Red Lions, Tigers and Bears: Broadcast Content Regulation and the First Amendment

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No issue in communications law has inspired such passionate controversy in recent years as the Fairness Doctrine. From its formal implementation in 1949 until its elimination by the Federal Communications Commission (FCC or Commission) in 1987, the doctrine required broadcasters to present contrasting viewpoints on controversial issues of public importance. Although a unanimous United States Supreme Court affirmed the constitutionality of this requirement in Red Lion Broadcasting Co. v. FCC, the policy became a lighting rod for criticism by those who contended that it impermissibly interfered with the editorial discretion of broadcast licensees. Eventually the Commission itself adopted the view that the Fairness Doctrine neither served the public interest nor passed muster under the first
amendment. In *Syracuse Peace Council v. FCC*, the United States Court of Appeals for the District of Columbia Circuit recently upheld the Commission's public interest finding, but declined to address the constitutional issue.

Ironically, the fruits of broadcasters' long-sought victory over the Fairness Doctrine have been bittersweet. The Commission's decision to scuttle the policy—on the same day it sent Congress a report that legislators had requested discussing possible alternatives to the Fairness Doctrine—has triggered a sharp dispute with Congress over the future course of communications policy that continues to simmer today. In response to a decision by the D. C. Circuit that the Communications Act of 1934, as amended, did not embody the Fairness Doctrine, Congress, by a wide margin, enacted a bill to codify the policy, only to witness President Reagan's veto of the measure as an impermissible intrusion on the constitutional rights of broadcasters. The *Syracuse* decision has, however, opened the door to new legislation on the Fairness Doctrine. An irritated Congress has barred broadcasters from pursuing any other items on their congressional agenda, including new mandatory carriage legislation and revisions

11. In the wake of the United States Court of Appeals for the District of Columbia Circuit's affirmance of the FCC's repeal of the Fairness Doctrine in *Syracuse Peace Council*, Congress has moved quickly to curtail FCC discretion by codifying the Doctrine. As this Article went to press, the legislation codifying the Fairness Doctrine awaited final passage on the floors of both the House of Representatives and the Senate. See H.R. 315, 101st Cong., 1st Sess. (1989); *Fairness Bill Gets House Committee Nod*, Multichannel News, Apr. 17, 1989, at 28; see also S. 577, 101st Cong., 1st Sess. (1989); *Fairness Doctrine Bill Sent to Senate Floor*, Communications Daily, Apr. 19, 1989, at 6. The Department of Justice has indicated that it views legislation codifying the Fairness Doctrine as constitutionally offensive, and that it will urge President Bush to veto any such enactment. See *Justice Dept. Urges Bush to Veto Fairness Doctrine Bill*, Communications Daily, Apr. 10, 1989, at 1.
12. The mandatory carriage or "must carry" rules required cable television system operators, upon request and without compensation, to transmit to subscribers certain over-the-air broadcast signals that were significantly viewed in the community. 47 C.F.R. §§ 76.57-.61 (1984). The D.C. Circuit declared these rules unconstitutional in 1985. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986). In an attempt
to the comparative renewal process, until legislators obtain satisfaction on the Fairness Doctrine. Frustration at their inability to make any headway on legislative initiatives has led some broadcasters' trade groups to consider softening their opposition to Fairness Doctrine legislation.

Aside from legislative strategy, the controversy over the Fairness Doctrine has raised fundamental issues about the role of the government in regulating broadcast content and has led to a watershed period in judicial, legislative, and administrative policymaking. The Supreme Court soon will have an opportunity to take a fresh look at the Fairness Doctrine, either in the Syracuse case or in the context of a challenge to new legislation. The Court could use the occasion to reexamine Red Lion. Emboldened by their success in persuading the Commission to eliminate the policy, some have called into question accommodating the court's concerns, the Commission adopted a new set of scaled-down must carry rules, but these also were declared void by the appeals court. Report and Order, Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 FCC Rcd 864 (1986), vacated. Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987) cert. denied, 108 S. Ct. 2014 (1988).


14. After much internal debate, the National Association of Broadcasters (NAB) has reaffirmed its commitment to block Fairness Doctrine legislation. The Association of Independent Television Stations, however, has apparently sided with Congress. See e.g., FCC Upheld on Fairness; Codification Urged, Multichannel News, Feb. 20, 1989, at 22. Fairness Doctrine, TV News & the First Amendment, Variety, Nov. 30, 1988, at 69, col. 1 (NAB expected to reconsider its earlier opposition to reimposition of the Fairness Doctrine); NAB Considering Whether To Pursue New Fairness Doctrine Battle, Communications Daily, Nov. 29, 1988, at 1 (same); Broadcasters Express Indifference to Fairness Law Possibility, Radio & Records, Nov. 4, 1988, at 6 (same); NAB Considers Easing Fairness Doctrine Stance, Electronic Media, Oct. 3, 1988, at 32 (same).

15. See supra note 4. In FCC v. League of Women Voters, 468 U.S. 364 (1984), the Supreme Court noted that it was disinclined to reconsider its Red Lion rationale absent "some signal from the Congress or the FCC that technological developments have advanced so far that some revisions of the system of broadcast regulation may be required." Id. at 377 n.11. Many view the Commission's repeal of the Fairness Doctrine as just such a message to the Court.
tion the bedrock principle that broadcasters are public trustees.  

Criticism of the public trustee theory of broadcast regulation has two primary elements. First, critics frequently argue that because of rapid innovation and technological change, the spectrum scarcity that gave rise to the public trustee concept of broadcast regulation is no longer relevant. Not only has the Commission licensed significantly more broadcast stations than it had twenty years ago, but the widespread availability of news and other information from many other sources ensures the public's exposure to a variety of viewpoints. Second, critics of the public trustee theory rest their case on the United States Constitution. The first amendment, they claim, forbids the government from dictating the content of any material broadcast over the airwaves. Any attempt to instill meaning into the public interest standard by overseeing the content of programming by broadcast licensees will invite censorship and thereby erode first amendment values.

In a thought-provoking essay, Timothy B. Dyk recently explored what might happen if the Supreme Court declared unconstitutional all government control of broadcast content. Through a fictitious dialogue between a proponent of the “old order” and advocates of a new regulatory regime, Mr. Dyk speculates on the legal issues that would arise as a consequence of a hypothetical decision he christens Red Lion II. The author appears to con-

16. The Communications Act of 1934 requires the Federal Communications Commission to regulate broadcasting in a manner that will promote the “public interest, convenience and necessity.” See, e.g., 47 U.S.C. § 303 (1982 & Supp. I 1983) (Commission may take certain actions “as public convenience, interest, or necessity requires”); id. § 307 (Commission may grant station licenses “if public convenience, interest, or necessity will be served thereby”). In NBC v. United States, 319 U.S. 190 (1943), the Supreme Court ruled that the Commission is not bound to act merely as a traffic officer, policing the wave lengths to guard against undesirable interference. Because the electromagnetic spectrum cannot accommodate all who wish to broadcast over it, the Commission may take affirmative steps to ensure that licensees provide the best possible service to their communities. Id. at 215-17. The principle that the Commission should require broadcasters to operate in the public interest, as public trustees, has been the cornerstone of broadcast regulation ever since. See, e.g., Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966)(“After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.”).


