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Children's Television: The FCC's Attempt to Educate America's Children May Force the Supreme Court to Reconsider the Red Lion Rationale

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The Federal Communications Commission (FCC or the Commission) is charged with regulating interstate and foreign communications by radio, television, wire, satellite, and cable. Under the Communications Act of 1934, Congress delineated the Commission’s jurisdiction and authority. Like many other federal agencies, the Federal Communications Commission’s existence is attributable to the complexities of mod-
ern technology that forced Congress to delegate some of its responsibilities to a specialized administrative body.  

Educational television is one such technological development. Dis- 
satisfied with the status of children's educational television, Congress enacted the Children's Television Act of 1990 (CTA or the Act). The CTA's objectives are "to increase the amount of educational and informational broadcast television programming available to children and to protect children from overcommercialization of programming." Through the promulgation of general guidelines, the CTA mandates that, in reviewing television license renewal applications, the FCC must consider whether the licensee has served the educational and informational needs of children. To increase the amount of children's educational and informational programs available on television, Congress enacted the CTA to provide the FCC with general guidelines for regulating children's television.

Although the standards established in the CTA are extremely broad, the Act requires the Commission to complete rulemaking proceedings and prescribe standards for commercial television broadcasts within 180 days of its enactment. After a lengthy stalemate, the Commission fi-

4. See WALTER GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 5-6 (1941); THE GEORGETOWN LAW JOURNAL, MEDIA AND THE FIRST AMENDMENT IN A FREE SOCIETY 111 (1972); Peter Marra, Comment, Have Administrative Agencies Abandoned Reasonability?, 6 SETON HALL CONST. L.J. 763, 767 (1996) (noting that "[t]he justifications for the delegation of congressional power to administrative agencies include Congress's inability to handle technical issues and act efficiently and effectively").

5. See supra note 4 and accompanying text (noting that the FCC was established due to modern technological developments).


8. See 47 U.S.C. § 303(b). The CTA also requires the FCC to adopt rules limiting the duration of advertising that broadcasters air during children's television programming. See id. § 303a(b).

9. See id. §§ 303(a), 303b (affording the FCC broad discretion in implementing and regulating television).

10. See id. § 303(a) (mandating that rulemaking proceedings be initiated within 30 days of the enactment of the statute).

11. See In re Policies and Rules Concerning Children's Television Programming: Revision of Programming Policies for Television Broadcast Stations, Report and Order, 11 F.C.C.R. 10660, 10771 (1996) [hereinafter Report and Order] (Chong, Comm'r, concurring in part) (comparing the process of adopting the rule to the process of making sausage by noting that "[i]t was not a pleasant or pretty process"). After lengthy debate, the FCC promulgated regulations that established a minimum amount of children's educational programming that broadcasters are required to air. See FCC Sets Regulation for Minimum Level of Educational TV, WALL ST. J., Aug. 9, 1996, at B3.
nally adopted a rule that demands more than the equivocal obligation of broadcasters, as required by the CTA and previous FCC rulings. In August 1996, the FCC strengthened the requirement for children's educational and informational programming by requiring broadcasters to air three hours of children's educational and informational programming per week. Additionally, the rules marked the first time in which the FCC attempted to articulate a more precise definition of "educational and informational programming."

This Comment first analyzes the development of the FCC's jurisdiction to increase the educational and informational programming available to children on commercial television. Second, this Comment reviews the FCC's regulation mandating quantitative programming guidelines for children's television. Third, this Comment examines the CTA, as well as the FCC's quantitative requirement for children's educational and informational programming under the lens of the First Amendment. This Comment examines constitutional limits on content regulation in the context of governmental regulation of television broadcasting. This constitutional analysis demonstrates that disparate results arise depending on whether the constitutionality of laws on children's television is measured under a traditional strict scrutiny standard or the less onerous standard applied to broadcast media. This Comment concludes that while the FCC's regulation may fall within the bounds of contemporary First Amendment standards for television broadcasting, such a standard is out-dated due to the vastly increased availability of electronic mass media outlets.

12. See Report and Order, supra note 11, para. 2; Editorial, Clinton's Push for More Kid TV, CHI. TRIB., Aug. 1, 1996, at 22 (noting that the CTA did not adequately apprise broadcasters of how to serve the educational and informational needs of children within the meaning of the CTA).

13. See Report and Order, supra note 11, para. 120. As of January 2, 1997, broadcasters are required either to air three hours of children's educational and informational programming, or demonstrate to the FCC that they are otherwise committed to meeting the educational and informational needs of children. See id. The FCC rule does not apply to cable television. See Clinton Agrees to an Increase in Educational TV Shows for Children, CHI. TRIB., July 29, 1996, at 3.

14. See Report and Order, supra note 11, paras. 76-80. Under the express language of the CTA, educational and informational television programming is defined as "any television program which is directed to an audience of children who are 16 years of age or younger and which is designed for the intellectual development of those children . . . ." 47 U.S.C. § 394(i)(1) (1994).
I. THE DEVELOPMENT AND IMPACT OF THE FCC'S JURISDICTION WITH RESPECT TO CHILDREN'S EDUCATIONAL AND INFORMATIONAL PROGRAMMING

Recognizing the tremendous influence television exerts on young audiences, Congress sought to ensure that television would serve children's educational needs.15 Studies conducted by Nielsen Media Research reveal that children between the ages of two and seventeen watch at least three hours of television per day.16 Furthermore, Congress cited

15. See Report and Order, supra note 11, para. 9. Congress noted the benefits of television programs as sources of educational and informational value to children:

In enacting the CTA, Congress cited research demonstrating that television programs designed to teach children specific skills are effective. There is substantial evidence in this proceeding that children can benefit greatly from viewing educational television. That television has the power to teach is important because nearly all American children have access to television and spend considerable time watching it.


Television affects several areas of American society, including: “family life and socialization; religion; laws and norms; leisure; public security; citizenship.” George Comstock, Television and American Social Institutions, in CHILDREN AND TELEVISION 27 (John C. Wright & Aletha C. Huston eds., 3d ed. 1983). On one level, researchers have noted that television reduces the time one spends in conversation, including interaction among family members. See id. At 28. In addition, some researchers maintain that television serves as a source of vicarious socialization. See id. At 29. It also has been noted that television reduces viewers' involvement in various activities and hobbies. See id.

Several Senators recently reiterated their belief that television is a “uniquely pervasive presence” in the lives of Americans. Television Improvement Act of 1997, S. 471, 105th Cong. § 2. Congress found that the average American home owns 2.5 televisions and the television is watched on an average of seven hours per day. See id.; see also HARVEY LESSER, TELEVISION AND THE PRESCHOOL CHILD: A PSYCHOLOGICAL THEORY OF INSTRUCTION AND CURRICULUM DEVELOPMENT 69 (1977) (arguing that because the depiction of events on a television screen does not affect children’s ongoing interaction among objects and people, “television is weakest in the exact spot where children need the most help”). But cf. Valeria O. Lovelace & Aletha C. Huston, How Can Television Teach Prosocial Behavior? in CHILDREN AND TELEVISION, supra, at 145 (noting that broadcasters' attempts to include prosocial content on television may not always have a positive effect on viewers).

16. See Report and Order, supra note 11, para. 11 (citing NIELSEN MEDIA RESEARCH, TELEVISION AUDIENCE 1993, at 14 (1993)). It is estimated that by the time the average American child enters the first grade, he “will have spent the equivalent of three school years in front of the television set.” Id. para. 12. By contrast, an average eighteen-year-old child will have spent fewer than 13,000 hours in a class room. See In re Policies and Rules Concerning Children's Television Programming; Revision of Programming Policies for Television Broadcast Stations, Notice of Proposed Rulemaking, 10 F.C.C.R. 6308, para. 9 (1995). But Cf. Geraldine Fabrikan, The Young and Restless Audience, N.Y. TIMES, Apr. 8, 1996, at D1 (announcing that according to Nielsen Media Research, the average weekly number of hours that children ages 2 to 11 spend watching television has dropped by approximately eighteen percent since 1984).
research indicating that television programs specifically designed to educate children can be extremely effective in influencing the perceptions, values, and behaviors of children.\textsuperscript{17}

The effectiveness of television as a pedagogical vehicle, coupled with the considerable time that children spend watching television, prompted Congress to investigate the status of children's broadcasting.\textsuperscript{18} Congress discovered that many broadcasters aired a minimal amount of children's educational and informational programming.\textsuperscript{19} For example, according to the National Association of Broadcasters, some stations are airing an average of only two hours of children's educational programming per week.\textsuperscript{20}

\textbf{A. The Children's Television Act of 1990}

Dissatisfied with the status of children's television programming, Congress enacted the CTA to enhance the quality and increase the quantity of children's educational commercial television.\textsuperscript{21} In enacting the CTA, Congress had two goals: (1) to limit the duration of advertising aired during children's programming; and (2) to provide children with more educational and informational programming.\textsuperscript{22} To achieve these goals,
the CTA limits the duration of advertising in children’s television programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. Additionally, Congress mandated that broadcasters air educational and informational programs and required the FCC to enforce this obligation.

