Telecommunications & Electronic Media

Charting A New Constitutional Jurisprudence for the Digital Age

*By Randolph J. May**

Communications law and policy would be very different today—and more suited to the now generally competitive and converging communications marketplace—if the Supreme Court's twentieth century jurisprudence had been different. As it was, the Court took an unduly restrictive view of First Amendment free speech rights and an overly broad view of the nondelegation doctrine. Thus, the Federal Communications Commission's (FCC) Fairness Doctrine, requiring broadcasters to present both sides of controversial public issues, along with much other program content regulation, was upheld against First Amendment attack. And the FCC, the administrative agency charged under the Communications Act with regulating broadcasters, common carriers, and other communications companies, was given what at times amounted to unbridled discretion to regulate "in the public interest." Arguably, at times the Court also took a somewhat overly narrow view of Fifth Amendment property rights of communications service providers.

Some of the key Supreme Court decisions that established the parameters of twentieth century communications law doctrine run contrary to fundamental tenets of our constitutional culture. This is especially so with respect to free speech rights, which are essential to the robust exchange of ideas in a democracy, and to separation of powers principles, which are necessary to maintain democratic accountability. In light of space considerations, it is the jurisprudence implicating these free speech and separation of powers concerns that will be the focus of this article. A persuasive case can be made that some of the key decisions discussed below ought to have been decided differently at the time as a matter of law. But in some ways, as a matter of communications policy, they at least reflected the tenor of the analog age times. Until the past decade or two, most segments of the communications marketplace generally were characterized as monopolistic or oligopolistic, regardless whether one considered the then-separate "broadcast," "telephone," or "cable" market segments.

But at least since the Telecommunications Act of 1996[1] amended the Communications Act of 1934,[2] the communications marketplace environment has been characterized by increasing competition among a variety of service providers and also by a convergence of the services offered by major service providers. Convergence has meant the blurring of formerly distinct service boundaries that were tied to what I have called "techno-functional constructs" because service classifications were based on technical characteristics or functional features.[3] It no longer makes sense to speak of the "telephone," "broadcast," "cable," or "cellphone" markets in the same way it did only a few short years ago. Telephone companies now provide video and Internet services in addition to voice, cable companies provide voice and Internet services, and wireless companies provide voice, video, and Internet services. Increasingly, people watch "television" programs on their "computer" screens, or even on their mobile devices.

The advent of competition and convergence is attributable in large part to the rapid technological developments accompanying the transition from analog to digital equipment and from narrowband to broadband services.[4] Much has been written about the marketplace transformation wrought by digital age competition and convergence. This is not the place to rehash the marketplace or technological developments which, in any event, often become outdated almost as soon as they are reported. Suffice it to say, for purposes of this essay, that the communications marketplace today bears little resemblance to that which existed at the time major communications law decisions of the twentieth century were rendered by the Supreme Court.

Next I am going to discuss some of these key decisions to show how they have shaped the existing jurisprudence defining the media's First Amendment rights and also the FCC's authority as industry overseer. Then I will suggest that, whatever the merits of these decisions at the time they were decided—and the merits are debatable—either through overruling or distinguishing them, the Court should find ways to chart new jurisprudential directions that will comport more comfortably with important constitutional values.

I. The Broadcast and Public Interest Models: Analog Era Regulatory Regimes

At the heart of twentieth century media regulation discussed here is the "broadcast model" which took firm root before the rise of successive newer media employing various technologies.[5] Under the traditional broadcast model, because the electromagnetic spectrum was considered to be a scare physical resource that could support only a limited number of users at one time, the Communications Act's framers subjected over the air broadcasting to a regime under which the FCC assigns frequencies to selected licensees to operate for limited periods of time in the "public interest, convenience, and necessity."[6] And after initial award, licenses may not be renewed or transferred to a third party without an FCC determination that such renewal or transfer serves the public interest.[7] Thus, as a practical matter, FCC approval is required for mergers or other combinations of communications companies in which the transfer of control of a spectrum license integral to the companies' business is involved.