18. See 1985 Fairness Report, supra note 3, at 190-92; Syracuse Peace Council, 2 FCC Rcd at 5052-57. In Syracuse Peace Council, despite its decision to eliminate the Fairness Doctrine, the Commission reaffirmed that it could impose conditions on licenses in furtherance of the public interest standard and that it could continue to “license broadcasters in the public interest, convenience, and necessity.” Id. at 5055.

clude that, as a matter of constitutional law, Congress could grant existing broadcasters essentially permanent licenses, provided that they comply with the FCC's regulations unrelated to program content, as a means of promoting industry stability and preserving first amendment values. As a practical matter, Mr. Dyk suggests that broadcasters will be unable to advance their regulatory agenda unless they improve their relations with Congress. He argues that continuing to urge the courts to confer on broadcasters broad first amendment protections comparable to those enjoyed by the print press eventually will result in more deference from Congress. 20

The author's essay raises the prospect of a "brave new world" for broadcasters, one in which they would enjoy freedom from all government content regulation. Yet many broadcasters fear the consequences of "full" first amendment rights. They recognize that, although government regulation exacts certain obligations, it also confers benefits. The quid pro quo for free and exclusive use of electromagnetic frequencies has been that the broadcaster must serve the needs and interests of its community of license. These groups fear that upsetting this historical bargain will have unintended consequences, including far-reaching changes in the manner in which the government allocates spectrum and regulates the industry. 21

This Article offers a response to Mr. Dyk's essay and provides some thoughts on how a limited degree of government oversight of broadcast content can be justified in an era of technological change. The first section of this Article's response discusses what full first amendment rights would mean in the context of broadcast regulation. Proposals to eliminate all government involvement in broadcast subject matter ignore the history of broadcast regulation. By allocating spectrum, the FCC necessarily makes decisions about the content of the information disseminated over the airwaves. The second section of this response addresses whether the need to maintain industry stability in a post-Red Lion environment would justify a decision to maintain the licenses of existing licensees for an indefinite period of time. Marketplace solutions will by no means automatically lead to results that serve the public interest. In any case, to attempt to preserve the stability of the broadcast industry would conflict with the free market theories recently used to justify widespread deregulation of broadcasting. The conclusion of the Article discusses Mr. Dyk's suggestion that the way for

20. Id. at 326-27.

21. See, e.g., INTV 'Fairness' Cost Too High, Variety, Nov. 30, 1988, at 70, col. 4. The Association of Independent Television Stations believes the price for getting rid of the Fairness Doctrine was too high. In this organization's view, the pursuit of full "print model" freedom threatens the traditional bargain in which broadcasting receives free use of the public airwaves in return for service attuned to the needs of the community. Id.
broadcasters to heighten their influence in Congress is to press for full first amendment protections.

Like Dorothy and her friends in The Wizard of Oz, broadcasters have tended to perceive government regulators—Congressmen as well as the Commission staff—as the unseen "lions, tigers and bears" who stifle creativity, interfere with their first amendment rights, and curtail their editorial freedom. The perception in Congress, however, is that broadcasters repeatedly attempt to preserve the benefits of regulation while shirking their responsibilities. If broadcasters were found to have full first amendment rights, Congress would be justified in expecting compensation for broadcasters' use of the electromagnetic spectrum.

I. FREE AT LAST: FULL FIRST AMENDMENT FREEDOM FOR BROADCASTERS?

In his essay, Mr. Dyk explores the consequences of a hypothetical Supreme Court ruling that broadcasters have the same first amendment rights as those enjoyed by the print press. After describing the current state of broadcast content regulation, the author posits that the Supreme Court has overruled Red Lion in a case he names Red Lion II. Through a hypothetical dialogue between a proponent of the old order, named G, and several adherents to a new vision of broadcasters' constitutional rights, named B and BB, the author raises some of the issues that would result if the Court declared unconstitutional all Commission content regulation of protected speech.

The debate begins as G, the proponent of the public interest standard, warns that broadcasters will live to regret the new decision. Congress, he says, will undoubtedly undertake a major revision of the statutory scheme that will entail auctioning frequencies or distributing them by means of a lottery. B, the broadcast representative who favors full first amendment rights, responds that Congress would be forbidden from withdrawing broadcast licenses because the government may not deny a privilege for an unconstitutional reason. To the contrary, G asserts, Congress would be free to

22. Dyk, supra note 19, at 301-08.
23. Id. at 312-27.
24. Id. at 313. Under the Bush Administration, the Commission evidently has embraced this perspective. It recently proposed replacing the comparative hearing process for selecting commercial broadcast licensees with a lottery system. See Notice of Proposed Rulemaking, Amendment of the Commission's Rules to Allow the Selection From Among Competing Applicants for New AM, FM and Television Stations by Random Selection (Lottery) 54 Fed. Reg. 11,416 (1989)(hereinafter Lottery NPRM). Congress' reaction, however, has been less than enthusiastic.
revise the regulatory scheme because the decision would have undermined one of the cornerstones of the current system—the Commission’s power to regulate programming.\textsuperscript{26}

The discussion then shifts to broadcasters’ renewal expectancy.\textsuperscript{27} Under the Commission’s traditional renewal expectancy policy, the FCC has rewarded broadcasters who have provided meritorious service to their communities with an advantage over challengers in a comparative hearing. G observes that because content lies at the heart of the renewal expectancy, and consideration of content would now be forbidden, broadcasters would no longer enjoy the protection of the renewal expectancy and would become vulnerable to competing applicants who present superior qualifications on the criteria of integration, diversification, and minority and female ownership. \textit{Red Lion II} would also compel elimination of the defense of meritorious programming to allegations of violations of the Commission’s rules.\textsuperscript{28}

B responds that the Commission legitimately could decide to renew existing broadcast licenses provided that the licensees complied with the Commission’s non-content related rules and policies, thereby assuring stability in the industry.\textsuperscript{29} Although renewal in such a situation would be virtually automatic, that would not be much different from current practice, because virtually no licensee has been denied renewal due to deficient programming. G protests that, according to the case law, the Commission must take into account the qualifications of competing applicants.\textsuperscript{30} But B claims that despite the Commission’s obligation to consider new applicants, it could nevertheless confer a renewal expectancy based on a licensee’s knowledge of the community, ascertainment of community needs and interests, and other non-programming policies currently embodied in the renewal expectancy.\textsuperscript{31}

B defends such a decision on the basis that marketplace forces will compel

\footnotesize{\begin{itemize}
\item \textsuperscript{26} Dyk, \textit{supra} note 19, at 314.
\item \textsuperscript{27} A renewal expectancy is a presumption that a broadcaster is entitled to a renewal of its license despite a superior showing by a competing applicant on other criteria that the Commission has deemed important in the comparative hearing process, such as diversity of broadcast ownership, integration of ownership and management of the station, and minority and female ownership. See, e.g., \textit{Central Fla. Enters. v. FCC}, 683 F.2d 503 (D.C. Cir. 1982), \textit{cert. denied}, 460 U.S. 1084 (1983). \textit{But see}, \textit{Shurberg Broadcasting, Inc. v. FCC}, No. 84-1600, slip op. at 1 (D.C. Cir. Mar. 31, 1989) (minority distress sale program deprives broadcaster of equal protection under the fifth amendment); \textit{Comparative Renewal Inquiry}, \textit{supra} note 13.
\item \textsuperscript{28} Dyk, \textit{supra} note 19, at 314.
\item \textsuperscript{29} \textit{Id.} at 314-15.
\item \textsuperscript{30} \textit{Ashbacker Radio Corp. v. FCC}, 326 U.S. 327 (1945); \textit{Citizens Communications Center v. FCC}, 447 F.2d 1201 (D.C. Cir. 1971).
\item \textsuperscript{31} Dyk, \textit{supra} note 19, at 315.
\end{itemize}}
broadcasters to offer news programming, whether or not the Commission imposes such a requirement. Broadcast stations, like newspapers, says B, sell a single product that they make more attractive by offering a range of features, even if some of those features may themselves attract only a small audience. Moreover, broadcasters can be expected to abide by journalistic standards that the marketplace will reinforce, ensuring evenhandedness.32

