DEREGULATION OF THE BROADCAST INDUSTRY
1976-1986

An Honors Thesis (ID 499)

by

Tina J. Duggins

Thesis Director
Mr. David L. Smith

Ball State University
Muncie, Indiana
May, 1986

Spring, 1986
The biggest controversy to hit the broadcast industry in the past ten years has been deregulation—taking away all unnecessary rules and regulations with the eventual goal of obtaining full First Amendment rights for broadcasters. As might be assumed, opposing forces have lined up on either side of this issue. This paper will look at deregulation by examining the background events from 1976 to around 1981-82. Along with this will be examples of viewpoints and attitudes that were prevalent during this time. A short update on more recent developments in deregulation follows this section. The final section examines the question of what would happen to the "public's interest" if total deregulation should ever come about. In this section, there is a look at Mark Fowler's chairmanship and the importance of his leadership in pushing for deregulation. Finally, there is a short comment on the deregulation atmosphere for the coming years.

Background 1976-1982

To understand what brought about the push for broadcast deregulation in 1976, one must first know the background of regulation in the broadcast industry. Regulation of broadcast stations began with the Radio Act of 1927. In this act, the clause, "in the public's interest, convenience and necessity" came into being. The Federal Radio Commission used this phrase when deciding who to grant a broadcast license to. The interpretation at this time stated that a license must show proof of performing in the public's interest to be granted a renewal of their license. Even those stations granted licenses
before 1927 had to show cause to gain a renewal of their license.

When the FRC was first established, Congress gave them limited regulatory power. Congress achieved this by budgeting the FRC every year. This kept the FRC dependent on the Congress and their good will. Licensing was the FRC's primary regulatory tool and it was used effectively in the "public's interest."

The Davis Amendment to this act pertained to licensing practices. This amendment did not grant the Commission the power to grant a license just to make a quota, but it did limit the number granted in each broadcasting zone. Even if a license may be in the public's interest, convenience or necessity, it was not granted because of this limit placed on each zone.

At this time, the phrase, "in the public's interest, convenience and necessity" was not concretely defined. The reasoning used to support the intentional vagueness of this phrase was that it provided flexibility in adapting to changing conditions in the field. However, the Commission did state several general principles that they felt demonstrated what was meant by this phrase. This statement, made in 1928, was the Federal Radio Commission's attempt to put some "meat" into the interpretation of public interest. They are as follows:

1. Set aside a specific band of frequencies for exclusive broadcast use.

2. The Commission has power to bring about the best possible reception conditions.

3. Fair distribution of different types of service, i.e., a certain number of channels should be permitted to broadcast in a large territory, others should be limited.
4. Avoid too much duplication in types of programs. Consideration will be given to the station that renders a service that is not a duplication.

5. Stations should give the public the type of service that they cannot receive otherwise, i.e., rural stations may play music, urbans may not.

6. Advertising must first serve the public interest, the advertiser second.

7. The station must operate on a regular schedule known to the public.

8. The station must control its reception and check its frequency.

As can be easily seen, many of these principles such as music only being allowed in rural areas, is extremely outdated. These are important to understand because the principles are based on the theory of "scarcity" that regulated all broadcast stations. These principles also follow the idea that the airwaves are owned by the public. The scarcity theory was first developed in the 1920's and to some extent may hold true today in relation to very new technology that is very expensive for the average consumer to own. Also in the 20's, the Commission felt that a limited number of stations(making them scarce) would keep technical interference to a minimum.

This theory of scarcity and the ideal of the public's interest carried over to the Communications Act of 1934 and was prominent until 1976. Technically, scarcity does not hold up any longer. For instance, small markets do not have all the allocations on the spectrum taken. Limits on spectrum use have been by economic reasons, not technology. Commissioner
James Quello, in 1978, agreed with this,

"...Limited spectrum scarcity arguments once embraced by the courts can hardly apply in today's abundance of radio-TV media compared with newspapers. Economic reality is a far more pervasive form of scarcity in all forms of business whether in broadcasting, newspapers, auto agencies or selling pizza. It is a fact that not everyone who wants to own a broadcasting station in a given community can do so. It is also an economic fact that not everybody who wants to own a newspaper, an auto agency or a pizza parlor in a given community can do so." 2

Other technologies also render the scarcity argument invalid. These technologies range from cable, satellite communications, fiber optics and low-power television. This new attitude against the scarcity theory was one of the main ideas behind a rewrite of the Communications Act of 1934.

FCC Chairman Mark Fowler believes that scarcity is no longer a valid argument. Instead he says the real question to be answered now "is how many different sources of opinion are available to the people." 3

The name to remember in connection with the push toward rewriting the Communications Act is Lionel Van Deerlin, a Democrat from California. Van Deerlin was the Chairman of the House Communications Subcommittee. Van Deerlin proposed the initial rewrite of the Communications Act of 1934 in 1976.

In 1977, in the middle of the rewrite, Van Deerlin’s subcommittee staff released a document called the "Options Papers." This document listed four options that Congress could choose from for rewriting the Communications Act. These four options dealt specifically with deregulation radio and television. The list included:
1. Retention of the current licensing system, with consideration given to the appropriate length of the license term, to staggering renewal dates and to the types of information to be submitted in license renewal applications.

