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A Distinction Without a Difference-The Spectrum Scarcity Rationale No Longer Justifies Content-Based Broadcast Regulation

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A Distinction Without a Difference—The Spectrum Scarcity Rationale No Longer Justifies Content-Based Broadcast Regulation[1]

I. INTRODUCTION

The Supreme Court has consistently allowed the federal government to impose content-based regulations on broadcast communications while at the same time finding similar regulations constitutionally offensive when applied to printed communications.[2] The Court has used spectrum scarcity to justify this disparate treatment of otherwise protected speech. Spectrum scarcity is based on the theory that because the broadcast spectrum is limited, and is a valuable public resource, government intervention is required to protect this resource by restricting who may use it and how.

This comment will analyze whether the spectrum scarcity rationale justifies closer content-based regulation of broadcast speech. Part II will provide background information on government regulation of broadcasters based on spectrum scarcity. Part III will review content-based government regulation that infringes on broadcasters' first amendment free speech rights. Part IV will explore the diminished validity of the spectrum

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1. After considering the spectrum scarcity rationale as justification for differential treatment of broadcasters vis a vis print journalists, Judge Bork made the following statement:

> [T]he line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. Employing the scarcity concept as an analytical tool . . . inevitably leads to strained reasoning and artificial results.
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> It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media.

Telecommunications Research & Action Center v. F.C.C., 801 F.2d 501, 508 (D.C.Cir.), *reh'g en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986).

2. *Compare*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) (Florida statute requiring newspapers to give equal time to political candidates who had been attacked declared violative of the first amendment) *with* 47 C.F.R. § 73.1920 (This regulation, known as the "Personal Attack Rule," requires broadcasters to allow air time to any person attacked over the air.). Note that the Supreme Court has expressly held that content-based regulations such as the Personal Attack Rule are constitutional. *See, e.g.*, Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

scarcity rationale; and finally, part V proposes changes to restore broadcasters' free speech rights.

II. Background of Government Regulation of Broadcasters Based on the Spectrum Scarcity Rationale

The first amendment makes it clear that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."[3] Indeed, Justice Hugo Black stated that this language is absolute, and that the Supreme Court should not allow any competing interest to outweigh first amendment values.[4] However, it is clear that Justice Black's statement goes too far because some speech may be regulated. For example, although the first amendment states that Congress shall make no law abridging the freedom of the press, Congress may require the press to print the truth, and may subject them to civil and criminal penalties if they do not. Likewise, although the first amendment states that Congress shall make no law abridging freedom of speech, it is constitutional to restrict speech constituting a clear and present danger to public safety or speech leading to the commission of a crime (such as conspiracy). So if some speech may be regulated, even when based on its content, what are the limits of this regulation?

Generally, the Supreme Court has held that in order to regulate speech, the government must show a compelling state interest and a means narrowly tailored to preserve that interest. Therefore, Congress, or any other state or federal government entity, may regulate the print media only if the regulation can pass this high standard of review. Generally, any statute subjected to this strict scrutiny standard will be ruled unconstitutional.

Despite this, it is—at the moment—axiomatic that Congress may regulate the broadcast media with a narrowly tailored means designed to serve a substantial governmental interest.[5]

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3. U.S. Const. amend. I.

4. Barenblatt v. United States, 360 U.S. 109, 140-44 (1959) (Black, J., dissenting).

5. F.C.C. v. League of Women Voters, 468 U.S. 364, 374-81 (1984). The D.C. Circuit interpreted the constitutional standard applicable to broadcasters enunciated in *League of Women Voters* as follows:

> Although the Court foreswore insistence on a " 'compelling' governmental interest," it stated that "our decisions have generally applied a *different First Amendment standard* for broadcast regulation than in other areas." More affirmatively, the Court stated that while the inherent scarcity of the electromagnetic spectrum allowed for a larger degree of governmental regulation of broad-

This language, while similar to the strict scrutiny standard applied to the print media, is actually a much different, lower standard. Under this standard, Congress and federal agencies can regulate both what broadcasters may and may not say. Broadcasters must also comply with content-based regulations in addition to structural regulations regarding such things as power output and other licensing requirements.[6] Justice White stated in *Red Lion Broadcasting Co. v. F.C.C.*,[7] that "[a]lthough broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of news media justify differences in First Amendment standards applied to them."[8]

The main "difference" between print and broadcast is that the broadcast spectrum is finite, while the capacity to communicate through print is theoretically unlimited. Therefore, protection of the "important public resource"—the electromagnetic spectrum—is considered the "substantial governmental interest" justifying otherwise constitutionally offensive regulation of content. Although other courts have recognized the spectrum scarcity justification, it has been most clearly articulated in the seminal *Red Lion* decision. In that case, the Supreme Court held that:

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But

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casting than for the print media, "broadcasters are engaged in a vital and independent form of communicative activity. As a result, the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area." The upshot was insistence that the restriction be "narrowly tailored to further a substantial governmental interest."

News America Pub. Inc. v. F.C.C., 844 F.2d 800, 812 (D.C. Cir. 1988) (emphasis in original) (citations omitted).

