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Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation

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For years broadcast stations have been subject to a range of government regulation that calls on them to act as public trustees of the airwaves. The Supreme Court has upheld this regulatory regime under the First Amendment primarily on the grounds that broadcast frequencies are a scarce resource, i.e., there are more individuals who want to broadcast than there are frequencies available. But scholars have long criticized this rationale for giving broadcasters a lower level of First Amendment protection than other media, which similarly rely on scarce resources. This Article seeks to go beyond the scarcity rationale and place broadcast regulation on firmer First Amendment footing. It finds a doctrinal basis for upholding broadcast regulation under the Court's public forum doctrine. It then explores two theoretical justifications for this result. The first derives from a view of the First Amendment that permits the government to take an active role in ensuring a robust and open debate on public issues. The second involves a quid pro quo

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theory, under which broadcasters are granted valuable rights to use the spectrum on the condition that they satisfy certain public interest obligations.

INTRODUCTION

Every broadcast television and radio station in this country operates under a license granted by the federal government. This license gives the broadcaster the exclusive right to use a portion of the electromagnetic spectrum, which Congress has deemed to be public property. Although these license rights are extremely valuable, broadcasters are not required to pay for them. Rather, in return for their use of the spectrum, broadcasters are expected to act as public trustees of the airwaves with the obligation to serve the "public interest, convenience, and necessity" in operating their stations and in choosing the programming they air.¹ For example, television stations must air a certain amount of children's educational programming every week, and both television and radio broadcasters must give candidates for federal office reasonable access to their stations.

Although this regulatory regime has been in place more than seventy years, it rests on uneasy constitutional footing. It is primarily premised on the "scarcity" rationale set forth in *Red Lion Broadcasting Co. v. FCC*.² In this 1969 decision, the Supreme Court held that the Federal Communications Commission (FCC) did not violate the First Amendment in requiring a radio or television station to give reply time to people who were the subject of a personal attack or political editorial aired by the station. In reaching this decision, the Court emphasized that "there are substantially more individuals who want to broadcast than there are frequencies to allocate," and "[b]ecause 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."³ Primarily on the basis of this reasoning, "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."⁴ It has been subject to a range of content-based requirements that would undoubtedly be struck down if they applied to newspapers.

The scarcity rationale has been criticized for years. Although broadcast frequencies are no doubt scarce, so are other valuable resources, including those that go into publishing a newspaper. Yet the

1. 47 U.S.C.A. § 309(k)(1)(A) (West Supp. 1997) (setting forth license renewal standards for broadcast stations).

2. 395 U.S. 367 (1969).

3. *Id.* at 388, 390.

4. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

latter enjoys full First Amendment protection, as *Miami Herald Publishing Co. v. Tornillo*,⁵ decided just a few years after *Red Lion*, demonstrates. In *Tornillo*, the Supreme Court invalidated a Florida statute that was strikingly similar to the FCC's right-to-reply rule, except that the Florida law applied to newspapers, not broadcasters. The statute at issue required newspapers to afford a political candidate a right to reply to editorials attacking the candidate's personal character. While sympathetic to the statute's underlying purpose, the Court held that the intrusion into the editorial process violated the First Amendment.⁶ Although the cases were decided only five years apart, *Tornillo* makes no mention of *Red Lion*.

Scarcity seems to provide little justification for treating broadcasters differently than newspaper publishers under the First Amendment. The analytical weaknesses behind *Red Lion*'s central rationale has led to a steady drumbeat over the years calling for the Supreme Court to overturn the 1969 decision. The issue even entered the latest presidential campaign, with Bob Dole aiming his hatchet at the "scarcity principle."⁷ Even more ominous are the recent signals sent by a number of Justices that they would like to reexamine the validity of *Red Lion*.⁸

If the Court dispenses with the scarcity rationale, we must still consider the constitutionality of broadcast regulation. This article proposes an alternate paradigm to replace the *non sequitur* of the scarcity rationale in justifying broadcast regulation under the First Amendment. Parts I and II provide an overview of broadcast regulation and the shortcomings of the scarcity rationale. As an alternative to this rationale, Part III analyzes broadcast regulation in terms of the Supreme Court's public forum doctrine. The Court has applied this doctrine in assessing government regulation of speech on a wide variety of publicly owned properties, both tangible and intangible, placing great emphasis on historical practice and the character of the particular forum at issue. It has struck down content regulation of speech taking place in traditionally open forums, such as public parks, while upholding such regulation in the context of less traditional, more limited forums, such as a military base or a public school's internal mail system. Applying this forum analysis, the broadcast spectrum can be viewed as a publicly owned forum for

5. 418 U.S. 241 (1974).

6. *See id.* at 256-58.

7. *The Dole Goal: "Get Government out of the way,"* BROADCASTING & CABLE, Oct. 14, 1996, at 29 (quoting Dole as saying, "Sure, broadcasters should enjoy the same First Amendment rights as publishers. I know my opponent doesn't agree, but that's because he subscribes to the outdated 'scarcity principle.' Imagine telling broadcasters that they can't have equal footing with publishers because there is a scarcity of licenses, even though we all know there are far more TV and radio stations in any given market than there are newspapers.").

8. *See infra* notes 99-106 and accompanying text.

communication that has been awarded to private broadcasters subject to a regulatory scheme that provides limited access to other speakers and seeks to promote certain public interest goals. Given this blend of private and public control, the airwaves are best characterized as a limited public forum under the Court's public forum precedent. As such, the government may impose reasonable content-based requirements on broadcasters, provided it does not discriminate against speech on the basis of its viewpoint. The public forum doctrine consequently provides a logical basis, grounded in precedent, for upholding broadcast regulation even if the Court were to dispense with the scarcity rationale.

The analysis, however, should not end with the public forum doctrine. While it is superior to the scarcity rationale, the public forum doctrine fails to provide a fully satisfactory answer in itself. Faulted for its rather narrow, circular mode of analysis, this doctrine provides precedent but little theoretical justification for broadcast regulation. Part IV of this Article takes up where the public forum analysis leaves off. It offers two alternative theories to explain why government regulation of broadcast programming is consistent with the First Amendment and, in fact, can be seen as furthering free speech values.

The first theory derives from a view of the First Amendment as enabling democratic self-governance by providing the means of generating a robust and open debate on public issues. Under this public debate theory, the government may at times play an active role in ensuring that public discourse is indeed open and robust. This approach, espoused by First Amendment scholars Owen Fiss and Cass Sunstein among others, contrasts sharply with the absolutist vision of the First Amendment. The absolutist vision advocates a *laissez-faire* approach, placing its faith in an unregulated marketplace of ideas as the best means of achieving individual liberty and the political and civic discourse that the First Amendment promises. On the other hand, public debate theory argues that the marketplace can often malfunction and exclude important views and participants from the debate. When that happens, the government can play a vital role in nurturing free speech values by ensuring that diverse voices are heard and that sufficient attention is dedicated to public issues. This Article describes the public debate theory of the First Amendment and explains how it provides a basis for upholding broadcast regulations—such as those governing children's educational television and air time for political candidates—that can promote free speech values in a viewpoint-neutral manner.

A second, alternative justification for broadcast regulation is premised on the preferential treatment broadcasters have received in the allocation of resources. Unlike other speakers, they have been granted, without charge, exclusive rights to use their medium of communication,

the broadcast spectrum. The direct preferential treatment broadcasters have received in the allocation of these valuable speech rights distinguishes them from newspapers and provides a *quid pro quo* justification for regulatory efforts that seek to promote important public interest goals. The Supreme Court has recognized the government's authority to place certain conditions on the receipt of government benefits, provided such conditions do not penalize free speech or other constitutionally protected liberty interests. This Article sets forth a *quid pro quo* rationale for broadcast regulation and describes the limits the government faces in placing conditions on broadcasters' use of the spectrum. These limits, drawn from the Court's unconstitutional conditions doctrine and public forum cases, require that the *quid* (the broadcaster's public interest obligations) be proportionate to the *quo* (the grant of the exclusive right to use the spectrum), that the two bear a close relationship to each other so as to avoid direct or indirect viewpoint discrimination, and that programming rules be clear and specific to avoid arbitrary enforcement decisions.

Although overshadowed by their reliance on scarcity, the Supreme Court's broadcasting cases, including *Red Lion*, have recognized both the public debate theory and *quid pro quo* rationales in establishing the First Amendment standards that apply to broadcasting. The Court may very well soon be called on to reassess these standards. Television broadcasters have recently been granted—again without charge—additional spectrum to convert to the next generation of technology, digital television. This has stirred a vigorous debate regarding what the public should get in return in terms of renewed public interest obligations imposed on broadcasters. President Clinton has established an advisory committee to study the issue.⁹ In addition, as part of broader campaign finance reforms, President Clinton and a number of members of Congress have proposed to require both radio and television broadcasters to provide free air time to political candidates during election time.¹⁰ The debate over these new obligations will inevitably raise the issue of whether they are consistent with the First Amendment and will eventually need to be resolved by the Court. This Article seeks to inform the debate by setting forth doctrinal and theoretical justifications to replace the scarcity rationale.

9. See Exec. Order No. 13,038, 62 Fed. Reg. 12,065 (1997).

10. See S. 25, 105th Cong., 1st Sess. § 102 (1997); Heather Fleming, *Clinton Calls for Free Airtime*, BROADCASTING & CABLE, Mar. 17, 1997, at 18; see also Leslie Wayne, *Broadcast Lobby's Formula: Airtime + Money = Influence*, N.Y. TIMES, May 5, 1997, at C1 (describing current public policy debate over television broadcasters' public interest obligations).

I

AN OVERVIEW OF BROADCAST REGULATION

The federal government has regulated radio and television broadcasters since the early days of broadcasting. Over eighty-five years ago, Congress enacted the Radio Act of 1912, which forbade the operation of a radio apparatus without a license from the Secretary of Commerce and Labor.¹¹ Later, Congress exerted greater regulatory control over broadcasters and other users of the electromagnetic spectrum.¹²

Broadcast licenses are now granted for a period of eight years.¹³ At the end of the eight-year term, broadcasters must apply to the FCC for renewal of their licenses.¹⁴ Congress consistently has required that broadcast licenses be assigned and renewed on the basis of the public interest, convenience, and necessity.¹⁵ Thus, in return for their use of the spectrum, broadcasters must operate and program their stations in the public interest. Broadcasters have come to be viewed as public trustees with a fiduciary obligation to serve the public through their programming. As Judge (later Chief Justice) Burger wrote for the D.C. Circuit, a "broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. . . . [A] broadcast license is a public trust subject to termination for breach of duty."¹⁶

The Communications Act of 1934 delegated the tasks of defining and enforcing broadcasters' "public obligations" to the FCC.¹⁷ Some

11. See Radio Act of 1912, ch. 287, 37 Stat. 302, *repealed by* Radio Act of 1927, ch. 169, § 39, 44 Stat. 1162, 1174, *repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064, 1102. The federal government's initial foray into the regulation of radio transmissions was the Wireless Ship Act of 1910, ch. 379, 36 Stat. 629, which prohibited any steamer carrying or licensed to carry fifty or more persons to leave any American port unless equipped with efficient apparatus for radio communication. See generally *NBC v. United States*, 319 U.S. 190, 210-14 (1943) (describing history of federal regulation of airwaves). For an excellent description of the history of broadcast regulation, see THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* 5-32 (1994). See also Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 213-17 (1982).

12. See Radio Act of 1927, 44 Stat. 1162; Communications Act of 1934, 48 Stat. 1064.

13. See 47 U.S.C.A. § 307(c)(1) (West Supp. 1997); 62 Fed. Reg. 5339, 5347 (1997) (to be codified at 47 C.F.R. § 73.1020). The Radio Act of 1927 originally provided for three-year license terms. See Radio Act of 1927, § 9, 44 Stat. at 1166. Congress lengthened the license term over the years, most recently in Section 203 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 112.

14. See 47 U.S.C.A. § 307(c)(1); see also 47 U.S.C.A. § 309(k) (West Supp. 1997) (setting forth license renewal procedures).

15. See 47 U.S.C.A. § 307(c)(1).

16. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966); see also KRATTENMAKER & POWE, *supra* note 11, at 157-74 (describing evolution of the public trustee concept).

17. See Communications Act of 1934, 48 Stat. 1064 (establishing the FCC). The FCC replaced the Federal Radio Commission, a creature of the Radio Act of 1927. See Radio Act of 1927, ch. 169,

of these obligations are straightforward and content-neutral. Broadcast stations, for example, must operate within clearly defined limits governing transmitter power, antenna height, signal contour, location, and frequency.¹⁸ Broadcasters must also comply with equal employment opportunity requirements¹⁹ and with restrictions on the number of stations they may own.²⁰

But the Commission is more than simply a "traffic officer, policing the wave lengths to prevent stations from interfering with each other."²¹ In addition to the "supervision of the traffic," the statutory public-interest mandate "puts upon the Commission the burden of determining the composition of that traffic."²² For example, the Commission must award broadcast licenses among competing applicants. Until very recently, the FCC was prohibited by statute from auctioning off broadcast licenses when more than one qualified entity applied for a license.²³ It instead drew administrative comparisons among the different suitors and awarded the license to the one that would best serve the public interest.²⁴

A broadcast licensee must abide by a number of programming requirements to be assured that its license will be renewed. Over the past twenty years, the Commission has actually eliminated a number of programming rules due to concerns about their effectiveness in an increasingly competitive video programming marketplace, as well as sensitivity to broadcasters' First Amendment rights.²⁵ Still, a number of

§ 3, 44 Stat. at 1162 (establishing the FRC); *see also* Communications Act of 1934, § 603, 48 Stat. 1064 (replacing the FRC with the FCC).

18. *See* 47 C.F.R. §§ 73.603-73.614 (1996).

19. *See* Streamlining Broadcast EEO Rules and Policies, 11 F.C.C.R. 5154, 5155 (1996).

20. In particular, a single entity may not own more than one broadcast television station in the same local market. Nationally, the entity's television stations may not reach more than 35 percent of television households nationwide. As for radio, the ownership limits vary by the size of the market; in the largest markets (*i.e.*, those with 45 or more commercial radio stations), an entity may own up to 8 commercial radio stations. *See* 47 C.F.R. § 73.3555(a)(1)(i), (b) (1996); *see also* Local Television Ownership Rules, 61 Fed. Reg. 66,978 (1996) (released Dec. 19, 1996) (proposing modifications to the local television ownership rules). The FCC's ownership rules seek to promote competition and diversity in the broadcast industry. *See id.*

21. *NBC v. United States*, 319 U.S. 190, 215 (1943).

22. *Id.* at 216.

23. Section 3002 of the Balanced Budget Act of 1997 amended Section 309(j) of the Communications Act of 1934 to give the FCC authority to auction broadcast licenses to the highest bidder. *See* 143 CONG. REC. H6029, H603I (daily ed. July 29, 1997) (codified at 47 U.S.C.A. § 309(j)); *see also infra* note 226 and accompanying text.

24. *See infra* note 228 and accompanying text.

25. *See, e.g.*, Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076 (1984), *aff'd in part and remanded in part sub nom.* Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987); Deregulation of Radio, 84 F.C.C.2d 968, 968-72 (1981), *rev'd and remanded in part sub nom.* Office of Communication of United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983).

programming rules remain, including requirements that affirmatively seek to promote "public interest" programming. These rules include the general requirement that broadcasters air programming responsive to the needs and interests of their local communities.²⁶ They also include more specific rules, such as the requirement under the Children's Television Act of 1990 (CTA) that television broadcasters air children's educational programming.²⁷ In August 1996, the FCC adopted new rules to strengthen its enforcement of the CTA.²⁸

In addition, both Congress and the FCC have established rules to ensure greater access to the airwaves for political candidates and diverse viewpoints. In particular, broadcasters must provide "reasonable access" to candidates for federal public office and equal opportunities to opposing candidates of all candidate-users of airtime.²⁹ The Communications Act also limits the advertising rates candidates may be charged to the "lowest unit charge" paid by the station's "most favored commercial advertisers."³⁰ In 1987, the Commission repealed the fairness doctrine, which required broadcasters to provide coverage of vitally important controversial issues of interest to the community served by the licensee and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.³¹ There are two corollaries of the fairness doctrine: the personal attack rule, which guarantees a right to reply to individuals who are attacked in the course of a discussion of controversial issues,³² and the political editorial rule, which gives political candidates the right to reply to editorials opposing them or

26. See *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2312 (1960). Toward that end, broadcasters must maintain publicly accessible files containing lists of programs they have aired that address community issues. See 47 C.F.R. § 73.3526(a)(8) & (9) (1996).

27. See *Children's Television Act of 1990 ("CTA")*, Pub. L. No. 101-437, 104 Stat. 996 (1990) (partially codified at 47 U.S.C. § 394).

28. See *Policies and Rules Concerning Children's Television Programming*, 11 F.C.C.R. 10,660 (1996). In this decision, the Commission set forth a guideline that calls for television broadcasters to air an average of three hours per week of programming that is specifically designed to serve the educational and informational needs of children. Stations that do so will be assured of having the CTA portion of their license renewal applications approved by the Commission. See *id.* at 10,718-19; see also 47 C.F.R. § 73.671 n.2 (1996).