With the delegation of "public interest" authority in hand, the FCC proceeded to adopt licensing criteria for broadcasters based in part on the content of programming.[8] For example, the agency required licensees to limit the amount of advertising material broadcast[9] and to limit network-produced programs broadcast during prime time.[10]

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There are other examples of broadcast content regulation. Perhaps the most notorious example is the FCC's now-defunct Fairness Doctrine. Over time, the Fairness Doctrine was subject to slightly different formulations, but this FCC statement from 1949 captures its essence as a component of broadcasters' public interest obligations:

> If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities.[11]

Thus, the Fairness Doctrine required broadcasters to cover controversial public issues and to do so in a balanced way. In the 1980s, the FCC began questioning whether, with the proliferation of additional media outlets, the doctrine was still in the "public interest." Ultimately, it concluded this government-mandated requirement of balanced programming exerted a chilling effect on broadcasters, creating incentives for licensees to broadcast less controversial public affairs programming than otherwise they would.[12] Although the Commission initially concluded only Congress or the courts could get rid of the doctrine, the D.C. Circuit disagreed.[13] With its authority clarified, the FCC acted shortly thereafter to jettison the Fairness Doctrine upon public interest grounds, and its decision was affirmed.[14]

Basing licensing decisions on programming content raises obvious First Amendment issues. But the Supreme Court early on adopted an approach permitting an intrusive government-supervised content regulatory regime applicable to broadcasters. In the landmark case of *National Broadcasting Co. v. United States* (1943),[15] the Supreme Court invoked spectrum scarcity in sanctioning a lesser degree of First Amendment protection for radio and television broadcasters. Upholding the first FCC regulations governing the relationship between new radio broadcasting networks and local affiliates, the Court declared: "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. 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 government regulation."[16] The FCC's "chain broadcasting" regulations prohibited certain practices that restricted the affiliate's discretion to broadcast a non-network supplied program.

Aside from rejecting the First Amendment claim on the basis of spectrum scarcity, the *NBC* case is also notable because Justice Frankfurter's majority opinion gave the FCC such wide berth to regulate "in the public interest." Referring to what he called the "dynamic nature" of the new field of broadcasting, Frankfurter declared the Communications Act's public interest delegation gives the agency "expansive powers."[17] And quoting from his earlier opinion in *FCC v. Pottsville Broadcasting Co.*, Justice Frankfurter proclaimed the public interest standard "is as concrete as the complicated factors for judgment in such a field of delegated authority permit."[18]

In 1969, in *Red Lion Broadcasting Co. v FCC*,[19] the Court employed the spectrum scarcity rationale used in *NBC* to affirm the constitutionality of the FCC's Fairness Doctrine. The FCC had determined that a radio broadcaster had violated the fairness mandate by refusing to provide broadcast time for someone claiming he had been personally attacked in the station's programming. Rejecting a challenge that the doctrine violated broadcasters' free speech rights, the Court responded:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.... Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.[20]

With *NBC* and *Red Lion*, curtailment of broadcasters' free speech rights, justified on the basis of spectrum scarcity, was firmly embedded in constitutional jurisprudence. Despite some periodic teases, the Supreme Court has yet to overturn *Red Lion*,[21] even though today there are thousands more broadcasting stations on the air than in 1969, not to mention the proliferation of new media outlets that did not then exist, such as cable and satellite systems, with hundreds of channels of video and audio programming, and DVDs, iPods, mobile devices, and the Internet.

