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Fourth Edition

DOCUMENTS OF AMERICAN BROADCASTING

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MIND PROBES

1. In addition to telling subscribing broadcasters to obey the law, what else do these documents prescribe or proscribe?

2. What are the advantages and disadvantages of self-regulation compared to government regulation to the public, broadcasters, and the government?

3. Some people look upon the federal government as a monolithic repository of power. Yet the FCC regarded the NAB Codes positively while the Justice Department by 1979 viewed key provisions negatively. How do you reconcile such apparent governmental discord?

RELATED READING

AUGUST, ELLEN, "Writers Guild v. FCC: Duty of the Networks to Resist Governmental Regulation," *Syracuse Law Review,* 28:2 (Spring 1977), 583–607.

COWAN, GEOFFREY, *See No Evil: The Backstage Battle Over Sex and Violence on Television.* New York: Simon & Schuster, 1979.

HELFFRICH, STOCKTON, "The Radio and Television Codes and the Public Interest," *Journal of Broadcasting,* 14:3 (Summer 1970), 267–74.

MACKEY, DAVID R., "The Development of the National Association of Broadcasters," *Journal of Broadcasting,* 1:4 (Fall 1957), 305–25.

WHITE, LLEWELLYN, *The American Radio.* Chicago: University of Chicago Press, 1947. (Reprinted New York: Arno Press, 1971.)

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The Brinkley Case

KFKB Broadcasting Association, Inc., v. Federal Radio Commission*

47 F.2d 670 (D.C. Cir.)

February 2, 1931

Government censorship of broadcast programming was expressly prohibited by § 29 of the Radio Act and its re-enactment as § 326 of the Communications Act. These provisions establish radio as a medium in which free speech enjoys the protection of the First Amendment to the Constitution. Yet the FRC and FCC were charged with the task of regulating broadcasting in the "public interest, convenience, or necessity." Since providing a program service to the general public is at the heart of any reasonable interpretation of the "public interest" in broadcasting, both commissions have found themselves poised on the horns of a dilemma: to impose prior restraints on programming is contrary to the legal and philosophical underpinnings of freedom of speech, but to exercise absolutely no influence over what is broadcast seems inimical to the concept of the public interest.

Dr. John R. Brinkley was hardly the only malpractitioner, medical or other, who gained access to the airwaves during radio's formative era, but he was certainly the most celebrated! His station, KFKB, was among the most popular in the nation for many years, and Brinkley himself twice came close to being elected governor of Kansas as a political independent. Brinkley had purchased his medical degrees from diploma mills but was nevertheless reputed to be a skilled surgeon. His medical specialty was a costly "goat gland" operation, the implantation of animal gonads in the scrota of men seeking sexual rejuvenation and salvation from enlarged prostates. Brinkley's questionable surgical practice and sales of his equally dubious prescription remedies earned him millions of dollars over the years—and the wrath of the American Medical Associ-

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ation. In 1930 a three-to-two majority of the Federal Radio Commission voted not to renew KFKB's license.

This Court of Appeals decision stands as the first judicial affirmation of the FRC's right to consider a station's past programming when deciding whether or not license renewal will serve the public interest. After the decision Brinkley continued to broadcast to his American audience from radio stations in Mexico for another decade, though his Kansas medical license was revoked in 1935. [See *Brinkley* v. *Hassig,* 83 F.2d 351 (10th Cir. 1936).]

Robb, Associate Justice.

Appeal from a decision of the Federal Radio Commission denying appellant's application for the renewal of its station license.

The station is located at Milford, Kan., is operating on a frequency of 1,050 kilocycles with 5,000 watts power and is known by the call letters KFKB. The station was first licensed by the Secretary of Commerce on September 20, 1923, in the name of the Brinkley-Jones Hospital Association, and intermittently operated until June 3, 1925. On October 23, 1926, it was relicensed to Dr. J. R. Brinkley with the same call letters and continued to be so licensed until November 26, 1929, when an assignment was made to appellant corporation.