29. See 47 U.S.C. §§ 312(a)(7), 315(a) (1994); 47 C.F.R. §§ 73.1941, 73.1944 (1996).

30. 47 U.S.C. § 315(b) (1994); 47 C.F.R. § 73.1942 (1996).

31. See *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5043 n.2, 5057-58 (1987), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

32. See 47 C.F.R. § 73.1920(a) (1996). The personal attack rule provides in pertinent part:

When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall . . . transmit to the persons or group attacked: (1) [n]otification of the date, time and identification of the broadcast; (2) [a] script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) [a]n offer of a reasonable opportunity to respond over the licensee's facilities.

Id. There are a number of exceptions to the rule. See *id.* at § 73.1920(b). *Red Lion* involved a challenge to the personal attack rule. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 373-75 (1969).

favoring their opponents.³³ Although these two rules currently remain in force, the FCC has proposed eliminating both of them in a pending proceeding.³⁴

In addition to rules that seek to encourage various types of programming or access, there are rules that restrict certain types of programming. There is a criminal prohibition against the broadcast of certain lottery information,³⁵ as well as the broadcast of obscene speech.³⁶ FCC regulations restrict the airing of "indecent" programs, defined as material that depicts, "in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience."³⁷ The D.C. Circuit has upheld a ban on the broadcasting of indecent material between 6:00 a.m. and 10:00 p.m., the hours of the day when children are most likely to be in the audience.³⁸ The Commission has fined broadcasters for violating this ban, as it did when Infinity Broadcasting aired certain segments of the Howard Stern show.³⁹

Violent television programming has also drawn the ire of both Congress and the Commission. The Telecommunications Act of 1996 requires the FCC to implement the "V-Chip," a device that will be placed in television sets so that parents can screen out "programming that contains sexual, violent, or other indecent material."⁴⁰ The television industry has devised a voluntary rating system that will work with

33. See 47 C.F.R. § 73.1930(a) (1996). The political editorial rule states in pertinent part:

Where a licensee, in an editorial, (1) [e]ndorses or, (2) [o]pposes a legally qualified candidate or candidates, the licensee shall . . . transmit to, respectively, (i) [t]he other qualified candidate or candidates for the same office or, (ii) [t]he candidate opposed in the editorial, (A) [n]otification of the date and the time of the editorial, (B) [a] script or tape of the editorial and (C) [a]n offer of reasonable opportunity for the candidate or a spokesman of the candidate to respond over the licensee's facilities.

Id.

34. See generally Notice of Proposed Rule Making, *in* Gen. Docket No. 83-484, 48 Fed. Reg. 28,295 (June 21, 1983).

35. See 18 U.S.C. § 1304 (1997); 47 C.F.R. § 73.1211 (1996); see also *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993) (upholding restriction against advertisements of state-run lotteries by stations located in states which did not have such a lottery, even if the station broadcasts into an adjacent state which has a state-conducted lottery). There are certain exceptions to this prohibition. See 18 U.S.C. § 1307 (1994); 47 C.F.R. § 73.1211(c) (1996).

36. See 18 U.S.C.A. § 1464 (West Supp. 1997).

37. *FCC v. Pacifica Found.*, 438 U.S. 726, 731-32 (1978) (upholding restrictions on indecent speech in the broadcast medium).

38. See *Action for Children's Television v. FCC*, 58 F.3d 654, 656 (D.C. Cir. 1995).

39. See, e.g., Letter to Mel Karmazin, President, Infinity Broadcasting Corp., 9 F.C.C.R. 1746 (1994) (issuing Notice of Apparent Liability in the amount of \$400,000 for four broadcasts of the "Howard Stern Show").

40. Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(b)(1), 110 Stat. at 140; see also J.M. Balkin, Comment, *Media Filters, The V-Chip, and the Foundations of Broadcast Regulation*, 45 *DUKE LJ.* 1131 (1996).

the V-Chip and has submitted this system to the FCC for review as provided by the 1996 Act.⁴¹

Finally, there are programming rules that seek to protect consumers or promote public safety. These include the Emergency Alert System used to alert the public in times of national, state, or local emergencies;⁴² the "sponsorship identification" rule;⁴³ the "broadcast hoax" rule;⁴⁴ the statutory prohibition against cigarette and smokeless tobacco advertising;⁴⁵ the requirement that information on licensee-conducted contests be accurate;⁴⁶ statutory "payola" and "plugola" restrictions;⁴⁷ requirements concerning the broadcast of telephone conversations;⁴⁸ requirements concerning the broadcast of taped, filmed, or recorded material;⁴⁹ and a policy against the deliberate rigging, staging, or distortion of a significant news event.⁵⁰

II

THE SCARCITY RATIONALE

The starting point for understanding broadcasting's unique yet tenuous place in the Supreme Court's First Amendment jurisprudence is

41. See Telecommunications Act of 1996, § 551(e); Public Notice, *Commission Seeks Comment on Industry Proposal for Rating Video Programming*, CS Docket No. 97-55, FCC 97-34, Report No. CS 97-6 (Feb. 7, 1997).

42. See 47 C.F.R. Pt. 11 (1996).

43. This rule requires the identification of entities sponsoring broadcast matter for valuable consideration. See 47 U.S.C. § 317 (1994); 47 C.F.R. § 73.1212 (1996).

44. This rule prohibits licensees from knowingly broadcasting false information concerning a crime or catastrophe if it is foreseeable that doing so will cause substantial public harm and does in fact directly cause such harm. See 47 C.F.R. § 73.1217 (1996); *Broadcast Hoaxes*, 70 R.R. 2d 1383 (1992).

45. See 15 U.S.C. §§ 1335, 4402(f) (1994).

46. See 47 C.F.R. § 73.1216 (1996).

47. See 47 U.S.C. §§ 317, 508 (1994). These restrictions arose out of the controversy caused by rigged game shows in the 1950s, as dramatized in the movie *Quiz Show*, as well as charges around the same time that disc jockeys were being bribed to play particular songs on their stations. They seek to prevent such deceptive practices by imposing certain disclosure requirements regarding sponsored programming. See T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE* 386 (1993) (defining "payola" as "accepting or receiving money or other valuable consideration for the inclusion of material in a broadcast without disclosing that fact to the audience," and "plugola" as "promoting goods or services in which someone responsible for selecting the material broadcast has a financial interest").

48. Under these requirements, if the conversation is live, the licensee must inform the other parties to the call of its intention to broadcast before the station can broadcast or record for broadcast the conversation. If the conversation is to be recorded for later broadcast, consent must be given before the recording can start. See 47 C.F.R. § 73.1206 (1996); *Broadcast of Telephone Conversations*, 65 R.R. 2d 444 (1988).

49. See 47 C.F.R. § 73.1208(a) (1996) ("Any taped, filmed or recorded program material in which time is of special significance, or by which an affirmative attempt is made to create the impression that it is occurring simultaneously with the broadcast, shall be announced at the beginning as taped, filmed or recorded.").

50. See *Galloway v. FCC*, 778 F.2d 16, 19-21 (D.C. Cir. 1985).

the scarcity rationale. This rationale has provided the primary basis for upholding the constitutionality of broadcast regulation over the past 50 years. Yet it has been criticized by scholars and courts alike for almost as long. Even the Supreme Court has, however obliquely, raised doubts about the validity of the scarcity rationale, placing broadcast regulation on shaky constitutional ground.

A. *The Supreme Court and the Scarcity Rationale*

The Supreme Court's most recent comprehensive statement regarding the First Amendment and broadcast regulation appeared in *Turner Broadcasting System, Inc. v. FCC*⁵¹ (*Turner I*), a 1994 case regarding cable television regulations. *Turner I* involved a challenge to the "must-carry" obligations that require cable systems to carry local broadcast channels. In an opinion for the Court, Justice Kennedy observed that "our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media."⁵² He explained that the justification for the distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium.

As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all. The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters. In addition, the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees.⁵³

The Court in *Turner I* concluded that the lower level of First Amendment scrutiny that applied to broadcast regulation should not apply to cable regulation. This was because "cable television does not suffer from the inherent limitations that characterize the broadcast medium."⁵⁴

51. 114 S. Ct. 2445 (1994) [hereinafter *Turner I*].

52. *Id.* at 2456.

53. *Id.* at 2456-57 (citations omitted).

54. *Id.* at 2457. The Court added: "Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel." *Id.* With respect to the particular issue before it, the Court held the must-carry regulations to be content-neutral restrictions on cable operators' speech, subject to intermediate First Amendment scrutiny. *See id.* at 2469. A plurality of the Court considered

The Supreme Court introduced the scarcity rationale in a case that predates *Turner I* by over fifty years. In *NBC v. United States*,⁵⁵ the Court upheld FCC regulation of the relationship between broadcast licensees and the networks (like NBC) that provided much of their programming.⁵⁶ Much of the case concerned the FCC's statutory authority to regulate such activity. Authored by Justice Frankfurter, the Court's broadly worded opinion held that the expansive public interest standard in the Communications Act did indeed bestow this authority on the Commission. The FCC's mandate was "to secure the maximum benefits of radio to all the people of the United States."⁵⁷ In reaching this holding, the Court described the chaos that reigned on the airwaves prior to the Radio Act of 1927, when unregulated radio stations went on the air with impunity and without any concern for interfering with other stations. According to the Court, the "plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody."⁵⁸

Thus was born the scarcity rationale. It provided the framework for analyzing the FCC's authority under the Communications Act, for the "facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest."⁵⁹ It also provided the basis for the Court's almost backhanded dismissal of the networks' claim that the challenged regulations violated the First

the record as then developed insufficient to determine whether the regulations could withstand such scrutiny and remanded the case for further fact-finding. *See id.* at 2472. On a subsequent appeal, the Court upheld the must-carry provisions, holding that the record on remand supported a finding that the provisions were narrowly tailored to further important governmental interests. *See Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174 (1997) (*Turner II*).

55. 319 U.S. 190 (1943).

56. The challenged regulations included the exclusive affiliation rule, the territorial exclusivity rule, a rule limiting the term of affiliation contracts to three years, the option-time rule, the right-to-reject rule, the network-ownership rule, the dual-network-operation rule, and the network-control-of-station-rates rule. *See id.* at 198-209. These rules were intended to protect against network dominance and to promote a greater diversity of programming reaching the audience. Many of them are still on the books today. *See* 47 C.F.R. §§ 73.658, 73.3613(a) (1996). The Commission, however, is currently reviewing the continuing need for these rules in the increasingly competitive television marketplace that exists today. *See In re Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, 10 F.C.C.R. 11951 (1995) (released June 15, 1995); *In re Review of the Commission's Regulations Governing Broadcast Television Advertising*, 10 F.C.C.R. 11853 (1995) (released June 14, 1995); *In re Amendment of Part 73 of the Commission's Rules Concerning the Filing of Television Network Affiliation Contracts*, 10 F.C.C.R. 5677 (1995) (released Apr. 5, 1995).

57. *NBC*, 319 U.S. at 217.

58. *Id.* at 213; *cf.* Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133 (1990) (tracing the origins of early broadcast regulations and arguing that federal regulatory decisions were designed to generate profits for influential constituents).

59. *NBC*, 319 U.S. at 216.

Amendment: "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."⁶⁰ The challenged regulations were simply an extension of the FCC's licensing authority, and the exercise of this authority under the public interest standard "is not a denial of free speech."⁶¹

The most comprehensive statement of the Court's First Amendment analysis of broadcast regulation, and its reliance on the scarcity rationale, came in the 1969 *Red Lion* case.⁶² The case arose out of the broadcast by WGCB, a radio station licensed to the Red Lion Broadcasting Company, of a 15-minute segment of Reverend Billy James Hargis' "Christian Crusade." In the broadcast, the good reverend railed against Fred J. Cook, a left-leaning journalist who had been critical of Barry Goldwater. Hargis charged that Cook had been fired from a newspaper for making false charges against city officials and that he had communist sympathies, having—heaven forbid—defended Alger Hiss and criticized J. Edgar Hoover and the CIA. Cook demanded that WGCB provide him free reply time. The FCC sided with Cook, finding that he had been subject to a personal attack and that WGCB had failed to live up to its obligations under the fairness doctrine to notify him of the attack and to provide Cook free reply time.

The station pursued the case to the Supreme Court, challenging the fairness doctrine, including the personal attack rule, as exceeding the FCC's statutory authority and as a violation of the First Amendment. Rejecting the first argument, the Supreme Court held that the fairness doctrine "and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority."⁶³ The Court then upheld the regulations under the First Amendment in "view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views."⁶⁴

The Court emphasized that broadcasting was unique because of the scarcity of broadcast spectrum. In short, "there are substantially more individuals who want to broadcast than there are frequencies to allocate . . ."⁶⁵ This scarcity made it "idle to posit an unbridgeable First

60. *Id.* at 226.

61. *Id.* at 227.

62. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

63. *Id.* at 385.

64. *Id.* at 400.

65. *Id.* at 388.

Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."⁶⁶ To the contrary:

There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves. . . . 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.⁶⁷

In stark contrast to *Red Lion*, in 1974 the Supreme Court struck down a Florida statute that required newspapers to provide political candidates with free space to reply to an editorial attacking the candidate's personal character.⁶⁸ The Court in *Tornillo* rejected arguments that concentration of control in the newspaper industry justified government intervention to ensure an open and robust political debate and ruled that the statute "fails to clear the barriers of the First Amendment because of its intrusion into the function of editors."⁶⁹ Despite the striking similarity between the two cases, *Tornillo* makes no mention of *Red Lion* or, for that matter, the scarcity rationale.

Viewed as enjoying a uniquely scarce resource, broadcasters have thus been subject to a lower level of First Amendment scrutiny than other media. Regulation of broadcast program content must be "narrowly tailored to further a substantial governmental interest."⁷⁰ This is similar to the standard that applies to content-neutral regulation, such as time, place, and manner restrictions.⁷¹ It is a far cry from the exacting scrutiny applied to content-based regulation of other media. Such regulations must be "precisely drawn means of serving a compelling state interest."⁷² Few regulations survive this test.

B. Debunking the Scarcity Rationale

Academia has maintained a withering attack on the scarcity rationale for years. To be sure, there are still a few ardent defenders.⁷³ But it is fair to say that the rationale "has lost credibility in the

66. *Id.*

67. *Id.* at 389-90.

68. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

69. *Id.* at 258.

70. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 380 (1984).

71. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

72. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980).

73. *See, e.g., Reed E. Hundt, A New Paradigm for Broadcast Regulation*, 15 J.L. & Com. 527, 542-43 (1996). (Mr. Hundt was Chairman of the FCC from November 1993 to November 1997.)

contemporary legal literature."⁷⁴ There are a number of possible variants to the scarcity rationale, each of which has been roundly criticized.⁷⁵ The essential reason for the rationale's shortcomings is the fact that "it is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists."⁷⁶ Scarcity therefore provides no basis for distinguishing broadcasting from other media—which similarly rely on scarce resources—in First Amendment analysis. In the words of one astute observer, the spectrum scarcity rationale is based on a "public policy non sequitur."⁷⁷

The lower courts have joined the growing chorus of critics. Judge Robert Bork has provided perhaps the best summary of the shortcomings of the scarcity rationale in an opinion he authored for the D.C. Circuit:

[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. . . . 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.⁷⁸

Even the politicians have jumped on the bandwagon. In one of his less "kinder, gentler" moments, President Bush refused to sign the Children's Television Act of 1989 (which nonetheless became law) because of his administration's disagreement with *Red Lion's* spectrum

74. Hazlett, *supra* note 58, at 138 n.15. The legal literature is replete with writings criticizing the spectrum scarcity rationale. For detailed critiques, see KRATTENMAKER & POWE, *supra* note 11, at 204-19; LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 200-09 (1987); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1007-20 (1989).

75. See KRATTENMAKER & POWE, *supra* note 11, at 204-19; Spitzer, *supra* note 74, at 1007-20.

76. R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959).

77. Hazlett, *supra* note 58, at 138.

78. *Telecommunication Research & Action Ctr. v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) (footnotes omitted); see also *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1442 n.12 (8th Cir. 1993) (questioning the scarcity rationale). But see *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 973-77 (D.C. Cir. 1996) (upholding regulation of direct broadcast satellite service under scarcity rationale).

scarcity rationale.⁷⁹ This followed a similar Reagan administration pocket-veto of a previous version of the Children's Television Act⁸⁰ and veto of Congress's attempt to reinstate the fairness doctrine.⁸¹ In the 1996 presidential election, Republican candidate Bob Dole similarly lashed out at the scarcity principle.⁸²

Has the Supreme Court gotten the message? It may be gradually sinking in, however slowly. Justice Douglas was the first dissenting voice. Absent from the unanimous *Red Lion* decision, he expressed disapproval in a subsequent case, stating that he "would not support it."⁸³ He pointed out that, while broadcast frequencies are scarce, "in practical terms the newspapers and magazines, like TV and radio, are also available only to a select few."⁸⁴ It was his "conclusion . . . that TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines."⁸⁵

In 1984, the Court reaffirmed the scarcity rationale in *FCC v. League of Women Voters of California*⁸⁶ yet also indicated that it might reexamine the issue in the future. The Court struck down a statutory ban on editorializing on public broadcasting stations that received federal funding.⁸⁷ In doing so, the Court adhered to its view that the "fundamental distinguishing characteristic of the new medium of broadcasting that . . . has required some adjustment in First Amendment analysis is that '[b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants."⁸⁸ But it noted that the scarcity

79. See S. REP. NO. 227-101, at 10-16 (1989) (finding the Children's Television Act to be consistent with the First Amendment and rejecting the Bush administration's position that *Red Lion* was no longer good law).

