

Policy Analysis

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Fairness 2.0 *Media Content Regulation in the 21st Century*

by Robert Corn-Revere

Executive Summary

Civil libertarians feared that a change of administrations would herald a revived Fairness Doctrine, a policy that previously permitted the government to oversee broadcast news coverage for “balanced views.” A return to the Fairness Doctrine, however, now seems unlikely. It is very likely, however, that politicians from both the left and the right will try to extend government control over the media beyond current policies. New rules adopted or proposed by the Federal Communications Commission suggest that the agency may be poised to enforce the most intensive government oversight of broadcast programming in decades—perhaps even in the history of the agency. The FCC voted last year to require each broadcast licensee to file quarterly “enhanced

disclosure” reports—highly detailed information regarding its programming and editorial choices. This information will be used by organized groups to file complaints to pressure broadcasters to air programming that the complainants prefer. The FCC is also formulating programming guidelines based on the enhanced disclosure reports purporting to ensure that broadcasters meet local needs. This “broadcast localism” effort may also require broadcasters to appoint local boards to oversee their performance and their editorial decisions. As the FCC seeks to expand regulation of broadcast media, the traditional justification for its authority—spectrum scarcity—has lost credibility, and the agency’s new efforts are likely to run afoul of the First Amendment.

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Introduction

Beginning with the 2008 presidential campaign, and particularly since the election, conservative talk radio and the blogosphere have been abuzz with rumors that the Democratic agenda would include reviving the Fairness Doctrine, which required broadcast licensees to air “controversial issues of public importance” and to do so in a “balanced” way. Established pundits also picked up on this theme. George Will warned that an effort to restore the doctrine would be a product of “reactionary liberalism,”¹ while former FCC general counsel Bruce Fein wrote that “[t]he Democratic Party intends to brandish the Fairness Doctrine to marginalize the influence of conservative talk-show hosts by making expression of their controversial views cost-prohibitive.”² A *Wall Street Journal* editorial predicted that the Fairness Doctrine was “likely to be reimposed” under a Democratically-controlled Congress as part of an effort “to shut down talk radio and other voices of political opposition.”³ Such reports spurred legislative efforts to block any attempt by the FCC to reimpose the Fairness Doctrine.⁴

From across the political divide, such concerns have been dismissed as right-wing paranoia. FCC commissioner (and recently acting chairman) Michael Copps said in a speech last spring that “[t]he Fairness Doctrine is long gone and it’s not coming back—as much as some conspiracy theorists see it lurking behind every corner.”⁵ The Washington Monthly’s *Political Animal* column described predictions of the Fairness Doctrine’s return as “ridiculous,” and stressed that “no one is seriously trying to reinstate the Fairness Doctrine.”⁶ Marin Cogan similarly wrote in the *New Republic* that the Fairness Doctrine “has almost no support from media-reform advocates.”⁷ And Craig Aaron, communications director of the advocacy group Free Press, denigrated such concerns as “completely imaginary,” comparing the danger to that presented by Bigfoot, killer bees, and fluoride in the drinking water.⁸

However, focusing on the specific set of

rules and policies once known as the “Fairness Doctrine” misses the essential point. The broadcast Fairness Doctrine, which formally existed from 1949 until 1987, required broadcast licensees to air “controversial issues of public importance” and to do so in a “balanced” way. The FCC eliminated most aspects of the policy in 1987, during the heyday of deregulation during the Reagan administration. The current debate is not really about the Fairness Doctrine *at all*, since it was entirely ineffectual, and many (if not most) serious observers doubt that a recodified rule that imposed the same or similar requirements would survive a judicial challenge.

Moreover, it would be a mistake to assume that the dispute represents a core difference of principle between liberals and conservatives. Prominent advocates on the left and the right and from both parties are proposing various regulations that would perpetuate the regulatory philosophy underlying the Fairness Doctrine, a philosophy set out in the Supreme Court decisions in *Red Lion Broadcasting Co. v. FCC*⁹ and *FCC v. Pacifica Foundation, Inc.*¹⁰ This outlook demands that radio and television content—and, if some have their way, that of other media—be subject to more extensive government control. Those who advance this philosophy believe that freedom of expression is far too precious a commodity to be left in the clutches of private hands. They have nurtured the fervent hope that, one day, a more regulatory-minded Congress and FCC would reaffirm the government’s authority to oversee news and public-affairs programming.

A Vast Bipartisan Conspiracy?

Some believe that, with the ascendancy of the Obama administration, their faith has been rewarded and their day has come. As then acting chairman Copps put it, “we may be launched on an era of reform to match what the Progressives and New Dealers of the last century gave us,” and “we need to *act*—and I mean act while the tide runs in our

direction.”¹¹ Such rhetoric from the political left has provided fodder for concerns about renewed FCC oversight of news and public-affairs programming, but it only tells part of the story.

Many who now express opposition to a more muscular FCC overlook the fact that many prominent conservatives championed the Fairness Doctrine before its demise, and the FCC under Republican chairman Kevin Martin was anything but reticent about broadcast-content regulation. Conservative activist Phyllis Schlafly was a vocal proponent of the Fairness Doctrine because of what she described as “the outrageous and blatant anti-Reagan bias of the TV network newscasts,” and she testified at the FCC in the 1980s in support of the policy “to serve as a small restraint on the monopoly power wielded by Big TV Media.”¹² Senator Jesse Helms was another long-time advocate of the Fairness Doctrine, and conservative groups Accuracy in Media and the American Legal Foundation actively pursued fairness complaints at the FCC against network newscasts.¹³

More recently, a Republican-controlled FCC under Kevin Martin has advocated far more extensive controls over broadcast and cable programming, including news and public affairs. These proposed regulations include requirements governing local programming, restrictions on the use of video news releases, and other new rules that would extend content controls beyond broadcasting. These initiatives have been embraced by liberal media activists, who have said they will seek to ensure that a Democratically-controlled FCC will adopt and enforce the proposals of the Martin FCC.

Indeed, new rules adopted and proposed by the Martin FCC, and to be implemented by the Democratic-controlled FCC (if finally approved by the agency and upheld by reviewing courts), suggest that the agency may be poised to enforce the most intensive government oversight of broadcast programming in decades—perhaps even in the history of the agency. Highly detailed reporting requirements for station programming cou-

pled with proposals for expanded public-interest mandates and heightened scrutiny of license renewals would give the FCC an unprecedented ability to impose programming preferences on licensees. Compared to this regulatory initiative, the Fairness Doctrine seems quaint.