On March 20, 1930, appellant filed its application for renewal of license (Radio Act of 1927, c. 169, 44 Stat. 1162, U.S.C. Supp. 3, tit. 47, § 81, et seq. [47 USCA § 81 et seq.]). The commission, failing to find that public interest, convenience, or necessity would be served thereby, accorded appellant opportunity to be heard. Hearings were had on May 21, 22, and 23, 1930, at which appellant appeared by counsel and introduced evidence on the question whether the granting of the application would be in the public interest, convenience, or necessity. Evidence also was introduced in behalf of the commission. Upon consideration of the evidence and arguments, the commission found that public interest, convenience, or necessity would not be served by granting the application and, therefore, ordered that it be denied, effective June 13, 1930. A stay order was allowed by this court, and appellant has since been operating thereunder.

The evidence tends to show that Dr. J. R. Brinkley established Station KFKB, the Brinkley Hospital, and the Brinkley Pharmaceutical Association, and that these institutions are operated in a common interest. While the record shows that only 3 of the 1,000 shares of the capital stock of appellant are in Dr. Brinkley's name and that his wife owns 381 shares, it is quite apparent that the doctor actually dictates and controls the policy of the station. The Brinkley Hospital, located at Milford, is advertised over Station KFKB. For this advertising the hospital pays the station from $5,000 to $7,000 per month.

The Brinkley Pharmaceutical Association, formed by Dr. Brinkley, is composed of druggists who dispense to the public medical preparations prepared according to formulas of Dr. Brinkley and known to the public only by numerical designations. Members of the association pay a fee upon each sale of certain of those preparations. The amounts thus received are paid the station, presumably for advertising the preparations. It appears that the income of the station for the period February, March, and April, 1930, was as follows:

Brinkley Pharmaceutical Association	$27,856.40
Brinkley Hospital	6,500.00
All other sources	3,544.93
Total	$37,901.33

Dr. Brinkley personally broadcasts during three one-half hour periods daily over the station, the broadcast being referred to as the "medical question box," and is devoted to diagnosing and prescribing treatment of cases from symptoms given in letters addressed either to Dr. Brinkley or to the station. Patients are not known to the doctor except by means of their letters, each letter containing a code signature, which is used in making answer through the broadcasting station. The doctor usually advises that the writer of the letter is suffering from a certain ailment, and recommends the procurement from one of the members of the Brinkley Pharmaceutical Association, of one or more of Dr. Brinkley's prescriptions, designated by numbers. In Dr. Brinkley's broadcast for April 1, 1930, presumably representative of all, he prescribed for forty-four different patients and in all, save ten, he advised the procurement of from one to four of his own prescriptions. We reproduce two as typical:

> Here's one from Tillie. She says she had an operation, had some trouble 10 years ago. I think the operation was unnecessary, and it isn't very good sense to have an ovary removed with the expectation of motherhood resulting therefrom. My advice to you is to use Women's Tonic No. 50, 67, and 61. This combination will do for you what you desire if any combination will, after three months' persistent use.

> Sunflower State, from Dresden Kans. Probably he has gall stones. No, I don't mean that, I mean kidney stones. My advice to you is to put him on Prescription No. 80 and 50 for men, also 64. I think that he will be a whole lot better. Also drink a lot of water.

In its "Facts and Grounds for Decision," the commission held "that the practice of a physician prescribing treatment for a patient whom he has never seen, and bases his diagnosis upon what symptoms may be recited by the patient in a letter addressed to him, is inimical to the public health and safety, and for that reason is not in the public interest"; that "the testimony in this case shows conclusively that the operation of Station KFKB is conducted only in the personal interest of Dr. John R. Brinkley. While it is to be expected that a licensee of a radio

broadcasting station will receive some remuneration for serving the public with radio programs, at the same time the interest of the listening public is paramount, and may not be subordinated to the interests of the station licensee."

This being an application for the renewal of a license, the burden is upon the applicant to establish that such renewal would be in the public interest, convenience, or necessity (Technical Radio Lab. v. Fed. Radio Comm., 59 App. D.C. 125, 36 F.(2d) 111, 114, 66 A.L.R. 1355; Campbell v. Galeno Chem. Co., 281 U.S. 599, 609, 50 S.Ct. 412, 74 L. Ed. 1063), and the court will sustain the findings of fact of the commission unless "manifestly against the evidence." Ansley v. Fed. Radio Comm., 60 App. D.C. 19, 46 F.(2d) 600.