G speculates that such a wrenching change in the foundations of broadcast regulation would invite the attention of Congress, which would never tolerate a system that virtually immunizes broadcasters from challenge. Broadcasters, G notes, have chalked up a terrible record in their dealings with federal legislators. Legislators would have no inclination to assist the industry when broadcasters have not upheld their side of the historical bargain, but have instead pressed for the elimination of content regulation. B responds that congressional anger would dissipate if the Supreme Court sided with broadcasters, and that the decline in the power of the television networks has mitigated legislators' concern.33

G objects that to entrench existing owners by conferring exclusive franchises would be unconstitutional. The cable industry, he points out, decided not to press for full first amendment rights because to gain such rights could threaten its ability to secure legislative approval of exclusive franchises. G adds that because the electromagnetic frequency remains a scarce resource, the Constitution demands content-neutral allocation, for example, by means of an auction or lottery. If existing licensees received renewals because of impermissible considerations of program content, the only solution is to subject existing licensees to new applications. The unconstitutional scheme harmed not only existing licensees, but also anyone who wanted to enter the business.34

B and G then bicker over whether Red Lion II would force the government to open broadcast frequencies to new bidders. B asserts that there is no constitutional right to a broadcast license, and that in any event those who seek to broadcast their views may purchase a station. G objects that existing licensees received their permits under an unconstitutional system based on content regulation. Because past government action has resulted in a preferred position for existing licensees, Congress would have to take some steps to include those voices that had previously been excluded from the process.35

At that point in the hypothetical dialogue, B is joined by BB, who accuses

32. Id. at 316-17.
33. Id. at 317-19.
34. Id. at 319-20.
35. Id. at 320-22.
G of threatening broadcasters with economic harm because of their decision to press for full first amendment rights.\textsuperscript{36} Licensing decisions have been essentially content-neutral since 1965, he argues, and in any event Congress could have granted perpetual licenses as an original matter. Moreover, BB asserts, there is a compelling government interest for affirming current licensees: industry stability. Broadcasters have invested billions of dollars in their licenses, and their investments would be eliminated under G’s approach. New entities that obtained licenses would be unlikely to serve the public as effectively as existing licensees, who have taken a long-term view of their investment. The result would be to virtually destroy broadcasting at the local level. The Supreme Court traditionally has declined to apply radically new constitutional doctrines retroactively to avoid disturbance of substantial investments.\textsuperscript{37}

G suggests that Congress, at a minimum, could charge a spectrum fee, but B responds that such a fee would constitute an improper selective tax on the press.\textsuperscript{38} After grudgingly conceding that the Supreme Court would probably uphold a statute confirming licenses in existing broadcasters or creating a renewal expectancy based on factors other than program content, G asks what would happen if Congress does not cooperate. BB concludes that it is vital that broadcasters improve their relations with Congress.\textsuperscript{39}

In sum, the dialogue suggests the author’s view that, in the wake of \textit{Red Lion II}, Congress would have statutory authority essentially to confirm existing licenses indefinitely by making them contingent only on compliance with FCC rules and regulations related to matters other than program content. As a matter of legislative strategy, the author identifies the critical issue as whether the failure of broadcasters to continue to press for full first amendment protection will prolong their current vulnerability to congressional pressure. Securing broader constitutional protections would alter the prevailing congressional attitude and call into question not only program regulation but other types of regulations that impose special requirements on broadcasters. Mr. Dyk posits that broadcasters will be able to enhance their reputation and influence only by continuing to urge the courts to grant them full first amendment protections.\textsuperscript{40}

\textsuperscript{36} Id. at 323.
\textsuperscript{37} Id. at 323-25.
\textsuperscript{38} See Arkansas Writers’ Project, Inc. v. Ragland, 481 U.S. 221 (1987)(unconstitutional for state to impose tax on general interest magazines but not on other specialized publications); Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue, 460 U.S. 575 (1983)(state tax that singled out a few members of the press was unconstitutional).
\textsuperscript{39} Dyk, supra note 19, at 326-27.
\textsuperscript{40} Id. at 327-29.
II. A Response

A decision as sweeping as Mr. Dyk proposes in Red Lion II would indeed have far-reaching implications, and this Article does not purport to address all of them. His dialogue does, however, rest on a number of questionable assumptions. First, this Article discusses what gaining full first amendment rights would mean in a system in which the FCC necessarily allocates frequencies and issues licenses based on information content. Second, it questions whether Congress should or would rest regulatory policy on the need to protect the stability of the broadcast industry.

A. Spectrum Scarcity, Frequency Allocation, and Content Regulation

The fundamental premise of Mr. Dyk's piece is that broadcasters should be entitled to the protection of the first amendment to the same extent as the print press. The Constitution, Mr. Dyk contends, intended to create a wall between the government and the press. Government should not disturb editorial decisions regardless of the nature of the medium involved. Accordingly, a particular form of content regulation that is unconstitutional if applied to the print press should also be unconstitutional if it constrains broadcasters.41

To date, of course, the Supreme Court has never said that the first amendment requires that all types of media be afforded the same level of constitutional protection from government intrusion. To the contrary, the Court has emphasized that "differences in the characteristics of new[ ] media justify differences in the first amendment standards applied to them."42 As Justice Jackson observed, "The moving picture screen, the radio, the newspaper, the handbill, the sound truck, the street corner orator have differing natures, values, abuses and dangers. Each . . . is a law unto itself."43 As a result, the Court has taken widely different approaches when reviewing regulations that affect newspapers,44 billboards,45 motion pictures,46 loudspeakers,47 and

41. Id. at 299-301.
43. Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)(government control appropriate for one type of speech would not necessarily be valid if applied to other types of speech).
In the area of broadcast regulation, the Supreme Court has granted the FCC considerable leeway. Limitations on broadcast content that would be unconstitutional if applied to the print press have been routinely upheld when applied to broadcasting. Although broadcasters have first amendment rights, they are subordinate to the rights of the viewing public. A reviewing court does not scrutinize broadcast regulation to determine whether or not it supports a compelling government interest; rather, it will sustain the regulation if it is “narrowly tailored to further a substantial governmental interest.”

The Court's ad hoc approach of tailoring its review of government regulation to the particular medium at issue is not attributable to shortsightedness. Broadcasting presents special problems that belie simplistic analogies to the print press. Specific regulations such as the Fairness Doctrine cannot be wrenched from their historical and statutory context and dissected without regard to the role they play in the overall public trustee regulatory model.

Spectrum scarcity—the shortage of electromagnetic frequencies available for public use—has served as the traditional basis for permitting a relatively extensive degree of government oversight of broadcast content. During the 1920's, far more people clamored to broadcast over the airwaves than the spectrum could accommodate, and no one could be heard in the resulting cacophony. The broadcast industry petitioned the government to regulate the fledgling service to avoid total chaos. In the Radio Act of 1927, Congress declined to utilize a system of government ownership of station facilities, common carrier-type regulation, or a totally unregulated publishing model. Instead, it opted for a system of government licensing where broad-

48. City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) (Court decided that cable television implicates first amendment interests, but declined to rule whether print or broadcast standard was appropriate).


50. “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.” Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).


