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*MEDIA BUREAU STAFF RESEARCH PAPER*

The Scarcity Rationale For  
Regulating  
Traditional Broadcasting:  
An Idea Whose Time Has Passed

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March 2005

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**The Scarcity Rationale  
for Regulating  
Traditional Broadcasting:  
An Idea Whose Time Has Passed**

JOHN W. BERRESFORD\*

FEDERAL COMMUNICATIONS COMMISSION

**Abstract**

This paper concludes that the Scarcity Rationale for regulating traditional broadcasting is no longer valid. The Scarcity Rationale is based on fundamental misunderstandings of physics and economics, efficient resource allocation, recent field measurements, and technology. It is outmoded in today's media marketplace. Perhaps in recognition of the Rationale's flaws, many variations of it have been attempted, but none fares much better under sensible, factual analysis.

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## I. The Scarcity Rationale

In the formative decades of broadcasting in the United States, an idea took hold that governed AM and FM radio and VHF and UHF TV<sup>1</sup> provided by use of radio spectrum. The idea was that these traditional broadcasters should be regulated by the government because radio spectrum was scarce.<sup>2</sup> This idea, still in effect today, became known as The Scarcity Rationale.

Seeds of the idea can be found almost at the beginning of radio regulation,<sup>3</sup> but a lengthy explanation of it appeared first in the United States Supreme Court's 1943 decision, *NBC v. United States*. The Court started with a factual premise, namely

certain basic facts about radio as a means of communication -- its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another.<sup>4</sup>

The *NBC* Court wanted government – specifically, the FCC – to be more than “a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other.”<sup>5</sup> Rather, the Court stated, the FCC should play an intrusive role in traditional broadcasting, that of “determining the composition of . . . traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.”<sup>6</sup>

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<sup>1</sup> This paper uses the term “traditional broadcasters” to refer to these broadcasters. The unqualified term “broadcaster” can refer also to cable TV, Direct Broadcast Satellite (“DBS”), the Internet (including web pages, web portals, radio stations that are available on the Internet, and file-sharing platforms), and Digital Audio Radio Service (“DARS”) operators. The broader term “the media” includes broadcasters and creators of newspapers, magazines, movies (in theatres and via purchase and rental in stores, by mail, and on the Internet), and recorded music in the form of tapes, CDs and DVDs.

<sup>2</sup> The regulators were the Secretary of Commerce until 1927, the Federal Radio Commission (“FRC”) from 1927 to 1934, and the Federal Communications Commission (“the FCC” or “the Commission”) from 1934 to date. All were under the supervision of the President and Congress.

<sup>3</sup> See, e.g., Opening Address of Secretary of Commerce Herbert C. Hoover at the Fourth National Radio Conference, Washington, D.C., Nov. 9, 1925 (“It is a simple physical fact that we have no more channels. . . . A half dozen good stations in any community operating full time will give as much service in quantity and a far better service in quality than 18, each on one-third time”); *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933) (“In view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses”); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940) (“The number of available radio frequencies is limited. . . . Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone”).

<sup>4</sup> *NBC v. United States*, 319 U.S. 190, 213 (1943) (“*NBC*”).

<sup>5</sup> *Id.*, 319 U.S. at 215.

<sup>6</sup> *Id.* at 216.

In the late 1960s, in *Red Lion Broadcasting Co. v. FCC*, the Court re-affirmed The Scarcity Rationale. Again, the Court stated the premise, that “because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few.”<sup>7</sup> The *Red Lion* Court characterized traditional broadcasters as “proxies for the entire community, obligated to give suitable time and attention to matters of great public concern.”<sup>8</sup> The Court held that “[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.”<sup>9</sup>

## II. The Consequences of the Scarcity Rationale

The fact that only a finite amount of spectrum use was allowed for traditional broadcasting, without more, did not require intrusive regulation. Merely an allocation system, defining and awarding exclusive rights to use certain frequencies,<sup>10</sup> would have sufficed to ‘choose from among the many who apply.’<sup>11</sup> Like any allocation system, this one would need clearly defined rights, a police force, and a dispute resolution system for allegations of interference, unauthorized operations, and other misconduct.

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<sup>7</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969) (“*Red Lion*”). See also *id.* at 399 (“spectrum space” is a resource “of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress”).

<sup>8</sup> *Id.* at 394.

<sup>9</sup> *Id.* at 390. For more recent statements, see *FCC v. Pacifica Foundation*, 438 U.S. 726, 731 n.2 (1978) (“*Pacifica*”) (“there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest”); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 101-02 (1973) (“*CBS v. DNC*”) (“Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated”); *Banzhaf v. FCC*, 405 F.2d 1082, 1099 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) (“*Banzhaf*”).

<sup>10</sup> Section 301 of the Communications Act (47 U.S.C. § 301), like its predecessor, forbids *ownership* of “channels of radio transmission.”