We have held that the business of broadcasting, being a species of interstate commerce, is subject to the reasonable regulation of Congress. Technical Radio Lab. v. Fed. Radio Comm., 59 App. D.C. 125, 36 F.(2d) 111, 66 A.L.R. 1355; City of New York v. Fed. Radio Comm., 59 App. D.C. 129, 36 F.(2d) 115; Chicago Federation of Labor v. Fed. Radio Comm., 59 App. D.C. 333, 41 F.(2d) 422. It is apparent, we think, that the business is impressed with a public interest and that, because the number of available broadcasting frequencies is limited, the commission is necessarily called upon to consider the character and quality of the service to be rendered. In considering an application for a renewal of the license, an important consideration is the past conduct of the applicant, for "by their fruits ye shall know them." Matt. VII:20. Especially is this true in a case like the present, where the evidence clearly justifies the conclusion that the future conduct of the station will not differ from the past.

In its Second Annual Report (1928), p. 169, the commission cautioned broadcasters "who consume much of the valuable time allotted to them under their licenses in matters of a distinctly private nature which are not only uninteresting, but also distasteful to the listening public." When Congress provided that the question whether a license should be issued or renewed should be dependent upon a finding of public interest, convenience, or necessity, it very evidently had in mind that broadcasting should not be a mere adjunct of a particular business but should be of a public character. Obviously, there is no room in the broadcast band for every business or school of thought.

In the present case, while the evidence shows that much of appellant's programs is entertaining and unobjectionable in character, the finding of the commission that the station "is conducted only in the personal interest of Dr. John R. Brinkley" is not "manifestly against the evidence." We are further of the view that there is substantial evidence in support of the finding of the Commission that the "medical question box" as conducted by Dr. Brinkley "is inimical to the public health and safety, and for that reason is not in the public interest."

Appellant contends that the attitude of the commission amounts to a censorship of the station contrary to the provisions of section 29 of the Radio Act of 1927 (47 USCA § 109). This contention is without merit. There has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest,

convenience, or necessity will be served by a renewal of appellant's license, the commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship.

As already indicated, Congress has imposed upon the commission the administrative function of determining whether or not a station license should be renewed, and the commission in the present case has in the exercise of judgment and discretion ruled against the applicant. We are asked upon the record and evidence before the commission to substitute our judgment and discretion for that of the commission. While section 16 of the Radio Act of 1927 (44 Stat. 1162, 1169, U. S. C., Supp. 3, tit. 47, § 96) authorized an appeal to this court, we do not think it was the intent of Congress that we should disturb the action of the commission in a case like the present. Support is found for this view in the Act of July 1, 1930 (46 Stat. 844 [47 USCA § 96]), amending section 16 of the 1927 Act. The amendment specifically provides "that the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious." As to the interpretation that should be placed upon such provision, see Ma-King v. Blair, 271 U.S. 479, 483, 46 S. Ct. 544, 70 L.Ed. 1046.

We are therefore constrained, upon a careful review of the record, to affirm the decision.

Affirmed.

MIND PROBES

1. Was it reasonable for the FRC to conclude that KFKB's license renewal would not be in the public interest when the popularity of the station demonstrated beyond doubt that the public was very much interested in what Brinkley was broadcasting?

2. Although the court disposes of Brinkley's claim of FRC *censorship* by using the traditional view limiting censorship to "prior restraint," the court does not grapple with the language of § 29 that states "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 communication." Use the quoted passage of § 29 as the basis for a dissent from Judge Robb's opinion.

RELATED READING

CALDWELL, LOUIS G., "Freedom of Speech and Radio Broadcasting," *The Annals of the American Academy of Political and Social Science,* 177 (January 1935), 179–207. (Reprinted in *Radio: Selected A.A.P.S.S. Surveys, 1929–1941.* New York: Arno Press, 1971.)

CARSON, GERALD, *The Roguish World of Doctor Brinkley.* New York: Holt, Rinehart & Winston, 1960.

SHELBY, MAURICE E., JR., "John R. Brinkley and the *Kansas City Star*," *Journal of Broadcasting,* 22:1 (Winter 1978), 33–45.