The CTA imposed several obligations on the FCC. First, the Act requires the FCC to promulgate and define broadcast standards with respect to commercial television broadcast licenses. Accordingly, the Commission defined educational and informational programming as “any television programming that furthers the educational and informational needs of children 16 years of age and under in any respect, including children’s intellectual/cognitive or social/emotional needs.” The FCC interpreted the CTA’s programming renewal requirement as applicable to programs produced and broadcasted for children sixteen years of age and younger.

Second, the FCC is required to enforce the CTA’s requirements. The CTA requires the FCC to review licensees’ compliance with the Act when commercial broadcasters seek renewal of broadcast licenses. Implicitly, the CTA authorizes the Commission to deny renewal of a broadcast license for insufficient compliance with standards for children’s educational television.

The broadcast industry’s good-faith efforts to provide educational programming for children is crucial to the success of the CTA’s objectives.

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advertisers for revenue, while commercial broadcast stations providing free programming are extremely dependent on advertising for the revenue they earn. See Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 629 (1994). The importance of commercial television is reinforced by the fact that thirty-seven percent of children from the ages of 2 to 11 and thirty-eight percent of children from the ages of 12 to 17 live in homes that do not have access to cable television. See Report and Order, supra note 11, para. 11.


24. See id. § 303a(a).

25. See id.; see also William E. Kennard & Jonathan E. Nuechterlein, Heeding Congress’ Call on Kids’ TV, LEGAL TIMES, Jan. 8, 1996, at 29 (noting that the broad language of the CTA requires that the FCC “spell out precisely what broadcasters must do”).

26. Report and Order, supra note 11, para. 79. Congress used the program “Fat Albert and the Cosby Kids” as an example of a program that served the cognitive/intellectual or social/emotional needs of children because it dealt with issues such as drug use, divorce, friendship, and child abuse. See S. REP. NO. 101-227, at 7 (1989).

27. See Report and Order, supra note 11, para. 79


29. See id. § 303b(a)(1).

30. See id.

31. Report and Order, supra note 11, para. 22 (emphasizing the significance of broadcaster compliance with the rules promulgated under the CTA as illustrated by § 303b(a) that requires the Commission to review the extent to which a licensee has served the educ-
Apart from a broad definition of educational and informational programming, however, the CTA provides little guidance for television broadcasters. For example, the Act establishes no minimum time requirement for the children's educational and informational programming that broadcasters must provide. The FCC initially declined to adopt quantitative processing guidelines, in fear of trespassing on the broadcaster's preserved right to exercise discretion regarding how appropriately to meet the educational and informational needs of children. Consistent with congressional intent, licensees were able to determine the nature of children's educational and informational programming they aired and the quantity of the programming to air.

B. Noncompliance on the Part of Broadcasters

Six years after the enactment of the CTA, some broadcasters continued to provide an insufficient amount of educational and informational programming for children. Studies revealed that some broadcasters...
were providing fewer than two hours of children's educational and informational programming per week. 37 Although the purpose of the CTA was to increase the two hour per week average of children's educational and informational programming, the CTA's goals were not being achieved. 38 The delinquent broadcasters failed to comply for two reasons: (1) low ratings produced by children's television, 39 and (2) insufficient guidance from the CTA. 40

1. Lack of Advertising Dollars

The low ratings generated by children's television programming and the even lower ratings of children's educational programming contributed to noncompliance among some broadcasters. 41 Low television ratings translate into lower advertising revenue for advertisers, and ultimately, decreased profits for broadcasters. 42 Because of this disincentive, broadcasters were reluctant to air more educational and informational programming for children. 43

2. The Vagueness of the Children's Television Act

The vagueness of the CTA also contributed to the broadcasters' non-compliance. 44 The CTA merely obligates broadcasters to provide children's educational and informational programming. 45 Although the FCC

37. See Report and Order, supra note 11, para. 41.
38. See id.
39. See id. para. 33. Accordingly, broadcasters were reluctant to air more educational programs because such programs produced low ratings. See Clinton's Push for More Kid TV, supra note 12, at 22.
40. See Report and Order, supra note 11, para. 36 (concluding that the CTA provided television broadcasters with insufficient guidance).
41. See id. para. 34 (surmising that because broadcasters who air a substantial amount of children's television are commercially disadvantaged as compared to those who do not, even broadcasters who want to air such programming may choose not to do so); see also KRATTENMAKER, supra note 3, at 21 (stressing that the "central driving force" of the television industry is the "quest of local broadcast stations for advertising dollars").
42. See Elizabeth Jensen & Albert R. Karr, Summit on Kids' TV Yields Compromise: FCC is Expected to Endorse New Program Guidelines, But Will the Audience?, WALL ST. J., July 30, 1996, at B14 (observing that children's educational programs typically "get low ratings and thus, lower advertising rates").
43. See Clinton's Push for More Kid TV, supra note 12, at 22; James J. Popham, Passion, Politics and the Public Interest: The Perilous Path to a Quantitative Standard in the Regulation of Children's Television Programming, 5 COMMLAW CONSPECTUS 1, 19 (1997) (predicting that broadcasters will air only the minimum amount of children's television as required by the FCC, "no more, no less").
44. See supra notes 32-40 and accompanying text (discussing the causes of the broadcasters', non-compliance with respect to the CTA).
45. Cf. Report and Order, supra note 11, para. 80 (arguing that the newly adopted
currently defines “educational and informational programming” as television programming that advances the positive development of children sixteen years of age and younger in terms of their “intellectual/cognitive or social/emotional needs,” this definition still affords considerable discretion to television broadcasters.4 For example, the FCC delegated to television broadcasters the final authority to determine which programs qualify as educational and informational within the meaning of the CTA.27

C. The Long Road to Adopting a Stricter Rule for Television Broadcasters

1. The FCC’s Attempts to Implement a Three Hour Per Week Requirement for Children’s Educational Programming

Because the CTA and the FCC rules promulgated thereunder lacked sufficient guidance, the FCC sought to articulate more precise and definite standards for broadcasters seeking to comply with the Act.48 These initial attempts to strengthen the requirements of the CTA drew significant criticism.49 FCC Chairman Reed E. Hundt and Commissioner Susan Ness favored a draft order prescribing a three hour per week minimum definition of “educational and informational programming” will maintain broadcasters’ current discretion in selecting the content of children’s programming that they air). In reviewing any applications for license renewal, the FCC will determine whether the broadcaster has met its obligation to children’s programming. See 47 U.S.C. § 303b (1994).

46. *Report and Order*, supra note 11, para. 79 (defining educational and informational television). Broadcasters characterized television shows such as “The Flintstones” and “The Jetsons” as educational. See Press Briefing by Greg Simon, Chief Domestic Policy Advisor for the Vice-President 4 (July 29, 1996) (transcript available from the White House, Office of the Press Secretary).

47. *See Report and Order*, supra note 11, para. 80. Congress allowed the FCC to provide broadcasters with their exact obligations. *See Kennard & Nuechterlein, supra* note 25, at 29.


49. *See FCC Sets Regulation for Minimum Level of Educational TV*, supra note 11, at B3 (noting that Commissioners Quello and Chong denounced any proposed FCC regulations that posed an unwarranted threat to the First Amendment rights of TV broadcasters); *see also* Chris McConnell, *Kids TV Accord Reached*, BROADCASTING & CABLE, Aug. 5, 1996, at 5 (noting that the passage of the three-hour children’s television requirement marked the end to a “months-long FCC stalemate”). Senior Commissioner James Quello sought to avoid the imposition of intrusive regulations that would violate the First Amendment. *See James H. Quello, The FCC’s Regulatory Overkill*, WALL ST. J., July 24, 1996, at A20. On the other side of the debate, Chairman Reed Hundt strongly advocated the quantitative programming requirements. *See Chairman Reed E. Hundt, Address at the National Press Club (July 27, 1995) <http://www.fcc.gov/Speeches/Hundt/spreh517.txt>.
for children’s educational and informational programming.\textsuperscript{50} Commissioners Rachelle Chong and Jim Quello, however, unequivocally denounced the stricter proposal and individually voiced their concerns over the proposed definition of children’s educational and informational programming.\textsuperscript{51} Thus, the FCC was deadlocked for months, unable to furnish more specific rules for television broadcasters.\textsuperscript{52}

2. \textit{President Clinton’s Children’s Television Summit}

Due to the approaching November presidential election and the FCC’s inability to agree upon standards for broadcasters, President Clinton met with representatives from the broadcasting industry and children’s television advocates to negotiate a resolution aimed at enriching children’s television.\textsuperscript{53} All parties eventually agreed to the proposal favored by Commissioners Ness and Hundt that required broadcasters to air three hours of children’s educational and informational programs per week in order to renew their licenses.\textsuperscript{54} Under the proposal, the three hours of programming consisted of regularly scheduled thirty-minute programs.\textsuperscript{55}

