest, convenience or necessity.” This phrase, taken from public utility legislation, lacks any definite meaning. It “means about as little as any phrase that the drafters of the Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority.”¹⁹ Furthermore, the many inconsistencies in Commission decisions have made it impossible for the phrase to acquire a definite meaning in the process of regulation. The character of the program proposals of an applicant for a frequency or channel is, of course, one of the factors taken into account by the Commission, and any applicant with a good lawyer will find that his proposals include live programs with local performers and programs in which public issues are discussed (these being program types which appear to be favored by the Commission). And when the time comes for renewal of the license, which at the present time is every three years, the past programing of the station is reviewed.²⁰

A good illustration of the difference between the position of the owner of a broadcasting station and the publisher of a newspaper is provided by the case of Mr. Baker, who operated a radio station in Iowa and was denied a renewal of his license in 1931 because he broadcast bitter personal attacks on persons and institutions he did not like. The Commission said:

This Commission holds no brief for the Medical Associations and other parties whom Mr. Baker does not like. Their alleged sins may be at times of public importance, to be called to the attention of the public over the air in the right way. But this record discloses that Mr. Baker does not do so in any high-minded way. It shows that he continually and erratically over the air rides a personal hobby, his cancer cure ideas and his likes and dislikes of certain persons and things. Surely his infliction of all this on the listeners is not the proper use of a broadcasting license. Many of his utterances are vulgar, if not indeed indecent. Assuredly they are not uplifting or entertaining.

Though we may not censor, it is our duty to see that broadcasting licenses do not afford mere personal organs, and also to see that a standard of refinement fitting our day and generation is maintained.²¹

It is hardly surprising that this decision has been described as “in spirit pure censorship.”²²

The Commission’s attempts to influence programing have met with little opposition, except on two occasions, when the broadcasting industry made vig-

¹⁹ Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 *Air L. Rev.* 295, 296 (1930).

²⁰ It is unnecessary for my purpose to review the policies of the Federal Radio Commission and the Federal Communications Commission in choosing among applicants and passing on the renewal of licenses. For discussions of such questions, the reader is referred to Warner, *op. cit. supra* note 1; J. M. Edelman, *The Licensing of Radio Services in the United States, 1927 to 1947* (1950); Federal Communications Commission, *Report of the Network Study Staff on Network Broadcasting* (1957), particularly Chapter 3, “Performance in the Public Interest.”

²¹ Decisions of the FCC, Docket No. 967, June 5, 1931. Quoted from Caldwell, *Censorship of Radio Programs*, 1 *J. Radio Law* 441, 473 (1931).

²² *Ibid.*

orous protests. The first arose out of the so-called *Mayflower* decision of 1940. A Boston station had broadcast editorials urging the election of certain candidates for public office and expressing views on controversial questions. The Commission criticized the station for doing this and renewed its license only after receiving assurances that the station would no longer broadcast editorials. In 1948 the Commission re-examined the question and issued a report which, while not explicitly repudiating the *Mayflower* doctrine, nevertheless expressed approval of editorializing subject to the criterion of "overall fairness." The Commission agreed that its ruling involved an abridgment of freedom but that this was necessary:

Any regulation of radio, especially a system of limited licensees, is in a real sense an abridgment of the inherent freedom of persons to express themselves by means of radio communications. It is however, a necessary and constitutional abridgment in order to prevent chaotic interference from destroying the great potential of this medium for public enlightenment [sic] and entertainment.

The Commission then went on:

The most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communications free from any governmental dictation as to what they can or cannot hear and free alike from similar restraints by private licensees.

It is not clear to me what the Commission meant by this. It could hardly have been the intention of the Commission to pay a tribute to the "invisible hand."²³

The second controversy arose out of the publication of the so-called Blue Book by the Federal Communications Commission in 1946, entitled *Public Service Responsibility of Broadcast Licensees*. In this report the Commission indicated that it was going to pay closer attention to questions of programming and that those stations which carried sustaining programs, local live programs, and programs devoted to the discussion of public issues and which avoided "advertising excesses" would be more likely to have their licenses renewed. In the case of sustaining programs, it was suggested that they should be used with a view to

(a) maintaining an overall program balance, (b) providing time for programs inappropriate for sponsorship, (c) providing time for programs serving particular minority tastes and interests, (d) providing time for non-profit organizations—religious, civic, agricultural, labor, educational, etc., and (e) providing time for experiment and for unfettered artistic self-expression.²⁴

It was argued (by Justin Miller, of the National Association of Broadcasters, among others) that the publication of the Blue Book was unconstitutional, as

²³ Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1257 (1949). Cf. *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940).

²⁴ Federal Communications Commission, *Public Service Responsibility of Broadcast Licensees* 55 (1946).

being contrary to the First Amendment, but on this the courts have not given an opinion.

The examination by the Commission of the past activities of applicants has at times posed a threat to other freedoms. One example is furnished by the proceedings in the *Daily News* case. The publishers of the New York *Daily News* applied for permission to construct an FM station. The American Jewish Congress intervened, arguing that the application should be denied because the *Daily News* had

evidenced bias against minority groups, particularly Jews and Negroes, and has published irresponsible and defamatory news items and editorials concerning such minorities . . . the *News* had thus demonstrated . . . that it is unqualified to be the licensee of a radio station because it could not be relied upon to operate its station with fairness to all groups and points of view in the community.

The admissibility of such evidence was questioned, but the Commission held that it could be received, although pronouncing it inconclusive in this case. The application of the owners of the *Daily News* was finally rejected on other grounds, although it has been suggested that the evidence of the American Jewish Congress in fact played a part in bringing about the decision. What seems clear is that a newspaper which has an editorial policy approved of by the Commission is more likely to obtain a radio or television license than one that does not. The threat to freedom of the press in its strictest sense is evident.²⁵ Another case involved the political activities of an owner of a radio station, Mr. Edward Lamb. In earlier hearings, Mr. Lamb had denied having Communist associations. When the license of his station came up for renewal in 1954, the Commission charged that his previous statements were false. According to Professor Ralph S. Brown, the Broadcast Bureau of the Commission “produced in support of its charge as sorry a collection of unreliable and mendacious witnesses as have appeared in any recent political case.” Finally, after lengthy proceedings, the license was renewed, but the Commission in its decision rejected the view that it “had no right to inquire into past associations, activities, and beliefs. . . .”²⁶

If we ask why it is that the Commission’s policies have met with so little opposition, the answer, without any doubt, is that the Commission has been extremely hesitant about imposing its views on the broadcasting industry. Sometimes licenses have been renewed on condition that the programs to which the Commission objected were not broadcast in the future. Some operators have not had their licenses renewed largely or wholly because of objections to the programs transmitted. But the number of such cases is not large, and the pro-

²⁵ See WBNX Broadcasting Co., 12 F.C.C. 805 (1948). For the view that this evidence may have had some effect on the Commission’s decision, see Radio Program Controls: A Network of Inadequacy, 57 Yale L. J. 275 (1947).

²⁶ R. S. Brown, Jr., Loyalty and Security: Employment Tests in the United States 371–72 (1958). For further details of this case and the questions it raises, see an article by the same author, Character and Candor Requirements for FCC Licensees, 22 Law & Contemp. Prob. 644 (1957).

grams to which objection was taken were devoted to such topics as fortune-telling, horse-racing results, or medical advice or involved attacks on public officials, medical associations, or religious organizations.²⁷

It is difficult for someone outside the broadcasting industry to assess the extent to which programing has been affected by the views and actions of the Commission. On the face of it, it would seem improbable that the Commission's cautious approach would intimidate many station operators. However, the complete compliance of the industry to the *Mayflower* decision may be cited as evidence of the power of the Commission. Furthermore, the Commission has many favors to give, and few people with any substantial interests in the broadcasting industry would want to flout too flagrantly the wishes of the Commission.

3. The Rationale of the Present System

Professor Chafee has pointed out that the newer media of communication have been subjected to a stricter control than the old:

Newspapers, books, pamphlets, and large meetings were for many centuries the only means of public discussion, so that the need for their protection has long been generally realized. On the other hand, when additional methods for spreading facts and ideas were introduced or greatly improved by modern inventions, writers and judges had not got into the habit of being solicitous about guarding their freedom. And so we have tolerated censorship of the mails, the importation of foreign books, the stage, the motion picture, and the radio.²⁸

It is no doubt true that the difference between the position occupied by the press and the broadcasting industry is in part due to the fact that the printing press was invented in the fifteenth and broadcasting in the twentieth century. But this is by no means the whole story. Many of those who have acquiesced in this abridgment of freedom of the press in broadcasting have done so reluctantly, the situation being accepted as a necessary, if unfortunate, consequence of the peculiar technology of the industry.

Mr. Justice Frankfurter, in delivering the opinion of the Supreme Court in one of the leading cases on radio law, gave an account of the rationale of the present system:

The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that

²⁷ See the Report of the Network Study Staff on Network Broadcasting, op. cit. supra note 20, at 150–51. The exact number of cases in which the failure to renew a license was due to past programing (that is, in which the renewal would have been made had the programing been different) is uncertain. See E. E. Smead, *Freedom of Speech by Radio and Television* 123 n. 7 (1959).