80. See *id.* at 5.

81. See *Veto of the Fairness in Broadcasting Act of 1987*, 23 WEEKLY COMP. PRES. DOC. 715 (June 19, 1987) (vetoing S. 742-100 (1987), reprinted in 133 CONG. REC. H4160 (daily ed. June 3, 1987)).

82. See *The Dole Goal*, *supra* note 7, at 29. Alas, Bush and Dole may have scored points with scholars (and certainly broadcasters) with their positions on broadcast regulation, but they had less luck with the general electorate. By contrast, Bill Clinton presented a rosy, family-friendly campaign message that included strong advocacy for continuing public interest regulation of broadcasters. See *Review of Policies and Rules Concerning Children's Television Programming*, 11 F.C.C.R. 10,660, 10,718 n.280 (1996) (noting letter of President Clinton advocating that the FCC require broadcasters to "air at least three hours per week, and preferably more, of educational children's programming"). Clinton also took a prominent role in jawboning television broadcasters into providing more educational programming for children, an effort that led to stricter FCC rules in this area. See *id.* at 10,662 & n.7.

83. *CBS, Inc. v. Democratic Nat'l Comm.*; 412 U.S. 94, 154 (1973) (Douglas, J., concurring). Justice Douglas concurred in the decision of the Court holding that neither the First Amendment nor the Communications Act requires broadcasters to accept editorial advertisements. See *id.* at 148.

84. *Id.* at 159.

85. *Id.* at 148.

86. 468 U.S. 364 (1984).

87. See *id.* at 364.

88. *Id.* at 377 (quoting *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973)).

rationale "has come under increasing criticism in recent years" as "obsolete" in a time when cable and satellite television technology has given communities access to a greater variety of video programming.⁸⁹ Yet the Court was clearly hesitant to venture down a road that could lead to the overturning of a fifty-year-old regulatory scheme and all the settled political and private expectations that come with it. Instead, it passed the buck, stating that it was "not prepared . . . to reconsider our long-standing 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."⁹⁰

The signal was short in coming, from the FCC at least. In 1987, the Commission, led by a Republican chairman, repudiated *Red Lion*. In ruling that the fairness doctrine was contrary to both the public interest and the First Amendment, the Commission found that the concept of scarcity was irrelevant and, in any event, that developments in technology and new allocations of broadcast stations had resulted in a wide variety of broadcast and other communications outlets. It consequently urged the Supreme Court to reconsider *Red Lion* and to treat broadcasters the same as newspaper publishers for purposes of the First Amendment.⁹¹

The FCC's change in policy, however, encountered severe interference. On appeal, the D.C. Circuit affirmed the Commission's elimination of the fairness doctrine, but the majority of the court did so on grounds that did not reach the First Amendment issue and the validity of the scarcity rationale.⁹² The FCC's signal was also quickly countermanded by the then Democrat-controlled Congress, which enacted a bill to reinstate the fairness doctrine.⁹³ Although this effort was blocked by President Reagan's veto,⁹⁴ Congress clearly did not agree with the FCC's views on the First Amendment treatment of broadcasters. In 1990, it enacted the Children's Television Act, over the Bush administration's First Amendment objections, and in doing so Congress once again embraced the concept of spectrum scarcity as a justification for content regulation of broadcasting.⁹⁵

89. *League of Women Voters*, 468 U.S. at 376 n.11.

90. *Id.*

91. See *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5052-58 (1987), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

92. See *Syracuse Peace Council*, 867 F.2d at 655-56. The court upheld the FCC's decision on the grounds that the FCC could reasonably have found as a policy matter that the fairness doctrine no longer served the public interest because the doctrine had the net effect of discouraging broadcasters' coverage of controversial issues. See *id.* at 656, 665.

93. See S. REP. NO. 742-100 (1987), *reprinted in* 133 CONG. REC. H4160 (daily ed. June 3, 1987) (enacted).

94. See *Veto of the Fairness in Broadcasting Act of 1987*, *supra* note 81, at 715-16.

95. See S. REP. NO. 227-101, at 10-16 (1989).

The Court will most likely continue to receive mixed signals from the other branches of government, although the players have since changed sides. The Republicans are now in charge of Congress and have made rumblings about eliminating the FCC altogether, let alone the current regime of broadcast regulation.⁹⁶ However, the Democrats now lead both the White House and the Commission, both of which strongly advocate continued public interest regulation of broadcasting; indeed, the Commission recently adopted tighter rules in enforcing the Children's Television Act, invoking *Red Lion* and the scarcity rationale to fend off First Amendment objections to the new rules.⁹⁷ Add to this the extreme divisions on the Court concerning basic conceptions of First Amendment jurisprudence,⁹⁸ and it is quite possible that *Red Lion* and its scarcity rationale will continue to march on, albeit with a bit of a limp.

Still, the Court will have to confront the issue of *Red Lion's* validity at some point. It parried with it in the *Turner I* decision. In *Turner I*, the Court acknowledged, as it had in *League of Women Voters*, the critics of the scarcity rationale.⁹⁹ As if holding its nose to a stench that would not go away, the Court stated that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, *whatever its validity in the cases elaborating it*, does not apply in the context of cable regulation."¹⁰⁰ Given this, it again "declined to question [the scarcity rationale's] continuing validity as support for [its] broadcast jurisprudence."¹⁰¹ While the Court dodged the bullet yet again, *Turner I* certainly cannot be read as a ringing endorsement of *Red Lion* or the scarcity rationale. In a subsequent case addressing the constitutionality of restrictions imposed on indecent speech on cable channels, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, indicated in dicta his readiness to dispense with the distinctions the Court has drawn between different media, calling them "dubious from their infancy."¹⁰² More recently, a majority of the Court seemed to distance itself somewhat from the scarcity rationale. In striking down provisions of the Communications Decency Act, the Court declined to apply the

96. See, e.g., GEORGE A. KEYWORTH ET AL., *THE TELECOM REVOLUTION—AN AMERICAN OPPORTUNITY* (1995); Peter Huber, *Abolish the FCC*, *FORBES*, Feb. 13, 1995, at 184.

97. See Policies and Rules Concerning Children's Television Programming, 11 F.C.C.R. 10,660, 10,728-33 (1996).

98. For example, the Justices were strongly divided over First Amendment issues in two recent cases regarding cable regulation. See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996); *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994) (*Turner I*).

99. See *Turner I*, 114 S. Ct. at 2457.

100. *Id.* at 2456 (emphasis added).

101. *Id.* at 2457 (citation omitted).

102. *Denver*, 116 S. Ct. at 2420 (Thomas, J., concurring in part and dissenting in part).

scarcity rationale to the Internet.¹⁰³ In doing so, it acknowledged that its "cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers."¹⁰⁴ The Court cited the scarcity rationale as one such justification, but also hedged its bets by citing as additional justifications "the history of extensive government regulation of the broadcast medium" and "its 'invasive' nature."¹⁰⁵

In consequence, it seems to be just a matter of time before the Court will have to decide whether the scarcity rationale justifies a lower level of scrutiny under the First Amendment for broadcast regulation. The remainder of this Article seeks to provide alternative justifications to replace the scarcity rationale and place broadcast regulation on sound and more principled First Amendment footing.¹⁰⁶

III

BROADCASTING AND FORUM ANALYSIS

Aside from scarcity, a number of reasons have been offered to justify at least some degree of regulation of broadcast speech. The Supreme Court itself has justified restrictions on the broadcast of indecent programming on grounds other than scarcity. In *FCC v. Pacifica Foundation*,¹⁰⁷ a man was driving with his young son one afternoon when the radio station to which they were tuned broadcast the "Filthy Words" monologue of George Carlin. Carlin satired "the words you couldn't say on the public . . . airwaves, . . . shit, piss, fuck, cunt, cocksucker, motherfucker, and tits."¹⁰⁸ The man apparently found no humor in this, for he filed a complaint with the FCC. The Commission ruled that the complaint had merit, finding that the broadcast, while not obscene, was indecent in that it used "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at

103. See *Reno v. ACLU*, 117 S. Ct. 2329, 2343-44 (1997).

104. *Id.* at 2343 (citations omitted).

105. *Id.* (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989)).

106. Regulation of direct broadcast satellite service ("DBS") also appears to hang in the balance. Orbiting satellites beam DBS programming to household dishes via a designated band of the spectrum. DBS providers are required, as a condition of receiving FCC licenses to use this spectrum, to reserve a portion of their channel capacity "equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature." See 47 U.S.C. § 335(b)(1) (1994). The D.C. Circuit recently upheld the constitutionality of this requirement based on *Red Lion's* scarcity rationale. See *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 973-79 (D.C. Cir. 1996). Because the demand for the finite number of available DBS orbital slots and frequencies exceeds their supply, the court concluded that the requirement "should be analyzed under the same relaxed standard of scrutiny that the [Supreme Court] has applied to the traditional broadcast media." *Id.* at 975.

107. 438 U.S. 726 (1978).

108. *Id.* at 751.

times of the day when there is a reasonable risk that children may be in the audience."¹⁰⁹ The Supreme Court upheld the Commission's ruling. Making no mention of the scarcity rationale, the Court premised its holding on its view that broadcasting has "established a uniquely pervasive presence in the lives of all Americans" and "is uniquely accessible to children."¹¹⁰ In this context, the First Amendment did not prohibit the government from restricting the broadcast of indecent speech in order to keep the pig out of the parlor.¹¹¹

While offering a new rationale, *Pacifica's* impact may go no farther than the context of indecency and other forms of speech that, in the Court's view, "lie at the periphery of First Amendment concern."¹¹² Indeed, the Court emphasized the highly contextual nature and "narrowness" of its holding.¹¹³ *Pacifica* consequently cannot fill the shoes of the scarcity rationale in providing a broader justification for regulating broadcast speech under the First Amendment.

Commentators have proposed a number of other theories as replacements for the scarcity rationale. A recent article argues persuasively that broadcasters engage in commercial speech, which the Supreme Court has generally granted the government greater leeway in regulating.¹¹⁴ But perhaps the strongest rationale for broadcast regulation relates to the preferential treatment broadcasters receive in being granted exclusive rights to use the electromagnetic spectrum. Viewed in this manner, broadcast regulation should be examined under the Supreme Court's public forum doctrine.

A. The Public Forum Doctrine

The modern public forum doctrine has developed over a period of approximately sixty years.¹¹⁵ It has sought to define First Amendment speech rights on public property, balancing the interests in free expression on such property against countervailing interests in using the property for other purposes. The very earliest cases gave the government

109. *Id.* at 732.

110. *Id.* at 748, 749.

111. *See id.* at 750-51.

112. *Id.* at 743.

113. *See id.* at 750. The Court, however, recently invoked *Pacifica* in upholding certain aspects of a federal law that restricts indecent programming carried on cable systems. *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2386 (1996). Some commentators have been critical of *Pacifica*. *See, e.g.,* KRATTENMAKER & POWE, *supra* note 11, at 196-202, 219-21.

114. *See generally* Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television Programming*, 45 DUKE L.J. 1193 (1996).

115. For excellent overviews of the Supreme Court's line of public forum cases, see Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79; Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

virtually unfettered discretion over speech on public property. The Court found that the government was just like any other property owner and an owner's "right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."¹¹⁶

Beginning in the 1930s, however, the Court afforded wide First Amendment protection to speech taking place on certain public forums, such as streets and parks. The Court reasoned that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."¹¹⁷ The vital role these places play in public debate and expression trump the government's property right.¹¹⁸ While they may be subject to reasonable time, place, and manner restrictions, content-based regulation of speech on such forums is subject to the highest scrutiny.

Not all public property is treated like streets and parks, however. To the contrary, the Court has stated,

Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities. . . . [T]he Government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."¹¹⁹

In balancing this interest against the interest in free expression, the Court has developed a categorical approach that emphasizes the nature and purpose of the public property at issue. This "forum analysis" provides the "means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."¹²⁰

B. The Court's Public Forum Categories

The Court has identified three general categories of public forums, and the level of First Amendment scrutiny varies significantly among

116. *Davis v. Massachusetts*, 167 U.S. 43, 48 (1897).

117. *Hague v. CIO*, 307 U.S. 496, 515 (1939).

118. In a ground-breaking article that coined the phrase "public forum," First Amendment scholar Harry Kalven, Jr. explored the vital interests in ensuring free expression in such public places as streets and parks. See Harry Kalven Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 *SUP. CR. REV.* 1.

119. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985) (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)).

120. *Id.* at 800.

them. The first category involves traditional public forums such as streets and parks. The highest level of scrutiny applies to these "quintessential public forums."¹²¹ The government may not prohibit all communicative activity, and any content-based regulation must be narrowly drawn to serve a compelling government interest. Content-neutral time, place, and manner restrictions are permissible so long as they are "narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication."¹²²

The second category is designated public forums, *i.e.*, "public property which the State has opened for use by the public as a place for expressive activity."¹²³ There are two kinds of designated public forums: limited and unlimited. A designated public forum of unlimited character is generally open to all comers, such as a municipal auditorium that a town has permitted the general public to use.¹²⁴ A limited designated public forum, by contrast, is "created for a limited purpose such as use by certain groups, . . . or for the discussion of certain subjects."¹²⁵

The government is not required to open up unlimited designated public forums for public discourse. But if it does so, it is subject to the same scrutiny that applies to a traditional public forum: "[R]easonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."¹²⁶ The Court has stated that a designated public forum is not created

by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.¹²⁷

The creation of an unlimited designated public forum triggers the highest level of scrutiny. Limited public forums receive a lower level of scrutiny: A recent decision by the Court holds that content-based restrictions on speech in limited public forums are permissible provided

121. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

122. *Id.* (citations omitted).

123. *Id.*

124. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975).

125. *Perry*, 460 U.S. at 46 n.7 (citing *Widmar v. Vincent*, 454 U.S. 263 (1981) (student groups) and *City of Madison Joint Sch. Dist. v. Wisconsin Pub. Employment Relations Comm'n*, 429 U.S. 167 (1976) (school board business)).

126. *Id.* at 46 (citation omitted).

127. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (citation omitted).

they are “reasonable in light of the purpose served by the forum” and do not “discriminate against speech on the basis of its viewpoint.”¹²⁸

The same lower-level First Amendment scrutiny applies to the third general category, nonpublic forums. The Court has stated that it “will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will [it] infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity.”¹²⁹ The Court has found that such places or instrumentalities as military reservations,¹³⁰ jailhouse grounds,¹³¹ public school mail facilities,¹³² and a charity drive aimed at federal employees¹³³ were nonpublic forums. As with limited public forums, “the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”¹³⁴

A reviewing court’s categorization of a forum is thus critical to the First Amendment analysis. Regulation of traditional or designated unlimited public forums faces a very high hurdle, with content-based rules rarely surviving this strict scrutiny. In contrast, the government has considerably more leeway in regulating a limited or nonpublic forum; it may impose reasonable content-based regulations provided they are viewpoint neutral.

C. Broadcasting as a Limited Public Forum

If the Supreme Court were to reject the scarcity rationale, the public forum doctrine could provide an alternative basis for upholding broadcast content regulation. Several commentators have described such a possibility, although with varying degrees of enthusiasm.¹³⁵ Given the

128. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2517 (1995) (quoting *Cornelius*, 473 U.S. at 804-06).

129. *Cornelius*, 473 U.S. at 803 (citation omitted).

130. See *Greer v. Spock*, 424 U.S. 828 (1976).

131. See *Adderley v. Florida*, 385 U.S. 39 (1966).

132. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

133. See *Cornelius*, 473 U.S. at 788.

134. *Perry*, 460 U.S. at 46 (citation omitted); see also *Cornelius*, 473 U.S. at 806 (“Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”).

135. Compare KRATTENMAKER & POWE, *supra* note 11, at 225-29 (acknowledging that a government-property rationale could be “grounded in logic and precedent,” but criticizing such an approach as insufficient to treat broadcasters differently than newspaper publishers for purposes of First Amendment analysis); Spitzer, *supra* note 74, at 1028-66 (describing how the Supreme Court could uphold broadcast regulation on the basis of a government-property rationale and public forum doctrine, but arguing that government ownership of the entire broadcast spectrum would itself be unconstitutional) with WILLIAM W. VAN ALSTYNE, *FIRST AMENDMENT* 490-97 (1991) (applying public forum analysis to broadcast regulation); Reed Hundt & Karen Kornbluh, *Renewing the Deal*

nature of the forum at issue and the longstanding model of government regulation of the spectrum, the Court could very well categorize the broadcast spectrum as a limited public forum. Broadcast regulation would generally be subject to the same lower-level First Amendment scrutiny applied in *Red Lion* and other broadcast cases, but for different reasons.

