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Diversity in Television's Speech: Balancing Programs in the Eyes of the Viewer

Richard Schiro*

Through regulation, the Federal Communications Commission has endeavored to provide diversity for viewers of the broadcasting media. Regulation has been approved by the courts as a valid means of providing the diversity which is necessary to preserve free speech in compliance with the first amendment. Examining the various rationales justifying the regulation of broadcasting, the author concludes that the regulations thus far promulgated have failed to provide that diversity. He then proposes a new technique to provide more successfully for the desired first amendment diversity.

I. INTRODUCTION

First Amendment doctrine as formulated by the Supreme Court has never accorded absolute protection to all speech. Not only does the government retain some power to regulate the time, place, and manner of speech, but some speech, such as obscenity, may be regulated because of its content. Such strictures generally apply to all of the various means of expression, although the application is not identical to all. This recognition of intrinsic differences among the media is most consistently and broadly applied in the courts’ willingness to allow, without finding any violation of the first amendment, greater regulation of broadcasting than of other means of expression.

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Yet despite the courts' reiteration of broadcasting's uniqueness, broadcast regulation has remained an issue of fervent debate and extended litigation for years. Regardless of how narrowly a regul-


7. Surely one of the most litigated broadcasting cases in recent years is National Broadcasting Co. v. FCC, 44 F.C.C. 2d 1027 (1973), in which the Commission first upheld a fairness doctrine complaint by Accuracy in Media, Inc. because of an NBC broadcast entitled "Pensions: The Broken Promise." A panel of the Court of Appeals for the District of Columbia reversed that decision, 516 F.2d 1101 (D.C. Cir. 1974). Then the Court of Appeals vacated the panel's opinions and judgment and granted a rehearing en banc, id. at 1155, but later vacated its rehearing order, reinstated the panel's opinions and
lation is drawn,8 or what element of the broadcasting industry is affected thereby,9 the industry's rebuttal invariably analogizes broadcasting's more regulated status to the print medium's freedom from regulation, and concludes that the regulation in question unconstitutionally infringes on broadcasting's first amendment rights and becomes thereby an impermissible means of achieving the regulatory goal.10 That goal, which underlies most of the Federal Communications Commission's regulatory efforts, is to achieve by active trading in the "marketplace of ideas"11 the "uninhibited, robust, and wide-open"12 debate in "a multitude of tongues"13 which the first amendment cherishes, seeks, and requires for its fulfillment.14 In a word, the goal is diversity.

To date the Commission has most often pursued diversity by regulating public affairs programming15 that type of speech which the amendment is generally deemed to protect most assiduously.16 Regulation of broadcasting's two other major species of speech—
entertainment programming and advertising—has been comparatively slight and ineffective. But to the extent there has been entertainment programming regulation, it has likewise been undertaken in the name of furthering first amendment diversity.

The thesis of this article is that effective utilization of the balanced programming regulations, which affect all television programming and not solely public affairs, has far greater potential for realizing first amendment diversity than does regulation of only preferred public affairs speech via the fairness doctrine and its peers. The latter method has far too limited a view of the potential for diversity in television programming. The present balanced programming regulations, as written and implemented, are but lip service to diversity: broadcasters can easily comply with their modest requirements, and then can cloak themselves in the first amendment as protection against demands for more effective regulations.

Part II of this article discusses the leading rationales for broadcast regulation which provide the bases for regulating television programming in a constitutionally acceptable fashion. However, as will be discussed, the regulatory doctrines so far developed by the FCC pursuant to these rationales have failed to provide the diversity sought by the first amendment. Part III proposes a new technique—termed “average audience distribution” (AAD)—for better achieving such diversity. The basic premise of AAD is that

17. “Entertainment programs (E) include all programs intended primarily as entertainment, such as music, drama, variety, comedy, quiz, etc.” 47 C.F.R. § 73.670 Note 1(b) (1975).
18. This article will not discuss regulation of broadcast advertising.
19. “The objections to the program quotas go more to the point that they are futile than that they are dangerous . . . . The requirements cannot serve to raise the quality of programming; they can only serve to even out the categories of mediocrity.” Kalven, supra note 6, at 46.
20. “[The licensee] should reasonably attempt to meet all such needs and interests ["of the public he is licensed to serve"] on an equitable basis.” Report and Statement of Policy Res: Commission en banc Programming Inquiry, 44 F.C.C. 2303, 2314 (1960) [hereinafter cited as Programming Statement].
21. See text accompanying notes 60-69 infra. The wisdom and success of the FCC’s regulation of public affairs programming to achieve first amendment diversity is beyond the scope of this article. It has been amply discussed elsewhere, see e.g., Geller, The Fairness Doctrine in Broadcasting: Problems and Suggested Courses of Action (published by The Rand Corporation, R-1412-FF, 1973).
22. The Average Audience Distribution proposal is a method of achieving meaningful program balance. It utilizes existing program categories and the
diversity in television programming will be meaningful only if that
diversity reaches the average viewer. If the programs which pro-
vide programming balance are broadcast in the wee hours of the
morning, the average viewer sees none of them. Diversity can be
achieved only in the eyes of the viewer and not in the programming
schedule of the licensee.23

II. History and Application of the
Regulatory Rationales

A. Four Rationales

Ever since the Radio Act of 1912 first forbade operation of a
radio apparatus without a license, dispute has raged over what
grounds justify and legitimize governmental regulation of the use
of the electromagnetic spectrum by private parties.24 The earliest
rationale for regulation was the necessity of allocating this scarce
resource among competing users.25 This rationale has supported a
variety of regulations through the years26 and is still viable today.27
The Communications Act of 1934 utilized the "public interest, convenience and necessity" language found in the earlier Radio Act of 1927 and made it the applicable standard for allocation of licenses both at the time of initial issuance\textsuperscript{28} and at renewal.\textsuperscript{29} Besides providing the standard for frequency allocation decisions, the Act employed this language as an independent rationale for creating, as distinct from applying, regulatory policies.\textsuperscript{30} Thus, in \textit{National Broadcasting Company v. United States},\textsuperscript{31} in upholding the Federal Communications Commission's chain broadcasting regulations which were designed to reduce network power, especially as realized through affiliation agreements with individual stations,\textsuperscript{32} the Supreme Court held that the FCC's activities were not to be confined to "finding that there are no technological objections to the granting of a license,"\textsuperscript{33} but were to extend to "determining the composition of that traffic"\textsuperscript{34} in fulfillment of the public interest, convenience, and necessity. The Court quoted language from the Commission's Report on Chain Broadcasting which merged the two rationales: "With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them."\textsuperscript{35} Yet neither the Communications Act nor the


\textsuperscript{28.} 47 U.S.C. §§ 307(a), 309(a), and 311(b) (1970).


\textsuperscript{31.} 319 U.S. 190 (1943).

\textsuperscript{32.} The Communications Act provides that "the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [h]ave authority to make special regulations applicable to radio stations engaged in chain broadcasting . . . ." 47 U.S.C. § 303(i) (1970).

\textsuperscript{33.} 319 U.S. at 216.

\textsuperscript{34.} \textit{Id.}

\textsuperscript{35.} \textit{Id.} at 218. This public "trustee" gloss was promptly used by the courts in McIntire v. Wm. Penn Broadcasting Co., 151 F.2d 597, 599 (3d Cir. 1945), \textit{cert. denied}, 327 U.S. 779 (1946), and by the Commission in its Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1247 (1949). It is still current: "The scheme of the Communications Act is clear. The broadcast licensee is a public trustee, given a limited license which can be renewed by the Commission only if it is in the public interest to do so." Dean Burch, Chairman, FCC, testifying at \textit{Hearings on Broadcast License Renewal Before the Subcomm. on Communications and Power of
Supreme Court provided guidelines for implementing this "public interest." On the contrary, the Court noted in NBC, as it had noted earlier, the necessity for and benefit available from such an unspecific regulatory standard.