6. Professor Matthew L. Spitzer noted the following:

> At present, the United States regulates broadcast communications much more intensively than it regulates printed communications. For example, broadcasters must obtain licenses to operate, but publishers need not. Federal statutes and regulations require broadcasters to cover fairly all sides of controversial issues of public importance, but printed publications may be biased. A broadcaster must program to meet the needs and interests of its community of license, but publishers need not. . . . This more pervasive control of the *content* of broadcast communications is embedded within *allocative* control of electromagnetic spectrum. Paper, in contrast, is left free.

Spitzer, *Controlling the Content of Print and Broadcast*, 58 S. CAL. L. REV. 1349, 1351-52 (1985) (citations omitted) (emphasis in original).

7. 395 U.S. 367 (1969).

8. *Id.* at 386-87 (quoting United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)).

> the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.[9]

Curiously, this reasoning suggests that listeners as well as speakers enjoy first amendment rights. Former FCC Chairman Mark Fowler, an avowed advocate of broadcaster deregulation, commented on this anomaly: "[I]t should be noted that the language of the first amendment protects the right of speech, not the right of access to ideas or even the right to listen. The direct concern of the first amendment is with the active speaker, not the passive receiver."[10]

This notion of an unwritten, collective public first amendment right of access to information allowing the government to regulate the programming and ownership of broadcasting facilities has its origins in radio regulation early in this century. Initially, overcrowding of ship-to-ship and ship-to-shore communications led Congress to adopt the first governmental regulation of broadcasters based on spectrum scarcity. This regulation, known as the Radio Act of 1912, prohibited operation of a radio station without a license from the Secretary of Commerce and Labor.[11] The breadth of this regulation was limited—the Secretary of Commerce and Labor did not even have the power to deny a license to anyone who applied.[12] Consequently, "a frequency free-for-all in the mid-1920's . . . doomed the 1912 scheme."[13] The *Red Lion* court viewed this time period as the seed of current spectrum scarcity-based broadcaster regulation: "It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard."[14]

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9. *Red Lion*, 395 U.S. at 390 (citations omitted).

10. Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 237-38 (1982).

11. 37 Stat. ch. 287 (1912), *repealed by* Communications Act of 1934, ch. 652 (1934), Pub. L. No. 73-416, 48 Stat. 1064, 1102.

12. Fowler & Brenner, *supra* note 10, at 214 n.28.

13. *Id.* at 214.

14. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 375-76 (1969) (footnote omitted).

In response to this situation, the Federal Radio Commission was established by statute in 1927 to preserve the "public interest" in the integrity of the spectrum by regulating the airwaves.[15] These early regulations relied on licensing procedures to achieve structural regulation of the spectrum. Two years later, however, these content-neutral regulations began to give way to content-based regulations. In *Great Lakes Broadcasting Co.*,[16] the Federal Radio Commission (FRC) held that its responsibility to preserve the public interest in the broadcast spectrum included limited editorial control over the content of broadcasts. The Commission stated that: "public interest requires ample play for the free and fair competition of opposing views, and the commission believes the principle applies . . . to all discussions of issues of importance to the public."[17]

Such early content-based regulations were expressly validated by Justice Frankfurter's opinion in *National Broadcasting Corp. v. FCC (NBC)*.[18] In *NBC*, Justice Frankfurter contrasted the role of the FRC (later known as the Federal Communications Commission (FCC)) in regulating broadcasters with that of a police officer regulating traffic. He stated that the FCC should be more than just a "traffic officer, policing the wave lengths to prevent stations from interfering with each other. . . . [T]he [1934] Act does not restrict the Commission merely to the supervision of traffic. It puts upon the Commission the burden of determining the composition of that traffic."[19] The FCC took the Court at its word, and content-based regulations became commonplace. Such regulations were not publicly challenged, and gradually became accepted by broadcasters.[20]

Decisions such as *NBC* stand sharply at odds with the original intent of the legislation aimed at simply clearing up broadcast signals by requiring all potential broadcasters to apply for and obtain a broadcast license. When considering the scope of the regulatory scheme to be imposed on broadcasters through the Radio Act of 1927, and, later, through the 1934 Communications Act, Congress discussed the possibility of granting the FCC

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15. Radio Act of 1927, ch. 169, 44 Stat. 1163 (1927).

16. 3 F.R.C. Ann. Rep. 32 (1929).

17. *Great Lakes*, 3 F.R.C. Ann. Rep. 32, 33 (quoted in *Red Lion*, 395 U.S. at 377).

18. 319 U.S. 190 (1943).

19. *Id.* at 215-16 (quoted by Fowler & Brenner, *supra* note 10, at 218).

