

CHARTING A NEW CONSTITUTIONAL JURISPRUDENCE FOR THE DIGITAL AGE

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I. INTRODUCTION

Communications law and policy would be much different today—and more suited to the now generally competitive and converging communications marketplace—if the Supreme Court’s twentieth century jurisprudence had been different. As it was, the Court took an unduly restrictive view of First Amendment free speech rights and an overly broad view of the nondelegation doctrine. Moreover, the Federal Communications Commission (FCC or Commission), the administrative agency charged under the Communications Act of 1934 (Communications Act or Act) with regulating broadcasters, common carriers, and other communications companies,¹ was given what at times amounted to unbridled discretion to regulate “in the public interest.” Thus, the FCC’s Fairness Doctrine, requiring broadcasters to present

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1. See Communications Act of 1934, Pub. L. No. 73-416, § 1, 48 Stat. 1064, 1064 (codified as amended at 47 U.S.C. § 151 (2000)).

both sides of controversial public issues, along with much other program content regulation, was upheld against First Amendment attack. Arguably, at times the Court also took a somewhat overly narrow view of Fifth Amendment property rights of communications service providers.

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

But at least since the Telecommunications Act of 1996² amended the Communications Act of 1934,³ the communications marketplace environment has been characterized by increasing competition among a variety of media and service providers and also by a convergence of the services offered by media companies and telecommunications providers. Convergence has meant the blurring of formerly distinct service boundaries that were tied to what I have called “techno-functional constructs” because service classifications were based on technical characteristics or

2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.); *see also id.* § 1(b), 110 Stat. at 56 (“[W]henver in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934.”).

3. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

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functional features.⁴ It no longer makes sense to speak of the “telephone,” “broadcast,” “cable,” or “cellphone” markets in the same way it did only a few short years ago. Telephone companies now provide video and Internet services in addition to voice services; cable companies provide voice and Internet services; and wireless companies provide voice, video, and Internet services. Increasingly, people watch “television” programs on their “computer” screens or even on their mobile devices.

The advent of competition and convergence is attributable in large part to the rapid technological developments accompanying the transition from analog to digital equipment and from narrowband to broadband services.⁵ Much has been written about the marketplace transformation wrought by Digital Age competition and convergence. This is not the forum, however, to rehash the marketplace or technological developments, which, in any event, often become outdated almost as soon as they are reported. Suffice it to say, for purposes of this essay, that the communications marketplace today bears little resemblance to that which existed at the time major communications law decisions of the twentieth century were rendered by the Supreme Court.

Next, I am going to discuss some of these key twentieth century decisions to show how they have shaped the existing jurisprudence defining the media’s First Amendment rights. Most significantly, the import of these decisions is that broadcasters have been accorded decidedly less First Amendment protection than the print media and even less protection than other forms of electronic media, such as cable television, which have received less protection than print publishers. I will also address the FCC’s seemingly limitless authority under prevailing Supreme Court decisions, to regulate, pursuant to the public

4. See Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 FED. COMM. L.J. 103, 104-08 (2006).

5. See *id.* at 108-10. As for convergence, in 2004 the FCC explained how the greater bandwidth of broadband networks encourages the introduction of services “which may integrate voice, video, and data capabilities while maintaining high quality of service.” IP-Enabled Services, Notice of Proposed Rulemaking, 19 F.C.C.R. 4863, at ¶ 16 (2004).

interest standard, the media and telecommunications companies that are subject to its jurisdiction. Finally, I will suggest that, whatever the merits of these decisions at the time they were decided—and the merits are quite debatable—either through overruling or distinguishing them, the Supreme Court should find ways to chart new jurisprudential directions that will comport more comfortably with important constitutional values.

Indeed, as I will explain in the last section, the Court has been presented this Term with just such an opportunity to render a decision that comports more comfortably with our constitutional values. In *FCC v. Fox Television Stations, Inc.*,⁶ the Court is reviewing a court of appeals decision holding that the FCC failed to provide a reasoned basis for a change in policy that led to sanctioning broadcasters for programs containing only “fleeting expletives” rather than non-isolated instances of what it considered to be indecent speech.⁷ While the Second Circuit based its vacation and remand of the FCC’s decision announcing its new broadcast indecency enforcement regime on traditional administrative law grounds, it did suggest in dicta that, in its view, the FCC’s new, more stringent enforcement policy might well be unconstitutional.⁸ In their Supreme Court briefs, the broadcaster parties and others urge the Court to hold the FCC’s new “fleeting expletives” policy unlawful not only on the basis that it was not adequately explained by the Commission, but also on the basis that it infringes the broadcasters’ free speech rights.⁹ Should the Court take on the constitutional issue, it would have an opportunity to rationalize its First Amendment jurisprudence in a way that would accord all the electronic media the same high level of free speech protection that the print media has always enjoyed.