The central premise of this argument is that broadcasters have been granted the exclusive use of a valuable resource—the electromagnetic spectrum—which Congress has deemed to be public property. In particular, UHF and VHF television stations each use 6 MHz of the spectrum; FM and AM radio stations each use 200 kHz and 10 kHz of spectrum, respectively.¹³⁶ Congress declared in the Radio Act of 1927 that this spectrum was public property, expressly rejecting a regime that would have allowed individuals to obtain private property rights in the spectrum.¹³⁷ This approach was carried forward in the Communications Act of 1934, which states that:

It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, *but not the ownership thereof*, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.¹³⁸

Forum analysis is not limited to tangible property. For example, a recent public forum case dealt with a student activities fund, which was “a forum more in a metaphysical than in a spatial or geographic sense,

Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television, 9 HARV. J.L. & TECH. 11, 21 (1996) (arguing that “government may impose reasonable, viewpoint-neutral restrictions on a private party's use of public resources” such as broadcast spectrum); Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976, 996-97 n.81 (1997) (noting the possibility of upholding broadcast regulation based on the theory that government may impose conditions on the use of public resources); William E. Kennard & Jonathan E. Nuechterlein, *Heeding Congress' Call on Kids' TV*, LEGAL TIMES, Jan. 8, 1996, at 29-30 (1984) (arguing that regulation of broadcast programming can be upheld under the public forum doctrine) (Mr. Kennard is currently Chairman of the FCC).

136. “MHz” and “kHz” stand for, respectively, megacycles and kilocycles per second—a measure of the frequency (or rate of oscillation) of a particular electromagnetic radiation being emitted by a station. FM radio stations and the 12 VHF television stations on the dial (or, these days, the clicker) are allocated from the 30 to 300 MHz band of the spectrum. UHF television spectrum, located on channels 14-69, is in the 300 to 3,000 MHz band. AM radio is located in the range between 300 and 3,000 kHz, one kHz being one thousand cycles per second. See CARTER ET AL., *supra* note 47, at 44-45.

137. See Radio Act of 1927, ch. 169, § 1, 44 Stat. 1162.

138. 47 U.S.C. § 301 (1934) (emphasis added).

but the same principles are applicable."¹³⁹ Broadcasters similarly use intangible property—the electromagnetic spectrum—to communicate their ideas. The broadcast spectrum is consequently the forum in which broadcast speech takes place. Having thus identified the forum, the next question is which particular forum category should apply for purposes of “assessing restrictions that the government seeks to place on the use of its property.”¹⁴⁰

The broadcast spectrum does not fall in the traditional public forum category. Unlike streets and parks, the spectrum has neither “by long tradition [n]or by government fiat . . . been devoted to assembly and debate,”¹⁴¹ nor has it been a designated public forum of unlimited nature. To the contrary, access to the spectrum is limited to those broadcasters who have received a license to use the airwaves, and they may program their channels as they see fit as long as they abide by their public interest obligations. The Communications Act expressly states that broadcasters are not to be treated as common carriers—a conduit for the speech of others.¹⁴² They need only provide “reasonable access” to federal political candidates, as well as a right to reply to personal attacks and political editorials, all under carefully prescribed circumstances. Indeed, the Supreme Court has held that neither the First Amendment nor the Communications Act requires broadcasters to accept paid editorial announcements from citizens at large, and the Commission has ruled that “no private individual or group has a right to command the use of broadcast facilities.”¹⁴³

The broadcast regulatory scheme of the past 70 years has sought “to strike a proper balance between private and public control.”¹⁴⁴ This scheme relies heavily on private enterprise, giving broadcasters considerable editorial discretion over programming. Marketplace forces govern this discretion, which, assuming a competitive market, generally maximizes consumer satisfaction. Broadcasters respond to the wants and needs of their audience because their financial success depends on it.¹⁴⁵ Congress and the Commission, however, have identified certain instances

139. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2517 (1995); *see also Cornelius*, 473 U.S. at 800-01 (applying public forum analysis to federal government charity drive).

140. *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

141. *Perry*, 460 U.S. at 45.

142. *See* Communications Act of 1934, ch. 652, §3(h), 48 Stat. 1066, *amended by* 47 U.S.C. § 153(h) (West Supp. 1997) (“[A] person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.”); *see also* *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 105 (1973) (finding in the legislative history of the Radio Act of 1927 that “Congress specifically dealt with—and firmly rejected—the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues”).

143. *CBS*, 412 U.S. at 113.

144. *Id.* at 104.

145. *See generally* *Deregulation of Radio*, 84 F.C.C.2d 968, 976-79 (1981).

in which the market may not supply diverse or socially beneficial programming. For example, with the Children's Television Act of 1990,¹⁴⁶ Congress found that market forces were not sufficient to ensure that commercial television stations would provide a sufficient amount of children's educational programming.¹⁴⁷ As a consequence, the CTA, as implemented by the FCC, now calls for television stations to air three hours per week of such programming.¹⁴⁸ In sum, the American broadcasting system harnesses the power of private enterprise to serve consumer needs, but the regulatory scheme also promotes certain public interest goals that the market may not be able to achieve.¹⁴⁹

The forum at issue, then, is based on a model of regulated private enterprise that is neither a traditional public forum nor an unlimited designated public forum. That leaves the possibility that broadcast spectrum is either a limited designated public forum or nonpublic forum. The Court, unfortunately, has not been entirely clear about the difference between these two types of forums, although they are closely related doctrinally. As described below, an analysis of the Court's nonpublic forum cases and a recent case involving limited public forums indicates that the broadcast spectrum is best characterized as a limited designated public forum.

The Court has relied heavily on historical practice and the character of the relevant property in forum analysis. This has led it to conclude that an internal school mail system¹⁵⁰ and a federal workplace charity drive¹⁵¹ are nonpublic forums. Each of these forums permitted some degree of expressive activity, but excluded certain types of communication in order to preserve the use of the forum for other intended purposes. In the charity drive case, for example, the Court upheld the exclusion of legal defense and political advocacy groups from the drive, because this minimized disruption of the federal workplace and avoided the appearance of political favoritism.¹⁵² In another case, the court held

146. Pub. L. No. 101-437, 104 Stat. 996 (1990) (codified at 47 U.S.C. §§ 303(a), 303(b), 394.

147. See S. REP. No. 227-101, at 8-9 (1989); see also Policies and Rules Concerning Children's Television Programming, 11 F.C.C.R. 10,660, 10,674-76 (1996) (explaining the economic disincentives for commercial broadcasters to provide children's educational programming).

148. See 47 C.F.R. § 73.671 n.2.

149. See *CBS*, 412 U.S. at 109 (finding that the Communications Act of 1934 "evinces a legislative desire to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations."). The political broadcasting rules are another example of promoting societal goals that the market does not sufficiently provide. See *infra* notes 202-206 and accompanying text.

150. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

151. See *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985).

152. The Court nonetheless remanded the case, directing the lower courts to determine whether the regulations, while valid on their face, were "in reality a facade for viewpoint-based discrimination." *Id.* at 811-13.

that an airport terminal was a nonpublic forum,¹⁵³ emphasizing that the “decision to create a public forum must . . . be made ‘by intentionally opening a nontraditional forum for public discourse.’”¹⁵⁴

Some of the Court’s opinions suggest that nonpublic forums are limited to those circumstances “[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license.”¹⁵⁵ When it comes to spectrum policy, the government is acting not as a proprietor but as a regulator. Consequently, the broadcast spectrum would most likely be characterized as a designated forum of limited nature. Like other limited public forums, the use of the spectrum is limited to certain groups (licensed broadcasters) and is accompanied by regulations that seek to promote speech on certain subjects (e.g., political campaign speech, children’s educational programming).

Some of the Court’s opinions have indicated that content regulation in designated public forums is “subject to the same limitations as that governing a traditional public forum” whether or not they are limited or unlimited in nature.¹⁵⁶ Yet the Court’s recent decision in *Rosenberger v. Rector and Visitors of the University of Virginia*¹⁵⁷ provides the government leeway in drawing content-based distinctions in limited public forums, provided it does not engage in viewpoint discrimination. The limited forum at issue in *Rosenberger* was a student activities fund that subsidized the printing costs of a variety of student publications. The university disbursed these funds based on a set of guidelines that, among other things, prohibited the funding of student religious activities. While the Court struck this prohibition down as unlawful viewpoint discrimination, it recognized that the government “‘may legally preserve the property under its control for the use to which it is dedicated.’ The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”¹⁵⁸ The government may consequently impose content-based restrictions on limited public forums provided they are “reasonable in light of the purpose served by the forum” and do not “discriminate

153. See *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

154. *Id.* at 680 (quoting *Cornelius*, 473 U.S. at 802).

155. *Lee*, 505 U.S. at 678; see also *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2413, 2374 (1996) (Kennedy, J., concurring in part and dissenting in part).

156. *Lee*, 505 U.S. at 678; see also *Denver*, 116 S. Ct. at 2410 (Kennedy, J., concurring in part and dissenting in part) (“Regulations of speech content in a designated public forum, whether of limited or unlimited character, are ‘subject to the highest scrutiny’ and ‘survive only if they are narrowly drawn to achieve a compelling state interest.’”) (quoting *Lee*, 505 U.S. at 678).

157. 115 S. Ct. 2510 (1995).

158. *Id.* at 2516-17 (quoting *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993)).

against speech on the basis of its viewpoint."¹⁵⁹ Interestingly, as support for this standard, the Court cited two of its nonpublic forum cases,¹⁶⁰ further indicating that regulation of both limited public forums and nonpublic forums receive similar, more deferential First Amendment scrutiny.

This deferential level of scrutiny resembles the First Amendment tests applied in *Red Lion* and its progeny of broadcast regulation cases, requiring content-based rules to be "narrowly tailored to further a substantial governmental interest."¹⁶¹ Under both analytical frameworks, the current system of broadcast regulation can be found to be consistent with the First Amendment as viewpoint neutral, reasonable, and serving substantial government interests. The rules affording access to political candidates, for example, serve a vital governmental interest in promoting political dialogue, and do so without regard to the political viewpoint in question.

The public forum doctrine thus provides an independent basis for upholding broadcast regulation under the First Amendment. Justice Stevens appears to hold this view. In a separate opinion in a recent case, he cited *Red Lion* as among the Court's cases that "recognize that reasonable restraints may be placed on access to certain well-regulated fora."¹⁶² He echoed this view in a subsequent opinion, this time for a majority of the Court, in stating that the "history of extensive government regulation of the broadcast medium" was one of several "special justifications for regulation of the broadcast media that are not applicable to other speakers."¹⁶³ Interpreting *Red Lion* in light of the public forum doctrine avoids relying on the confusing *non sequitur* of spectrum scarcity. It instead relies on cases permitting some degree of regulation of speech on public property. It also provides a logical, reasoned basis for distinguishing broadcasters from newspaper publishers. The government grants broadcasters the exclusive right to use the medium with which they communicate their speech—the spectrum. In contrast,

159. *Id.* at 2517 (quoting *Cornelius*, 473 U.S. at 804-06).

160. In particular, *Rosenberger* cited both *Cornelius*—the federal workplace charity drive case—and *Perry*—the internal mail school system case; see *id.* at 2517. Justice Kennedy, the author of the opinion for the Court in *Rosenberger*, subsequently sought to chart a different course in a separate opinion joined by Justice Ginsburg in *Denver*. In this opinion, Justice Kennedy indicated that he would apply strict scrutiny to limited forum cases, stating flatly that "the same standard applies to exclusions from limited or unlimited designated public forums as from traditional forums." *Denver*, 116 S. Ct. at 2413. However, he went on to contradict himself by saying, "I do not foreclose the possibility that the Government could create a forum limited to certain topics or to serving the special needs of certain speakers or audiences without its actions being subject to strict scrutiny." *Id.* at 2414.

161. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 380 (1984).

162. *Denver*, 116 S. Ct. at 2398 n.1.

163. *Reno v. ACLU*, 117 S. Ct. 2329, 2343 (1997). Justice Stevens also cited scarcity and the "invasive nature" of broadcasting as other "special justifications" for the regulation of broadcasting. *Id.*

newspapers are not published with the use public property, nor does the government grant them special, exclusive rights in their speech activities. *Red Lion* can be squared with *Tornillo* after all.

IV

GOING BEYOND CATEGORIES: EXPLORING AN UNDERLYING JUSTIFICATION FOR BROADCAST REGULATION

The public forum doctrine provides a stronger foundation for upholding broadcast regulation under the First Amendment and would allow the Court to dispense with the scarcity rationale. But the public forum doctrine has its own faults. Although it has not taken the beating the scarcity rationale has suffered, First Amendment scholars and some Justices have criticized it as an incoherent "jurisprudence of categories."¹⁶⁴ Public forum cases often seem preoccupied with result-determinative labeling based on historical practice and the physical make-up of the forum, obscuring the underlying principles behind the Court's decision. As Professor Laurence Tribe has noted, "[b]eyond confusing the issues, an excessive focus on the public character of some forums, coupled with inadequate attention to the precise details of the restrictions on expression, can leave speech inadequately protected in some cases, while unduly hampering state and local authorities in others."¹⁶⁵

These shortcomings arise in applying the public forum doctrine to broadcast regulation. The broadcast forum fits the limited public forum category, providing firm precedent for upholding the regulatory regime, but the analysis on the surface can seem rather circular. The very restrictions being challenged as unconstitutional form the basis for the Court to conclude that the broadcast spectrum is a limited public forum and thus subject to more deferential First Amendment scrutiny. The fact that government has traditionally limited access to the spectrum and regulated those receiving a license means, under the Court's labeling approach, the government can continue to do so.

As for the spectrum being publicly owned, commentators have faulted this rationale as proving too much.¹⁶⁶ If the government can decide by fiat that it owns the spectrum, why could it not do the same

164. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 694 (1992) (Kennedy, J., concurring in judgment).

165. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 993 (2d ed. 1988) (footnotes omitted); *see also* *United States v. Kokinda*, 497 U.S. 720, 741-42 n.1 (1990) (Brennan, J., dissenting) (summarizing scholarly criticism of public forum doctrine).

166. *See* KRATTENMAKER & POWE, *supra* note 11, at 228 ("The biggest problem with the public ownership argument is that it proves too much."); Spitzer, *supra* note 74, at 1041-66 (arguing that federal ownership of the spectrum is unconstitutional).

for newsprint or, for that matter, air?¹⁶⁷ Could the government then impose content regulations on newspaper publishers because they use publicly owned newsprint, not to mention the rest of us who use the now nationalized air to utter our speech? The somewhat superficial logic of the public forum/public property rationale can in this way be taken to unsettling extremes.

It is consequently necessary to search beyond the superficial categories of the public forum doctrine to identify a more persuasive and principled rationale for permitting content regulation of broadcasting. This Article offers two such rationales. The first is based on a "public debate" theory of the First Amendment, in which government actively promotes speech and enhances the marketplace of ideas. The second rests on a *quid pro quo* rationale, whereby broadcasters receive spectrum rights in exchange for agreeing to abide by certain public interest responsibilities.

A. *Promoting Public Debate Through Broadcast Regulation*

The language of the First Amendment is seemingly straightforward: "Congress shall make no law . . . abridging the freedom of speech, or of the press."¹⁶⁸ Yet the Supreme Court and First Amendment scholars have grappled for years with the issue of when a law can be said to "abridge" speech.

1. *The Absolutist View of the First Amendment*

One theory of the First Amendment holds that the amendment's prohibition should be interpreted broadly. Proponents of an absolutist view, such as Justices Hugo Black and William O. Douglas, see the First Amendment as an immovable bulwark against government efforts to censor speech or impose an official orthodoxy.¹⁶⁹ Government should not actively participate in the marketplace of ideas but, at most, be a neutral bystander. Neutrality calls for any regulation of speech to be content-neutral. Anything else receives the highest scrutiny, with a strong presumption of invalidity. Absolutists cite the language and history of the amendment to support their views. But its origins can be

167. See KRATTENMAKER & POWE, *supra* note 11, at 228; VAN ALSTYNE, *supra* note 135, at 496-97.

168. U.S. CONST. amend. I.

169. See, e.g., *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 156 (1973) (Douglas, J., concurring) ("The First Amendment is written in terms that are absolute. . . . The ban of 'no' law that abridges freedom of the press is in my view total and complete."); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 61 (1961) (Black, J., dissenting) ("[T]he very object of adopting the First Amendment, as well as the other provisions of the Bill of Rights, was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to 'balance' the Bill of Rights out of existence."); HUGO LAFAYETTE BLACK, *A CONSTITUTIONAL FAITH* (1968).

traced to classical liberalism, according to which the people are the ultimate sovereign and the government an enemy of freedom, or at least a necessary evil to be distrusted and held in check.¹⁷⁰ Freedom of speech is an end in itself, a hallmark of individual liberty. The “marketplace of ideas” is also the best means of finding truth, or at least of achieving popular consensus. The government should leave it alone.

The marketplace metaphor goes back to John Milton’s 1644 tract, *Areopagitica*, an eloquent attack on government licensing of speech as hampering the free exchange of ideas.¹⁷¹ Two centuries later, John Stuart Mill further explored the dangers of government interference, espousing the free market exchange of ideas as the best avenue to enlightenment.¹⁷² Some of the Court’s greatest Justices have also invoked the marketplace metaphor in assailing government suppression of speech during times of great domestic turmoil, including Justice Holmes in his dissent in *Abrams v. United States*,¹⁷³ Justice Douglas in his dissent in *Dennis v. United States*,¹⁷⁴ and Justice Harlan in *Cohen v. California*.¹⁷⁵

170. See generally OWEN M. FISS, *THE IRONY OF FREE SPEECH* 2-3 (1996) (discussing libertarian view of the First Amendment); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 5 (1993) (describing underpinnings of absolutist view of the First Amendment).