20. *See generally* Mayton, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 EMORY L.J. 715 (1989).

power to control the content of programming. However, Congress expressly rejected such a possibility. As one historian noted:

> While a more expansive federal regulatory role was urged by various constituencies and their representatives in Congress during debate on the 1927 Act, this more expansive role was rejected. . . .
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> . . . .
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> . . . [P]assage of the 1934 Act . . . triggered a major free-for-all respecting the appropriate scope of federal power. In this fair fight (confined as it then was to the constitutionally prescribed playing field—the Congress), those who would enhance that power were the losers. In both the House and Senate, various amendments to give the new commission [the FCC] this or that new authority were vigorously sponsored. Without significant exception, however, these amendments failed. . . . [A]s indicated by individual Congressmen these amendments failed out of an underlying regard for the first amendment.[21]

The majority of the rejected amendments to the 1934 Act would have given content-based regulatory control to the FCC. Similar amendments were also proposed at the time Congress debated the 1927 Radio Act. For example, Congress considered a proposal which would have forced radio stations to comply with federally mandated programming priorities which were based on subject matter. Out of concern for broadcasters' first amendment rights, the proposal was rejected.[22] Rather than granting the FCC vast control over the content of programming, Congress instead legislated that the FCC was to be responsible for allocating frequencies, the power at which broadcasters could operate, and permissible broadcast hours.[23] However, Congress also inserted in the legislation that the FCC was to act in the "public interest." Speculation and interpretation by the FCC and the judiciary on the meaning of the phrase "public interest" led to a fierce debate over its meaning. The key issue in the debate was whether, under the mandate of serving the public interest, the FCC had the authority to regulate the broadcast content. The debate culminated in the *NBC* decision,[24] in which the Supreme

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21. *Id.* at 731, 733.

22. F.C.C. v. WNCN Listeners Guild, 450 U.S. 582, 597 (1981) (quoted by Mayton, *supra* note 20, at 731-32).

23. Radio Act of 1927, ch. 169, 44 stat. 1162 (1927).

24. 319 U.S. 190 (1943). *See also* text accompanying note 19. Commentators have

Court allowed the "public interest" standard to be the gateway to permissible content-based regulation. Opponents of content-based regulations claim that Congress' loose "public interest" standard and the *NBC* decision are the primary reasons the scope of government regulation extended beyond the original parameters covering structure to encompass editorial decisions as well.

Clearly, the statutory language of the 1927 Radio Act is one reason the FCC has indulged in content-based regulation. Congress, in effect, told the FCC to act in the "public interest," but failed to give more explicit guidance. The FCC was left with as much, or as little, power as it wished to exercise.[25] In addition, the Supreme Court in *NBC*, by allowing content-based regulation, ignored not only the legislative history referred to above, but also direct, controlling precedent. Prior to *NBC*, in its first opinion on the scope of FCC authority under the Radio Act of 1927 and the Communications Act of 1934, a unanimous Supreme Court stated in *F.C.C. v. Sanders Bros. Radio Station*[26] that "the fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license."[27] The Court reasoned in *Sanders Bros.* that because legislation governing broadcaster regulation was aimed at directing "the allocation and regulation of the use of radio frequencies,"[28] the FCC had no power to "regulate the business of the licensee."[29] As a result, the Court held that "[t]he Commission is given no supervisory control of the programs, of business management or of

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postulated that one reason Justice Frankfurter went as far as he did to allow government regulation of the broadcast spectrum was the context in which he wrote the opinion: "The times were perhaps different when Justice Frankfurter considered these matters. A Supreme Court Justice in the 1940's could not ignore the importance of a news service during wartime, nor could he easily dispute the public policy of mandating broadcaster 'responsibility' in such times." Fowler & Brenner, *supra* note 11, at 218.

25. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930) (As a contemporary of the early statutory language, Professor Caldwell concluded that the phrase "public interest" meant "about as little as any phrase that the drafters of the [1927] Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority.") (quoted by Fowler & Brenner, *supra* note 11, at 214-15). For a current critique of the public interest standard, see Mayton, *supra* note 21.

26. *Id.* at 474.

27. *Id.* at 474.

28. *Id.*

29. *Id.* at 475.

policy."[30] Nevertheless, the Court just three years later in *NBC* laid the foundation for a two-tiered constitutional approach to regulations governing print and broadcast communications.

Because content-based regulations recognized in *NBC* were not constitutionally permissible when applied to printed speech, a different constitutional standard developed for one form of communication (print), than for another (over-the-air broadcasts). Professor Spitzer writes of this situation:

> Licensing newspapers is unconstitutional, but for almost sixty years the federal courts have allowed the Federal Communications Commission to license broadcasters on the basis of "spectrum scarcity." According to the Supreme Court, scarcity specially characterizes radio spectrum in a way that justifies licensing and content controls in broadcasting, but could never justify similar restrictions in print. The FCC, following the federal courts' lead, often has embraced the idea of spectrum scarcity to justify restrictions on content in broadcasting. Thus, scarcity ostensibly props up the entire regulatory process—a process which represents perhaps the most important anomaly of our time in first amendment jurisprudence.[31]

Despite such sentiment, since *NBC* the Supreme Court has consistently upheld the constitutionality of content-based broadcast restrictions, relying almost exclusively on the notion of spectrum scarcity.[32] In the Court's view, the 1927 Radio Act, and the subsequent Communications Act of 1934 which transferred the regulatory power to the FCC, were attempts to balance the public's interest in access to diverse viewpoints against broadcasters' free speech rights.

This balancing approach was expressly acknowledged by the Supreme Court in *Columbia Broadcasting System v. Democratic National Committee*[33] (*CBS*). At issue in *CBS* was whether FCC content-based regulation precluded a licensee from maintaining a policy which denied certain groups the right to buy air time in order to express their views regarding certain important public issues. The Court held that neither the Communications Act of 1934 nor the first amendment prevented

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30. *Id.* at 475.

31. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 990 (1989) (citation omitted).

32. *See e.g.*, Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 379-80 (1969); Columbia Broadcasting System v. Democratic Nat'l Committee, 412 U.S. 94, 126 (1973).

33. 412 U.S. 94 (1973).

broadcasters from denying applications for paid editorials. Although *CBS* seems to prohibit content-based regulation of broadcasters, certain language in the opinion suggested that content-based regulation in other circumstances would nevertheless be allowed when the rights of the public to be informed outweighed the first amendment free speech rights of broadcasters:

> Although the broadcaster is not without protection under the First Amendment, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not be constitutionally abridged either by Congress or by the FCC."
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> Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century. For, during that time, Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned.[34]

The Court took the position in *CBS* that Congress and the FCC have the power to limit the free speech rights of broadcasters due to a constitutionally unexpressed right of the public to be informed. This seems to be simply a reformulation of the statutory requirement that the FCC protect the "public interest" in the broadcast spectrum. The necessity of compromising broadcasters' first amendment rights by balancing them against the non-constitutional "public interest" in the broadcast spectrum is premised on the assumption that spectrum scarcity exists, i.e., that there are not enough sources to provide an outlet for all diverse viewpoints.

However, the foundation upon which content-based regulations rest has significantly eroded. The spectrum scarcity rationale today simply lacks validity given the wide range of media outlets. Spectrum scarcity existed in the 1920s, when the Radio Act of 1927 was written, and in the 1940s, when Justice Frankfurter penned his opinion in *NBC*, and it probably existed in the late 1960s and early 1970s when *Red Lion* and *CBS* were handed

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34. *Id.* at 102 (citations omitted).

down. However, because there are enough media outlets in 1991 to accommodate the various viewpoints,[35] content-based broadcaster regulation is now outmoded.

Nevertheless, courts in general, and most importantly the Supreme Court, continue to uphold extremely broad content-based regulation by the FCC. The reasoning is as follows. Through the Communications Act of 1934, Congress created the FCC and granted it exclusive authority to license and otherwise regulate radio and television broadcasters in order to better serve the public interest.[36] The pervasive regulatory scheme developed by the FCC since 1934 reflects the breadth of authority under the public interest standard.[37] FCC regulations may be structural, such as allotting specific bandwidths and allowable power outputs to licensees, or content-based, such as the political attack rule and the now discredited Fairness Doctrine.[38] It is clear that such content-based restrictions offend traditional notions of free speech and a free press, and would be impermissible if applied to print.[39] However, when such regulations are applied to broadcasters the judicial branch has upheld them as a justifiable infringement on the free speech rights of broadcasters due to the substantial state governmental interest in protecting the scarce public resource of the broadcast spectrum. This content-based regulation continues despite the fact that several courts, and the FCC itself, have questioned the continuing validity of spectrum scarcity.[40] Several examples of FCC-sanctioned content-based broadcast regulations are analyzed in part III to illustrate the extent of such regulations.

III. Federal Government Regulations Based on Spectrum Scarcity

A review of the reach of selected content-based broadcast regulations illustrates the extent of free speech restrictions im-

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35. *See infra* notes 62-64 and accompanying text.

36. Communications Act of 1934, ch. 652, 48 Stat. 1064. *See also* 47 U.S.C. §§ 151, 303 (1988); Metro Broadcasting v. FCC, 110 S. Ct. 2997, 2997-98 (1990). The FCC's regulatory authority extends to all communications transmitted over-the-air for direct reception by the general public. 47 U.S.C. § 153(o). Such communications include AM and FM radio and TV transmissions.

37. See Mayton, *supra* note 20, for a critique of the broad regulatory powers claimed by the FCC under the banner of "public interest."

38. Spitzer, *supra* note 31.

39. *See e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974).

40. *See infra* notes 62-69 and accompanying text.

posed on broadcasters.[41] Many of the current content-based broadcast regulations deal with political campaigns. The Equal Opportunities Rule, discussed immediately below, presents the greatest potential infringement on broadcasters' programming discretion by requiring broadcasters to offer air time to candidates equal to time already granted opposing candidates. The Political Editorial Rule is frequently used to ensure that both sides of political issues are presented by broadcasters. This rule requires broadcasters to allow opposing viewpoints to be aired when an editorial is presented. Other regulations, such as the Personal Attack Rule,[42] are used less frequently and are designed to protect individuals who are verbally attacked through an over-the-air broadcast. The Personal Attack Rule permits an individual attacked over the air to respond to the allegations made against him.