As foreseen in NBC, the public interest rationale has been continuously applied to uphold the constitutionality of a broad range of broadcasting regulations. Despite this continuing viability,


36. Professor Kalven subjected National Broadcasting Co. v. United States, 319 U.S. 190 (1943), to intensive analysis in a memorandum for the Columbia Broadcasting System (CBS), subsequently published as Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15 (1967). For him, the opinion has a decidedly limited reach. In the decision's attempt to preserve the regulations challenged as unauthorized by the Communications Act of 1934, "[t]he concern is not with what the Constitution permits but with what Congress intended." Id. at 42. The Court rejected the argument that this intent was to limit the Commission to the assessment of financial and engineering data in issuing licenses and indicated that other criteria for issuance and renewal may be considered, but it did not say what those criteria could be. From this omission Kalven argued that "[w]hat he [Frankfurter] had in mind and was addressing his generous language toward was nothing more complex than the wasting of frequencies." Id. at 43. But, if the Court were concerned only with that narrow question, could not the Commission prevent that waste by confining its investigations to technical aspects of the electromagnetic spectrum's use?

While the Court in NBC did not specify what additional criteria were acceptable, it did say that, "Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different." 319 U.S. at 226. Kalven interprets this language to mean that something more than financial and technical data may serve as criteria, but that the Court will not say what. However, this interpretation finds too little in the language. The Court is saying that, on the one hand, the Commission may consider other criteria besides financial and engineering data, and that, on the other hand, it may not consider applicants' "political, economic or social views" and may not choose between applicants on "any other capricious basis." The Court has thus stated the two extremities of consideration and is requiring the Commission to consider more than the first and less than the second. Nonfinancial and nontechnical criteria which do not involve the proscribed views or "any other capricious basis" will be tolerated, if not mandated. As Kalven noted, balanced programming is a criterion which falls within these boundaries. Kalven, supra note 6, at 45.

38. 319 U.S. at 219-20.

two more assertive rationales—the impact rationale and the affirmative-view-of-the-first-amendment rationale—have been used in recent years to support certain key, adopted or advocated regulations. The public interest rationale inheres in both of these and supplies their evolutionary base, but each is an independent rationale as well. In contrast to the public interest standard, which frequently affords no more than a handy label and an after-the-fact justification for certain regulations, these newer rationales define the public interest by the nature of the regulations they seek and require for their fulfillment.

The impact rationale, advanced with increasing frequency and considerable conviction in recent years, maintains that the impact of the electronic media, especially television, is too potent to remain unregulated. As data on the behavioral significance of television programming become more conclusive, the contention is ever more widely espoused that, in the public interest, television's content must be regulated. More than fifteen years ago it was observed:

40. See, e.g., The People's Choice: TV is Voted Best Advertising Medium, Broadcasting, Jan. 12, 1976, at 29 (by a large margin, adults consider television to be "the most influential advertising medium" and "also consider its advertising the most authoritative, most up-to-date and most exciting"); Television: The More Medium, Broadcasting, Sept. 15, 1975, at 53 (increase in the number of adults watching television and in the amount of time they watch it, with a decrease in the number of adults reading a daily newspaper).

41. Branscomb, The First Amendment As A Shield or A Sword: An Integrated Look at Regulation of Multi-Media Ownership 104 (published by The Rand Corporation, P-5418, 1975): In summary, First Amendment theory will make much better sense when we begin to recognize that it is not technological scarcity or abundance nor even public ownership which justifies regulation of the mass media. We regulate the mass media because they are powerful and influential and because they are uniquely affected by the public interest and because, if we do not, democracy as we know it may not survive.

42. See generally Television as a Social Force: New Approaches to TV Criticism (Aspen Institute ed. 1975). One commentator, after noting that television newscasters as distinct from print media reporters were "themselves occasions [and] events," observed:

Thus it matters to the culture that Howard K. Smith will no longer be co-anchorman with Harry Reasoner of the ABC Evening News. . . . These people mess around mightily with our consciousness. . . . They are paid to be more than messengers: their celebrity is conferred on them because they are our stand-ins for life as it is botched outside our living-rooms. Superstars are supposed to behave super. It's an obligation of stardom.

Cyclops, On the Metamorphosis from Anchorman to Superman, N.Y. Times, May 25, 1975, § D, at 19, col. 1. Contra: "Broadcasting has at best an incremental and at worst a marginal effect on political consciousness. Too
[T]he question cannot be evaded whether this type of entertainment by de-civilizing-at-the-source, at work on a hundred million people day by day, can fail to affect and be affected by a public interest in maintaining civilization. If so, this unintended education-in-reverse demands a type of public attention which the media themselves [because of their necessary preoccupations with the commercial aspects of the medium] are not in a position to furnish.43

The broadcast industry,44 as well as the Commission and the courts,45 has begun to note and act upon46 this increased concern about the impact of television programs and advertising.

Each of these three regulatory rationales, scarce resource, public interest, and impact, was created to resolve the circumstances of a particular time, but each has remained viable thereafter. The scarce resource theory was imperative in the early days of broadcasting when a radio signal could travel but a few miles in the

high a price in administrative and judicial inefficiencies, or in broadcasting revenues, should not be paid for doctrines designed to increase the number of voices heard on the air.” Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 HARV. L. REV. 768, 771 (1972).


44. “The consensus for free broadcasting in the United States is decreasing. . . . The people on both the left and on the right find much to be disturbed about in that which we do.” Arthur Taylor, then President of CBS, speaking on a tape prepared by the National Association of Broadcasters and quoted in BROADCASTING, Oct. 13, 1975, at 30. Mr. Taylor continued: “I think that places a very great responsibility on all of us to see the levels of violence, the levels of obscenity, particularly in certain time periods, kept to a very minimum. It’s that kind of responsibility which will forestall the legislative and regulatory pressures which I think we are all going to face in the years to come.” BROADCASTING, Oct. 20, 1975, at 33.

45. See address made in 1959 by then FCC Chairman John C. Doerfer to the National Association of Broadcasters, quoted in Coase, supra note 6, at 37-38, in which Doerfer observed that the FCC’s regulatory power “stems from the potential power inherent in broadcasting to influence the minds of men and the concomitant scarcity of the available frequencies.” In Office of Communications of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969), the court observed: “The infinite potential of broadcasting to influence American life renders somewhat irrelevant the semantics of whether broadcasting is or is not to be described as a public utility.” Id. at 548.

46. The best known recent instance of industry concern is the adoption of the family viewing hour (FVH) by the National Association of Broadcasters. Debate as well as litigation continues on whether FVH is genuine self-regulation by the industry or disguised FCC regulation. As to the litigation, see note 9 supra, and as to the debate, see, e.g., BROADCASTING, May 19, 1975, at 34-35.
clogged airwaves, and it has remained useful to support a variety of regulations for the greatly increased number of stations. The FCC rationalized in the name of the "public interest" its regulatory efforts aimed at curtailing the networks' threatened monopoly domination of the industry, and has continued to use that language in a wide range of regulations.\(^{47}\) And the impact rationale becomes more cogent as doubts arise about the depth and breadth of television's influence on our children and ourselves.

The affirmative-view-of-the-first-amendment rationale is a relatively recent addition and is also uniquely a product of its time.\(^ {48}\) The idea that the first amendment cherishes diversity and finds its fulfillment in "uninhibited, robust and wide-open" debate is neither new nor controversial. The Court has repeatedly applied it in a range of first amendment cases.\(^ {49}\) The novel permutation of that

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\(^{47}\) "Congress moved [to enact the Communications Act of 1934] under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940).