2. A system of leasing, under which the obligations of a broadcaster would be set out as conditions in a lease agreement and which would generate fees based on a percentage of profits that "could be used to accomplish desired public benefits."

3. A public utility approach that would give each broadcaster monopoly control over the frequency, with a rate of return established to create "an incentive to the broadcaster to utilize excess profits for more local programming, expanded news and public affairs, minority training programs, etc."

4. An access or quasi-common carrier approach under which a broadcaster would be treated like a common carrier for a certain percentage of the broadcast day—the access percentage requirement replacing most of the other, more general content rules or concepts such as the Fairness Doctrine and equal time.

The rewrite of 1978 most closely matched the option that utilized the idea of leasing and a user fee. The "Options Papers" listed options for each section of the Act.

The first draft of the rewrite was titled HR 13015. HR 13015 was introduced in 1978. The rewrite was dubbed, "The Communications Act of 1978." The basic premise behind deregulation and this rewrite was that the FCC and Congress would only provide regulation where market forces did not work. This draft separated radio from television, with radio getting the biggest breaks.
HR 13015 would free cable television from federal regulations, allow AT & T to enter any other telecommunications field such as cable, and almost totally deregulate radio. This bill also would lessen regulation of television, make license time indefinite, and levy fees for use of the spectrum frequency. Radio would be freed from equal time rules and television would be free from rules that concern all national and statewide election campaigns.

The most significant feature of HR 13015 was that the phrase "in the public's interest, convenience and necessity" was eliminated. The logic behind eliminating the public interest standard was that the marketplace competition between stations would insure that the public would be served well. It was also argued that the phrase was so vague anyway that it was difficult to enforce it or use it as a means of evaluation of a station's performance. The elimination of the phrase was part of the movement away from the concept of "public trusteeship." FCC Chairman Charles D. Ferris spoke out against the elimination of the phrase in a statement before the House Subcommittee on Communications. He said,

"The public interest standard has protected the interests of groups that have not had the economic clout to gain a foothold in the marketplace or to significantly alter its behavior. Minorities and women have gained access to the media through affirmative FCC efforts...And in cases such as WLBT-TV in Jackson, Mississippi, where blacks were effectively ignored despite the fact that they constituted almost half the city's population, the public interest
standard allowed the courts—where
the FCC itself—had failed to act—
to redress the total failure of
the economic marketplace alone to
produce a true marketplace of ideas. 5

Later, in 1979, when the proposal for radio deregulation
was released, the notice made it clear that the public
interest standard would not be eliminated. A statute
would have to be repealed to accomplish this. 6

Changes in the equal time provisions were substantial
in the initial rewrite. HR 13015 would have given radio
stations freedom from equal time and helped television stations
by not considering appearances by candidates in newscasts to
be open to equal time. Also, there was no obligation on the
part of the station to even allow use by political candidates.
Some felt this provision of the rewrite was an improvement
because it would probably allow more extensive debates to
take place by state and national candidates. Congress had to
pass this part of the rewrite, so in April of 1978, the FCC
recommended that presidential and vice-presidential candidates
be exempt from the equal time law. The FCC also recommended
to Congress that the equal time rules only apply to "major
party" candidates. 7

Even though the fairness doctrine was not totally
repealed for television in HR 13015, the wording was changed.
The change would be "equitable" treatment of controversial
issues of public importance. HR 13015 would not require
that broadcasters identify and cover issues of importance
to their community. This clause relieved broadcasters of
their public interest responsibilities. The rewrite would
only require that public affairs programming be broadcast "throughout the broadcast day." Needs of the community would not be identified. Glen O. Robinson, who was a commissioner in 1976, would applaud this rewrite, but probably would prefer the elimination of any type of regulation that restricts free broadcast journalism. In an article of Television/Radio Age, Robinson said, "I do not think this Commission can define "fairness" with sufficient clarity or enforce it with sufficient vigor to justify the pretense that the obligation promotes fairness in the treatment of controversial public issues." 8

In 1977, FCC Chairman Richard E. Wiley suggested an experimental suspension of the fairness doctrine in large radio markets. This brought about a debate whether the fairness doctrine would have to be suspended by the Commission or by authorized legislation by Congress. 9,10 The U.S. Court of Appeals in Washington disagreed with Robinson and Wiley on the elimination of the fairness doctrine. The court stated, "As long as the Commission strictly enforces the...obligations to present opposing points of view whenever there is direct, obvious or explicit advocacy on one side of a controversial issue of public importance, it will be acting consistently with the public interest standard." 11

There were many criticisms of the initial rewrite. Broadcasters felt the user fee was a high price to pay for deregulation. Broadcasters were confused by the elimination of the public interest phrase and the addition of the phrase, "locally-produced
programming throughout the broadcast day." This was an attempt to maintain a level of local evaluation of how well the public interest was being served in each market. The dropping of the public interest phrase also caused concern in the general public. Public interest groups spoke out against it.

Criticism from public interest groups become harsher as radio deregulation got closer to being accepted. Citizen groups were frustrated because they weren't allowed to present their views. Dr. Everett Parker of the Office of Communication of the United Church of Christ was ready to push for a court suit against the FCC. Their concern was the "elimination of EEO rules and rules mandating that stations represent their local communities and afford an opportunity for all elements to be heard." Their real fear is that broadcasters will no longer have an incentive to pick up religious programming—which can be broadly defined as public interest material.