Also treated in more detail below is the Fairness Doctrine, which required broadcasters to cover issues of public importance as well as "provide opportunities for the presentation of contrasting viewpoints on such issues."[43] The Fairness Doctrine was the most broadsweeping content-based government imposition into the first amendment rights of broadcasters until it was abolished by the D.C. Circuit's 1989 decision *Syracuse Peace Council v. F.C.C.*.[44]

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41. It is interesting to note, however, that the FCC and the lower federal courts are currently in the process of weakening these restrictions, arguably because the burden placed on the free speech rights of broadcasters outweighs the rights of the public to hear a balanced presentation of issues. This deregulation effectively contradicts the spectrum scarcity-based notion that such regulations are required because the spectrum would otherwise contain overly homogeneous viewpoints. Deregulation implies that enough broadcast outlets exist in today's market to ensure that a diversity of viewpoints can be received by the public. If this is true, then the balance struck by *CBS* and *Red Lion* should shift in favor of broadcasters' first amendment free speech rights. However, this has not yet happened because the Supreme Court has failed to recognize the different relationship which now exists between broadcasters' rights and the public's rights. This failure ensures that some content-based regulation will continue. For example, the Supreme Court in Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997 (1990), relied on spectrum scarcity to justify continued government intervention into broadcasters' business decisions. *See infra* notes 71-72 and accompanying text.

42. 47 C.F.R. § 73.1920. The Personal Attack Rule is a corollary to the Fairness Doctrine. Because the Fairness Doctrine has been abolished by the FCC, the future of the Personal Attack Rule is uncertain.

43. *See infra* notes 57-61 and accompanying text.

44. 867 F.2d 654, 669 (D.C. Cir.), *cert. denied*, 110 S.Ct. 717 (1989).

A. *The Equal Opportunities Rule*

The Equal Opportunities Rule, codified at 47 U.S.C. section 315, requires broadcast licensees which grant use of broadcast facilities to a legally qualified candidate for public office to "afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."[45] The key phrase in this requirement is "use of broadcast facilities."

The FCC has defined a "use of broadcast facilities" as follows:

> In the case of spots, if a candidate makes any appearance in which he is identified or identifiable by voice or picture, even if it is only to identify sponsorship of the spot, the whole announcement will be considered a use. In the case of a program, the entire program is a use if "the candidate's personal appearance(s) is substantial in length, integrally involved in the program, and indeed the focus of the program, and where the program is under the control and direction of the candidate."[46]

Although from this definition it seems that any identification of a political candidate by a broadcaster gives rise to burdensome requirements under the Equal Opportunities Rule, several significant exceptions exist. An "[a]ppearance by a legally qualified candidate on any (1) bona fide newscast, (2) bona fide news interview, (3) bona fide news documentary, or (4) on-the-spot coverage of bona fide news events," is not deemed a "use of broadcast facilities" under the Equal Opportunities Rule.[47] In recent years the scope of these exceptions has expanded significantly, suggesting a clear trend toward deregulation.

For example, the FCC initially refused to exempt coverage of political debates from the Equal Opportunities Rule.[48] But after increasing congressional pressure the FCC first exempted nonbroadcaster-sponsored debates, and later broadcaster-sponsored debates from the strictures of the Rule. This trend continued in 1987 when the FCC ruled that even candidate-sponsored

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45. 47 U.S.C. § 315(a) (1988). The broadcaster was required to charge the responding candidate at the same rate as the initial user.

46. 1978 Political Broadcasting Primer, 69 F.C.C.2d 2209, 2245 (quoted by Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 515 (D.C. Cir. 1986) (emphasis omitted)).

47. 47 U.S.C. § 315(a).

48. *See e.g.*, In re Petition of the Aspen Institute, 55 F.C.C.2d 697 (1975), *aff'd sub. nom.* Chisolm v. F.C.C., 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976) (broadcasters' coverage of political debates invokes Equal Opportunities Rule).

political debates did not impose Equal Opportunity Rule obligations on broadcasters.[49] A 1987 decision by the D.C. Circuit, *Johnson v. FCC*,[50] exemplified the size of the Equal Opportunities candidate debate coverage exception. In *Johnson*, the court held that the exclusion of a minor party presidential and vice-presidential candidate did not invoke any government regulation allowing participation in the debate because the so-called Reasonable Access Rule and the provisions of the Equal Opportunities Rule protected the candidates' right of access to the broadcast facilities only, and not participation rights in the debate itself. The Eighth Circuit reached a similar conclusion in *DeYoung v. Patten*.[51] There the court found that a candidate for the United States Senate had no right to be included in a televised debate, and further that the broadcaster would not be required to grant the excluded candidates equal time.

Another major exception to the Equal Opportunities Rule is on-the-spot news coverage. Traditionally, compliance with this exception required that the coverage of the news event be contemporaneous with the event's occurrence. Failure to broadcast coverage of an event within twenty-four hours of its occurrence invoked the provisions of the Equal Opportunities Rule. But again, the trend has been toward deregulation. The FCC first replaced the one day contemporaneity requirement with the "reasonably recent" test in 1983. Later the FCC expanded its interpretation of the exception so broadly that it allowed five weeks to pass between the event's occurrence and the broadcast without requiring the broadcaster to grant equal time to opposing candidates.[52]

The trend toward deregulation may result in the complete abolition of section 315. Section 315 is actually a codification of the Fairness Doctrine, discussed *infra*.[53] At least one court has

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49. For a discussion of this decision and the general trend toward deregulation, see Underwood, *Mandatory Access for Minor Party Presidential Candidates: Revamping Section 315 of the Equal Opportunities Doctrine*, 12 HAST. COMM./ENT. L.J. 263, 279-80 (1989).