²⁸ Z. Chafee, *Free Speech in the United States* 381 (1942).

can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile. In enacting the Radio Act of 1927, the first comprehensive scheme of control over radio communication, Congress acted upon the knowledge that if the potentialities of radio were not to be wasted, regulation was essential.

To those who argued that we should “regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other,” Mr. Justice Frankfurter answered:

But the Act does not restrict the Commission merely to supervision of traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the “public interest, convenience or necessity.”

. . . The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. . . . The Commission’s licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of “public interest” were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation of radio, comparative considerations as to the services to be rendered have governed the application of the standard of “public interest, convenience or necessity.”²⁹

The events which preceded government regulation have been described very vividly by Professor Charles A. Siepmann:

The chaos that developed as more and more enthusiastic pioneers entered the field of radio was indescribable. Amateurs crossed signals with professional broadcasters. Many of the professionals broadcast on the same wave length and either came to a gentleman’s agreement to divide the hours of broadcasting or blithely set about cutting one another’s throats by broadcasting simultaneously. Listeners thus experienced the annoyance of trying to hear one program against the raucous background of another. Ship-to-shore communication in Morse code added its pulsing dots and dashes to the silly symphony of sound.

Professor Siepmann sums up the situation in the following words: “Private enterprise, over seven long years, failed to set its own house in order. Cutthroat competition at once retarded radio’s orderly development and subjected listeners to intolerable strain and inconvenience.”³⁰

Notwithstanding the general acceptance of these arguments and the eminence of the authorities who expound them, the views which have just been quoted are based on a misunderstanding of the nature of the problem. Mr. Justice

²⁹ National Broadcasting Co. v. United States, 319 U.S. 190, 213, 215–17 (1943).

³⁰ C. A. Siepmann, Radio, Television and Society 5–6 (1950).

Frankfurter seems to believe that federal regulation is needed because radio frequencies are limited in number and people want to use more of them than are available. But it is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor, and capital are all scarce, but this, of itself, does not call for government regulation. It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resource. But the way this is usually done in the American economic system is to employ the price mechanism, and this allocates resources to users without the need for government regulation.

Professor Siepmann seems to ascribe the confusion which existed before government regulation to a failure of private enterprise and the competitive system. But the real cause of the trouble was that no property rights were created in these scarce frequencies. We know from our ordinary experience that land can be allocated to land users without the need for government regulation by using the price mechanism. But if no property rights were created in land, so that everyone could use a tract of land, it is clear that there would be considerable confusion and that the price mechanism could not work because there would not be any property rights that could be acquired. If one person could use a piece of land for growing a crop, and then another person could come along and build a house on the land used for the crop, and then another could come along, tear down the house, and use the space as a parking lot, it would no doubt be accurate to describe the resulting situation as chaos. But it would be wrong to blame this on private enterprise and the competitive system. A private-enterprise system cannot function properly unless property rights are created in resources, and, when this is done, someone wishing to use a resource has to pay the owner to obtain it. Chaos disappears; and so does the government except that a legal system to define property rights and to arbitrate disputes is, of course, necessary. But there is certainly no need for the kind of regulation which we now find in the American radio and television industry.

In 1951, in the course of a comment dealing with the problem of standards in color television, Mr. Leo Herzel proposed that the price mechanism should be used to allocate frequencies. He said:

The most important function of radio regulation is the allocation of a scarce factor of production—frequency channels. The FCC has to determine who will get the limited number of channels available at any one time. This is essentially an economic decision, not a policing decision.

And, later, Mr. Herzel suggested that channels should be leased to the highest bidder.³¹ This article brought a reply from Professor Dallas W. Smythe of the

³¹ "Public Interest" and the Market in Color Television Regulation, 18 U. of Chi. L. Rev. 802, 809 (1951).

Institute of Communications Research of the University of Illinois and formerly chief economist of the Federal Communications Commission. In his article, Professor Smythe presented the case against the use of the price mechanism in broadcasting.³²

First of all, Professor Smythe pointed out that commercial broadcasting was not a “dominant user of spectrum space” but “a minor claimant on it.” He explained that “the radio spectrum up to at least 1,000,000 Kc is susceptible of commercial exploitation, technologically. On this basis, the exclusive use of frequencies by broadcasters represents 2.3 per cent of the total and the shared use, 7.2 per cent.” But, according to Professor Smythe, even these percentages may overstate the importance of broadcasting. “The FCC has allocated the spectrum to different users as far as 30,000,000 Kc. And on this basis commercial broadcasters use exclusively less than one tenth of one per cent, and, on a shared basis, two tenths of one per cent.”³³

Professor Smythe then went on to explain who it was that used most of the radio spectrum. First, there were the military, the law-enforcement agencies, the fire-fighting agencies, the Weather Bureau, the Forestry Service, and the radio amateurs, “the last of which by definition could hardly be expected to pay for frequency use.” (This is, of course, in accordance with the modern view that an amateur is someone who does not pay for the things he uses.) Then there were many commercial users other than broadcasters. There were the common carriers, radiotelegraph and radiotelephone; transportation agencies, vessels on the high seas, railroads, street railways, busses, trucks, harbor craft, and taxis. There were also various specialized users, such as electric power, gas and water concerns, the oil industry (which used radio waves for communication and also for geophysical exploration), the motion-picture industry (for work on location), and so on. Professor Smythe commented:

Surely it is not seriously intended that the non-commercial radio users (such as police), the non-broadcast common carriers (such as radio-telegraph) and the non-broadcast commercial users (such as the oil industry) should compete with dollar bids against the broadcast users for channel allocations.

To this Mr. Herzel replied:

It certainly is seriously suggested. Such users compete for all other kinds of equipment or else they don't get it. I should think the more interesting question is, why is it seriously suggested that they shouldn't compete for radio frequencies?

Certainly, it is not clear why we should have to rely on the Federal Communications Commission rather than the ordinary pricing mechanism to decide whether a particular frequency should be used by the police, or for a radio-telephone, or for a taxi service, or for an oil company for geophysical exploration,

³² Smythe, *Facing Facts about the Broadcast Business*, 20 U. of Chi. L. Rev. 96 (1952), and a Rejoinder by the student author, Mr. Leo Herzel, which appeared in 20 U. of Chi. L. Rev. 106 (1952).

³³ Of course not all these frequencies would be equally desirable for use in the broadcasting industry.

or by a motion-picture company to keep in touch with its film stars or for a broadcasting station. Indeed, the multiplicity of these varied uses would suggest that the advantages to be derived from relying on the pricing mechanism would be especially great in this case.

Professor Smythe also argued that the use of market controls depends on “the economic assumption that there is substantially perfect competition in the electronics field.” This is a somewhat extreme view. An allocation scheme costs something to administer, will itself lead to a malallocation of resources, and may encourage some monopolistic tendencies—all of which might well make us willing to tolerate a considerable amount of imperfect competition before substituting an allocation scheme for market controls. Nonetheless, the problem of monopoly is clearly one to be taken seriously. But this does not mean that frequencies should not be allocated by means of the market or that we should employ a special organization, the Federal Communications Commission, for monopoly control in the broadcasting industry rather than the normal procedure. In fact, the antitrust laws do apply to broadcasting, and recently we have seen the Department of Justice taking action in a case in which the Federal Communications Commission had not thought it necessary to act.³⁴ The situation is not simply one in which there are two organizations to carry out one law. There are, in effect, two laws. The Federal Communications Commission is not bound by the antitrust laws and may refuse an application for a license because of the monopolistic practices of the applicant, even though these may not have been illegal under the antitrust laws. Thus, the broadcasting industry, while subject to the antitrust laws, is also subject to another not on the statute book but one invented by the Commission.³⁵

It may be wondered whether such an involved system is required for the broadcasting industry, but this is not the question with which I am mainly concerned. To increase the competitiveness of the system, it may be that certain firms should not be allowed to operate broadcasting stations (or more than a certain number) and that certain practices should be prohibited; but this does not mean that those regarded as eligible to operate broadcasting stations ought not to pay for the frequencies they use. It is no doubt desirable to regulate monopolistic practices in the oil industry, but to do this it is not necessary that oil companies be presented with oil fields for nothing. Control of monopoly is a separate problem.

³⁴ See *United States v. Radio Corp. of America*, 358 U.S. 334 (1959).

³⁵ Compare the statement of the court in *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33 (App. D.C., 1950): “Whether Mansfield’s activities do or do not amount to a positive violation of law, and neither this court nor the Federal Communications Commission is determining that question, they still may impair Mansfield’s ability to serve the public. Thus, whether Mansfield’s competitive practices were legal or illegal, in the strict sense, is not conclusive here. Monopoly in the mass communication of news and advertising is contrary to the public interest, even if not in terms proscribed by the antitrust laws.”

4. The Pricing System and the Allocation of Frequencies

There can be little doubt that the idea of using private property and the pricing system in the allocation of frequencies is one which is completely unfamiliar to most of those concerned with broadcasting policy. Consider, for example, the comment on the articles by Mr. Herzel and Professor Smythe (discussed in the previous section) which appeared in the Journal of the Federal Communications Bar Association and which was therefore addressed to the group with the greatest knowledge of the problems of broadcasting regulation in the United States: "The whole discussion will be over the heads of most readers."³⁶ Or consider the answers given by Mr. Frank Stanton, president of Columbia Broadcasting System and one of the most experienced and able men in the broadcasting industry, when Representative Rogers in a congressional inquiry raised the possibility of disposing of television channels by putting them up for the highest bids:

Mr. Rogers. Doctor, what would you think about a proposition of the Government taking all of these channels and opening them to competitive bidding and let the highest bidder take them at the best price the taxpayers could get out of it?