Goodwill Industries, the Ohio Council of Churches, and the Hawaiian Council of Churches opposed deregulation of radio. They feared that all public service needs of a community would be ignored. The Chairman of National Citizens Committee for Broadcasting, Ralph Nader, denounced the proposal for radio deregulation "as a further entrenchment of federally protected monopolies for a few hundred corporations at the expense of 220 million Americans." Peggy Chareen, President of Action for Children's Television accused the administration of being "one which seems absolutely bent on doing away with every shred of the public interest in every aspect of government."
Sam Simon, executive director of the National Citizen's Committee for Broadcasting said,

"It appears the chairman [Ferris] is not particularly sensitive to our concerns and positions on these issues. We just don't see the need for a change. The broadcasters have managed to grow under what they call "burdensome" regulations and they are more profitable than ever before." 17

Citizen groups weren't the only ones opposing deregulation of radio in 1979. Representative Ronald Mottl, a Democrat from Ohio, disagreed with the marketplace theory. Mottl wanted the adoption of quantifying standards for programming, "one in terms of time, the other in terms of expenditures." 18 New York Times television correspondent Les Brown opposes deregulation

"...not only does the marketplace not assure service in the public interest, but that broadcasters will not provide such service unless members of the public take an active role in the regulatory process." 19 Robert E. Jacobson in a collection of essays, "Telecommunications Policy and the Citizen, points out that the marketplace forces cannot create an efficient market.

"Deregulation assumes the operation of marketplace forces creating an efficient market-and, by extension, social justice. The fatal flaw in this steely machinery is the existence of economic and political factors in the real world..." 20

The strongest argument against Rewrite HR 13015 was that it did not consider the First Amendment rights of viewers and
listeners, only those of the broadcasters. It would take away the obligation of broadcasters to give any coverage to controversial issues. Stations would not have to ascertain what issues are important in their market. The bill also did not address the problem of integrating new technology. Public interest groups were most concerned that this rewrite would limit or end access by non-broadcasters.

HR 13015 was a complete rewrite of the Communications Act of 1934. This rewrite failed. Van Deerlin stepped back and began a new rewrite of the rewrite and introduced it in 1979. The major change would be the re-instatement of the public interest groups. Van Deerlin wanted to see this phrase spelled out in definition.

The second rewrite was titled HR 3333. In some ways, this rewrite was more radical, yet it tried to find common ground between broadcasters and public interest groups. Van Deerlin agreed to help broadcasters by setting a percentage limit on the user fee. This would be established by the FCC. The plan was to make it a percentage of revenues.

The public interest standard was re-instated. This would increase the likelihood that the other policy changes would be accepted. However, the public interest phrase still was not spelled out. The rewrite simply stated that stations must prove that they broadcast public affairs and local programming to be eligible for license renewal.

Broadcasters found HR 3333 to be more favorable than HR 13015, but cable operators and citizen's groups were alienated. Cable
was against it because they would not be able to carry programming without permission from the broadcaster or the owner. Citizen groups spoke out against the deletion of the fairness doctrine and equal time law for radio.

The rewrite HR 3333 was much closer to enactment because the Senate Chairman and a ranking member took an interest in deregulation and introduced their own versions of the rewrite. These rewrites were tighter versions of HR 3333 by Van Deerlin. Even with all this support, HR 3333 was defeated in July of 1979.

These first two attempts at rewriting the Communications Act of 1934 were significant because they pushed the FCC to take action on some important issues. The FCC began action on deregulation of the telephone industry, a proposed reduction in the AM channel spacing, creation of low-power television and authorization of a direct-to-home satellite broadcast service. Communications issues became important in Congress and in the White House. However, the best look at what the rewrites accomplished was expressed by its innovator/driving force, Van Deerlin.

He said,

"The rewrite is generating a new environment in Washington—an environment in which the old laws and established institutions are being challenged by the skepticism of new players in a new era. As a long observer and participant, I tell you this: things will never be the same again." 21
Van Deerlin was defeated in 1980, but his introduction of deregulation ideas and the debates they started would change regulatory policy decisions from then on.

After this point, the FCC swung into action in 1979. In September, the Commission adopted a Notice of Inquiry and Proposed Rulemaking. This was a proposal for far-reaching radio deregulation. This deregulation would eliminate:

1. non-entertainment programming guidelines
2. commercial guidelines
3. ascertainment requirements
4. program logs

This proposal substituted the marketplace theory for rules to determine programming practices. This allowed radio stations to ascertain by any reasonable method. No more programming percentage guidelines would have to be followed. Commercials were no longer limited by time and program length commercials were allowed. Program logs were no longer required by the FCC.

The proponents of deregulation were excited by this proposal. During this time, many arguments were heard advocating deregulation. An economic analysis was done by the Office of Plans and Policy. Dr. Nina Cornell, who headed the office in 1979 felt the data that was collected proved that the market would provide adequate regulation. The NAB executive vice-president, John B. Summers, agreed that the statistics "demonstrate that the radio industry
can be deregulated immediately without any loss of service to the public. These numbers prove that radio stations, including those in small markets, serve their communities, and will be able to serve better without the burden of those unnecessary rules."