6. No. 07-582 (U.S. argued Nov. 4, 2008).

7. *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 446 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008).

8. *See id.* at 463, 467.

9. *See infra* notes 82-84 and accompanying text.

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II. THE BROADCAST AND PUBLIC INTEREST MODELS: ANALOG ERA REGULATORY REGIMES

At the heart of twentieth century media regulation discussed here is the “broadcast model,” which took firm root before the rise of successive newer media employing various technologies.¹⁰ Under the traditional broadcast model, the electromagnetic spectrum was considered to be a scarce physical resource that could support only a limited number of users at one time. For this reason, the Communications Act’s framers subjected over the air broadcasting to a regime under which the FCC assigns frequencies to selected licensees to operate for limited periods of time in the “public interest, convenience, and necessity.”¹¹ And after initial award, licenses may not be renewed or transferred to a third party without an FCC determination that such renewal or transfer serves the public interest.¹² Thus, as a practical matter, FCC approval is required for mergers or other combinations of communications companies in which the transfer of control of a spectrum license integral to the companies’ business is involved.

With the delegation of “public interest” authority in hand, the FCC proceeded to adopt licensing criteria for broadcasters based in part on the content of programming.¹³ For example, the

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

11. 47 U.S.C. § 309(a) (2000); *see also id.* §§ 303, 307. The literature describing the linkage between the theory of spectrum scarcity and the Communications Act’s public interest standard is well nigh inexhaustible. For a good general introduction, with citation to many authorities, see generally THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* (1994) (especially Chapters 2, 3, and 6). Two other good introductory articles concerning the theory of broadcast regulation arising from the claim of spectrum scarcity, each with ample citation of authorities, are: Glen O. Robinson, *Title I, The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in *A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934*, 3 (Max D. Paglin ed., 1989) and Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133 (1990).

12. *See* 47 U.S.C. §§ 307(c)(1), 309(k)(1)(A), 310(d) (2000).

13. *See generally* KRATTENMAKER & POWE, *supra* note 11. The entire book concerns the regulation of program content by the FCC. For a description of the

agency required licensees to limit the amount of advertising material broadcast¹⁴ and to limit network-produced programs broadcast during prime time.¹⁵

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

If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities¹⁶

Thus, the Fairness Doctrine required broadcasters to cover controversial public issues and to do so in a balanced way. In the 1980s, the FCC began questioning whether, with the proliferation of additional media outlets, the doctrine was still in the "public interest." Ultimately, it concluded this government-mandated requirement of balanced programming exerted a chilling effect on broadcasters, creating incentives for licensees to broadcast less controversial public affairs programming than

comprehensive nature of the FCC's early efforts to regulate broadcast program content, see generally FED. COMM'NS COMM'N, PUBLIC SERVICE RESPONSIBILITIES OF BROADCAST LICENSEES (1946), *reprinted in* DOCUMENTS OF AMERICAN BROADCASTING (Frank J. Kahn ed., 2d ed. 1973) 151-233.

14. See FED. COMM'NS COMM'N, *supra* note 13, at 208-24.

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

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

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they otherwise would.¹⁷ Although the Commission initially concluded only Congress or the courts could get rid of the doctrine, the D.C. Circuit disagreed.¹⁸ With its authority clarified, the FCC acted shortly thereafter to jettison the Fairness Doctrine upon public interest grounds, and its decision was affirmed.¹⁹

Basing licensing decisions on programming content raises obvious First Amendment issues. Indeed, the Communications Act itself contains a “no-censorship” provision.²⁰ As a practical matter, it has never meant what its language, at least literally construed, seems to imply. Rather, the no-censorship provision’s inclusion in the Act only calls attention to the tension the FCC’s program content intrusions create with respect to licensees’ free speech rights.²¹ Early in the development of radio and television broadcasting, the Supreme Court adopted an approach permitting an intrusive government-supervised content regulatory regime applicable to broadcasters. In the landmark 1943 case of *National Broadcasting Co. (NBC) v. United States*,²² the Supreme Court invoked spectrum scarcity in sanctioning a lesser degree of First Amendment protection for broadcasters. Upholding the first FCC regulations governing the relationship between new radio broadcasting networks and local affiliates, the Court declared: “Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its

17. Inquiry into § 73.1910 of the Commission’s Rules and Regulations Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 145, 246-47 (1985).