New Disclosure Requirements for Television Licensees

In January 2008, the commission issued a Report and Order imposing enhanced disclosure requirements on broadcast television stations.¹⁴ The rules require that television stations: (1) post their public inspection files on their websites (if they have one); and (2) file a new form, FCC Form 355, on a quarterly basis detailing their programming in minute detail. Form 355 requires stations to identify programming by specific program categories, to provide explanations of their editorial choices, and to certify that the station has complied with a number of FCC programming rules. The new requirements were immediately challenged, and have not yet gone into effect.¹⁵

If ultimately approved, the rules will greatly expand the FCC’s oversight of broadcast programming. The degree of detail required is more substantial than has ever before been required of broadcasters—far more detailed even than the information broadcasters were required to gather prior to the deregulation of the 1980s. The rule requires television stations to report, for both analog and digital programming streams, the average number of programming hours devoted each week to the following: (1) high-definition programming; (2) national news; (3) local news produced by the station; (4) local news produced by some other entity (who must be identified); (5) programming devoted to “local civic affairs”;¹⁶ (6) coverage of local elections;¹⁷ (7) independently produced programming (i.e., programming not produced by a company with substantial ownership by a national network); (8) “other” local programming; (9)

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public service announcements; (10) paid public service announcements (a PSA-type announcement for which the station or any group that the station is affiliated with receives something of value); and (11) closed-captioned programming. To comply with this requirement, each day's programming will need to be timed, classified, and recorded so that the weekly averages to be reported can be computed, as the form requires a complete catalog of all public-interest programming.¹⁸

The new form requires each broadcast licensee to file highly detailed information regarding its programming and editorial choices. Form 355 requires broadcasters to report: (1) the title, length, and date and time of the airing of all independently produced programming; (2) a list of all local programming not otherwise reported, with title, length, and date and time of airing, including whether the station received consideration for airing the program; (3) the name of the sponsoring organization for both paid and unpaid PSAs, the number of times each PSA ran, the length, and the percentage of times that each spot ran during prime time; (4) details of programming directed to "underserved communities";¹⁹ (5) details of religious services or other local religious broadcasts aired at no charge; and (6) details regarding programming for audience members with handicaps.²⁰ For each of these programming categories, the licensee must describe how it determined that the programming met community needs.²¹

Form 355 focuses particularly on news and public-affairs programming. For each national news story that includes significant treatment of community issues, the licensee must report: the story's title, length, and date and time it was aired; whether it was aired on the station's primary channel; whether it was locally produced; whether it previously aired on the station making the report or any other station; if it was part of a regularly scheduled news program; and whether any consideration was received for the broadcast of the segment. The same details must be reported for all local news program segments dealing with community issues, all local civic affairs program seg-

ments that provide significant treatment of a community issue, and all electoral affairs programs that include significant treatment of community issues.²²

Gathering information for the quarterly reports will be demanding for the licensees. Stations will have to monitor all programming (including multicast streams and all network and syndicated programming) to determine if their schedules contain any significant discussions of important issues of public concern. For any program segment that contains such a discussion, the station must identify the program, name the topic, time its duration, and note the time of the broadcast. This requires a minute-by-minute review of station operations, and daily updates to be able to provide the necessary reports when they are due.

In adopting Form 355 and associated requirements, the FCC denied that it was "altering in any way broadcasters' substantive public-interest obligations."²³ Specifically, it stated that its decision "does not adopt quantitative programming requirements or guidelines" and it "does not require broadcasters to air any particular category of programming or mix of programming types."²⁴ However, this facile disclaimer ignores the dynamics of broadcast licensing. Even absent new public-interest mandates, the entire point of the new reporting requirements is to subject television licensees to greater oversight of their programming. Moreover, the commission wants to increase citizen participation in the operation of television stations and specifically in the programming decisions that stations make, noting that it "hope[s] to encourage the public to play a more active role" in the license renewal process.²⁵ Toward that end, the Order also requires licensees to post most of the information in their public files on their websites.²⁶

Thus, the information compiled with the new forms likely will encourage organized groups to file complaints based on the perceived shortcomings of broadcasters' programming. Broadcasters, in turn, will likely feel pressured to air programming aimed at forestalling such complaints.

Additionally, the Order makes clear that

Form 355 is being adopted in anticipation of other new public-interest requirements that will be enforced using the newly compiled information. So, while this order may not mandate “quantitative programming requirements or guidelines,” it acknowledges that such mandates “are being considered and addressed in other proceedings.”²⁷ The main vehicle for such mandates is the commission’s rulemaking on broadcast localism, discussed in the next section, which proposes both substantive programming requirements and procedural changes that will significantly increase government authority over broadcast content. But the adoption of Form 355 will increase the FCC’s power over broadcasters’ editorial choices whether or not new programming mandates are adopted.

Broadcast Localism Proposals

As a companion piece to the Report and Order on enhanced disclosure, the commission simultaneously released its *Report on Broadcast Localism and Notice of Proposed Rulemaking*.²⁸ The Report summarized the FCC’s findings regarding its investigation into whether broadcasters are meeting local needs and proposed a number of measures that would subject editorial decisions to greater governmental scrutiny.

Most notably, the commission tentatively concluded that it “should reintroduce specific procedural guidelines for the processing of renewal applications for stations based on their localism programming performance.”²⁹ Stations failing to meet the minimum quantitative “guidelines” would be subjected to further scrutiny at renewal. The commission sought further comment on this proposal by asking a number of questions, each of which suggests an expanded regulation:

- What categories of standards should be established and how should the FCC define the programming that would qualify in each category?

- Should the guidelines cover particular types of programming (such as local news, political, public affairs, and entertainment), or should they just focus on the need for local programs?
- Should requirements be established as specific numbers of minutes, or hours per day or per week, or by a percentage of programming, or through some other metric?
- Should other specific requirements or measurements be established?
- Should guidelines address whether particular types of programs air at certain times of day?³⁰

The commission also asked whether broadcasters should be required to report the songs that they play, and how they choose their music. Should it consider the amount of local music played when assessing whether a station has served the needs of its community at license renewal time?³¹

Not surprisingly, the enhanced disclosure requirements embodied in Form 355 were woven into the fabric of the commission’s proposals to enhance local programming. The FCC observed that the forms “will help licensees document the kind of responsive programming that they have broadcast in a manner that is both understandable to the public and of use in the commission’s review of license renewal applications.” The disclosure forms were among the measures the commission adopted “to increase the public awareness of, and participation, in our license renewal proceedings,” and to provide “listeners and viewers a meaningful opportunity to provide their input through the filing of a complaint, comment, informal objection, or petition to deny a renewal application.”³²

Because of the possibility that “watchdog” organizations might not participate spontaneously, the commission also proposed that “licensees should convene permanent advisory boards comprised of local officials and other community leaders to periodically advise them of local needs and issues.”³³ If this plan ultimately is adopted, such advisory

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The commission also suggested that other community outreach efforts should be considered as possible mandates for broadcasters.

boards would become “an integral component of the commission’s localism efforts.”³⁴ In the rulemaking proceeding, the commission asked how to identify the relevant community organizations that should participate, whether members should be selected or elected, and how frequently licensees should be required to meet with the advisory boards. The commission also suggested that other community outreach efforts should be considered as possible mandates for broadcasters. In this regard, it asked whether these requirements should be imposed using rules or guidelines, and notes how the recently adopted standardized disclosure form “will require broadcasters to describe any public-outreach efforts undertaken during the reporting period.”³⁵

The enhanced disclosure requirements and the proposed localism guidelines could not be imposed absent the public-interest requirements imposed by the Communications Act of 1934, as amended. But how far may public-interest mandates be stretched under the Act’s authority before they conflict with limitations imposed by the “no censorship” provision of Section 326 of the Act or the First Amendment? This question goes to the heart of the delicate balance between the Communications Act and constitutional protections for free expression.