Mr. Stanton. This is a novel theory and one to which I have not addressed myself during my operating career. This is certainly entirely contrary to what the Communication Act was in 1927 and as it was later amended.

Mr. Rogers. I know, but if the Government owns a tract of land on which you raise cattle, they charge a man for the use of the land.

Why would it not be just as reasonable to charge a man to use the avenues of the air as it would be to use that pasture? Why should the people be giving one group something free and charging another group for something that is comparable?

Mr. Stanton. This is a new and novel concept. I think it would have to be applied broadly to all uses of the spectrum and not just confined to television, if you will.

Mr. Rogers. I understand that. Do you not think that would really be free enterprise where the taxpayer would be getting the proceeds?

Mr. Stanton. You have obviously given some thought to this and you are hitting me for the first time with it.³⁷

This "novel theory" (novel with Adam Smith) is, of course, that the allocation of resources should be determined by the forces of the market rather than as a result of government decisions. Quite apart from the malallocations which are the result of political pressures, an administrative agency which attempts to perform the function normally carried out by the pricing mechanism operates under two handicaps. First of all, it lacks the precise monetary measure of benefit and cost provided by the market. Second, it cannot, by the nature of things, be in possession of all the relevant information possessed by the managers of every business which uses or might use radio frequencies, to say nothing of the preferences of consumers for the various goods and services in the production of

³⁶ Recent Articles, 13 Fed. Com. B.J. 89 (1953).

³⁷ Hearings on Subscription Television before the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. 434 (1958).

which radio frequencies could be used. In fact, lengthy investigations are required to uncover part of this information, and decisions of the Federal Communications Commission emerge only after long delays, often extending to years.³⁸ To simplify the task, the Federal Communications Commission adopts arbitrary rules. For example, it allocates certain ranges of frequencies (and only these) for certain specified uses. The situation in which the Commission finds itself was described in a recent speech by Commissioner Robert E. Lee. He explained that the question of undertaking a study of assignments below 890 mc was being considered, but whether this would be done was uncertain.

There is considerable discussion of such a move within and without the Commission. . . . The examination of the more crowded spectrum below 890 mc presents an extremely difficult administrative problem. While this should be no excuse, I hope that all will appreciate the limitations of our overburdened staff, which, as a practical matter, must be given great weight.

And, after referring to a possible change in procedure, he added:

I am finding it increasingly difficult to explain why a steel company in a large community, desperate for additional frequency space cannot use a frequency assigned, let us say, to the forest service in an area where there are no trees.³⁹

This discussion should not be taken to imply that an administrative allocation of resources is inevitably worse than an allocation by means of the price mechanism. The operation of a market is not itself costless, and, if the costs of operating the market exceeded the costs of running the agency by a sufficiently large amount, we might be willing to acquiesce in the malallocation of resources resulting from the agency's lack of knowledge, inflexibility, and exposure to political pressure. But in the United States few people think that this would be so in most industries, and there is nothing about the broadcasting industry which would lead us to believe that the allocation of frequencies constitutes an exceptional case.

An example of how the nature of the pricing system is misunderstood in current discussions of broadcasting policy in the United States is furnished by a recent comment which appeared in the trade journal *Broadcasting*:

In the TV field, lip service is given to a proposal that television "franchises" be awarded to the highest bidder among those who may be qualified. This is ridiculous on its face, since it would mean that choice outlets in prime markets would go to those with the most money.⁴⁰

³⁸ A former chairman of the Federal Communications Commission argued that it could not be intelligent in its regulation "if . . . [the Commission's] information lags behind the latest developments and policies of the industry—if the industry knows more than the government does." Edelman, *op. cit.* supra note 20, at 20. But it is inevitable that the industry will know more than the Commission.

³⁹ *Broadcasting*, February 4, 1957, p. 96.

⁴⁰ *Broadcasting*, February 24, 1958, p. 200.

First of all, it must be observed that resources do not go, in the American economic system, to those with the most money but to those who are willing to pay the most for them. The result is that, in the struggle for particular resources, men who earn \$5,000 per annum are every day outbidding those who earn \$50,000 per annum. To be convinced that this is so, we need only imagine a situation occurring in which all those who earned \$50,000 or more per annum arrived at the stores one morning and, at the prices quoted, were able to buy everything in stock, with nothing left over for those with lower incomes. Next day we may be sure that the prices quoted would be higher and that those with higher incomes would be forced to reduce their purchases—a process which would continue as long as those with lower incomes were unable to spend all they wanted. The same system which enables a man with \$1 million to obtain \$1 million's worth of resources enables a man with \$1,000 to obtain a \$1,000's worth of resources. Of course, the existence of a pricing system does not insure that the distribution of money between persons (or families) is satisfactory. But this is not a question we need to consider in dealing with broadcasting policy. Insofar as the ability to pay for frequencies or channels depends on the distribution of funds, it is the distribution not between persons but between firms which is relevant. And here the ethical problem does not arise. All that matters is whether the distribution of funds contributes to efficiency, and there is every reason to suppose that, broadly speaking, it does. Those firms which use funds profitably find it easy to get more; those which do not, find it difficult. The capital market does not work perfectly, but the general tendency is clear. In any case, it is doubtful whether the Federal Communications Commission has, in general, awarded frequencies to firms which are in a relatively unfavorable position from the point of view of raising capital. The inquiries which the Commission conducts into the financial qualifications of applicants must, in fact, tend in the opposite direction.⁴¹

And if we take as examples of "choice outlets in prime markets" network-affiliated television stations in the six largest metropolitan areas in the United States on the basis of population (New York, Chicago, Los Angeles, Philadelphia, Detroit, and San Francisco), we find that five stations are owned by American Broadcasting-Paramount Theatres, Inc., four by the National Broadcasting Company (a subsidiary of the Radio Corporation of America), four by the Columbia Broadcasting System, Inc., and one each by the Westinghouse Broadcasting Company (a subsidiary of the Westinghouse Electric Corporation), the Storer Broadcasting Company, and three newspaper publishing concerns.⁴² It would be dif-

⁴¹ On the Commission's policies with regard to financial qualifications, consult Edelman, *op. cit.* supra note 20, at 62-64, and Warner, *op. cit.* supra note 1, § 22a.

⁴² The first four firms are so well known as not to require any notation. The Storer Broadcasting Company owns television stations in Toledo, Cleveland, Detroit, Atlanta, and Wilmington and radio stations in Toledo, Cleveland, Detroit, Philadelphia, Wheeling, Atlanta, and Miami. Of the three stations owned by newspaper publishing concerns, one in Philadelphia is owned by Triangle Publications (which publishes the Philadelphia Inquirer and other papers, owns four other television

ficult to argue that these are firms which have been unduly handicapped in their growth by their inability to raise capital.

The Supreme Court appears to have assumed that it was impossible to use the pricing mechanism when dealing with a resource which was in limited supply. This is not true. Despite all the efforts of art dealers, the number of Rembrandts existing at a given time is limited; yet such paintings are commonly disposed of by auction. But the works of dead painters are not unique in being in fixed supply. If we take a broad enough view, the supply of all factors of production is seen to be fixed (the amount of land, the size of the population, etc.). Of course, this is not the way we think of the supply of land or labor. Since we are usually concerned with a particular problem, we think not in terms of the total supply but rather of the supply available for a particular use. Such a procedure is not only practically more useful; it also tells us more about the processes of adjustment at work in the market. Although the quantity of a resource may be limited in total, the quantity that can be made available to a particular use is variable. Producers in a particular industry can obtain more of any resource they require by buying it on the market, although they are unlikely to be able to obtain considerable additional quantities unless they bid up the price, thereby inducing firms in other industries to curtail their use of the resource. This is the mechanism which governs the allocation of factors of production in almost all industries. Notwithstanding the almost unanimous contrary view, there is nothing in the technology of the broadcasting industry which prevents the use of the same mechanism. Indeed, use of the pricing system is made particularly easy by a circumstance to which Professor Smythe draws our special attention, namely, that the broadcasting industry uses but a small proportion of "spectrum space." A broadcasting industry, forced to bid for frequencies, could draw them away from other industries by raising the price it was willing to pay. It is impossible to say whether the result of introducing the pricing system would be that the broadcasting industry would obtain more frequencies than are allocated to it by the Federal Communications Commission. Not having had, in the past, a market for frequencies, we do not know what these various industries would pay for them. Similarly, we do not know for what frequencies the broadcasting industry would be willing to outbid these other industries. All we can say is that the broadcasting industry would be able to obtain all the existing frequencies it now uses (and more) if it were willing to pay a price equal to the contribution which they could make to production elsewhere. This is saying nothing more than that the broadcasting industry would be able to obtain frequencies on the same basis as it now obtains its labor, buildings, land, and equipment.