Sam Cook Digges, president of CBS's Radio Division, said in *Television/Radio Age* that government regulations are only a minimum anyway.

"Any good station operator is going to go far beyond the standards proposed or contemplated by any government agency. It's good business frankly. The good stations certainly go beyond any requirements now in force in terms of service to the community—and that practice will continue...I can't see any station running wild with commercials because the competition would kill them.".

An argument against the claim that public affairs programming and related programming would be ignored was given by NRBA's Abe Voron who said,

"A radio station that serves a community has to provide public affairs programming or it's not going to survive. You cannot operate a radio station in the highly competitive business we're in without serving the community—not out of altruism, but because if you want the largest audience, you have to include this in the mix of programming."
Commissioner James H. Quello made a strong statement in favor of deregulation in an article in *Television/Radio Age* in 1979. Quello stated,

"I don't believe the rewrite goes far enough. I have been urging virtually complete deregulation of all broadcasting. I have to say "virtually" because it's clear that technical regulations will continue to be necessary in order to prevent unnecessary interference. Except for technical restraints, however, broadcasting must have the same freedom and opportunity to serve the public as newspapers, magazines or any other information media. There is absolutely no logical reason why broadcasters—and the public they serve—should continue to be treated as second-class citizens insofar as the First Amendment to the U.S. Constitution is concerned."\(^{25}\)

One quote by a scholar from George Washington University sums up how most broadcasters feel deregulation will work for themselves and the public. "The one thing that protects the industry is the selfishness of the industry and the one thing that protects the public is the selfishness of the industry."\(^{26}\)

Henry Geller, head of the National Telecommunications and Information Administration is a self-proclaimed convert to deregulation. He feels that regulation has not worked and that in requiring broadcasters—who are in business to
make money-to serve as public trustees, the government is imposing a serious burden on the First Amendment.\textsuperscript{27}

Of course the National Association of Broadcasters were strong supporters of radio deregulation. They felt "the time has come for the FCC's performance to achieve the President's directives."\textsuperscript{28}

By January of 1981, Congress had abandoned any effort to pass a single rewrite, so they considered trying a series of bills. These bills would only address one or a few issues at a time. Around this time, the FCC announced a Report and Order that eliminated guidelines for advertising, non-entertainment programming, staff and ascertainment. Program logging requirements were also eliminated. The courts sent the program logging requirements back to the FCC for more work.

All through 1981, numerous bills were introduced. Some of these bills were to extend license terms, levy fees on stations to cover the cost of regulation, and a bill to effectively legalize the FCC's deregulation. The two bills introduced that caught the most attention were the repeal of the fairness doctrine and equal time laws and the Regulatory Reform Act. The act would allow for Congressional veto power over regulatory agencies' rules and would provide for easier access to the courts by "interested parties" in agency rule-making.

Deregulation of radio was approached first. There were many reasons for this. For example, there have been three major on-going structural changes in radio. Number one, there
has been increased competition, especially in larger markets. Two, radio's role has shifted to a secondary and specialized medium rather than a major information medium for the mass audience. Lastly, radio has been responsive to the diverse American society and its changes. Because of these changes, the Commission re-evaluated the rules and policies for radio. The Commission felt that this was in the best interest of the society. The theory was that centralized regulations do not take into account local differences in markets. Competitive markets would be efficient enough at determining local wants. Producers of goods and services must be responsive to consumer's desires to compete successfully. It is good for the public's interest to encourage this competition and increase the number of competitors in a market. In summary, market forces will yield programming that serves consumer choices of entertainment and information.

In September of 1979, the Commission stated their view in the Notice of Inquiry and Proposed Rulemaking.

"The radio deregulation we are proposing today is part of an overall scheme that has as its hub a shift in our regulatory approach based on structural means of achieving diversity rather than one emphasizing conduct, fraught with all the dangers and inefficiencies inherent in such a system. Such an approach would entail more effective use of multiple ownership regulation, creation of a more representative pool of people making decisions about programs through EEO and
minority ownership policies, and increasing the number of outlets through more efficient use of the spectrum, expanding the spectrum available to broadcast radio, and fostering new technologies. It is our belief that such measures will increase the number of independent voices in a fashion most likely to serve the public interest without the need for government intrusion in programming areas."

Radio deregulation did come about in 1982. By this time, the FCC had taken a stab at controlling paperwork by initiating the postcard renewal form for most radio and television stations. Randomly chosen stations would have to fill out the long form occasionally. When the postcard size renewal form was adopted in 1981, the idea was to reduce paperwork for the Commission as well as broadcasters. The renewal form is concerned with equal employment and ownership. The Commission's intention was to rely on public complaints to tell them whether the station was operating in the public interest.

In June of 1984, this renewal form was challenged for the last time by a number of citizen groups. The Supreme Court refused to hear their appeal.

The deregulation of radio was forecasted to bring about an upsurge in commercials, no public affairs programming, and the dogmatic use of the airwaves. Richard Shibin, chief of the FCC's broadcast bureau says market forces have proven to be adequate in protecting the public interest.
shown that stations have managed more restraint than critics believed they would. One reason behind this self-restraint may be that it is just good common business sense to do it. Along with the adoption of deregulation came a statement from the FCC that if the deregulation climate proved to be unacceptable, they would return to regulation.