18. See *Meredith Corp. v. FCC*, 809 F.2d 863, 872-73 & n.11 (D.C. Cir. 1987) (noting that the Communications Act does not mandate the Fairness Doctrine).

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

20. See 47 U.S.C. § 326 (2000).

21. Section 326 provides: “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.*

22. 319 U.S. 190 (1943).

unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.”²³ The FCC’s “chain broadcasting” regulations prohibited certain practices that restricted the affiliate’s discretion to broadcast a non-network supplied program.

Aside from rejecting the First Amendment claim on the basis of spectrum scarcity, the *NBC* case is also notable because Justice Frankfurter’s majority opinion gave the FCC such wide berth to regulate “in the public interest.” Referring to what he called the dynamic nature of the new field of broadcasting, Frankfurter declared the Communications Act’s public interest delegation to give the agency “expansive powers.”²⁴ And quoting from his earlier opinion in *FCC v. Pottsville Broadcasting Co.*,²⁵ Justice Frankfurter proclaimed the public interest standard “is as concrete as the complicated factors for judgment in such a field of delegated authority permit.”²⁶

In 1969, in *Red Lion Broadcasting Co. v. FCC*,²⁷ the Court employed the spectrum scarcity rationale used in *NBC* to affirm the constitutionality of the FCC’s Fairness Doctrine. The FCC had determined that a radio broadcaster had violated the fairness mandate by refusing to provide broadcast time for someone claiming he had been personally attacked in the station’s programming. Rejecting a challenge that the doctrine violated broadcasters’ free speech rights, the Court declared:

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. . . .

. . . .

. . . Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor

23. *Id.* at 226.

24. *Id.* at 219.

25. 309 U.S. 134 (1940).

26. *NBC*, 319 U.S. at 216 (quoting *Pottsville Broad. Co.*, 309 U.S. at 138).

27. 395 U.S. 367 (1969).

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of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.²⁸

With *NBC* and *Red Lion*, curtailment of broadcasters' free speech rights, justified on the basis of spectrum scarcity, was firmly embedded in constitutional jurisprudence. Despite some periodic teases, the Supreme Court has yet to overturn *Red Lion*.²⁹ Thus, *Red Lion* has prevailed even though today there are thousands more broadcasting stations on the air than in 1969, not to mention the proliferation of new media outlets that did not then exist, such as cable and satellite systems with hundreds of channels of video and audio programming, and DVDs, iPods, mobile devices, and the Internet.

Although claimed spectrum scarcity has provided the primary justification for the broadcast model's free speech curtailment, it is worth noting that the Supreme Court has employed another rationale. In 1978, in *FCC v. Pacifica Foundation*,³⁰ the Court, split 5-4, upheld in a narrowly drawn opinion the FCC's determination that it could sanction a radio station that broadcast George Carlin's "Filthy Words" monologue,

28. *Id.* at 388, 390.

29. For an early hint that the scarcity rationale might be undermined in the future, see *CBS v. Democratic National Committee*, 412 U.S. 94, 102 (1973) (plurality opinion), noting, "[T]he broadcast industry is dynamic in terms of technological change" so that "solutions adequate a decade ago are not necessarily so now, and those acceptable today may be outmoded 10 years hence." *See id.* at 158 n.8 (Douglas, J., concurring in the judgment) ("Scarcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*. It has been predicted that it may be possible within 10 years to provide television viewers 400 channels through the advances of cable television."). For a later hint, see *FCC v. League of Women Voters*, 468 U.S. 364, 377 n.11 (1984), stating, "We are not prepared . . . to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *See generally* Yoo, *supra* note 10, at 284-88.

30. 438 U.S. 726 (1978).

which the agency determined to be “indecent.”³¹ In rejecting the broadcaster’s First Amendment challenge, the Supreme Court, citing *Red Lion*, pointed out that “a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve ‘the public interest, convenience, and necessity.’”³² Then, the Court offered two non-spectrum scarcity rationales: “First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.”³³ As a second rationale, the Court maintained that “broadcasting is uniquely accessible to children,” unlike other forms of offensive expression that “may be withheld from the young without restricting the expression at its source.”³⁴

The *Pacifica* Court did emphasize the “narrowness”³⁵ of the holding, one in which “context is all-important.”³⁶ And Justice Powell, in his concurrence joined by Justice Blackmun that supplied the two votes necessary for a majority, emphasized the “narrow focus” of the Court’s opinion.³⁷ Relevant to the *Fox Television* case, to be decided this Term in the Supreme Court, he pointed out that the offensive language in the Carlin monologue “was repeated over and over as a sort of verbal shock treatment.”³⁸ Nevertheless, *Pacifica* cemented the notion that broadcasters enjoyed—or suffered—diminished First Amendment rights. As the *Pacifica* Court concluded: “[O]f all the forms of communication, it is broadcasting that has received the most limited First Amendment protection.”³⁹ There you have a concise

31. *Id.* at 732. For authority, the FCC relied on the statute that prohibits the use of “any obscene, indecent, or profane language by means of radio communication.” 18 U.S.C. § 1464 (2006).