53. Herbert Hoover commented in 1924 that broadcasting was “probably the only industry of the United States that is unanimously in favor of having itself regulated.” S. HEAD, BROADCASTING IN AMERICA: A SURVEY OF TELEVISION AND RADIO 126 (3d ed. 1976) (quoting Secretary of Commerce Herbert Hoover, 1924).

casters obtain limited rights to the use of electromagnetic frequencies conditioned upon their compliance with certain public interest obligations. Congress carried forward this general approach essentially unchanged in the Communications Act of 1934.55

From the beginning, federal officials took an active role in overseeing program content. The Radio Act of 1927 required that stations choosing to provide air time to political candidates also offer time to opposing candidates.56 The Federal Radio Commission, the FCC's predecessor agency, took the position that it was entitled to examine a broadcaster's past performance and program content when considering whether to renew the license.57

The argument that interjecting the government into decisions of broadcast program content inevitably leads to forbidden censorship received a full airing in the period leading to the adoption of the landmark communications legislation. Industry spokespersons asserted that the government should not engage in censorship, and that broadcasters should have the same freedom of speech enjoyed by the print press.58 Others contended that because limited available spectrum would soon render it impossible for all interested applicants to acquire broadcast stations, broadcasters should be subject to public interest obligations and treated more like a common carrier.59 They further maintained that "editorial privilege" becomes suspect if exercised under the protective umbrella of a government license.60

Fear that broadcast licensees would engage in private censorship and exclude particular viewpoints from the airwaves offset concerns over government censorship. Specific instances of such private censorship prompted outcries of protest. Licensees themselves deemed subjects such as prostitution, birth control, cigarettes, and expression of certain political views un-

56. Ch. 169, § 18, 44 Stat. 1162 (codified as amended at 47 U.S.C. § 315(a) (1982)) (This provision is known as the "equal opportunity requirement.").
57. "The [Federal Radio Commission believes it is entitled to consider the program service rendered by the various applicants, to compare them and to favor those which render the best service." 2 FRC ANN. REP. 160-61 (1928) quoted in I. POOL, TECHNOLOGIES OF FREEDOM 123 (1983). As one contemporary commentator observed:

The standard of "public convenience and necessity" seems to afford a sufficiently effective device to guarantee the freedom of the air. What the character of its program is, and, more particularly, whether on controversial questions a station has given fair representation to both sides would easily seem important elements in the determination of whether or not it should be permitted to continue broadcasting.

58. See I. POOL, supra note 57, at 108.
59. Id. at 136-38.
60. See id. at 120-24.
suitable for radio audiences. When AT&T was licensee of New York station WEAF, for example, it ordered popular radio personality H.V. Kaltenborn fired for criticizing Secretary of State Charles Evans Hughes.\(^6\) Stations barred speakers because of their political positions or chosen topics. Secretary of Commerce Herbert Hoover recognized the risk of domination of the broadcast medium by a few voices, testifying that “we can not allow any single person or group to place themselves in [a] position where they can censor the material which shall be broadcasted [sic] to the public.”\(^6\) The resulting statutory system obligated broadcasters to use their licenses to serve the public interest, but forbade the government from censoring programming.\(^6\) As the courts consistently held, however, regulators’ consideration of program content in licensing decisions did not constitute censorship.\(^6\)

\(^{61}\) Id.

\(^{62}\) Hearings on H.R. 7357 Before the House Comm. on the Merchant Marine and Fisheries, 68th Cong., 1st Sess. 8 (1924).


Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Id.

\(^{64}\) In KFKB Broadcasting Ass’n v. Federal Radio Comm’n, 47 F.2d 670, 672 (D.C. Cir. 1931), the D.C. Circuit upheld the denial of a license renewal to a station owner who gave medical advice over the air and solicited patients for dubious surgical procedures involving goat glands. The court explicitly rejected the claim that the denial was constitutionally forbidden censorship:

This contention is without merit. There has been no attempt on the part of the commission to subject any part of appellant’s broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest, convenience or necessity will be served by a renewal of appellant’s license, the commission has merely exercised its undoubted right to take note of appellant’s past conduct, which is not censorship.

Id.

In Trinity Methodist Church, South v. Federal Radio Comm’n, 62 F.2d 850 (D.C. Cir.), cert. denied, 284 U.S. 685 (1932), the court upheld the denial of a license renewal to a minister who had used his station to broadcast anti-Catholic views. The court observed:

If ... one in possession of a permit to broadcast in interstate commerce may ... use these facilities ... to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord ... then this great science, instead of a boon, will become a scourge .... This is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the First Amendment ... Appellant may continue to indulge his strictures upon the characters of men in public office ... [b]ut he may not ... demand, of right, the continued use of an instrumentality of commerce for such purposes ... .

Id. at 852-53; see also Ansley v. Federal Radio Comm’n, 46 F.2d 600 (D.C. Cir. 1930) (refusing to grant license where “much objectionable matter had been broadcast” by the station); Chicago Fed’n of Labor v. Federal Radio Comm’n, 41 F.2d 422, 423 (D.C. Cir. 1930)(station
The notion that spectrum scarcity justifies more active government regulation of broadcast programming has come under sharp attack. The fact that spectrum capacity is scarce, it is claimed, does not distinguish it from any other economic resource. Nor does it automatically require that the FCC supervise the material broadcasters choose to air. This view casts the Commission merely in the role of a traffic policeman, ensuring that stations do not interfere with one another, but refusing to register any opinion on program content.

The FCC's involvement in broadcast content, however, extends beyond the surface programming requirements of the equal opportunity rule or the personal attack doctrine. Consideration by the FCC of information content is inherent in the entire system of frequency allocation. When the FCC allocates spectrum for particular uses, it dictates the nature of the information that will be carried over those frequencies. As the House Committee on Energy and Commerce reported when Congress attempted to reinstate the Fairness Doctrine: "The rigid wall separating government and the printed press does not exist [in broadcasting], since the Commission must, of necessity, select among competing applicants for available broadcast frequencies, and ensure that licensees abide by rules governing the use of these frequencies." When it allocates spectrum to cellular radio, land mobile service, direct broadcast satellite, or public safety use, the Commission inevitably decides among competing uses of those frequencies and determines the "content" of the information to be carried on the airwaves.

For example, the FCC has reserved Instructional Television Fixed Service (ITFS) frequencies for instructional programming by educational institutions, and has prescribed both the qualifications of entities eligible for those licenses and the nature of the programming that may be carried by them. ITFS channels must be devoted primarily to the transmission of "instruct-
tional and cultural material," and each channel must include formal educa-
tional material offered for credit to enrolled students. ITFS license
applications must be accompanied by program proposals, which Commis-
sion officials scrutinize to determine whether they legitimately further the
purposes of the educational television service. The Commission has also
authorized educational institutions to sublease those frequencies to commer-
cial entities, but has limited the number of hours during which the licensee
may devote the frequencies to this alternative programming. No less than
the Fairness Doctrine, these regulations represent a "content-based" restriction
on the speech rights of licensed entities, and the Commission dictates
what information may and may not be broadcast. Yet, no one has chal-
lenged the educational television licensing scheme on the ground that it im-
poses a constitutionally forbidden restraint on speech.

Why does it seem apparent that the government may dedicate a range of
frequencies for educational and instructional use and set programming re-
quirements for the use of those frequencies? Because electromagnetic fre-
quencies are a scarce public resource, the government has a substantial
interest in determining the nature of their use. Educational television fulfills
a public need that would in all likelihood be ignored in the absence of a
specific frequency allocation. Moreover, educational institutions applying
for instructional television licenses know exactly what they will get. In re-
turn for permission to use scarce frequencies, they agree to provide educa-
tional programming that complies with the Commission’s guidelines and
serves the public’s interest in obtaining educational instruction. Both sides
receive what they have bargained for, and the quid pro quo appears entirely
reasonable.

