Full First Amendment Freedom for Broadcasters: The Industry as Eliza on the Ice and Congress as the Friendly Overseer¹

Timothy B. Dyk†

Opponents of the various permutations of the doctrine of original intent view the Bill of Rights as a flexible instrument for expanding the rights of new generations of Americans. They find in the language and history of the Constitution values which, when applied to current circumstances, yield new principles for modern times. Ironically, many of these same people object to applying the underlying values of the First Amendment to the relatively new medium of broadcasting. They have urged that broadcasting, unknown at the time of the framing of the Constitution and thus not having been within the original intent, is not entitled to the same First Amendment protection as the print medium, and, therefore, that its content may be regulated in the public interest.²

In fact, traditional constitutional analysis leads to a far different result.

† A.B. Harvard College, 1958; L.L.B. Harvard Law School, 1961; partner, Wilmer, Cutler & Pickering, Washington, D.C.; sometime Lecturer at the Yale Law School and the University of Virginia School of Law. The author has served as counsel for broadcasters in a number of the matters discussed in this Article.

A number of people within and without the broadcast industry have generously spent their time reviewing this Article. They bear no responsibility for the views expressed. The author is particularly grateful to Henry Geller, George Vradenburg III, and the author’s partners at Wilmer, Cutler & Pickering, for their insightful comments, and to Teresa D. Baer, an associate at the firm, for her research and assistance.

1. See H. STOWE, UNCLE TOM’S CABIN OR LIFE AMONG THE LOWLY 64–66 (1852).
2. See, e.g., The No Uncertain Terms of John Dingell, Broadcasting, Mar. 5, 1984, at 53, where John Dingell, the Chairman of the House Committee on Energy and Commerce, argued:

   Go over to the Capitol for me, would you, please? Between the House floor and the gallery is a staircase, and there’s a huge picture at the head of it. It’s the signing of the Constitution of the United States . . . . Go over and look at it, and then come back and tell me how many television cameras and how many radio microphones you find in it. And then tell me that the founders had in mind radio or TV when they drafted the Constitution and the first 10 amendments.


Copyright © 1988 by the Yale Journal on Regulation. 299
The guiding principle of the First Amendment could not have been clearer. Its purpose was to protect the press from the government. It was not designed to protect the government from the press or to authorize government regulation of the press under the guise of protecting First Amendment values. This principle applies at all times to all media. However, the courts have yet to recognize this obvious truth.

The difficulties experienced in applying First Amendment principles to new media have not been limited to broadcasting. Motion pictures and cable television are primary examples. While the law is now established in the area of motion pictures, the Supreme Court is only beginning to grapple with the problems of cable television. In broadcasting, cable, and other newer media, the Court appears to be having conceptual difficulty because the line between what is government and what is private has been blurred as government has itself engaged in more speech activities, has subsidized others, and has conferred regulatory benefits on particular speakers.

The courts have by far had the greatest difficulty in the area of broadcasting. Until now, the courts have afforded broadcasting a lesser degree of protection than traditional media. However, they may be on the thresh-

3. Initially, the Supreme Court held that the First Amendment did not apply at all to motion pictures. Mutual Film Corp. v. Ohio Indus. Comm’n, 236 U.S. 230 (1915). More recently, it has recognized the existence of broad protection, but has permitted administrative censorship. See Freedman v. Maryland, 380 U.S. 51 (1965) (government may require that motion pictures be submitted to censorship board before release); see also Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952) (noting that different First Amendment standards may apply to motion pictures).

4. In City of Los Angeles v. Preferred Communications, 476 U.S. 488 (1986), the Court held that cable television “plainly implicat[es] First Amendment interests,” id. at 494, but explicitly did not decide whether the First Amendment standard for the print media or the broadcast media applied. See id. at 496–97 (Blackmun, J., concurring). Left unresolved was the question whether there were justifications, such as natural monopoly or the limitations of space on utility poles, for limiting First Amendment protection. See Central Telecommunications v. TCI Cablevision, 800 F.2d 711 (8th Cir. 1986), cert. denied, 107 S. Ct. 1358 (1987); Pacific W. Cable Co. v. City of Sacramento, 672 F. Supp. 1322, 1330–39 (E.D. Cal. 1987); Group W Cable v. City of Santa Cruz, 669 F. Supp. 954, 959–67 (N.D. Cal. 1987); Century Federal v. City of Palo Alto, 648 F. Supp. 1465, 1470–78 (N.D. Cal. 1986), appeal dismissed, 108 S.Ct. 1002 (1988).


6. For example, the government has subsidized public broadcasting. See FCC v. League of Women Voters, 468 U.S. 364 (1984) (striking down a statute prohibiting federally funded public broadcasters from editorializing).

7. For example, the government has allocated the spectrum to broadcasters through its licensing process.

The Court also appears to have encountered difficulties because of the increasing prevalence in modern society of corporate, as opposed to individual, speech. See, e.g., Consolidated Edison Co. v. Public Serv. Comm’n, 447 U.S. 530 (1980) (striking down prohibition on inclusion of inserts discussing controversial public policy issues in monthly electric bills); First Nat’l Bank v. Bellotti, 435 U.S. 765 (1978) (state prohibition of corporate speech on public issues unconstitutional).
First Amendment and Broadcasting

old of accepting the principle that at least the core First Amendment protections against government control of content must apply to the broadcast medium as well as to the print medium.8

This Article looks in depth at the consequences of such a holding. It first addresses the current state of broadcast content regulation, then describes the constitutional issues which are now being brought before the courts for a second and more searching look. The Article next turns to the questions that full First Amendment protection in the broadcast medium may pose for the future of the broadcast industry. The Article concludes that full First Amendment protection is critical to preserving the independence and vitality of the broadcast medium.

I. The Scope of Broadcast Content Regulation

Effective broadcast regulation began with the Radio Act of 1927.9 Regulation to allocate and assign licenses was necessary because of the great demand for radio frequencies and the interference among existing stations.10 The scheme of regulation set by the 1927 Act continued in the Communications Act of 1934,11 and that Act still governs the broadcast industry today. A central function of federal regulation in the broadcast field is the assignment of frequencies to competing applicants through a licensing system.12

When a frequency becomes available for broadcasting, applications for the station license are received and considered comparatively if there are multiple applicants. When a license is awarded, it is only for a limited period (recently extended to five years in television and seven in radio), and the existing licensee must apply for renewal at the expiration of the period.13 Although they rarely do so, competing applicants may also apply for the frequency when the license expires, and a license may be awarded to a competing applicant. Typically, however, the license of the existing broadcaster is renewed. Regulation of existing licensees is largely delegated to the Federal Communications Commission (the Commission)

8. As discussed below, the Federal Communications Commission has held the fairness doctrine, which requires the presentation of opposing views on various issues, unconstitutional. That case is now on review in the District of Columbia Circuit. In re Syracuse Peace Council, 2 FCC Rcd 5043 (1987), petition for review pending, Nos. 87-1516, 87-1544 (D.C. Cir. Sept. 24, 1987).
13. Id. § 307(c).
under a "public interest" standard, although Congress in the past has imposed some specific regulatory requirements and appears increasingly interested in doing so.\textsuperscript{15}

Programming has received particular attention in the intervening sixty years since the passage of the 1927 Act, and there has been no dearth of content regulation by the Congress and Commission. Despite significant deregulation of broadcasting by the Commission,\textsuperscript{16} much content regulation remains, in large part because of congressional resistance to deregulation in this area.\textsuperscript{17}

Congress has been particularly concerned with content regulation designed to serve the interests of congressional candidates. It included in the 1927 Act, and continued in the 1934 Act, a provision requiring broadcasters who give or sell time to a political candidate to give or sell equal time to opposing candidates.\textsuperscript{18} In 1972, Congress adopted Section 312(a)(7), guaranteeing "reasonable access" for federal, but not state and municipal, candidates; in other words, Congress guaranteed federal candidates the right to buy broadcast time during political campaign periods.\textsuperscript{19} At the same time Congress adopted provisions guaranteeing candidates the lowest unit rate for purchases of political time.\textsuperscript{20} Congress has also sought to limit the right of public stations to editorialize\textsuperscript{21} and has barred them from endorsing political candidates.\textsuperscript{22}

\textsuperscript{14} Id. \$ 303.
\textsuperscript{15} See Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 1988 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 1329. That continuing budget resolution forbade the Commission to use appropriated funds to abolish minority and female preferences in its licensing proceedings or its distress sale or tax certificate policies, to diminish the number of VHF channel assignments for public television stations and to reconsider the existing newspaper-television cross-ownership ban or extend any temporary waivers of the rule. The prohibition on extension of temporary waivers was struck down in News America Publishing v. FCC, No. 88-1037, slip op. (D.C. Cir. Mar. 29, 1988).