\(^{48}\) Two other rationales are available, although neither can be viewed as uniquely derived from some timely circumstance. By analogy to public utilities it can be argued that since a scarce resource is owned by the citizenry (unlike the resources of many public utilities which are scarce but privately owned) and licensed by the government to private entities for a limited term (subject to renewal), the profits realizable by those private entities from this publicly owned asset should be limited by regulation. Professor Coase believes that the necessary antecedent to regulation as a public utility is "sale" of the airwaves to private owners, and that an appropriately high sale price would have a decided impact upon the networks' and licensees' high profits. Coase, supra note 6, at 22. Cf. the observations of former FCC Commissioner Robinson in the context of comparative license renewal hearings that "licenses do confer property rights." The statutory theory to the contrary . . . has been nullified by immemorial practice." WESH-TV Case Brings FCC's Comparative Procedures into Question, Broadcasting, July 12, 1976, at 25.

The other rationale employs the Commission's power to regulate chain broadcasting, set forth in the Communications Act, 47 U.S.C. § 303(i) (1970), as the basis for regulating the networks directly. Such regulation would surely have impact, since the licensees have almost wholly abdicated responsibility for prime time programming to the networks. Programming Statement at 2314. Arguably, such regulation would have scant first amendment difficulty since the networks are only within the amendment's protective ambit to the extent they hold broadcast licenses. There is precedent for this use of Section 303(i): Bryant noted the "regulatory potential" of that section, Bryant, supra note 6, at 619, and then discussed the prime time access rule as "a landmark in regulation of television networks . . . [because it] operates directly on network organizations rather than on affiliate licensees as do the Chain Broadcasting Rules." Id. at 634.

\(^{49}\) Buckley v. Valeo, 424 U.S. 1, 14-23 (1976).
idea is that the first amendment actually mandates this diversity and, therefore, also mandates affirmative government action to achieve it. As one leading proponent of the affirmative-view-of-the-first-amendment stated: "[A] provision preventing government from silencing or dominating opinion should not be confused with an absence of governmental power to require that opinion be voiced." 50 This rationale was the basis for seeking a right of paid access to television in Columbia Broadcasting System, Inc. v. Democratic National Committee. 51 While the Court in CBS rejected the access claim because of, among other things, "the risk of an enlargement of Government control over the content of broadcast discussion of public issues," 52 it also indicated that some "limited" formulation of the access concept might well be "both practicable and desirable" 53 and presumably constitutional. But, as discussed below, application of the affirmative-view-of-the-first-

50. Barron, supra note 14, at 1676. Compare Barron's statement with the following: "[W]e are constrained to point out that the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it." Programming Statement at 2308.


52. Id. at 126. The Court's reference to "public issues" may be to the tier system of first amendment analysis which, in Professor Meiklejohn's formulation, discerns two principal levels of speech—"public speech" and "private speech."

The guarantee given by the First Amendment is not, then, assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest. Private speech, or private interest in speech, on the other hand, has no claim whatever to the protection of the First Amendment. If men are engaged, as we so commonly are, in argument, or inquiry, or advocacy, or incitement which is directed toward our private interests, private privileges, private possessions, we are, of course, entitled to "due process" protection of those activities. But the First Amendment has no concern over such protection. . . . [W]e draw sharply and clearly the line which separates the public welfare of the community from the private goods of any individual citizen or group of citizens.


53. 412 U.S. at 131.
amendment rationale need not be confined to the right of access concept.

Regardless of which rationale is employed, the broadcasting industry has insistently defended itself by litigation and comment against any regulation which it deems an infringement of its first amendment rights. FCC rulemakings are frequently tested in litigation, and the industry's point of view is steadily espoused in the literature. Despite these efforts, "the courts have consistently sustained the authority of the FCC to consider programming." The Commission has interpreted this consistency as providing a firm mandate for diversity-motivated regulation: "The Supreme Court, in its landmark decision in Red Lion Broadcasting Co. v. FCC . . . gave considerable support to the principle that the FCC could properly interest itself in program categories."

B. Application of the Rationales

The question, then, is how these rationales have been applied to diverse questions involving programming. For the rationales

54. See, e.g., Loevinger, Free Speech, Fairness, and Fiduciary Duty in Broadcasting, 34 LAW & CONTEMP. PROB. 278 (1969). The author, a former FCC Commissioner, endeavored to rebut the scarcity and public interest regulatory rationales but could cite no cases in support of his argument. Finally, he conceded that "[the Court] has converted the responsibilities of broadcasting, with respect to information, into legal duties, and it has elevated these duties to constitutional status. There can be little doubt that these principles will be the law for a long time to come." Id. at 297 (footnote omitted).


56. Action for Children's Television, 31 F & F RADIO REG. 2D 1228, 1233 (1974). The FCC further observed in that ruling:

While the holding of the Red Lion case was limited to the fairness doctrine, the Court's opinion has a significance which reaches far beyond the category of programming dealing with public issues. . . . [The Court] stated . . . that "[i]t is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by the Congress or by the FCC." . . . This language, in our judgment, clearly points to a wide range of programming responsibilities on the part of the broadcaster.

Id. at 1234.

1. Fairness Doctrine

The fairness doctrine inheres directly in the public interest standard, and indirectly expresses the two more recent rationales. As the Court noted in CBS: “Formulated under the Commission’s power to issue regulations consistent with the ‘public interest,’ the doctrine imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints.”\footnote{CBS v. Democratic Nat’l Comm., 412 U.S. at 186-87 (Brennan, J., dissenting).} Congress, in fact, amended Section 315 of the Communications Act to recognize broadcasters’ responsibility “to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.”\footnote{25 U.S.C. § 315(a) (1970). For a full discussion of the evolution of the fairness doctrine, see id. at 375-86; Geller, supra note 21, at 1-43.} The Supreme Court recognized the constitutional validity of the doctrine in Red Lion Broadcasting Co. v. FCC.\footnote{395 U.S. 367, 386-401 (1969).}

Unfortunately, notwithstanding its affirmative component, the doctrine in practice demands so little that broadcasters are able to “meet their fairness responsibilities through presentation of carefully edited news programs, panel discussions, interviews, and documentaries.”\footnote{Id. at 187.} Therefore, to compel the adequate coverage of important public issues which the fairness doctrine seeks but apparently cannot achieve, the right of access doctrine was formulated.\footnote{Id. at 187.} Just as the right of access evolved from the fairness...
doctrine in pursuit of the "widest possible dissemination of information from diverse and antagonistic sources," so the rationale for access—namely, an affirmative view of the first amendment—evolved from the earlier public interest rationale.

2. Equal Time Rule

As set forth in Section 315(a) of the original Communications Act of 1934, the equal time rule requires: "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station". Since Section 315 applies to major and minor candidates and to all air time, whether sold or donated by the broadcaster, its passage resulted in great reluctance by broadcasters to provide any time for candidates. A 1972 amendment to Section 312(a) of the Act sought to overcome this reluctance by creating as an additional ground for revocation of any station license the "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

Although the original Section 315 was forged in the debate over broadcasting's common carrier status, its enactment was grounded in the public interest rationale as well. And just as a new regulatory rationale supported the evolution of the right of access concept from the fairness doctrine, so that same rationale—the affirmative-view-of-the-first-amendment—supports the evolution of Section 315 to include the requirement of the 1972 amendment.