32. *Pacifica Found.*, 438 U.S. at 748.

33. *Id.*

34. *Id.* at 749.

35. *Id.* at 750.

36. *Id.*

37. *Id.* at 756 (Powell, J., concurring in part and concurring in the judgment).

38. *Id.* at 757.

39. *Id.* at 748 (majority opinion).

summary of the twentieth century's jurisprudence under the "broadcast model."

Not much has changed from a jurisprudential perspective since Justice Jackson observed in *Kovacs v. Cooper*⁴⁰ that each of the different communications media represents a "law unto itself."⁴¹ On the one hand, any speech restrictions affecting the print media receive very strict scrutiny. In the leading case of *Miami Herald Publishing Co. v. Tornillo*,⁴² the Court unanimously held that a Florida statute requiring a newspaper to publish a reply to an editorial that criticized a political candidate violated the First Amendment.⁴³ So, *Tornillo* constituted an unequivocal rejection of the assertion that a *Red Lion*-like "right of access" regime—a fairness doctrine, if you will—should be applied to newspapers in the interest of enhancing the speech rights of newspaper readers. The Court had no trouble holding the Florida "right of reply" statute unconstitutional even as it declared that "[c]hains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events."⁴⁴ The "scarcity" rationale that served as the basis for curtailing the broadcasters' First Amendment rights held no sway with respect to newspapers.

On the other hand, in the 1994 *Turner Broadcasting System, Inc. v. FCC*⁴⁵ case, the Court rejected a First Amendment challenge to a "right of access" mandate in a 5-4 decision.⁴⁶ Having in mind the government's argument that "free" over-the-air television service provided by local broadcast stations deserved special protection, the majority refused to invalidate, at least on its face, a law requiring cable operators to carry local

40. 336 U.S. 77 (1949).

41. *Id.* at 97 (Jackson, J., concurring).

42. 418 U.S. 241 (1974).

43. *Id.* at 256-58.

44. *Id.* at 249.

45. 512 U.S. 622 (1994).

46. *Id.* at 661-62.

broadcast signals.⁴⁷ The Court acknowledged that the burdens and obligations imposed by the “must-carry” mandate ultimately implicated cable operators’ free speech rights.⁴⁸ Nevertheless, the Court applied an “intermediate level of scrutiny”⁴⁹ and asserted cable operators possessed a marketplace “bottleneck” that allowed them to play a “gatekeeper” role with respect to programming entering subscribers’ homes,⁵⁰ thereby rejecting the argument that the *Tornillo* print model, which applied strict scrutiny to speech restrictions, should govern. It is important to note that in rejecting application of the First Amendment print model, the Court did not place any reliance on the spectrum scarcity rationale at the heart of *Red Lion*.

Finally, thus far at least, the Court has reviewed content-based restrictions applied to the Internet under a strict scrutiny standard akin to that applied to the print media. In the 1997 leading case, *Reno v. ACLU*,⁵¹ the Court struck down on First Amendment grounds a law regulating “indecent” communications on the Internet.⁵² In doing so, the Court declared, “unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a ‘scarce’ expressive commodity.”⁵³

47. *Id.* at 662-63, 665-68.

48. *See id.* at 641.

49. This is not the place, nor would there be space, to discuss the Court’s tortured constitutional “standards” jurisprudence, even with respect to the First Amendment. Suffice it to say that in *Turner*, a key to the employment of intermediate rather than strict scrutiny was Justice Kennedy’s determination for the majority that the “must carry” requirement was content-neutral. In dissent, Justice O’Connor argued the carriage requirement was in fact a content-based restriction because it was directed at “local” broadcast station content. *Id.* at 676-78 (O’Connor, J., concurring in part and dissenting in part).

50. *Id.* at 656 (majority opinion).

51. 521 U.S. 844 (1997).

52. *Id.* at 849.

53. *Id.* at 870.