50. 829 F.2d 157 (D.C. Cir. 1987).

51. 898 F.2d 628 (8th Cir. 1990).

52. *See In re* Delaware Broadcasting, 60 F.C.C.2d 1030, 1032-33 (1970) (one day rule); In re Henry Geller, 95 F.C.C.2d 1236, 1246-47 (1983) (reasonably recent test); and In re Southern Center for Int'l Studies, 3 F.C.C. Rec. 492, 493 (1988) (relative newsworthiness and broadcaster good faith allows a five week delay from coverage to air time to nevertheless fall within the "on the spot news coverage" exception). *See also* Underwood, *supra* note 49, at 281 (criticizing the *Southern Center* ruling).

53. *See infra* notes 57-61 and accompanying text.

speculated that the fall of the Fairness Doctrine calls into question the constitutionality of Section 315 since both impose similar burdens on broadcasters. The United States Court of Appeals for the District of Columbia, in *Branch v. F.C.C.*,[54] stated: "The [FCC] may now have sent . . . a signal [suggesting revision of broadcast regulation] by issuing a report which concludes that section 315 is unconstitutional and should be abandoned."[55] However, the D.C. Circuit also stated that it was for the Supreme Court to rule on the constitutionality of section 315. Two years after *Branch*, the Supreme Court denied certiorari in *Syracuse Peace Council*,[56] a case which effectively abolished the Fairness Doctrine. Because of the similarity of section 315 and the Fairness Doctrine, this leaves the constitutionality of section 315 in doubt. However, the FCC continues to enforce section 315 obligations.

B. *The Fairness Doctrine*

Shortly after the FCC received its congressional mandate to serve the public interest by regulating the airwaves, it began articulating a rule which required broadcasters to "provide coverage of vitally important controversial issues of interest in the community served by the licensees, [and] to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues."[57] Over time, these obligations became known as the Fairness Doctrine.

The Fairness Doctrine was largely enforced by the FCC itself through licensing procedures. However, it was granted constitutional status in *Red Lion*.[58] In that case, the Supreme Court stated that "[b]elieving that the specific application of the fairness doctrine in *Red Lion*, and the [codification of the Fairness

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54. 824 F.2d 37 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

55. *Id.* at 50 (citations omitted).

56. Syracuse Peace Council v. F.C.C., 867 F.2d 654 (D.C. Cir.), *cert. denied*, 110 S.Ct. 717 (1989).

57. In re *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 146 (1985) (citations omitted) [hereinafter Fairness Report]. *See also* United Broadcasting Co., 10 F.C.C. 515 (1945) (broadcaster must adequately cover issues of public importance); News Broadcasting Co., 6 P & F Radio Reg. 258 (1950) ("coverage must be fair in that it adequately represents opposing viewpoints"). These two cases were cited by the Court in *Red Lion* as support for the two prongs of the Fairness Doctrine.

58. 395 U.S. 367, 377 (1969).

Doctrine], are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional. . . ."[59] The rationale for a constitutional imposition of the Fairness Doctrine was clearly based on spectrum scarcity. The Court put it this way:

> It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgement of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect.[60]

Despite this statement, the Court acknowledged the possibility that the Fairness Doctrine's obligations could convince broadcasters to avoid all reference to controversial issues in order to keep from incurring the equal time requirements of the Fairness Doctrine's second prong. Although this would seem to violate the first prong of the doctrine—the obligation to provide coverage of issues of public importance—the Court found it more difficult to force broadcasters to present such coverage than to require them to allow response time when they did so. Thus, the Court did nothing to resolve this inherent conflict between the two prongs of the Fairness Doctrine.

The result feared by the *Red Lion* Court did in fact occur. The 1985 Fairness Report issued by the FCC released findings that the Fairness Doctrine actually had the effect of chilling speech on issues of public importance, and therefore was in violation of the public interest standard on which the FCC's regulatory authority is based. Because of this, the FCC favored abolition of the doctrine. The D.C. Circuit agreed with the FCC's findings in the 1985 Fairness Report and upheld its decision to

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59. *Id.* at 375.
60. *Id.* at 394.

abolish the Fairness Doctrine in *Syracuse Peace Council v. F.C.C.*.[61]

From the dust left by the Fairness Doctrine's fall arises the question, if such content-based regulations are not in the public interest, why are broadcasters' free speech rights subjected to a lesser degree of scrutiny than others? Spectrum scarcity alone falls short of the mark.