171. See CARTER ET AL., *supra* note 47, at 17 (“And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?”) (quoting JOHN MILTON, *AREOPAGITICA* (1644)).

172. See John Stuart Mill, *On Liberty of Thought and Discussion*, in *UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT* 102, 104 (E.P. Dutton & Co. ed., 1951).

But the peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation—those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.

Id. at 76.

173. 250 U.S. 616, 630 (1919).

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Id. (Holmes, J., dissenting).

174. 341 U.S. 494, 584 (1951).

When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

Id. (Douglas, J., dissenting).

175. 403 U.S. 15, 24-25 (1971) (Stating that while “the immediate consequence of [free speech] may often appear to be only verbal tumult, discord, and even offensive utterance[.]” these are “necessary side effects of the broader enduring values which the process of open debate permits us to achieve.”).

The absolutist, marketplace conception has had a significant influence on the Court's First Amendment jurisprudence.¹⁷⁶ It bars government attempts to censor particular viewpoints or skew debate but also severely limits benign regulatory efforts to provide for a more robust, open public dialogue. It provided the model for the Court's decision in *Tornillo* to strike down a right-of-reply statute as applied to newspapers. In sum, the absolutist model advocates a *laissez-faire* approach, placing its faith in an unregulated marketplace as the best means of achieving the individual liberty and political discourse the First Amendment promises.

2. *The Public Debate Model of the First Amendment*

A second First Amendment model, like the first, also seeks to safeguard against government censorship and viewpoint discrimination but envisions an active role for the government in promoting public debate and democratic goals. This model has been put forth by Owen Fiss¹⁷⁷ and Cass Sunstein.¹⁷⁸ This view of the First Amendment justifies government regulation of broadcasting as a means of fostering a more diverse and informative use of the nation's airwaves.

Professor Sunstein describes a "Madisonian conception" of the First Amendment that emphasizes the deliberative functions of free speech as essential to democratic self-government.¹⁷⁹ Free speech undergirds the democratic process, "ensur[ing] broad communication about matters of public concern among the citizenry at large and between citizens and representatives."¹⁸⁰ The process is premised on political equality, where ideas flourish or wither on the strength of their merits, not because of the power, identity or resources of the speaker.¹⁸¹ Professor Sunstein sets forth two essential ingredients of a democratic system: "broad and deep attention to public issues"¹⁸² and "public exposure to an appropriate diversity of view."¹⁸³ The unregulated marketplace model fails to provide these ingredients, leading to a dysfunctional

176. Professor Cass Sunstein has observed that "it is fair to say that the absolutist position is at least relatively ascendant, and that its basic commitments have left a huge mark on the law." SUNSTEIN, *supra* note 170, at 8.

177. See FISS, *supra* note 170; see also Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987). Other scholars have also envisioned some affirmative role for the government to play in the speech marketplace as a means of promoting democratic self-governance. See, e.g., ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* (1941); HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (Jamie Kalven ed., 1988); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

178. See SUNSTEIN, *supra* note 170.

179. *Id.* at 18.

180. *Id.* at 19.

181. See *id.* at 20.

182. *Id.*

183. *Id.* at 21 (emphasis omitted).

system of free expression. He views the *laissez-faire* system as a myth given that the status quo and current distribution of speech rights, as with economic rights in general, is in large part a function of property laws and other government actions. For example, broadcast speech rights are derived from a regulatory scheme that grants a right to use the spectrum to the exclusion of others. Professor Sunstein calls for a New Deal for speech that permits the government to take an active role in promoting free speech values and political deliberation. Under this model, government “may try to ensure political equality. It may attempt to promote attention to public issues. It may try to ensure diversity of view. It may promote political speech at the expense of other forms of speech.”¹⁸⁴

Professor Owen Fiss posits a democratic theory of speech that “views the First Amendment as a protection of popular sovereignty.”¹⁸⁵ Noting that the “liberalism of today embraces the value of equality as well as liberty,”¹⁸⁶ he points to “the impact that private aggregations of power have upon our freedom”¹⁸⁷ and on the goal of an “uninhibited, robust, and wide-open”¹⁸⁸ public debate that is critical to democracy. He argues for a “public debate rationale” of the First Amendment that permits the government

to act to further the robustness of public debate in circumstances where powers outside the state are stifling speech. It may have to allocate public resources—hand out megaphones—to those whose voices would not otherwise be heard in the public square. It may even have to silence the voices of some in order to hear the voices of others.¹⁸⁹

When the government is acting in this role, it “is not trying to arbitrate between the self-expressive interests of the various groups but rather trying to establish essential preconditions for collective self-governance by making certain that all sides are presented to the public.”¹⁹⁰

3. *Regulating Broadcasting to Promote Public Debate*

Professors Fiss and Sunstein, as well as others,¹⁹¹ have argued that regulation of broadcasting can further First Amendment and democratic values. The public interest obligations imposed on broadcasters

184. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 256 (2d ed. 1995).

185. FISS, *supra* note 170, at 2.

186. *Id.* at 9.

187. *Id.* at 2.

188. *Id.* at 3.

189. *Id.* at 4.

190. *Id.* at 18.

191. See, e.g., Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

recognize the critical role these channels of communication play in our political and civic dialogue. Americans rely on television and radio to get their news more than any other source.¹⁹² The broadcast media has become the forum for our collective national debate and shared culture. Professor Sunstein defends broadcast regulation that is “designed to ensure diversity of view and attention to public affairs”¹⁹³ as furthering a system of free expression and “promot[ing] both political deliberation and political equality.”¹⁹⁴

There are instances in which the market may not produce the most efficient or socially beneficial outcomes. Private markets sometimes fail to internalize effects on others, resulting in the undersupply of certain socially beneficial goods or services or the oversupply of socially harmful ones.¹⁹⁵ These effects can be exacerbated in broadcasting markets, which earn revenue through selling advertising rather than through subscriber fees. To attract advertisers, a broadcaster places a premium on programming that generates the largest possible audience and targets preferred demographic groups. The nature of this market can result in the undersupply of certain types of socially beneficial programming, as well as a lack of diversity in programming. Government intervention tries to correct these market imperfections consistent with the First Amendment.

As previously noted, Congress enacted the Children’s Television Act of 1990 based on a finding that market forces could not be relied on to ensure a sufficient supply of children’s educational programming on commercial television stations.¹⁹⁶ As described in a recent FCC decision tightening its rules under this Act, there are a number of factors that explain these marketplace constraints.¹⁹⁷ First, broadcasters lack

192. See ROPER STARCH WORLDWIDE, *AMERICA’S WATCHING: PUBLIC ATTITUDES TOWARD TELEVISION* (1995) (reporting results of public survey and stating that “[t]elevision continues to be far and away Americans’ primary and most credible source for news and information”); Richard Corliss, *Look Who’s Talking*, *TIME*, Jan. 23, 1995, at 22-23 (citing poll reporting that 44% “of Americans named talk radio as their chief source of political information”).

193. SUNSTEIN, *supra* note 170, at xix.

194. *Id.*

195.

An example of a harmful external effect would be the famous case of an upstream factory polluting the water used by downstream farmers without first obtaining their consent. The case of a beekeeper’s honey production being increased when a neighboring landowner plants an apple orchard provides an example of a beneficial external effect. In each instance, there is some social cost or benefit—often called an “externality”—which was not taken into account by the owner in deciding how to use his property rights; the total costs or benefits caused by his action do not equal the private cost he incurred or the benefit he obtained.

Arthur S. DeVany et al., *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 *STAN. L. REV.* 1499, 1508-09 (1969).

196. See *supra* note 147 and accompanying text.

197. See Policies and Rules Concerning Children’s Television Programming, 11 *F.C.C.R.* at 10,660, 10,674-76 (1996).

incentives to air programming aimed at children, because they are significantly smaller in number than general audiences, and thus less attractive to advertisers. Second, *educational* children's programming is an even tougher sell to advertisers, because it generally needs to be targeted at smaller, specific age-group categories; an educational program for children aged two through five will be of little interest to children aged six to eleven. In contrast, entertainment programming for children is more likely to appeal to a broader age range and thus a larger audience. To be more precise, there are sixteen million children aged two through five, 22.2 million aged six to eleven, and 21.3 million children aged twelve to eighteen, while adults aged eighteen to forty-nine number 122.2 million.¹⁹⁸ As the FCC described the situation, "[b]ecause the adult audience is so much larger than the children's audience, the potential advertising revenues are also much larger and therefore provide broadcasters with an incentive to focus on adult programming rather than children's educational television programming."¹⁹⁹ Moreover, because broadcasting is an advertising-supported medium, parents with strong demands for children's programming have no way to "signal" the intensity of their demand for such programming. In other retail markets, consumers can send such signals through the amount of money they are willing to spend, that is, their dollars vote. In broadcasting, however, the votes that count are advertising dollars, which depend on the size and demographics of the overall audience, not the intensity of an individual viewer's preferences.

In this way, children's educational programming is underprovided, particularly in light of the social benefits it can provide. These benefits accrue not only to the child learning from the particular programming but also to society at large, which benefits from a more educated, productive future generation. The Children's Television Act is a corrective response aimed at promoting these public benefits. The FCC's new rules require three hours per week of programming that is specifically designed to educate and inform children, although broadcasters are given discretion to satisfy their obligation under the Act in other ways.²⁰⁰ These rules are content based in the broadest sense of the term—programming must be educational or informational—but the Commission emphasized that whether or not a program is counted "does not depend in any way on its topic or viewpoint."²⁰¹ The rules are a viewpoint-neutral means of contributing to an important public

198. *See id.* at 10,675.

199. *Id.*

200. *See id.* at 10,715-26; Educational and Informational Programming for Children, 47 C.F.R. § 73.671 n.2 (1996).

201. Policies and Rules Concerning Children's Television Programming, 11 F.C.C.R. 10,660, 10,699 (1996).

goal—the education of the nation's children and tomorrow's electorate. They reflect the public debate model of the First Amendment, allowing government intervention, even in a content-based manner, to serve important governmental interests and enhance speech.

The same goes for the political broadcasting requirements. The Communications Act requires broadcasters to afford qualified political candidates equal opportunities, the lowest unit charge, and reasonable access. "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."²⁰² The Communications Act also requires that candidates buying airtime on stations during the 45 days before a primary and the 60 days before a general election be charged rates not to exceed "the lowest unit charge of the station for the same class and amount of time for the same period"; this, in essence, gives the candidate the advantage of paying the rates of the station's highest-volume advertiser.²⁰³ At all other times, the rates charged candidates may not exceed "the charges made for comparable use of such station by other users thereof."²⁰⁴ Finally, broadcasters must "allow reasonable access to or . . . 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 [or her] candidacy."²⁰⁵ More recently, there have been legislative proposals to provide qualified political candidates with limited amounts of free access to the airwaves as part of broader campaign finance reforms.²⁰⁶

Political broadcasting requirements promote political dialogue, which goes to the heart of deliberative democracy. The legislative history of the lowest unit charge and reasonable access provisions states that Congress acted to "give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters."²⁰⁷ Indeed, the public debate-enhancing nature of the reasonable access requirement was a critical element in the Supreme Court's 1981 decision

202. 47 U.S.C. § 315(a) (1994). The statute exempts news coverage and documentaries from these equal opportunity obligations, so Dan Rather can interview democrats on the *CBS Evening News* during the campaign without triggering an obligation to provide airtime to republicans (and vice versa). *See id.*

203. 47 U.S.C. § 315(b); *see also* CARTER ET AL., *supra* note 47, at 250.

204. 47 U.S.C. § 315(b).

205. 47 U.S.C. § 312(a)(7).

206. *See* S. 25, 105th Cong., 1st Sess. § 102 (1997) (providing qualified Senate candidates with 30 minutes of free broadcast time except if there are more than two candidates, in which case all the candidates together get a total of 60 minutes free time); Fleming, *supra* note 10, at 18 (describing the McCain-Feingold campaign finance reform legislation).

207. S. REP. NO. 96-92, at 20 (1971), *reprinted in* 1972 U.S.C.C.A.N. 1773, 1774.

upholding the measure's constitutionality. According to the Court, "Section 312(a)(7) . . . makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."²⁰⁸ This language is unmistakably grounded in the public debate theory of the First Amendment.

4. *Red Lion and the Public Debate Model*

The Court's First Amendment cases wax and wane between the absolutist, marketplace model and the public debate model, never quite settling at either end.²⁰⁹ While the marketplace model seems in ascendancy in some of the Court's most recent cases,²¹⁰ the public debate model has had a strong hold on the Court's First Amendment cases involving broadcasting. Their reliance on spectrum scarcity obscures the model, but a closer look reveals that the Court views broadcast regulation as a means of enhancing the marketplace of ideas.

In *Red Lion*, the Court viewed the speech rights at issue broadly by focusing on rights beyond those belonging to broadcasters. The Court flatly stated that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount,"²¹¹ and described the "crucial" issue as "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."²¹² The underlying First Amendment principles were also given broad scope:

[T]he 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 purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.²¹³

208. *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981).

The First Amendment interests of candidates and voters, as well as broadcasters, are implicated by § 312(a)(7). We have recognized that "it is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." Indeed, "speech concerning public affairs is . . . the essence of self-government[.]" The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office."

Id. (citations omitted).

209. *See Fiss, supra* note 170, at 5.

210. *See, e.g., Reno v. ACLU*, 117 S. Ct. 2329 (1997); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Texas v. Johnson*, 491 U.S. 397 (1989).

211. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

212. *Id.*

213. *Id.*

The Court saw the broadcast rules in *Red Lion* as furthering robust debate, because the private forces of the marketplace might fall short of "the First Amendment goal of producing an informed public capable of conducting its own affairs."²¹⁴ Left to their own devices, "station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed."²¹⁵ This was an unacceptable result, for "[t]here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. 'Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.'"²¹⁶

The Court's broadcasting cases thus can be seen as also deriving from the public debate model of the First Amendment. Moreover, although these cases do not explicitly invoke the public forum doctrine, the First Amendment principles they espouse mesh well with the notion of treating the broadcast spectrum as a limited public forum. *Red Lion* recognized broadcasting as a vital forum for public debate in this country. The access to this forum is limited to a select group of private broadcasters, and for this very reason the government can play an important role in ensuring that this private control does not inhibit the diversity and robustness of the debate that takes place in the forum. The public debate model thus goes beyond the public forum's "jurisprudence of categories." It provides an underlying justification for applying a deferential level of scrutiny to regulations that seek to enhance speech in limited forums such as broadcasting.

The "speech enhancing" distinction is an important one. Some broadcast regulation, such as the restrictions on indecent programming, are speech restrictive. These regulations must consequently look elsewhere for a First Amendment justification.²¹⁷ In addition, the typical public forum case involves government efforts to preclude a speaker from entering a particular forum that is operated by the government itself. These restrictions are generally struck down if a traditional public forum or unlimited designated public forum is involved, while they have been upheld in nonpublic forum cases where the government is acting as a proprietor, managing its own internal operations, such as the internal mail system at issue in *Perry* or the federal workplace charity drive in *Cornelius*. Broadcasting presents a different paradigm. The forum

214. *Id.* at 392.

215. *Id.*

216. *Id.* (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

217. As described above, the Court's *Pacifica* decision provides such an independent rationale for indecency regulation. See *supra* notes 107-111 and accompanying text; see also *infra* notes 306-310 and accompanying text.

does not involve internal government operations, but rather a central forum of public communications that has been turned over to private parties. Given this allocation scheme, broadcast regulation seeks to enhance free speech values by providing access to other speakers in limited circumstances or by requiring public interest programming. In this way, broadcasting regulation is consistent with the First Amendment's purpose, as viewed from the public debate theory model, of promoting open and robust speech and democratic self-governance.

Does this justification for broadcast regulation provide a basis for reconciling *Red Lion* with *Tornillo*? One answer is that the two cannot be reconciled: they arguably embrace opposing visions of the First Amendment. *Red Lion* grants the government leeway to regulate the speech marketplace to promote public debate, while *Tornillo* draws the absolutist's boundary to bar such intervention. But this is not the only possible answer. Professor Lee Bollinger has argued that *Red Lion* and *Tornillo* both reached the correct result not because of any significant differences between newspapers and broadcast stations, but because "the very similarity of the two major branches of the mass media provides a rationale for treating them differently."²¹⁸ He describes the benefits of government intervention in the speech marketplace as a means of insuring "the widespread availability of opportunities for expression within the mass media,"²¹⁹ yet acknowledges the potential risks of government regulation of speech.²²⁰ He then posits a First Amendment theory of partial regulation:

By permitting different treatment of [newspapers and broadcasters], the Court can facilitate realization of the benefits of two distinct constitutional values, both of which ought to be fostered: access in a highly concentrated press and minimal governmental intervention. . . . The Court has imposed a compromise . . . of competing first amendment values.²²¹ Under this compromise, broadcast regulation is permissible while regulation of newspapers is not.

B. Broadcasters' Preferred Position in the Allocation of Speech Rights—The Public Interest Quid Pro Quo

Another way of reconciling *Red Lion* and *Tornillo* focuses on the manner in which broadcasters, unlike newspapers, receive favored treatment from the government in the special access they are given to their

218. Lee C. Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 36 (1976).

219. *Id.* at 6.