Broadcast licenses come with strings attached. In return for their agree-
ment to comply with FCC rules and regulations, broadcasters, unlike news-
paper publishers, receive substantial protections. They receive free and
exclusive use of a valuable government resource that assures them a pathway
into the home. For many years, they were even guaranteed carriage on cable
systems. Other forms of communication receive no such subsidy. The
Supreme Court has found that the government may attach conditions to the
provision of government benefits, even where those conditions may involve

70. 47 C.F.R. § 74.931(a).
71. Id. § 74.932.
72. Id. § 74.931(e).
United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1969) (a licensee 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").
74. See supra note 12 and accompanying text.
the relinquishment of constitutional rights.\textsuperscript{75}

Yet, it is claimed, developments in the information marketplace have rendered the scarcity basis for broadcast regulation obsolete, and the extensive body of Supreme Court precedent conferring considerable discretion on the Commission to impose a wide range of content limitations has lost its relevance.\textsuperscript{76} Vast changes in the media marketplace over the last twenty years assure the public access to a wide variety of information sources.

First, it is said, unlike the situation years ago when there were relatively few broadcast stations, many television and radio stations are now licensed and operating throughout the country.\textsuperscript{77} The fact remains, however, that the demand for broadcast spectrum far exceeds the supply of frequencies available. The economic value of existing licenses continues to soar, one obvious indicator of a shortfall in supply.\textsuperscript{78} Moreover, demand for new stations continues unabated, requiring the Commission to continue to conduct comparative hearings.\textsuperscript{79} Although the Commission in the 1985 Fairness Report found a significant increase in the number of television stations, that growth has been accompanied by a rise in the population and in the number of groups seeking to use the spectrum. There are virtually no broadcast channels available in the top markets, and any that are available are less desirable Ultra High Frequency (UHF) channels.\textsuperscript{80} Plainly, a wide gap still

\textsuperscript{75} For example, in Buckley v. Valeo, 424 U.S. 1, 12-59 (1976), the Supreme Court struck down limitations on campaign expenditures established by the Federal Election Commission Act as violative of the first amendment. The Court concluded that these limitations impermissibly infringed upon the right of candidates for public office to engage in constitutionally-protected political activities. The Court then upheld identical spending limitations on candidates who accepted public financing of their campaigns. Similarly, in Regan v. Taxation with Representation of Washington, 461 U.S. 540, 550 (1983), the Court upheld regulations that conditioned the grant of a tax exemption on forbearance from constitutionally protected lobbying activities. The Court observed that “[w]here governmental provision of subsidies is not ‘aimed at the suppression of dangerous ideas,’” id. (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)), “its ‘power to encourage actions deemed to be in the public interest is necessarily far broader.’” Id. (quoting Maher v. Roe, 432 U.S. 461, 476 (1977)); see also Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985)(upholding constitutionality of content-based restrictions on membership in government charitable fundraising drive); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)(government as proprietor of transit system may prohibit political advertising on placards in buses).

\textsuperscript{76} See supra note 17 and accompanying text.


\textsuperscript{78} See 1987 HOUSE REPORT, supra note 68, at 13.

\textsuperscript{79} For example, 46 applicants filed for authorization to operate a new FM radio station on Channel 255A in Orlando, Florida. FCC Notice, Report No. NA-28 (Feb. 12, 1987). In recognition of the limits of the current system’s capacity to process the glut of applicants efficiently, the FCC recently proposed eliminating the hearing process and using lotteries to select among basically qualified competing applicants. Lottery NPRM, supra note 23.

\textsuperscript{80} 1987 HOUSE REPORT, supra note 68, at 15. Although in 1985 the Commission re-
exists between the amount of spectrum available and the level of demand—the criterion identified as significant by the Supreme Court.81

Critics of the spectrum theory also cite the development of alternative video distribution technologies, such as cable television, multichannel multipoint distribution service, satellite master antenna systems, videocassette recorders (VCR's), and other technologies.82 They assert that broadcast information cannot be viewed in isolation from other media. Broadcasters face competition daily from published newspapers, cable television, and new technologies, as well as from alternative forms of entertainment provided by motion pictures and VCR's. They also point to the decline in network dominance and the rise of independent stations. Surely this, they assert, has eliminated the need for any oversight of broadcast content.

The effect of these new technologies, however, has been limited. The influence of broadcasting remains enormously powerful, and the popularity of free, over-the-air broadcasting as a means of reaching the American people remains undiminished. The percentage of the public that relies exclusively on television as its source of news has risen dramatically. It is not surprising that for many years more people have cited television as their primary source of news than any other source. Moreover, the number of people who report that they rely on television exclusively for their news recently reached fifty percent for the first time.83 Twenty years ago—when the court decided Red Lion—only twenty-five percent of the population relied exclusively on television for their news. By 1980, that statistic had increased to thirty-nine percent.84 “In 1959, 42 percent of Americans surveyed reported getting their news from two or more sources equally; in contrast, now, only 16 percent say they use two or more sources.”85

Not only is television an increasingly dominant purveyor of news and information, but the viewing public also perceives it as the most credible news

81. See generally Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396-400 (1969)(discussion of congested airwaves); see also T. Emerson, The System of Freedom of Expression 662 (1970) (television is “scarcer” than the print press because the significant comparison is the number of available broadcast outlets versus the number of persons who wish to use broadcast facilities, not the number of newspapers versus the number of stations).

82. See 1985 Fairness Report, supra note 3, at 208-17; see also Syracuse Peace Council, 2 FCC Rcd 5043, 5053-54 (1987)(substitute technologies), aff’d on other grounds, 867 F.2d 654 (D.C. Cir. 1989); Fowler & Brenner, supra note 17, at 225-26 (scarcity does not “recognize the substitutes for over-the-air distribution”).


84. Id.

85. Id.
source, by a margin that has steadily grown. The credibility of television news plausibly may be attributed to a public perception that broadcasters generally present a spectrum of viewpoints in the context of individual news stories. Aside from journalistic professionalism, requirements such as the Fairness Doctrine have reinforced and nurtured this instinctual presentation of balanced views.

The widely touted emergence of new communications technologies has had little practical effect on viewing alternatives available to the public. Such services as Satellite Master Antenna Television (SMATV), low power television, and Multichannel Multipoint Distribution Systems (MMDS) offer alternatives more in theory than in practice, and they have had no significant effect on the video marketplace. Of the new technologies, only cable television has had a measurable impact. However, for the less than half of United States households that have cable service, that medium has served primarily as a means of delivering entertainment programming or broadcast signals, rather than originating news or informational programming.