\textsuperscript{16} Much of the deregulation has been outside the area of content, for example, the relaxation of the multiple ownership rules discussed infra note 106, but there has been some deregulation within the content area as well. See, e.g., Office of Communication of United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983) (upholding elimination of program quantity guidelines and formal ascertainment requirements and redefining general public interest standard for programming).

\textsuperscript{17} Thus, for example, Congress in recent years has persistently declined to eliminate the specific statutory program requirements discussed below, despite Commission proposals that it do so. FCC Legislative Proposals Jan. 30, 1986 (on file with FCC Office of Cong. and Pub. Affairs). Commission action to eliminate the fairness doctrine and a Court of Appeals holding that the doctrine had not been codified by earlier legislation, Telecommunications Research & Action Center v. FCC, 801 F.2d 501, 517-18 (D.C. Cir. 1986), \textit{cert. denied}, 107 S. Ct. 3196 (1987), led to congressional proposals to codify the doctrine. See infra notes 69, 107.

\textsuperscript{18} Pub. L. No. 69-632, \textsection 18, 44 Stat. 1162 (1927) (codified at 47 U.S.C. \textsection 315 (1982)).
\textsuperscript{19} 47 U.S.C. \textsection 312(a)(7) (1982).
\textsuperscript{20} Id. \textsection 315(b).
\textsuperscript{21} Id. \textsection 399; see FCC v. League of Women Voters, 468 U.S. 364, 381-83 (1984) (invalidating this provision).
\textsuperscript{22} 47 U.S.C. \textsection 399 (1982); see also 18 U.S.C. \textsection 1464 (1982), relating to indecency discussed infra note 31 and accompanying text. Other limitations have been adopted relating to commercial speech: 15 U.S.C. \textsection 1335 (1982) (cigarette advertising); 18 U.S.C. \textsection 1304 (1982) (lotteries); 47
First Amendment and Broadcasting

The Commission, acting under the public interest standard of the Communications Act, has adopted additional specific regulations governing the content of broadcasting. Its 1940 *Mayflower Broadcasting Corp.* decision prohibited editorializing by all commercial broadcasters. In 1949, while overruling *Mayflower*, it articulated the fairness doctrine, requiring broadcasters who editorialize and otherwise treat controversial issues of public importance to present opposing views. In 1968, the Commission, as a corollary to the fairness doctrine, adopted the personal attack rule, which guarantees to individuals who are attacked in the course of a discussion of controversial issues the right to personally appear and reply regardless of the truth or falsity of the charge, and the political editorializing rule, which gives candidates the right to reply to editorials opposing them or favoring their opponents.

The Commission's regulation has not been limited to imposing reply requirements. It has also prohibited speech in the broadcast medium that is permitted in other media. Thus, the Commission has prohibited "staging" by broadcasters, that is, the deliberate falsification of news, whether or not there is any damage to reputational interests. With an exception for favored program categories, the Commission has effectively barred network programming for one hour each evening on affiliated stations in order to encourage the growth of non-network programs. It has sought


23. 8 F.C.C. 333, 340 (1940).

24. Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). Another aspect of the fairness doctrine requires broadcasters to cover controversial issues of public importance. Because that aspect of the fairness doctrine closely parallels the so-called responsive programming obligation discussed below, it is not separately treated. In 1959, when Congress exempted news and news-related programs from the equal time requirements, it gave the Commission authority to apply the fairness doctrine in the exempt areas. 47 U.S.C. § 315(a) (1982). The contention that Congress codified the fairness doctrine in 1959 has recently been rejected. See *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 517–18 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987).


27. See *Public Media Center v. FCC*, 587 F.2d 1322 (D.C. Cir. 1978) (applying fairness doctrine to ballot advertising); see also *In re Nicholas Zapple*, 23 F.C.C.2d 707 (1970) (applying "equal time" principles to appearances of candidate supporters).


29. No such policy has been upheld for the print press. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (public officials can recover for damage to reputational interests but only if statement made with actual malice).

30. See *Mt. Mansfield Television v. FCC*, 442 F.2d 470 (2d Cir. 1971). The Supreme Court has held in other areas that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment
to regulate the broadcast of indecency pursuant to a congressional statute, to bar from most broadcast hours material that is not obscene but that contains "language that describes, in terms patently offensive as measured by contemporary community standards . . . sexual or excretory activities and organs . . . ."

Perhaps the most important Commission program regulation has been the consideration, in the course of the licensing process itself, of overall programming. In the early days, the Commission held that proposed programming by new applicants was a factor to be weighed comparatively in determining who should be granted a broadcast license. In 1965, the Commission, suddenly aware that it had been deluged with false promises of twenty-four-hour-a-day local, live, informational programming, then the most favored type, changed the rules and stated that in the future, except in unusual circumstances, it would not consider proposed programming by new applicants as a basis for preferring one applicant over another. But the Commission continues to consider past programming, both in determining whether a renewal applicant licensee is qualified to continue as a broadcaster and in determining whether, in comparing the renewal applicant with a new applicant, the existing station should prevail.

That consideration takes three forms.

First, in order to be qualified, a broadcaster, during the past license period, must have broadcast some minimum amount of programming. . . . BUCKLEY v. VALEO, 424 U.S. 1, 48 (1976) (per curiam); see also First Nat'l Bank v. Bellotti, 435 U.S. 765, 790-792 (1978).


33. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 397 n.9 (1965). However, new applicants must propose at least a minimum amount of responsive programming. See Application for Construction Permit for Commercial Broadcast Station, § 4 (Program Service Statement) (1986) (available from FCC Office of Cong. and Pub. Affairs). The unusual circumstances in which the Commission will consider proposed programming comparatively include proposals for Spanish language programming, see, e.g., In re American Int'l Dev., 86 F.C.C.2d 808, 818 & n.55 (1981); In re Broadcast Communications, 93 F.C.C.2d 1162, 1169-71 (Rev. Bd. 1983), and for programming that is particularly sensitive to minority needs and interests, see, e.g., In re La Fiesta Broadcasting Co., 6 F.C.C.2d 65 (Rev. Bd. 1966).

34. The concept of qualification means that there is no statutory or Commission bar to granting the license to a particular applicant. If an applicant is qualified, the Commission will judge it comparatively against competing applicants. See Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179, 1182 (1986).
"responsive" to community needs and interests. This type of programming is also relevant to the so-called renewal expectancy discussed below. Second, if a licensee has violated a Commission rule or policy during the past license period, including those relating to programming, it may be found to be unqualified. If there is an issue as to a broadcaster's qualifications, so-called meritorious programming may be considered in mitigation of violations of the Commission's rules and policies. The programming considered in that context also appears to be the same type considered in the context of the renewal expectancy.

Third, and most important, every broadcaster facing an actual or potential challenge from a competing applicant wants to assure its right to a renewal expectancy. This is, in effect, a presumption that the broadcaster is entitled to renewal of its license. If awarded, that expectancy will virtually assure renewal for a broadcaster who is otherwise qualified. That expectancy will outweigh the stellar attributes that a competing applicant may have in other areas deemed significant by the Commission, such as diversity of broadcast ownership, integration of ownership and management of the station, and minority and female ownership.