220. *See id.* at 29-32.

221. *Id.* at 36.

medium of communication. Existing broadcasters have received a very valuable resource—a license to use the spectrum—without being required to pay a fee. Rather, their licenses are conditioned on their serving the public interest, including in the programming they air. This *quid pro quo* provides another rationale for upholding broadcast regulation under the First Amendment.

1. *The Allocation of Broadcast Licenses*

Until very recently, Congress chose not to allocate broadcast licenses by auctioning them off to the highest bidder, as it has done for a number of nonbroadcast licenses.²²² Auctions offer several benefits. They are far more efficient than the time-consuming administrative hearings the FCC has used in the past in awarding broadcast licenses; the license simply goes to the highest bidder that meets a set of basic qualifications.²²³ A competitive bidding procedure also puts the auctioned resource into the hands of the entity that values it the most, and who will therefore put it to the most economically efficient use.²²⁴ Finally, auctions increase the public fisc, “yield[ing] reimbursement to the public for the transfer of the entitlement.”²²⁵

222. For example, the FCC has auctioned licenses for personal communications services (“PCS”), the next generation of cellular telephone service. See generally <<http://www.fcc.gov/wtb/auctions>>.

223. In the broadcast context, these basic qualifications include complying with the Communication Act’s alien ownership provision, 47 U.S.C.A. § 310(b) (West Supp. 1997), and the FCC’s rules limiting the number of stations a single entity can own, 47 C.F.R. § 73.3555 (1996); see *supra* note 20. An applicant for a broadcast license must also be technically and financially qualified and must satisfy certain character qualifications. See Policy Regarding Character Qualifications in Broadcast Licensing, 5 F.C.C.R. 3252 (1990) (stating that FCC may find applicant to be unqualified if, for example, she or he has been convicted of a felony); Financial Qualification Standards, 72 F.C.C.2d 784 (1979) (setting forth financial requirements); Financial Qualification Standards for Aural Broadcast Applicants, 69 F.C.C.2d 407 (1978) (stating that an applicant must show that it has enough funds to operate the proposed station for three months without relying on advertising or other broadcast revenue); Power and Antenna Height Requirements, 47 C.F.R. § 73.614 (setting forth power and antenna height requirements).

224. As two commentators have explained, an auction establish[es] the value of the resource, and, as the resource is awarded to the highest bidder, it is employed in its most highly valued use. In other words, the resource is as productive as it can be, given present technology and knowledge and the limits of the market mechanism as an evaluator of value. KRATTENMAKER & POWE, *supra* note 11, at 53. This has been the case with recent FCC auctions, which have expedited the introduction of PCS. See *In re* Improving Commission Processes, 11 F.C.C.R. 14006, 14010 (1996); see also John McMillan, *Why Auction the Spectrum?*, 19 TELECOMM. POL’Y 191, 193-94 (1995) (arguing that auctions are quicker and more economical than administrative allocation); Evan Kwerel & Alex D. Felker, *Using Auctions to Select FCC Licenses* (Office of Plans and Policy, FCC working paper No. 16, 1985) (arguing that auctions are more likely to lower costs on the FCC and society than other methods of allocation).

225. *Mobile Communications Corp. of Am. v. FCC*, 77 F.3d 1399, 1405 (D.C. Cir. 1996) (citations omitted), *cert. denied*, 117 S. Ct. 81 (1996). The winning bids in a series of FCC auctions of PCS licenses amounted to over \$20 billion payable to the U.S. Treasury. See <<http://www.fcc.gov/wtb/auctions/summary/revenue.gif>>.

These benefits have only recently prompted Congress to authorize the FCC to auction off broadcast licenses to the highest bidder.²²⁶ Congress could have chosen this allocation system long ago. Indeed, several scholars have advocated a system of charging broadcasters the full market price for use of the spectrum and replacing the current system of public interest regulation with one that uses these "spectrum fees" to directly subsidize the kind of programs the government now seeks to promote through programming requirements.²²⁷

But Congress did not choose this model. Instead of being charged a fee for their use of the spectrum, all current broadcasters have been awarded their licenses on the condition that they serve the public interest. For years, the FCC awarded vacant broadcast channels not to the highest bidder but to the applicant that would provide "(1) maximum diffusion of control of the media of mass communications; and (2) best practicable service to the public."²²⁸

Once an applicant was awarded a broadcast license, it generally could count on the license being renewed at the end of its license term.²²⁹ Until recently, broadcasters seeking to renew their licenses could

226. See Section 3002 of the Balanced Budget Act of 1997, 143 CONG. REC. H6029, H6031 (daily ed. July 29, 1997) (amending Section 309(j) of the Communications Act of 1934, codified at 47 U.S.C.A. §309(j)).

227. See generally HENRY GELLER & DONNA LAMPERT, CHARGING FOR SPECTRUM USE (1989); Ronald Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101 (1997). The government has taken this approach to some extent in reserving spectrum for noncommercial television and radio broadcasters and providing them federal grants through the Corporation for Public Broadcasting. See Public Broadcasting Act of 1967, Pub. L. 90-129, 81 Stat. 365 (codified at 47 U.S.C. §§ 390-393, 395-396 (1994)).

228. Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 F.C.C.R. 2664 (1992) (citing Policy Statement on Comparative Broadcast Hearings, F.C.C.2d 393 (1965)). This assessment took place in an administrative hearing to decide which of the competing applicants would be awarded the broadcast license. The FCC established a number of criteria for the administrative law judge to follow in making this decision, including diversification of control of the mass media, integration of ownership into management, the applicant's past broadcast record, if any, and the degree to which an applicant's proposal makes efficient use of the spectrum. See *id.* In some cases, the administrative law judge would take into account proposed programming service in deciding among competing applicants. See *id.* at 2666 (stating that preferences would be given to applicants that showed "an unusual attention to local community matters for which there is a demonstrated community need"). This comparative hearing process was subject to considerable criticism by the FCC, see *id.* at 2665 (stating that comparative hearings using the relevant criteria "often appear to become bogged down in litigating subjective or trivial distinctions"), by the courts, see *Bechtel v. FCC*, 10 F.3d 875, 887 (D.C. Cir. 1993) (invalidating "integration" criterion), and by commentators, see Robert A. Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 STAN. L. REV. 1, 39-61 (1971); Matthew L. Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC, and the Courts*, 88 YALE L.J. 717, 731-56 (1979).

229. See CARTER ET AL., *supra* note 47, at 119 ("The FCC has generally been reluctant to deny renewals except in egregious cases."); Hundt, *supra* note 73, at 533 ("[T]he Commission for at least fifteen years has not taken away a single one of the approximately 1500 television licenses or 10,000 radio licenses in this country for failure to serve the public interest.").

face competing applicants; the challenger would seek to persuade the FCC that it should be awarded the license over the incumbent broadcaster. This rarely proved successful, as the FCC adopted a "renewal expectancy" that created a presumption in favor of renewing the incumbent's license, provided it could demonstrate a meritorious record of performance during the preceding license term.²³⁰ Congress has recently gone the next step and eliminated altogether the opportunity to file a competing application against a broadcaster seeking renewal of its license. In particular, the Telecommunications Act of 1996 amended the Communications Act to eliminate comparative renewal hearings and to require the FCC to renew a broadcaster's license if statutory renewal standards are met.²³¹

Clearly the rights to operate newspapers are not allocated in this fashion. To be sure, newspaper publishers enjoy the benefits of government-enforced property and contract rights that allow them to function as a business.²³² But these rights are the same rights enjoyed by other businesses in a private market economy. More importantly, newspaper publishers are not the recipients of any special governmental benefits in the allocation of the resources that go into communicating their speech. They come by their printing presses based on their ability to pay, just as any other would-be publishers.

In contrast, broadcasters have enjoyed the fruits of a government allocations system that has granted them the exclusive right to use the broadcast spectrum. And these rights have proven to be extremely valuable. An FCC staff study has estimated that the value of the spectrum currently granted to broadcast stations is between \$20 to \$132 billion.²³³

230. See *Central Fla. Enters., Inc. v. FCC*, 683 F.2d 503, 505-06 (D.C. Cir. 1982).

231. See 47 U.S.C.A. § 309(k) (West Supp. 1997). This section requires the FCC to renew a broadcast station's license

if it finds, with respect to that station, during the preceding term of its license—(A) the station has served the public interest, convenience, and necessity; (B) there have been no serious violations by the licensee of this [Act] or the rules and regulations of the Commission; and (C) there have been no other violations by the licensee of this [Act] or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse.

Id. The 1996 Act also extended broadcast license terms to eight years; they were previously five years for television stations and seven years for radio stations. See 47 U.S.C. § 307(c)(i) (1994) (amended); 47 C.F.R. §73.1020 (1996) (amended).

232. In Professor Sunstein's view, even these broadly applicable legal rights are significant for purposes of First Amendment analysis and "should be assessed in individual cases for conformity with the free speech guarantee." SUNSTEIN, *supra* note 170, at 41. As described above, they tend to undermine arguments based on the absolutist, *laissez-faire* model of the First Amendment. See *supra* note 176 and accompanying text.

233. See Letter from Robert Pepper, Chief, FCC Office of Plans and Policy, Federal Communications Commission, to Senators Joseph Lieberman, Kent Conrad, Patrick Leahy, and Robert Kerrey (May 5, 1995) (on file with author). This estimate is extrapolated from the prices investors have paid for licenses for various wireless communications services that the Commission has

The FCC study also cites New York City's proposed sale of its licensed UHF television station, WNYC-TV (Channel 31), in illustrating the value of spectrum rights. The "book value" of this station's tangible assets is about \$8 to \$10 million, while an investment bank estimated its sale price at more than \$65 million, putting the value of the station's spectrum rights at \$55 to \$60 million.²³⁴ In addition to this FCC study, the National Telecommunications and Information Administration, an arm of the Department of Commerce, has estimated the marketplace value of the current television and radio broadcast spectrum at \$11.5 billion.²³⁵ Although these estimates are difficult to make and to some extent represent only educated guesses, it is beyond dispute that the spectrum rights broadcasters have been granted are exceptionally valuable.

2. *The Spectrum Set-Aside for Digital Television*

Incumbent television broadcasters have recently received an additional government spectrum set-aside to the exclusion of others. In April 1997, the FCC concluded a proceeding it had initiated in 1987 to examine the conversion of the current broadcasting system to one that uses advanced television technology.²³⁶ This new technology will allow broadcasters to use digital, as opposed to analog, transmissions, which will give them far greater flexibility in the type of programs and information they can transmit. This flexibility offers broadcasters potentially enormous business opportunities. They will be able to transmit, over the same 6 MHz channel, movie-theater quality pictures, or multiple channels of standard-quality pictures, or even non-video programming data.²³⁷

auctioned to the highest bidder. The staff study noted the difficulty in estimating market values through such proxies. *See id.*

234. *See id.*

235. *See* Nat'l Telecomm. & Info. Admin., U.S. Dep't of Comm., *U.S. Spectrum Management Policy: Agenda for the Future*, NTIA Special Pub. No. 91-23 (Feb. 1991); *see also* CARTER ET AL., *supra* note 47, at 120 ("VHF [television] stations may be worth \$500 million or more, and even radio stations may be worth tens of millions of dollars."); Christopher Stern, *HDTV Spectrum May Be Auction Target*, BROADCASTING & CABLE, Mar. 27, 1995, at 9 (reporting that the National Cable Television Association estimates that the broadcast spectrum is worth between \$40 and \$60 billion).

236. *See* Notice of Inquiry in MM Docket No. 87-268, 2 F.C.C.R. 5125 (1987); Fifth Report and Order in MM Docket No. 87-268, F.C.C. 97-116 (released Apr. 21, 1997).

237. In its Fourth Report and Order in MM Docket No. 87-268, 11 F.C.C.R. 17,771 (1996), *modified*, 12 F.C.C.R. 3388 (1997), the Commission adopted a digital television transmission standard and stated:

[It] is generally recognized to represent a significant technological breakthrough. . . . In addition to being able to broadcast one, and under some circumstances two, high definition television ("HDTV") programs, the [digital television] Standard allows for multiple streams, or "multicasting," of Standard Definition Television ("SDTV") programming at a visual quality better than the current analog signal. Utilizing this Standard, broadcasters can transmit three, four, five, or more such program streams simultaneously. The Standard allows for the broadcast of literally dozens of CD-quality audio signals. It permits the rapid delivery of large amounts of data; an entire edition of the local daily newspaper could be

These new business opportunities will be limited to incumbent television broadcasters in the first instance. Each existing television station has been awarded a second 6 MHz channel to use for its digital transmissions,²³⁸ with the total value of the spectrum that will be used for digital television estimated to be between \$11 to \$70 billion.²³⁹ Because today's television sets are not designed to receive these transmissions, however, the broadcaster will also be able to keep its current 6 MHz channel to transmit its analog signal until the year 2006,²⁴⁰ and possibly longer if significant numbers of consumers have not purchased digital television sets or converter boxes that enable them to receive digital television transmissions by that date.²⁴¹ Eliminating any doubt about this spectrum set-aside, the Telecommunications Act of 1996 instructed the FCC to "limit the initial eligibility for [digital] licenses to persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both)."²⁴² No others need apply.

3. *The Quid Pro Quo: Spectrum Rights and Public Interest Obligations*

Broadcasters have thus enjoyed a privileged place relative to other speakers in the access to their medium of communication.²⁴³ This favorable treatment distinguishes broadcasters from newspapers, which

sent, for example, in less than two seconds. Other material, whether it be telephone directories, sports information, stock market updates, information requested concerning certain products featured in commercials, computer software distribution, interactive education materials, or virtually any other type of information access can also be provided. It allows broadcasters to send. [sic] video, voice and data simultaneously and to provide a range of services dynamically, switching easily and quickly from one type of service to another. For example, a broadcaster could transmit a news program consisting of four separate, simultaneous SDTV program streams for local news, national news, weather and sports; then transmit an HDTV commercial with embedded data about the product; then transmit a motion picture in an HDTV format simultaneously with unrelated data.

Id. at 17,774 (footnotes omitted).

238. See Fifth Report and Order in MM Docket No. 87-268, FCC 97-116, ¶¶ 11-12, 17 (released Apr. 21, 1997); Letter from Robert Pepper, *supra* note 233.

239. See Letter from Robert Pepper, *supra* note 233.

240. See Section 3003 of the Balanced Budget Act of 1997, 143 CONG. REC. H6029, H6032-33 (daily ed. July 29, 1997) (codified at 47 U.S.C.A. § 309(j)(14)).

241. See *id.* (setting forth circumstances that will require the FCC to extend the 2006 deadline).

242. Section 201 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 107-08 (1996) (codified at 47 U.S.C.A. § 336(a)(1)). More recently, Congress clarified that the digital television channels incumbent television broadcasters will be receiving are exempt from the auction authority it has given the FCC in assigning new broadcast licenses in the future. See Section 3002 of the Balanced Budget Act of 1997, 143 CONG. REC. H6029, H6031 (daily ed. July 29, 1997) (codified at 47 U.S.C.A. § 309 (j)(2)(B)).

243. In addition to the receipt of spectrum, broadcasters have enjoyed other government-conferred benefits. These include statutory "must-carry" rights that entitle television broadcasters to carriage on local cable systems. These must-carry provisions have been upheld by the Supreme Court against First Amendment attack by the cable industry. See *Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174 (1997).

receive no special treatment in obtaining their means of communicating. It is not scarcity that is the distinguishing factor, rather it is the subsidy of broadcaster speech that has taken place in the government's allocation of scarce spectrum rights. A person interested in entering the newspaper business competes with others in paying the full free market price to acquire the scarce resources that go into establishing and publishing newspapers. The government plays no direct role in this competition. In contrast, broadcasters have received, without charge, a direct government allocation of their means of communication—the right to use the spectrum. This benefit has been conferred on broadcasters on the explicit condition that they will serve the public interest in operating their stations, including in the programming they air. These public interest obligations can thus be justified as an in-kind payment—a *quid pro quo*—for the right to use the spectrum. In terms of public interest programming and limited access requirements, this payment can result in important social benefits that accrue to those who have not enjoyed the preferred position of broadcasters in the allocation of spectrum, as well as to society as a whole.

Red Lion's emphasis on spectrum scarcity obscured this distinguishing characteristic of broadcasting, just as it obscured the public debate model of the First Amendment that can be seen as providing a foundation for the Court's decision. But the opinion also can be read to provide an alternative justification for broadcast regulation based on the preferential treatment broadcasters receive in the allocation of spectrum. As an initial matter, the Court made clear that broadcasters have no First Amendment entitlement to the spectrum they are allocated: "No one has a First Amendment right to a license or to monopolize a radio frequency"244 The *Red Lion* Court was also sensitive to the fact that the government's direct involvement in the allocation of the spectrum excludes other speakers from this medium, which prompted it to remark that "the First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use."²⁴⁵

More important, however, is language at the end of the Court's opinion which strongly suggests that the special allocational rights enjoyed by broadcasters may justify broadcast regulation without reliance on general notions of spectrum scarcity. In responding to the argument that new technologies and other factors had made spectrum scarcity a thing of the past, the Court recited a series of facts in concluding that

244. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969).