3. Balanced Programming

Although the Commission and the courts have long been involved in program-related discussions, the 1960 Programming

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70. Kalven, Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15 (1967); Rosenbloom, supra note 24, at 130-41, 155-70. The FCC's earliest broad statement on program content was entitled Public
Statement 71 was the Commission’s major effort to deal comprehensively with television programming. In regard to fulfilling the licensee’s principal obligation to execute the “public interest, convenience and necessity” standard, the Commission found that:

The principal ingredient of such obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area. If he has accomplished this, he has met his public responsibility. 72

This ascertainment requirement 73 carries with it the obligation that the licensee “should reasonably attempt to meet all such needs and interests on an equitable basis.” 74 In an effort to provide guidance for the fulfillment of this requirement, the Commission specified fourteen programming categories which it deemed to be “[t]he major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission . . . .” 75 The Programming Statement has been implemented by the requirement that the licensee’s program log 76 contain “[a]n entry classifying each program as to type, using the definitions set forth in Note 1 at the end of this section.” 77 Note 1 defines eight program types, each of which corresponds to a program category

Service Responsibility of Broadcast Licensees (1946), popularly known as the “Blue Book.”
72. Id. at 2312.
73. The ascertainment process was more fully developed by the Commission in its Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971), and in the recent revisions of the ascertainment process entitled Ascertainment of Community Problems by Broadcast Applicants, 41 Fed. Reg. 1372 (1976).
74. Programming Statement at 2314.
76. The program log (47 C.F.R. § 73.670 (1975)) is to be distinguished from the operating log (47 C.F.R. § 73.671 (1975)) and the maintenance log (47 C.F.R. § 73.672 (1975)).
listed in the Programming Statement. Programming balance is required among the categories.

In setting forth categories the Commission believed it was (1) avoiding any difficulty with the first amendment and Section 326 of the Communications Act, which bar the Commission from conditioning "the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program," and (2) simultaneously dealing with the practical considerations which bar the "Commission's role... [from being] one of program dictation or program supervision." Further, the Commission

78. Of the five Programming Statement categories unnamed in Note 1, one—weather and market reports—is subsumed under the Note's definition of news program. 47 C.F.R. 73.670 Note 1(c) (1975). Two other categories in the Programming Statement—opportunity for local self-expression, and development and use of local talent—are not program types for Note 1 purposes, apparently because they are not content-related designations. But their importance as indicia of a primary programming goal of the Commission is accounted for by the requirement that the log must note the source—local, network, or recorded—for each program. 47 C.F.R. § 73.670 (1975). See R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 97-120 (1973) [hereinafter cited as ECONOMIC ASPECTS].

The Programming Statement's "service to minority groups" category is omitted from the program regulation, but is increasingly the subject of independent activity and concern by and before the Commission. The fifth Programming Statement category omitted from the log regulations is children's programs, but this program type is subject to continuing discussion and rulemaking by the Commission and interested parties. For example, in 1974 the Commission applied the balanced programming concept to this one category by ruling that: "In the future, stations' license renewal applications should reflect a reasonable amount of programming designed to educate and inform children, and not simply to entertain. Broadcasters are not necessarily expected to have programs designed to cover every subject or field of interest." Action for Children's Television, 31 P & F RADIO REG. 2D 1228, 1228-29 (1974). In addition, while the Commission follows a licensee's balance in non-entertainment programming by means of the Annual Programming Report, 38 Fed. Reg. 28773-801 (1973), children's programming is the subject of a separate question in the license renewal application form. 38 Fed. Reg. 28797 (1973).

79. This section provides: "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326 (1970).

80. Programming Statement at 2308.

81. Id. at 2309. "As for the question whether the FCC should consider the quality of programming within a category, or seek to set minimum standards of quality, I think that is nearly impossible." Cox, supra note 6, at 595.
emphasized that these standards or guidelines should in no sense constitute a rigid mold for station performance, nor should they be considered as a Commission formula for broadcast service in the public interest. Rather they should be considered as indicia of the types and areas of service which, on the basis of experience, have usually been accepted by the broadcasters as more or less included in the practical definition of community needs and interests.82

Although the Programming Statement's fourteen categories have been translated into the details of the FCC's day-to-day regulatory effort, in actuality little has been accomplished toward realizing balance in television programming. Despite a reluctance to foster balance by requiring percentages for various program categories or even recommending some desirable ratio among categories,83 the Commission employs minimum percentages as an administrative tool,84 requires that program percentages be stated in the Annual Programming Report,85 and usually speaks in percentages when assessing merits and demerits for programming in comparative license renewal decisions.86 But this limited "counting" or tabulation of program diversity has not been undertaken to foster diversity; it has been adopted solely for administrative ease. In sum, "[t]he agency has never informed the regulated industry of its responsibilities—has never set out guidelines or criteria as to what is expected of the licensee concerning even the most basic allocations goals such as local or informational programming."87

82. Programming Statement at 2313.
83. See discussion of specified program percentages in note 92 infra.
84. The Commission recently revised its guidelines for minimum acceptable percentages of nonentertainment programming by commercial TV licensees. Effective Oct. 1, 1976, a television licensee should broadcast "five percent total local programming, five percent informational (news plus public affairs) programming, [and] ten percent total non-entertainment programming." 41 Fed. Reg. 20169, 20170 (1976). A similar but less specific rule applies to commercial AM and FM licensees. 47 C.F.R. § 0.281 (a)(8)(1) (1973). More noteworthy for purposes of AAD, this recent revision for television provides that "the percentages and the comparisons for programming are to be based upon the period 6:00 a.m. to midnight . . . . Programs designed to meet community needs may be offered whenever they reasonably can be expected to be effective. . . . We believe that expectation is higher before midnight than in the early morning hours thereafter." 41 Fed. Reg. 20170 (1976) (citation omitted). This new timing provision represents an acknowledgement by the Commission of the problem the AAD concept is designed to correct.
86. See, e.g., RKO Gen., Inc. (KHJ-TV), 44 F.C.C.2d 123, 130 & n.22 (1973).
The result is that the balanced programming regulations have not moved the licensee toward a reasonable attempt "to meet all such needs and interests ["of the public he is licensed to serve"] on an equitable basis."88 The task remains of restructuring these regulations in order to achieve diversity while simultaneously preserving the first amendment rights and profit-seeking needs of the broadcasters. The average audience distribution proposal is designed to accomplish that goal. Just as the right of access concept evolved from the fairness doctrine,89 and the requirement of the 1972 amendment evolved from Section 31590—both of these evolutions being premised on the impact and affirmative-view-of-the-first-amendment rationales (as well as a view of the public interest)—so the average audience distribution proposal has evolved from the balanced programming regulations and is likewise premised on these two rationales (and the public interest).

III. Programming Balance Should Be in the Eyes of the Viewer

A. The Average Audience Distribution Proposal (AAD)

The two most frequently stated proposals for improving the effectiveness of the balanced programming concept are (1) to divide the entertainment programming category into subcategories and require some balance among those subcategories,91 and (2) to re-

88. Programming Statement at 2314.
89. See text accompanying notes 60-65 infra.
90. See text accompanying notes 66-69 infra.

This cure is meritorious. In first amendment terms, it is but a logical extension of the constitutionally acceptable balanced programming regulations. Creating entertainment subcategories acknowledges the incontrovertible monotony of present entertainment programming and seeks to change this in pursuit of first amendment diversity. A similar process has been pursued for the prime time access rule without constitutional objection. National Ass'n of In-
quire licensees to program certain minimum percentages of each program category. While each of these suggestions refines the

dependent Television Producers and Distribs. v. FCC, 516 F.2d 526, 539-40 (2d Cir. 1975). Administratively, logging more program types is certainly possible for the licensees; indeed, the A.C. Nielsen Company compiles data for 36 program types, most of which are entertainment subcategories. See Nielsen National TV Ratings Report, Oct. 2, 1975, at C.

The idea's weakness stems from the manner in which it is usually propounded. For example, former FCC Commissioner Kenneth A. Cox observed in 1969 that, "[w]ithin the entertainment category I would like to create a subclass of more serious entertainment fare." Cox, supra. Limiting the subcategory idea to fostering "serious" fare has two drawbacks. First, in political terms, if the proposal is a means to "highbrow" entertainment, its defeat is ensured—the broadcasting industry has assiduously argued that such programming is financially disastrous because of its meager audiences. U.C.L.A.L. Rev. supra, at 876 n.32. The FCC is unlikely to compel licensees to diversify only into unprofitable programming.