The agreement between broadcasters and the President hinged on an alternative provision that granted flexibility to television broadcasters.\textsuperscript{56}

\begin{thebibliography}{99}
\bibitem{50} See \textit{FCC Sets Regulation for Minimum Level of Educational TV}, \textit{supra} note 11, at B3.
\bibitem{51} See \textit{id.}
\bibitem{52} See McConnell, \textit{supra} note 49, at 5.
\bibitem{53} The Children’s Television Conference was held on July 29, 1996. See President William J. Clinton, Remarks at the Children’s Television Conference (July 29, 1996), \textit{in} 32 \textit{WEEKLY COMP. PRES. DOC.} 1362 (Aug. 5, 1996) [hereinafter Clinton Address]. During the Conference, President Clinton urged the FCC to adopt the three hours per week proposal supported by Commissioners Ness and Hundt. \textit{See id.} at 1363.
\bibitem{54} \textit{See Clinton Address, supra} note 53, at 1363; McConnell, \textit{supra} note 49, at 5; \textit{see also} Clinton Agrees to an Increase in Educational TV Shows for Children, \textit{supra} note 13, at 3 (noting the importance of the compromise to the president during an election year); Farhi, \textit{supra} note 32, at A1 (noting that the compromise arises “amid a new round of presidential campaign rhetoric about cultural values”); William Neikirk, \textit{Clinton Calls for Summit on Kids’ TV}, \textit{CHI. TRIB.}, June 12, 1996, at 4 (noting that the President’s request for more children’s television “added another item to Clinton’s campaign theme emphasizing family values”).
\bibitem{55} See McConnell, \textit{supra} note 49, at 5.
\bibitem{56} President Clinton noted that:
This proposal fulfills the promise of the Children’s Television Act, that television should serve the educational and informational needs of our young people. It gives broadcasters flexibility in how to meet those needs. And it says to America’s parents, you are not alone; we are all committed to working with you to see that educational programming for your children makes the grade.

\textit{Clinton Address, supra} note 53, at 1363; \textit{see also} Chris McConnell, \textit{Burning the Midnight Oil Over Kids TV}, \textit{BROADCASTING & CABLE}, Aug. 5, 1996, at 8 (discussing the flexibility of the agreement).
\end{thebibliography}
This provision afforded leniency to broadcasters who air fewer than three hours of programming per week by allowing the broadcasters to substitute programming that is "equivalent" to the three-hour requirement.\textsuperscript{57} This alternate programming could include fifteen-minute programs, public service announcements, and specials.\textsuperscript{58}

II. THE FCC-APPROVED REGULATION FOR MINIMAL LEVEL OF EDUCATIONAL TELEVISION FOR CHILDREN

Bowing to intense pressure from President Clinton, the FCC eventually agreed to the compromise reached by the White House and the television industry.\textsuperscript{59} The FCC's regulation not only imposes a quantitative three-hour requirement on broadcasters, it also establishes an unequivocal definition of educational and informational "core" programming.\textsuperscript{60} The FCC recognized that the previous definition of educational and informational programming was over-broad.\textsuperscript{61} Therefore, the FCC sought to adopt a more precise and definite definition of "core" programming, namely programming that is "specifically designed to serve the educational and informational needs of children."\textsuperscript{62}

A. Analysis of the FCC's Requirements for "Core" Programming

1. The Significant Purpose of the Program

In order to qualify as "core" programming, the purpose of the program must be to serve the educational and informational needs of children ages sixteen and younger.\textsuperscript{63} Programming that communicates only a mi-

\textsuperscript{57} McConnell, supra note 49, at 5.
\textsuperscript{58} See Sheryl Stolberg & Jane Hall, Educational Children's TV Shows to Air; Media: Networks Bow to Pressure from Clinton in Agreeing to Programming Three Hours a Week. Pact is Considered Election-Year Coup for President, L.A. TIMES, July 30, 1996, at A12.
\textsuperscript{59} The four Commissioners voted unanimously in favor of the plan announced at the President's Television Summit. See FCC Sets Regulation for Minimum Level of Educational TV, supra note 11, at B3.
\textsuperscript{60} See Report and Order, supra note 11, paras. 78-80.
\textsuperscript{61} See id. para. 73.
\textsuperscript{62} Id.
\textsuperscript{63} See id. para. 79. The Commission opined that: The "significant purpose" standard appropriately acknowledges the point advanced by broadcasters and others that to be successful, and thus to serve children's needs as mandated by the CTA, educational and informational programming must also be entertaining and attractive to children. Accordingly, . . . we will require that core programming be specifically designed to meet the educational and informational needs of children ages 16 and under and have educating and informing children as a significant purpose.
nor educational or informational message, yet claims to serve the needs of children, does not fall within the scope of the definition. The FCC "relies on the good-faith judgment of broadcasters," in determining whether programming falls within the definition of "core" programming. In addition, the FCC relies on the public to monitor broadcaster performance in complying with the regulation.

2. The Requirement of a Written Statement Specifying the Educational and Informational Objective and Target Child Audience

The regulation also requires broadcasters to submit written statements to the FCC outlining the educational and informational purpose of a program intended to qualify as "core" programming. The written statement consists of a description of the program's educational and informational objective, the program's expected educational and informational effects, and an indication of the program's target age groups. The written statement encourages the public to actively monitor broadcast licensee compliance with the regulation.


CBS announced that it would comply with the new FCC ruling on children's television by choosing the program "Beakman's World" to air on Saturday morning. See Steve McClellan, CBS Programs Educational Saturday, BROADCASTING & CABLE, Dec. 9, 1996, at 38 [hereinafter McClellan, CBS Programs]. Because of the FCC's decision to mandate three hours of children's educational and informational programming, one entrepreneur established the company, JP Kids, to produce and distribute children's programming that meets the FCC requirements. See Steve McClellan, New Kids Programming Producer Formed; With Help from Wall Street, Children's Advocate Launches JP Kids, BROADCASTING & CABLE, Dec. 2, 1996, at 42. JP Kids founder, Jim Steyer, is also the founder of the advocacy group, Children Now. See id. In addition to providing quality children's programming for broadcast television, Steyer intends to aggressively pursue various other media, such as cable and the Internet. See id. at 42-43.

64. See Report and Order, supra note 11, para. 81.
65. Id. para. 88.
66. See id.
67. See id. para. 93. Commercial television broadcasters are required to complete a Children's Television Programming Report (Report) on a quarterly basis. See 47 C.F.R. § 73.3526(a)(8)(iii) (1996). The report is completed on FCC Form 398 and should identify the efforts made to serve the educational and informational needs of children in the preceding quarter as well as the goals for the next quarter. See id.
68. See 47 C.F.R. § 73.3526(a)(8)(iii). Although the report must explain how the designated programs satisfy the "core" programming requirement, the written statement does not need to specify the viewpoint of the program. See id.
69. See Report and Order, supra note 11, para. 93. The FCC determined that the requirement of a written statement of purpose "ensure[s] that broadcasters devote attention to the educational and informational goals of core programming." Id. The written statement distinguishes between programs that serve the educational and informational needs of children from programs that entertain. See id.
3. Time Considerations

“Core” programming must be aired between the hours of 7:00 A.M. and 10:00 P.M. These hours represent the period of time in which the greatest number of children are in the audience. The 7:00 A.M. to 10:00 P.M. time limit became necessary because broadcasters preferred to air children’s programming during non-prime-time hours, which produced low ratings and few advertising dollars.

4. Regularly Scheduled Programming

“Core” programming also requires the children’s television program to be regularly scheduled. A regularly scheduled program must air at least once a week. Hence, specially scheduled programming does not meet the “core” requirement.

This requirement reflects the FCC’s view that regularly scheduled programs are more likely to attract and maintain regular audiences. Regularity of scheduling permits greater dissemination of information about the program through published television guides and increases viewer loyalty through program anticipation. The FCC’s rules, however, provide opportunities to evade the scheduling element of the “core” program definition in two ways. First, the FCC’s rules do not es-

70. See 47 C.F.R. § 73.671(c)(2) (1996); see also Clinton’s Push for More Kid TV, supra note 12, at 22 (discussing the provisions of the agreement between President Clinton and television broadcasters). The time period for “core” programming does not coincide with the indecency safe harbor, which is between 10:00 P.M. and 6:00 A.M. See Report and Order, supra note 11, para. 102. The CBS network proposed airing children’s programs on Saturday from 7:00 A.M. until 9:00 A.M. and then from 11:00 A.M. to 12:00 P.M. to satisfy FCC regulations. See McClellan, CBS Programs, supra note 63, at 38.

71. See Report and Order, supra note 11, para. 99. Less than five percent of children between the ages of 2 and 17 watch television at 6:00 A.M. See id. The average number of children viewers between the ages of 2 and 17 drops from thirteen million at 10:00 P.M. to eight million at 11:00 P.M. See id. para. 101.

72. Cf. id. para. 100 (noting that airing children’s educational and informational programming during the early morning hours is less costly for broadcasters).

73. See id. para. 105. The FCC opined that adopting a “regularly scheduled” requirement would foster the continued viewership of parents and children, encourage loyalty to a certain program, and reinforce educational and informational messages. See id.