Although claimed spectrum scarcity has provided the primary justification for the broadcast model's free speech curtailment, it is worth noting that the Supreme Court has employed another rationale. In 1978, in *FCC v. Pacifica Foundation*,[22] the Court, split 5-4, upheld in a narrowly-drawn opinion the FCC's determination that it could sanction a radio station that broadcast George Carlin's "filthy words" monologue, which the agency determined to be "indecent."[23] In rejecting the broadcaster's First Amendment challenge, the Supreme Court, citing *Red Lion*, pointed out that "a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve 'the public interest, convenience, and necessity.'"[24] Then the Court offered two non-spectrum scarcity rationales. First, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans.... Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content."[25] Second, "broadcasting is uniquely accessible to children," unlike other forms of offensive expression that "may be withheld from the young without restricting expression at its source."[26]

Even with its emphasis on the "narrowness"[27] of the holding, one in which "context is all-important,"[28] *Pacifica* cemented the notion that broadcasters enjoyed—or suffered—diminished First Amendment rights. As the *Pacifica* Court concluded: "[O]f all the forms of communication, it is broadcasting that has received the most limited First Amendment protection."[29] There you have a concise summary of the twentieth century's jurisprudence under the "broadcast model."

Not much has changed from a jurisprudential perspective since Justice Jackson observed in *Kovacs v. Cooper* that each of the different communications media represents a "law unto itself."[30] On the one hand, any speech restrictions affecting the print media receive very strict scrutiny. In the leading case of *Miami Herald Publishing Co. v. Tornillo*, the Court unanimously held that a Florida statue requiring a newspaper to publish a reply to an editorial criticizing a political candidate violated the First Amendment.[31] So *Tornillo* constituted an unequivocal rejection of the assertion that a *Red Lion*-like "right of access" regime, a fairness doctrine, if you will, should be applied to newspapers in the interest of enhancing the speech rights of newspaper readers.

On the other hand, in *Turner Broadcasting System v. FCC* (1994), the Court sustained a "right of access" mandate against First Amendment challenge in a 5 to 4 decision.[32] Relying heavily on Congress's judgment that "free" over-the-air television service provided by local broadcast stations deserved special economic protection, the majority refused to invalidate, at least on its face, a law requiring cable operators to carry local broadcast signals. The Court acknowledged the "must carry" mandate directly implicated cable operators' free speech rights.[33] Nevertheless, applying an "intermediate level of scrutiny,"[34] and asserting cable operators' possessed a marketplace "bottleneck" that allowed them to play a "gatekeeper" role with respect to programming entering subscribers' homes,[35] the Court rejected the argument that the *Tornillo* print model should govern. It is important to note that in rejecting application of the print model, the Court did not place any reliance on the scarcity rationale at the heart of *Red Lion*, even though it did acknowledge that many communities were one newspaper towns.

Finally, thus far the Court has reviewed content-based restrictions applied to the Internet under a strict scrutiny standard. In the leading case, in *Reno v. ACLU* (1997), the Court struck down on First Amendment grounds a law regulating "indecent" communications on the Internet.[36] In doing so, the Court declared, "unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a 'scarce' expressive commodity."[37]

II. The Way Forward

A Constitutional Jurisprudence for the Digital Era

In today's competitive and converging digital environment, it is time for the Court finally to abandon the scarcity rationale used in *Red Lion* to justify limited First Amendment protection for radio and television broadcasters. In *Red Lion's* place, the Court should articulate a jurisprudence that generally affords the various forms of electronic media the same strict First Amendment protection that newspapers receive under *Tornillo* and that the Internet receives under *Reno*. There will always be special considerations presented by laws or regulations defended on the basis they are intended to protect children from harmful content, and the government's interest in this respect certainly is legitimate. But in today's digital environment, much more so than in the past, parents have available easy-to-use filtering and blocking tools to screen out offensive content, whether such content is delivered via broadcasting, cable, satellite, or the Internet. The widespread availability of such screening tools surely constitutes a "less restrictive alternative" to content regulation that should render *Pacifica's* pervasiveness and uniquely accessible to children rationales largely a historical relic. The *Pacifica* Court was wise at the time "to emphasize the narrowness" of its holding.[38]