The Public Interest and the First Amendment Tightrope

Broadcasters historically have been subject to various forms of content regulation under the public-interest standard of the Communications Act. The Act imposes certain specific requirements, such as those for educational programming as well as general public-interest mandates that are unlike regulations that may be applied to print media. The Supreme Court upheld this differential level of protection because of spectrum scarcity in *Red Lion Broadcasting Co. v. FCC*.³⁶ The Court has also noted that Congress has recognized that broadcasters “are engaged in a vital and independent form of communica-

tive activity”³⁷ and conferred upon licensees “the widest journalistic freedom consistent with their public [duties].”³⁸ Thus, Section 326 of the Act prohibits censorship and expressly withholds from government the power to “interfere with the right of free speech by means of radio communication.” This denies to the FCC “the power of censorship” as well as the ability to promulgate any “regulation or condition” that interferes with freedom of speech.³⁹ These policies “were drawn from the First Amendment itself [and] the ‘public interest’ standard necessarily invites reference to First-Amendment principles.”⁴⁰ Consequently, the Supreme Court has stressed that “the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area.”⁴¹

This obvious tension between public-interest regulation and traditional First-Amendment concepts has been blunted somewhat to the extent that the FCC has approached broadcast licensees with a certain degree of sensitivity to the competing values at stake. From the beginnings of broadcast regulation, Congress and the FCC (and its predecessor agency, the Federal Radio Commission) appeared to approach the business of regulation with the understanding that constitutional limitations might prevent too great a reliance on specific programming mandates. One of the bills submitted prior to passage of the Radio Act of 1927 included a provision that would have required stations to comply with programming priorities based on subject matter. However, the provision was eliminated because “it was considered to border on censorship.”⁴² Similarly, the FRC sought to “chart a course between the need of arriving at a workable concept of the public interest in station operation, on the one hand, and the prohibition laid on it by the First Amendment to the Constitution of the United States . . . on the other.”⁴³

In 1960 the FCC emphasized that “[i]n considering the extent of the commission’s authority in the area of programming it is essential [first] to examine the limitations imposed upon it by the First Amendment to the Constitution and Section 326 of the

Communications Act.”⁴⁴ After an extensive analysis of the meaning of the public interest, the FCC found that the required constitutional and statutory balance barred the government from implementing programming requirements that were too specific. It noted:

[S]everal witnesses in this proceeding have advanced persuasive arguments urging us to require licensees to present specific types of programs on the theory that such action would enhance freedom of expression rather than to abridge it. With respect to this proposition we are constrained to point out that the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it. The protection against abridgment of freedom of speech and press flatly forbids governmental interference, benign or otherwise. The First Amendment, while regarding freedom in religion, in speech, in printing and in assembling and petitioning the government for redress of grievances as fundamental and precious to all, seeks only to forbid that Congress should meddle therein.⁴⁵

Such considerations led the commission to conclude that it could not “condition the grant, denial, or revocation of a broadcast license upon its own subjective determination of what is or is not a good program.”⁴⁶ To do so, the commission concluded, would “lay a forbidden burden upon the exercise of liberty protected by the Constitution.”⁴⁷ The commission found that “as a practical matter, let alone a legal matter, [its role] cannot be one of program dictation or program supervision.”⁴⁸

Over the years the FCC has attempted to balance the constitutional imperative of the First Amendment with the public-interest aspirations of the Communications Act. It has found that while it may “inquire of licensees what they have done to determine the needs of a community they propose to serve, the commission may not impose upon

them its private notions of what the public ought to hear.”⁴⁹ In particular, public interest “standards or guidelines should in no sense constitute a rigid mold for station performance, nor should they be considered as a commission formula for broadcasts in the public interest.”⁵⁰

Recognizing this delicate balance, courts have noted that the commission must “walk a ‘tightrope’” to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act.⁵¹ The Supreme Court has described this balancing act as “a task of great delicacy and difficulty,” and stressed that “we would [not] hesitate to invoke the Constitution should we determine that the [FCC] has not fulfilled with appropriate sensitivity to the interest of free expression.”⁵² The Court found that the Communications Act was designed “to maintain—no matter how difficult the task—essentially private broadcast journalism.”⁵³ For that reason, licensees are to be held “only broadly accountable to public-interest standards.”⁵⁴ Thus, in *Turner Broadcasting System, Inc. v. FCC*, the Supreme Court quoted the 1960 *En Banc Policy Statement*, and reiterated that the commission does not have the authority to dictate programming choices.⁵⁵

Specific program requirements generally are considered the most constitutionally suspect among the requirements imposed by broadcasting regulations. The United States Court of Appeals for the District of Columbia Circuit has noted that the “power to specify material which the public interest requires or forbids to be broadcast . . . carries the seeds of the general authority to censor denied by the Communications Act and the First Amendment alike.”⁵⁶ Public-interest requirements relating to specific program content create a “high risk that such rulings will reflect the commission’s selection among tastes, opinions, and value judgments, rather than a recognizable public interest,” and “must be closely scrutinized lest they carry the commission too far in the direction of the forbidden censorship.”⁵⁷

In those instances in which Congress has adopted affirmative obligations—such as the

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requirement of Section 312(a)(7) of the Communications Act that broadcast licensees provide “reasonable” access to federal political candidates—it has stressed that the requirement must be implemented “on an individualized basis” and not on the basis of “across-the-board policies.”⁵⁸ The commission has never attempted to specify what amount of candidate access is “reasonable” and the Supreme Court’s First Amendment analysis of the law assumed that the broadcaster’s editorial discretion would be accorded appropriate deference.⁵⁹

In *Turner I*, the Supreme Court emphasized “the minimal extent” that the government may influence the programming provided by broadcast stations. The Court noted that “the FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations.”⁶⁰ The challenge facing broadcast-content regulation is the need to reconcile public-interest mandates with constitutional commands and statutory restrictions.