In view of the continued spectrum scarcity and the undiminished need for the FCC to allocate frequencies and make licensing decisions, the implications of a declaration that broadcasters have full first amendment rights remain far from clear. Certainly the theoretical foundation for the equal

86. Id. at 5.
88. Broadcasting-Cable Yearbook 1988, A-2 (49.8% of television homes have cable).
89. The sole exception is Cable News Network (CNN), which offers twenty-four hour news service to cable subscribers. CNN viewership is likely to be more fractionalized, however, than that of similar broadcast offerings because it represents only one of many channels available to cable customers. In addition, the fact that fewer than half of U.S. households subscribe to cable service, see id., makes it difficult for a cable offering such as CNN, by itself, to significantly affect the predominant position of the networks in the provision of news and information. Moreover, CNN primarily covers national events; broadcast stations remain the sole source of television and radio news responsive to the needs and interests of particular localities.
90. As the Commission has pointed out, newspapers do not have full first amendment privileges, in the sense that the Constitution does not "necessarily bar[ ] every regulation which in any way affects what the newspapers publish." Memorandum Opinion and Order, Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 2 FCC Red 3593, 3624 n.32, aff'd, Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987) (quoting Banzhaf v. FCC, 405 F.2d 1082, 1100 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969)). Newspapers may be forced to satisfy certain content-related standards in order to obtain government benefits. For example, newspapers must devote at least 25% of their space to news and editorials to secure a second-class postage rate. United States Postal Service, Domestic Mail Manual, Issue 29 §§ 421, 422, 231(a) (eff. date Dec. 18, 1988)(requiring newspapers seeking second-class postage rates to primarily disseminate news and information and contain no more than 75% advertising).
opportunities\textsuperscript{91} and reasonable access\textsuperscript{92} provisions of the Communications Act would weaken considerably, and probably give way altogether. The Supreme Court sustained the reasonable access requirements in section 312(a)(7) on the grounds that they properly balance the first amendment rights of federal candidates, the public, and broadcasters, and that they enhance the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process.\textsuperscript{93} Following the hypothetical \textit{Red Lion II}, however, no such balancing would be possible; the rights of broadcasters would override other factors in the constitutional calculus.

Although broadcasters presumably would applaud the elimination of reply and access requirements, a sweeping decision such as \textit{Red Lion II} could not be confined to the excision of specific programming regulations that broadcasters consider objectionable. Interpreted literally, the principle that no regulation of speech can be applied to broadcasters if it could not also be applied to the print press could wipe out most of the FCC's regulations. It would be difficult, for example, to justify under such a standard any restrictions on the time of day when broadcasters may deliver particular programming, for such a regulation surely could not be applied to the print press.\textsuperscript{94} Restrictions on broadcasting of lottery information\textsuperscript{95} or tobacco advertisements\textsuperscript{96} may also be vulnerable.\textsuperscript{97} The Commission's qualification requirements for license eligibility would attract heightened scrutiny, since the government imposes no such requirements on newspapers. Efforts to reserve

\textsuperscript{91} 47 U.S.C. § 315(a) (1982)(licensee that permits use of station by candidates must afford equal opportunity for use of station by other candidates); see supra notes 56-57 and accompanying text.

\textsuperscript{92} 47 U.S.C. § 312(a)(7) (1982)(license may be revoked for willful or repeated failure to allow reasonable access to broadcast stations by political candidates).


\textsuperscript{97} Although Mr. Dyk limits his article to issues of "pure" political speech, the line between commercial and political information is not always easily drawn. To declare that broadcasters have full first amendment rights could render suspect the restriction on advertisement of tobacco products, which currently applies only to electronic media. \textit{Id.} Although the Supreme Court has ruled that commercial speech is entitled to a less stringent degree of protection than core political speech, Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 340 (1986), the extent to which the government may discriminate among types of media when regulating commercial speech remains unclear.
a portion of the spectrum for promoting educational and noncommercial interests could be questioned because these, too, would be "content-based." Indeed, it is not inconceivable that Red Lion II would throw into doubt the entire system of FCC frequency allocation, since by assigning frequencies the Commission necessarily determines the content of what is to be sent over the airwaves.

Such a sweeping ruling would also call into question the fundamental requirement that broadcasters serve the public interest. Following such a ruling, it is hard to see how the government could demand that a broadcaster serve its community of license. Because newspapers are not required to promote anyone's interests but their own, to require broadcasters to do so would deny them their full constitutional rights. Even critics of the spectrum scarcity theory appear uncomfortable with the notion that broadcasters would have no public interest obligations. In eliminating the Fairness Doctrine, for example, the Commission took pains to note that it was not questioning the public interest basis for broadcast regulation. But once Pandora's box is opened, it may be impossible to salvage any vestige of the public interest standard.

To declare invalid all content regulation of broadcasting might also expose broadcasters to greater political pressure. Requirements such as the Fairness Doctrine, equal time and reasonable access insulate broadcasters from those who might be tempted to use political power to persuade them to air a single point of view or to carry a presentation featuring only one political candidate. They can point to their public interest responsibilities as FCC licensees as a basis for declining such requests. Indeed, by vesting the functions of the FCC in an independent agency, free of the control of the Executive Branch, Congress revealed its desire to prevent arm-twisting of broadcasters by those who exercise political power. To wipe away the panoply of reply requirements would leave the broadcast industry vulnerable to such pressures.

Mr. Dyk stops short of asserting that broadcasters should be subject to no public interest requirements. The obligation that broadcasters provide programming responsive to the needs of the community, he speculates, might pass muster under the Constitution even if broadcasters have full first amendment rights, both because such a requirement would not have the chilling effect of other content-specific regulations such as the Fairness Doctrine, and because it would merely confirm what the ethical standards of

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98. Syracuse Peace Council, 2 FCC Rcd 5043, 5048-52 (1987), aff'd on nonconstitutional grounds, 867 F.2d 654 (D.C. Cir. 1989) ("The fact that government may not impose unconstitutional conditions on the receipt of a public benefit does not preclude the Commission's ability, and obligation, to license broadcasters in the public interest, convenience and necessity.").
journalism already require. It is unlikely, however, that the Constitution could support such finely drawn distinctions. Critics of the Fairness Doctrine consistently objected to the policy, but not because it required balanced coverage of controversial issues. This requirement, they asserted, was already incorporated in journalistic ethical standards. The complaint was that the government, and not broadcasters or the public, decided the appropriate level and type of news coverage. But a decision by the FCC that a broadcaster's programming has not responded to community needs represents no less of an intrusion into the broadcaster's editorial role than a ruling that the broadcaster's coverage of controversial issues has been unbalanced.

B. Industry Stability, Private Markets, and the Public Interest

Mr. Dyk's dialogue suggests that a decision as sweeping as Red Lion II need not trigger chaos. The need to maintain industry stability, he asserts, would justify either a decision by the Commission to expand broadcasters' renewal expectancy based on nonprogramming factors, or would support legislative changes by Congress that would confirm licenses for existing licensees for indefinite periods, assuming they continue to comply with technical FCC regulations. The first amendment, he claims, does not demand that existing broadcasters be stripped of their licenses and their investments.

The author's suggestion that licensees be granted "squatters' rights," however, would turn the Communications Act on its head. One of the primary purposes of the Communications Act was to vest ownership of the airwaves in the federal government. Pursuant to the Communications Act, renewal applicants waive any claim to "rights" in any particular frequency arising from previous use of the frequency. Although licensees typically invest large amounts in the development of their license, they do so with the knowledge that the security of the investment depends upon compliance with the FCC's rules and regulations, which are subject to change, and that the investment could be lost if the Commission revokes or declines to renew the license.

99. Dyk, supra note 19, at 311-12.
100. RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, CODE OF BROADCAST NEWS ETHICS (1987) states that its members will "[s]trive to present the source or nature of broadcast news material in a way that is balanced, accurate and fair." Id.
102. 47 U.S.C. § 301 (1982)(one purpose of the Communications Act is "to maintain the control of the United States over all channels of interstate radio transmission").
To be sure, the courts have recognized that it would disserve the public interest to subject licensees to the threat of license withdrawal despite their provision of superior service to the community of license. But to confirm licenses automatically in existing licensees would effectively insulate broadcasters from competition and preclude the Commission from administering the license allocation system to accomplish other public interest objectives. As early as 1933, in *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, the Supreme Court upheld a decision by the Commission terminating the licenses of several existing broadcast stations to achieve a more equitable geographic distribution of licenses. The Court observed that broadcasters “had no right superior to the exercise of this power of regulation,” and that they “necessarily made their investments and their contracts in the light of, and subject to, this paramount authority.” In *FCC v. Sanders Bros. Radio Station*, the Court noted explicitly that “it is not the purpose of the [Communications] Act to protect a licensee against competition but to protect the public.” More recently, in *FCC v. National Citizens Committee for Broadcasting*, the Court upheld Commission regulations prohibiting cross-ownership of newspapers and broadcast stations and requiring divestiture in certain cases.