A broadcaster receives a renewal expectancy largely by convincing the Commission that it has a meritorious past broadcast record. In the past, the Commission counted heavily the quantity of news, public affairs, and other informational and local programs broadcast by the licensee, and it would compare a renewal applicant's performance in these categories with that of other existing broadcasters. Recently, the Commission has

35. See Office of Communication of United Church of Christ v. FCC, 707 F.2d 1413, 1432-34 (D.C. Cir. 1983). Compliance with this requirement is judged by looking at the quarterly "issues/programs" lists that licensees are required to keep in their public files. They show programming that the licensee has presented which responds to community needs and interests. See 47 C.F.R. § 73.3526(a)(8) (1987).
38. See, e.g., Central Fla. Enters. v. FCC, 683 F.2d 503 (D.C. Cir. 1982), cert. denied, 460 U.S. 1084 (1983); see also Reexamination of the Commission's Comparative Licensing Distress Sales & Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications, 1 FCC Rcd 1315 (1986). The scope and significance of these factors is described infra text accompanying notes 83-87.
39. At one time, the District of Columbia Circuit had held that a licensee's programming had to be "superior" and not just "substantial" in order to warrant a renewal expectancy. Central Fla. Enters. v. FCC, 598 F.2d 37, 56-58 (D.C. Cir. 1979), cert. dismissed, 441 U.S. 957 (1979). In an appeal from a second Commission decision after remand, however, the court held that "substantial" or "meritorious" programming would be sufficient. Central Fla. Enters. v. FCC, 683 F.2d 503, 506 (D.C. Cir. 1982), cert denied, 460 U.S. 1084 (1983). As discussed below, programming is not the only ingredient of the renewal expectancy.
40. See, e.g., Central Fla. Enters., 683 F.2d at 503-10; Deregulation of Radio, 84 F.C.C.2d 968, 982-83 (1981), aff'd in part, remanded in part sub nom., Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983); see also FEDERAL COMMUNICATIONS COMM'N, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946). In passing, one might
changed the standard to make clear that what counts is not the absolute quantity of informational and local programming, but the amount and nature of programming that has been responsive to the problems, needs, and interests of the community, as those needs have been "ascertained" by the licensee, usually through discussions with community leaders.\footnote{At the same time, the Commission has deemphasized the importance of locally produced programs, recognizing that network and other non-locally produced programs may also respond to local needs. See Revision of Programming & Commercialization Policies, Ascertainment Requirements & Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076, 1092 (1984), rev'd in part sub nom. Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987); see also Deregulation of Radio, 84 F.C.C.2d at 982-83. Formal ascertainment procedures are no longer required. Revision of Programming & Commercialization Policies, Ascertainment Requirements & Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d at 1097-1101; Deregulation of Radio, 84 F.C.C.2d at 993-99.}

A renewal expectancy is established in the course of a license renewal hearing by presenting evidence of the community problems, needs, and interests that the licensee has "ascertained," together with a showing as to the programming broadcast during the license period that discussed those problems, needs, and interests.\footnote{Community leaders also play a role in the renewal process as public witnesses, testifying to the responsiveness of the station's programming in serving particular needs. Because of this community leader role, broadcasters may intentionally avoid offending community leaders to help to assure the absence of adverse testimony and the support of community leaders in renewal proceedings.}

The Commission's recent revision of the comparative standard does not constitute a radical change,\footnote{See Revision of Programming & Commercialization Policies, Ascertainment Requirements & Program Log Requirements for Commercial Television Stations, 104 F.C.C.2d 357, 371-72 (1986). As the Commission has recognized, setting standards for meritorious performance would itself raise constitutional problems. See National Black Media Coalition, 589 F.2d at 581. In 1981, the Commission released a Notice of Inquiry to gather information on how to define meritorious service for the purpose of gaining a renewal expectancy, Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process, 88 F.C.C.2d 120 (1981), but to this date the Commission has taken no further action in that proceeding. Congress has also considered proposals in this area. See, e.g., S. 1277, 100th Cong., 1st Sess. § 101 (1987); H.R. 3493, 100th Cong., 1st Sess. § 3 (1987).}

but it is fair to say that under both the old standard and the new standard, no one is quite sure how to measure a meritorious past programming record. In the last several years, the Commission has rejected proposals to adopt a quantitative standard for measuring meritorious performance,\footnote{See, e.g., National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978).}

and indeed even stopped keeping and publishing statistics on the amount of such programming.\footnote{See Revision of Programming & Commercialization Policies, Ascertainment Requirements & Program Log Requirements for Commercial Television Stations, 104 F.C.C.2d at 357, 371-72 (1986). As the Commission has recognized, setting standards for meritorious performance would itself raise constitutional problems. See National Black Media Coalition, 589 F.2d at 581. In 1981, the Commission released a Notice of Inquiry to gather information on how to define meritorious service for the purpose of gaining a renewal expectancy, Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process, 88 F.C.C.2d 120 (1981), but to this date the Commission has taken no further action in that proceeding. Congress has also considered proposals in this area. See, e.g., S. 1277, 100th Cong., 1st Sess. § 101 (1987); H.R. 3493, 100th Cong., 1st Sess. § 3 (1987).} The Commission's adjudicative decisions have offered little guidance in determining the existence of a meritorious record. The consequence of this lack of
First Amendment and Broadcasting

standards and meaningful precedent is that a meritorious broadcast record is whatever the Commission says it is in any particular case.

To be sure, in recent years the Commission has not finally taken away a television license from a renewal applicant on comparative grounds, and it has been criticized for being overly favorable to existing broadcasters in its renewal rulings, most pointedly by the District of Columbia Circuit in *Central Florida Enterprises v. FCC.* It is nonetheless troubling that there are virtually no articulated guidelines for this important type of Commission program regulation.

Not only have existing licensees routinely earned renewal expectancies, but also the record of broadcasters' compliance with the specific program requirements has been impressive. It would be the envy of any other regulatory agency. Few licenses have been lost in recent times as a result of broadcaster non-compliance with specific program requirements. While some may attribute the routine awarding of renewal expectancies and the record of compliance with specific requirements to undue Commission favoritism to broadcasters, I think there is another explanation. Broadcasters are simply unwilling to test the outer limits of Commission regulatory power because of the enormous consequences of losing a license, which in a major television market may be worth hundreds of millions of dollars. This reluctance is exacerbated by the high cost of defending Commission


47. 683 F.2d 503, 510 (D.C. Cir. 1982). In one case, the Commission, in apparent response to the suggestion from the Court of Appeals, awarded the license of a classical music station to a new applicant on the ground that the existing station had done almost no informational programming. The Court of Appeals affirmed the Commission's decision not to award the licensee a renewal expectancy, but it remanded the case because the Commission had failed to give the existing station sufficient credit for integration and diversification. Committee for Community Access v. FCC, 737 F.2d 74 (D.C. Cir. 1984).


49. For example, the court in *Central Florida Enterprises* was "troubled by the fact that the record remains that an incumbent television licensee has never been denied renewal in a comparative challenge." 683 F.2d at 510 (emphasis in original).

50. *See TV's, Broadcasting,* Feb. 8, 1988, at 72-73.
proceedings and the uncertain constitutional protection afforded broadcasters.

II. The Limited Constitutional Protection for Broadcasters

From 1927 to the present day, only once has the Supreme Court held any regulation of broadcast content unconstitutional. That case was *FCC v. League of Women Voters*, which invalidated a prohibition on editorializing by public stations that receive federal funds. Even that decision was by the narrowest of margins. Yet it is reasonably clear that none of the programming rules or policies described in the preceding Part would be constitutional if applied to the print press. In fact, merely proposing such restrictions for the print press would now be viewed as being insensitive to First Amendment values.

One may ask what permits content regulation with respect to the broadcast press. Apart from some muddled claims about the public's owning the airwaves, broadcasting as a privilege, or broadcasting's being unduly powerful, the large majority of broadcast content regulation is justified on the so-called "scarcity" theory, articulated by the Supreme Court was split 5-4. *Id.* at 365. Broadcasters have not fared any better in the courts of appeals. There, too, there has been only one final decision striking down program regulation, and it too involved public broadcasting. See Community Serv. Broadcasting of Mid-America v. FCC, 593 F.2d 1102 (D.C. Cir. 1978) (en banc).

One may ask what permits content regulation with respect to the broadcast press. Apart from some muddled claims about the public's owning the airwaves, broadcasting as a privilege, or broadcasting's being unduly powerful, the large majority of broadcast content regulation is justified on the so-called "scarcity" theory, articulated by the Supreme

51. Even if a broadcaster were certain of ultimate success, it would often be reluctant to take actions that would increase the risk of challenge because the defense of a comparative proceeding may run into millions of dollars. See Communications Daily, Oct. 20, 1987, at 4; D. Patrick, Remarks Before the Nat'l Ass'n of Broadcasters 8-9 (Apr. 12, 1988) (Chairman, FCC) (on file with author). Even the cost of defending against a fairness complaint can be substantial. See *In re Syracuse Peace Council*, 2 FCC Rcd 5043 (1987), petition for review pending, Nos. 87-1516, 87-1544 (D.C. Cir. Sept. 24, 1987); Inquiry Into Section 73.1910 of the Commission's Rules & Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145, 164 (1985).


53. The Court was split 5-4. *Id.* at 365. Broadcasters have not fared any better in the courts of appeals. There, too, there has been only one final decision striking down program regulation, and it too involved public broadcasting. See Community Serv. Broadcasting of Mid-America v. FCC, 593 F.2d 1102 (D.C. Cir. 1978) (en banc).


56. See Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 783 (1972). Despite the frequency with which this claim is made, it is interesting that the framers of the Radio Act of 1927 did not view the regulatory scheme as founded on the concept of public ownership of the airwaves. See 68 CONG. REC. 2870, 2872 (1927) (remarks of Sen. Dill) ("The Government does not own the frequencies, as we call them, or the use of frequencies. It only possesses the right to regulate the apparatus . . . We might declare that we own all the channels, but we do not.").