The Public Interest and Programming Mandates

As a general matter, the commission has required broadcast licensees to provide programming that is responsive to the needs of the community of license.⁶¹ In the past, when broadcasting was the primary mass medium available to the public, this requirement was enforced with a greater degree of specificity. For example, in its 1960 *En Banc Programming Inquiry*, the commission listed 14 categories of programs generally considered necessary to serve the public interest, including programs that provided an opportunity for local self-expression; programs that used local talent; children’s programs; religious programs; educational programs; public affairs programs; editorials; political broadcasts; agricultural programs; news; weather and market reports; sports programs; service to minority groups; and (finally) entertainment programming.⁶²

Although the commission did not prescribe the transmission of particular programs, noting that the specified categories should not be considered “a rigid mold or fixed formula for station operation,” it nevertheless concluded that the listed programming types, provided in some reasonable mix, provided evidence that a licensee was operating in the public interest.⁶³ This list was enforced in part through the use of formal ascertainment procedures, which required applicants for broadcast licenses to interview community leaders in 19 specified categories ranging from agriculture to religion.⁶⁴

In 1981 the FCC eliminated its rules and policies that required radio stations to keep program logs, to conduct ascertainment of community problems, to air nonentertainment programming, and to limit the amount of commercial time.⁶⁵ The FCC similarly deregulated television, eliminating ascertainment and other requirements in 1984.⁶⁶ The commission also simplified the renewal process, eliminating the detailed program-related questions that had accompanied the ascertainment process.⁶⁷ In its place, FCC rules required radio and television broadcasters to file quarterly reports listing the programs that have provided the station’s most significant treatment of community issues during the proceeding three-month period. This list called for a brief narrative statement describing what issues were given significant treatment and which programs addressed the particular issues. Additionally, the FCC moved away from examining the programming formats chosen by broadcast stations, leaving such decisions to the marketplace.⁶⁸

The recent adoption of enhanced disclosure requirements that include highly specific reporting requirements signals a return to a policy of more direct FCC supervision of broadcast programming. The FCC’s new approach may well surpass the intensity of past regulatory efforts, particularly if it ultimately is coupled with new programming guidelines along with the government’s encouragement of viewer complaints and petitions to deny. Although the commission has disavowed an

intention to create “program quotas,” it has made equally clear its view that broadcasters have enjoyed too much freedom. The FCC explained that “[a]llowing broadcasters complete discretion to decide what kinds of programming to list in their quarterly forms may result in a broadcaster’s failure to give a complete picture of how they are trying to fulfill their public-interest obligations.”⁶⁹ The question this raises is whether this new emphasis on detailed and focused oversight of programming goes too far.

The Constitutionality of Expanded Public-Interest Requirements

Whether or not Congress or the FCC at the present time could constitutionally adopt such detailed content requirements under the public-interest standard is far from certain. Although the prevailing standard for broadcast regulation articulated in *Red Lion* has permitted the government to regulate broadcast content more intensively than other media in the past, the courts have never defined how far this power might extend. Additionally, it has been 40 years since the Supreme Court decided *Red Lion*, a case based on “the present state of commercially acceptable technology” as of 1969.⁷⁰

Since then, both Congress and the FCC have found that the media marketplace has undergone vast changes. For example, the legislative history of the Telecommunications Act of 1996 suggested that the historical justifications for the FCC’s regulation of broadcasting require reconsideration. The Senate Report noted that “[c]hanges in technology and consumer preferences have made the 1934 [Communications] Act a historical anachronism.” It explained that “the Act was not prepared to handle the growth of cable television” and that “[t]he growth of cable programming has raised questions about the rules that govern broadcasters” among others.⁷¹ The House of Representatives’ legislative findings were even more direct. The House

Commerce Committee pointed out that the audio and video marketplace has undergone significant changes over the past 50 years “and the scarcity rationale for government regulation no longer applies.”⁷²

The FCC has reached similar conclusions over the years. In the mid-1980s, for example, the commission “found that the ‘scarcity rationale,’ which historically justified content regulation of broadcasting . . . is no longer valid.”⁷³ More recently, in complying with the congressional mandate to conduct a biennial review of broadcast regulations, the FCC again found that the media landscape has been transformed.⁷⁴ It concluded that “the modern media marketplace is far different than just a decade ago,” finding that traditional media “have greatly evolved” and “new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history.”⁷⁵

In 2005, an unofficial FCC staff report, which purports to take up where the 1987 Fairness Doctrine decision left off, concluded that the spectrum scarcity rationale “no longer serves as a valid justification for the government’s intrusive regulation of traditional broadcasting.”⁷⁶ It criticized the logic of the scarcity rationale for content regulation and added that “[p]erhaps most damaging to The Scarcity Rationale is the recent accessibility of all the content on the Internet, including eight million blogs, via licensed spectrum and WiFi and WiMax devices.” Content regulation “based on the scarcity of channels has been severely undermined by plentiful channels.”⁷⁷

Of course, if Congress or the FCC chose to adopt new public-interest requirements, they would be expected to adopt new legislative or regulatory findings. But it would be difficult in the current media marketplace to fashion credible findings that the broadcast medium operates in a condition of scarcity, or that the public would be deprived of information absent FCC programming mandates. Moreover, any new rules regulating broadcast content would necessarily implicate the First Amendment, and reviewing courts would not be required to defer to the policymakers’ findings.⁷⁸

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In this context, it is not a foregone conclusion that the Supreme Court (or, for that matter, other reviewing courts) would accept the technological assumptions upon which *Red Lion* is based. It has been a long time since the Court has directly confronted the constitutional status of broadcasting, and where the issue has come up in dictum, its endorsement of *Red Lion* has been lukewarm at best. In *Turner I*, for example, the Court rejected the government's bid to extend the principles of *Red Lion* to the regulation of cable television. After noting the commission's "minimal" authority over broadcast content, the Court pointed out that "the rationale for applying a less-rigorous standard of First Amendment scrutiny to broadcast regulation, *whatever its validity in the cases elaborating it*, does not apply in the context of cable television."⁷⁹

Lower court decisions in this area have reached mixed results. The case that provides the strongest support for some type of expanded public-interest requirement is 1996's *Time Warner Entertainment Co. v. FCC*, in which the D.C. Circuit used a straightforward application of *Red Lion* to uphold a 1992 Cable Act provision requiring Direct Broadcast Satellite operators to set aside 4 to 7 percent of their channel capacity for "noncommercial programming of an educational or informational nature."⁸⁰ The panel reasoned that the provision "should be analyzed under the same relaxed standard of scrutiny that the court has applied to the traditional broadcast media."⁸¹