A thoroughgoing employment of the pricing mechanism for the allocation of radio frequencies would, of course, mean that the various governmental authorities, which are at present such heavy users of these frequencies, would also

stations and some radio stations), one in Detroit is owned by the publisher of the Detroit News, and one in San Francisco is owned by the publisher of the San Francisco Chronicle.

be required to pay for them. This may appear to be unnecessary, since payment would have to be made to some other government agency appointed to act as custodian of frequencies. What was paid out of one government pocket would simply go into another. It may also seem inappropriate that the allocation of resources for such purposes as national defense or the preservation of human life should be subjected to a monetary test. While it would be entirely possible to exclude from the pricing process all frequencies which government departments consider they need and to confine pricing to frequencies available for the private sector, there would seem to be compelling reasons for not doing so. A government department, in making up its mind whether or not to undertake a particular activity, should weigh against the benefits this would confer, the costs which are also involved: that is, the value of the production elsewhere which would otherwise be enjoyed. In the case of a government activity which is regarded as so essential as to justify any sacrifice, it is still desirable to minimize the cost of any particular project. If the use of a frequency which if used industrially would contribute goods worth \$1 million could be avoided by the construction of a wire system or the purchase of reserve vehicles costing \$100,000, it is better that the frequency should not be used, however essential the project. It is the merit of the pricing system that, in these circumstances, a government department (unless very badly managed) would not use the frequency if made to pay for it. Some hesitation in accepting this argument may come from the thought that, though it might be better to provide government departments with the funds necessary to purchase the resources they need, it by no means follows that Congress will do this. Consequently, it might be better to accept the waste inherent in the present system rather than suffer the disadvantages which would come from government departments having inadequate funds to pay for frequencies. This, of course, assumes that government departments are, in general, denied adequate funds by Congress, but it is not clear that this is true, above all for the defense departments, which, at present, use the bulk of the frequencies. Furthermore, it has to be remembered that a pricing scheme for frequencies would not involve any budgetary strain, since all government payments would be exactly balanced by the receipts of the agency responsible for disposing of frequencies, and there would be a net gain from the payments by private firms. In any case, such considerations do not apply to the introduction of pricing in the private sector and, in particular, for the broadcasting industry.

The desire to preserve government ownership of radio frequencies coupled with an unwillingness to require any payment for the use of these frequencies has had one consequence which has caused some uneasiness. A station operator who is granted a license to use a particular frequency in a particular place may, in fact, be granted a very valuable right, one for which he would be willing to pay a large sum of money and which he would be forced to pay if others could bid for the frequency. This provision of a valuable resource without charge naturally raises the income of station operators above what it would have been in competitive conditions. It would require a very detailed investigation to de-

termine the extent to which private operators of radio and television stations have been enriched as a result of this policy. But part of the extremely high return on the capital invested in certain radio and television stations has undoubtedly been due to this failure to charge for the use of the frequency. Occasionally, when a station is sold, it is possible to glimpse what is involved. Strictly, of course, all that can be sold is the station and its organization; the frequency is public property, and the grant of a license gives no rights of any sort in that frequency. Furthermore, transfers of the ownership of radio and television stations have to be approved by the Federal Communications Commission. However, the Commission almost always approves such negotiated transfers, and, when these take place, there can be little doubt that often a great part of the purchase price is in fact payment for obtaining the use of the frequency. Thus when WNEW in New York City was sold in 1957 for \$5 million or WDTV in Pittsburgh in 1955 for \$10 million or WCAV (AM, FM, and TV) in Philadelphia in 1958 for \$20 million, it is possible to doubt that it would cost \$5 million or \$10 million or \$20 million to duplicate the transmitter, studio equipment, furniture, and the organization, which nominally is what is being purchased.⁴³ The result of sales at such prices is, of course, to reduce the return earned by the new owners to (or at any rate nearer to) the competitive level. When, as happened in the early days of radio regulation but less often since the Commission refused to sanction transfers at a price much more than the value of the physical assets and the organization being acquired, the effect was simply to distribute the benefits derived from this free use of public property more widely among the business community: to enable the new as well as the old owners to share in it. I do not wish to discuss whether such a redistribution of the gain is socially desirable. My point is different: there is no reason why there should be any gain to redistribute.

The extraordinary gain accruing to radio and television station operators as a result of the present system of allocating frequencies becomes apparent when stations are sold.⁴⁴ Even before the 1927 Act was passed, it was recognized that stations were transferred from one owner to another at prices which implied that the right to a license was being sold.⁴⁵ Occasionally, references to this problem are found in the literature, but the subject has not been discussed extensively. In part, I think this derives from the fact that the only solution to the problem of excessive profits was thought to be rate regulation or profit control.⁴⁶ Such

⁴³ See the Annual Report of the Federal Communications Commission for 1957 at p. 123, and for 1958, at p. 121.

⁴⁴ See *Radio and Television Station Transfers: Adequacy of Supervision under the Federal Communications Act*, 30 *Ind. L. J.* 351 (1955), and Warner, *op. cit. supra* note 1, Chapter V, "The Transfer and Assignment of Broadcasting Licenses." Compare C. C. Dill, *Radio Law* 208-9 (1938).

⁴⁵ See Hearings on S. 1 and S. 1754, *Radio Control*, before the Senate Committee on Interstate Commerce, 69th Cong., 1st Sess. 38-47 (1926).

⁴⁶ Consult Stewart, *The Public Control of Radio*, 8 *Air L. Rev.* 131 (1937); Hettinger, *The Economic Factor in Radio Regulation*, 9 *Air L. Rev.* 115 (1939); Salsbury, *The Transfer of Broadcast Rights*, 11 *Air L. Rev.* 113 (1940); Lissner, *Public Control of Radio*, 5 *Am. J. Econ. & Soc.* 552 (1946).

solutions were unlikely to gain support for a number of reasons. Although in the early days of the broadcasting industry it was commonly thought that it would be treated as another public utility, this view was later largely abandoned. An attempt to make broadcasters common carriers failed. And broadcasting has come to be thought of, so far as its business operations are concerned, as an unregulated industry. As the Supreme Court has said: “. . . the field of broadcasting is one of free competition.”⁴⁷ In any case, the determination of the rates to be charged or the level of profits to be allowed would not seem an easy matter, although it has been claimed that “it should be possible for resource and tax economists to develop norms for levying such special franchise taxes.”⁴⁸ Furthermore, rate or profit regulation with the concomitant need for control of the quality of the programs is hardly an attractive prospect.

It is an odd fact that the obvious way out of these difficulties, which is to make those wishing to use frequencies bid for them (allowing the profits earned to be determined not by a regulatory commission but by the forces of competition), received no attention in the literature, so far as I know, until comparatively recently. Mr. Herzl's article contains the first reference I have found. More recently, the suggestion has been mentioned on a number of occasions. In 1958 the proposal for bidding made its appearance in a bill introduced by Representative Henry S. Reuss. This bill would have established an order of priority for the various categories of applicants for radio and television licenses but contained the provision that, where there was more than one applicant falling into the highest category, the Federal Communications Commission would then grant the license to the highest bidder in that category, with the money to be “deposited in the Treasury of the United States to the credit of miscellaneous receipts.” The same procedure would be applied when a license was transferred. Representative Reuss explained: “The airwaves are the public domain, and under such circumstances a decision should be made in favor of the taxpayers, just as it is when the government takes bids for the logging franchise on public timberland.”⁴⁹

It is to be expected that even so modest a suggestion for bidding as that of Representative Reuss would not be welcomed. From the earliest days of radio regulation suggestions have been made that those holding radio licenses should pay a fee to the regulating authority, but this has never been incorporated in the law. When, a few years ago, the Federal Communications Commission announced that it was considering a proposal that radio and television licenses should pay a fee to cover the costs of the licensing process (that is, the cost of the Federal Communications Commission), the Senate Committee on Interstate and Foreign Commerce quickly adopted a resolution suggesting that the Commission should suspend consideration of this proposal for the time being, since

⁴⁷ FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940).

⁴⁸ Lissner, *op. cit.* supra note 46.

⁴⁹ Press release dated April 14, 1958, from the office of Congressman Henry S. Reuss. See H.R. 11893, 85th Cong., 2d Sess. (1958).

“the proposal for license fees for broadcasting stations raises basic questions with regard to the fundamental philosophy of regulation under the Communications Act. . . .”⁵⁰

It is not easy to understand the feeling of hostility to the idea that people should pay for the facilities they use. It is true that this attitude has been supported by the argument that it was technologically impossible to charge for the use of frequencies, but this is clearly wrong. It is difficult to avoid the conclusion that the widespread opposition to the use of the pricing system for the allocation of frequencies can be explained only by the fact that the possibility of using it has never been seriously faced.

5. Private Property and the Allocation of Frequencies

If the right to use a frequency is to be sold, the nature of that right would have to be precisely defined. A simple answer would be to leave the situation essentially as it is now: the broadcaster would buy the right to use, for a certain period, an assigned frequency to transmit signals at a given power for certain hours from a transmitter located in a particular place. This would simply superimpose a payment on to the present system. It would certainly make it possible for the person or firm who is to use a frequency to be determined in the market. But the enforcement of such detailed regulations for the operation of stations as are now imposed by the Federal Communications Commission would severely limit the extent to which the way the frequency was used could be determined by the forces of the market.