Court in 1969 in *Red Lion Broadcasting Co. v. FCC*. The theory is that since the government excludes certain individuals from broadcasting because of the scarcity of available frequencies, the government has a right, and perhaps even an obligation, to regulate the content of broadcasting to ensure that the public can hear the excluded voices. This is said to serve the public's "paramount" First Amendment interest in access to diverse voices.

Few clear principles emerge from judicial discussion of the scarcity theory other than that broadcast content regulation is to be judged not by the compelling interest standard that is applied in other First Amendment areas, but by a standard under which courts will uphold regulation that is "narrowly tailored to further a substantial governmental interest." The scarcity theory has been much criticized in the legal literature, and a recent decision of the District of Columbia Circuit has urged that the Supreme Court discard the scarcity theory as incompatible with First Amendment principles.

---


61. Id. One properly may be skeptical as to whether the voices excluded from station ownership by the licensing process are the ones that benefit from Commission content regulation.


In the midst of all this uncertainty surrounding the scarcity theory, the Commission, newly converted to the view that its own regulatory activities raise substantial First Amendment questions, has rendered a decision of enormous constitutional significance: the *Syracuse Peace Council* decision held the fairness doctrine unconstitutional on the ground that it chills protected speech, involves impermissible government oversight of broadcast content, and serves no substantial governmental purpose because of the plethora of alternative views available in broadcasting and other media.\(^6\) Perhaps the most extraordinary aspect of this decision is the Commission’s alternative rationale, its “preferred” view,\(^7\) that any regulation of broadcast program content would be unconstitutional unless the same type of regulation would be constitutional as applied to the print press. The Commission’s view that “full First Amendment protections against content regulation should apply equally to the electronic and the printed press,”\(^8\) has also been expressed by the President in vetoing legislation to codify the fairness doctrine\(^9\) and by the Department of Justice in commenting on a pending bill to strengthen Commission content regulation in the license renewal process.\(^10\)

At the same time that it held the fairness doctrine unconstitutional, the Commission, in apparent contradiction of its present view that broadcasting and the print press should be treated identically, tried to preserve the public interest standard. It stated that it “may still impose certain conditions on licensees in furtherance of its public interest obligation,” and that “[n]othing in this decision . . . is intended to call into question the validity of the public interest standard under the Communications Act.”\(^11\) Apparently, the Commission sought to preserve the responsive programming obligation discussed earlier, as well as make clear that other types of non-content regulation were not affected.\(^12\)

\(^{6}\) See *Syracuse Peace Council*, 2 FCC Rcd 5043 (1987), petition for review pending, Nos. 87-1516, 87-1544 (D.C. Cir. Sept. 24, 1987). In so holding, the Commission was following an apparent invitation by the Supreme Court in the *League of Women Voters* decision to reconsider the constitutionality of the doctrine. See 468 U.S. at 376 nn.11-13.

\(^{7}\) *Syracuse Peace Council*, 2 FCC Rcd at 5057.

\(^{8}\) Id.


\(^{11}\) *Syracuse Peace Council*, 2 FCC Rcd at 5055.

\(^{12}\) One aspect of the fairness doctrine, the requirement that broadcasters cover controversial issues of public importance, closely parallels the responsive programming obligation. While holding the entire fairness doctrine unconstitutional, the Commission took pains to point out that the respon-
There is currently litigation as to the correctness of the Commission's decision on the fairness doctrine, and there will be equal controversy and litigation as to whether the other specific program obligations should suffer a similar fate. But perhaps far more important is the question whether there is a principled distinction between invalidating the fairness doctrine and other specific program regulations, while continuing to enforce the responsive programming obligation.

To be sure, the Commission's primary rationale in the Syracuse Peace Council decision would not affect the responsive programming obligation since that rationale rests in large part on the chilling effect of the fairness doctrine and the particular opportunities for intrusive government oversight in its enforcement. The imposition of the responsive programming obligation would not appear to chill broadcast speech in the same way as the fairness doctrine, the equal time requirement in Section 315, and other reply requirements. It is also far less content-specific and involves less specific government oversight, for (at least at present) the Commission is not telling the broadcaster whether particular speech is favored or disfavored, required or not required, but only that the broadcaster's speech must relate to community problems, needs, and interests that the broadcaster itself has determined to exist. Relating programming to the community's problems, needs, and interests is itself good journalism, and often good business because of the appeal of such programming to the local audience. It is thus far from clear that the responsive programming requirement has had a material impact on programming content, or that the
responsive programming obligation is unconstitutional under the Commission's primary rationale for invalidating the fairness doctrine.

But if the Commission's alternative "preferred" rationale in the Syracuse Peace Council decision prevails and if the broadcast press and the print press are equally protected from content regulation, the responsive programming obligation may well be held unconstitutional despite the Commission's suggestions that it could survive such equality of treatment. The Commission is requiring broadcasters to do some minimum amount of responsive programming to be qualified for renewal and, presumably, to do a somewhat larger amount of responsive programming to garner a renewal expectancy. It has offered to mitigate violations of other Commission requirements by considering responsive programming. The government surely cannot regulate the amount of informational content of a newspaper or insist that it be responsive to community problems, needs, and interests. The risks are simply too great, the argument goes, that the government would impose its perceptions of what the audience ought to see or hear and that the government, in doing so, might seek to serve its own interests. Protection from such government oversight, it can be urged, is what the First Amendment is all about.

I do not plan to offer here a resolution of these difficult constitutional questions, though it does seem to me that principled distinctions can be made between specific content regulation, such as the fairness doctrine, and the responsive programming obligation on which the renewal expectancy is founded. There may well be an opportunity to address these questions further in the cases that are currently being litigated. The more interesting, and even more difficult, issue is: what would happen if all Commission content regulation of protected speech were held unconstitutional?

III. A Dialogue Concerning the Consequences of Full First Amendment Protection for Broadcasting

So far the approach of most broadcasters has been to seek maximum First Amendment protection, but some have suggested that broadcasters should be concerned that their exclusive licenses may be put in jeopardy if, as a result of these efforts, the Commission is barred entirely from regulating program content. Let us suppose that the Commission's deci-
sion in the fairness proceeding were upheld by the Supreme Court in a case which we will call Red Lion II. It overrules Red Lion I, and, rejecting distinctions between the fairness doctrine and other content regulation, it does so on the ground that all content regulation of protected speech in broadcasting, including the responsive programming obligation, violates the First Amendment, unless the regulation could be constitutionally imposed on the print press.\(^79\) I offer this dialogue between B, a broadcast representative who favors full First Amendment rights, BB, a second broadcaster, and G, a proponent of the old regulatory order, as a mechanism for raising some of the questions that would have to be addressed.

B: Have you read the Red Lion II opinion? It's a real victory for broadcasters.

G: A real victory for broadcasters?! I think they'll live to regret it.

B: That's provocative and smacks a bit of your being a sore loser. Why so?

G: Members of Congress are afraid of the power of broadcasters, and many of its most influential members are fond of referring to broadcasters as being arrogant bastards.\(^80\) You know that John Dingell and others have threatened broadcasters with a major revision of the statutory scheme\(^81\) that could result in auctioning frequencies or distributing them by lottery if the fairness doctrine were invalidated. Now here you are.

B: Well, it may be that Congress did not have to create general purpose broadcasting in the first place, but it cannot come in now and simply do away with existing broadcast licenses, and redistribute them by auction or lottery. That would raise serious First Amendment problems.

G: I don't see why. There is no obligation to continue to devote any part of the spectrum to general purpose broadcasting.

B: Perhaps not, but in the First Amendment area there are plenty of cases which hold that the government may not deny someone a privilege for an unconstitutional reason.\(^82\)

\(^79\) We will assume that the opinion in Red Lion II was modeled after language in the majority opinion in Telecommunications Research & Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 3196 (1987). It is far from certain that this sweeping result would necessarily follow from invalidation of the fairness doctrine, but it is certainly possible. See supra notes 71-77 and accompanying text.

\(^80\) E.g., Network's Image Problem, BROADCASTING, Jan. 14, 1985, at 138 (remarks of Rep. Swift referring to television networks). G is overstating; most members of Congress have a close, one might say symbiotic, relationship with their local broadcasters, but view the networks and the industry as a whole with suspicion.


G: Those cases aren't much help to you. They all turn on a finding of improper purpose, and you would have a hard time with that here.