B. The Public Interest Standard

Before elaborating more fully on the way forward for a new First Amendment jurisprudence for the electronic media, a word is in order concerning the public interest standard under which so much of the FCC's regulatory activity, including content regulation, takes place.[39] In the leading case of *J. W. Hampton, Jr. v. United States*, the Supreme Court, although rejecting a nondelegation doctrine challenge to a tariff statute, affirmed: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates be directed to conform, such legislative action is not a forbidden delegation of legislative power."[40] Although the Court has not held a statute unconstitutional on nondelegation doctrine grounds since 1935 (when it did so twice),[41] it has continued to maintain that in order not to violate fundamental separation of powers principles there must be an "intelligible principle" set forth in every statute delegating congressional authority.[42]

With respect to the Communications Act's "public interest" delegation, the Supreme Court's jurisprudence is incongruous and unsatisfactory. In *Mistretta v. United States*, Justice Scalia proclaimed in dissent: "It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature."[43] Nevertheless, he observed, without expressing disapproval, that the "vague" public interest standard has withstood constitutional challenge.[44] And in *Whitman*, now writing for the majority, Justice Scalia once again cited the public interest standard as an indication of how far the Court has been willing to go in sustaining vague delegations.[45]

The fact is that it is difficult, if not impossible, to square the indeterminate public interest standard with the "intelligible principle" requirement to which the Court continues to pay lip service. Shortly after the passage of the Federal Radio Act, upon which the Communications Act was modeled, the agency's first general counsel stated: "'Public interest, convenience, or necessity' means about as little as any phrase that the drafter of the Act could have used…."[46] Another way of expressing, accurately, the same thought is to say the standard means whatever a majority of the agency's commissioners say it means on any given day.

I have argued in a much more extensive treatment that the public interest delegation ought to be held unconstitutional as a violation of the nondelegation doctrine's requirement that Congress lay down an intelligible principle, and I refer the reader to that article.[47] Constitutional law scholar Gary Lawson has called the public interest standard "easy kill number one," as an example of a provision that should be

held unconstitutional on nondelegation grounds.[48] At its next opportunity, the Court should reconsider those cases that have held the public interest standard constitutional. Doing so would force Congress to provide more policy direction for a so-called independent regulatory agency increasingly at sea in the new digital environment. And, in furtherance of the separation of powers principles which underlay the nondelegation doctrine, doing so would make Congress more politically accountable for establishing—or, perhaps, failing to establish—sound communications policy direction.

C. Defining a New First Amendment Jurisprudence for the Electronic Media

Red Lion's scarcity rationale was suspect, in one sense, on the day it was rendered, and in another not long thereafter. As Ronald Coase explained in his famous article ten years before the decision, all resources, not just spectrum, "are limited in amount and scarce, in that people would like to use more than exists."[49] Indeed, the extent to which spectrum is more or less scarce is impacted greatly by the government's regulatory decisions in allocating frequencies. As Christopher Yoo puts it nicely, "because the amount of spectrum available at any moment is itself a product of regulation, any reliance on spectrum scarcity in effect allows the regulation to serve as a constitutional justification for other regulations."[50] As Coase and many other scholars have pointed out, the so-called spectrum scarcity problem underpinning the *NBC* and *Red Lion* decisions would not exist, at least in the way asserted, if Congress did not prohibit the emergence of an enforceable property rights regime. Under a property rights regime, claims concerning spectrum interference would be resolved through marketplace mechanisms or through litigation. Then the notion of spectrum scarcity as a justification for the government to regulate program content under the indeterminate public interest standard would be eviscerated.

Even putting aside the classical Coasian economic argument against spectrum scarcity,[51] the communications marketplace has changed so radically since *Red Lion* was decided that the scarcity rationale should be jettisoned as a justification for continued diminished First Amendment protection. The *Red Lion* Court itself acknowledged the pace of "technological advances," but thought it "unwise to speculate" as to how such advances might alter the scarcity calculus.[52] As a practical matter, however, the fact is that technological advances have rendered obsolete the notion of a scarcity of media outlets. We live in an age of media abundance, rather than an age of scarcity.