245. *Id.* at 391.

this is not the case and that the demand for spectrum exceeds its supply.²⁴⁶ But in the penultimate paragraph of opinion the Court states:

Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. *These advantages are the fruit of a preferred position conferred by the Government.*²⁴⁷

The preferential treatment broadcasters receive in being granted their rights to use the spectrum consequently provides an independent basis for upholding regulations "requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."²⁴⁸ Thus, in upholding the regulations at issue in *Red Lion*, the Court not only cited "the scarcity of broadcast frequencies,"²⁴⁹ but also "the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views."²⁵⁰

A number of the Court's other broadcasting cases similarly contain language that speaks in terms of a *quid pro quo*, premising the permissibility of broadcast regulation on broadcasters' exclusive rights to use the public spectrum. For example, in *CBS, Inc. v. FCC*, the Court stated that a "licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'"²⁵¹ Thus, in return for receiving substantial benefits allocated by the government, broadcasters must abide by a number of public interest conditions that, in the absence of this government allocation, would be found unconstitutional.

This *quid pro quo* theory resonates in public policy debates in Congress and elsewhere regarding broadcasters' public interest

246. *See id.* at 396-99.

247. *Id.* at 400 (emphasis added).

248. *Id.* at 389.

249. *Id.* at 400.

250. *Id.*

251. 453 U.S. 367, 395 (1981) (quoting Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966)); *see also* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 126 (1973) ("[T]he use of a public resource by the broadcast media permits a limited degree of Government surveillance, as is not true with respect to private media . . .").

obligations, especially with the spectrum set-aside television stations have recently received to convert to digital technology.²⁵² It is also akin to the public access channel requirements imposed on cable operators by local governments. The forum of communication involved is privately owned cable lines, a portion of which must be set aside for educational and governmental use in return for the operator's being awarded a local franchise to use public rights-of-way. While the Supreme Court has not directly addressed the issue, the lower courts have upheld these access requirements against First Amendment attack.²⁵³

The *quid pro quo* rationale has also been raised to justify regulation of direct broadcast satellite service ("DBS") that requires, among other things, operators of this service to set aside channel capacity for educational programming.²⁵⁴ A panel of the D.C. Circuit upheld such regulation against First Amendment attack by analogizing DBS providers (who similarly use the spectrum) to broadcasters and invoking the scarcity rationale set forth in *Red Lion*.²⁵⁵ The court subsequently denied a petition for rehearing *en banc*. Judge Williams, joined by four of his colleagues, issued a dissenting statement, rejecting the scarcity rationale as a basis for justifying DBS regulation. "While *Red Lion* is not in such poor shape that an intermediate court of appeals could properly

252. This set-aside prompted President Clinton to establish an Advisory Committee to examine the public interest obligations of television broadcasters. See Exec. Order, *supra* note 9. It has also led several members of Congress to advocate requiring broadcasters to provide free airtime to political candidates. BROADCASTING & CABLE quoted Senator McCain as saying,

I believe that when [broadcasters] receive their licenses for use of extremely valuable spectrum, when they agree to act in the public interest, part of that obligation might be to provide political candidates with an opportunity to express their views. . . . [Broadcasters] do use something that's owned by the public, just like the rafter uses the Grand Canyon. I believe the American taxpayer should have the benefit of that something.

Tough's the Word for John McCain, BROADCASTING & CABLE, Mar. 3, 1997, at 19. Further, in response to arguments that greater public interest duties should go with the new digital channels, the FCC placed broadcasters on notice that it may adopt new public interest rules for digital television and stated its intent to initiate a proceeding to examine this matter. See Fifth Report and Order in MM Docket No. 87-268, FCC 97-116, ¶ 50 (1997). Moreover, efforts to require broadcasters to pay for their new digital spectrum have been fended off on the basis of the *quid pro quo* notion that they will serve the public interest in exchange for this benefit. See, e.g., 142 CONG. REC. H1145-46, H1167 (statement of Hon. Billy Tauzin) ("The issue of broadcast spectrum is tied up with something called the public interest standard. It has to do with the trade we made a long time ago to licensed broadcasters who operate under a public interest standard, a relicensing by the FCC, and a review of that licensing over time.").

253. See *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 971-73 (D.C. Cir. 1996) [hereinafter *Time Warner I*]; cf. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2410 (1996) (Kennedy, J., dissenting in part and concurring in part) (finding a private cable system's public access channels to be a public forum because, "in return for granting cable operators easements to use public rights-of-way for their cable lines, local governments have bargained for a right to use cable lines for public access channels").

254. See *supra* note 106.

255. See *Time Warner I*, 93 F.3d at 973-77.

announce its death, we can think twice before extending it to another medium."²⁵⁶ He then went on to consider the possibility that "DBS regulation could be saved as a condition legitimately attached to a government grant."²⁵⁷ In other words, as with the *quid pro quo* underlying broadcast regulation—in exchange for the right to use the spectrum—DBS operators must dedicate a portion of their airtime to certain public interest programming.

This *quid pro quo* rationale can exist even where the spectrum is auctioned, as it has been in the case of DBS and will be in the future for new broadcast licenses. The auction bids are discounted by the fact that the licensee has been placed on notice that it will be required to comply with a range of programming requirements:

Those bidding for the DBS channels necessarily discounted their bids in light of the known prospect that a portion of the channels would be allocated for educational programming (and that the DBS provider would bear at least some of the operating costs and overhead). This differential—money that the government could have received had it not imposed the programming requirement—constitutes a subsidy exactly matching the pecuniary burden imposed by the provision.²⁵⁸

This same reasoning explains why the *quid pro quo* rationale exists even though many current broadcasters paid substantial amounts of money in acquiring their licenses from the entity that was originally awarded the license from the FCC. There is indeed a healthy private market in which broadcast licenses are transferred from one party to another. But the prices paid in this market are presumably discounted by the fact that the license being acquired carries with it certain public interest programming obligations.²⁵⁹ The same goes for the auctions the FCC will conduct in assigning new broadcast licenses in the future.²⁶⁰

4. *Unconstitutional Conditions and the Limits on Broadcast Regulation*

The *quid pro quo* rationale does not give the government unlimited authority in regulating broadcast programming. It is here that the rationale meshes with the Court's public forum doctrine, which, as discussed, requires regulation of a limited public forum, such as broadcasting, to be reasonable and viewpoint-neutral. The public forum doctrine can also be seen as a more specific application of the Court's

256. *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of petition for rehearing *en banc*) [hereinafter *Time Warner II*].

257. *Id.* at 726.

258. *Id.* at 728.

259. Moreover, a license can only be transferred if the FCC finds that such transfer is in the public interest. See 47 U.S.C. § 310(d) (1994).

260. See *supra* note 226 and accompanying text.

general doctrine of unconstitutional conditions.²⁶¹ Exploring the underpinnings of this doctrine sheds further light on the First Amendment boundaries between permissible and impermissible regulation of broadcasting.

The “unconstitutional conditions” doctrine generally holds that “government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”²⁶² This straightforward description is somewhat misleading, for the Court has struggled over the years in drawing subtle, sometimes seemingly elusive distinctions between permissible government decisions that can be characterized as simply withholding a discretionary benefit, and impermissible benefits decisions that penalize speech and other liberty interests.²⁶³ In the words of one scholar, “recent Supreme Court decisions on challenges to unconstitutional conditions seem a minefield to be traversed gingerly.”²⁶⁴

The Supreme Court’s 1991 decision in *Rust v. Sullivan*²⁶⁵ is the Court’s most recent significant pronouncement in this area. *Rust* granted the government greater leeway in attaching conditions on the recipients of government benefits, even when these conditions implicate speech rights. It involved federal regulations that limited the ability of recipients of federal funding under Title X of the Public Health Service Act to engage in abortion-related activities. Projects receiving these funds were prohibited from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning. The Court rejected a First Amendment challenge to these regulations, including an argument that they constituted impermissible viewpoint discrimination:

Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.²⁶⁶

The Court similarly found that the regulations did not impose an unconstitutional condition. It drew a distinction between denying a benefit to anyone and “insisting that public funds be spent for the

261. See *Time Warner II*, 105 F.3d at 727 n.3 (noting that the public forum doctrine “is merely a specialized set of rules limiting the conditions that government may impose on use of its resources”).

262. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

263. See *TRIBE*, *supra* note 165, §§ 11-15.

264. Sullivan, *supra* note 262, at 1415-16.

265. 500 U.S. 173 (1991).

266. *Id.* at 193.

purposes for which they were authorized. . . . [They] do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities."²⁶⁷ The Court emphasized that *Rust* did not present the situation where "the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."²⁶⁸ This was the defect in an earlier case, *FCC v. League of Women Voters of California*,²⁶⁹ in which the Court struck down a federal law that prohibited editorializing by noncommercial broadcast stations that received federal funding from the Corporation for Public Broadcasting. There was an inadequate nexus between the funding and the speech restriction, for the funding recipient was "barred absolutely from all editorializing," because it was "not able to segregate its activities according to the source of its funding" and thus had "no way of limiting the use of its federal funds to all noneditorializing activities."²⁷⁰

Rust, as well as several other Supreme Court cases in this area,²⁷¹ provide support for the *quid pro quo* rationale for broadcast regulation under the First Amendment. Grant of a license to use the airwaves may appropriately be conditioned on certain program content and access regulations that further the purpose of allocating spectrum rights in a manner that promotes the public interest without going beyond the scope of the operation of the licensed broadcast facilities. This is so even though the benefit—the exclusive right to use the spectrum without charge—is not in the form of a cash subsidy; the Court has viewed the concept of benefit broadly to include such government activities as selective taxes and tax exemptions.²⁷²

Rust, to be sure, has been criticized for giving short shrift to the speech rights at issue in that case. Indeed, four Justices dissented in *Rust*, with Justice Blackmun accusing the majority of white-washing regulations he believed were plainly aimed at suppressing a pro-choice

267. *Id.* at 196.

268. *Id.* at 197.

269. 468 U.S. 364 (1984).

270. *Id.* at 400.

271. *See, e.g.*, *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) (upholding Congress' authority to refuse to subsidize lobbying activities of tax-exempt charities by prohibiting such organizations from using tax-deductible contributions to support their lobbying efforts); *Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating various aspects of campaign finance reform law, but upholding limit on private campaign expenditures of candidates receiving federal campaign funds).

272. *See, e.g.*, *Regan*, 461 U.S. at 544 (tax exemption); Michael Fitzpatrick, Note, *Rust Corrodes: The First Amendment Implications of Rust v. Sullivan*, 45 STAN. L. REV. 185, 189-90 n. 32 (1992); *see also Rust*, 500 U.S. at 199-200 (characterizing the use of public property, such as a street and other traditionally public forums, as a form of government "subsidy").

viewpoint.²⁷³ In his view, the regulations were inconsistent with precedent that made “clear that ideological viewpoint is a . . . repugnant ground upon which to base funding decisions.”²⁷⁴ The Court’s decision in *Rust* does seem alarmingly open-ended, as several commentators have pointed out.²⁷⁵ Read broadly, it would seem to countenance such perverse possibilities as the government funding “Democrats but not Republicans, or . . . anyone who agrees to speak for causes that government favors.”²⁷⁶

But perhaps in answer to the potentially broad sweep of its decision, the majority opinion in *Rust* concludes its First Amendment discussion by stating that its holding should not be interpreted as “suggest[ing] that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression.”²⁷⁷ As an example, the opinion then notes the limits imposed on government regulation of public forums that have “‘been traditionally open to the public for expressive activity’ or have been ‘expressly dedicated to speech activity.’”²⁷⁸ As described below, with respect to the limited public forum of broadcasting, the limits on government regulation require that there be a *quid* that goes with the *quo*, that the two bear a close relationship so as to avoid direct or indirect viewpoint discrimination, and that programming rules be clear and specific to avoid arbitrary enforcement decisions.

5. Requiring the Quid to Be Comparable to the Quo

As an initial matter, the *quo* can only be justified if there is a *quid*. If broadcasters had paid the full free-market price for their frequencies, there would be no First Amendment justification under the *quid pro quo* rationale for regulating broadcast programming.²⁷⁹ The *quid*—the public interest obligations—should therefore be proportional to the *quo*—the value of the license granted to the broadcaster. The *quid* imposes costs on the broadcaster in terms of the opportunity cost of lost

273. See *Rust*, 500 U.S. at 208-11 (Blackmun, J., dissenting).

274. *Id.* at 211.

275. A number of commentators have discussed *Rust*’s potentially far-reaching implications for First Amendment jurisprudence. See, e.g., Fiss, *supra* note 170, at 45-49; SUNSTEIN, *supra* note 170, at 116-18; Fitzpatrick, *supra* note 272, at 185; Ronald J. Krotoszynski, Jr., *Brind & Rust v. Sullivan: Free Speech and the Limits of a Written Constitution*, 22 FLA. ST. U. L. REV. 1, 18-25 (1994).

276. SUNSTEIN, *supra* note 170, at 117.

277. *Rust*, 500 U.S. at 199.

278. *Id.* at 200 (citations omitted).

279. As noted, a government benefit or subsidy can exist even when the frequencies are auctioned, because the bidding is discounted by the fact that the licensee will be required to comply with certain programming requirements. See *supra* notes 258-260 and accompanying text. In these circumstances, the licensee has not bid the full free-market price for the channel.

advertising (e.g., commercial ads that could have aired in place of 30 minutes of free airtime given to a political candidate) and any production costs that may go into airing public interest programming (e.g., the cost of producing a children's educational program). These costs should not exceed the benefit conferred on the broadcaster by the grant of the license to use the airwaves, which in turn can be measured by the amount of money—amortized over the life of the license—the government could have received had it auctioned off the license for its full free-market price.

To be sure, it is difficult to measure these costs and benefits with precision. The value of advertising time, as well as the spectrum, may fluctuate over time and may vary for each licensee depending on its geographic area and various marketplace factors. The costs of public interest obligations may also vary, as the government revises them from time to time in light of changing public policy goals. But the *quid* and the *quo* need not be matched down to the last cent. The First Amendment is not a cost-accounting device. Rather, it provides a safeguard against unjustified government burdens on speech. And these burdens are unjustified when the *quid* is qualitatively disproportionate to the *quo*. It would be problematic, for example, for the government to require a commercial broadcaster to turn over its entire channel to political candidates during prime time in the last month of an election. Although viewpoint neutral, such a requirement would impose an excessive burden on the broadcaster not only in terms of the costs it would impose but also because it would completely preclude the broadcaster's speech during a time period when it has its largest audience.²⁸⁰

By the same token, the government cannot justify speech regulation by simply declaring that a *quid* exists or deeming a particular medium of communication—newspapers, for example—to be government property. This can be seen in the Supreme Court's decision in *Pacific Gas and Electric Co. v. Public Utilities Commission of California*.²⁸¹ That case involved a state utility commission decision requiring a utility to use the "extra space" in its billing envelopes to transmit the newsletter of a consumer group. The public utility commission justified this requirement by deeming the "extra space"—the space left over after including the bill and required notices that could be used to transmit other material without incurring additional postage—to be public property. The Court, however, observed that the envelope itself, as well as its

280. Cf. *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 973 (D.C. Cir. 1996) ("[W]ere a local authority to require as a franchise condition that a cable operator designate three-quarters of its channels for 'educational' programming, defined in detail by the city council, such a requirement would certainly implicate First Amendment concerns.").

281. 475 U.S. 1 (1986).

other contents, were private property, and that the state regulation violated the First Amendment in requiring the utility to use its private property to “distribute the message of another.”²⁸² The purported *quid*—the extra space—thus appears disproportionate to the burden imposed by the regulation. More fundamentally, the *quid* can be seen as illusory. To be sure, the utility was subject to government regulation as a monopoly provider of electricity. But unlike broadcasters, it received no direct grant of speech rights from the government. It paid its own way in buying postage and mailing materials in sending its bills to its customers. Indeed, to the extent the utility wished to use the envelope to transmit its own newsletter, it admitted that the state could exclude the cost of doing so from its rate base.²⁸³ Broadcasters, in contrast, enjoy a government benefit in the direct preferential treatment they receive in the allocation of spectrum rights. It is this preferential treatment—the *quid*—that is critical, not the fact that the spectrum is deemed government property under the Communications Act.

6. *The Nexus Between the Quid and the Quo—A Searching Viewpoint Discrimination Test*

A second limitation on broadcast regulation requires a close nexus between the *quid* and the *quo*. This limitation is related to the concept of “germaneness” found in the Court’s unconstitutional conditions cases. As described by Robert Hale and more recently by Kathleen Sullivan, the concept stands for the principle that the greater power the government has to deny a subsidy for a good reason includes the lesser power to impose conditions on the receipt of the subsidy for the same reason, but the government cannot impose a condition for a reason not germane to one that would have justified denial in the first place.²⁸⁴ Sullivan illustrates this principle thus:

For example, a state could constitutionally make acceptance of common carrier liability the price paid by a trucker for permission to use the highways if the condition served to conserve the highways—a purpose that would have justified exclusion of private truckers altogether—but not if it functioned simply to protect existing carriers from competition.²⁸⁵

Applying this principle to broadcast regulation, the government may impose regulations that further the purposes served by granting exclusive licenses to use the airwaves on the condition that the licensee

282. *Id.* at 17-18.

283. *See id.* at 22-23 n.1 (Marshall, J., concurring).

284. *See* Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 349-51 (1935); Sullivan, *supra* note 262, at 1460.