The distinction between policies that ensure an appropriate level of industry stability, and those that go too far in shielding broadcasters from competitive forces, is not easy to identify. In *Carroll Broadcasting Co. v. FCC*, the D.C. Circuit found that the Commission could consider economic injury to an existing broadcast station when deciding whether to allow new entry, a ruling that appeared to conflict with the spirit if not the letter of the Supreme Court’s earlier holding in *Sanders Bros.* The Commission later adopted regulations that impaired the development of technological alterna-
tives to broadcasting, such as cable and subscription television. Although the Commission subsequently abandoned this approach, the courts still on occasion chastise the Commission for regulatory decisions that protect broadcasters at the expense of the public.

Marketplace proponents respond that the threat of license loss has never provided an effective competitive spur to improve performance. They argue that regulatory fiat will never assure responsiveness to public interests and concerns as effectively as unfettered discretion to select programming that broadcasters believe will attract and retain audiences in the face of competition from other broadcasters and from alternative video technologies and entertainment forms. For example, at one point in the dialogue in Mr. Dyk's article, B asserts that content regulation of broadcasters is unnecessary because marketplace forces will ensure that broadcasters will continue to air news and informational programming.

The theory that free markets have displaced the need for government regulation has become popular in the 1980's, not only in the field of communications but also in other industries. The marketplace approach to broadcast regulation springs from the view that consumers are best off when society's resources are allocated in a manner that permits them to seek their wants and desires as fully as possible. Removal of barriers to entry promotes social utility by preventing a firm or group of firms from dominating markets, and by creating conditions that enable pricing of goods as close as possible to their costs of production. By casting broadcasters in the role of marketplace competitors, rather than public trustees, the argument runs, broadcasters will provide the public with the programming they desire, which would enhance social utility without the need for affirmative regulation.

In many situations market forces become a highly effective tool to promote consumer welfare, an important component of the public interest. In a variety of areas, the FCC has successfully unleashed private economic forces to supplant regulation where experience has shown that approach to be unwise and counterproductive. For example, in telephone, the Commission

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113. See Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985); National Ass'n of Broadcasters v. FCC, 740 F.2d 1190, 1198 (D.C. Cir. 1984) ("existing licensees[] have no entitlement that permits them to deflect competitive pressure from innovative and effective technology.").

114. Dyk, supra note 19, at 316-17.

115. See generally Fowler & Brenner, supra note 17.
has trimmed regulation of new common carriers that now offer competitive alternatives to established service providers, and the public has benefitted from access to a wider range of products and services at competitive prices.\textsuperscript{116} In cable television, the Commission has done away with regulations that primarily served to protect broadcasters from competition while offering no public interest benefits.\textsuperscript{117}

Markets, however, do not offer a talismanic solution to the problems of broadcast regulation.\textsuperscript{118} A perfectly competitive industry is one in which there exists ease of entry and exit and a large number of competitors, none of whom alone has sufficient market power to influence price. Yet the element of free entry and exit is absent from broadcasting. The enormous demand for scarce radio frequencies, and the inevitability of interference without government intervention, force the federal government to allocate spectrum for particular uses. Because the broadcast industry is not and cannot be purely competitive, introducing market forces on a selective basis does not necessarily produce the results predictable under a pure competition model.

Marketplace proponents point out that the possibility of resale mitigates some of the effects of the barriers to entry created by the system of frequency allocation. It is possible, they suggest, to purchase a radio or television station on the open market. An active marketplace in the purchase and sale of broadcast facilities currently thrives, prodded in no small part by the deregulatory actions of the last decade. But prices for these stations have reached staggering levels, reflecting both the fact that licensees are assured exclusive use of government-owned frequencies, and that deregulation has expanded the number of stations a single entity may hold.\textsuperscript{119} The possibility of station resale does nothing to increase the number of frequencies available. To the contrary, it serves the interests of those who have gained access to a frequency to restrict as much as possible its availability to potential competing


\textsuperscript{117} See supra note 112 and accompanying text.

\textsuperscript{118} See generally Deregulation Has Gone Too Far, Many Telling New Administration, N.Y. Times, Dec. 11, 1988, at A1, col. 1.

\textsuperscript{119} See 1987 HOUSE REPORT, supra note 68, at 13 (the value of stations has greatly increased over the past thirty years); see also Report and Order, Repeal of the “Regional Concentration of Control” Provisions of the Commission's Multiple Ownership Rules, 101 F.C.C. 2d 402 (1984)(to be codified at 47 C.F.R. § 73.3555 (d)-(f))(Commission's repeal of previous restriction on the number of stations one entity may hold).
Even if the broadcast industry did operate in a perfectly competitive manner, complete reliance on market forces would be unlikely to generate programming that serves the public interest. There are many examples of situations in which regulatory action has been necessary to check undesirable effects resulting from unfettered operation of the market. The area of obscenity and indecency provides a classic example. At the same time that the Commission has embraced the marketplace as a justification for eliminating the Fairness Doctrine, it has aggressively enforced sanctions for violations of statutory and regulatory restrictions on the broadcast of indecent and obscene matter by licensees exercising their editorial discretion to satisfy the desires of the public.

The impoverished state of children's television offers another case of unchecked market forces at work. For years the Commission maintained specific guidelines on the permissible level of commercialization in children's programming and strict requirements that broadcasters maintain adequate separation between program content and commercial messages. When the Commission eliminated these limitations on children's advertising as

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120. There is yet another problem with applying competition theory to broadcasting. The "customers" of broadcasters are not viewers, but rather advertisers who purchase space on programs. Viewers pay nothing to view broadcast programming. Although advertisers may pay higher rates for programming that attracts a higher audience level, the interjection of an intermediate level of advertisers between programmers and viewers makes it unlikely that programming will fully reflect viewers' preferences.

121. Until 1987, the Commission had interpreted 18 U.S.C. § 1464 (1982 & Supp. IV 1986) to prohibit broadcast of obscene programming during the entire day and indecent programming only when there was a reasonable risk that children would be in the audience, which the Commission considered to be before 10:00 p.m. Pacifica Found., 56 F.C.C.2d 94 (1975), aff'd, 438 U.S. 726 (1978). In 1987, however, the Commission decided that broadcasts of indecent material would not be permitted until after 12:00 midnight. Pacifica Found., 2 FCC Rcd 2698 (1987); Regents of the Univ. of Cal., 2 FCC Rcd 2703 (1987); Infinity Broadcasting Corp., 2 FCC Rcd 2705 (1987), on recon., 3 FCC Rcd 930 (1987), aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988). In Action for Children's Television, the court of appeals affirmed a Commission ruling that a morning broadcast violated § 1464, but it remanded two other rulings regarding post-10 p.m. broadcasts for a further explanation justifying its "new, more restrictive channeling approach." Id. at 1334. On October 1, 1988, the President signed legislation which required the Commission to enforce 18 U.S.C. § 1464 on a 24 hour per day basis; Dep'ts of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act 1989, Pub. L. No. 100-459, § 608, 1989 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2186, 2228; and the Commission adopted an order complying with this legislation on December 21, 1988. Order, Broadcast Services; Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. § 1464 on Twenty-four Hour Per Day Basis, 53 Fed. Reg. 52,425 (1988)(to be codified at 47 C.F.R. § 73.3999). As a result, the ban on the broadcast of indecent material now applies twenty-four hours per day.

part of a general program of deregulating the commercial and programming content of television, the level of advertising increased dramatically and the D.C. Circuit ordered the Commission to provide a more detailed justification for its sudden change in policy. With the support of the National Association of Broadcasters, Congress overwhelmingly passed legislation that would have limited advertising during children's programming to 10.5 minutes an hour on weekends and twelve minutes an hour on weekdays. President Reagan, however, vetoed the bill.