74. See id.

75. See id. para. 107.

76. See id. para. 105, 107.

77. See id. para. 107.

78. See id. para. 105.

79. See Stolberg & Hall, supra note 58, at A12 (outlining the “alternative” methods by which broadcasters who fail to air three hours of core programming per week may avoid losing their licenses).
tablish a standard requiring broadcasters to air programs for a consecutive number of weeks. Second, the rules allow for preemption of "core" programming with "breaking news" and "live sports events," and do not limit the amount of preemption.

5. Minimum Length of "Core" Programming

The FCC also requires that "core" programming be at least thirty-minutes in duration. The thirty-minute format reflects current industry practice, and the Commission determined that children's educational programming should comport with this standard. Although the FCC recognized that programs that are fewer than thirty-minutes in length provide public interest benefits, shorter programs will not be credited as "core" programming. The FCC opined that a thirty-minute program format contributes to the accessibility of educational and informational programming to children. This program format is more accessible because it is usually regularly scheduled, and listed in television program guides that parents may read for more information about the program.

6. Identification of a Children's Program as Educational and Informational

The last element of "core" programming requires broadcasters to accurately identify children's educational and informational programming. The FCC adopted its initial proposal contained in the Notice of Proposed Rule Making. The FCC maintained that broadcast stations

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80. Cf. Report and Order, supra note 11, para. 106 (noting that serial programs usually air for 13 consecutive weeks, but have no consecutive week requirement).
81. See id. para. 106.
82. See id. para. 110. The FCC reasoned that the purpose of the length requirement for children's educational and informational programming is to promote accessibility. See id. The CBS network announced its intent to air educational and informational programming for children in a two hour block between 7:00 A.M. and 9:00 A.M. and a one hour block from 11:00 A.M. and 12:00 P.M. See McClellan, CBS Programs, supra note 63, at 38.
83. See Report and Order, supra note 11, para. 110.
84. See id. para. 112.
85. See id. para. 110.
86. See id.
87. See id. para. 113. By requiring station broadcasters to identify a core program as educational and informational, the FCC intends to make this information available for published program guides which enhances parental accessibility to such information. See id. Furthermore, the FCC hopes that the identification requirement will promote greater accountability among broadcasters in complying with the Commission's rules. See id.; cf. McClellan, CBS Programs, supra note 63, at 38 (discussing children's programming selected to air during the 1997-98 season and identified as educational by CBS).
88. See Report and Order, supra note 11, para. 113 & n.265. Broadcasters had to
must designate programs as educational and informational on television, before they air, and also identify educational and informational programs in published program guides. The FCC stated that holding broadcasters responsible for the identification of programming will ensure that programming is properly designated as educational and informational. According to the Commission, identification also will facilitate parental awareness, and assist in monitoring broadcasters' compliance with the rule.

B. The Flexibility of the FCC Regulation

The FCC regulation incorporates a provision that gives television broadcasters flexibility in complying with the Commission's rules. This provision allows broadcasters who have not satisfied the six elements of "core" programming to comply with the license renewal requirements in an alternative fashion. Absent a demonstration that the six elements have been met, the processing guidelines prescribed under the FCC's regulations allow for renewal by showing that the broadcaster offers a programming package that is equivalent to the three-hour requirement.

Broadcast licensees who fail to meet the FCC's quantitative guidelines will have a "full opportunity to demonstrate compliance with the CTA." Licensees may demonstrate such compliance by exhibiting a "commitment to educating and informing children that is at least equivalent to airing three hours per week of core programming." Stations opting to take this alternative method may use their sponsorship of educational programming on other stations to show their commitment. Furthermore, television stations may denote any "special non-broadcasting ef-

meet the processing guideline by the fall of 1997, while they had until only January 2, 1997 to meet the identification requirement. See id. paras. 160-61; Chris McConnell, Kids Icons to Make Debut, BROADCASTING & CABLE, Dec. 16, 1996, at 28. In December 1996, NBC, CBS, Fox, and UPN television networks notified program guide publishers of their intent to use the symbol "E/I" to identify their educational and informational programs. See id. The ABC network did not join in the announcement, but stated that it will also establish a symbol for educational and informational programming for use in their publishers' guides. See id. 89. See Report and Order, supra note 11, para. 113. 90. See id. 91. See id. 92. See McConnell, supra note 56, at 8. 93. See McConnell, supra note 49, at 5. 94. See Report and Order, supra note 11, para. 133. 95. Id. para. 120. 96. Id. para. 133. 97. See id. para. 120.
forts" that generally promote the value of educational and informational television programming.98

III. SCOPE OF THE FIRST AMENDMENT FREEDOM OF SPEECH

The First Amendment prohibits Congress from enacting any law that abridges the freedom of speech.99 However, the First Amendment has been interpreted to permit certain limited restrictions on free expression.100 The Supreme Court has established a complex and sometimes conflicting body of precedent in an effort to adjust the competing interests surrounding First Amendment litigation.101 A dominant principle in First Amendment jurisprudence is that government regulations that impose content-based restrictions on free speech are subject to the greatest degree of judicial scrutiny.102 Therefore, in deciding whether a government restriction comports with the First Amendment, it is necessary first to determine whether the restriction is content-based.103

A. Distinguishing Content-Based from Content-Neutral Restrictions on Speech

A fundamental principle applied in First Amendment jurisprudence is the distinction between content-based and content-neutral regulation of

98. Id. para. 137.
99. U.S. CONST. amend. I. The Amendment in pertinent part provides that "Congress shall make no law... abridging the freedom of speech, or of the press." Id.
100. See Konigsberg v. State Bar of California, 366 U.S. 36, 49 (1961) (rejecting the view that freedom of speech and association are "absolutes"); see also GERALD GUNTHER, CONSTITUTIONAL LAW 1004 (12th ed. 1991) (examining whether First Amendment rights are absolute); WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 614 (8th ed. 1996) (noting that laws that restrict certain modes of free expression are commonplace).
101. See R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (invalidating a city ordinance that prohibited protected speech); Texas v. Johnson, 491 U.S. 397, 416 (1989) (concluding that flag burning is a form of protected speech). The Supreme Court has noted that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972); see also Carey v. Brown, 447 U.S. 455, 471 (1980) (invalidating an Illinois statute that prohibited picketing of residences or dwellings when the pickets contained certain subject matter).
102. See Carey, 447 U.S. at 461-62 (explaining that government discrimination among speech-related activities triggers a heightened standard of review); cf. R.A.V., 505 U.S. at 381 (striking down an ordinance because it included otherwise lawful speech in its prohibition on certain types of speech); Mosley, 408 U.S. at 95 (striking down a statute that "describes permissible picketing in terms of its subject matter").
103. Cf. Carey, 447 U.S. at 460-61 (determining whether the statute in question constituted a content-based or content-neutral restriction).
speech. Content-based regulation involves the restriction of expression based on its communicative impact. On the other hand, a content-neutral regulation restricts speech without regard to the content of the message. These restrictions regulate merely the time, place, or manner in which speech is permitted.

1. Content-Based Regulations

Government regulations that govern the content of expression are subject to strict judicial scrutiny. Under the strict scrutiny standard, a content-based regulation is presumptively invalid and will be upheld only if it advances a compelling government interest and is narrowly tailored... to effectuate that interest without infringing upon other forms of protected expression.


107. See id. (citing cases which addressed content-neutral regulations of free speech).

108. See Texas v. Johnson, 491 U.S. 397, 412 (1989) (explaining that the government's interest in restricting content-based expression must be subjected to "the most exacting scrutiny").


In analyzing the Supreme Court's First Amendment jurisprudence, one commentator notes:

The Court apparently focuses... on the extent to which the speech furthers the historical, political, and philosophical purposes that underlie the first amendment. In making this determination, the Court applies a "defining out" approach. That is, the Court begins with the presumption that the first amendment protects all communication and then creates areas of non-protection only after it affirmatively finds that a particular class of speech does not sufficiently further the underlying purposes of the first amendment.


110. See Simon & Schuster, 502 U.S. at 120-21 (finding a compelling government interest in the Son of Sam law that transfers to victims compensation earned from the "fruits of crime").

111. See Sable Communications, Inc. v. FCC, 492 U.S. 115, 130-31 (1989) (holding that a complete ban on indecent telephone messages was not narrowly tailored to advance the compelling interest of shielding children from indecency).

112. See Johnson, 491 U.S. at 412, 420 (striking down a Texas statute that proscribed flag burning after applying a strict scrutiny standard and concluding that the Texas statute
The Supreme Court applied the strict scrutiny test in *Miami Herald Publishing Co. v. Tornillo*113 where it struck down a content-based restriction.114 *Tornillo* involved a Florida statute that granted a political candidate the right to require a newspaper to print a reply to the newspaper's criticism of the candidate's personal character or official record.115 Applying the strict scrutiny standard, the Supreme Court held the statute unconstitutional because it forced newspapers to forgo publication of other news.116 Moreover the Court reiterated the principle that the government cannot invade the function of the newspaper editor.117

2. Content-Neutral Regulations

When evaluating content-neutral regulations, the Court employs a less onerous standard of review.118 Content-neutral regulations are perceived as a lesser burden on First Amendment rights,119 and, therefore, are subject to a more liberal intermediate level of scrutiny.120 Under this standard, a government regulation will be upheld if the regulation affects conduct with both “speech” and “nonspeech” elements and the government has a sufficiently important interest in the regulation of the nonspeech element.121

impermissibly restricted expressive conduct); see also supra note 109 (citing additional cases in which strict scrutiny was applied).