IV. Is Spectrum Scarcity Still a Valid Rationale for Differential Constitutional Treatment of Broadcasters?

Despite the reaffirmation it has consistently received from the Supreme Court, support for the spectrum scarcity rationale is currently eroding in many other quarters. In its 1987 memorandum and order abolishing the Fairness Doctrine,[62] the FCC reported on the explosion of available media outlets for viewpoints of all kinds. The FCC reviewed its 1985 Fairness Report,[63] in which the Commission studied information outlets available to the public at that time. The FCC originally commissioned the study to ascertain "whether this type of government regulation [the Fairness Doctrine] is in fact necessary to ensure the availability of diverse sources of information and viewpoints to the public."[64] What the study found was interesting but not surprising:

> This review, as discussed in more detail below, revealed an explosive growth in both the number and types of such outlets in every market since the 1969 *Red Lion* decision. And this trend has continued unabated since 1985. For example, 96% of the public now has access to five or more television stations. Currently, listeners in the top 25 markets have access to an average of 59 radio stations, while those in even the smallest markets have access to an average of six radio stations. . . .[65]

The study also determined that new technology had served to increase the public's access to information: "Not only has the number of television and radio stations increased the public's access to a multiplicity of media outlets since 1969, but the advent and increased availability of such technologies as cable and

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61. 867 F.2d 654, 669 (D.C. Cir.), *cert. denied*, 110 S.Ct 717 (1989).
62. 2 F.C.C.2d 5043, 5051 (1987).
63. 102 F.C.C.2d 143, 196-221 (1985).
64. 2 F.C.C. Rec. at 5051 (footnote omitted).
65. *Id.* (footnotes omitted).

satellite television services has dramatically enhanced that access.[66]

The FCC then determined that the Fairness Doctrine, a content-based regulation of broadcasters' speech rights, did not even meet the lower constitutional standard which the Supreme Court has chosen to apply to such regulations:

> In further analyzing whether the Fairness Doctrine is narrowly tailored to achieve a substantial government interest, we look again to our evaluation of the 1985 Fairness Report of whether this type of government regulation is in fact necessary. . . . As a result of its 1985 review, the Commission determined that "the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today."[67]

According to these statements by the FCC, content-based regulations of broadcasters may not even meet the substantial government interest test.

In addition to criticism by commentators,[68] and the FCC itself, courts have begun to question the continuing validity of the scarcity rationale. For example, the D.C. Circuit stated in *Telecommunications Research & Action Center v. F.C.C.*:

> [T]he line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. Employing the scarcity concept as an analytical tool . . . inevitably leads to strained reasoning and artificial results.
>
> It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. . . . Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.[69]

A recent bill passed by Congress will serve to increase the

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66. *Id.*

67. *Id.* (footnote omitted).

68. For an especially scathing criticism of the scarcity rationale, see former FCC commissioner Fowler's article, Fowler & Brenner, *supra* note 10.

69. 801 F.2d 501, 508 (D.C. Cir.), *reh'g en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986).

amount of electromagnetic spectrum available to broadcasters, further decreasing the validity of the spectrum scarcity rationale. The bill, H.R. 2965, reallocates a portion of the spectrum previously reserved for government use. Despite the indicia that the spectrum scarcity rationale is no longer a valid justification for content-based broadcaster regulation, the Supreme Court and the FCC have continued to justify government intervention based on spectrum scarcity. The Supreme Court recently upheld the spectrum scarcity justification in *Metro Broadcasting, Inc. v. F.C.C.*.[70] In a series of sweeping statements, the *Metro* Court proclaimed that spectrum scarcity had long been the rationale for governmental involvement in the broadcast licensing scheme, and that because viewpoint diversity was in the public interest, the government was justified in enhancing viewpoint diversity by granting minority preferences.[71] It thus appears that the validity of the spectrum scarcity rationale, while in question, is nevertheless currently in force. Additionally, at least two of the current FCC commissioners have indicated that they support the spectrum scarcity rationale.[72]

V. A Proposal For Change

That the spectrum scarcity rationale should continue to justify a lower constitutional standard seems counterintuitive. The balance which historically existed may well have justified a lower constitutional standard leading to some content-based regulations of broadcasters. But now, with the many changes that have taken place, a reconsideration of the constitutional standard is warranted. Indeed several of the courts which originally found content-based restrictions constitutional inserted in their opinions the idea that if the situation should change, the balance should be altered.

For example, the *Red Lion* Court stated that if spectrum

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70. 110 S.Ct. 2997 (1990). Because this case involved fifth amendment issues of racial classifications, its application of a constitutional standard may not be helpful in first amendment constitutional analysis. In addition, the restrictions involved ownership of broadcast facilities rather than broadcast content.

71. *Id.* at 464-65.

72. 10 Warren Publishing, Inc. No. 174, page 7 (September 7, 1990) ("On spectrum reform [newest FCC Commissioner Duggan] asked 'who in the world came up with the idea that we no longer have to worry about spectrum scarcity,' which he said 'is the very rationale for mass media regulation.' "); 10 Warren Publishing, Inc. No. 94, page 1 (May 15, 1990) ("[FCC Commissioner] Barrett said he's still convinced that spectrum scarcity should remain the rationale driving FCC licensing policies.").

scarcity no longer existed, content-based regulation of broadcasters' speech rights would perhaps no longer be constitutionally permissible:

> A related argument, *which we also put aside*, is that quite apart from scarcity of frequencies . . . Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public.[73]

The Court's opinion in *F.C.C. v. League of Women Voters* contained a footnote reminiscent of this language from *Red Lion*. In *League of Women Voters* the Court suggested that if the FCC gave some signal to the court that spectrum scarcity no longer existed, the Court would revise its system of broadcast regulation. The footnote stated the following:

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.[74]

Such a signal was sent by the FCC in both its 1985 Fairness Report and the 1987 memorandum and order which abolished the Fairness Doctrine.