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III. THE WAY FORWARD: A CONSTITUTIONAL JURISPRUDENCE FOR THE DIGITAL ERA

In today's competitive and converging digital environment, it is time for the Court finally to abandon the scarcity rationale used in *Red Lion* to justify limited First Amendment protection for radio and television broadcasters. In *Red Lion's* place, the Court should articulate a jurisprudence that generally affords the various forms of electronic media the same strict First Amendment protection that newspapers receive under *Tornillo* and that the Internet receives under *Reno*. There will always be special considerations presented by laws or regulations defended on the basis that they are intended to protect children from harmful content, and the government's interest in this respect is certainly legitimate. But in today's digital environment, much more so than in the past, parents have available easy-to-use filtering and blocking tools to screen out offensive content, whether such content is delivered via broadcasting, cable, satellite, or the Internet. The widespread availability of such screening tools surely constitutes a "less restrictive alternative" to content regulation that should render *Pacifica's* "uniquely pervasive" and "uniquely accessible to children" rationales largely historical relics. The *Pacifica* Court was wise at the time "to emphasize the narrowness" of its holding.⁵⁴

A. The Public Interest Standard

Before elaborating more fully on the way forward for a new First Amendment jurisprudence for the electronic media, a word is in order concerning the public interest standard under which so much of the FCC's regulatory activity, including content regulation, takes place.⁵⁵ In the leading case of *J. W. Hampton, Jr. & Co. v. United States*,⁵⁶ the Supreme Court, although there

54. *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978).

55. Congress has directed or authorized the FCC to act in the public interest in nearly one hundred separate statutory provisions. See Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L.J. 427, 429, app. A (2001) [hereinafter May, *The Public Interest Standard*].

56. 276 U.S. 394 (1928).

rejecting a nondelegation doctrine challenge to a tariff statute, affirmed: “If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates be directed to conform, such legislative action is not a forbidden delegation of legislative power.”⁵⁷ Although the Court has not held a statute unconstitutional on nondelegation doctrine grounds since 1935, when it did so twice,⁵⁸ it has continued to maintain that, in order not to violate fundamental separation of powers principles, there must be an “intelligible principle” set forth in every statute delegating congressional authority.⁵⁹

With respect to the Communications Act’s “public interest” delegation, the Supreme Court’s jurisprudence is incongruous and unsatisfactory. In *Mistretta v. United States*,⁶⁰ Justice Scalia, in dissent, proclaimed: “It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature.”⁶¹ Nevertheless, he observed, without expressing disapproval, that the “vague” public interest standard has withstood constitutional challenge.⁶² And, in *Whitman*, now writing for the majority, Justice Scalia once again cited the public interest standard as an indication of how far the Court has been willing to go in sustaining vague delegations.⁶³

The fact is that it is difficult, if not impossible, to square the indeterminate public interest standard, with the “intelligible principle” requirement to which the Court continues to pay lip service. Shortly after the passage of the Federal Radio Act, upon which the Communications Act was modeled, the agency’s first general counsel stated: “Public interest, convenience, or

57. *Id.* at 409.

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

59. For the most recent discussion of this principle, see *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472-73 (2001).

60. 488 U.S. 361 (1989).

61. *Id.* at 415 (Scalia, J., dissenting).

62. *Id.* at 416.

63. *Whitman*, 531 U.S. at 474-75.

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necessity' means about as little as any phrase that the drafter of the Act could have used"⁶⁴ Another way of expressing, accurately, the same thought is to say the standard means whatever a majority of the agency's commissioners say it means on any given day.

I have argued in a much more extensive treatment that the public interest delegation ought to be held unconstitutional as a violation of the nondelegation doctrine's requirement that Congress lay down an intelligible principle, and I refer the reader to that article.⁶⁵ Constitutional law scholar Gary Lawson has called the public interest standard, "[e]asy kill number 1," as an example of a provision that should be held unconstitutional on nondelegation grounds.⁶⁶ At its next opportunity, the Court should reconsider those cases that have held the public interest standard constitutional. Doing so would force Congress to provide more policy direction for a so-called independent regulatory agency increasingly at sea in the new digital environment. And, in furtherance of the separation of powers principles which underlay the nondelegation doctrine, doing so would make Congress more politically accountable for establishing—or, perhaps, for failing to establish—sound communications policy direction.

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

Red Lion's scarcity rationale was suspect in one sense on the day it was rendered and in another not long thereafter. As Ronald Coase explained in his famous article ten years before *Red Lion*, all resources, not just spectrum, "are limited in amount and scarce, in that people would like to use more than exists."⁶⁷

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

65. See May, *The Public Interest Standard*, *supra* note 55, at 443-52.

66. Gary Lawson, *Delegation and the Constitution*, REG., Summer 1999, at 23, 29, available at <http://www.cato.org/pubs/regulation/regv22n2/delegation.pdf>.