Second, entertainment programming's diversity potential is greater than can be achieved by the limited injection of serious fare into the present uniformity. The content of some highly popular entertainment programs has become more complex and significant in recent years because of the social and political issues raised. See H. Newcomb, TV: THE MOST POPULAR ART 211-42 (1974); U.C.L.A.L Rev., supra, at 882. Subcategorization should acknowledge this diversity and provide an incentive to develop it further. Many additional entertainment programming ideas are suitable for creating diversity. For example, music as entertainment is almost wholly confined to radio; yet it is surely a possible source of television programming diversity, and not solely in the classics. The primary obstacle to diversity within the entertainment category is the networks' follow-the-leader mentality for program selection. See Stein, A Never Failing Formula for TV, The Wall Street Journal, Jan. 6, 1976, at 24, col. 6. Regulations which create entertainment subcategories and foster balance among them are a technically feasible, constitutionally permissible, and highly advantageous way to counteract that mentality.

92. Amending the balanced programming regulations to require that licensees broadcast certain minimum percentages in the various categories, particularly local and public affairs programming, has been a recurring recommendation. The issue of percentages is central to the debate over what standards will apply in the comparative renewal hearing process between competing applicants for the same license. If the standards for acceptable and, therefore, renewable service by a licensee are stated in terms of percentages, as was suggested by then FCC Chairman Burch in the 1973 hearings on the license renewal bill, Hearings on Broadcast License Renewal Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess., pt. 1, at 1121, such percentages may become the sole renewal criterion, and any licensee who fulfills that criterion will be unchallengeable on other grounds, however egregiously poor its service may have been. See Goldberg, A Proposal to Deregulate Broadcast Programming, 42 Geo. Wash. L. Rev. 73, 84 (1973). As noted earlier, the Commission already informally uses percentages for administrative reference purposes. See note 84 and text accompanying notes 84-86 supra. The issue of the use of percentages in the license renewal process has been stirring since the issuance of the Commission's Policy Statement on Comparative Broadcast Hearings,
requirements for programming balance, and each serves as an element in the average audience distribution proposal (AAD), neither of them individually can promote effective balance. The reason is that neither goes to the critical weakness in the balanced programming regulations. The fact is that, in the pursuit of maximum audiences, licensees can achieve the minimal programming balance now required by scheduling the requisite diversity in odd hours throughout the seven broadcast days in the composite week. Since most television viewing is in the early evening and prime time hours, the viewer sees entertainment programming almost exclusively. Whatever balance exists in the broadcaster's schedule is meaningless. If programming balance is to have any significance and impact in promoting first amendment diversity, it must foster diversity in the eyes of the viewer, in what the viewer sees rather than merely in what the licensee broadcasts.

Refining the second proposal to require that certain percentages of various program categories be broadcast in prime time over-

1 F.C.C.2d 393 (1965), and seems likely to conclude with a Commission statement establishing qualitative, rather than quantitative, performance standards for comparative renewal proceedings. For a complete history of this topic, see H. Geller, supra note 87.

93. The composite week provides the statistical base for programming performance in three categories: news, public affairs, and all other programming exclusive of entertainment and sports. These data are stated in terms of minutes of operation and percentage of total operating time for various segments of the broadcast days in the week, and is submitted by the licensee to the Commission in the Annual Programming Report. The particular week which is selected to be the composite week is announced by the Commission in mid-fall. 38 Fed. Reg. 28773-78, 28792-93 (1973).

94. "Prime time" is subject to varying definitions. The prime time access rule applies to the period 7 p.m. to 11 p.m. (except for the Central Time Zone). Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 473 (2d Cir. 1971). The FCC's Annual Programming Report designates the period from 6 p.m. to 11 p.m. as one of its broadcast day segments, and refers to it as "the early evening and prime time hours." 38 Fed. Reg. 28793 (1973).

95. Although it appears that no one to date has proposed a mechanism as comprehensive as average audience distribution to achieve program balance in the prime time hours, the idea of requiring the broadcasting of certain program categories in prime time has been raised. For example, one commentator, in questioning the usefulness of comparing the percentages of time allocated by licensees to the different program categories in determining program balance, observed: "Percentages alone reveal nothing about the precise timing of any program; five percent of discussion in prime time may reach more people than ten percent at less desirable times. A requirement that the reports [submitted by licensees at renewal time] show what percentages in the different categories were broadcast in prime time would make the analysis more meaningful." Note, HARV. L. REV., supra note 91, at 705. "It is entirely appro-
comes, at least theoretically, this critical deficiency in the effectiveness of the balanced programming regulations. However, since most nonentertainment diversity programming lacks mass appeal, whatever gains are made in content diversity due to these mandated prime time programs will be quickly lost by the diminished viewing audience. This approach fails to incorporate an incentive to overcome the industry's conviction that most of such programming cannot attract a large and thus profitable audience. Because mandating diversity in prime time does not insure a viewing audience, licensees will be compelled to absorb the financial loss produced by this unprofitable prime time programming. In view of the possibly devastating impact of this loss, it can be safely assumed that the FCC would not enact such a requirement. In contrast, the AAD proposal avoids this financial loss. Under AAD the licensee, able to fulfill the balanced programming requirements more quickly with fewer broadcast hours devoted to such less profitable programs, is motivated to upgrade nonentertainment programming and schedule it (as well as certain less popular, more cultural entertainment programs) in prime time in order to attract maximum audiences.

The average audience distribution proposal shifts the focus for measuring program balance from percentages of the licensee's broadcast time to percentages of the viewer's viewing time. Since first amendment diversity is meaningful only when the viewer sees it, the logical unit of measurement for such balance is viewer hours—the time spent by the viewer watching television. Under AAD, a licensee computes the total viewer hours achieved by its broadcasting during a certain time period, for example a month, and then schedules the various program categories in proportion to the total hours computed in order to achieve programming balance.96

96. This idea that viewers are numbers to be parcelled among various shows has arisen previously but in a different context. In an article tracing the evolving relations between advertisers and networks in regard to program control, Stanley E. Cohen, Washington editor of Advertising Age, noted that advertisers did not mind losing program control in exchange for minimizing the
AAD's unique ingredient is its built-in incentive for broadcasters to foster diversity and their own profits simultaneously. Since the number of viewers for prime time entertainment programming is so vast, any diversity achieved within prime time, and thereby in the regular television diet of the average viewer, will have significantly greater impact, even if broadcast for a shorter period of time, than will larger amounts of diverse programming scattered in the least-watched portions of the broadcast schedule. Since the percentages for purposes of programming balance under AAD are measured in viewer hours rather than in broadcast hours, the more popular a particular show becomes, the more quickly a licensee is able to fulfill its balance quota in that program category. The show's popularity means that the requisite number of viewer hours for that program category will be accumulated quickly, thereby freeing other portions of the broadcast schedule for profit-maximizing entertainment programs. The proposal is best illustrated by the following hypothetical.

Assume that a particular station, based on its signal's contours, is found to reach a market of 750,000 television households. Its ratings and audience share for programs broadcast in that

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97. See NCCB Campaigning for Weekly Hours of Network, Local Public Affairs Shows, BROADCASTING, Jan. 19, 1976, at 26: "The National Citizens Committee for Broadcasting has begun an effort to enlist groups across the country in a campaign to obtain from television stations and networks one hour of public affairs programming in prime time each week."

