marked at an earlier session: "I have been on this subcommittee now for some eighteen years. I have always been a rather strong believer in the national-origin theory. It was the law when I came here. It is the law of the land today, thank heaven."

Pilgrim Fathers

There is even less liking for reform within the Senate subcommittee on Immigration, which is headed by the xenophobic James O. Eastland (D., Mississippi). This hostile subcommittee, after some pressure by the White House, held a few perfunctory hearings on immigration last year but never seriously considered the administration bill. Eastland has been content to let the House struggle with the issue. Now, however, the mounting pressure for liberalization makes it unlikely that either the House or the Senate subcommittee can do much more than wage a delaying battle in 1965. If need be, administration forces can probably bypass both panels. Thus the real question appears to be: How much liberalization will Congress approve?

Faced with the new realities—the pro-administration majorities and a genuine Presidential push—some opponents are concluding that their best course lies in supporting a compromise plan that would relax restrictions to some extent while preserving the national-origins system largely intact. The reformers obviously expect much more, and it seems probable that Congress will consent to increase the immigrant totals substantially and sanction greater quotas for countries with waiting lists. It is likely, too, that significant alteration in the national-origins system will occur—perhaps with 1960 instead of 1920 used as a basis in allocating quotas.

But the primary goal—the abolition of the national-origins concept—may prove unattainable because of entrenched resistance. Even among some reformers there remains more than a trace of the feeling voiced by Finley Peter Dunne's Mr. Dooley: "As a pilgrim father that missed th' first boats, I must raise me claryon voice agin' th' invasion iv this fair land be th' paupers an' arnychists iv effete Europe. Ye bet I must—because I'm here first."

Religion and the FCC

MARCUS COHN

While the U.S. Supreme Court has been gradually strengthening Jefferson's "wall of separation between church and state," the Federal Communications Commission has been doing its best to persuade people to go to church.

Ever since its creation thirty years ago, the FCC has required an applicant for a new radio or television station to give detailed information concerning the quantity and quality of the various types of programs he intends to broadcast. Prominently listed in second place on its application form are religious programs. In fact, the applicant is required to submit a program schedule that sets forth the exact times when religious programs will be carried and whether the sponsoring churches will be required to pay for their time.

When the time comes around to renew his license, every three years, the station owner is required to state, among other things, the precise amount of time he devoted to religious programming during the preceding three years and the quantity and nature of such programming he intends to broadcast in the future. He is also frequently requested to supply additional programming information—including further details concerning past and proposed religious programming. The commission then proceeds to decide whether the station has served and will continue to serve the "public interest, convenience and necessity."

Although it is difficult to estimate the exact weight the FCC gives to religious programming in its decision processes, there can be no doubt that it is significant. The commission has held, for example, that the proposed religious programming of one applicant for a television station in Evansville, Indiana, was superior to another because it afforded a "more positive proposal for providing time to diverse religious faiths." In another case, it gave a comparative—although not a disqualifying—demerit to one of two competing applicants because its proposed program schedule failed to include "any strictly religious programs" and thus left a "void in [its] over-all program structure."

In 1960 the commission issued a decision concerning two applicants for a radio station at Oswego, New York. One of the applicants intended to broadcast three hours of sustaining—that is to say, free—religious

programming a week, while the other proposed to broadcast two hours of commercially sponsored religious programs. The FCC held that "While the Commission does not regard commercial religious programs as inherently objectionable, nevertheless, it is concluded that the provision of more religious programming [by one of the applicants] and all on a sustaining basis is better calculated to serve the varied religious needs of the community. . . ."

There is no evidence that the FCC has ever awarded a license just on the basis that one applicant has proposed a better religious program schedule than another. But through the practice of making comparative judgments in this category, the commission has clearly implied that religious programming could be a decisive factor if two or more applicants were equally qualified on all other points.

'Established Faiths'

From time to time, the commission has frowned upon certain kinds of religious programming and has implicitly held that they were inferior to other kinds. This has been particularly true of the programming of small and unorthodox religious groups that buy time on a station and sometimes solicit funds in their broadcasts. In *Follett* v. *Town of McCormick* the Supreme Court held that the protection of the First Amendment was "not restricted to orthodox religious practices" and was "not merely reserved for those with a long purse"; it then proceeded to prohibit the city of McCormick, South Carolina, from requiring a Jehovah's Witness minister to secure a license in order to go from house to house and sell his religious tracts.