285. Sullivan, *supra* note 262, at 1460-61 (basing example on *Stephenson v. Binford*, 287 U.S. 251, 275 (1932) and *Frost & Frost Trucking Co. v. Railroad Comm’n*, 271 U.S. 583 (1926)).

serve the public interest. Thus, children's programming requirements and political broadcasting rules promote robust and diverse private speech and attention to important public interest issues just as the FCC's licensing scheme seeks to further the same goals. It would be impermissible, however, for the government to require broadcasters to air only the views of Democrats, just as it would constitute impermissible viewpoint discrimination for the FCC to deny a license to a person simply because he or she is a Republican.

The degree of germaneness that is required varies according to the nature and context of the government subsidy and manifests itself in relation to how the Court applies its pliable viewpoint discrimination standard. This is best illustrated by comparing the Court's decisions in *Rust* and *Rosenberger v. Rectors & Visitors of the University of Virginia*.²⁸⁶ The Court applied a grudging, narrow standard in *Rust*, finding no viewpoint discrimination in the challenged regulations, even though they had the clear effect of favoring one side of the abortion debate over the other. In contrast, *Rosenberger* used a broad conception of viewpoint discrimination.

Rosenberger involved a state university's student activities fund that provided subsidies to student publications. The university refused to grant the petitioners a subsidy because their student paper, "Wide Awake: A Christian Perspective at the University of Virginia," was deemed a religious activity, defined under the university's guidelines as "primarily promot[ing] or manifest[ing] a particular belie[f] in or about a deity or an ultimate reality."²⁸⁷ The university argued that this guideline drew distinctions based on content, not viewpoint, and was therefore permissible given that the case involved a limited public forum. The Court, while acknowledging that "the distinction is not a precise one," found that the guidelines discriminated on the basis of viewpoint not just content.²⁸⁸ It did so even though, as the dissent pointed out, the guidelines barred subsidies to all religious viewpoints, whether Christian, Muslim, Jewish, agnostic, or atheist.²⁸⁹

Why do *Rosenberger* and *Rust* present such divergent conceptions of the viewpoint discrimination standard? *Rosenberger* provides an answer in distinguishing *Rust*:

[In *Rust*], the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. [The Court] recognized that when the government appropriates public funds

286. 115 S. Ct. 2510 (1995).

287. *Id.* at 2513.

288. *Id.* at 2517.

289. *See id.* at 2549 (Souter, J., dissenting).

to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.²⁹⁰

In *Rosenberger*, by contrast, the state university was “expend[ing] funds to encourage a diversity of views from private speakers.”²⁹¹ The two situations are “controlled by different principles.”²⁹² The former is government speech that can be identified as such, allowing it to be judged in the marketplace of ideas accordingly. It also leaves private speech unfettered to voice opposing viewpoints. The latter can influence the shape of private speech in positive ways by adding to diversity and the robustness of speech; however, it also carries a greater risk of government skewing public debate through indirect as well as direct means.

Consequently, there should be heightened scrutiny for such skewing effects—direct as well as indirect—when government creates a program to encourage private speech. As in *Rosenberger*, the viewpoint discrimination standard takes on a broader, more searching meaning. Thus, the Court was not satisfied by the fact that university guidelines discriminated “against an entire class of viewpoints” regarding religion, because the exclusion of multiple viewpoints is just as problematic in this context as the exclusion of one:

It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The [argument] that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.²⁹³

Putting it in terms of the concept of germaneness, regulation that so skews public debate is inconsistent with the goal of encouraging private speech that is the purpose of the government subsidy in the first place. A regulation that evenhandedly squashes debate on an issue frustrates this purpose just as much as, if not more than, one that shuts out just one side of the debate. Either type of regulation falls outside the scope of the speech-enhancing purposes of the government intervention in the speech marketplace and is therefore impermissible.

The distinction between “government speech” and “private speech” subsidies can be seen in broadcasting. As an example of the former, the government has spent millions of dollars to fund the airing of anti-drug public service announcements, or “PSAs,” on broadcast

290. *Id.* at 2519 (citations omitted).

291. *Id.*

292. *Id.*

293. *Id.* at 2518.

stations.²⁹⁴ Here the government is acting as a speaker, and it would be perfectly reasonable for it to insist that the producer of such PSAs—a broadcast station, say—not use this funding to create a program that advocates the legalization of marijuana. The grant of a broadcast license presents a different situation. It is indeed a valuable benefit, considerably more valuable than the advertising revenues the station may earn from producing and airing the anti-drug PSAs. But the benefit is granted for an entirely different purpose. It seeks to promote private speech and diversity of views. Given this, the government cannot, as a condition for receiving the license, require the station to air only anti-drug messages, or even prohibit the station from airing programming about the use of drugs no matter what the viewpoint.

Similarly, the government should not inhibit a broadcaster's ability to editorialize. In *League of Women Voters*,²⁹⁵ the Court struck down a prohibition against editorializing by noncommercial stations that received federal funding. While the Court did not address such an argument, the same result should apply were the government to require a broadcaster to relinquish its right to editorialize in exchange for receiving its license, as once was the case.²⁹⁶ While viewpoint neutral in the narrow sense used in *Rust*, such a condition that prohibits all editorializing no matter what the viewpoint silences broadcast speakers and would have a tendency to skew debate. It would clearly flunk the germaneness test, as it inhibits rather than encourages public debate. The Court emphasized this idea in *League of Women Voters*.

[B]roadcasters are "entitled under the First Amendment to exercise the 'widest journalistic freedom consistent with their public [duties].'" Indeed, if the public's interest in receiving a balanced presentation of views is to be fully served, we must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters who bear the public trust.²⁹⁷

Red Lion made a similar point, making it clear that, in upholding the fairness doctrine, the Court was not endorsing a government "refusal to permit the broadcaster to carry a particular program or to publish his own views."²⁹⁸ And in *CBS*,²⁹⁹ the Court affirmed the FCC's refusal to require broadcast licensees to accept all paid political

294. See Heather Fleming, *Government Plans Anti-Drug PSA Push*, BROADCASTING & CABLE, Feb. 17, 1997, at 16.

295. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984).

296. See, e.g., *Mayflower Broad. Corp.*, 8 F.C.C. 333, 340 (1940) (renewing a license only after receiving affidavits which concede that editorializing is against the public interest and that the station will air no more). The FCC subsequently abolished the prohibition on editorializing. See *Editorializing By Broadcast Licensees*, 13 F.C.C. 1246, ¶¶ 14-17 (1949).

297. *Mayflower*, 8 F.C.C. at 378 (citations omitted).

298. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396 (1969).

299. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

advertisements, finding that such a requirement would tend to transform broadcasters into common carriers and would intrude unnecessarily upon the editorial discretion of broadcasters.

The germaneness test and the broader viewpoint-neutral standard also guard against indirect effects that skew public debate. On its face, a regulation may be viewpoint neutral and serve to promote diversity and attention to important issues. But in practice it may have the indirect effect of chilling speech or reducing diversity. In upholding the fairness doctrine and its component personal attack and political editorial rules, the Court in *Red Lion* stated that "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage [of controversial issues], there will be time enough to reconsider the constitutional implications."³⁰⁰ This, in fact, is what happened in the FCC's 1987 decision to eliminate the fairness doctrine, which rested in large part on a finding that, in practice, the doctrine had the effect of chilling coverage of controversial issues, particularly the expression of unorthodox views on controversial subjects.³⁰¹

7. *Requiring the Quid to Be Clear and Specific*

Finally, broadcast regulation, even under a lower level of First Amendment scrutiny, is still subject to the vagueness and overbreadth doctrines, which require sufficiently clear and narrowly drawn rules to prevent arbitrary and discriminatory enforcement. This is necessary to provide adequate notice regarding public interest obligations to broadcasters and the public. As Reed Hundt, a former FCC Chairman, has written, clear standards also ensure accountability in the enforcement of these obligations, safeguarding against "the surreptitious suppression of disfavored viewpoints."³⁰² Partly for this reason, and also to strengthen its enforcement of the Children's Television Act of 1990, the FCC adopted clearer and more specific children's television rules in 1996.³⁰³

300. *Red Lion*, 395 U.S. at 393.

301. See *Syracuse Peace Council v. FCC*, 867 F.2d 654, 660-61 (D.C. Cir. 1989). There is also a pending proceeding before the FCC to eliminate the personal attack and political editorial rules because of their potential chilling effects. See *Personal Attack and Political Editorial Rules*, 61 Fed. Reg. 68, 201 (1996).

302. Hundt, *supra* note 73, at 536 ("Evaluating broadcasters without clear standards diserves First Amendment principles, as well as the Due Process principle that the government punish only after giving proper notice."); see also *City of Lakewood v. Plain Dealer Publ'g. Co.*, 486 U.S. 750, 758 (1988) ("[T]he absence of express standards makes it difficult to distinguish . . . between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech.").

303. See *Policies and Rules Concerning Children's Television Programming*, 11 F.C.C.R. 10,660 (1996).

To summarize, broadcast regulation can be premised on a *quid pro quo* rationale that at the same time provides strong safeguards against direct or indirect viewpoint discrimination and the impermissible skewing of public debate. It requires that a broadcaster's public interest obligations be proportionate to the benefit it receives in being granted a license and that these obligations bear a close relationship to the speech-enhancing purposes behind granting these benefits. Access regulations such as the political broadcasting rules satisfy this test. They aim to create greater diversity of viewpoint and encourage public dialogue on important issues. They pursue these goals in a viewpoint neutral manner, with sufficient clarity, and in a way that leaves considerable editorial discretion to the broadcaster.³⁰⁴ Affirmative public interest programming requirements such as children's television rules also pass muster. To be sure, they draw distinctions based on the content of speech: To qualify under the rules, a program must serve an educational purpose. But they promote important societal benefits that the marketplace may be underproviding, without interfering with a broadcaster's right to air its own viewpoints.³⁰⁵ While this may impose a burden on broadcasters in terms of the opportunity cost of lost advertising revenues that might be generated by airing programming that appeals to a larger adult audience, it is a fair price for broadcasters to pay for the valuable licenses they are granted to use the airwaves.

A different analysis applies to those broadcast regulations, such as the indecency rule, that seek to prohibit or limit certain speech. By their very nature, these rules contract broadcasters' editorial discretion in a direct fashion. Rather than seeking to promote access to a wide variety

304. The political broadcasting rules are crafted to preserve broadcasters' editorial discretion. For example, the equal opportunity requirements for political candidates are not triggered by news or documentary programming under exemptions expressly set forth in the Communications Act. See *supra* note 202 and accompanying text. In contrast to the political broadcasting rules, the Court found the access regulations involved in *Pacific Gas and Electric Co.* contrary to the First Amendment, because they amounted to viewpoint discrimination and had the effect of chilling speech. See 475 U.S. 1, 12-14 (1986). The regulations required a public utility to transmit with its bill the newsletter of only those groups that disagreed with its own views (e.g., consumer groups that opposed the utility's position on rate increases). These state regulations, unlike the political broadcasting rules, consequently "discriminate[d] on the basis of the viewpoints of the selected speakers." *Id.* at 12. In addition, the compelled access in *Pacific Gas and Electric Co.* presented a far greater risk that the views of others would be associated with and possibly even wrongly attributed to the access provider. The utility company in that case had never opened its billing envelopes to the public. Its customers might therefore be led to believe that the material contained in the envelopes had been endorsed by the company. Broadcasters, in contrast, make a living out of transmitting the views of others, from Procter & Gamble to Ross Perot. The public knows this quite well and is unlikely to mistake their views for those of the broadcaster.

305. For instance, while the FCC's children's television rules call for broadcasters to air three hours per week of programming that has educating and informing children as a significant purpose, the broadcaster has full discretion in selecting the topic, let alone viewpoint, of the educational programming. See *supra* note 201 and accompanying text.

of voices or ensure attention to public interest programming, they restrict particular types of speech because of their potential societal harms, particularly with respect to children. These restrictions were upheld in the Court's *Pacifica* decision,³⁰⁶ which relies on a different doctrinal framework than the one set forth in *Red Lion* and other broadcasting cases. *Red Lion*, while primarily based on the scarcity rationale, also emphasized the speech-enhancing nature of the regulations at issue. In contrast, *Pacifica* relied on the low value of the speech at issue—indecent programming—and television's accessibility to children.³⁰⁷ In the presence of these factors, it may be possible to uphold certain speech-restrictive conditions attached to a broadcast license, such as the indecency regulations, under the *quid pro quo* rationale.

Support for this can be found in the Court's decision in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,³⁰⁸ regarding regulation of indecent and obscene speech on cable channels. The Court's decision deals with a myriad of issues with a dizzying array of separate opinions by the Justices. The aspect of the decision dealing with leased access channels—cable channels a cable operator is required by federal law to reserve for unaffiliated programmers—is particularly relevant. In upholding a provision that permits cable operators to prohibit indecent or obscene programming on leased access channels, the Court emphasized the impact of indecent programming on children and television's accessibility, relying heavily on *Pacifica*.³⁰⁹ A majority of the Justices also appear to have based their decision on a *quid pro quo* rationale. A lower court made this observation:

Justice Breyer (joined in this aspect by Justices Stevens, O'Connor & Souter) stressed that the [provision] merely gave operators permission to "regulate programming that, but for a previous Act of Congress, would have had no path of access to cable channels free of an operator's control." Part of Justice Breyer's reasoning seems to be that Congress may, in its redistribution away from the cable operators, attach content-based strings to its grant to the lessees. The opinion of Justice Thomas, for himself as well as Chief Justice Rehnquist and Justice Scalia, takes a similar tack, observing that the rights of the petitioners to access to cable have been "governmentally created at the expense of cable operators' editorial discretion."³¹⁰

306. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

307. *See supra* text accompanying notes 107-111.

308. 116 S. Ct. 2374 (1996).

309. *See id.* at 2386-87.

310. *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 727 (D.C. Cir. 1997) (Williams, J., dissenting from denial of petition for rehearing *en banc*) (quoting *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. at 2386, 2424 (1996)) (citations omitted).

In sum, the *quid pro quo* rationale provides a First Amendment basis to uphold broadcast regulations that enhance diversity of viewpoint and attention to particular public interest issues, provided they do not engage in viewpoint discrimination or unduly intrude on broadcasters' editorial discretion. A case can also be made to justify certain speech-restrictive limitations, such as indecency regulation, under the *quid pro quo* rationale. It is a more difficult case to make, however, as these limitations by their very nature restrict speech and carry a greater risk of viewpoint discrimination. But the Court has upheld such regulation in circumstances in which the speech involved has traditionally been viewed as having low social value and shown to be harmful to children.

CONCLUSION

Broadcasting is at the dawn of the digital era. Television broadcasters have been assigned additional spectrum to convert to this new technology, which promises to revolutionize the way people watch the world's most influential medium. Digital technology can greatly improve picture and sound quality. It can also give the broadcaster flexibility to offer a wide range of new programming and other services on a single television channel, from multiple streams of news and entertainment programming to electronic delivery of the morning newspaper.

The new opportunities digital offers, as well as the spectrum set-aside to make it possible, have prompted a reexamination of broadcasters' public interest obligations. Should these obligations be redefined for the digital era? Does the spectrum set-aside warrant an increase in broadcasters' public interest duties? Should broadcasters be required to provide free airtime to political candidates during election season? Congress, the FCC, and a federal advisory committee established by President Clinton are debating these questions as the digital era unfolds.

This public policy debate is taking place at a time when the constitutional basis of broadcast regulation is at a crossroads. For years, the Supreme Court has upheld the broadcast regulatory regime primarily on the notion that broadcast frequencies are scarce. This is no doubt true, but, as many commentators have asked, so what? Scarcity is a fact of economic life, but it does not explain why broadcasters should be treated differently than newspaper publishers or other media for First Amendment purposes.

At some point, the Supreme Court will need to reexamine broadcasting's creaky First Amendment foundation. It can choose to take an absolutist approach, repudiate the scarcity rationale and *Red Lion*, and apply strict scrutiny to broadcast regulation, in which case much of the current regulatory regime will come tumbling down. But this is not the

only alternative. This Article has set forth several doctrinal and theoretical bases for the Court to uphold broadcast public interest regulation consistent with First Amendment principles.

On a doctrinal level, the Court's public forum doctrine provides the most appropriate map for assessing broadcast regulation. It provides a basis for treating broadcasting as a limited public forum and upholding broadcast regulation so long as it is reasonable and viewpoint neutral. This Article also offers two alternative underlying theories to justify this doctrinal result. The first derives from a view of the First Amendment as enabling democratic self-governance by providing the means of generating robust and open debate on public issues. Under this view, the government may at times play an active role to ensure that this public debate is indeed open and robust. The second theory is premised on the preferential treatment broadcasters receive in being granted valuable rights to use the spectrum. This allocation scheme should not be divorced from the First Amendment analysis of the regulatory regime. The former bestows valuable benefits on broadcasters to the exclusion of others, while the latter calls for a *quid pro quo* in terms of promoting important social goals such as providing greater access to this medium and attention to public interest programming.

Broadcast regulation can thus be seen as consistent with First Amendment principles. These principles require broadcast regulation to be reasonable and to avoid either direct or indirect viewpoint discrimination. But at the same time they give the government flexibility to fashion rules that can in fact enhance the public debate that takes place on broadcast channels.

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