98. The Nielsen rating for a show is the number of total U.S. TV households tuned to the program during the average minute of its broadcast ex-
market range from highly popular to rather unpopular. This licensee's viewer hours for a month—the number of hours that viewers watch its signal—are calculated by totaling the program ratings for a day's broadcasting and multiplying that total by 30 days. Also assume that on Mondays from 8 to 9 P.M. the station's rating is the equivalent of 150,000 viewers; from 9 to 10 P.M. its rating represents 250,000 viewers; etc. The total number of these viewers for each broadcast hour in that day multiplied by 30 days is that station's average audience for the month. Thus, assuming that this station reaches an average of 125,000 viewers per broadcast hour that day, and further assuming an average broadcast day of 16 hours, this station broadcasts 60 million viewer hours per month. (125,000 viewers × 16 broadcast hours per day × 30 days = 60 million viewer hours per month.) With this number in mind, the licensee must then broadcast the appropriate percentage of viewer hours in each program category, thereby reaching the requisite number of viewers and achieving balanced programming for the month. For example, if the recommended (or required) expressed as a percentage of the total. Nielsen National TV Ratings Report, Oct. 2, 1975, at B. This number does not reflect the actual number of viewers seated in front of each set. According to a recent report by the A.C. Nielsen Co., the number of television homes in the United States will increase by 2.6% from the 1975-76 year to the 1976-77 year, with the result that a “network rating point will be worth 714,000 homes, as compared with 696,000 now.” 714,000 to 1, Broadcasting, Mar. 29, 1976, at 7.

99. In Nielsen terminology: “Share of Audience: Audience during the average minute of the program, in percent of households using television at the time of the program’s principal telecast. . . .” Nielsen National TV Ratings Report, supra note 98. In other words, audience share is the percentage of the total audience watching television at a given time which is watching the particular show in question; it is not a percentage of the total potential television audience.

100. In AAD's implementation, the licensee would total the actual viewers per hour (or half-hour) for each day, and then add the total viewers for each day to determine the viewer hours for a month, rather than assuming a particular day to be average and multiplying that day's total viewer hours by 30. These viewer data are already collected by the program rating services.

101. The Nielsen rating measures audience in terms of households rather than viewers because it is easier to determine whether a set is on than how many people are watching it. However, the term “viewer hour” is preferable to “household hour” because it is more expressive of the first amendment interests involved in AAD.

102. The composite week now in use is an unacceptably brief balancing period for applying AAD. Since AAD requires a finer tuning of its program schedule by a licensee than do the present regulations, at least a month is necessary to provide sufficient latitude to achieve success within the requirements of AAD while at the same time affording the licensee ample scheduling flexibility.
percentage for public affairs programming is ten percent of a licensee's viewer hours, then the licensee in this hypothetical must broadcast six million viewer hours per month of public affairs programs in order to fulfill its balance requirements.

At this point the average audience distribution principle is applied to determine how the minimum of six million viewer hours per month of public affairs programming will be broadcast. This can be achieved by broadcasting public affairs for approximately 24 hours when the average audience for the station is 250,000 viewers (6,000,000 viewer hours / 250,000 viewers = 24 broadcast hours), or by broadcasting 40 hours when the average audience is 150,000 viewers (6,000,000 viewer hours / 150,000 viewers = 40 broadcast hours). Of course, these hours may be spread over the month in whatever manner the licensee chooses. More importantly for AAD's built-in incentive, the six million viewer hours of public affairs programming may be achieved by totaling widely disparate audiences: one hour with an audience of 500,000, plus two hours on another day with an audience of 50,000, and so on.

An important question is when a licensee's average audience is to be computed. Although the time periods used now for computing ratings will be inapplicable, the present method of determining ratings can be retained for AAD purposes. The key is to encourage licensees to provide the best possible programming in each category in order to attract the largest possible audience, thereby achieving the greatest possible diversity for the first amendment at the greatest possible profit to the licensee. At the end of each month a licensee can calculate viewer hours achieved for each program category and thereby assess how well it has fulfilled its balanced programming requirements. Since the pursuit of balance and ratings is an ongoing process, in the succeeding month the licensee will be expected to adapt its schedule in response to its successes and failures in the preceding month. Of course, the realities of program planning are such that month to month adaption will be impossible. But whatever time frame is established by the Commission's AAD rulemaking, the premise remains the same: licensees will be expected to make a good faith effort to narrow the gap for each program category between viewer hours predicted prior to broadcast and the reality of a category's audience each month.

103. The details of implementing the AAD proposal will be best developed in hearings and comments submitted in connection with an FCC rulemaking.
One additional consideration remains. Under the present balanced programming regulations, the tabulation of programming diversity which occurs is done more for informational and administrative purposes than for regulatory purposes.\textsuperscript{104} One reason for this limited use of counting is that the Commission's initial foray into specifying percentages for renewal purposes became entangled in litigation on another issue arising out of the same rulemaking.\textsuperscript{105} Second, the Commission has apparently viewed the fixing of percentages as posing a conflict with the dictates of the anti-censorship statement in the Communications Act.\textsuperscript{106} In contrast to this present regulatory scheme, AAD is premised on counting, but the counting is fairer and more effective because the unit—viewer hours—truly measures the diversity achieved. Whereas counting percentages of broadcast hours for various program categories under the present regulations yields little benefit because there is no guarantee that audiences are watching the programs,\textsuperscript{107} adoption of the viewer hour tabulation required by AAD produces first amendment diversity benefits which easily outweigh any reservations stemming from Section 326.

B. AAD's Built-in Incentive

The decision to ban common carrier status for broadcasting in the Communications Act,\textsuperscript{108} and thereby forego utility-like regulation of the industry notwithstanding the scarce resource rationale,\textsuperscript{109} meant that broadcasting would be a privately owned, profit-maximizing industry. It has remained relentlessly successful in that effort to the present day.\textsuperscript{110} Consequently, the realities of broadcast regulation\textsuperscript{111} dictate that, in order to obtain FCC adoption, any regulations proposed for the industry must foster, or at least take account of, that motivation.\textsuperscript{112} AAD achieves this.

\textsuperscript{104} See text accompanying notes 84-86 supra.
\textsuperscript{105} See Geller, supra note 87, at 18-34.
\textsuperscript{106} See note 79 supra.
\textsuperscript{107} See text accompanying notes 91-95 supra, and note 92 supra.
\textsuperscript{110} ECONOMIC ASPECTS, supra note 78, at 16-18.
\textsuperscript{112} A proposal to obtain diversity by re-instituting the sustaining program requirement is unrealistic in its expectation that the FCC will impose such
The benefit to the licensee from AAD is that the quota for public affairs programming \(^{113}\) can be achieved rapidly and profitably if a popular show in that category can be developed. Not only can a licensee accumulate the requisite number of viewer hours more quickly with a popular show, but the increased popularity also means a corresponding decrease in the number of broadcast hours which must be devoted to that category. The broadcast time thus freed from public affairs programs can be filled with more popular entertainment programs, and such programming, even when scheduled in the odd hours presently occupied by public affairs shows, may well attract substantially larger audiences and advertising revenue than did the shows scheduled at the same hour prior to the adoption of AAD.

The profitability of broadcasting public affairs programming in prime time in an effort to maximize viewer hours is unlikely to be as substantial as what could be realized by broadcasting entertainment programming at the same hour;\(^{114}\) but such scheduling can be profitable,\(^{115}\) even if not maximally so. And any decrease in profits due to broadcasting public affairs in prime time may be more than offset by an increase in profits realized from the availability of more broadcast hours for entertainment programs than are available under the present regulations.

From the viewer's perspective, AAD will produce improved program quality based on greater program expenditures while at the same time making such programs more accessible in the broadcast schedule. The improved programming produced by this increased expenditure\(^{116}\) will attract a larger audience (and thus
more advertising revenue), thereby generating more viewer hours and greater first amendment diversity in fewer broadcast hours.

The major argument against AAD is that viewers will simply tune out unappealing prime time programs and either watch something more appealing on another station or not watch at all. The reply to this argument is twofold. First, the "prime time audience has been remarkably stable for at least two decades, staying within two or three percentage points of 60 percent of television households —this in the face of big changes in programming, a large increase in the number of reruns, and the advent of color TV." The result of this relative constancy will be that a licensee's audience loss at one time will be its gain and a competitor's loss at another time. The networks will counterprogram each other with even more sophistication and competitiveness than they do now, for they will be matching each other in several program categories (and perhaps in entertainment subcategories as well), not simply in general entertainment.