Later in 1982, the FCC took a step back with AM stereo systems and refused to choose one. FCC Chairman Fowler called this decision a benchmark of the Commission's commitment to deregulation and faith in the marketplace. Broadcasters who pushed for deregulation, criticized the FCC for not choosing. The industry did not want the burden of selection. It was hard to find a middle ground that pleased everyone.

In 1983, Edwin Diamond, Norman Sandler, and Milton Mueller wrote that the FCC felt its top priority in policy-making was to lift controls and requirements on business practices and broadcast content. The Commission had a broad view of allowing the industry to set its own standards except where this freedom clashes with the public's interest.33

This view would allow for more First Amendment freedom for broadcasters. President Reagan agrees with the FCC's policy. In 1982, in a letter to the NAB Convention, President Reagan said, "it is essential to extend to electronic journalism the same rights that newspapers and magazines enjoy."34

Recent Developments 1983-1986

In more recent years [1983-1986], there has been an increased interest in repealing the fairness doctrine. As with other
regulations, the fairness doctrine has its opponents and proponents. As might be assumed, the proponents for repeal of this doctrine are those who are regulated by it.

The NAB points out that the doctrine is contrary to its intended purpose. "The doctrine inhibits some because of its complex and vague standards and requirements, the threat it carries of broader government supervision of content and economic and managerial hardships." The NRBA agrees, "No justification exists to limit the editorial discretion of broadcast licensees through the fairness doctrine, particularly since the inevitable effect of that doctrine is to chill the full expression of ideas and viewpoints." NBC states that the rationale behind the doctrine is no longer valid and that's why they are calling for a full repeal.

"Because the fairness doctrine inhibits rather than promotes diversity of views expressed, and because, given the abundance of media voices now speaking, it is no longer necessary—if it ever was—to promote diversity of views by government fiat, the fairness doctrine is now contrary to public interest. Because the scarcity rationale is itself no longer viable, the doctrine, which embodies government-imposed content regulation, is no longer constitutional. The Commission has the authority to rescind the doctrine; in order to promote the public interest and the First Amendment interest in an uninhibited marketplace of ideas, it should do so now."
Ben Brown, owner of KGAS in Texas argues that the doctrine adds to the workload of a broadcaster. "Before a broadcaster presents a program on a controversial topic, he will deliberately or subconsciously consider the potential hassle, and often turn his attention to matters more pressing." 38

Bill Monroe, NBC news correspondent feels the fairness doctrine "cheats the public by imposing a special inhibition on electronic editors." 39

Even academicians find the fairness doctrine stifling for broadcasters. Thomas G. Krattenmaker of the Georgetown University Law Center, calls the doctrine "incoherent and unworkable." He recommends, "the FCC should abandon, or be forced to abandon a doctrine-now in its fifth decade-that violates every accepted principle of First Amendment jurisprudence, represents an ill-advised and ineffectual regulatory policy, and has no ascertainable content." 40

Eddie Fritts, current president of the NAB calls the doctrine "a relic of the past" and looks forward to its repeal. 41

One group of broadcasters, however, is not advocating a repeal of the doctrine. Group W said the doctrine was fine as is. They called it "an essential ingredient of a broadcaster's obligations to the public. So long as broadcast stations are statutorily required to operate "in the public interest, convenience and necessity" some type of fairness doctrine-whether called by that or another name-will continue to be an inseparable and fundamental condition of the license." 42
Former FCC Chairman Charles Ferris is one of those in favor of retention of the doctrine. He claims that the fairness doctrine, along with the equal time law, "provide an affirmative obligation for broadcasters to cover controversial issues and individuals." Ferris also says,

"What these regulations do is provide shields in many cases to permit you to involve yourself and do the journalistic job which otherwise you might be inhibited from doing because of economic disincentives. There are going to be pressures in the community from people who feel strongly about certain issues for ideological reasons, and economic disincentives on the part of advertisers who might not be going to you because you do get involved in areas that they think are out of the main stream." 

Others opposing abolition of the doctrine include General Motors Corporation, the International Paper Company and Campbell-Ewald Company. They say, "a broadcaster has the statutory obligation to serve the public interest by presenting a fair cross-section of opinion in its coverage of controversial public matters." These companies were not against an experiment involving paid advertisements and public service announcements being exempt from the fairness doctrine.

Those favoring the appeal had a small victory in August of 1985. The FCC concluded that the fairness doctrine is not in the public interest and inhibits broadcasters from presenting controversial issues of public importance.
"The compelling evidence in this proceeding demonstrates that the fairness doctrine, in operation, inhibits the presentation of controversial issues of public importance. As a consequence, even under a standard of review short of the strict scrutiny standard applied to test the constitutionality of restraints on the press, we believe that the fairness doctrine can no longer be justified on the grounds that it is necessary to promote the First Amendment rights of the viewing and listening public. Indeed, the chilling effect on the presentation of controversial issues of public importance resulting from our regulatory policies affirmatively disserves the interest of the public in obtaining access to diverse viewpoints. In addition, we believe that the fairness doctrine, as a regulation which directly affects the content of speech aired over broadcast frequencies, significantly impairs the journalistic freedom of broadcasters."