Despite such decisions, the commission has solemnly evaluated religious programming where the time was bought by a church and has implicitly—though never explicitly—found it to be inferior to religious programming for which no charge was made. For instance, in 1947 the commission considered eleven applications for FM facilities in Chicago. One of the applicants, Gene T. Dyer, was the licensee of radio station WAIT, whose programming was offered in evidence at the FM hearing. In deciding for ten of the applicants and against Dyer, the FCC pointed out that WAIT devoted practically all its Sunday time "to commercial religious programs and that no time has been set aside for the carrying of religious services on a sustaining basis from the churches of established faiths in the Chicago area."

On several occasions, the commission has upheld the right of stations to refuse to sell time to a church that otherwise would have no opportunity to broadcast its programs. One example of this occurred in 1949 when the New Jersey Council of Christian Churches and the Bible Presbyterian Church (two Pentecostal groups) filed a complaint against radio station WCAM in Camden. They had been unable to obtain any free or commercial time from the radio station. The FCC, in rejecting the complaint, stated: "While the Commission's Rules and Regulations do not forbid the sale of radio time for religious purposes, a decision by a licensee, who affords a reasonable amount of time for the broadcast of religious programs on a sustaining basis, that the sale of additional time for the broadcast of religious programs is inappropriate because of the subject matter, appears to be clearly within the area of discretion in which licensees are free to make decisions as to the operation of their stations."

More recently, the commission proposed to change its application forms so as to single out religious programs and require applicants to state whether such programs were carried on a free or a commercial basis. No comparable classifications would be required for any of the other thirteen programming categories—educational, agricultural, news, entertainment, etc.

Several religious faiths (Mormons, Catholics, Lutherans, and the Moody Bible Institute, for example) hold licenses for radio and television stations themselves. Their applications are given extraordinary scrutiny by the commission to make certain that religious programs for other faiths have been and will be carried by the stations. For instance, Loyola University of New Orleans, a Jesuit institution, was an applicant for a new television station in 1957. It was able to overcome its handicap of being a religious institution—and the charge that its radio station WWL had at one time refused to carry Protestant programs—only after convincing the FCC that the program schedule for its proposed television station would, in fact, reflect the religious needs of the community, i.e., broadcasts for all three dominant faiths.

In July of 1960, the FCC issued a policy statement that required owners seeking a new license or a renewal to ascertain the needs, tastes, and desires of the community and then to inform the commission how the station proposed to fulfill them. One of the suggested "needs" was, of course, religion. Now it is one thing for the commission to require a licensee to ascertain and implement the educational or agricultural needs of the community, since the words "education" and "agriculture" do not appear in any of the first ten amendments of the Constitution. But it is altogether another thing for the Federal government, through the FCC, to *require*, as a condition for licensing, that a person first ascertain and then fulfill the religious needs of his community. As Supreme Court Justice Tom C. Clark said in the majority opinion in the *Schempp* case, the "establishment clause" of the First Amendment requires the Federal government to "maintain strict neutrality, neither aiding nor opposing religion."

A Form of Coercion

Is the FCC's requirement that an applicant state the precise manner in which his station will serve the religious needs of the community a blow to the First Amendment's "establishment clause"? No commissioner has ever formally questioned, nor has any licensee had the temerity to challenge, the constitutionality of such inquiries. However, one commissioner, Lee Loevinger, at a meeting of the National Association of Broadcasters last spring, stated that he thought such inquiries were unconstitutional. "When the Constitution says that Congress shall make no law," Loevinger told the broadcasters during a question-and-answer session, "what it is saying is that the Federal government shall not act;

the FCC is a branch of Congress and cannot do that which Congress cannot do. Congress cannot pass a law requiring you to broadcast religion as a condition of getting a Federal license; neither can the FCC. . . . There is a real Constitutional issue here. I don't think you can gloss it over or paper it over by talking about 'community needs'. . . ."