———— , "John R. Brinkley: His Contribution to Broadcasting" in Lawrence W. Lichty and Malachi C. Topping, eds., *American Broadcasting: A Sourcebook on the History of Radio and Television.* New York: Hastings House, 1975, pp. 560–68, 683–85.

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The Shuler Case

Trinity Methodist Church, South v. Federal Radio Commission*

62 F.2d 850 (D.C. Cir.)

November 28, 1932

Compared to "Doc" Brinkley whose rural charms held sway throughout much of the country, "battling Bob" Shuler was more a local phenomenon. Following the *Brinkley* case by almost two years, this appellate decision built on the court's earlier opinion in upholding the FRC's denial of license renewal to Shuler's radio station, KGEF, because of the minister's defamatory and otherwise objectionable utterances.

While the *Brinkley* decision is confined to statutory interpretation, the *Shuler* case grapples with constitutional issues arising from the appellant's reliance on First and Fifth Amendment claims. The Supreme Court declined to review the decision, 288 U.S. 599 (1933).

Despite these unequivocal judicial affirmations of the statutory and constitutional authority of the licensing agency to withhold franchises from broadcasters whose past programming served predominantly private interests rather than the public interest, the FCC has been timid in its exercise of programming powers through the licensing process. Instead, the Commission has relied on broad, marginally enforced policy statements (see Documents 22 and 25) and "regulation by raised eyebrow" through which a commissioner's speech (see Document 27) or a proposed (but not enacted) rule motivates program decisions in the broadcasting industry. These methods of encouraging programming in the public interest are subtler than license denial, but their effectiveness is difficult to measure.

In those rare instances in which the FCC declined to renew licenses on programming grounds, other issues have been involved, particularly licensee misrepresentation to the Commission. Judicial affirmations in these cases have tended to rely on the latter ground

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rather than program content. See *Robinson* v. *FCC,* 334 F.2d 534 (D.C. Cir. 1964) affirming *Palmetto Broadcasting Company (WDKD),* 33 FCC 250 (1962); *Brandywine-Main Line Radio, Inc.* v. *FCC,* 473 F.2d 16 (D.C. Cir. 1972) affirming 24 FCC 2d 18 (1970). In the comparative renewal context, however, an incumbent licensee's past record of inadequate programming may result in a license being granted to a competitor promising superior service. See *Applications of Simon Geller and Grandbanke Corp.,* 90 FCC 2d 250 (1982) (appeal pending).

Groner, Associate Justice.

Appellant, Trinity Methodist Church, South, was the lessee and operator of a radio-broadcasting station at Los Angeles, Cal., known by the call letters KGEF. The station had been in operation for several years. The Commission, in its findings, shows that, though in the name of the church, the station was in fact owned by the Reverend Doctor Shuler and its operation dominated by him. Dr. Shuler is the minister in charge of Trinity Church. The station was operated for a total of 23¼ hours each week.

In September, 1930, appellant filed an application for renewal of station license. Numerous citizens of Los Angeles protested, and the Commission, being unable to determine that public interest, convenience, and necessity would be served, set the application down for hearing before an examiner. In January, 1931, the matter was heard, and the testimony of ninety witnesses taken. The examiner recommended renewal of the license. Exceptions were filed by one of the objectors, and oral argument requested. This was had before the Commission, sitting in banc, and, upon consideration of the evidence, the examiner's report, the exceptions, etc., the Commission denied the application for renewal upon the ground that the public interest, convenience, and/or necessity would not be served by the granting of the application. Some of the things urging it to this conclusion were that the station had been used to attack a religious organization, meaning the Roman Catholic Church; that the broadcasts by Dr. Shuler were sensational rather than instructive; and that in two instances Shuler had been convicted of attempting in his radio talks to obstruct the orderly administration of public justice.

This court denied a motion for a stay order, and this appeal was taken. The basis of the appeal is that the Commission's decision is unconstitutional, in that it violates the guaranty of free speech, and also that it deprives appellant of his property without due process of law. It is further insisted that the decision violates the Radio Act because not supported by substantial evidence, and therefore is arbitrary and capricious.

We have been at great pains to examine carefully the record of a thousand pages, and have reached the conclusion that none of these assignments is well taken.