67. R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959).

Indeed, the extent to which spectrum is more or less scarce is impacted greatly by the government's regulatory decisions in allocating frequencies. So nicely put by Christopher Yoo, "because the amount of spectrum available at any moment is itself a product of regulation, any reliance on spectrum scarcity in effect allows the regulation to serve as a constitutional justification for other regulations."⁶⁸ And, as Coase and many other scholars have pointed out, the so-called spectrum scarcity problem underpinning the *NBC* and *Red Lion* decisions would not exist, at least in the sense asserted, if Congress did not prohibit the emergence of an enforceable property rights regime. Under a property rights regime, claims concerning spectrum interference would be resolved through established marketplace mechanisms or through litigation resolving contract or tort-like claims. Then, the notion of spectrum scarcity as a justification for the government to regulate program content under the indeterminate public interest standard would be eviscerated.

Even putting aside the classical Coasian economic argument against spectrum scarcity,⁶⁹ the communications marketplace has changed so radically since *Red Lion* was decided that the scarcity rationale should be jettisoned as a justification for continued diminished First Amendment protection. The *Red Lion* Court itself acknowledged the pace of "technological advances," but thought it "unwise to speculate" as to how such advances might alter the scarcity calculus.⁷⁰ The fact is, as a practical matter, technological advances have rendered obsolete the notion of a scarcity of media outlets. We live in an age of media abundance rather than an age of scarcity.

Without trying to paint a complete landscape here,⁷¹ consider

68. Yoo, *supra* note 10, at 251; *see also* Hazlett, *supra* note 11, at 133-34.

69. It is pertinent to point out here that the Court in *Red Lion* based its decision firmly on what it referred to as "a technological scarcity of frequencies," thus allowing it to avoid dealing with the "economic scarcity" argument. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 401 n.28 (1969).

70. *Id.* at 399.

71. There is simply not space to do so. The figures presented in this paragraph are well known. For a book with lots of facts and figures and tables and charts documenting the extent to which the media landscape has changed since *Red Lion*, see generally ADAM D. THIERER, THE PROGRESS & FREEDOM FOUNDATION, MEDIA MYTHS: MAKING SENSE OF THE DEBATE OVER MEDIA

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this. When *Red Lion* was decided in 1969, in addition to the daily newspaper and other print media, most Americans got their news and other information from the over-the-air broadcast stations affiliated with the then three major networks, ABC, CBS, and NBC, and a few other television and radio stations serving their communities. In 1970, one year after the *Red Lion* decision, there were 875 television stations and 6,751 radio stations. In 2004, there were 1,747 television stations and 13,476 radio stations.⁷² Today, over ninety percent of Americans subscribe to either multi-channel cable or satellite services, on average receiving over a hundred separate information and entertainment channels. There are over three hundred different national program networks from which cable and satellite subscribers may choose. In addition to cable and satellite television, there is now satellite radio, which offers hundreds of information and entertainment program channels. As the FCC said back in 2003, “[w]e are moving to a system served by literally hundreds of networks serving all conceivable interests.”⁷³ Since then, more individual networks have emerged. The switchover to digital television will lead to still more over-the-air television program channels. And, of course, today’s broadband Internet services are a key development in terms of further enhancing access to thousands of additional information sources. We truly live in an age of information abundance.

The Roberts Court should seize the first opportunity to chart a new jurisprudential course that provides broadcasters, as well as other electronic media, including cable, satellite, wireless, and broadband Internet providers, with First Amendment protections that are on par with those traditionally enjoyed by the print media. In other words, government content restrictions applicable to the various electronic media, regardless of the technological platform used to deliver content, would be subject

OWNERSHIP (2005), available at <http://www.pff.org/issues-pubs/books/050610mediamyths.pdf>. For much data on the increasing number of information sources since *Red Lion*, see especially Chapter One, “Death of Diversity or Age of Abundance.”

72. *Id.* at 31 tbl.5.

73. 2002 Biennial Regulatory Review of the Commission’s Broadcast Ownership Rules, FCC 03-127, June 2, 2003, at 48.

to the same strict scrutiny the Court employed in *Tornillo* in holding unconstitutional a newspaper “right of reply” mandate. This would mean, whether explicitly or in some less direct fashion, overturning *Red Lion* and *Turner Broadcasting*. With the availability of today’s various parent-empowering blocking and filtering technologies, including, for example, the V-chip now embedded in every television set, it would not be difficult for the Court, were it so inclined, to acknowledge *Pacifica*’s “uniquely pervasive” and “uniquely accessible to children” rationales have much diminished force as justifications for content regulation.