However, a deadlocked court of appeals denied rehearing in that case, and five judges endorsed a dissenting statement that casts a shadow over the panel's strong endorsement of *Red Lion*.⁸² The five dissenters pointed out that "[e]ven in its heartland application, *Red Lion* has been the subject of intense criticism," noting that the assumptions underlying spectrum scarcity are suspect in light of the scarce nature of all economic goods.⁸³ Judge Stephen Williams noted that the *Red Lion* Court suggested that the reason for such relaxed treatment would vanish along with the end of scarcity, and pointed out that, even in its nascent state, "[t]he new DBS technology

already offers more channel capacity than the cable industry, and far more than traditional broadcasting."⁸⁴ The dissent further reasoned that the DBS set-aside requirement for "educational" or "informational" programming is content-based, and that "as a simple government regulation of content, the DBS requirement would have to fall."⁸⁵ In light of the 5-5 deadlock among the D.C. Circuit judges at the time, the *Time Warner* case represents more of a hung jury than it does a constitutional mandate for new content regulations.⁸⁶

Other cases further suggest that reviewing courts will closely scrutinize any new regulation of broadcast content. In *MPAA v. FCC* (2002), the D.C. Circuit Court vacated the commission's video-description rules.⁸⁷ Although the court analyzed only the question of whether the FCC had been given statutory authority to adopt the rules, it explained that it interpreted the commission's powers narrowly because any regulation of programming content "invariably raise[s] First Amendment issues."⁸⁸ It expressed no opinion on the constitutional issues, but the thrust of the holding was that the FCC's general public-interest authority over programming is far less expansive than was previously assumed.

The same conclusion follows from the D.C. Circuit's decision in 2000 in *RTNDA v. FCC*, where the court ordered the commission rules requiring an opportunity to respond to a personal attack or political endorsement from the media.⁸⁹ There, the court held that the FCC had the burden to justify rules that "interfere with editorial judgment of professional journalists and entangle the government in day-to-day operations of the media."⁹⁰ Although the court did not decide whether such rules are constitutional or would serve the public interest, it was unwilling to allow the FCC to continue to enforce these rules, which already had been subject to protracted review, while the commission assessed their validity.

Other circuit-court opinions have raised similar questions. In *Lutheran Church-Missouri Synod v. FCC*, the D.C. Circuit invalidated FCC equal-employment-opportunity rules that

were predicated on promoting diverse programming.⁹¹ Although the court did not analyze program content regulation based on spectrum scarcity, it noted the dilemma the FCC faces if it is either too general or too specific when it attempts to regulate programming. It observed that the notion of “diverse programming” may be “too abstract to be meaningful,” but that “[a]ny real content-based definition of the term may well give rise to enormous tensions with the First Amendment.”⁹² The D.C. Circuit reached a similar conclusion in *MD/DC/DE Broadcasters Ass’n. v. FCC*.⁹³ In short, the FCC still must walk the First Amendment tightrope.

How Much Oversight is Too Much?

Even assuming the continuing validity of more rigorous content regulation for broadcasting under *Red Lion*, the question necessarily arises whether renewed and enhanced oversight regarding licensees’ editorial choices goes too far. The issue is even more pressing if the commission ultimately adopts new substantive-programming mandates, as it appears poised to do.⁹⁴ But even without such requirements, it would be necessary to determine whether more active oversight under the highly particularized enhanced disclosure requirement threatens to disrupt the delicate balance between public-interest requirements and First Amendment limits.⁹⁵

The commission itself appears to be of two minds on how much oversight it is proposing. On one hand, the FCC emphasized that “[e]ditorial control will remain in the hands of the licensee” and that the standardized reporting requirements will not “create program quotas.” On the other hand, it clearly seems to be putting its thumb on the scale regarding what types of programming will tip the public-interest balance. It notes, for example:

The new form [355] requires each television licensee to report on its efforts to identify programming needs of vari-

ous segments of their communities, and to list their community-responsive programming by category. Included in these categories of programming is local electoral affairs programming, defined as candidate-centered discourse focusing on the local, state, and United States Congressional races for offices to be elected by a constituency within the licensee’s broadcast area. Such programming includes broadcasts of candidate debates, interviews or statements, as well as substantive discussions of ballot measures that will be up before the voters in a forthcoming election.⁹⁷

In addition, licensees must report whether the programming was produced locally. Among other things, the FCC has concluded that network television “often is not sufficiently culturally diverse,” and it notes that the new form “requires each licensee to report on its efforts to identify the programming needs of various segments of their communities, and to provide detailed information about its community-responsive programming by category,” including programming for “underserved communities.”⁹⁸

Of course, gathering such detailed information is not a neutral act, nor is it intended to be. The commission has made quite clear that the information it obtains will be fodder for citizen complaints and petitions to deny, and will be used to evaluate broadcasters’ performance for purposes of license renewal. The whole point of the exercise is to effect changes in current editorial practices. The commission may disavow any intention to create programming quotas, but the practical effect of the new form will be to do just that.

The D.C. Circuit has recognized the various ways a regulatory agency can put pressure on a regulated firm, “some more subtle than others.” In particular, it has observed that the FCC “has a long history of employing . . . ‘a variety of *sub silentio* pressures and “raised eyebrow” regulation of program content. . . . The practice of forwarding viewer or listener complaints to the

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broadcaster with a request for a formal response to the FCC, the prominent speech or statement by a commissioner or Executive official, the issuance of notices of inquiry . . . serve as means for communicating official pressures to the licensee.”⁹⁹ In this regard, an investigation based on data submitted on a form “is a powerful threat, almost guaranteed to induce the desired conduct.”¹⁰⁰ The court has noted that “[a] station would be flatly imprudent to ignore any one of the factors it knows may trigger intense review.”¹⁰¹

Such concerns are particularly acute where the change in FCC procedures reinforces the government’s ability to supervise content more intensively. Thus, in *Community-Service Broadcasting of Mid-America, Inc. v. FCC* (1978), the D.C. Circuit struck down a statutory requirement that noncommercial broadcasters maintain an audio recording for 60 days of any program in which an issue of public importance is discussed. The majority invalidated the provision, finding that it “places substantial burdens on noncommercial educational broadcasters and presents the risk of direct governmental interference with program content.”¹⁰² As that case was being litigated, the FCC rejected a similar proposal that would have required commercial broadcasters to retain tapes of their programs. The commission noted that “the concern that the proposed rule might have a chilling effect on free speech and press cannot be easily dismissed,” and deferred judgment on the constitutional issue because it was being considered by the court in *Community-Service Broadcasting*.¹⁰³

Although the decision in *Community-Service Broadcasting* turned on equal protection grounds because of the special requirement for noncommercial broadcasters, Judge Skelly Wright also emphasized that the taping requirement “in its purpose and operation serves to burden and chill the exercise of First Amendment rights by noncommercial broadcasters.”¹⁰⁴ He noted that “the operation of the taping requirement serves to facilitate the exercise of ‘raised eyebrow’ regulation” because “it provides a mechanism, for those who would wish to do so, to review systematically the con-

tent of . . . programming.” Based on such review “they may make use of existing means for communicating their displeasure.”¹⁰⁵