We need not stop to review the cases construing the depth and breadth of the

first amendment. The subject in its more general outlook has been the source of much writing since Milton's *Areopagitica,* the emancipation of the English press by the withdrawal of the licensing act in the reign of William the Third, and the *Letters* of Junius. It is enough now to say that the universal trend of decisions has recognized the guaranty of the amendment to prevent previous restraints upon publications, as well as immunity of censorship, leaving to correction by subsequent punishment those utterances or publications contrary to the public welfare. In this aspect it is generally regarded that freedom of speech and press cannot be infringed by legislative, executive, or judicial action, and that the constitutional guaranty should be given liberal and comprehensive construction. It may therefore be set down as a fundamental principle that under these constitutional guaranties the citizen has in the first instance the right to utter or publish his sentiments, though, of course, upon condition that he is responsible for any abuse of that right. Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S. Ct. 625, 75 L.Ed. 1357. "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity." 4th Bl. Com. 151, 152. But this does not mean that the government, through agencies established by Congress, may not refuse a renewal of license to one who has abused it to broadcast defamatory and untrue matter. In that case there is not a denial of the freedom of speech, but merely the application of the regulatory power of Congress in a field within the scope of its legislative authority. See KFKB Broadcasting Ass'n v. Federal Radio Commission, 60 App. D.C. 79, 47 F.(2d) 670.

Section 1 of the Radio Act of 1927 (44 Stat. 1162, title 47, USCA, § 81) specifically declares the purpose of the act to be to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its territories and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmissions; and to provide for the use of such channels for limited periods of time, under licenses granted by federal authority. The federal authority set up by the act to carry out its terms is the Federal Radio Commission, and the Commission is given power, and required, upon examination of an application for a station license, or for a renewal or modification, to determine whether "public interest, convenience, or necessity" will be served by the granting thereof, and any applicant for a renewal of license whose application is refused may of right appeal from such decision to this court.

We have already held that radio communication, in the sense contemplated by the act, constituted interstate commerce, KFKB Broadcasting Ass'n v. Federal Radio Commission, supra; General Elec. Co. v. Federal Radio Commission, 58 App. D.C. 386, 31 F.(2d) 630, and in this respect we are supported by many decisions of the Supreme Court, Pensacola Telegraph Co. v. Western Union Tel. Co., 96 U.S. 1, 9, 24 L.Ed. 708; International Text-Book Co. v. Pigg, 217 U.S. 91, 106, 107, 30 S. Ct. 481, 54 L.Ed. 678, 27 L.R.A. (N.S.) 493, 18 Ann. Cas. 1103; Western Union Teleg. Co. v. Pendelton, 122 U.S. 347, 356, 7 S. Ct. 1126, 30 L.Ed. 1187. And we do not understand it is contended that where, as in the case before us, there is no

physical substance between the transmitting and the receiving apparatus, the broadcasting of programs across state lines is not interstate commerce, and, if this be true, it is equally true that the power of Congress to regulate interstate commerce, complete in itself, may be exercised to its utmost extent, and acknowledges no limitation, other than such as prescribed in the Constitution (Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23), and these powers, as was said by the Supreme Court in Pensacola Tel. Co. v. Western Union Tel. Co., supra, "keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances."

In recent years the power under the commerce clause has been extended to legislation against interstate commerce in stolen automobiles, Brooks v. United States, 267 U.S. 432, 45 S. Ct. 345, 69 L.Ed. 699, 37 A.L.R. 1407; to transportation of adulterated foods, Hipolite Egg Co. v. United States, 220 U.S. 45, 31 S. Ct. 364, 55 L.Ed. 364; in the suppression of interstate commerce for immoral purposes, Hoke v. United States, 227 U.S. 308, 33 S. Ct. 281, 57 L.Ed. 523, 43 L.R.A. (N.S.) 906, Ann. Cas. 1913E, 905; and in a variety of other subjects never contemplated by the framers of the Constitution. It is too late now to contend that Congress may not regulate, and, in some instances, deny, the facilities of interstate commerce to a business or occupation which it deems inimical to the public welfare or contrary to the public interest. Lottery Cases, 188 U.S. 321, 352, 23 S. Ct. 321, 47 L.Ed. 492. Everyone interested in radio legislation approved the principle of limiting the number of broadcasting stations, or, perhaps, it would be more nearly correct to say, recognized the inevitable necessity. In these circumstances Congress intervened and asserted its paramount authority, and, if it be admitted, as we think it must be, that, in the present condition of the science with its limited facilities, the regulatory provisions of the Radio Act are a reasonable exercise by Congress of its powers, the exercise of these powers is no more restricted by the First Amendment than are the police powers of the States under the Fourteenth Amendment. See In re Kemmler, 136 U.S. 436, 448, 449, 10 S. Ct. 930, 34 L.Ed. 519; Hamilton v. Kentucky, etc., Co., 251 U.S. 146, at page 156, 40 S. Ct. 106, 64 L.Ed. 194. In either case the answer depends upon whether the statute is a reasonable exercise of governmental control for the public good.