It might be argued that this is by no means an unusual situation, since the rights acquired when one buys, say, a piece of land, are determined not by the forces of supply and demand but by the law of property in land. But this is by no means the whole truth. Whether a newly discovered cave belongs to the man who discovered it, the man on whose land the entrance to the cave is located, or the man who owns the surface under which the cave is situated is no doubt dependent on the law of property. But the law merely determines the person with whom it is necessary to make a contract to obtain the use of the cave. Whether the cave is used for storing bank records, as a natural gas reservoir, or for growing mushrooms depends, not on the law of property, but on whether the bank, the natural gas corporation, or the mushroom concern will pay the most in order to be able to use the cave. One of the purposes of the legal system is to establish that clear delimitation of rights on the basis of which the transfer and recombination of rights can take place through the market. In the case of radio, it should be possible for someone who is granted the use of a frequency to arrange to share it with someone else, with whatever adjustments to hours of operation, power, location and kind of transmitter, etc., as may be mutually agreed upon; or when the right initially acquired is the shared use of a frequency

⁵⁰ 100 Cong. Rec. 3783 (1954).

(and in certain cases the FCC has permitted only shared usage), it should not be made impossible for one user to buy out the rights of the other users so as to obtain an exclusive usage.

The main reason for government regulation of the radio industry was to prevent interference. It is clear that, if signals are transmitted simultaneously on a given frequency by several people, the signals would interfere with each other and would make reception of the messages transmitted by any one person difficult, if not impossible. The use of a piece of land simultaneously for growing wheat and as a parking lot would produce similar results. As we have seen in an earlier section, the way this situation is avoided is to create property rights (rights, that is, to exclusive use) in land. The creation of similar rights in the use of frequencies would enable the problem to be solved in the same way in the radio industry.

The advantage of establishing exclusive rights to use a resource when that use does not harm others (apart from the fact that they are excluded from using it) is easily understood. However, the case appears to be different when it concerns an action which harms others directly. For example, a radio operator may use a frequency in such a way as to cause interference to those using adjacent frequencies.

Let us start our analysis of this situation by considering the case of *Sturges v. Bridgman*,⁵¹ which illustrates the basic issues. A confectioner had used certain premises for his business for a great many years. When a doctor came and occupied a neighboring property, the working of the confectioner's machinery caused the doctor no harm until, some eight years later, he built a consulting room at the end of his garden, right against the confectioner's premises. Then it was found that noise and vibrations caused by the machinery disturbed the doctor in his work. The doctor then brought an action and succeeded in securing an injunction preventing the confectioner from using his machinery. What the courts had, in fact, to decide was whether the doctor had the right to impose additional costs on the confectioner through compelling him to install new machinery, or move to a new location, or whether the confectioner had the right to impose additional costs on the doctor through compelling him to do his consulting somewhere else on his premises or at another location.⁵² What this example shows is that there is no analytical difference between the right to use a resource without direct harm to others and the right to conduct operations in such a way as to produce direct harm to others. In each case something is denied to others: in one case, use of a resource; in the other, use of a mode of operation.⁵³ This example also brings out the reciprocal nature of the relationship

⁵¹ 11 Ch. D. 852 (1879).

⁵² Another possibility is that the doctor or confectioner might abandon his activity altogether.

⁵³ In the case of *Sturges v. Bridgman*, the situation would not have been analytically different had the dispute concerned the ownership of a piece of land lying between the two premises on which either the doctor could have installed his laboratory or the confectioner could have installed his machinery.

which tends to be ignored by economists who, following Pigou, approach the problem in terms of a difference between private and social products but fail to make clear that the suppression of the harm which A inflicts on B inevitably inflicts harm on A. The problem is to avoid the more serious harm. This aspect is clearly brought out in *Sturges v. Bridgman*, and the case would not have been different in essentials if the doctor's complaint had been about smoke pollution rather than noise and vibrations.

Once the legal rights of the parties are established, negotiation is possible to modify the arrangements envisaged in the legal ruling, if the likelihood of being able to do so makes it worthwhile to incur the costs involved in negotiation. The doctor would be willing to waive his right if the confectioner would pay him a sum of money greater than the additional costs he would have incurred in carrying out his consulting at another location (which we will assume to be \$200). The confectioner would be willing to pay up to an amount slightly less than the additional costs imposed on him by the decision of the court in order to induce the doctor to waive his rights (which we will assume to be \$100). With the figures given, the doctor would not accept less than \$200, and the confectioner would not pay more than \$100, and the doctor would not waive his right. But consider the situation if the confectioner had won the case (as well he might). In these circumstances the confectioner would be willing to waive his right if he could obtain more than \$100, and the doctor would be willing to pay slightly less than \$200 to induce the confectioner to do so. Thus it should be possible to strike a bargain which would result in the confectioner's waiving his right. This hypothetical example shows that the delimitation of rights is an essential prelude to market transactions; but the ultimate result (which maximizes the value of production) is independent of the legal decision.⁵⁴

What this analysis demonstrates, so far as the radio industry is concerned, is that there is no analytical difference between the problem of interference between operators on a single frequency and that of interference between operators on adjacent frequencies. The latter problem, like the former, can be solved by delimiting the rights of operators to transmit signals which interfere, or might potentially interfere, with those of others. Once this is done, it can be left to market transactions to bring an optimum utilization of rights. It is sometimes implied that the aim of regulation in the radio industry should be to minimize

⁵⁴ It is, of course, true that the distribution of wealth as between the doctor and the confectioner was affected by the decision, which is why questions of equity bulk so largely in such cases. Indeed, if the efficiency with which the economic system worked was completely independent of the legal position, this would be all that mattered. But this is not so. First of all, the law may be such as to make certain desirable market transactions impossible. This is, indeed, my chief criticism of the present American law of radio communication. Second, it may impose costly and time-consuming procedures. Third, the legal delimitation of rights provides the starting point for the rearrangement of rights through market transactions. Such transactions are not costless, with a result that the initial delimitation of rights may be maintained even though some other would be more efficient. Or, even if the original position is modified, the most efficient delimitation of rights may not be attained. Finally, a waste of resources may occur when the criteria used by the courts to delimit rights result in resources being employed solely to establish a claim.

interference. But this would be wrong. The aim should be to maximize output. All property rights interfere with the ability of people to use resources. What has to be insured is that the gain from interference more than offsets the harm it produces. There is no reason to suppose that the optimum situation is one in which there is no interference. In general, as the distance from a radio station increases, it becomes more and more difficult to receive its signals. At some point, people will decide that it is not worthwhile to incur costs involved in receiving the station's signals. A local station operating on the same frequency might be easily received by these same people. But if this station operated simultaneously with the first one, people living in some region intermediate between the stations may be unable to receive signals from either station. These people would be better off if either station stopped operating and there was no interference; but then those living in the neighborhood of one of these other stations would suffer. It is not clear that the solution in which there is no interference is necessarily preferable.

In some circumstances it has been suggested that cost considerations may lead to a minimizing of interference. Thus it has been said of mobile radio:

Dollar discipline is a very effective force which prevents unwarranted overdesign of land mobile communications system. Vehicular communication is a business tool and like any other tool, the return on investment suffers if excessive overcapacity is provided. Experience has shown that land mobile station licensees are not willing to pay for equipment to provide coverage significantly in excess of their requirements. This attitude serves to effectively reduce adjacent area, co-channel interference to a minimum.⁵⁵

But cost considerations alone cannot always be relied upon to bring about such happy results. The reduction of interference on adjacent frequencies may require costly improvements in equipment, and operators on one frequency could hardly be expected to incur such costs for the benefit of others if the rights of those operating on adjacent frequencies have not been determined. The institution of private property plus the pricing system would resolve these conflicts. The operator whose signals were interfered with, if he had the right to stop such interference, would be willing to forego this right if he were paid more than the amount by which the value of his service was decreased by this interference or the costs which he would have to incur to offset it. The other operator would be willing to pay, in order to be allowed to interfere, an amount up to the costs of suppressing the interference or the decrease in the value of the service he could provide if unable to use his transmitter in a way which resulted in interference. Or, alternatively, if this operator had the right to cause interference, he would be willing to desist if he were paid more than the costs of suppressing the interference or the decrease in the value of the service he could provide if interference were barred. And the operator whose signals were interfered with

⁵⁵ Testimony of Motorola Inc., Statutory Inquiry into the Allocation of Frequencies to the Various Non-Government Services in the Radio Spectrum between 25 mc and 890 mc, FCC Docket No. 11997, March 30, 1959, at p. 29.

would be willing to pay to stop this interference an amount up to the decrease in the value of his service which it causes or the costs he has to incur to offset the interference. Either way, the result would be the same. It is the problem of the confectioner's noise and vibrations all over again.

The fact that actions might have harmful effects on others has been shown to be no obstacle to the introduction of property rights. But it was possible to reach this unequivocal result because the conflicts of interest were between individuals. When large numbers of people are involved, the argument for the institution of property rights is weakened and that for general regulations becomes stronger. The example commonly given by economists, again following Pigou, of a situation which calls for such regulation is that created by smoke pollution. Of course, if there were only one source of smoke and only one person were harmed, no new complication would be involved; it would not differ from the vibration case discussed earlier. But if many people are harmed and there are several sources of pollution, it is more difficult to reach a satisfactory solution through the market. When the transfer of rights has to come about as a result of market transactions carried out between large numbers of people or organizations acting jointly, the process of negotiation may be so difficult and time-consuming as to make such transfers a practical impossibility. Even the enforcement of rights through the courts may not be easy. It may be costly to discover who it is that is causing the trouble. And, when it is not in the interest of any single person or organization to bring suit, the problems involved in arranging joint actions represent a further obstacle. As a practical matter, the market may become too costly to operate.