Judge Wright observed that the costs involved in “responding to FCC inquiries or participating in license-renewal hearings, as well as the uncertainties involved, independently exert a chilling effect on the licensee’s willingness to court official displeasure.”¹⁰⁶ A chilling effect can exist even when a regulatory requirement “neither creates any new content restrictions . . . nor establishes any new mechanism for enforcement of existing standards” to the extent the measure was adopted for the purpose of exerting greater control over content. In analyzing such matters, the court’s “ultimate concern is not so much what government officials will actually do, but with how reasonable broadcasters will perceive regulation, and with the likelihood they will censor themselves to avoid official pressure and regulation.”¹⁰⁸

Such a requirement will have a heightened effect as the commission exerts closer ongoing oversight of programming generally. Former commissioner Glen O. Robinson has described “regulation by the lifted eyebrow” as a “Sword of Damocles” over the broadcaster’s head. “If the sword does not often fall, neither is it ever lifted and the *in terrorem* effect of the sword’s presence enables the commission to exercise far-reaching powers of control over the licensee’s operations.”¹⁰⁹ Judge Skelly Wright had noted some time before: “If the Government can require the most pervasive and effective information medium in the history of this country to make tapes of its broadcasting for possible government inspection, in its own self-interest that medium will trim its sails to abide the prevailing winds.”¹¹⁰ The same reasoning applies to detailed programming reporting forms.

If the commission takes the next step and adopts quantitative processing guidelines, the practical effect would be virtually indistinguishable from a programming quota. Indeed, in the context of the FCC’s equal-employment-opportunity rules, the D.C. Circuit rejected the commission’s argument that quantitative guidelines did not have such an impact on

licensees. “It cannot be seriously argued,” the court reasoned, “that this screening device does not create a strong incentive to meet the numerical goals. No rational firm—particularly one holding a government-issued license—welcomes a government audit.”¹¹¹

To the extent that licensees adhere to the FCC’s favored list of programming types and subject matter, it is also uncertain that reviewing courts would necessarily agree that the public-interest mandate of the Communications Act requires each broadcaster to fall in line. As the D.C. Circuit explained in dictum in *Lutheran Church-Missouri Synod*, the FCC’s “purported goal of making a single station all things to all people makes no sense.” Such a requirement “clashes with the reality of the radio market, where each station targets a particular segment: one pop, one country, one news radio, and so on.”¹¹² If the FCC adopts heightened public-interest requirements that fail to take into account the current marketplace for video programming, reviewing courts may conclude that the commission has gone too far.

The Once and Future (and Universal) Public-Interest Standard?

If new public-interest requirements are adopted, it seems unlikely that the government will attempt to defend their constitutionality solely based on traditional justifications, such as reliance of the spectrum scarcity theory of *Red Lion*. In a world in which the government is struggling to develop policies that seek to cope with the increasing abundance of media platforms and consumer choices, it seems a bit embarrassing to rely on a constitutional doctrine predicated on “scarcity.” For that reason, the agency will most likely explore new rationales that would enable it to expand existing broadcast-content regulations, and to apply them to other media as well.

Acting Chairman Copps foreshadowed this development in a speech last May:

[A]s broadcast and other content migrate

online, how do we promote the goals that we, as a society, really care about? How do we nourish a dynamic civic dialogue? How do we get information about real issues of public concern? How do we educate and protect our kids? Historically, government regulation has been based on some sort of licensing relationship or statutory directive. But how does *that* apply to the online world, where websites not only are not licensed, but they may not even be *in* the United States?¹¹³

According to media reports, Copps also initiated a yet-to-be-released FCC inquiry on “the state of media journalism” in one of his final acts as acting chairman of the agency.¹¹⁴ Likewise, President Obama’s new FCC chairman, Julius Genachowski, is advocating updating the requirements of the Children’s Television Act, with modifications to correspond to the existence of other digital media.¹¹⁵ For some, this means not only expanding the Act’s requirements with respect to broadcasters, but extending regulations to other new media as well.¹¹⁶

To a certain extent, this broader regulatory focus can be seen in an FCC study conducted pursuant to the Child Safe Viewing Act.¹¹⁷ The purpose of the study is to examine ways to develop and implement effective technologies to filter or block “indecent” or “objectionable” programming. Based on the statutory mandate, the commission is investigating the existence and effectiveness of “advanced blocking technologies that may be appropriate across various distribution platforms, including wired, wireless, and Internet platforms.”¹¹⁸ Depending on the commission’s findings, Congress may then fashion legislation, the scope of which would not likely be limited to the broadcast medium.

Simply put, policymakers are contemplating media regulations that extend far beyond the more limited broadcast regulations contemplated under current judicial doctrines set forth in cases like *Red Lion Broadcasting Company* or *Pacifica*. They are considering reg-

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ulations that would govern various types of content that have not previously been subject to restrictions, and for those areas that have been regulated in the past, they are proposing more vigorous government oversight than ever before. In the face of such developments, assurances that “no one wants to bring back the Fairness Doctrine” ring quite hollow.

In preparation for new forms of regulation, and for the likely constitutional confrontation that would follow, regulatory advocates are trying out new theories to replace the threadbare doctrines on which broadcast regulation traditionally has been based. Declaring that “[c]urrent free-speech doctrine appears to rest on a mistake,” the general counsel of Free Press (a group advocating stricter regulation of media) is proposing a theory of First-Amendment analysis to mandate what he describes as “democratic content” on any medium of communication so long as the requirement is “viewpoint neutral.”¹¹⁹ This sweeping new theory is based on the not-very-modest premise that “[t]he widely shared and deeply held assumptions about content analysis” underlying virtually all First Amendment jurisprudence “are wrong.”¹²⁰ And it would permit regulators to impose a myriad of new content controls on all media, including print and the Internet. Another writer has proposed a “broadband public-interest standard” on the assumption that “the current state of the Internet as a platform for expression and democratic engagement calls for significantly more, and not less, proactive government intervention.”¹²¹

Conclusion

Debates over the Fairness Doctrine and justifications for broadcast regulation based on spectrum scarcity are figments of the past. Proposals for new media regulations have moved on, even though the courts never finally addressed the validity of these older theories of regulation. Just as we have entered a new age of media abundance, proponents of government regulation are now pushing

new theories based on the paradoxical notion that the promise of the First Amendment—that “Congress shall make no law . . . abridging the freedom of speech, or of the press”—cannot be realized without affirmative government oversight for all media. The debate about the future of media regulation will not be about the Fairness Doctrine or other traditional broadcast content controls. It will instead raise the question of whether any medium will continue to be free.