In the case under consideration, the evidence abundantly sustains the conclusion of the Commission that the continuance of the broadcasting programs of appellant is not in the public interest. In a proceeding for contempt against Dr. Shuler, on appeal to the Supreme Court of California, that court said (In re Shuler, 210 Cal. 377, 292 P. 481, 492) that the broadcast utterances of Dr. Shuler disclosed throughout the determination on his part to impose on the trial courts his own will and views with respect to certain causes then pending or on trial, and amounted to contempt of court. Appellant, not satisfied with attacking the judges of the courts in cases then pending before them, attacked the bar association for its activities in recommending judges, charging it with ulterior and sinister purposes. With no more justification, he charged particular judges with sundry immoral acts. He made defamatory statements against the board of health. He charged that the labor

temple in Los Angeles was a bootlegging and gambling joint. In none of these matters, when called on to explain or justify his statements, was he able to do more than declare that the statements expressed his own sentiments. On one occasion he announced over the radio that he had certain damaging information against a prominent unnamed man which, unless a contribution (presumably to the church) of a hundred dollars was forthcoming, he would disclose. As a result, he received contributions from several persons. He freely spoke of "pimps" and prostitutes. He alluded slightingly to the Jews as a race, and made frequent and bitter attacks on the Roman Catholic religion and its relations to government. However inspired Dr. Shuler may have been by what he regarded as patriotic zeal, however sincere in denouncing conditions he did not approve, it is manifest, we think, that it is not narrowing the ordinary conception of "public interest" in declaring his broadcasts—without facts to sustain or to justify them—not within that term, and, since that is the test the Commission is required to apply, we think it was its duty in considering the application for renewal to take notice of appellant's conduct in his previous use of the permit, and, in the circumstances, the refusal, we think, was neither arbitrary nor capricious.

If it be considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use these facilities, reaching out, as they do, from one corner of the country to the other, to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality, and be answerable for slander only at the instance of the one offended, then this great science, instead of a boon, will become a scourge, and the nation a theater for the display of individual passions and the collision of personal interests. This is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the First Amendment, or an impairment of their free exercise. Appellant may continue to indulge his strictures upon the characters of men in public office. He may just as freely as ever criticize religious practices of which he does not approve. He may even indulge private malice or personal slander—subject, of course, to be required to answer for the abuse thereof—but he may not, as we think, demand, of right, the continued use of an instrumentality of commerce for such purposes, or any other, except in subordination to all reasonable rules and regulations Congress, acting through the Commission, may prescribe.

Nor are we any more impressed with the argument that the refusal to renew a license is a taking of property within the Fifth Amendment. There is a marked difference between the destruction of physical property, as in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321, and the denial of a permit to use the limited channels of the air. As was pointed out in American Bond & Mtg. Co. v. United States (C.C.A.) 52 F.(2nd) 318, 320, the former is vested, the latter permissive, and, as was said by the Supreme Court in Chicago, B. & Q. R. Co. v. Illinois, 200 U.S. 561, 593, 26 S. Ct. 341, 350, 50 L.Ed. 596, 4 Ann. Cas. 1175: "If the injury complained of is only incidental to the legitimate exercise

of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution." When Congress imposes restrictions in a field falling within the scope of its legislative authority and a taking of property without compensation is alleged, the test is whether the restrictive measures are reasonably adapted to secure the purposes and objects of regulation. If this test is satisfied, then "the enforcement of uncompensated obedience" to such regulation "is not an unconstitutional taking of property without compensation or without due process of law." Atlantic Coast Line R. Co. v. Goldsboro, 232 U.S. 548, 558, 34 S. Ct. 364, 368, 58 L.Ed. 721.