In these circumstances it may be preferable to impose special regulations (whether embodied in a statute or brought about as a result of the rulings of an administrative agency). Such regulations state what people must or must not do. When this is done, the law directly determines the location of economic activities, methods of production, and so on. Thus the problem of smoke pollution may be dealt with by regulations which specify the kind of heating and power equipment which can be used in houses and factories or which confine manufacturing establishments to certain districts by zoning arrangements. The aim of such regulation should not, of course, be to eliminate smoke pollution but to bring about the optimum amount of smoke pollution. The gains from reducing it have to be matched with the loss in production due to the restrictions in choice of methods of production, etc. The conditions which make such regulation desirable do not change the nature of the problem. And, in principle, the solution to be sought is that which would have been achieved if the institution of private property and the pricing mechanism were working well. Of course, as the making of such special regulations is dependent on the political organization, the regulatory process will suffer from the disadvantages mentioned in the previous section. But this merely means that, before turning to special regulations, one should tolerate a worse functioning market than would otherwise be the case. It does not mean that there should be no such regulation. Nor

should it be thought that, because some rights are determined by regulation, there cannot be others which can be modified by contract. That zoning and other regulations apply to houses does not mean that there should not be private property in houses. Businessmen usually find themselves both subject to regulation and possessed of rights which may be transferred or modified by contracts with others.

There is no reason why users of radio frequencies should not be in the same position as other businessmen. There would not appear, for example, to be any need to regulate the relations between users of the same frequency. Once the rights of potential users have been determined initially, the rearrangement of rights could be left to the market. The simplest way of doing this would undoubtedly be to dispose of the use of a frequency to the highest bidder, thus leaving the subdivision of the use of the frequency to subsequent market transactions. Nor is it clear that the relations between users of adjacent frequencies will necessarily call for special regulation. It may well be that several people would normally be involved in a single transaction if conflicts of interests between users of adjacent frequencies are to be settled through the market. But, though an increase in the number of people involved increases the cost of carrying out a transaction, we know from experience that it is quite practicable to have market transactions which involve a multiplicity of parties. Whether the number of parties normally involved in transactions involving users of adjacent frequencies would be unduly large and call for special regulation, only experience could show. *Some* special regulation would certainly be required. For example, some types of medical equipment can apparently be operated in such a way as to cause interference on many frequencies and over long distances. In such a case, a regulation limiting the power of the equipment and requiring shielding would probably be desirable. It is also true that the need for wide bands of frequencies for certain purposes may require the exercise of the power of eminent domain; but this does not raise a problem different from that encountered in other fields. It is easy to embrace the idea that the interconnections between the ways in which frequencies are used raise special problems not found elsewhere or, at least, not to the same degree. But this view is not likely to survive the study of a book on the law of torts or on the law of property in which will be found set out the many (and often extraordinary) ways in which one person's actions can affect the use which others can make of their property.

If the problems faced in the broadcasting industry are not out of the ordinary, it may be asked why was not the usual solution (a mixture of transferable rights plus regulation) adopted for this industry? There can be little doubt that, left to themselves, the courts would have solved the problems of the radio industry in much the same way as they had solved similar problems in other industries. In the early discussions of radio law an attempt was made to bring the problems within the main corpus of existing law. The problem of radio interference was examined by analogy with electric-wire interference, water rights, trade marks, noise nuisances, the problem of acquiring title to ice from public ponds, and

so on. It was, for example, pointed out that a "receiving set is merely a device for decoying to the human ear signals which otherwise would not reach it," and an analogy was drawn with a case in which one man had maintained a decoy for wild ducks but another on neighboring land had frightened the ducks away by shooting, so that they avoided the decoy. Some of the analogies were no doubt fanciful, but most of them presented essentially the same problem as that posed by radio interference. And when the problem came before the courts, there seems to have been little difficulty in reaching a decision.⁵⁶ No doubt, in time, statutes prescribing some special regulation would also have been required. But this line of development was stopped by the passage of the 1927 Act, which established a complete regulatory system.⁵⁷

Support for the 1927 Act came, in part, from a belief that no other solution was possible, and, as we have seen, the rationale which has developed since certainly largely reflects this view. But some of those who favored government regulation in the early 1920's did so in order to prevent the establishment of property rights in frequencies. Their reasons for wanting government regulation were vividly expressed by Mr. Walter S. Rogers:

There is no question that certain private radio companies believe that by something analogous to what we call "Squatters' Rights" they can secure an actual out-and-out ownership of the right to use wave lengths, and they do not want to get the right to use wave lengths through a license from any government or as a result of any international agreement. They want to hold completely the right to the use of wave lengths which they employ in their services. In a certain sense the development of radio has opened up a new domain comparable to the discovery of a hitherto unknown continent. No one can foresee with certitude the possible development of the transmission of energy through space. Really great stakes are being gambled for. And private interests are trying to obtain control of wave lengths and establish private property claims to them precisely as though a new continent were opened up to them and they were securing great tracts of land in outright ownership.⁵⁸

Similar views were held in Congress. Mr. Harry P. Warner has explained that, during the period before the 1927 Act,

⁵⁶ See S. Davis, *The Law of Radio Communication* (1927), particularly Chapter VII, "Conflicting Rights in Reception and Transmission." Articles dealing with this question are: Rowley, *Problems in the Law of Radio Communication*, 1 *U. of Cinc. L. Rev.* 1 (1927); Tauger, *The Law of Radio Communication with Particular Reference to a Property Right in a Radio Wave Length*, 12 *Marq. L. Rev.* 179, 299 (1928); Dyer, *Radio Interference as a Tort*, 17 *St. Louis L. Rev.* 125 (1932). In the case of *Tribune Co. v. Oak Leaves Broadcasting Station* (Cir. Ct., Cook County, Illinois, 1926), reproduced in 68 *Cong. Rec.* 216 (1926), it was held that the operator of an existing station had a sufficient property right, acquired by priority, to enjoin a newcomer from using a frequency so as to cause any material interference.

⁵⁷ Although attempts were made to assert property rights in frequencies after the establishment of the Federal Radio Commission, such claims were not sustained. See Warner, *op. cit. supra* note 1, at 543.

⁵⁸ Rogers, *Air as a Raw Material*, 112 *Annals* 251, 254 (1924). Mr. Rogers was adviser to the American Delegation to the Peace Conference in Paris, 1919. Compare Childs, *Problems in the Radio Industry*, 14 *Am. Econ. Rev.* 520 (1924).

the gravest fears were expressed by legislators, and those generally charged with the administration of communications . . . that government regulation of an effective sort might be permanently prevented through the accrual of property rights in licenses or means of access, and that thus franchises of the value of millions of dollars might be established for all time.⁵⁹

It may be that in some cases these views reflected a dislike of the institution of private property as such, but in the main what seems to have been feared is that private persons and organizations might establish property rights in frequencies without making any payment for appropriating what was called "the last of the public domain." The view that property rights in frequencies should be acquired in an orderly fashion and that those acquiring these rights should be required to pay for them is clearly one which commands respect. But this is not what happened as a result of the 1927 Act. In fact, government regulation brought about the very results which some of its supporters had sought to avoid. Because no charge has been made for the use of frequencies, franchises worth millions of dollars have been created, have been bought and sold, and have served to enrich those to whom they were first granted. Intertwined with the dislike of property rights acquired by priority of use was the fear that monopolies might be established. But, as we have seen (although in discussions of broadcasting policy it is often overlooked), it is not necessary to abolish the institution of private property in order to control the growth of monopolies.

When we contemplate the simple misunderstandings which are rife in discussions of government policy toward the radio industry, it is difficult to resist the conclusion that one factor that has helped to bring this about is terminological in character.⁶⁰ I have spoken, following the normal usage, of the allocation of frequencies (or the use of frequencies) and of the establishment of property rights in frequencies (or the use of frequencies). But this way of speaking is liable to mislead. Every regular wave motion may be described as a frequency. The various musical notes correspond to frequencies in sound waves; the various colors correspond to frequencies in light waves. But it has not been thought necessary to allocate to different persons or to create property rights in the notes of the musical scale or the colors of the rainbow. To handle the problem arising because one person's use of a sound or light wave may have effects on others, we establish the rights which people have to make sounds which others may hear or to do things which others may see.

Clarity of thought is even more difficult to achieve when we speak not of ownership of frequencies but of ownership of the ether, the medium through which the wave travels. Mr. James G. McCain has argued that the "radio wave [should] be clearly distinguished from the medium through which it is transmitted. Metaphorically, it is the difference between a train and a tunnel." His

⁵⁹ Warner, *op. cit. supra* note 1, at 540.