B: Well, I am not so sure. If Congress did away with the existing licenses because broadcasters had successfully asserted their constitutional rights, I think the congressional action might well be found to be unconstitutional.

G: Well, I think you're attributing an improper purpose to Congress where no such purpose exists. Revision of the statutory scheme follows naturally from the holding in Red Lion II because one of the fundamental tenets of the regulatory scheme, the ability of the Commission to regulate programming, has been undermined. But Congress doesn't have to do a thing anyway. The existing system has already been sunk. Ask yourself: What is going to happen to the renewal expectancy that broadcasters so cherish as a way of securing the near-perpetual renewal of their broadcast licenses?

B: I admit that is a bit of a problem.

G: It's more than a bit of a problem. Content is at the heart of the current renewal expectancy. If the broadcaster does not have a renewal expectancy, it almost certainly will lose its license in a comparative proceeding to a new applicant who will receive credits for integration, diversification, and minority and female ownership that are not available to most of the existing licensees. While these credits are not sufficient to outweigh a renewal expectancy, in most cases they would almost certainly outweigh any other comparative enhancement afforded to existing licensees. Also, the meritorious programming defense would be lost as a method to mitigate violations of Commission rules and policies.

B: You have me there. But the Commission should be able to come up with something. For example, the Commission could adopt a policy that


83. See supra text accompanying notes 39–42.
84. See supra note 38 and accompanying text. The minority and female preferences themselves raise constitutional questions, but not under the First Amendment.

The reason that a new applicant would prevail in most circumstances is that a large number of broadcast stations are owned by entities that have other broadcast interests, and hence fare poorly on the diversification criterion. Still fewer are owned by minorities and women, or involve integration of ownership and management, that is, a situation in which the owners participate in operating the station on a day-to-day basis. See Central Fla. Enters. v. FCC, 683 F.2d 503, 507–09 (D.C. Cir. 1982). If broadcasting and print are entitled to the same First Amendment protections, these integration and diversification criteria may themselves be constitutionally suspect, however.

85. See Central Fla. Enters., 683 F.2d at 503.
86. See supra note 84.
87. See supra text accompanying notes 39–45.
would result in renewal of existing broadcast licenses so long as the existing licensee were found to be qualified, that is, if the existing licensee had, during its license term, complied with the Commission's rules and policies. By this mechanism the Commission could assure stability in the industry.

G: By "assure stability in the industry," I assume you mean broadcasters could get their licenses renewed pretty much automatically.

B: Well, that wouldn't be much of a change from the situation now. Some broadcasters have been found to be unqualified on grounds unrelated to programming. That would continue. In fact, almost no one has ever been disqualified on grounds relating to programming, and no television broadcaster has ever lost a license on comparative grounds, a phenomenon about which the District of Columbia Circuit has, I think inappropriately, chided the Commission in the past.

G: But what you are proposing is dispensing with the traditional comparative criteria and telling the broadcaster that he will get renewed if he is found qualified. That can't be done by the Commission. You know that under the Supreme Court's decision in Ashbacker Radio Corp. v. FCC and the District of Columbia Circuit's decision in Citizens Communications Center v. FCC, the Commission is barred by statute from taking that step. It has to allow the filing of competing applications even if the broadcaster is qualified, and it has to consider them comparatively.

B: I think you're probably right that under the existing statute the Commission can't renew broadcasters automatically simply because they have been found to be qualified, but I still think that, consistent with those cases, the Commission can refashion the renewal expectancy to eliminate consideration of content. There's nothing that would bar the Commission from giving a renewal expectancy based on a licensee's knowledge of the community, its ascertainment of community needs and interests, the participation of its station management in community activities, its non-program policies, and its equal employment opportunity performance. In fact, those are already ingredients of the renewal expectancy. Under

88. See supra note 48 and accompanying text.
89. See supra note 49 and accompanying text.
90. 326 U.S. 327 (1945).
91. 447 F.2d 1201 (D.C. Cir. 1971).
93. See, e.g., In re Tele-Broadcasters of California, 58 Rad. Reg. 2d (P & F) 223, 227 (Apr. 30, 1985); In re United Broadcasting Co., 57 Rad. Reg. 2d (P & F) 885, 891 (Jan. 14, 1985); In re
this approach, the Commission would continue to impose requirements on the process, but not on the end product. 94

G: That step constitutes a really radical revision of the standard, and it is hardly consistent with Citizens, which made clear that "incumbent licensees should be judged primarily on their records of past performance." 95

B: Well, the simple answer to that is that Red Lion II held that aspect of the Citizens decision unconstitutional; program content may no longer be taken into account.

G: But if the statutory criterion for judging the renewal expectancy has been held unconstitutional, then doesn't Congress have to go back to the drawing board and itself refashion the renewal expectancy?

B: I don't read Citizens as holding that the statute required consideration of programming as part of the renewal expectancy. After all, the whole notion of a renewal expectancy is Commission-invented. 96 I don't see why the Commission itself can't appropriately revise its standard for renewal expectancy in the light of Red Lion II. 97

G: I'm still dubious. After all, you're proposing that the Commission give a renewal expectancy even if the broadcaster puts on entertainment programming twenty-four hours a day, no news, no informational programming, and no local programming. 98

B: It's a theoretical possibility that a broadcaster might do that, but I think it's highly unlikely that many stations would react that way. After

Pillar of Fire, 57 Rad. Reg. 2d (P & F) 601, 612 (Dec. 21, 1984). There is a question as to whether these elements of a refashioned renewal expectancy would be constitutional if applied to the print press.

94. In a recent speech, Commission Chairman Patrick suggested that the Commission could fashion a non-content-based renewal expectancy and consider "other evidence of past performance . . ." Patrick Makes a Case for Cleaning Up Comparative Renewal, Broadcasting, Mar. 7, 1988, at 76.

95. Citizens Communications Center, 447 F.2d at 1213.


97. While the renewal expectancy notion is probably not statutory, there is certainly legislative history to suggest that Congress contemplated some consideration of programming in the course of licensing. See generally Rosenbloom, Authority of the Federal Communications Commission, in app. I to Freedom and Responsibility in Broadcasting (J. Coons ed. 1961). Compare National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (statute requires regulation of composition of traffic) with FCC v. WNCN Listeners Guild, 450 U.S. 582, 603 (1981) (declining to consider whether Commission's policies for nonentertainment programming comply with Communications Act). I would urge that the consideration of programming is not so integral to the statute that invalidation of that approach by Red Lion II would undermine the entire statutory scheme. After all, the Commission, even without benefit of a constitutional holding, has largely eliminated all consideration of programming in new licensing. See supra note 33 and accompanying text; see also Black Citizens for a Fair Media v. FCC, 719 F.2d 407 (D.C. Cir. 1983) (upholding simplified postcard license renewal form), cert. denied, 467 U.S. 1255 (1984).

98. For example, G might point to the existence of the Home Shopping Network which provides "live, discount shop-at-home TV service." Broadcasting Cablecasting Yearbook 1987 E-8. Under the present regulatory scheme, it also provides informational programs.
all, as the Commission has already concluded, there’s a public demand out there for news programming quite apart from any Commission requirement.  

Regulation or no regulation, the marketplace will keep news on the air. In network television, there is a substantial demand for public affairs programming. After all, for many years, 60 Minutes has been near the top of the ratings. I will grant you that the audience demand for locally-produced public affairs programming in both television and radio may not be as great, and the ratings are generally lower for these programs than for non-network entertainment programs. But broadcasters are responsible journalists, and they’ll continue to produce these programs, just as their colleagues in the print press continue to publish informational material for which there is no specific public demand.  

Broadcast stations, like newspapers, are selling a single product, and the product as a whole is made materially more attractive by the inclusion of features that in themselves may have a low audience. I note that the record of television networks in presenting news and informational programming is extraordinary. And as for being overly one-sided or offensive, broadcasters abide by journalistic standards requiring balance, and the marketplace generally imposes restraints in that area as well. Look at what happened to that Utah station that put on the Aryan Nations Hour and lost its advertisers.

G: Perhaps, but even if I concede that the existing renewal expectancy standard is not statutory, the Commission’s past approach was so longstanding and the approach you suggest is, at least in theory, such a radical change because it eliminates any consideration of programming by the


100. This assessment may be more accurate for television than radio. Stone, Survey Finds Little Effect from Deregulation, RTNDA Communicator, May 1985, at 14; Stone, Deregulation Felt Mainly in Large-Market Radio and Independent TV, RTNDA Communicator, Apr. 1987, at 9.