A few times since *Red Lion*, the Court has indicated receptivity to revisiting the decision. For example, almost a quarter a century ago, in *FCC v. League of Women Voters*,⁷⁴ the Court acknowledged, “[c]ritics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete.”⁷⁵ But on this and other occasions, while taking note of the doctrine’s possible obsolescence, the Court has refused to bury it. It is time to do so. The Court could recognize that it erred in a fundamental way at the time, and before, in not recognizing that spectrum, in an economic sense, is no scarcer than other resources. Or perhaps more palatably, it could acknowledge that advances have rendered obsolete the

74. 468 U.S. 364 (1984).

75. *Id.* at 376-77 n.11. In 1998, yet another FCC Commissioner (and soon-to-be FCC Chairman) declared: “I believe that any attempt to consider how changes in technology and the regulatory environment affect public interest obligations, necessarily must include a review of the underpinnings of current First Amendment jurisprudence. . . . I submit the time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today’s communications marketplace.” Michael K. Powell, Comm’r, Fed. Commc’ns Comm’n, Willful Denial and First Amendment Jurisprudence, Remarks Before the Media Institute, Washington, D.C. (Apr. 22, 1998), available at <http://www.fcc.gov/Speeches/Powell/spmcp808.html>. Commissioner Powell went on to state: “Most importantly, the advances in technology have been astonishing since the time of *Red Lion*. Digital convergence, rather than reinforcing the unique nature of broadcasting, has blurred the lines between all communications medium [sic]. . . . Even this brief overview of the marketplace makes the reasoning of *Red Lion* seem almost quaint . . .” *Id.* Remember, these remarks were delivered over a decade ago.

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“technological scarcity” upon which *Red Lion* was premised. In either case, the Court would acknowledge that the scarcity rationale’s obsolescence means that content regulation based on it cannot withstand First Amendment challenge.

Fortuitously, the opportunity to emphasize the limited continuing relevance, if not outright irrelevance, of *Pacifica* may be at hand. In March 2008, the Supreme Court granted certiorari to review the Second Circuit’s decision in the *Fox Television Stations* case holding that a new FCC policy sanctioning “fleeting expletives” is arbitrary and capricious under the Administrative Procedure Act” for failure to articulate a reasoned basis for the change in policy.⁷⁶ Prior to announcing its new policy, the agency required more than fleeting or isolated use of expletives such as “fuck” and “shit” to find a violation of the indecency statute. Under the new policy, isolated uses of these words were presumptively subject to indecency sanction, with the broadcaster bearing the burden to show that they were not.

While the court of appeals based its decision on traditional administrative law grounds, it went on in dicta to “question whether the FCC’s indecency test can survive First Amendment scrutiny.”⁷⁷ The court stated: “[W]e are sympathetic to the Networks’ contention that the FCC’s indecency test is undefined, indiscernible, inconsistent, and, consequently, unconstitutionally vague.”⁷⁸ Taking note that new filtering and blocking technologies might provide “less restrictive alternative[s]” to achieve the government’s interest in protecting children than outright banning of speech, the Court observed that “[it] would be remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and, at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television.”⁷⁹

76. See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 447 (2d Cir. 2007), cert. granted, 128 S. Ct. 1647 (2008). The case was argued in the Court on November 4, 2008.

77. *Id.* at 463.

78. *Id.*

79. *Id.* at 465.

The government asserts in its brief that the Second Circuit's decision conflicts with the breadth of the FCC's authority recognized in *Pacifica* to enforce the statute prohibiting "indecent" broadcasts,⁸⁰ and that, because the adequacy of the Commission's explanation was the only issue on which the appellate court based its reversal, there is no need for the Supreme Court to reach the constitutional issue.⁸¹ But, Fox Television and other parties urge the Court to address head-on the First Amendment issues the Second Circuit discussed. Fox states:

While petitioners would have the Court ignore those issues, the regulation of "indecent" speech necessarily implicates core First Amendment values, and the administrative law analysis simply cannot be divorced from the constitutional one. A change in policy that results in the restriction of a greater amount of speech—as the change in this case undoubtedly does—must be justified not only by a "reasoned explanation," but also by proof that the policy represents the "least restrictive" means to address a real, established harm. . . .

. . . In the 30 years since *Pacifica*, legal and technological developments have eroded the underpinnings of the *Pacifica* decision, which make an expansion of the indecency regime especially suspect.⁸²

Interestingly, an amicus curiae brief submitted by a group of former FCC officials, including three former FCC Chairmen and one former FCC Commissioner, urges the Court to affirm the Second Circuit's decision.⁸³ They too urge the Court to reach the

80. See *supra* note 31 and accompanying text; see also 18 U.S.C. §1464 (2006).

81. See Brief for the Petitioners at 19-20, *FCC v. Fox Television Stations, Inc.*, No. 07-582 (U.S. June 2, 2008) ("And there is no reason for this Court to depart from its customary practice and reach out to decide constitutional questions not passed on below.").