114. See id. at 256-58.
115. See id. at 244. The Florida “right of reply” statute provided that if a newspaper attacked a candidate’s personal character or official record, the candidate had the right to reply to such allegations. See id. The right to reply entitled the candidate to demand that the same newspaper print a reply free of charge. See id. The statute required the newspaper to print the reply in a conspicuous location and in the same kind of print as the original charges. See id. A newspaper that failed to comply with the statute was guilty of a first-degree misdemeanor. See id.
116. See id. at 256.
117. See id. at 258. The Court specifically stated that “the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.” Id.
118. See infra notes 119-21 and accompanying text (detailing the intermediate level of scrutiny used for content-neutral regulations).
119. Cf. Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result) (“A licensing standard which gives an official authority to censor the content of a speech differs toto coelo from one limited by ... non-discriminating practice, to considerations of public safety and the like.”).
120. Cf. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (stating that content-neutral regulations do not violate the First Amendment if they regulate without regard to content, are narrowly tailored, and allow information to be expressed through “alternative channels”).
121. See United States v. O'Brien, 391 U.S. 367, 376 (1968). The *O'Brien* Court also rejected the assertion that “an apparently limitless variety of conduct can be labeled
B. The Difference Between Broadcast Media and Traditional Speech

Because television broadcasters transmit speech, the broadcast medium is implicated within the meaning of the First Amendment.\textsuperscript{122} Moreover, in the First Amendment context, broadcasting is a unique medium of expression.\textsuperscript{123} Accordingly, the Court has determined that the First Amendment rights of broadcasters are not equal to “the right of every individual to speak, write, or publish.”\textsuperscript{124} The justification for treating television differently stems from three different theories: public ownership,\textsuperscript{125} scarcity,\textsuperscript{126} and the pervasiveness rationale.\textsuperscript{127}

'speech' whenever the person engaging in the conduct intends thereby to express an idea.” \textit{Id.}

\textsuperscript{122} Cf. United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948) (stating that the First Amendment's freedom of press guaranty includes the medium of “moving pictures”). The Court has interpreted the First Amendment to encompass all forms of mass media communication within the meaning of “the press.” \textit{See DONALD M. GILLMOR ET AL., MASS COMMUNICATION LAW 9 (5th ed. 1990); see also WALTER S. BAER, TECHNOLOGY'S CHALLENGES TO THE FIRST AMENDMENT 1 (1992) (noting that the contemporary meaning of “speech” in the context of the First Amendment includes radio and television broadcasting, cable networks, facsimile transmission over telephone lines, computer-based desktop publishing, and high-speed printing presses).}

\textsuperscript{123} \textit{See Denver Area Educ. Telecomm. Consortium v. FCC, 116 S. Ct. 2374, 2386 (1996) (plurality opinion) (examining the reasons why broadcasting is afforded different First Amendment protections than other media).}

\textsuperscript{124} \textit{Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969). One commentator noted that:}

\textit{The First Amendment commands that Congress shall make no law abridging freedom of speech or of the press. The courts, however, historically have allowed a greater degree of governmental intervention with respect to broadcast content than with traditional print media on the theory that “differences in the characteristics of new media justify differences in the First Amendment standard applied to them.”}

\textit{Robert Corn-Revere, \textit{Red Lion and the Culture of Regulation, in RATIONALES AND RATIONALIZATIONS 1} (Robert Corn-Revere ed., 1997). Because broadcasting is afforded a lesser degree of First Amendment protection, restrictions often are imposed on the industry that would be unacceptable if applied to the print media. \textit{See LEE C. BOLLINGER, IMAGES OF A FREE PRESS 71-73 (1991) [hereinafter BOLLINGER, FREE PRESS]; see also Lee C. Bollinger, Jr., Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media, 75 MiCH. L. REV. 1, 1 (1976) (noting the drastic disparity with respect to the constitutional safeguards applicable to the print and broadcast media) [hereinafter Bollinger, Regulation of Mass Media].}

\textsuperscript{125} \textit{See infra} notes 128-36 and accompanying text (discussing the public ownership rationale).

\textsuperscript{126} \textit{See infra} notes 137-56 and accompanying text (discussing the scarcity rationale).

\textsuperscript{127} \textit{See infra} notes 157-64 and accompanying text (discussing the pervasive presence theory).
1. Public Ownership Rationale

Employment of more liberal First Amendment standards to broadcasting is illustrated by Congress's power to allocate broadcast licenses selectively.\(^{128}\) Unlike traditional modes of communication, broadcast frequencies are scarce resources because of the physical limitations of the electromagnetic spectrum.\(^{129}\) Therefore, in order to facilitate meaningful communication and to prevent the engineering chaos that would ensue by interfering signals, the government must regulate the use of broadcast channels.\(^{130}\) These limitations require the allocation of spectrum space to a limited number of broadcasters.\(^{131}\) Accordingly, governmental allocation necessarily means that some will be permitted to broadcast and others will not.\(^{132}\)

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128. See BOLLINGER, FREE PRESS, supra note 124, at 70 (discussing the Supreme Court's approach to broadcast regulation in Red Lion). With respect to broadcast licensing, the Commission has noted that:

The airwaves belong to the public, not to any individual broadcaster. As the Supreme Court observed in CBS, Inc. v. FCC, "a licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'"

The fact that Congress elected to retain public ownership of the broadcast spectrum and to lease it for free to private licensees for limited periods carries significant First Amendment consequences.

Report and Order, supra note 11, para. 149 (internal footnotes omitted).


130. See Red Lion, 395 U.S. at 375-76. Prior to 1927, the allocation of radio frequencies was in the hands of the private sector. See id. at 375. The government assumed control over regulating the airways to dispel the confusion engendered by the overburdened use of the electromagnetic spectrum. See THE GEORGETOWN LAW JOURNAL, supra note 4, at 11. Congress responded to the public outcry by enacting the Communications Act of 1934 which created and empowered the FCC to regulate the airways. See id.

131. See FCC v. League of Women Voters, 468 U.S. 364, 377 (1984). The basic unit of measure of electromagnetic radiation is cycles per second or hertz (Hz). See MARC A. FRANKLIN & DAVID A. ANDERSON, CASES AND MATERIAL ON MASS MEDIA LAW 630 (4th ed. 1990). The system of measure of electromagnetic radiation is as follows:

One KiloHertz (KHz) = 1,000 Hz
One MegaHertz (MHz) = 1,000 KHz
One GigaHertz (GHz) = 1,000 MHz

See id. The radio spectrum is comprised of frequencies of electromagnetic radiation, ranging from 10kHz to 3,000 GHz. See id. With existing technology, only the frequencies from 10 kHz to approximately 40 GHz may be used. See id.

132. See League of Women Voters, 468 U.S. at 377; see also National Broad. Co. v. United States, 319 U.S. 190, 226-27 (1943) (admonishing that not every denial for allocation of a broadcast license constitutes abridgment of free speech).
The public ownership rationale cannot justify affording broadcasters less First Amendment protection. Not all government-controlled property is afforded limited First Amendment protection. For example, although the government regulates the parks and the sidewalks, such control does not empower the government to censor based on the content of speech. Thus, the Supreme Court has not used the governmental control rationale to uphold its unique restriction of First Amendment protection for broadcast regulation.

2. Scarcity Rationale

Justice Frankfurter announced the scarcity rationale in National Broadcasting Co. v. United States. The National Broadcasting majority upheld special regulations applicable to radio stations engaged in chain broadcasting due to the scarcity of broadcast frequencies. Because the electromagnetic spectrum is a scarce resource that can be used effectively by only a limited number of speakers simultaneously, licensees are granted the use of the spectrum contingent on the understanding that

134. Cf. id. (noting that the public ownership rationale cannot justify the disparate treatment of broadcast television).
135. See id.
136. See id. at 199-200.
137. President Clinton commented on the future of broadcasting prior to the 1992 election:

As you know, the distinction between broadcasting and publishing in terms of the First Amendment is based on the scarcity principle. Free over-the-air broadcasting will continue to be a vital part of our media, and availability of licenses will continue to be limited. When that changes, the distinction between broadcasting and print will change too.