⁶⁰ In the development of my ideas on this subject, I was greatly helped by an article by Segal and Warner, "Ownership" of Broadcasting "Frequencies": A Review, 19 *Rocky Mt. L. Rev.* 111 (1947).

reason for making this distinction is that it affords the “most satisfactory” basis for holding radio communication to be interstate commerce. His argument, briefly, is that the ether by reason of its omnipresence and the use to which it is devoted constitutes a natural channel for interstate commerce, thus making federal regulation of radio communication constitutional under the commerce clause.⁶¹ The Senate once declared the ether or its use to be “the inalienable possession” of the United States, and today all those to whom radio or television licenses are granted have to sign a waiver of any right not only to the use of a frequency but also to the use of the ether. This attempt to nationalize the ether has not been without its critics. There is some doubt whether the ether exists. Certainly, its properties correspond exactly to those of something which does not exist, a tunnel without any edges. And Mr. Stephen Davis has remarked: “Whoever claims ownership of a thing or substance may very properly be required to prove existence before discussing title.”⁶²

What does not seem to have been understood is that what is being allocated by the Federal Communications Commission, or, if there were a market, what would be sold, is the right to use a piece of equipment to transmit signals in a particular way. Once the question is looked at in this way, it is unnecessary to think in terms of ownership of frequencies or the ether. Earlier we discussed a case in which it had to be decided whether a confectioner had the right to use machinery which caused noise and vibrations in a neighboring house. It would not have facilitated our analysis of the case if it had been discussed in terms of who owned sound waves or vibrations or the medium (whatever it is) through which sound waves or vibrations travel. Yet this is essentially what is done in the radio industry. The reason why this way of thinking has become so dominant in discussions of radio law is that it seems to have developed by using the analogy of the law of airspace. In fact, the law of radio and television has commonly been treated as part of the law of the air.⁶³ It is not suggested that this approach need lead to the wrong answers, but it tends to obscure the question that is being decided. Thus, whether we have the right to shoot over another man’s

⁶¹ McCain, *The Medium through which the Radio Wave Is Transmitted as a Natural Channel of Interstate Commerce*, 11 *Air L. Rev.* 144 (1940). The grounds on which radio communication has been held to be interstate commerce are not those advanced by Mr. McCain. As he explains, the reasons given by the courts for holding radio communication to be interstate commerce are that radio waves cross state lines (even though the communication is intrastate) and potentially interfere with interstate communication. The advantage of Mr. McCain’s approach would appear to be that it would allow federal regulation of intrastate communication which interferes with no one. Other articles dealing with this question are: Fletcher, *The Interstate Character of Radio Broadcasting: An Opinion*, 11 *Air L. Rev.* 345 (1940), and Kennedy, *Radio and the Commerce Clause*, 3 *Air. L. Rev.* 16 (1932).

⁶² Davis, *op. cit. supra* note 56, at 15. See also the article by Segal and Warner, *op. cit. supra* note 60, at 112–14.

⁶³ See, e.g., Jome, *Property in the Air as Affected by the Airplane and the Radio*, 4 *J. Land Pub. Util. Econ.* 257 (1928). The *Air Law Review* dealt with radio law and aviation law. And lawbooks, for example, Manion, *Law of the Air* (1950), are often organized in the same way.

land has been thought of as depending on who owns the airspace over the land.⁶⁴ It would be simpler to discuss what we should be allowed to do with a gun. As we saw earlier, we cannot shoot a gun even on our own land when the effect is to frighten ducks that a neighbor is engaged in decoying. And we all know that there are many other restrictions on the uses of a gun. The problem confronting the radio industry is that signals transmitted by one person may interfere with those transmitted by another. It can be solved by delimiting the rights which various persons possess. How far this delimitation of rights should come about as a result of a strict regulation and how far as a result of transactions on the market is a question that can be answered only on the basis of practical experience. But there is good reason to believe that the present system, which relies exclusively on regulation and in which private property and the pricing system play no part, is not the best solution.

In defining property rights, it would be necessary to take into account the existence of international agreements on the use of radio frequencies.⁶⁵ Such agreements do not, of course, prevent bidding by individuals and firms for the facilities which have been allocated to the United States. But, to the extent that the ways in which frequencies can be used are specified in the agreements, the transfer and recombination of rights through the market are restricted. However, the reservation contained in the present agreements by which frequencies can be used "in derogation of the table of frequency allocations" when this does not cause harmful interference to stations in foreign countries operating in conformity with the table would seem to permit considerable flexibility in the way frequencies are used. (There is no legal restriction on military use of radio frequencies.)⁶⁶ The aim of the United States government should be to secure the maximum freedom for countries to use radio frequencies as they wish. To read the intentions of a government from the proceedings of an international conference is obviously hazardous. But on the surface it is not clear that the United States government wished to secure this maximum of freedom. In the conference of 1947, the group of countries led by the United States "wanted to take the frequency requirements of all the countries of the world and fit them 'by engineering principles' into the available frequency spectrum." The group led by the Soviet Union "wanted to use the old international frequency list as a point of departure, assigning frequencies on the basis of dates of notification."⁶⁷ In effect, the Soviet Union seemed to want the establishment of international property rights based on priority. Since the Soviet Union had registered notifications of claim to large parts of the radio spectrum, it is probably true that the ac-

⁶⁴ See Ball, *The Vertical Extent of Ownership in Land*, 76 U. Pa. L. Rev. 631 (1928); Niles, *The Present Status of the Ownership of Airspace*, 5 Air L. Rev. 132 (1934); and W. L. Prosser, *Law of Torts* 85 (1941).

⁶⁵ For a detailed discussion of international agreements on the use of radio frequencies, see G. A. Codding, Jr., *The International Telecommunication Union* (1952), and an article by the same author, *The International Law of Radio*, 14 Fed. Com. B.J. 85 (1955).

⁶⁶ See Codding, *The International Law of Radio*, 14 Fed. Com. B.J. 85, 91-2, 97-8 (1955).

⁶⁷ *Id.*, at 94 n. 40.

ceptance of their proposals would have given the Soviet Union advantages. But it also seems clear from the conference proceedings that the Soviet Union was unwilling to give the details required for an assessment of its needs and did not wish to be bound in its internal arrangements by the decisions of an international conference.⁶⁸ In the National Missile Conference held in Washington in May, 1959, two scientists (British and American) called for “the creation of an international communications commission to administer and police future myriad uses of the electronics spectrum in space communications, overseas space television, weather reports and other activities.”⁶⁹ If this international body is to be patterned after the Federal Communications Commission, there are obvious dangers in this proposal. It would not be wise for the United States to press (possibly against Russian opposition) for the establishment of an international planning system which would make it difficult or impossible to operate a free-enterprise system in the United States.

6. The Present Position

The Federal Communications Commission has recently come into public prominence as a result of disclosures before the House Subcommittee on Legislative Oversight, concerning the extent to which pressure is brought to bear on the Commission by politicians and businessmen (who often use methods of dubious propriety) with a view to influencing its decisions.⁷⁰ That this should be happening is hardly surprising. When rights, worth millions of dollars, are awarded to one businessman and denied to others, it is no wonder if some applicants become overanxious and attempt to use whatever influence they have (political and otherwise), particularly as they can never be sure what pressure the other applicants may be exerting. Some of the suggestions for improving the situation—for example, the enactment of a statutory code of ethics—may have merit in themselves. Others, such as the creation of administrative courts, may secure greater honesty at the expense of efficiency. But what needs to be emphasized is that the problem, so far as the Federal Communications Commission is concerned, largely arises because of a failure to charge for the rights granted. If these rights were disposed of to the highest bidder, the main reason for these improper activities would disappear. In the panel discussion on the Adminis-

⁶⁸ See Coddling, *The International Telecommunication Union* 380 (1952).

⁶⁹ *Broadcasting*, June 1, 1959, p. 79.

⁷⁰ See *Hearings on Investigation of Regulatory Commissions and Agencies before the Special Subcommittee and Agencies before the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. (1958)*. The Subcommittee was not simply concerned with the Federal Communications Commission but with the operations of all the independent regulatory commissions. The publicity received and the emphasis on improper personal conduct in the hearings was due to the activities of Dr. Bernard Schwartz, chief counsel of the Subcommittee, who exerted himself with a zeal which went beyond the call of duty and whose services with the Subcommittee were finally terminated. See B. Schwartz, *The Professor and the Commissions* (1959).

trative Process and Ethical Questions held by the Subcommittee, a similar point of view was expressed by Professor Clark Byse of the Harvard Law School:

A TV license in some areas often is worth millions of dollars. The Administrative agency dispensing this bonanza operates under the broadest type of congressional direction. The agency is told to grant an application if public convenience, interest, or necessity will be served. It is true that the Commission has developed a number of criteria to govern its exercise of this broad grant of power. But the criteria are so general and numerous that it is often difficult to determine whether Commission action is the product of reasoned deliberation or of caprice. Would it not have been better if Congress had established some basic criteria concerning competence, diversification of mass communication media, and monopoly, and then had provided that the licenses should go to the highest bidder? There may be drawbacks to this suggestion in the TV area, and the device of automatic criteria perhaps cannot be widely adopted. But certainly the goal should be to limit discretion to the narrowest legitimate limits, particularly when the legislation authorizes distribution of a bonanza or contemplates the substitution of an administrative decision for a decision which would otherwise be determined by the forces of competition.⁷¹

At the present time the idea of using the pricing mechanism in the radio industry is coldly received, and it is not surprising that Professor Byse's suggestion was not taken up in the report of the Subcommittee. In part, this hostile attitude is a reflection of the misunderstandings which have been discussed in previous sections;⁷² but there is more to it than that. When Professor Smythe had completed his economic case against using the pricing system (in the article discussed earlier), he introduced an argument of a quite different character. He said that a second broad postulate which seems to underlie proposals such as that advanced [by Mr. Herzl] is politico-economic in nature: that the public weal will be served if broadcasting, like grocery stores, uses the conventional business organization, subject only to general legal restraints on its profit-seeking activity. This postulate carries with it, usually, the parallel assumption that the educational and cultural responsibilities of broadcast station operators ought to be no more substantial at the most than those of the operators of the newspapers and magazines. . . .