101. At CBS, for example, the amount of news and public affairs programming increased 600% from 1950 to 1986, from 352 yearly hours in 1950 to 2129 hours in 1986. In 1986, it was almost one-third of total programming. CBS Audience Services (Apr. 14, 1987) (on file with author).

102. See CODE OF BROADCAST NEWS ETHICS OF THE RADIO TELEVISION NEWS DIRECTORS ASSOCIATION (1973) (on file with author) (stating that members believe “their prime responsibility as journalists . . . is to provide to the public they serve a news service as accurate, full and prompt as human integrity and devotion can devise”); CODE OF ETHICS OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI (1984) (on file with Society of Professional Journalists, Sigma Delta Chi) (observing that “[n]ews reports should be free of opinion or bias and represent all sides of an issue”).

Commission, that the Commission should insist that the step be taken by Congress rather than shape new policy itself.104

B: Well, I don't see why the Commission can't do it, but if the Commission won't do it, I assume that broadcasters will be able to get some relief from Congress, which will provide for automatic renewal of qualified broadcasters or the fashioning of a non-content-based renewal expectancy.

G: You must be kidding. Broadcasters have not had any significant clout with the Congress for a long time. They lost the financial interest and syndication fight,105 the 12-12-12 fight,106 and if Congress had had its way, broadcasters would have lost the fairness doctrine fight too.107 Broadcasters made the Democrats angry in the process.108 Programming obligations have always been viewed as a trade for a near-perpetual renewal of broadcast licenses. Now broadcasters have violated their part of the bargain by getting content regulation held unconstitutional. Congress certainly is not going to help them by revising the scheme to give them near-perpetual licenses, at least not without exacting a heavy price.

B: Yes, broadcasters lost some fights. But the issues you cite weren't life-threatening issues to most broadcasters. We were able to defeat the proposed tax on the transfer of broadcast licenses because that issue affected all of us who hold commercial broadcast licenses.109 That shows that we can mobilize the industry when it counts. I also think we'll get a lot of public support for our position. The public likes the service it's getting.110 It's always hard for the public to understand why an existing

104. A similar approach was originally taken with respect to the fairness doctrine. See Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145, 148 (1985).


106. The Commission replaced its rule prohibiting persons from holding cognizable ownership interests in more than 7 AM, 7 FM, and 7 TV stations, with a rule prohibiting such interests in more than 12 AM, 12 FM, and 12 TV stations; the rule was to sunset after six years. Congress imposed a moratorium on implementation of the new rule, Second Supplemental Appropriation Act of 1984, Pub. L. No. 98-396, § 304, 98 Stat. 1423 (1984), and on reconsideration the Commission eliminated the sunset provision and imposed a 25% ownership cap, Amendment of Section 73.3555, 100 F.C.C.2d 74 (1985).


110. See TIO/ROPER, AMERICA'S WATCHING: PUBLIC ATTITUDES TOWARD TELEVISION 2-3
broadcaster should be kicked out in favor of some newcomer who is an
unknown quantity, has no experience, and is often in the business to make
a quick buck. Also, I assume that Congress isn't immune to the moral
force of a Supreme Court decision holding content regulation to be uncon-
stitutional. Now that the Supreme Court has sided with us on the content
issue, I think a lot of the congressional anger is going to subside. The
decline in the power and influence of the television networks, whose com-
bined audience share has fallen from over ninety percent of television
homes, to seventy-five percent of homes, has also made broadcasters a less
threatening force.\textsuperscript{111} I think broadcasters can get renewal legislation that
will bar competing applications unless the renewal applicant is held
unqualified, and that we won't have to settle for merely a refashioned
renewal expectancy.

G: But the House Democrats just rejected that very approach.\textsuperscript{112}

B: Yes, but only because they thought they could get a responsive pro-
gramming obligation.\textsuperscript{113} No longer. \textit{Red Lion II} makes that clear enough.

G: Okay. Suppose you do get the legislation. It would be unconstitu-
tional under the First Amendment because it grants exclusive franchises
and entrenches the existing owners. The cable people could see that in
their industry. They saw that if the First Amendment applied, it meant
that existing franchisees could not be protected from new entrants. At
least they have had enough sense not to continue claiming full First
Amendment rights.\textsuperscript{114} I call that good sense.

B: The cable situation is entirely different. In cable, the industry
wanted to keep its monopoly franchises, even though it's physically possi-
ble to have multiple cable franchisees.\textsuperscript{115} In broadcasting, there are large

\footnotesize

\textsuperscript{112} See Cable's Catch-22, \textit{Broadcasting}, Dec. 21, 1987, at 28-30. In the \textit{Preferred} case
before the Supreme Court, the National Cable Television Association filed a brief in support of the
position of the unsuccessful applicant. See also FCC Legislative Proposals 32-33 (Jan. 30, 1986) (on
file with the FCC Office of Congressional and Public Affairs) (similar proposal by FCC not adopted
by Congress).

\textsuperscript{113} S. 1277, 100th Cong., 1st Sess. §§ 101-02 (1987). B may be wrong about that. Congress
wanted much more. Among other things, the legislation would have limited the assignment or transfer
of a license by a licensee who held the license for less than three years. \textit{Id.} § 201.

\textsuperscript{114} While there may be some limit on the number of cable systems that can be accommodated on
existing utility poles, except in rare situations the demand is not likely to exceed the supply. In most
situations economic reasons render it unlikely that more than two franchises would be sought. \textit{Over-
numbers of competing stations in the large majority of markets, and licensing further stations in most instances simply is impossible.

G: Not necessarily. The spectrum allocated to broadcasting could be expanded. But I agree there are competing uses, and that there is a compelling interest in dividing up the spectrum, allocating it to particular uses, and assigning licenses to avoid interference. That, I grant you, is consistent with the First Amendment. So the cable industry is different. But in other First Amendment areas scarcity or competing uses also exist, and the Constitution demands content-neutral allocation of the available opportunities. If content regulation in broadcasting is to be proscribed by the First Amendment, then we must go all the way to the print model. That means that broadcast licenses must be allocated in some content-neutral fashion, whether by auction or lottery.

B: It's obviously true that in the future the Commission can't consider content in assigning new licenses, and I would provide for auctions or lotteries for new broadcast stations in the legislation. But I'm interested in confirming existing licenses without a lottery or auction. Isn't that permissible?

G: I don't think you can do that consistent with the First Amendment.

B: But existing licensees have been protected up to now.

G: That's true, but Red Lion II says we now follow the print model. That, as I said, requires content-neutral allocation.

B: But why does it require reallocation? After all, newspapers have a perpetual right to publish.

G: The print press is quite different. The existing newspapers are not here because of government favoritism. We have agreed that the original licensees in broadcasting were selected under an unconstitutional system. Also, the existing licensees got renewals based on impermissible considerations of program content. The only way to undo the improper selections and renewals is to open it up all over again.

B: That makes no sense at all. The unconstitutional consideration of programming harmed only the existing broadcasters who had to make promises to get their licenses in the first place and had to conform to Commission program expectations as a way of keeping their licenses.

---

118. All that would be required to accomplish this is an amendment to the existing lottery statute. 47 U.S.C. § 309 (1982).
First Amendment and Broadcasting

Why does the First Amendment require them to lose their rights to broadcast in order to set things right?

G: The unconstitutional content-based licensing scheme didn’t just harm the existing broadcasters. It harmed anyone who wanted to enter the business. Competing applicants lost out to existing licensees under a system that impermissibly provided for consideration of content. Even potential applicants who never filed suffered because of the existence of improper content-based rules which deterred them from applying. Opening up the system is particularly important because almost all available broadcast licenses have been allocated. The Court of Appeals suggested this in *Citizens*.

In *Red Lion I*, the Court seemed to anticipate the very problem we are talking about, and noted that even if spectrum scarcity disappeared, there would still be concern about existing licensees having a preferred position because of past government action.

You can’t simply close the system. You have to give some chance to the voices excluded by past licensing decisions.

B: Wait a minute. Have you forgotten about the Supreme Court’s decision in *Columbia Broadcasting System v. Democratic National Committee*, which was cited with approval in *Red Lion II*? *CBS v. DNC* held that the First Amendment does not require that members of the general public be given access to broadcast facilities.

G: *CBS v. DNC* involved public access to existing broadcast stations, not access to the spectrum.

B: Sure, but there are plenty of cases holding that no one has a constitutional right to have a broadcast license.

G: Those cases don’t say that there is no constitutional right to apply for a license. In any event, you are forgetting that *CBS v. DNC* and all these other cases rested explicitly on the existence of public interest pro-

---

119. Citizens Communications Center v. FCC, 447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971) ("As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies.").