The FCC certainly cannot justify its position on the ground that the public is not required to listen to or view religious programs since the set can always be turned off. The Supreme Court dismissed in one sentence a comparable argument in the *Schempp* case in June, 1963. On that occasion, the State of Pennsylvania argued that, after all, public-school children did not have to participate in the school-conducted prayers since they could be excused from taking part in them if their parents so requested. "That fact," said Justice Clark, "furnishes no defense to a claim of unconstitutionality under the establishment clause" of the First Amendment.

It is quite clear that the mere existence of the question on the application compels the applicant to commit himself to foster the practice and growth of religion. Any doubt as to the impact of the question in the application was dispelled by the Reverend Charles Brackbill, Jr., of the Division of Radio and Television of the United Presbyterian Church, when he admitted at a hearing before the FCC last July that the commission's inquiry itself amounts to "coercion" on stations to carry religious programs. Yet each of the some four thousand radio and seven hundred television stations continues to reply to the commission's inquiry and solemnly swears to promote the "establishment of religion" in its daily programming.

What Is Religion?

In 1946 the commission received a complaint against three radio stations in the San Francisco area on the ground that although they carried various religious programs, they did not afford opportunity for "the broadcasting of talks on the subject of atheism." Though denying the complainant's request that the licenses of the stations be revoked, the FCC went on to point out that religious programming could be controversial and, therefore, as a general proposition, proponents of atheism also had a right to express their views on the stations.

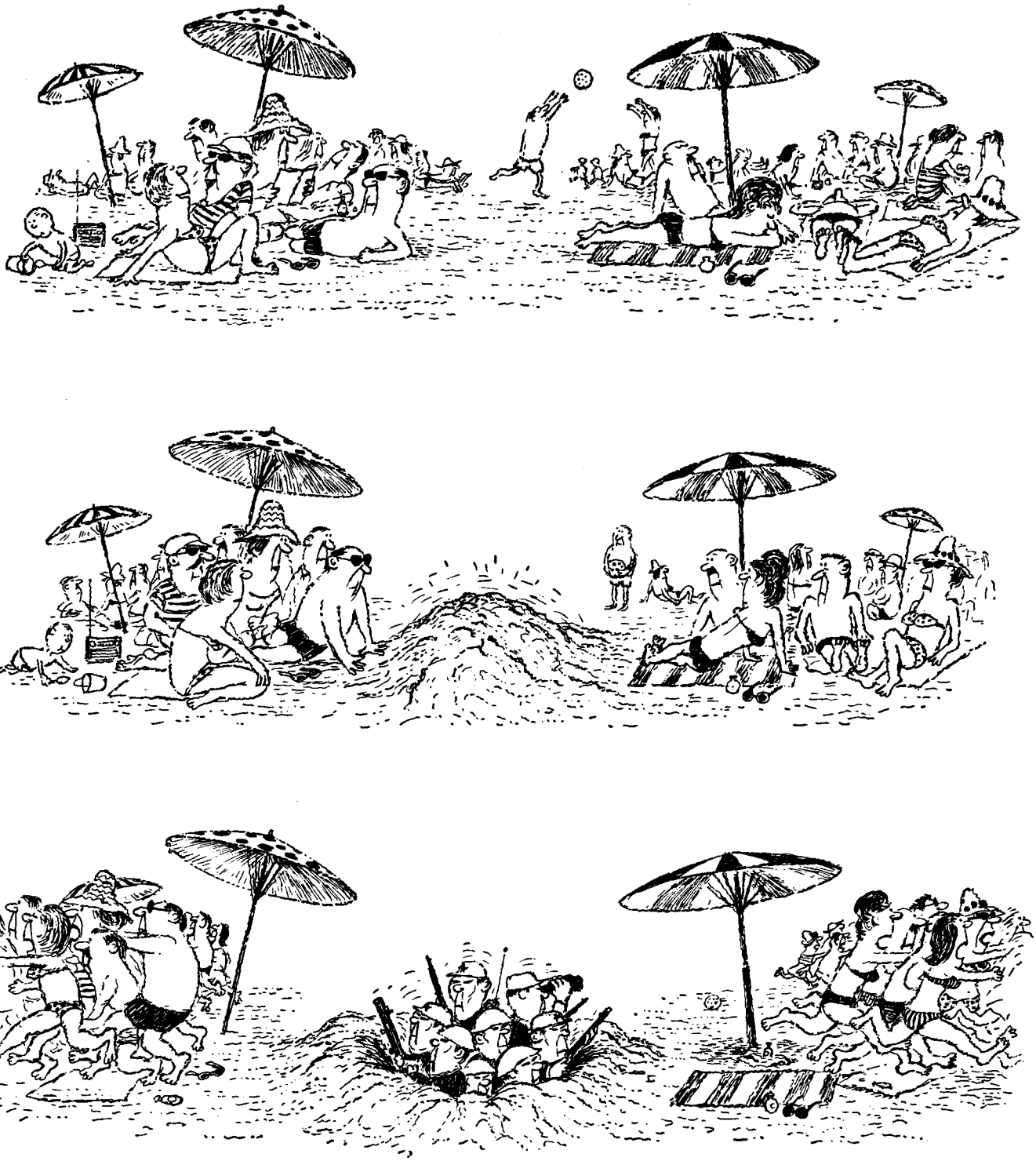
But the basic issue is not whether atheists should or should not have an opportunity to answer men of the cloth, and in turn whether religious leaders have an opportunity to answer the nonbelievers. The fundamental question is whether the Federal government, as represented by the FCC, is prohibited from making *any* decision on the question. After all, the Supreme Court had specifically held in the *Everson* case in 1947 that the Federal government may not ". . . influence a person to go to or to remain away from church. . . ." And yet the Federal government at present certainly does require broadcasters to present "religious programs," which, according to the commission's most recent definition, include sermons, devotionals, and "music and drama when presented primarily for religious purposes." What is more, the FCC not only encourages and demands that religious programming be carried but, in effect, has actually taken unto itself the Olympian task of defining what constitutes "religion."