. . . [D]espite the extensive use made of these two assumptions by business organizations for propaganda purposes, there is a powerful tradition in the United States that the economic, educational and cultural rights and responsibilities of broadcasting are unique.⁷³

Professor Smythe's position would seem to be that broadcasting plays (or should play) a more important role, educationally and culturally, than newspapers and magazines (and, I assume he would add, books) and that, therefore, there ought

⁷¹ See the panel discussion by representatives of law schools, of the government, and of the bar, in Hearings, *op. cit. supra* note 70, at 166–67. A similar point was raised by Professor Arthur S. Miller of Emory University Law School. *Id.*, at 172.

⁷² During the Hearings Representative Moulder asked Professor Byse whether his proposal would not lead the Commission to “award the license not to the most competent, but to the one who has the most money?” *Id.*, at 186.

⁷³ Smythe, *Facing Facts about the Broadcast Business*, 20 *U. of Chi. L. Rev.* 96, 104 (1952). See note 32 *supra*.

to be stricter governmental regulation of what is broadcast than of what is printed. It is possible to dispute both parts of this argument. But Professor Smythe is right to claim that this view (or something like it) has been long and firmly held by most of those concerned with broadcasting policy in the United States. Thus Mr. Hoover in 1924 said:

Radio communication is not to be considered as merely a business carried on for private gain, for private advertisement, or for entertainment of the curious. It is a public concern impressed with the public trust and to be considered primarily from the standpoint of public interest in the same extent and upon the basis of the same general principles as our other public utilities.⁷⁴

And the present chairman of the Federal Communications Commission, Mr. John C. Doerfer, in 1959, said that regulation of programing

stems from the potential power inherent in broadcasting to influence the minds of men and the concomitant scarcity of the available frequencies. . . . The conjunction . . . of potentially great persuasive powers and the insufficiency of desirable spectrum space, has been the mainspring of all actions: legislative, administrative or court, which has qualified those freedoms generally enjoyed by the journalist, the artist and the minister.⁷⁵

If the aim of government regulation of broadcasting is to influence programing, it is irrelevant to discuss whether regulation is necessitated by the technology of the industry. The question does, of course, arise as to whether such regulation is compatible with the doctrine of freedom of speech and of the press. In general, this is not a question which has disturbed those who wished to see the Federal Communications Commission control programing, largely because they thought a clear distinction could be drawn between broadcasting and the publication of newspapers, periodicals, and books (for which few would advocate similar regulation).⁷⁶ Thus, in a comment on the *Mayflower* doctrine, we read:

. . . radio is unique. It involves a medium which, while quantitatively limited, has almost infinite capacities as a means for mass communication of ideas, and which is essentially unthinkable as a subject of any but public ownership. To draw an analogy to freedom of the individual or of the press is fruitless in this area.⁷⁷

The Supreme Court made the distinction between broadcasting and the publication of newspapers rest on the fact that a resource used in broadcasting is

⁷⁴ Hearings on H.R. 7357, To Regulate Radio Communication, before the House Committee on the Merchant Marine and Fisheries, 68th Cong., 1st Sess. 10 (1924).

⁷⁵ Address by John C. Doerfer at Chicago before the National Association of Broadcasters (March 17, 1959).

⁷⁶ There have been some who interpret the doctrine of freedom of speech and of the press not as an absolute prohibition of certain types of government action but as being "permissive and . . . subject (under due process of law) to forfeiture," if it results in "serious damage to some aspect of the public interest" (Siepmann, *op. cit. supra* note 30, at 231). The establishment of a Federal Press Commission with powers similar to those of the Federal Communications Commission would presumably be compatible with this interpretation of the meaning of freedom of speech and of the press.

⁷⁷ Radio Editorials and the *Mayflower* Doctrine, 48 Col. L. Rev. 785, 788 (1948).

limited in amount and scarce. But, as we have seen, this argument is invalid. Another common argument is that, since broadcasters are making use of public property, the government has a right to see that such public resources are used “in the public interest.” “Radio is a public domain to which licensees have only conditional and temporary access. Its ‘landlord’ is the public. Licensees are ‘tenant farmers’. The public’s ‘factor’ is the FCC.”⁷⁸ This would seem to give the government the right to influence what is printed in newspapers, periodicals, and books if one of the resources used were public property or subject to government allocation. Mr. Justin Miller, the president of the National Association of Broadcasters, in evidence to a Senate subcommittee in 1947, pointed out that government regulation of what a newspaper could print would be held unconstitutional. But broadcasting also came within the protection of the First Amendment, and therefore, he argued, regulation designed to influence the programming of broadcasting stations was unconstitutional. The senators seem to have been completely unconvinced by Mr. Miller’s arguments. Senator McFarland said:

. . . there is a difference between the press and the radio. You can compare them but you cannot assume they are alike. You are granting frequencies in the radio field. Once a license is granted, it is worth a lot of money. That is not true with the press at all. That is where you people get off base, in my opinion.

And Senator White said:

I just do not get at all the idea that there is a complete analogy between a broadcast license, which comes from the Government and is an exercise of power by Government, and the right of anybody to start a newspaper, anybody who wants to, without any let or permission or hindrance from the Government. . . . [I]t is pretty difficult for me to see how a regulatory body can say that a licensee is or is not rendering a public service if it may not take a look and take into account the character of the program being broadcast by that licensee.⁷⁹

These comments point clearly to the misunderstanding involved in this defense of the present system. The argument moves from the existence of public property in frequencies to the assertion of the right which this gives to influence programming. But, as we have seen, there is no reason why there should not be private

⁷⁸ Siepmann, *op. cit. supra* note 30, at 222.

⁷⁹ Hearings on S. 1333, to Amend the Communications Act of 1934, before the Senate Committee on Interstate and Foreign Commerce, 80th Cong., 1st Sess. 120, 123 (1947). Mr. Miller’s statement will also be found in National Association of Broadcasters, *Broadcasting and the Bill of Rights* 1–35 (1947). This interchange between Mr. Miller and the Senators is discussed in *Regulation of Broadcasting: Half a Century of Government Regulation of Broadcasting and the Need for Further Legislative Action*, a study by Mr. Robert S. McMahon, for the House Subcommittee on Legislative Oversight, 85th Cong., 2d Sess. (1958).

property in frequencies.⁸⁰ If regulation of programing is desirable, it has to be advocated on its own merits; it cannot be justified simply as a by-product of particular economic arrangements. To say that resources should be used in the public interest does not settle the issue. Since it is generally agreed that the use of private property and the pricing system is in the public interest in other fields, why should it not also be in broadcasting? Mr. William Howard Taft, who was Chief Justice of the Supreme Court during the critical formative period of the broadcasting industry, is reported to have said: "I have always dodged this radio question. I have refused to grant writs and have told the other justices that I hope to avoid passing on this subject as long as possible." Pressed to explain why, he answered:

. . . interpreting the law on this subject is something like trying to interpret the law of the occult. It seems like dealing with something supernatural. I want to put it off as long as possible in the hope that it becomes more understandable before the court passes on the questions involved.⁸¹

It was indeed in the shadows cast by a mysterious technology that our views on broadcasting policy were formed. It has been the burden of this article to show that the problems posed by the broadcasting industry do not call for any fundamental changes in the legal and economic arrangements which serve other industries. But the belief that broadcasting industry is unique and requires regulation of a kind which would be unthinkable in the other media of communication is now so firmly held as perhaps to be beyond the reach of critical examination. The history of regulation in the broadcasting industry demonstrates the crucial importance of events in the early days of a new development in determining long-run governmental policy. It also suggests that lawyers and economists should not be so overwhelmed by the emergence of new technologies as to change the existing legal and economic system without first making quite certain that this is required.

⁸⁰ It was a weakness of Mr. Miller's presentation that he accepted the need for government allocation of frequencies and apparently was unaware of the possibility of disposing of frequencies by using the pricing mechanism. Mr. Miller attempted to bring the Senators to see the validity of his analogy between broadcasting and the publication of newspapers, so far as the First Amendment was concerned, by citing a hypothetical example. He said that there was a shortage of newsprint and that "some of these days we may have a government agency authorized to make allotments of newsprint. . . . Would it be proper, under such circumstances, for such a government body to impose the sort of abridgments upon freedom of the press that are now imposed on radio broadcasting? The question would seem to answer itself." But if the government allocated newsprint to users without charge, there can be little doubt that it would take into account what the newsprint was being used to produce. The obvious way to avoid the government's doing this would be to sell the newsprint at a price which equated demand to supply.

⁸¹ C. C. Dill, *Radio Law* 1-2 (1938). Mr. Taft was Chief Justice of the Supreme Court from 1921 to 1930. So far as I can discover, the Supreme Court did not consider any radio case while Mr. Taft was Chief Justice.