Second, the quality of the less appealing program categories will be upgraded by broadcasters in order to take maximum advantage of the viewer hour incentive built into the AAD proposal. While some now-contented viewers will tune out, some present non-viewers and less contented viewers will tune in. Presumably all licensees in a given market will benefit to the extent there is a net gain in the prime time audience because of the diversity and improved quality fostered by AAD.

118. A recent Rand Corporation study concluded:
    The most striking empirical finding is the discovery of a significant number of households who do not watch standard programming but joined the television audience when the Watergate hearings were shown. . . . The existence of such a group establishes that the observed "constancy" of total television audience is the result of the programming normally available rather than of "passive" preference of audiences who will watch anything. As a result, the prospects for the successful introduction of new programming are brighter than would be the case if a fixed audience were divided among one or more additional stations.
119. If a given market is less competitive—for example, two VHF network affiliated stations rather than three—it can be argued that a licensee broadcasting a less popular program category in that market will lose fewer viewers because there are fewer viewing alternatives. This argument depends on the "LOP" theory, that "audiences watch TV whether they like what's on or not, settling for 'the least objectionable program.'" The Philadelphia Inquirer, Mar. 25, 1976, § C, at 6, cols. 1 & 2.
A second argument against AAD is that in reality it is regulation of broadcasters' profits, contrary to Section 3(h) of the Communications Act and broadcasting's long-standing status as a private industry rather than a public utility. However, it is unlikely that profits will be reduced by AAD. Even if there were a reduction, profits in the industry are so substantial, and rising so swiftly relative to other industries, that some diminution in these profits may be but small compensation for the "spectacular subsidy" created by the government's giving away rather than selling broadcast licenses. In addition, overriding the profit-seeking interest of the broadcasters is less significant than overriding their first amendment interests; indeed, whatever profit reduction may occur under AAD will be more than outweighed by the great benefit to first amendment diversity.

The third argument against AAD is simply—why? In the view of most broadcasters, television is now fulfilling its promise as an entertainment and information medium, and those who argue for greater diversity are an unrepresentative elite. Yet the industry's evolution over the last fifteen years indicates that, in addition to the benefits from diversity for those who already watch television, those who will be attracted to the greater program diversity fostered by AAD are a substantial minority rather than a minute elite. The concentration of program control in the networks, the departure of

120. See text accompanying notes 108-16 supra. Interestingly, broadcasters opposed the prime time access rule when it was first proposed. But when the rule's result was to allow networks to drop their least profitable half-hours of prime time programming without having to replace them, they were placketed to say the least. See How TV Cashed in on a Court Ruling, BUSINESS WEEK, Sept. 14, 1974, at 33. And, as would be the case with AAD, the FCC was not dissuaded from adopting the prime time access rule by the novelty of the regulations and their element of unpredictability. See Bryant, Historical and Social Aspects of Concentration of Program Control in Television, 34 LAW & CONTEMP. PROB. 610, 634 (1969).

121. ECONOMIC ASPECTS, supra note 78, at 16-18.

122. In commenting on the mix between broadcasting and nonbroadcasting profits at CBS, William S. Paley, Chairman of the Board of CBS, observed: "The only trouble is we tried to develop a formula where we would have profits from nonbroadcasting amount to 50% of total profits. But this wasn't taking into account the accelerated rate of the increase in broadcasting. Broadcasting's gone up so fast it's made it very difficult for us to meet our target." The Winning Ways of William S. Paley, BROADCASTING, May 31, 1976, at 36. See also Merrill Lynch Is Also Bullish on Television, BROADCASTING, Feb. 2, 1976, at 43; Wall Street Sees Big Year in Broadcast Profits, Prices, BROADCASTING, May 17, 1976, at 21.

123. Kalven, supra note 91, at 31.

124. See text accompanying notes 40-46 supra, regarding the impact rationales for regulation of television.
advertisers from program production and sponsorship in favor of spot advertising, the pressure for homogeneous programs which promote audience flow from one show to the next, and the resultant intolerance of broadcasters and advertisers for any diverse, "disruptive" program—all this is well documented and widely known.¹²⁵ The result is prompt banishment of shows which, although popular and profitable, are not maximally so when compared to the competition.¹²⁶ And this occurs even though the show may still have a willing sponsor.¹²⁷ This state of the industry, when considered with the four regulatory rationales as interpreted here, argues for some regulatory effort to increase the impact of the first amendment in television programming.

C. AAD's Constitutionality

The final argument against AAD is that it unconstitutionally infringes on the licensee's discretion as a journalist in violation of the

¹²⁵ Barrow, supra note 95, at 634-37, 641; Bryant, supra note 120, at 620-21, 627-29; Cohen, supra note 96; Comment, COLUM. J. LAW & SOCIAL PROB., supra note 112, at 319-34; Comment, U.C.L.A.L. REV., supra note 91, at 869-78. As Justice Brennan recently observed in dissent:

Indeed, in light of the strong interest of broadcasters in maximizing their audience, and therefore their profits, it seems almost naive to expect the majority of broadcasters to produce the variety and controversy of material necessary to reflect a full spectrum of viewpoints. Stated simply, angry customers are not good customers and, in the commercial world of mass communications, it is simply "bad business" to espouse—or even allow others to espouse—the heterodox or the controversial.

¹²⁶ Advertisers pay "top dollars" only for the highest rated programs—and those seldom reach more than 20% of the potential audience. Yet, in subservience to this advertiser quirk, media owners repeatedly abandon programs that promise many millions more people than the most widely circulated national magazines. In this unscientific process a program with a loyal, substantial audience may be lost because it had the misfortune of competing with another equally attractive program on another network, fractionalizing the audience so that neither emerges with the magic ratings so vital to advertisers. Yet the same program, against other competition, might have produced more attractive "numbers" and survived.

¹²⁷ But no one should be deluded into thinking that the networks will agree to exhibit an advertiser-licensed program which promised to attract significantly less than one-third of the total network audience during prime time. The mere exhibition of such a series would reduce the value of all succeeding shows on that network during the same evening because of the carryover effect of audiences in television.


Crandall, The Economic Effect of Television—Network Program "Ownership", 14 J. LAW & ECON. 385, 395 (1971). See also Barrow supra note 95, at 635-36; Bryant, supra note 120, at 613 n.12.
first amendment and Section 326 of the Communications Act. Resolution of this recurring conflict in broadcast regulation requires that a balance be struck between what the licensee "might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee.'" 128 Of all the FCC regulations for which this balance has been struck in favor of the public interest, the prime time access rule (PTAR) 129 most closely resembles AAD in purpose and content. In National Association of Independent Television Producers and Distributors v. FCC, 130 the Court of Appeals for the Second Circuit, in upholding the constitutionality of the third version of PTAR, found that PTAR's purpose "to encourage diverse sources of programming and . . . diversity of programming" 131 outweighed whatever first amendment interests may have been at stake for the licensees. 132 Just as PTAR does not require "any program or even any type of program to be broadcast in access time," 133 neither does AAD require specific program categories to be broadcast at specific times, nor does AAD mandate content for particular program categories. In NAITPD the court bowed briefly and in rather stilted fashion to Section 326 and the censorship issue: "The Commission may not take from the licensee the ultimate control, and the ultimate responsibility as well, for the actual content of particular programs within the broad categories promulgated to serve the public interest." 134

Unlike PTAR, the Programming Statement and its regulations have not been tested for constitutional validity in litigation. This may be testimony either to their ineffectiveness or to their clear-cut constitutionality. But if PTAR does not violate Section 326, then neither will AAD. Just as each succeeding version of PTAR has been a refinement of the original in pursuit of the goal of diverse

128. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 117-18 (1973). In CBS, the anti-access result was premised in part on the need to preserve licensee discretion.