Commissioner Quello concurred on the vote, yet he stated that he also believes that the doctrine does not serve the public interest. However, he felt Congress holds the key to its repeal, not the FCC. This was the attitude of the majority of the Commissioners, they didn't feel it was in the public interest, but they would continue to enforce it.

One congressman was especially adamant about the FCC not repealing the fairness doctrine. John Dingell, a Democrat from Michigan feels that it is destructive for the government [FCC] to have the idea that they should deregulate the industry as fast as possible. Yet he conceded that the proposals that were
based on nostalgia for the comfortable days of monopoly regulation were not acceptable either. He stressed that congressional intervention would be used to prevent the FCC from repealing the doctrine.

"Last week [February, 1985] I was saddened to feel it necessary to warn the FCC against continuing its foolish assault on this fundamental protection for free speech. My defense of this doctrine extends to its corollaries, the political editorial and personal attack rules, which the Commission is targeting for extinction as well."48

Other significant policies that have been eliminated or changed in recent years range from rules that regulated fraudulent billing to one governing broadcast contests and promotions. Policies that prohibited licenses from falsifying ratings and using their station to promote their non-broadcast business interests were also struck from the record. These changes were consistent with how Diamond, Sandler, and Mueller described the FCC's attitude toward deregulation in 1983. Proposals to eliminate rules governing network clipping, combination advertising rates and joint-sales practices were considered. The regional concentration rules which prohibits the ownership of three broadcast stations when two are located within a hundred miles of the third and the primary service contours of any overlap, was also scrapped early on in the deregulation clean-up.49

The FCC likes to refer to these policy items as "underbrush:"
Jim Hudgens, the senior attorney for the FCC's Office of Plans and Policy, said that most of these "underbrush" items relate only to intra-industry conduct and will cause little, if any, harm to the public. 50

Loss of the Public Interest?

Even though substantial work has been done in deregulating the broadcast industry, much remains. The questions continues, however, of how far deregulation can go before the public interest is severely affected. It is hard to find a middle ground concerning this issue. Many are strongly opposed to deregulation that does not allow for the public's input or interest. Others are die-hard deregulation fans who feel the public interest will take care of itself. Some, like Commissioner Quello, started out seeming to be a die-hard, but now has become a mellow supporter of anything in the "public interest." In a phone interview with a special assistant to Commissioner Quello, it was evident there was a change. Commissioner Quello is in favor of re-instituting the policy that put a limit on how long a person has to own a station before selling it again. He feels this will insure better business and a commitment to broadcasting rather than a fast buck. In his opinion, this is more in the public's interest. 51

The major argument behind eliminating the public interest standard in regulation is that the term is so vague anyway that broadcasters are not sure how to adhere to it. Broadcasters also feel that this allows for uneven interpretation and enforcement by the FCC at license renewal time. Others applaud the
intentional vagueness of the phrase, saying it leaves it flexible enough to allow for new technology and new situations.

"The public interest is a constantly evolving concept that almost has to be vague in order to account for the evolution of various communications media." In other words, the concept of public interest is a dynamic rather than constant concept.

Don Wear, assistant to the former Chairman of the FCC, Richard E. Wiley, tried to summarize and define "public interest." "I think the public interest is an amalgam of what members of industry have to say, what individual citizens have to say, and that it's the FCC's job to seek out and listen to all of those interests and blend them." At one time, Commissioner Robinson defined the "public interest" as a "meaningless defined purpose" that means different things at different times to different people. With this in mind, it is easy to see why broadcasters get frustrated with how to live up to it and why the FCC gets frustrated with enforcing the public interest standard fairly and properly.

In general, broadcasters have become outspoken in their support of eliminating the public interest standard. This viewpoint has picked up supporters in the FCC, too. In 1979, Chairman Ferris said,

"The FCC should examine whether it needs to continue to play as strong a regulatory role in the marketplace of ideas...I do not think the government should linger in any field of electronic communications a day longer than absolutely
necessary to insure adequate protection of the public's interest in diverse speech..." 55

Even with those types of comments coming out of the FCC, one of Ferris' close associates stated, "The new attitude at the FCC is to look at what is good for the public... and let the industry fall in line, instead of looking at what is good for the industry and assume that would be good for the public." 56 The comment from Commissioner Quello's special assistant earlier in this paper on how Quello now views public interest supports this statement.

In more recent years, Chairman of the FCC, Mark Fowler has been pushing for the elimination of the public interest standard. Fowler stands on the philosophy of the free marketplace and that the viewing/listening public will protect their own interests. He advocates this because he says a free marketplace encourages a freer interchange and exchange of ideas. Fowler says the public will regulate what broadcasters do by simply turning the dial. 57

Former Chairman Wiley stated in 1978 that the industry needs to recognize competition, not persuasive regulation. He feels this would be in the public interest. 58 Eddie Fritts, NAB's president, agreed with the concept of competition rather than regulation for broadcasters. Fritts testified at a House hearing in 1984 and cited growth in competition within the industry and between it and new technologies as eliminating the need for "intrusive government regulation." He said that
broadcasters are ready and "want to compete on a level regulatory playing field with our new competitors." 59

The overall feeling about deregulation affecting the public interest is simply, "Our impression is that things will not change drastically if we[FCC] were to do all of the things that we proposed in our notice to deregulate...in fact, there would virtually be no perceptible change at all."60

Those who oppose the elimination of the public interest phrase have some champions in high places. Tyrone Brown, a Commissioner in 1979, opposed Van Deerlin's rewrite of the Communications Act because it would have eliminated the public interest standard. His only allowance when dealing with the problem would be to allow broadcasters a greater discretion in meeting the public interest obligations. He would leave the choice to broadcasters of how to fulfill the public service requirements. He would define the standard in broad terms. Along with this, Brown felt that other public interest objectives would have to remain because, in his opinion, they could not be left to the marketplace.61

Jerome Barron, dean of George Washington University Law School had harsh words for the FCC in 1980, when radio deregulation was proposed.