Notes

1. George F. Will, “Broadcast ‘Fairness’ Fouls Out,” *Washington Post*, December 7, 2008, B7.
2. Bruce Fein, “Exhuming the Fairness Doctrine,” *Washington Times*, December 16, 2008.
3. “A Liberal Supermajority,” *Wall Street Journal*, October 22, 2008, p. A12.
4. Representatives Mike Pence and Greg Walden, along with 148 cosponsors, introduced the Broadcaster Freedom Act of 2009, H.R. 226, 111th Cong., 1st sess. (introduced January 7, 2009). A corresponding bill in the Senate had 28 sponsors: Broadcaster Freedom Act of 2009, S. 34, 111th Cong., 1st sess. (introduced January 6, 2009).
5. Michael J. Copps, Acting FCC Chairman (remarks, Free Press Summit: *Changing Media*, Washington, May 14, 2009).
6. Steve Benen, “Political Animal,” *Washington Monthly*, December 7, 2008, (emphasis in original), http://www.washingtonmonthly.com/archives/individual/2008_12/015956.php.
7. Marin Cogan, “Bum Rush,” *New Republic*, December 3, 2008, <http://www.tnr.com/politics/story.html?id=68d07041-7dbc-451d-a18a-752567145610&p=2>.
8. Craig Aaron, “Fairness Doctrine: Secret Republican Agenda Exposed!,” January 8, 2009, www.huffingtonpost.com/craig-aaron/fairness-doctrine-secret_b_156227.html.
9. 395 U.S. 367 (1969).
10. 438 U.S. 726 (1978).
11. Copps.
12. Robert L. Corn, “Broadcasters in Bondage,”

Reason, September 1985, pp. 31–32.

13. *Ibid.*, pp. 31, 33–34.

14. *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 23 FCC Rcd. 1274 (2008).

15. *NAB et al. v. FCC*, Nos. 08-1135, 08-1151, 08-1185, 08-1186, 08-1187 (D.C. Cir. filed March 27, April 9, and May 12, 2008), *stayed pending FCC recon.*, Order, July 11, 2008, *pets. for recon. pending*, 73 Fed. Reg. 28116 (May 15, 2008).

16. This is defined as programming designed to provide the public with information about local issues, including statements or interviews with local officials, discussions of local issues, and coverage of local legislative meetings. Programming reported in this category must be subtracted from the amount reported for “news” programming.

17. This also must be subtracted from the amount reported for “news” programming.

18. *Standardized and Enhanced Disclosure Requirements*, Appendix B, pp. 31–38.

19. *Id.* “Underserved communities” is defined as demographic segments of the community to which little or no programming is directed.

20. *Id.*, p. 36. Such reports must include details on the amount of closed-captioned programming broadcast by the station, and a list of exempt programs that were aired, with details as to the exemptions; whether the station voluntarily provided video description of any of its programs and, if so, the amount; and information about broadcasts about community emergencies, including a statement as to whether or not the station complied with the rules that require such programs to be accessible to the disabled.

21. *Id.*

22. *Id.*, Appendix B, pp. 33–34.

23. *Id.*, pp. 1275, 1287, 1292.

24. *Id.*, p. 1287.

25. *Id.*, p. 1279–80.

26. *Id.*, p. 1281. Stations can either post the public file contents on their own websites or on the website of their state broadcast association. If the state association agrees to host the website, the station must have a link to the report on its website.

27. *Id.*, pp. 1275, 1287. See also *Id.*, 96n. (“As noted above, broadcasters’ substantive public interest obligations are being considered in other proceedings.”)

28. *Report on Broadcast Localism and Notice of Proposed Rulemaking*, 23 FCC Rcd. 1324 (2008).

29. *Id.*, p. 1373.

30. *Id.*

31. *Id.*, p. 1366.

32. *Id.*, pp. 1353–54, 1357.

33. *Id.*, p. 1344.

34. *Id.*, p. 1336.

35. *Id.*, pp. 1336–37.

36. 395 U.S. 367 (1969). The statutory authority for the public interest mandate is explicated, see p. 379.

37. *League of Women Voters of Cal. v. FCC*, 468 U.S. 364, 378 (1984).

38. *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981), (quoting *Democratic National Committee*, 412 U.S. 110).

39. 47 U.S.C. § 326.

40. *CBS, Inc. v. FCC*, 412 U.S. 121.

41. *League of Women Voters of Cal. v. FCC*, 468 U.S. 378.

42. See *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 597 (1981).

43. *Report and Statement of Policy re: Commission En Banc Programming Inquiry*, 44 F.C.C. 2303, 2313 (1960).

44. *Id.*, p. 2306.

45. *Id.*, p. 2308 (citation omitted).

46. *Id.*

47. *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)).

48. *Id.*, p. 2309.

49. *Id.*, p. 2308.

50. *Id.*, p. 2313.

51. *Democratic National Committee*, 412 U.S. 117; *Banzhaf v. FCC*, 405 F.2d 1082, 1095 (D.C. Cir., 1968), *cert. denied sub. nom. Tobacco Institute, Inc. v. FCC*, 396 U.S. 342 (1969).
52. *Democratic National Committee*, 412 U.S. 102.
53. *Id.*, p. 120.
54. *Id.*
55. 512 U.S. 622, 650 (1994) (“*Turner P*”) (citation omitted).
56. *Banzhaf*, 405 F.2d 1095.
57. *Id.*, 1096. See also *Public Interest Research Group v. FCC*, 522 F.2d 1060, 1067 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) (“[we] have doubts as to the wisdom of mandating ... government intervention in the programming and advertising decisions of private broadcasters”); *Anti-Defamation League of B’nai B’rith v. FCC*, 403 F.2d 169, 172 (D.C. Cir. 1968) (“the First Amendment demands that [the FCC] proceed cautiously [in reviewing programming content] and Congress . . . limited the Commission’s power in this area”).
58. *CBS, Inc.*, 453 U.S. 387.
59. *Id.*, pp. 396–397.
60. 512 U.S. 622, 650–652.
61. 47 C.F.R. §§ 73.3526(e)(11)–(12), 73.3527(e)(8) (2007).
62. *En Banc Programming Inquiry*, 44 F.C.C. 2314.
63. *Id.*
64. See *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650 (1971).
65. *Deregulation of Radio*, 84 F.C.C.2d 968 (1981), *aff’d. in part and remanded in part, Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983).
66. *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Requirements for Commercial Television Stations*, 98 F.C.C.2d 1078 (1984); *Revisions of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees*, 96 F.C.C.2d 74 (1984). See *Action for Children’s Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987) (remanding FCC decision to eliminate commercial guidelines for children’s programming).
67. See *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984).
68. See *FCC v. WNCN Listeners Guild*, 450 U.S. 604.
69. *Standardized and Enhanced Disclosure Requirements*, 23 FCC Rcd. 1291–92.
70. *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 811 (D.C. Cir. 1988) (quoting *Red Lion*, 395 U.S. 388). See *Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987) (“the Court reemphasized that the rationale of *Red Lion* is not immutable”). See also *Banzhaf*, 405 F.2d 1100 (“some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets”).
71. *Telecommunications Competition and Deregulation Act of 1995*, S. Rpt. 104-23, 104th Cong., 1st sess. 2–3 (March 30, 1995).
72. *Communications Act of 1995*, H. Rpt. 104-204, 104th Cong., 1st sess. 54 (July 24, 1995).
73. *Meredith Corp.*, 809 F.2d 867, citing *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985) (“1985 Fairness Doctrine Report”). See *Syracuse Peace Council*, 867 F.2d at 660–666 (discussing 1985 Fairness Doctrine Report and upholding the FCC’s decision to repeal the fairness doctrine).
74. *2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620, 13623 (2003) (“*Biennial Regulatory Review*”).
75. *Id.*, pp. 13647–48.
76. John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* (Media Bureau Staff Research Paper, March 2005), p. 8. FCC staff research papers are unofficial studies and do not necessarily reflect the position of the Media Bureau or the Commission.
77. *Id.*, p. 11. The report also concludes that alternative rationales for broadcast content regulations are similarly flawed. *Id.*, pp. 18–28. For a more comprehensive discussion of various justifications for broadcast content regulation, see *Rationales and Rationalizations*, ed. Robert Corn-Revere (Washington: Media Institute, 1997).
78. *Playboy Entertainment Group*, 529 U.S. 817–818; *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989) (“Deference to a legislative finding cannot limit judicial inquiry