Clinton on Communications, Broadcasting & Cable, Sept. 23, 1996, at 22.
138. 319 U.S. 190 (1943). Characterizing the confusion that ensued after Secretary Hoover abandoned all attempts to regulate radio stations, Justice Frankfurter noted that “[t]he result was confusion and chaos. With everybody on the air, nobody could be heard.” Id. at 212.
139. See id. at 194 n.1 (defining “chain broadcasting” as the “simultaneous broadcasting of an identical program by two or more connected stations”).
140. See id. at 213 (noting that the regulation is necessary to prevent interference between signals because the spectrum “simply is not large enough to accommodate everybody”). But see Ronald J. Krotoszynski, Jr., Into the Woods: Broadcasters, Bureaucrats, and Children’s Television Programming, 45 Duke L.J. 1193, 1206 (1996) (noting that “[i]t . . . makes little sense to continue holding television broadcasters hostage to some sort of second class status under the First Amendment on the theory that they hold an effective monopoly on access to the marketplace of ideas”).
they will operate in a manner consistent with the "public interest, convenience, or necessity."\footnote{141}

In \textit{Red Lion Broadcasting Co. v. FCC},\footnote{142} the Supreme Court unanimously reaffirmed the applicability of the scarcity rationale.\footnote{143} \textit{Red Lion} involved the refusal of a Pennsylvania radio station to grant reply time to an individual the station publicly assailed on the air.\footnote{144} The Court relied on the fairness doctrine to justify imposing the affirmative obligation of providing full and fair coverage of opposing viewpoints on issues of public importance.\footnote{145} The Court, in reaffirming the fairness doctrine, upheld


\footnote{142. 395 U.S. 367 (1969).}

\footnote{143. \textit{See id.} at 400-01 (holding that regulations that impose affirmative obligations on broadcasters are constitutional because of the "scarcity of broadcast frequencies, the Government's role in allocating those broadcast frequencies, and the legitimate claims of those, unable without governmental assistance, to gain access to those frequencies for expression of their views").}

\footnote{144. \textit{See id.} at 371-72. The radio station aired a broadcast by the Reverend Billy James Hargis during which a book authored by Fred J. Cook entitled, "Goldwater—Extremist on the Right," was discussed. \textit{See id.} During the broadcast, Hargis claimed that Cook had been fired by a newspaper for making false charges against New York City officials; that after losing his job he worked for a Communist-affiliated publication; that he had defended Alger Hiss; that he had attacked J. Edgar Hoover and the Central Intelligence Agency; and that Cook had written the book to "smear and destroy Barry Goldwater." \textit{Id.} at 371.}

\footnote{145. \textit{See id.} at 377-78. During the \textit{Red Lion} litigation, the FCC issued a Notice of Proposed Rule Making aiming to more precisely set forth rules governing political editorials, and to more clearly define the personal attack component of the fairness doctrine. \textit{See id.} at 373. The FCC adopted the proposed rules with only minor changes. \textit{See id.} The United States Court of Appeals for the Seventh Circuit, however, found the rules unconstitutional. \textit{See Radio Television News Dirs. Ass'n v. United States, 400 F.2d 1002, 1020 (1968), rev'd, Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).} Consequently, the FCC amended the rules as follows:

When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

\textit{Red Lion}, 395 U.S. at 373-74.

The fairness doctrine, which was repealed in 1987, required broadcasters to air controversial public issues. \textit{See Toni Elizabeth Gilbert, Note, Economic Regulation of the Cable Television Industry: Reigning in a Giant at the Expense of the First Amendment, 45 CATH. U. L. REV. 615, 630 n.81 (1996).} Furthermore, the doctrine required that broadcasters provide contrasting viewpoints on those issues. \textit{See id.} The fairness doctrine stemmed from the government's attempts to regulate discussions of political issues over the television and radio. \textit{See id.}
a regulation that required broadcasters to furnish reply time to an individual attacked on television or the radio.\textsuperscript{146}

The \textit{Red Lion} Court upheld the fairness doctrine based in part, upon the scarcity rationale.\textsuperscript{147} The Court concluded that the First Amendment does not prevent Congress or the FCC from placing affirmative obligations on a broadcast licensee, even if the obligations constitute content-based restraints.\textsuperscript{148} Accordingly, licensees who are granted use of the electromagnetic spectrum must serve as public fiduciaries by airing programs of public concern.\textsuperscript{149} The \textit{Red Lion} decision illustrated the Court's willingness to depart from settled principles of First Amendment jurisprudence with respect to evaluating the constitutionality of radio and television broadcasting regulations.\textsuperscript{150}

The Court reaffirmed the scarcity rationale for increased regulation of television broadcasting in \textit{FCC v. League of Women Voters.}\textsuperscript{151} At issue was a statute that prohibited a noncommercial broadcasting station that received a grant from the Corporation of Public Broadcasting from engaging in editorializing.\textsuperscript{152} The Supreme Court held that the statute was

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\textsuperscript{146} See \textit{Red Lion}, 395 U.S. at 386, 400-01.

\textsuperscript{147} See \textit{id.} at 388-89, 396-401.

\textsuperscript{148} See \textit{id.} at 390.

\textsuperscript{149} See \textit{id.} at 389.

\textsuperscript{150} See \textit{id.} at 386 (noting that because broadcast media differs from other forms of media, the nature of the First Amendment protections given to broadcast media is different as well).


\textsuperscript{152} See \textit{id.} Section 399 of the Public Broadcasting Act of 1967 prohibited any non-commercial educational broadcasting station that received a grant from the Corporation for Public Broadcasting from engaging in editorializing. See 47 U.S.C. § 399 (1994) (amended 1988). In 1988, Congress amended § 399 by removing the provisions that pro-
not narrowly tailored to address the government's suggested interests without unnecessarily abridging other forms of protected expression.\(^\text{153}\) Justice Brennan, writing for the majority, noted that the scarcity rationale had come under attack given the emergence of cable and satellite television.\(^\text{154}\) The Court refused, nevertheless, to reconsider its long-standing First Amendment standard for broadcasting.\(^\text{155}\) Curiously, the Court pointed to Congress or the FCC to reconsider the unique broadcasting doctrine.\(^\text{156}\)

3. The Pervasiveness Rationale

FCC v. Pacifica Foundation\(^\text{157}\) marked the first and only time that the Supreme Court departed from the scarcity rationale.\(^\text{158}\) The Supreme Court upheld the limited First Amendment protection applied to radio broadcasters, not only because broadcasting is scarce, but also because of the uniquely accessible, or pervasive\(^\text{159}\) presence of television in the lives of Americans.\(^\text{160}\) The Pacifica Court noted that broadcasting material is unique in that it confronts an individual in the privacy of the home.\(^\text{161}\) Relying on an individual's right to be left alone in the home, the Court upheld an FCC declaratory order that banned the afternoon broadcast of indecent messages.\(^\text{162}\) The FCC order placed extensive restrictions on ob-

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154. See id. at 376 n.11. The Court noted that because new technologies have been developed that allow for more stations to broadcast, critics have argued that the scarcity doctrine is obsolete. See id.; see also Mark S. Fowler & Daniel L. Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 221-226 (1982) (discussing defects in the scarcity rationale).
155. See League of Women Voters, 468 U.S. at 376 n.11.
156. See id.; see also POWE, supra note 133, at 197 (noting that the Court in League of Women Voters appealed to Congress or the FCC to "bail it out").
158. See POWE, supra note 133, at 209; see also Lehman v. Shaker Heights, 418 U.S. 298, 304 (1974) (validating a city ordinance that prohibited political advertisements in a city transit system based on a rationale similar to that applied in Pacifica, namely, that the commuters constitute a "captive audience").
159. See WEBSTER'S NEW WORLD DICTIONARY 1009 (3d ed. 1988) (defining pervasive as "tending to pervade or spread throughout"); see also THE MEDIA AND THE LAW 33-34 (Howard Simons & Joseph A. Califano, Jr., eds., 1976) (arguing that "the unprecedented power of television communication" readily distinguishes the broadcast and print media).
161. See id. at 748-49 (noting that an "individual's right to be left alone plainly outweighs the First Amendment rights of an intruder").
162. See id. at 732-33, 748-51. The FCC asserted its power to regulate the radio broadcast after determining that an afternoon broadcast of a satiric monologue was indecent and prohibited by federal law. See id. at 732.
scene, indecent, and profane broadcasting, including a complete ban on indecent programming during the hours when children are likely to be in the audience. These hours were later determined to be between 6:00 A.M. and 10:00 P.M.

C. Application of First Amendment Principles to the FCC's 1996 Children's Television Regulations

The FCC's 1996 children's television regulations acknowledge two First Amendment arguments: (1) that the FCC's authority granted in the CTA to enforce the television broadcaster's obligation to provide educational and informational programming for children is unconstitutional; and (2) that the quantification of this obligation imposed by the FCC is unconstitutional. In promulgating the new regulations, the FCC dismissed the first argument concerning the obligation of broadcasters under the CTA. The FCC noted that Congress had concluded that when considering a license renewal application, the First Amendment permits the FCC to consider whether a television broadcaster has provided sufficient educational and informational programming designed for children. Furthermore, the FCC noted that Congress, like the courts, has determined that requiring children's informational and educational programming is within the public interest obligation of television broadcasters. Nevertheless, the Supreme Court has not considered the constitutionality of the CTA and the FCC's regulations. Because the Supreme Court, rather than Congress, is ultimately charged with determining the constitutionality of statutes and regulations, the constitutionality of

163. See id. at 730-33. The Pacifica Court emphasized that the unique accessibility of broadcasting to children supported the difference in First Amendment principles between broadcast and print media. See id. at 748-49. The Supreme Court previously recognized in Ginsberg v. New York that government regulation of otherwise protected expression is constitutionally permissible, in part, due to the government's compelling interest in protecting the "well-being of its youth." 390 U.S. 629, 640 (1968).