"It's true that the FCC can experiment with the public standard. But I don't think they have the authority to interpret the public interest standard in such a way that there is no means of measuring public interest performance. So I think [the commenced undertaking is ] a violation
of the statute, and I think it's a violation of the entire structure of broadcast regulation, which is service in the public interest and which proceeds from the idea that licenses are just that—licenses—and that the airwaves belong to the public." 62

In 1983, Commissioner Fogarty sided with those concerned about elimination of the public interest requirement. Fogarty feels that deregulation should be based on what impact an action has on the public—by a public interest finding. 63

Citizen groups such as the Church of Christ and Action For Children's Television have been sure to have their views heard by the Commission. In 1981, both these groups testified at a hearing dealing with the proposed radio deregulation. Rev. Everett Parker recommended that if the public interest standard is eliminated, it should be replaced by a spectrum fee. Testifying before the FCC is only one way that citizens can be sure that their interest will be protected. 64

The Church of Christ and other religious groups are concerned that the FCC will not evaluate licenses in terms of public service. They feel a "minimalist approach will disserve the public interest." 65

When the Court of Appeals upheld the FCC's proposed radio deregulation in 1983, they did not neglect the "public interest." The court stated that it is the "crucial" right of citizens to participate in the review of a station's public interest performance at renewal time. At this time, the court sent the
logging requirements back to the FCC for re-work because citizens need the logs to support any petition to deny at license renewal time. "The public ... posses an unassailable right to participate in the disposition of valuable public licenses, free of charge, to "public trustees." 66

Citizen groups are not the only ones concerned about deregulation and the public's interest. Top people in the advertising business have voiced concern over total deregulation. Cyril Penn, of Shaller Rubin Associates, voiced concern that if the public interest stand is done away with that overcommercialization or deceptive commercial practices would overrun the broadcasting business. He says, "Deregulation is not in the advertising industry's or the American public's interest, convenience and necessity." 67 The Association of National Advertisers fear that deregulation will bring about extensive double billing and other frauds against advertisers. They also fear that co-op advertising will be affected. They say that this will eventually affect other areas of the public interest because dishonest stations would not be caught. 68

Former Chairman Wiley pointed out in an article of Broadcasting in 1978, that broadcasters have been severely limited in their freedom to change formats because of protests by members of the public. 69 This is a clear example of the market protecting its interests. The best example, however, of the public protecting its interests is simply the fact that the FCC is still attempting to push through total deregulation without success.
Many people believe that the climate of the FCC is determined by its chairman, and in the case of Mark Fowler, this is especially true. Fowler has been the driving force behind deregulation in the 80's.

Fowler has a business/competition/free marketplace philosophy. He says, "My chairmanship has been guided by two very simple principles, freedom of thought and economic freedom. I'm neither zealot nor martyr for these ideas, but I am a "true believer: I believe in these freedoms because they're what America is all about." Fowler aligns himself with Reaganomics.

"So long as Ronald Reagan remains President and I remain FCC chairman, the government will be a spectator-not a dictator-when it comes to content [regulation]. We want to let broadcasting do what it does best by keeping red tape to a minimum." Fowler wants to see broadcasters enjoy maximum freedom to the maximum extent possible.

Though many disagree, Fowler is concerned about the public's interest. He puts the average citizen in line with the government. "Under our system, as I see it, government has no more power over what it is seen or heard on television or radio than the citizen watching the screen or listening to the speaker." Fowler has even come up with his own principle of deregulation. After making popcorn in a hot-air popper, Fowler compares deregulation to this. He says the machine works great without what was long thought to be a necessary ingredient-oil.
"In many ways, this device describes the deregulatory principle of the FCC's policy. Remove what was thought an essential ingredient-heavy government regulation-and our communications system still works. In fact, it works better. I call this principle the Popcorn Principle."\(^74\)

Fowler is a big supporter of total First Amendment rights for all journalism.

"The issue really comes down to having a fair press or having a free press. The problem with attempting to establish a fair press is that it requires the government to be umpire and the government is not perfect. I opt for a totally free press in all respects-electronic as well as print-because that is must consistent with a free society."\(^75\)

Fowler is proud of the Commission's accomplishments in deregulation thus far. However, he doesn't see his idea of full First Amendment rights coming about soon. Fowler sees little hope that the Commission will be given the chance to eliminate the fairness doctrine. He blames this on politicians. "There is great hostility in Washington to networks. So many politicians think they have been burned...that is also the reason why I don't think we will be given a chance to end the fairness doctrine."\(^76\)

Much ground has been covered concerning deregulation of the broadcast industry. Commissioneer Quello feels that from this point on, deregulation will be counterproductive for broadcasters.
In his opinion, only technical regulations such as VHF drop-ins and must-carry need to be eliminated or dealt with. However, many people[broadcasters] still want to see more accomplished. They continue to argue in favor of the marketplace. According to a study done by the House Telecommunications subcommittee, government regulations have kept prices and profits at "artificially high level" in broadcasting without bestowing "significant monopoly power on any one firm." Yet costs continue to rise, so broadcasters won't be making more than normal returns. This will be an argument used to support deregulation. Deregulation is not going to cause a monopoly situation because there is plenty of competition between stations and between stations and other forms of communication.