82. Brief for Respondent Fox Television Stations, Inc. at 17-18, *FCC v. Fox Television Stations, Inc.*, No. 07-582 (U.S. Aug. 1, 2008) (internal citations omitted).

83. See Brief for Amici Curiae Former FCC Commissioners and Officials in Support of Respondents, *FCC v. Fox Television Stations, Inc.*, No. 07-582, (U.S.

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First Amendment question:

[W]e do not believe the question of administrative arbitrariness can be isolated from the deeper free speech issues that lie at the heart of this controversy. The Government's attempt to frame the issue before this Court as simply one of administrative procedure ignores what the court of appeals made clear: the issue of reasoned analysis is inextricably bound up with a fundamental constitutional question. While the court labeled its treatment of the First Amendment issue as *dicta*, it clearly expressed its judgment that the FCC's failure to offer a reasoned explanation for its new "fleeting expletive" regime" was not merely a procedural defect but was a constitutional defect as well.⁸⁴

Of course, it is not clear now whether the Court will reach the First Amendment question in deciding the *Fox* case. Despite the pleas to the contrary, it is certainly possible it could dispose of the case without doing so. But if the Court does reach the constitutional issue, in my view, it should use the opportunity to further restrict *Pacifica's* already narrow holding. The Court has an opportunity to restore at least some, if not all, of broadcasters' long lost free speech rights.

As for cable (and satellite) operators, whatever *Turner Broadcasting's* merits when it was decided, these providers should now receive full First Amendment protection. Recall that the Court freely acknowledged cable operators' free speech rights were implicated by the "must carry" mandate.⁸⁵ But, in ultimately refusing to hold the mandate unconstitutional after a fact-finding remand, the Court relied heavily on Congress's judgment that local stations providing "free" over-the-air television deserved special economic protection.⁸⁶ Today, with many more media outlets available, along with the Internet, the justification, if ever there were any, for providing special protection to local broadcasters at the expense of cable operators' First Amendment rights is even more problematic. In *Turner*,

Aug. 8, 2008). Two of the former Commissioners joined in the FCC's original *Pacifica* decision that was ultimately affirmed by the Supreme Court.

84. *Id.* at 3-4.

85. See *supra* text accompanying note 48.

86. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185, 224-25 (1997).

the Court viewed cable operators as possessing a control different in kind than the “monopoly status” it acknowledged in *Tornillo* that most newspapers enjoyed in increasingly prevalent “one-newspaper towns.”⁸⁷ The *Turner* Court stated:

[T]he physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber’s home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude.⁸⁸

Although it is doubtful that by the mid-1990s cable operators continued to have such dominance as to justify the “bottleneck” or “gatekeeper” tag, it is simply not the case today that they can control the video programming which enters a subscriber’s home. Cable companies compete vigorously with satellite operators that provide hundreds of channels and, increasingly and more ubiquitously, with “telephone” companies that now offer hundreds of channels of programming over high-capacity networks. And, the Internet is the root of virtually unlimited information sources, including audio and video. More and more people watch the latest “television” programs on their “cellphones.”

Turner was a close 5-4 decision. When the occasion next arises, the Court should indicate, in light of the changed communications marketplace, the decision’s rationale has been undermined and cable operators are entitled to enjoy the same First Amendment rights as newspapers.

IV. CONCLUSION

While not likely any time soon, perhaps one day the Supreme Court will breathe some new life into the nondelegation doctrine by holding that the indeterminate public interest standard which

87. See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 249 (1974); see also *supra* text accompanying note 44.

88. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 656 (1994).

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is at the core of the Communications Act does not contain the requisite “intelligible principle” to guide agency action. Hopefully sooner rather than later, the Court will revisit *Red Lion*, *Pacifica*, and *Turner* in order to establish a new First Amendment paradigm for the electronic media, one that is much more in keeping with the founders’ First Amendment vision. It may even move in this direction this Term upon its *Fox Television* decision.

Perhaps it was predictable, maybe even likely, that the First Amendment’s protections would be limited substantially during the twentieth century’s Analog Age that tended towards a monopolistic or oligopolistic communications marketplace. But now, in the face of proliferating competitive alternatives attributable to profound marketplace and technological changes, it ought to be considered predictable and yes, even likely, for the Court to establish a new First Amendment jurisprudence befitting the media abundance of the twenty-first century’s Digital Age.