165. See Report and Order, supra note 11, para. 147.

166. See id.

167. See id.

168. See id.

169. See Kennard & Nuechterlein, supra note 25, at 29 (noting that the FCC is merely following Congress's constitutional judgment in establishing its well-defined three-hour requirement).

170. But cf. id. (noting that the broadcast industry's quarrel with children's television is with Congress, rather than with the FCC because Congress has supplied the "constitutional path" that the FCC must follow with respect to the CTA).
both the CTA and the FCC’s regulations are still a genuine First Amendment issue.171

1. Analysis of the FCC’s Children’s Broadcasting Rules Under the Strict Scrutiny Standard

The analysis of the children’s television regulations under a strict scrutiny standard would afford television broadcasters the same constitutional protections applicable to newspapers.172 Assuming this standard applies, the question becomes whether the government can compel a newspaper to publish a specific column or allocate a specific portion of its publication to particular subjects. In Miami Herald Publishing Co. v. Tornillo,173 the Court held that the First Amendment bars such governmental regulation.174 In Tornillo, the Court struck down a state statute that forced newspapers to forgo publication of other news.175 In holding the statute unconstitutional, the Court noted that the government had intruded improperly upon the guarded province of newspaper editors.176 Thus, under the strict scrutiny standard typically applied to the print medium, the FCC’s educational television regulations for children are unconstitutional.177 Like the regulation at issue in Tornillo, the three-hour minimum weekly requirement forces broadcasters to forgo broadcasting other programs.178

171. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that “it is emphatically the province and duty of the judicial department to say [sic] what the law is”).

172. Government regulations of print media are subject to the traditional strict scrutiny standard. See Associated Press v. United States, 326 U.S. 1, 19-20 (1994) (applying the strict scrutiny standard); Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (finding a state right-of-reply statute invalid under strict scrutiny analysis); see also Gilbert, supra note 145, at 628 (discussing the application of the strict scrutiny standard to print media). The Supreme Court recently has held that government regulations of the Internet are also subject to the strict scrutiny test rather than the more liberal test for broadcast media. See Reno v. ACLU, 117 S. Ct. 2329, 2346 (1997) (noting that the Internet, unlike broadcast, “can hardly be considered a ‘scarce’ expressive commodity”).


174. See id. at 258.

175. See id.

176. See id. at 256-58.

177. Cf. id. at 259 (White, J. concurring) (“According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned.”).

178. Compare id. at 256-58 (invalidating a statute that would require newspapers to print right-of-reply articles and thus forgo publication of other material the editors may have preferred to publish), with Report and Order, supra note 11, para. 150 (noting that the CTA requires broadcasters to air programs “they might not otherwise choose to pro-
Under a strict scrutiny standard, a regulation that compels a broadcaster to forgo other programming will survive only if the regulation advances a compelling governmental interest and is narrowly tailored to effectuate that interest without restricting other protected forms of expression. As the Commission observed, the purpose of the CTA is to harness the power of television to “benefit society by helping to educate and inform our children.” Such a goal constitutes a compelling governmental interest because the Supreme Court repeatedly has recognized an interest in protecting children.

Whether the FCC’s regulations are narrowly tailored to achieve this interest in educating and informing children is uncertain. A content-based restriction is sufficiently narrow as long as it is “designed to serve [compelling governmental] interests without unnecessarily interfering with First Amendment freedoms.” Under this prescription, the government may not regulate speech so that a substantial portion of the burden does not serve to advance its stated interests.

Applying this standard to children’s television, the FCC’s regulations are not sufficiently narrow to survive the strict scrutiny standard. The three-hour requirement does not serve the compelling governmental interest of educating and informing children for two reasons: (1) television is a poor educator; and (2) some of the programming that satisfies the FCC’s broad criteria is far from educational or informational. There-

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179. See supra notes 108-17 and accompanying text (discussing the strict scrutiny standard).

180. Report and Order, supra note 11, para. 9.

181. The Supreme Court traditionally has recognized protecting the well-being of children as a compelling government interest. See Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2346 (1997); Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989) (re-affirming that protecting minors from indecent interstate commercial telephone messages, such as “dial-a-porn,” is a compelling governmental interest).

182. Sable Communications, 492 U.S. at 126 (stating that “it is not enough to show that the Government’s ends are compelling; the means must be carefully tailored to achieve those ends”).

183. See id.

184. Cf. LESSER, supra note 15, at 44-47 (reviewing research studies that question the efficacy of the popular children’s television program, Sesame Street, as an effective educational tool). Dorothy G. Singer, Television and the Developing Imagination of the Child, in CHILDREN AND TELEVISION 229-233 (John C. Wright & Aletha C. Huston eds., 3d ed. 1983) (citing clinical research suggesting that television may hinder the development of childhood creativity, frustrate early scholastic performance, and encourage aggressive or anti-social behavior).

185. The government’s ability to choose educational programming for children must be questioned when Congress designated the Smurfs and Pee Wee’s Playhouse as programs that satisfy the criteria for children’s educational and informational programming.
fore, by imposing such speech restrictions on broadcasters, the government fails to satisfy the "narrowly tailored" requirement under the strict scrutiny test. Accordingly, the restrictions imposed on television broadcasters under the CTA cannot withstand the strict scrutiny standard of review.


Under modern First Amendment principles, television broadcasting is not subject to the traditional strict scrutiny standard. Broadcast television is subject to the more liberal standard articulated in Red Lion. This less stringent level of scrutiny balances the interests of the broadcasters as private entrepreneurs against the interest of the government in ensuring that each broadcaster acts as a trustee for the public. Thus, if the regulation on speech is reasonably related to the government's interest in ensuring broadcasters serve as public trustees, it is permissible under the First Amendment.


186. See supra notes 172-83 and accompanying text (discussing the strict scrutiny standard).

187. See supra notes 108-17 and accompanying text (discussing generally the strict scrutiny standard of review of content-based restrictions); see also supra notes 21-35 and accompanying text (discussing the CTA's requirements).

188. See supra notes 122-27 and accompanying text (describing the difference between television broadcasting and traditional speech). Compare Justice Douglas's statement regarding his view of the First Amendment in Columbia Broadcasting System, Inc. v. Democratic National Committee:

What kind of First Amendment would best serve our needs as we approach the 21st century may be an open question. But the old-fashioned First Amendment that we have is the Court's only guideline; and one hard and fast principle which it announces is that Government shall keep its hands off the press. That principle has served us through days of calm and eras of strife and I would abide by it until a new First Amendment is adopted. That means, as I view it, that TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of "press" as used in the First Amendment and therefore are entitled to live under the laissez-faire regime which the First Amendment sanctions.


189. See Campaign Finance Reform Proposals of 1996: Hearings on Proposals Pertaining to the Financing of Senate Election Campaigns Before the Senate Committee on Rules and Administration, 104th Cong. 418 (1996) [hereinafter Hearings] (statements of Henry Geller) ("[B]roadcasting does not come within that traditional First Amendment jurisprudence. It has its own unique jurisprudence and that is very liberal.").


191. See FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (noting that broadcasters, unlike other speakers, can be deprived of their licenses "if the Commission decides that
Applying this balancing test to the children’s television restrictions on broadcasters, the decisive issue is whether the restrictions are reasonably related to serving the public interest. The FCC regulations, along with the CTA itself, impose reasonable conditions on broadcasters that are reasonably related to advancing the government’s interest in “the education of America’s children.” Requiring broadcasters to air only three hours of children’s broadcasting a week, only about two and a half percent of the entire schedule, is not excessively burdensome within the meaning of the First Amendment.

Furthermore, the restrictions Congress and the FCC adopted to advance the education of America’s children, also may be justified under the Supreme Court’s analysis in FCC v. Pacifica Foundation. Indeed, the guidelines adopted by the FCC, pursuant to the CTA, impose less of a burden on broadcasters than the FCC regulation that the Court held valid in Pacifica. As opposed to the sixteen-hour complete ban of indecent programming approved in Pacifica, the FCC’s children’s television regulations require only a half-hour of designated children’s programming during a fifteen-hour time period. Moreover, the CTA itself is even less burdensome because it does not impose quantitative durational standards for children’s programs.

Accordingly, when subjected to the liberal First Amendment standard applicable to broadcast, the CTA and the FCC’s regulations promulgated thereunder weigh in favor of promoting the government’s interest in the
education of America's children. Thus, the government action is constitutional under the First Amendment. Therefore, avoidance of such government action can be accomplished only by the reversal of Red Lion and, consequently, an analysis under a traditional strict scrutiny standard.

IV. RETURNING TELEVISION TO THE LEVEL OF SOAPBOX EXPRESSION

Under the rationale for regulating broadcast content in the public interest, a government restriction that is otherwise unconstitutional under the traditional strict scrutiny standard is transformed into a perfectly constitutional restriction. The transformation results from the First Amendment distinction between broadcast media and other types of protected expression. This distinction is premised on the physical scarcity of the electromagnetic spectrum.