A case which illustrates this principle is Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251, 35 S. Ct. 551, 59 L.Ed. 939. In that case the state of Virginia had established lines of navigability in the harbor of Norfolk. The lumber company applied for and obtained permission from the state to build a wharf from its upland into the river to the line of navigability. Some twenty years later the government, in the exercise of its control of the navigable waters and in the interest of commerce and navigation, adopted the lines of navigability formerly established by the state of Virginia, but a few years prior to the commencement of the suit the Secretary of War, by authority conferred on him by the Congress, re-established the lines, as a result of which the riparian proprietor's wharf extended some two hundred feet within the new lines of navigability. The Secretary of War asserted the right to require the demolition of the wharf as an obstruction to navigation. The owner insisted that, having received a grant of privilege from the state of Virginia prior to the exercise by the government of its power over the river, and subsequently acquiesced in by its adoption of the state lines, the property right thus acquired became as stable as any other property, and the privilege so granted irrevocable, and that it could be taken for public use only upon the payment of just compensation. The contention was rejected on the principle that the control of Congress over the navigable streams of the country is conclusive, and its judgment and determination the exercise of a legislative power in respect of a subject wholly within its control. To the same effect is Gibson v. United States, 166 U.S. 269, 17 S. Ct. 578, 41 L.Ed. 996, in which a work of public improvement in the Ohio river diminished greatly the value of the riparian owner's property by destroying his access to navigable water; and Union Bridge Co. v. United States, 204 U.S. 364, 27 S. Ct. 367, 51 L.Ed. 523, where the owner of a bridge was required to remodel the same as an obstruction to navigation, though erected under authority of the state when it was not an obstruction to navigation; and Louisville Bridge Co. v. United States, 242 U.S. 409, 37 S. Ct. 158, 61 L.Ed. 395, in which the same rule was applied in the case of a bridge erected expressly pursuant to an act of Congress. So also in United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53; 33 S. Ct. 667, 57 L.Ed. 1063, the right of the government to destroy the water power of a riparian owner was upheld; and in Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 33 S. Ct. 679, 57 L.Ed. 1083, the right of compensation for the destruction of privately owned oyster beds was denied. All of these cases indubitably show adherence to

the principle that one who applies for and obtains a grant or permit from a state, or the United States, to make use of a medium of interstate commerce, under the control and subject to the dominant power of the government, takes such grant or right subject to the exercise of the power of government, in the public interest, to withdraw it without compensation.

Appellant was duly notified by the Commission of the hearing which it ordered to be held to determine if the public interest, convenience, or necessity would be served by granting a renewal of its license. Due notice of this hearing was given and opportunity extended to furnish proof to establish the right under the provisions of the act for a renewal of the grant. There was, therefore, no lack of due process, and, considered from every point of view, the action of the Commission in refusing to renew was in all respects right, and should be, and is, affirmed.

Affirmed.

Van Orsdel, Associate Justice, concurs in the result.

MIND PROBES

1. One proposition emerging from this case is that free speech protections must yield to congressional jurisdiction over broadcasting because of the shortage of frequencies. If the radio spectrum were plentiful rather than scarce, would this warrant striking the balance between the commerce clause and the First Amendment any differently?

2. The court has little difficulty finding no violation of the Fifth Amendment caused by a procedurally proper nonrenewal of license. Do §§ 6 and 7 of the 1927 Radio Act or § 606 of the Communications Act appear to pass the test of the Fifth Amendment?

RELATED READING

ORBISON, CHARLEY, "'Fighting Bob' Shuler: Early Radio Crusader," *Journal of Broadcasting*, 21:4 (Fall 1977), 459–72.

ROSENBLOOM, JOEL, "Authority of the Federal Communications Commission" in John E. Coons, ed., *Freedom and Responsibility in Broadcasting*. Evanston, Ill.: Northwestern University Press, 1961.