

in the ideology of program regulation. However, the one to which all ultimately return is that of "spectrum scarcity." As Justice Frankfurter stated in the NBC case,³⁶ "Unlike other modes of expression, radio inherently is not available to all * * * and that is why, unlike other modes of expression, it is subject to governmental regulation."

The most obvious shortcoming of this logic is that, notwithstanding conceded physical limitations on frequency availability and the corresponding limitation on the number of broadcast facilities which can be operated, the fact remains that radio and television stations are more numerous than any of the other competing mass communications media which exists today. If radio is not "available to all" neither is any other significant mass communications medium. It is impossible, therefore, to distinguish radio and television from newspapers, movie theaters, or magazine and book publishers on this basis. If barriers to entry and limitations on access to the use of mass communications media are to be relied on as a basis for imposing regulation of free speech, such regulation should not discriminate against radio and television but should extend to all communications media.

Indeed one scholar has argued that true fidelity to the spirit of the first amendment requires just that and has proposed that newspapers should also be subject to some kind of general editorial regulation, similar to the fairness doctrine, to insure that a diversity of viewpoints is presented to the public.³⁷

But, I suggest that to invoke the aim of diversity to support government control of speech is purest sophistry. It is just such a philosophy of "benevolent" Government interference for the "good of the public" which has fed the most blatant and obnoxious forms of censorship.

It has been suggested that if the Government does not place some direct editorial control on mass communications media, it is allowing them to be censors. In short, we are told to replace the private censor with a Government censor. Frankly, if private censorship is an ill to be cured, I think this cure is worse than the illness.

Some have expressed a distrust of the judgment and responsibility of broadcasters. It seems to me that this distrust stems more from a belief in the "original sin" of broadcasters than any tangible evidence of misconduct. However, even if we are skeptical about broadcaster responsibility, is there any more reason to have an abiding faith in the judgment of the FCC or any other governmental agency in these matters?

I think a reappraisal of the role of the FCC in such matters is clearly called for.

Thank you.

Dean BARROW. A comment will now be made by Prof. Charles A. Siepmann.

COMMENT ON PAPER NO. 3, BY CHARLES A. SIEPMANN

MR. SIEPMANN. Given 10 minutes I think all I can do is identify the true thrust of the argument before us. As we do so, it appears clear to me that Mr. Robinson's potshots at the doctrine constitute a mere diversionary ploy.

³⁶ *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943).

³⁷ Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967).