The rapid rise of "shock" or tabloid television offers the most recent sign of the effects of unfettered market forces. In a quest for higher ratings, some broadcasters have resorted to increasingly lurid news reports and confrontational talk show formats. Networks have reduced their internal staffs devoted to maintaining broadcast standards, leading to greatly liberalized portrayals of sexually graphic material. Rather than generating a wider range of programming choices for the public, the newly competitive marketplace appears, at least in some cases, to generate programming that falls to the lowest common denominator that will attract the largest audience.

None of this means, of course, that the government should step in and monitor day-to-day programming and editorial decisions of broadcasters. It does suggest, however, that one may legitimately express skepticism at the incantation of market forces as the alternative to all content regulation. It is unlikely that competitive pressures alone will cause a wide variety of public affairs programming to be aired in the absence of specific consumer demand for such programming. Even in an era of technological change, government appropriately may maintain a limited role in overseeing broadcast content, as a means to ensure that users of broadcast frequencies serve the public interest.

In fact, the solution proposed by Mr. Dyk's article—exclusive and essentially permanent franchises for existing broadcasters that abide by the Commission's technical rules—would be wholly inconsistent with a marketplace

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126. See, e.g., Why Sparks Flew in Retelling the Tale of Flight 007, N.Y. Times, Nov. 28, 1988, at H3, col. 1 (noting cutbacks in network censorship departments in recent months); Mann, NBC Steps Over the Line, Wash. Post, Nov. 9, 1988, at C3, col. 4 ("If the networks don't come to their senses pretty quickly about [sexually explicit programming], they are going to find themselves fighting off a drive for censorship that will have unprecedented popular appeal.")
Relaxing restrictions on the length of the license term could significantly enhance a license's value. Rather than facilitating entry into the broadcast industry, a conclusive renewal expectancy would make access to broadcast frequencies by outside entrants even more difficult.

If the Court in *Red Lion II* were to sweep away broadcasters' public interest obligations, Congress would face a troubling decision. The legislature could legitimately ask whether broadcasters should continue to receive regulatory treatment that confers competitive advantages on the industry over other media. Congress might favor preserving a modicum of free, over-the-air local broadcast programming. But Congress could also decide that broadcasters should no longer receive free use of the electromagnetic frequencies if they are not obliged to serve the public in return. An auction of those frequencies to the highest bidder, or imposition of a spectrum fee to compensate the government for the use of the frequencies, seems a logical solution.

A decision to assess broadcasters fees for use of the spectrum, either by auction or through fees on existing licenses, would not have the drastic consequences foreseen by Mr. Dyk. Broadcasters with existing licenses could preserve their status if they are willing to pay as much as the next highest bidder. In those situations where broadcasters were unwilling to pay the necessary amounts, the influx of new ownership into the broadcast industry could be a healthy influence. The contention in Mr. Dyk's dialogue that new licensees would exercise more of a short-range view than existing licensees is unpersuasive. If Congress combined an auction or spectrum fee arrangement with a long-term license, the licensee would be able to make substantial investments confident of a low risk of license loss.

In Mr. Dyk's piece, BB contends that Congress could not assess existing broadcasters a spectrum fee or conduct an auction for those licenses without violating the Constitution. Such a fee, the article claims, would represent punishment of broadcasters for assertion of their first amendment rights. This cramped interpretation of the Constitution probably would not constrain the Congress. If the Court declares invalid the statutory conditions upon free use of a government resource established by the Communications Act, nothing would prevent Congress from reallocating those resources on

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127. See 47 U.S.C. § 151 (1982)(Congress enacted the Communications Act in part for the purpose of promoting a system of wire and radio communications "at reasonable charges.").


129. Dyk, supra note 19, at 325.

130. Id. at 323-36.
the basis of their considerable market value. Nor could such a decision be challenged on the ground that it discriminates between broadcasters and other types of media that pay no such fees, those other forms of media make no use of electromagnetic frequencies and therefore do not receive the same level and type of government benefits.

If anything, the importance of preserving the stability of the broadcast industry points to retention, not rejection, of the sixty-year-old public trustee model. The system of broadcast regulation has evolved slowly, as the courts and the Commission have struggled to balance the first amendment rights of broadcasters against their responsibilities to the public. To topple that system with a sweeping declaration that the public interest requirement has no substantive content would only generate widespread uncertainty over the future of the industry.

III. CONCLUSION

The issue of whether to accede to Congress' wishes on the Fairness Doctrine deeply divides the broadcast community. Mr. Dyk's view is that broadcasters should continue to press the courts to confer full first amendment protections. Success, he contends, will enhance broadcasters' reputation and their ability to persuade Congress of the correctness of their position. Many broadcasters endorse this view, fearing that concession on this issue will subject them to more intrusive federal regulation at a later date. Others, however, believe that the battle over the Fairness Doctrine has little point. They already provide balanced coverage of controversial issues, and therefore do not believe that codification of the Doctrine would affect their daily editorial decisions. As a practical matter, they realize that Congress has made clear in no uncertain terms that broadcasters will not achieve progress in other important areas until they agree to a version of the Fairness Doctrine.

The image of the broadcast industry has been tarnished not because the courts have declined to confer on the industry full first amendment rights, but rather because broadcasters' invocation of the Constitution tends to be selective. When programming requirements affecting them are at issue, broadcasters attack these obligations as an interference with their first amendment rights. When the free exercise of constitutional rights by other media would undermine broadcasters' preferred position, however, the

132. See supra notes 16, 23 and accompanying text.
133. Dyk, supra note 19, at 327-29.
134. See supra notes 14-16 and accompanying text.
broadcast industry is quick to invoke the shield of the public trustee doctrine to attempt to restrict competing technologies.\textsuperscript{135}

For the past sixty years, Congress has offered free and exclusive use of electromagnetic frequencies in return for broadcasters' agreement to fulfill certain minimal public interest responsibilities. A limited degree of government oversight of content appropriately balances the rights of broadcasters and the viewing public, and is inherent in the public trustee system of broadcast regulation. In the event the courts grant broadcasters full first amendment freedoms and strike down all obligations to serve the public interest, broadcasters will discover that they have gained a pyrrhic victory. Congress would likely not allow broadcasters to jettison their public interest obligations while continuing to enjoy the benefits of subsidized transmission capability. Some form of auction or spectrum fee would probably result. This would not, as Mr. Dyk's article suggests, constitute punishment for asserting constitutional rights; it would merely represent an appropriate response to the disruption of the traditional bargain that has governed broadcasting for the past sixty years. The public interest would be better served if broadcasters and Congress could work together to improve the regulatory process while preserving the fundamental tenets of the public trustee model.

\textsuperscript{135} In the battle over the must-carry rules, for example, broadcasters consistently downplayed the first amendment rights of cable operators on the ground that those rights were subordinate to the public's interest in preserving free, over-the-air local broadcasting. \textit{See supra} note 12 and accompanying text.