A. A Retreat from the Scarcity Rationale

The scarcity rationale that gave rise to earlier Supreme Court decisions is rapidly disappearing. For at least fifty years after the advent of broadcasting, there was no other form of electronic mass media. Since then, broadcast outlets have increased with the creation of over 11,500 broadcast radio stations and almost 1,600 television stations. Cable television and digital technology make the current opportunities to

199. See Report and Order, supra note 11, para. 149.
201. See Hearing, supra note 189, at 424 (statement of Henry Geller).
202. See Robert Corn-Revere, Regulation in Newspeak: The FCC's Children's Television Rules, POLICY ANALYSIS (CATO Institute, Washington, D.C.), Feb. 19, 1997, at 12 (noting that "content regulation has been allowed for broadcasting that would be unthinkable for the print medium").
204. See id.

The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete.

Id.; see also Fowler & Brenner, supra note 154, at 221-26 (discussing the shortcomings of the scarcity rationale).
206. See Hearing, supra note 189, at 435 (statement of P. Cameron DeVore).
207. See id. at 422 (statement of Henry Geller).
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broadcast virtually limitless. The advent of the Internet also has vastly increased the number and availability of electronic mass media outlets.

All of these considerations greatly undermine the scarcity rationale for broadcast regulation.

Even if broadcast frequencies are scarce in comparison to print or pure speech, this theory alone should not support restrictions on broadcasting that the Court has held impermissible if applied to any other medium. Many modes of communication are scarce in the sense that some willing speakers lack the opportunity to speak. The sidewalks surrounding the Supreme Court are scarce, for example, yet restrictions on the content of views expressed on these sidewalks are upheld only after analysis under a strict form of judicial review.

The First Amendment's guaranty of freedom of speech protects the rights of individuals on the sidewalk to express themselves through speech or silence. Thus, the government cannot force an individual wearing a sandwich board on the sidewalk to reserve a portion of the board for someone else's speech. The children's television regulations, unlike the sidewalks surrounding the Supreme Court, are not narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.
Supreme Court, are not subjected to the strict scrutiny test and force the television broadcaster to finance a message prescribed by the government.\(^\text{217}\)

Because scarcity is prevalent to a degree in many communications media, all forms of media should be regulated consistently.\(^\text{218}\) Employing the scarcity rationale to distinguish among the different forms of media, when all forms are subject to resource scarcity, is logically inconsistent.\(^\text{219}\) Thus, it “makes little sense to continue holding television broadcasters hostage” to a lesser form of First Amendment protection under the scarcity rationale.\(^\text{220}\)

**B. Let the Viewers Decide**

The premise behind the public interest balancing test of Red Lion completely disregards the current structure of commercial broadcasting.\(^\text{221}\) The Red Lion Court articulated the principle that the First Amendment precludes broadcasters from maintaining “an effective monopoly on access to the marketplace of ideas” transmitted over the public airways.\(^\text{222}\) This theory presupposes that a broadcaster’s only motivation for speaking is to advocate a certain view. This myopic rationale ignores the nature of commercial broadcast television.\(^\text{223}\) Most of television programming is offered to the public in an effort to sell advertising time.\(^\text{224}\) Broadcasters transmit speech to facilitate a commercial transaction: the bundling and selling of audiences to advertisers.\(^\text{225}\) Any theory of diminished First Amendment rights must acknowledge the reality that

\[^{217}\text{See supra notes 188-91 and accompanying text (outlining the less stringent level of scrutiny afforded to television broadcasting).}\]
\[^{219}\text{See Telecommunications Research, 801 F.2d at 508.}\]
\[^{220}\text{Krotoszynski, supra note 140, at 1206.}\]
\[^{221}\text{See supra notes 205-11 and accompanying text (describing the technological developments that undermine the scarcity rationale).}\]
\[^{222}\text{Krotoszynski, supra note 140, at 1206; see also Red Lion Broad. Co. v. FCC, 395 U.S. 367, 391 (1969) (discussing the public interest rationale).}\]
\[^{223}\text{See ROGER G. NOLL ET AL., ECONOMIC ASPECTS OF TELEVISION REGULATION 10-11 (1973) (arguing that “[t]he sale of advertising now governs the extent of diversity on commercial television”).}\]
\[^{224}\text{See KRATTENMAKER, supra note 3, at 21 (maintaining that the “driving force” in the broadcast industry is broadcast revenue); Clinton’s Push for More Kid TV, supra note 12, at 22 (noting that broadcasters are reluctant to air children’s programs that produce lower ratings and, thus, lower revenues).}\]
\[^{225}\text{See NOLL ET AL, supra note 223, at 10-11 & n.26.}\]
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broadcasters will instinctively air programs that attract the most viewers, and, thus, generate the most revenue dollars.\(^\text{226}\)

C. The Children's Broadcasting Requirements May Allow for the Demise of Red Lion

Although Red Lion has been severely criticized, it has not been reversed.\(^\text{227}\) Recently, the Court and commentators have retreated from the special treatment afforded broadcasters in Red Lion.\(^\text{228}\) Although the Turner Broadcasting System v. FCC Court failed to modify its previous First Amendment standard applicable to broadcast, the Court did announce the application of a different standard to cable television that seems to undermine the scarcity rationale.\(^\text{229}\) Furthermore, the FCC v.

\(^{226}\) See id. Editorial decisions are driven by market demand to maximize advertising revenue by selling advertising time associated with programming that enjoys large audiences. See id.

\(^{227}\) See FCC v. League of Women Voters, 468 U.S. 364, 376 n.11 (1984) (recognizing criticism of the scarcity rationale, but refusing to abandon the rationale); Krotoszynski, supra note 140, at 1206 (noting that it "makes little sense to continue holding television broadcasters hostage to some sort of second class status under the First Amendment on the theory that they hold an effective monopoly on access to the marketplace of ideas").

\(^{228}\) See Robert M. O'Neil, Dead or Alive: How Long Will the RED LION Specter Haunt Free Speech and Broadcasting?, in RATIONALES AND RATIONALIZATIONS, supra note 124, at 34-35 (discussing the Court's possible retreat from Red Lion in Turner Broadcast. Sys., Inc. v. FCC, 512 U.S. 622 (1994)).

\(^{229}\) See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 638 (1994) (declining to apply the scarcity rationale to justify lessened First Amendment rights for cable providers). In Turner Broadcasting System, Inc. v. FCC, the Court considered the constitutionality of must-carry cable provisions that require cable systems to allocate some channels to local broadcasters. See id. at 626. The Turner Court classified the must-carry regulations in the 1992 Cable Act as content-neutral regulations that impose "incidental" restrictions on free speech. See id. at 662. Therefore, the Court determined that the must-carry restrictions were subject to an intermediate level of scrutiny that applies to time, place, and manner restrictions. See id.; see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (stating that the applicable test for time, place, and manner regulations is whether the regulations are "justified without reference to the content of the regulated speech, . . . serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information").

Initially, the Court was forced to consider whether to evaluate the must-carry cable provisions under the broadcast or print standard. See Turner, 512 U.S. at 637-41. The Court stated that print media enjoys the highest level of protection under the First Amendment. See id.; see also Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716-19 (1931) (noting that because freedom of the press is an extremely important constitutional right, prior restraint of this freedom will rarely be tolerated); FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT 197 (1976) (arguing that Miami Herald Publishing Co. v. Tornillo and Red Lion Broadcasting Co. v. FCC are indistinguishable). Next, the Supreme Court explained that broadcast television, due to its unique characteristics, receives the least amount of First Amendment protection. See Turner, 512 U.S. at 637-41; see also FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (noting that "of all forms
League of Women Voters\textsuperscript{200} Court directly questioned the continued applicability of the scarcity rationale and called upon Congress or the FCC to reconsider the First Amendment standard for broadcasting.\textsuperscript{201}

As recent cases indicate, the Supreme Court may be willing to depart from its long-standing First Amendment precedent applicable to broadcasting.\textsuperscript{232} The new children's television regulations may give the Court an opportunity to abandon the outdated scarcity rationale and afford broadcast speech a greater level of protection.\textsuperscript{233} The CTA, alone, does not furnish the Supreme Court an opportunity to overturn \textit{Red Lion}. Apparently, the CTA's unequivocal obligation does not compel television broadcasters to pray for judicial relief. Nonetheless, the FCC is treading on thin ice with the three-hour requirement. The flexibility incorporated into the regulation may keep broadcasters content for the present time. The FCC's next step, however, may push television broadcasters into the courts.

\section*{VI. CONCLUSION}

The children's television regulations imposed on broadcasters display the apparent tension between a constitutional ideal of free speech and a desire to educate America's youth. The scarcity rationale announced in \textit{Red Lion} still prevents broadcasters from sharing First Amendment...
rights equal to other speakers. This outdated rationale is rapidly disappearing due to the advent of other forms of electronic mass media. The FCC's new regulation, however, may give the Court the opportunity to reevaluate the lesser standard of free speech applied to television broadcasters.