- when First Amendment rights are at stake.”) (citation omitted).
79. *Turner I*, 512 U.S. 637 (emphasis added).
80. 93 F.3d 957 (D.C. Cir. 1996) (upholding 47 U.S.C. § 335(b)(1) against a First Amendment challenge).
81. *Id.*, p. 975.
82. Judge Steven Williams, joined by Judges Edwards, Silberman, Ginsburg, and Sentelle, sharply questioned the central premises of extending the constitutional rationale of broadcast regulation. *Time Warner Entertainment Company v. FCC*, 105 F.3d 723 (D.C. Cir.) (Williams, J., dissenting).
83. *Id.*, p. 724 nn.1–2.
84. *Id.*, p. 725.
85. *Id.*, p. 726.
86. Other lower courts have declined to apply the *Time Warner* panel’s analysis of *Red Lion*. See *Satellite Broadcasting & Communications Ass’n. of America v. FCC*, 146 F. Supp. 2d 803, 823 (E.D. Va. 2001) (rejecting *Time Warner* analysis and applying intermediate scrutiny) (“numerous courts have questioned and/or declined to extend the *Red Lion* rationale”).
87. 309 F.3d 796 (D.C. Cir. 2002). The FCC required video description of video programming to assist visually-disabled consumers.
88. *Id.*, p. 805.
89. *Radio-Television News Directors Assn. v. FCC*, 229 F.3d 269 (D.C. Cir. 2000) (per curium).
90. *Id.*, p. 270 (it is “incumbent upon the Commission to ‘explain why the public interest would benefit from rules that raise these policy and constitutional doubts’”) (citation omitted).
91. 141 F.3d 344 (D.C. Cir. 1998).
92. *Id.*, p. 354.
93. 236 F.3d 13 (D.C. Cir. 2001), *cert. denied sub nom. Minority Media and Telecom. Council v. MD/DC/DE Broadcasters Ass’n*, 534 U.S. 1113 (2002).
94. *Report on Broadcast Localism*, 23 FCC Rcd. at 1343, 1373.
95. See, for example, *Accuracy in Media v. FCC*, 521 F.2d 288, 296–297 (D.C. Cir. 1975) (interpreting the Act to create “a more active role by the FCC in oversight of programming . . . threaten[s] to upset the constitutional balance”).
96. *Standardized and Enhanced Disclosure Requirements*, 23 FCC Rcd. 1291–92.
97. *Report on Broadcast Localism*, 23 FCC Rcd. at 1353–54.
98. *Id.*, pp. 1354, 1357.
99. *MD/DC/DE Broadcasters Ass’n.*, 236 F.3d 19 (quoting *Community-Service Broadcasting of Mid-America*, 593 F.2d 1116).
100. *Id.*, p. 19 (quoting Barry Cole and Mal Ottinger, *Reluctant Regulators* 213 (1978) (“investigatory hearing before FCC ‘is considered by both key staff people and most commissioners almost as drastic as taking a license away’”).
101. *Lutheran Church-Missouri Synod*, 141 F.3d at 353.
102. *Community-Service Broad.*, 593 F.2d at 1105.
103. *Petition for Rulemaking to Require Broadcast Licensees to Maintain Certain Program Records, Third Report & Order*, 64 F.C.C.2d 1100, 1113 (1977).
104. *Community-Service Broad.*, 593 F.2d 1110 (C. J. Wright).
105. *Id.*, p. 1116.
106. *Id.*
107. *Id.*, p. 1115.
108. *Id.*, p. 1116.
109. Glen O. Robinson, “The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation,” *Minnesota Law Review* 52, no. 67, (1967): 119.
110. *Community-Service Broad.*, 593 F.2d 1123 (C. J. Wright).
111. *Id.*, p. 353.
112. 141 F.3d 355–356.
113. Copps.
114. See Matt Cover, *FCC Commissioner Circulates Document on “The State of Media Journalism,”* CNSNews.com, July 9, 2009, www.cnsnes.com/public/content/article.aspx?RsrcID=50761.
115. Julius Genachowski, Chairman, Federal

Communications Commission, *Rethinking the Children's Television Act for a Digital Media Age* (statement before the United States Senate Committee on Commerce, Science and Transportation, July 22, 2009).

116. *Rockefeller Calls for Review of Children's TV Act*, *Communications Daily*, July 23, 2009, pp. 1–2 (“Policymakers are studying the legal basis for extending FCC authority over children’s programming beyond broadcast TV to Internet or mobile video, according to a Democratic staff memo on the hearing.”)

117. *Child Safe Viewing Act of 2007*, P.L. 110-452, 122 Stat. 5025 (December 2, 2008).

118. *Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, 24 FCC Rcd. 3342, 3344 (2009). The technologies in question are used by parents, not the government.

119. Marvin Ammori, “Beyond Content Neutrality: Understanding Content-Based Pro-motion of Democratic Speech,” *Federal Communications Law Journal* 61, no. 273 (March 2009).

120. *Id.*, p. 277.

121. Anthony E. Varona, “Toward a Broadband Public Interest Standard,” *Administrative Law Review* 61, no. 1, (Winter 2009): 134.

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