Last June the commission held a hearing in order to re-examine the programming portion of its radio application forms. The witnesses included representatives of the United Church of Christ, the United Presbyterian Church, and the National Council of the Churches of Christ, who appeared before the commission and argued that the forms be revised so as to encourage—if not force—stations to carry more religious programs. They also urged the commission to expand its definition of what constitutes a religious program. The National Council representative suggested, on behalf of the thirty-nine million persons whom he represented, that the FCC's definition of religion should "include sermons, devotionals, religious news, music, drama, commentary, spots and other programs when presented primarily for religious purposes. . . ." In a prior document filed with the FCC, the council stated that its Broadcasting and Film Commission had instituted studies "for the integration of plans for the use of the mass media in the program of the church, to appraise the church's present program for the use of the media, and to give strategic guidance on these problems." The council spokesman then went on to shatter whatever might be left of the "establishment clause" by observing that he was "of the view that this basic responsibility is one which should be shared" by the FCC!

WHEN the commission either voluntarily eliminates its requirement that stations engage in religious programming or is forced to do so by a court decision, the step probably will not have any substantial effect on the amount of religious programming broadcast by stations. It might even result in an increase of such programs. As a practical matter, it would be quite unusual for a manager of a radio or television station to turn a deaf ear to the requests of religious organizations for the use of his station. Most religious groups maintain very cordial relationships with stations.

Moreover, several religious groups that now find it difficult, and in some cases impossible, to secure time on radio and television stations might well meet with greater success in their efforts to get air time, on either a free or commercial basis. The very fact that the Federal government would no longer be promoting and analyzing the religious programming of stations would permit station managers to exercise a greater freedom of choice. Today a number of such minority faiths are precluded, in actual practice, from using radio and television because of the latent fear of the licensees that such minority religious programming would be frowned upon by the commission. Thus the members of these faiths do not, as a practical matter, enjoy the Constitutionally protected "free exercise" of their religious beliefs—at least, not to the extent of the participants in more popular religions—because the Federal government, through its licensing process, has in effect graded religions by the standards of what a few people have defined as "the public interest."

And this, of course, is something else that the First Amendment was designed to prevent.



Season in the Sun

by Fernando Krahn