129. "The Prime Time Access Rule . . . prohibits television stations in the 50 largest metropolitan areas from broadcasting network programs in more than three of the four evening hours, 7 P.M. to 11 P.M., in which most people watch television ('Prime Time') to allow the remaining hour ('Access Time') to be available for independently created programs." National Ass'n of Independent Television Producers and Distributors v. FCC, 516 F.2d 526, 528 (2d Cir. 1975).

130. 516 F.2d 526 (2d Cir. 1975).

131. Id. at 528.

132. Id. at 536.

133. Id. at 537.

134. Id. at 538 (emphasis added).
programming, so AAD is but a refinement of the original balanced programming regulations in pursuit of that same goal.

D. AAD and the Regulatory Rationales

AAD's perception of balanced programming—through the eyes of the viewer, not the program schedule of the licensee—finds ample support in the four rationales for broadcast regulation. The scarce resource rationale has always been applied to the electromagnetic spectrum; but scarcity is also a fact of life in broadcasting's other key resource—the hours in a day. Just as the government must allocate the spectrum between competing users, so it must allocate the broadcast day between the competing needs and interests of the viewing public.

The public interest rationale also supports regulation designed to effect the AAD proposal. Notwithstanding surveys which indicate a taste among some viewers for more of the same in entertainment programming, a significant number of households are tuned out during prime time each evening. Even after discounting for the myriad reasons why a household might not watch television on a particular evening, a substantial number of nonviewers (as well as dissatisfied viewers) remain. Yet the Programming Statement interpreted its public interest premise as requiring a licensee to program for the needs and interests of all citizens in its service area on an equitable basis. That requirement must include the substantial minority which has an ample appetite for greater variety in television's monotonous entertainment fare. Professor Harry Kalven

135. ECONOMIC ASPECTS, supra note 78, at 9 table 1-2.
136. See text accompanying note 117 supra.
137. Programming Statement at 2314. In at least one recent ruling the Commission seemed aware that to effect this Programming Statement principle, it would have to move toward the AAD concept: "It is not a reasonable scheduling practice to relegate all of the programming for children to Saturdays and Sundays. The Commission expects considerable improvement in scheduling practices in the future." Action for Children's Television, 31 P & F RADIO REC. 2d 1228, 1229 (1974). Similarly, a primitive version of AAD intertwines with the fairness doctrine: a key issue in the application of the fairness doctrine has been the frequency and timing of presentations of the opposing viewpoint on a controversial issue, since the viewer who has seen the initial broadcast is unlikely to be watching when the reply is shown. See Public Media Center v. Radio Station KATY, F.C.C. No. 76-453 (1976); Westinghouse Broadcasting, Inc., KPIX-TV, 16 F.C.C.2d 1034, 1035 (1969); Television Station WCBS-TV, 9 F.C.C.2d 921, 941-42 (1967), aff'd sub nom. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968).
138. See J. Besen & B. Mitchell, supra note 118.
appreciated the market forces which have disenfranchised this minority and neatly summarized its plight:

[Broadcasting] is one market in which the consumer cannot vote with dollars. It is not that advertising sponsorship is evil because it is commercial; it is rather that its logic necessarily seeks programs best for advertising results and this means programs with the largest audiences. The upshot is that broadcasting is programmed for the largest common denominator and that minorities, who are able to buy their way into other markets, are left out of this one and complain. If there is a legitimate complaint about the quality of programming, it is not that the quality is low but that the programming is, among American communications, uniquely nonrepresentative. 139

The impact rationale and the affirmative-view-of-the-first-amendment rationale also buttress the AAD interpretation of balanced programming. Far short of the “1984” hobgoblin, 140 regulations for effective diversity can be seen as enriching the personal lives of individuals as well as their view of and role in society, thereby benefitting the polity. 141 Diversity in the average citizen’s primetime viewing fare will counter and diffuse the present impact of that programming and further television’s ability as a medium of speech to fulfill the first amendment mandate for a “multitude of tongues.”

IV. CONCLUSION

Television’s primary ill is almost universally diagnosed as a lack of program diversity. The conflict is between those who advocate

139. Kalven, supra note 91, at 31-32. See also Economic Aspects, supra note 78, at 48.

140. This day [when we realize “that individuals are programmed to behave with a set of values acquired primarily in very early youth, and that even today the greatest input component to the formation of these values is by electrical communications”] is probably not near because someone will first have to prove beyond a shadow of a doubt (1) that our value system is acquired and not God-given, (2) that it is very much subject to societal guidance through communications, and (3) that tampering with it is not as bad as leaving it alone.


141. This is very much what Alexander Meiklejohn meant when he stated; “Now, in that method of political self-government [where discussion of public issues is promoted in order to have an informed electorate], the point of ultimate interest is not the words of the speakers, but the minds of the hearers.” A. Meiklejohn, Free Speech and Its Relation to Self-Government, in Political Freedom, the Constitutional Power of the People 26 (1948).
more regulation as the only mechanism for curing this ill, and those who defend in the name of the first amendment the present system’s “abundance” and maintain that greater diversity in television’s speech can be achieved by less regulation. The problem for regulatory advocates is that broadcasting does, in fact, have some first amendment status. However, in support of these advocates, Section 326 of the Communications Act was apparently never intended to create a first amendment barrier to the FCC’s regulation of program quality and diversity. This is apparently also the judicial view, for the courts have consistently found the Commission’s programming regulations constitutional, despite the broadcasters’ claim of first amendment infringement. While regulations such as balanced programming and the prime time access rule have been criticized as failing in their diversity goal and possibly even promoting homogeneity, the courts have determined that correction of these regulations’ shortcomings rather than their abandonment is the better means of furthering that goal.

To this end, the average audience distribution concept is proposed as a means of improving the balanced programming regulations’ effectiveness in promoting diversity. This proposal is but another application of the precept that broadcasting must be interpreted and regulated from the viewer’s perspective.

Yet the question remains whether one more proposal for program diversity will accomplish anything. Other proffered reforms have been easily ignored, and perhaps justifiably so. Their implementation would not have cured the essential weakness in the present regulations. AAD does cure this weakness by creating a new unit of measurement—viewer hours—and by then using that unit as an incentive for broadcasters to program more effective diversity in few-

142. See Kalven, supra note 91, at 32.
143. See Rosenbloom, supra note 109; Note, Harv. L. Rev., supra note 91, at 715.
144. “[T]he general power of the F.C.C. to interest itself in the kinds of programs broadcast by licensees has consistently been sustained by the courts against arguments that the supervisory power violates the First Amendment.” National Ass’n of Independent Television Producers and Distribrs. v. FCC, 516 F.2d 526, 536 (2d Cir. 1975).
146. See Crandall, supra note 127, at 386.
147. “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.” Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).
er broadcast hours with greater profits. To be sure, there will be opposition from the broadcasting industry. But the next step for AAD is to make it the subject of an FCC rulemaking. In that forum the solidity of AAD's grounding in the first amendment and in the four regulatory rationales will be apparent, and the details of its implementation can be agreed upon.

These four rationales—scarce resource, public interest, impact, and affirmative-view-of-the-first-amendment—have evolved with the broadcasting industry: the growth of its prosperity and power has begotten regulations, and these in turn have required rationales to support them. AAD is simply an effective version of the balanced programming regulations, well supported by the regulatory rationales.

AAD is a minor and palatable regulatory measure, the adoption of which seems very much in the broadcasting industry's interest. If AAD works, the industry will have gone a long way toward neutralizing some of its most virulent critics. If AAD is ignored, more comprehensive and perhaps less palatable changes may be advanced in an effort to fulfill the first amendment's mandate for diversity.