Without trying to paint a complete landscape here,[53] consider this. When *Red Lion* was decided in 1969, in addition to the daily newspaper and other print media, most Americans got their news and other information from the over-the-air broadcast stations affiliated with the then three major networks, ABC, CBS, and NBC, and a few other television and radio stations serving their communities. Today, over ninety percent of Americans subscribe to either multi-channel cable or satellite services, on average receiving over a hundred separate information and entertainment channels. There are over three hundred different national program networks from which cable and satellite subscribers may choose. In addition to cable and satellite television, there is now satellite radio, which offers hundreds of information and entertainment program channels. As the FCC said back in 2003, "We are moving to a system served by literally hundreds of networks serving all conceivable interests."[54] Since then, more networks have emerged. The switch-over to digital television will lead to still more over-the-air television program channels. And, of course, today's broadband Internet services are a key development in terms of further enhancing the age of information abundance.

The Roberts Court should seize the first opportunity to chart a new jurisprudential course that provides broadcasters, as well as other electronic media, including cable, satellite, wireless, and broadband Internet providers, with First Amendment protections that are on par with those traditionally enjoyed by the print media. In other words, government content restrictions applicable to the various electronic media, regardless of the technological platform used to deliver content, would be subject to the same strict scrutiny the Court employed in *Tornillo* in holding unconstitutional a newspaper "right of reply" mandate. This would mean, whether explicitly or in some less direct fashion, overturning *Red Lion* and *Turner Broadcasting*. And it would mean declaring that, with the availability of today's various parent-empowering blocking and filtering technologies, --including, for example, the V-chip embedded in every television set--*Pacifica's* "uniquely pervasive" and "uniquely accessible to children" rationales have outlived whatever jurisprudential utility they once may have had as a justification for content regulation.

A few times since *Red Lion*, the Court has indicated receptivity to revisiting the decision. For example, almost a quarter a century ago, in *FCC v. League of Women Voters*, the Court acknowledged, "[c]ritics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete."[55] But on this and other occasions, while taking note of the doctrine's possible obsolescence, the Court has refused to bury it. It is time to do so. The Court could recognize that it erred at the time, and before, in not recognizing that spectrum, in an economic sense, is no scarcer than other resources. Or perhaps more palatably, it could acknowledge that advances have rendered obsolete the "technological scarcity" upon which *Red Lion* was premised. In either case, the Court would acknowledge that the scarcity rationale's obsolescence means that content regulation based on it cannot withstand First Amendment challenge.

And the opportunity to emphasize the limited continuing relevance, if not outright irrelevance, of *Pacifica* may be at hand. In March 2008, the Court granted certiorari to review the Second Circuit's decision holding that a new FCC policy sanctioning "fleeting expletives" is arbitrary and capricious under the Administrative Procedure Act for failure to articulate a reasoned basis for the change in policy.[56] While the court of appeals based its decision solely on administrative law grounds, the government asserts the Second Circuit's decision conflicts with the FCC's authority recognized in *Pacifica*. If the Court does reach the constitutional issue, which it may not, it should use the opportunity to further restrict *Pacifica's* already narrow holding.

As for cable operators, whatever *Turner Broadcasting's* merits when it was decided, cable (and satellite operators) now should receive full First Amendment protection. Recall the Court acknowledged cable operators' free speech rights were implicated by the "must carry" mandate, but nevertheless relied heavily on Congress's judgment that local stations providing "free" over-the-air television deserved special economic protection. Today, with many more media outlets available, and the Internet, the justification, if ever there were any, for providing special protection to local broadcasters at the expense of cable operators' First Amendment rights is even more problematic. In *Turner*, the Court viewed cable operators as possessing a control different in kind than the "monopoly status" position it conceded in *Tornillo* most newspapers enjoyed. The Court stated:

> [T]he physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude.[57]