Even the Court in *CBS* acknowledged that changing technology could give rise to an appropriate reconsideration of the lower constitutional standard. Immediately after advocating a balancing approach which, in effect, found that broadcasters had a lesser degree of constitutional protection than print journalists, the Court stated: "The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago

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73. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 401 n.28 (1969) (citation omitted) (emphasis added).

74. F.C.C. v. League of Women Voters, 468 U.S. 364, 376-77 n.11 (1984) (citations omitted).

are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."[75]

If the Supreme Court is the mainstay behind the lower constitutional standard, statements like these deserve the Court's attention. Now is the time to grant broadcasters the same degree of speech protection accorded to any other group—strict scrutiny. If indeed the disparate treatment of broadcasters and print journalists is a distinction without a difference as Judge Bork wrote, then let us erase the distinction.

Some would argue that the trend toward erasing content-based regulation has effectively solved the problem of two-tiered media regulation.[76] However, because the Supreme Court has decided to ignore the very signals that it asked for in League of Women Voters[77] and continues to uphold as constitutional regulations violative of the first amendment if applied to print media, and because the FCC has indicated a willingness to abide by the spectrum scarcity rationale, a proposal for changing the status quo must be made and adopted.

The most logical approach to restoring broadcasters' free speech rights while maintaining the public's interest in structural regulation of the spectrum would be the following two step change: 1) Abolish all content-based regulations which are currently constitutional when applied to broadcasters but unconstitutional when applied to the print media; and 2) Maintain content-neutral regulation of the spectrum in order to preserve clear signals.

Step one would be accomplished by repealing all congressional and administrative action which places a different level of constitutional protection on the speech of broadcasters than publishers. Once this is done, then all speech-restrictive regulation applied to broadcasters would be subjected to the same constitutional standard of strict scrutiny that is currently applied to regulations of the print media. Thus, compelling government interests, such as keeping the airwaves free of obscene material, could be protected while optimizing the speech rights of broadcasters. This would effectively erase the distinction without a difference.

Step two of the proposal is already in place. By retaining

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75. Columbia Broadcasting System, Inc, v. FCC, 412 U.S. 94, 102 (1973).

76. *See supra* notes 62-69 and accompanying text.

77. 468 U.S. 364 (1984); *see also supra* note 74 and accompanying text.

this legislative and regulatory scheme, the public interest in the broadcast spectrum would be preserved. Under this scheme, the FCC would continue to license broadcasters to ensure that the public has access to clear broadcast channels.

Adoption of this proposal would redefine the scope of the FCC's powers to pre- *NBC* days. Arguably this is what Congress originally intended when it created the FCC, and how the Supreme Court interpreted the FCC's powers, before the Supreme Court began allowing, and even suggesting, that the FCC determine the content of broadcaster programming.[78] As discussed previously, in *NBC*, Justice Frankfurter analogized the role of the FCC in regulating broadcasters to that of a traffic officer in regulating traffic, but granted the officer the additional power to determine the composition of the traffic.[79] Just as it would be improper to allow a police officer to tell people what color of car they should drive, so is it improper for the FCC to tell broadcasters what programs they should broadcast. This proposal would redefine Frankfurter's analogy by relegating the traffic officers of the FCC to simply directing traffic in order to ensure that it flows smoothly, without granting it power to control the composition of that traffic.

This is not to say that some content-based restrictions would not be allowed. Clearly the FCC must protect the public from constitutionally unprotected broadcaster speech—such as broadcasters not telling the truth. But since such speech does not pass muster under the strict scrutiny standard of a compelling state interest anyway, broadcasters would not be constitutionally compromised as they are under the status quo's two-tiered regulatory scheme. It is possible to grant both print journalists and broadcasters equal treatment under the Constitution. This proposal would do just that. The FCC would retain its licensing authority in order to avoid the radio chaos which resulted in the 1920s,[80] while broadcasters would enjoy the free speech rights promised to them by the Constitution.

VI. Conclusion

While preservation of the integrity of the spectrum is a de-

78. *See supra* notes 18-30 and accompanying text.

79. *See supra* note 19 and accompanying text.

80. Arguably such structural regulations are content-neutral, and therefore not subject to a first amendment strict scrutiny test anyway.

sirable and substantial governmental interest, it is not a compelling interest which could survive a strict scrutiny standard. Because there is currently great viewpoint diversity available to the public due to the high number of media outlets, content-based broadcast regulations are no longer necessary. Therefore, the rationale for differentiating between print and broadcast media is no longer valid. Consequently, the government should cease to impose content-based regulations on the broadcast media which would be invalid if applied to the print media.[81] Content-neutral structural regulations are enough to preserve the public interest in a smoothly run spectrum allocation program. As Professor Mayton has stated: "[I]t is today evident that controlling frequencies so as to prevent a bad, interfering use is no reason to regulate the broadcast industry generally."[82]

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81. Clearly certain content based regulations which could survive the strict scrutiny standard, such as regulation of obscene material, must be allowed to apply to broadcasters as well.

82. Mayton, *supra* note 20, at 737.