120. 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.


122. There, the Supreme Court held that members of the general public have no First Amendment right of access to broadcast stations and that broadcasters cannot be compelled to sell time for the discussion of public issues.

gramming obligations in the broadcasters, and that *Red Lion I* clearly suggested that those excluded from the broadcasting spectrum must be accommodated in some fashion. If they cannot be accommodated by giving them access under the old system through such requirements as the fairness doctrine and equal time, then they have to be accommodated by giving them a meaningful opportunity to apply for and secure a license.

*B*: There's no lack of opportunity for people to get licenses. They can buy them.

*G*: That's partially true, but entirely irrelevant. You can't just have the public debate dominated by those who have had the money to buy existing broadcast properties.¹²⁴

*B*: Why not? All other press outlets are allocated that way, and so are virtually all goods and services. Most of the existing licensees paid full value for the stations they got.¹²⁵ If a few existing licensees who got broadcast properties as a result of comparative renewal proceedings are being given a windfall, I ask again, what's wrong with that? They were selected under the old system, and they have performed honorably for many years. They could have sold to others. Why can't they be confirmed as licensees for the future?

*G*: Because the government is subsidizing the speech of the existing broadcasters by giving them perpetual licenses. And that's true even of licensees who bought their stations. Those stations will be more valuable under the new statute, which will make the licenses more secure than they were under the pre-existing system.

*B*: It is highly doubtful that confirmation of existing licenses would make them any more valuable. Very few licenses were lost under the existing system, and those that were lost, were lost unexpectedly. There is very little discount in station prices attributable to that risk.¹²⁶ In any event, the federal government can subsidize anyone it wants to.¹²⁷ No one

---


¹²⁵ "Approximately 71% of today's radio stations and 54% of today's television stations have been acquired by the current licensees on the open market." *In re Syracuse Peace Council*, 2 FCC Rcd 5043, 5055 (1987), *petition for review pending*, Nos. 87-1516, 87-1544 (D.C. Cir. Sept. 24, 1987).


¹²⁷ *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984) (distinguishing *Taxation With Representation* on ground that public broadcasting stations could not segregate their funds according to source, but stating that denial of subsidy would be valid if they could do so); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (holding that Congress can refuse to subsidize lobbying activities of tax-exempt charitable organizations while still subsidizing lobbying activities of veterans' organizations); *see Arkansas Writers' Project v. Ragland*, 107 S. Ct. 1722, 1732 (1987) (Scalia, J., dissenting) (citing *DOMESTIC MAIL MANUAL* to show that United States Postal Service grants a special rate to "religious, educational, scientific, philanthropic, agricultural, labor, veterans', and fra-
suggested that extending the license terms in radio from five to seven years and from three to five years in television raised any constitutional questions.

G: The government does not have unlimited power to discriminate among selected speakers when it subsidizes. But I'll grant you that the act of confirming the licenses of the existing owners probably isn't much of a subsidy given prior Commission licensing practices and the almost automatic renewal that those practices afforded to licensees. Perhaps what we really have here is not a subsidy, but government action that has kept everyone else out of the market, except a selected few.

B: It may be that originally those who were excluded might have had a constitutional claim, but those licensing proceedings were litigated to a conclusion long ago. The doctrine of res judicata bars any effort to attempt to litigate now a constitutional claim which could have been litigated then.

G: I doubt that very much. All that was resolved at that time was the right to the initial license. Licensing decisions are never really final and legally complete. Every five or seven years licenses expire. All licensees specifically agreed that they would acquire no ownership interest and knew that they got their licenses for a limited period.

[Fortunately for B, who seems to be having some difficulty, he has brought a friend along, BB.]

BB: I have been sitting here listening for a long time. Aren't you both making this all too complicated? G, you are doing no more than threatening us with economic harm because we didn't knuckle under to your antiquated view of the First Amendment in broadcasting. I can't believe that the First Amendment requires the result you propose. The supposed lack of content neutrality in the issuance of existing licenses is a myth. The selection process has been essentially content-neutral since at least 1965, and even before then we all know that very few broadcasters got their original licenses because of their program proposals. I agree with you that a renewal expectancy focused on programming has allowed them and their successors to retain those licenses. But what difference does that
ternal organizations.


131. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 397 (1965) (“[d]ecisional significance will be accorded only to material and substantial differences between applicants' proposed program plans.”). But see supra note 33 (discussing consideration of Spanish language programming proposals and proposals sensitive to minorities' needs and interests).
Yale Journal on Regulation

Vol. 5: 299, 1988

make? If they could have been confirmed as perpetual licensees right from the start, so what if it took a few decades longer to get to that point?

G: You mean that if programming considerations didn't really play a role in the original selection process, then the selection didn't rest on an unconstitutional premise? Well, you have a point there, but what about those cases where the original licensing did rest on consideration of programming?

BB: First of all, I can't believe that those who failed to apply for the licenses have any standing to complain about defects in the original licensing process.132 Even those who did apply and were unsuccessful have no standing to complain that the successful licensee got the license by willingly accepting unconstitutional program obligations.133

G: I agree that's merit to your argument. But suppose the standing argument fails. After all, under the current system, listeners and viewers have standing to complain about Commission actions,134 and they may well have standing to complain about the existing assignments. Let's also assume that unconstitutional programming considerations did infect the entire process. What then?

BB: Those are pretty dubious assumptions, particularly your assumption about the importance of programming in the assignment process, but I have an answer. You agree, I assume, that the existing licensees could be confirmed if there were a compelling governmental interest.

G: Sure.

BB: Well, a compelling government interest does exist. It's the interest in industry stability that you sneered at earlier. The Supreme Court in the National Citizens Committee for Broadcasting case, and even the court of appeals in Citizens, recognized the importance of industry stability.135

There's a particularly compelling reason not to disrupt the system here


133. Ste, e.g., Berkshire Cablevision v. Burke, 773 F.2d 382 (1st Cir. 1985) (unsuccessful cable system applicant had no standing to challenge condition imposed as requirement of license grant).


324
by opening up existing licenses to new content-neutral allocation. Broadcasters have invested billions of dollars in broadcast station licenses. What you are proposing is the elimination of all of that investment. That is not only unfair, but it would also cause extraordinary economic turmoil in the broadcasting industry and widespread bankruptcies of existing licensees. This would necessarily impair program service to the public. It is true that new entities would be licensed on the existing frequencies, but I don’t have much confidence that they would serve the public as well as existing licensees. Stability in the industry encourages long-term investment, rather than the reaping of short-term profits. If the licenses were reallocated by lottery or auction, the new licensees might well focus on short-term gain and be quite reluctant to invest in informational and local programming to the same extent as existing stations. If I had such a license, I’d be quite concerned that Congress in the future might decide again to reassign the licenses.  

The impact on broadcast journalism at local stations would be particularly great. Broadcast journalism serves a critically important role in informing and educating the American public. The recent Roper survey shows that a majority of the American public relies on television as its primary source of news. Reallocating existing licenses could effectively destroy broadcast journalism as we know it today, at least at the local stations.

G: That may be important as a matter of administrative law, but it’s not constitutionally significant.

BB: Sure it is. Talk about the importance of preserving First Amendment values! The First Amendment surely does not require Congress to eliminate the broadcast press, or at least that part of it represented by the local stations. And in this delicate constitutional area, there

136. It seems unlikely that any auction or lottery would confer a permanent right to the frequency since technological change could make it necessary to revise the system drastically at some future date. See McLuhan’s Revenge, Broadcasting, Nov. 30, 1987, at 138 (possibility of exclusively wired transmission of programming).

137. TIO/Roper, supra note 110, at 4 (“Today, 66% of Americans mention television as a main news source, compared to 36% who mention newspapers, 14% who cite radio, 4% who say magazines.”).

138. A substantial argument can be made that network news would not be adversely affected to the same extent because the new station owners would affiliate with an existing network. But it is not obvious that the new owners, seeking short-term returns, would support network journalism to the same degree as at present. For example, they might decide not to clear low-rated network public affairs programs to the same extent that they presently do, thereby undermining the necessary support for such network programming.

is a special deference due to the judgment that Congress made when it passed the statute.\textsuperscript{140}

Quite apart from these First Amendment considerations that favor preservation of existing stations, we don’t have to throw out all the existing licenses just because the winds of constitutional doctrine have shifted. The Supreme Court has been careful to protect reliance interests when it radically alters the existing constitutional rules, and it declines to apply new constitutional doctrine retroactively.\textsuperscript{141} The First Amendment area is no exception.\textsuperscript{142} The Court wants to avoid imposing significant hardships as a result of unanticipated shifts in the governing constitutional rules. As we have discussed, taking licenses away from existing licensees would cause those licensees serious hardship, and the adverse effect wouldn’t be limited to the licensees, but would extend to the public that they serve.