Although it is doubtful that by the mid-1990s cable operators continued to have such dominance as to justify the "bottleneck" or "gatekeeper" tag, it is simply not the case today that they can control the video programming which enters a subscriber's home. Cable competes vigorously with satellite operators providing hundreds of channels, and, increasingly and more ubiquitously, with "telephone" companies that now offer hundreds of channels of programming over high-capacity networks. And the Internet is the source of virtually unlimited information sources, including video, while more and more people watch the latest "television" programs on their "cellphones." *Turner* was a close 5-4 decision. When the occasion next arises, the Court should indicate, in light of the changed communications marketplace, the decision's rationale has been undermined and cable operators are entitled to enjoy the same First Amendment rights as newspapers.

With the revisiting of *Red Lion, Pacifica, and Turner* along the lines discussed above, the Court can establish a new First Amendment paradigm for the electronic media, one that, I would argue, is much more in keeping with the Founders' First Amendment vision. Perhaps it was predictable, maybe even likely, that the First Amendment's protections would be limited substantially during an analog age that tended towards a monopolistic or oligopolistic communications marketplace. But it should be considered predictable, and, yes, even likely, for the Court now to establish a new First Amendment jurisprudence befitting the media abundance of the digital age.

Endnotes

1 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.)

2 Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.)

3 *See* Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 Fed. Comm. L. J. 103, 104-108 (2006).

4 *See id.* at 108-110. As for convergence, in 2004 the FCC explained how the greater bandwidth of broadband networks encourages the introduction of services "which may integrate voice, video, and data capabilities while maintaining high quality of service." IP-Enabled Services, Notice of Proposed Rulemaking, 19 F.C.C.R. 4863, at ¶16 (2004).

5 Other scholars have used this "broadcast model" terminology. For a particularly cogent recent exposition of the role of the "broadcast model," see Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 Geo. L. J. 245 (2003).

6 *See* 47 U.S.C. §§ 303, 307, 309. The literature describing the linkage between the theory of spectrum scarcity and the Communications Act's public interest standard is well nigh inexhaustible. For a good general introduction, with citation to many authorities, see Thomas G. Krattenmaker & Lucas A. Powe, Jr., Regulating Broadcast Programming, AEI Press (1994) (*see especially* Chapters 2, 3, and 6). Two other good introductory articles concerning the theory of broadcast regulation arising from the claim of spectrum scarcity, each with ample citation of authorities, are Glen O. Robinson, "Title I, The Federal Communications Act: An Essay on Origins and Regulatory Purpose," *in* A Legislative History of the Communications Act of 1934, 3 (Max D. Paglin ed., 1989) and Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcasting Spectrum*, 33 J. L. & Econ. 133 (1990).

7 47 U.S.C. §§ 308, 310 (d).

8 *See* Krattenmaker & Powe, *supra* note 6. The entire book concerns the regulation of program content by the FCC. For a description of the comprehensive nature of the FCC's early efforts to regulate broadcast program content, see Federal Communications Commission, Public Service Responsibilities of Broadcast Licensees (1946).

9 Federal Communications Commission, Public Service Responsibilities of Broadcast Licensees 41 (1946)

10 Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in network Television Broadcasting, 23 F.C.C. 2d 382 (1970).

11 Editorializing by Broadcast Licensees, Report of the Commission, 13 F.C.C. 1246, 1251 (1949). See also The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Fairness Doctrine Report, 48 F.C.C. 2d 1 (1974). Krattenmaker & Powe, *supra* note 6, have extensive discussion throughout their book on the Fairness Doctrine, including all of Chapter 9 ("The Fairness Doctrine").

12 Inquiry into § 73.1910 of the Commission's Rules and Regulations Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 143 (1985).

13 Meredith Corp. v. FCC, 809 F. 2d 863 (D.C. Cir. 1987) (The Communications Act does not mandate the Fairness Doctrine.)