A few basic attitudes have carried over from 1976 when the push for deregulation began. The marketplace theory is still used as an argument and public interest groups are still fighting for their "interests." Abe Voron, of the NRBA sums up how broadcasters think about market forces regulating the industry. He says, "We don't claim the marketplace is the ideal regulator, but it is more efficient than a Washington bureaucracy." 

Sadly enough, Theodore Pierson, a communications lawyer may have summed up the deregulation atmosphere for the coming years, "whether you like it or not, the [broadcasting] industry is sensitive to political concerns" and if people abuse the freedom of the free marketplace and permit service to suffer, they will be inviting re-regulation."
ENDNOTES

2 Television/Radio Age, "It's time to Rewrite Communications Act, and Also Time to Set Some Priorities," p. 56-57, 114-123
5 Television/Radio Age, "Inside the FCC," pg. 111-112.
7 Television/Radio Age, "Inside the FCC," pg. 125-126.
8 Television/Radio Age, "The Conflict Between Broadcast Regulation and First Amendment," pg. 64-65, 101-104.
19 *Broadcasting*, "Down On Deregulation," pg. 16-17.

20 Ibid.


24 Ibid.


31 *Broadcasting*, "Supreme Court Upholds Postcard Renewal," pg. 38.


33 Ibid.

34 Ibid.


36 Ibid.

37 Ibid.

38 *Broadcasting*, "The Great Debate on Fairness is a Little Less Than That," pg. 30-32.

39 Ibid.
40 Broadcasting, "Fairness Doctrine Finds Foe in Law Professor," pg. 85.
44 Ibid.
47 Broadcasting, "Fairness Doctrine: the FCC Doesn't Like It But Says It Will Be Enforced," pg. 30-32.
49 Broadcasting, "Regional Ownership Restrictions Jettisoned," pg. 48.
50 Broadcasting, "A Day of Deregulation," pg. 35.
51 Phone Interview, May 13, 3:00 p.m.
53 Ibid.
54 Ibid.
56 Ibid.
63 Broadcasting, "FCC in 1983: Undaunted Deregulatory March," pg. 78, 80, 82, 86.
66 Broadcasting, "Radio Dereg Gets High Sign From Court of Appeals," pg. 33-34.
67 Television/Radio Age, "Viewpoints," pg. 45
70 Broadcasting, "Fowler Sings Marketplace Praises," pg. 46.
71 Ibid.
79 Broadcasting, "Hopes for Broadcast Dereg Fade as Congress Near\$ Adjournment," pg. 61.
80 Broadcasting, "Changing Point of View at the FCC," pg. 38-41.
BIBLIOGRAPHY


"Broadcast Dereg Grinds to a Halt" Broadcasting, September 24, 1984, pg. 33-36.

"Broadcast Deregulation Plan Imperils Co-op, ANA Warns" Advertising Age, May 14, 1979, pg. 1 and 93.


"Changing Point of View at the FCC" Broadcasting, June 17, 1985, pg. 38-41.


"Contradictions Surface in Regulatory Posture" Television/Radio Age, April 7, 1980, pg. 45-50, 110.


"Down on Deregulation" Broadcasting, October 22, 1979, pg. 16-17.


"Fairness Doctrine Finds Foe in Law Professor" Broadcasting, July 8, 1985, pg. 85.

"Fairness Doctrine: the FCC Doesn't Like It But Says It Will Be Enforced" Broadcasting, August 12, 1985, pg. 30-32.


"FCC Offers Ammo for Fairness Challenge" Broadcasting, August 26, 1985, pg. 38.


"Fight Looms On Idea of Fewer Curbs in Radio" Variety, September 12, 1979, pg. 49 and 86.


"Fowler Sings Marketplace Praises" Broadcasting, April 22, 1985, pg. 46.


"Hopes for Broadcast Dereg Fade as Congress Nears Adjournment" Broadcasting, September 24, 1984, pg. 61.


"It's Time to Rewrite Communications Act, and Also Time to Set Some Priorities" Television/Radio Age, April 10, 1978, pg. 56-57, 114-123.


"Latest Plan to Loosen the Reins on Broadcasting" U.S. News and World Report, April 12, 1982, pg. 43-44.


Phone interview with Brian Fontes, special assistant to Commissioner Quello, May 13, 1986, 3:00 p.m.


"Radio Dereg Gets High Sign From Court of Appeals" Broadcasting, May 16, 1983, pg. 33-34.


"Regional Ownership Restrictions Jettisoned" Broadcasting, April 16, 1984, pg. 48.


"A Day of Deregulation" Broadcasting, January 21, 1985, pg. 35.

"Viewpoints" Cyril Penn in Television/Radio Age, June 18, 1979, pg. 45.