\textbf{G}: I can’t deny that your points are powerful. But if the existing licensees are to be protected, can’t we at least make them pay a spectrum fee? In other words, if they are going to receive perpetual licenses, is it really too much to ask that they should pay an annual fee for the use of the spectrum?\textsuperscript{143} We could use the proceeds to fund public broadcasting to achieve program diversity in a constitutionally permissible way.

\textbf{BB}: Is that anything more than an improper selective tax on a part of the press? I think it falls under \textit{Minneapolis Star} and \textit{Arkansas Writers’ Project}.\textsuperscript{144}

\textbf{G}: Well B, your friend is pretty persuasive. I guess I would have to


\textsuperscript{141} See, e.g., Hill v. Stone, 421 U.S. 289, 301–02 (1975) (nonretroactive effect given to decision striking down classifications restricting right of non-property owners to vote on bond issues); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (per curiam) (same). Reliance interests may be protectable even if the constitutional rules have not changed. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (striking down layoff provision of collective bargaining agreement which extended preferences to some minority employees).

\textsuperscript{142} See, e.g., Lemon v. Kurtzman, 411 U.S. 192 (1973) (plurality opinion) (declining to give retroactive effect to decision striking down grant of state monies to private sectarian schools).

\textsuperscript{143} See J. Dingell, \textit{supra} note 81.


Such a spectrum fee is clearly distinguishable from a payment by an applicant to secure a license in an auction and from lease payments made by an applicant (if the government were to decide to lease spectrum space). Those payments are fixed in advance, and the danger does not exist that fees will be selectively imposed or increased because of the content of a licensee’s speech, a danger which clearly exists with respect to spectrum fees imposed on existing licensees.
concede that the Supreme Court would probably sustain a statute con-
firming the licenses in existing broadcasters or creating a non-content-
based renewal expectancy. I have only one last question. What if Con-
gress doesn't go along? Where are you then?

BB: In terms of constitutional doctrine, that's a tough question. There
may be no way that existing broadcasters can claim a First Amendment
right to protection. For the moment, I have only a practical suggestion.
We had better improve our relations with Congress. It's hard. The gov-
ernment and the press are natural antagonists. We can only hope Con-
gress will learn from the Red Lion II opinion and respect broadcasters as
an important part of the American press. Red Lion II is sound, it's elo-
quent, it's the Supreme Court, and, as we found out in Marbury v. Mad-
sion, it's the Court that has the last word on the Constitution, not
the Congress.

It's also important that we educate the public about what the First
Amendment is all about if we are to get the public support we need.
Recent surveys suggest that the public doesn't understand the First
Amendment very well at all. It's a problem with our public educational
system that we don't teach more about the Constitution in high school and
even college. We as broadcasters bear some of the responsibility, and we
had better make an effort to educate if we want public support in the
 crunch.

IV. Some Reflections on the Dialogue

In a very real sense, the dialogue Part of this Article has the issue
exactly backwards. The critical question is not whether securing expanded
First Amendment rights will make broadcasters more vulnerable to Con-
gress, but whether failing to secure greater First Amendment protection
will continue a vulnerability that now exists.

The existence of that vulnerability can hardly be questioned. The Dem-
ocratic Congress has assumed an active role in framing communications
policy and is not willing to leave that role to the Commission. It has
also sought to influence the Commission's resolution of constitutional
issues in broadcasting. Such congressional activism may be the result of

145. 5 U.S. (1 Cranch) 137, 176 (1803).
147. See, e.g., supra note 15 (discussing various restrictions incorporated into recent appropri-
ations legislation). See generally Shooshan & Krasnow, Congress and the Federal Communications
Commission: The Continuing Contest for Power, 9 COMM/ENT 619 (1987) (discussing congress-
sional checks on Commission decisionmaking).
148. The District of Columbia Circuit has admonished the Commission to ignore congressional
(citation omitted) ("removal of the legislative bar on consideration of News America's application will
congressional mistrust of the Reagan Administration's Federal Communications Commission, but congressional interest in communications policy is nothing new, and I strongly suspect that such interest will long outlast the present Administration. And, Congress has almost always been less sensitive than the Commission to First Amendment concerns. Congress believes, based on current Supreme Court precedent, that it has extensive regulatory power over broadcast programming, and it threatens to exercise that power if broadcasters are uncooperative in taking "voluntary action" with respect to programming.\textsuperscript{149} Similarly, based on Supreme Court decisions sustaining Commission structural regulation (for example, rules barring the ownership of a television station and a newspaper in the same market)\textsuperscript{150} Congress evidently believes that such regulation presents no First Amendment problems.\textsuperscript{161} Congress has insisted that a number of broadcast cross-ownership rules be retained.\textsuperscript{182} It is also well known that certain legislative agenda items of broadcasters are made more difficult to obtain because of broadcasters' continuing insistence on greater First Amendment protection, for example, in the area of the fairness doctrine.\textsuperscript{183} But more fundamentally, the fact that broadcasters are viewed as having lesser First Amendment rights than the print press creates an atmosphere in which broadcasters are fair game for regulation generally. The lack of broader First Amendment protection fosters an attitude that broadcasters are less deserving of congressional respect and should be subservient to the wishes of Congress.\textsuperscript{184}

In my own mind, there is little question but that securing greater First

leave in place the 'intense political . . . pressure from Congress that gave rise to the Amendment itself. That pressure must, of course, play no role in agency adjudications involving important constitutional rights.'\textsuperscript{149}

\textsuperscript{149} Television violence, children's programming, and election projections are perennial candidates for congressional attention, and while no legislation has been enacted in any of those areas, the threat of such legislation has been used to coerce "voluntary" change. See Dyk & Goldberg, The First Amendment and Congressional Investigations of Broadcast Programming, 3 J.L. & POL. 625, 630–31 (1987).


\textsuperscript{151} This assumption is not correct. See News Am. Publishing v. FCC, No. 88-1037, slip op. (D.C. Cir. Mar. 29, 1988) (noting that unresolved First Amendment issues remain with respect to newspaper-broadcast cross-ownership rules).

\textsuperscript{152} See supra note 15. Recent appropriations legislation bars the Commission from altering the newspaper-broadcast cross-ownership rules during the current fiscal year. Congress has codified the broadcast-cable cross-ownership rule. 47 U.S.C. § 533(a) (Supp. III 1986). And it has discouraged the Commission from making more drastic changes to the multiple ownership rules and from repealing the so-called syndication and financial interest rules. See supra notes 105–06.

\textsuperscript{153} See Short and Sweet, BROADCASTING, Feb. 22, 1988, at 210 (broadcaster efforts to secure legislative action with respect to must-carry rules).

\textsuperscript{154} There is even some evidence that, on occasion, Congress regulates broadcasters in a purportedly content-neutral fashion in order to punish them for espousing critical views. See, e.g., News Am. Publishing v. FCC, No. 88-1037, slip op. (D.C. Cir. Mar. 29, 1988) (noting possible congressional motive to punish Rupert Murdoch for his editorial views, but invalidating legislation on alternative ground).
First Amendment and Broadcasting

Amendment rights for broadcasters, either by invalidating specific program requirements or by more broadly conferring on broadcasters the same First Amendment rights as newspapers, would materially alter the congressional view. Securing those broader First Amendment protections would call into question not only direct program regulation, but a host of other regulations that impose special requirements on the broadcast press.155

Conclusion

As this Article suggests, there may be dangers in pursuing broader First Amendment rights, but I believe that those dangers are largely theoretical. There is nothing theoretical about the difficulties that broadcasters now experience in their dealings with Congress as the result of their second-class citizenship.

We stand watching, wondering whether Eliza will stay on the bank or whether, in an act of courage, she will step onto the ice and begin her journey to freedom.

155. If broadcasters had the same First Amendment protection as newspapers, it might be that any regulation would be suspect if it singled out broadcasting for special treatment. See Arkansas Writers' Project v. Ragland, 107 S. Ct. 1722 (1987); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); see also News Am. Publishing v. FCC, No. 88-1037, slip op. (D.C. Cir. Mar. 29, 1988) (suggesting that even under existing First Amendment standards for reviewing broadcast regulation, legislation that singles out particular broadcasters may be unconstitutional; striking down legislation directed at Rupert Murdoch which barred FCC from granting him extension of temporary waivers under newspaper-broadcast cross-ownership rule).