14 For a description of the doctrine, its impact on broadcasters, and a history of its demise, see Syracuse Peace Council, 2 F.C.C.R. 5043 (1987), *aff'd*, 867 F. 2d 654 (D.C.Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

15 NBC v. United States, 319 U.S. 190 (1943).

16 319 U.S. at 226.

17 *Id*. at 219.

18 *Id*. at 216, quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

19 395 U.S. 367 (1969).

20 *Id*. at 388, 390.

21 For an early hint that the scarcity rationale might be undermined in the future, see CBS v. Democratic National Committee, 412 U.S. 94, 102 (1973) ("The broadcast industry is dynamic in terms of technological change" so that "solutions adequate a decade ago are not necessarily so now, and those acceptable today may be outmoded 10 years hence." (plurality opinion) and ("Scarcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*. It has been predicted that it may be possible within 10 years to provide television viewers 400 channels through the advances of cable television." *Id*. at 158, n.8 (Douglas, J., concurring in the judgment.) For a

later hint, see FCC v. League of Women Voters, 468 U.S. 364, 376 n.11 (1984) (We are not prepared… to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.") See generally Yoo, *supra* note 5, at 245, 284-88 (2003).

22 438 U.S. 726 (1978).

23 For authority, the FCC relied on the statute that prohibits the use of "any obscene, indecent, or profane language by means of radio communications." 18 U.S.C. § 1464.

24 438 U.S. at 748.

25 438 U.S. at 748.

26 *Id*. at 749.

27 *Id*. at 750.

28 *Id*.

29 *Id*. at 748.

30 336 U.S. 77, 97 (1949) (concurring opinion).

31 418 U.S. 241 (1974).

32 512 U.S. 622 (1994).

33 *Id*. at 641.

34 This is not the place, nor is would there be space, to discuss the Court's tortured constitutional "standards" jurisprudence, even with respect to the First Amendment. Suffice it to say that in *Turner* a key to the employment of intermediate rather than strict scrutiny was Justice Kennedy's determination for the majority that the "must carry" requirement was content neutral. In dissent, Justice O'Connor argued the carriage requirement was in fact a content-based restriction because it was directed at "local" broadcast station content.

35 512 U.S. at 656.

36 521 U.S. 844 (1997).

37 *Id.* at 896.

38 438 U.S. at 750.

39 Congress has directed or authorized the FCC to act in the public interest in nearly one hundred separate statutory provisions. *See* Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional*, 53 Fed. Comm. L. J. 427, 429 and Appendix A (2001).

40 276 U.S. 394 (1928).

41 Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

42 See most recently, Whitman v. American Trucking Assn., 531 U.S. 457, 472 (2001).

43 488 U.S. 361, 415 (1989).

44 *Id*. at 416.

45 531 U.S. at 474.

46 Louis G. Caldwell, *The Standard of the Public Interest, Convenience or Necessity as Used in the Radio Act of 1927,* 1 Air L. Rev. 295, 296 (1930).

47 *See* May, *supra* note 39, at 443-452.

48 Gary Lawson, *Delegation and the Constitution*, 22 Reg., No. 2, 1999, at 23, 29.

49 R.H. Coase, *The Federal Communications Commission*, 2 J. L. & Econ. 1 (1959).

50 Yoo, *supra* note 5, at 251. *See also* Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum,* 33 J. L. & Econ. 133 (1990).

51 It is pertinent to point out here that the Court in *Red Lion* based its decision firmly on what it referred to as "a technological scarcity of frequencies," thus allowing it to avoid dealing with the "economic scarcity" argument. *See* 395 U.S. at 401, n. 28.

52 395 U.S. at 397.

53 There is simply not space to do so. The figures presented are well-known, and to the extent they are changing, it is in the direction of more, rather than fewer, media outlets and information sources.

54 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules, FCC 03-127, June 2, 2003, at 48-49.

55 468 U.S. 364, 376, n.11 (1984).

56 *See* Fox Television Stations, Inc. v. FCC, 489 F. 3d 444 (2nd Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008).

57 512 U.S. at 656.