<sup>11</sup> See *NBC*, 319 U.S. at 216. See also *Syracuse Peace Council*, 2 FCC Rcd 5043, 5068 n.201 (1987) (“the fact that government may license broadcasters to use frequencies in order to minimize interference, and thus to maximize the effective dissemination of speech through the electromagnetic spectrum, does not justify content regulation”), *affirmed*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

The chosen allocation system could have been first-come-first-served (originally called “squatters rights”), lotteries, prices or, as Congress and the FCC chose, political-administrative decisions. See Lee C. Bollinger, *IMAGES OF A FREE PRESS* at 89 (Univ. of Chicago Press, Chicago IL, 1994). In addition, some spectrum use might be reserved for necessary activities that the market would not provide in adequate amount, such as children’s educational broadcasting, 47 U.S.C. § 394.

Armed with The Scarcity Rationale, however, the FCC followed the Supreme Court's urging to 'determine the composition of the traffic'<sup>12</sup> and make traditional broadcasters 'proxies for the entire community.'<sup>13</sup> The FCC put a large number of regulations on traditional broadcasters.<sup>14</sup> These were believed to promote good results such as balanced debate about important issues, the education of children and their protection from indecent content, adequate local service for rural areas, the promotion of locally created programming and diverse kinds of programs, racial integration, the empowerment of women, and competition among creators of programming. To further these public policy goals, the government relied on The Scarcity Rationale to justify depriving traditional broadcasters of many freedoms that ordinary businesses have.<sup>15</sup> Perhaps most important, The Scarcity Rationale was thought to justify making the First Amendment<sup>16</sup> rights of traditional broadcasters less than those of providers of newspapers, books and magazines, movies, live performances, and cable and satellite broadcasters.<sup>17</sup>

Regulations covered many aspects of operating a traditional broadcast business. First and perhaps most important, entry into traditional broadcasting was limited to those who could fit within the allocation that the FCC had made for that activity.<sup>18</sup> Their

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<sup>12</sup> See *NBC*, 319 U.S. at 216.

<sup>13</sup> See *Red Lion*, 395 U.S. at 394.

<sup>14</sup> For simplicity, all regulations, whether in the form of rules, decisions in individual cases, or guidelines will be referred to by the all-encompassing term "regulations." This paper does not address explicit statutory obligations, such as ones about children's television (47 U.S.C. §§ 303a *et seq.*), facilities for candidates for public office (47 U.S.C. § 315), and programming of an educational or informational nature (47 U.S.C. § 335(b)(1)).

<sup>15</sup> The Scarcity Rationale, even if it is valid, does not allow any and all regulation of traditional broadcasters. See, e.g., *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1110 n.17 (D.C. Cir. 1978) (en banc) ("Where government licensing and regulation is premised on the scarcity of a medium of communication, then even noncoercive and seemingly voluntary contracts or grants by which government uses that medium to express or enforce a point of view must be strictly scrutinized").

<sup>16</sup> The First Amendment to the U.S. Constitution provides: The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. Amend. I.

<sup>17</sup> Traditional broadcasters have substantial First Amendment rights. *FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984) ("*League of Women Voters*") ("broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties") (quotations and brackets omitted); *CBS v. DNC*, 412 U.S. at 110 (1973) ("Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations"), 124 (referring to broadcasters as "editors"); *Red Lion*, 395 U.S. at 386 ("broadcasting is clearly a medium affected by a First Amendment interest"); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) ("We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment").

Recently, it has been suggested that the response to any scarcity that would be most consistent with the First Amendment would be not regulation of few broadcasters, but the allocation of more spectrum for broadcasting. Stuart M. Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1 (2002).

<sup>18</sup> Entry was also limited by FCC rules that specified the coverage areas of individual broadcasters, the separation between their licensed frequencies, and many other seemingly technical matters.

numbers, originally, were few.<sup>19</sup> The FCC carefully chose the few who would be given a frequency license and the many who would be denied one.

In using its licensing power to limit entry into traditional broadcasting, the FCC joined the ranks of governments that limited the right to speak to a large audience. When printing presses were first used in Western Europe, for example,

Pope Alexander VI issued a bull in 1501 against the unlicensed printing of books. In 1559 the *Index Expurgatorius*<sup>[20]</sup> was first issued. Printing was by then widespread enough to worry the authorities and centralized enough to present a target for control. . . . In 1557, the British crown, seeking to check seditious and heretical books, chartered the Stationers' Company and limited the right to print to the members of that guild. Thirty years later the Star Chamber, to curtail 'greate enormities and abuses' of 'dyvers contentyous and disorderlye persons professinge the arte or mystere of Pryntinge or sellinge of bookes,' restricted the right to print to the two universities and to the twenty-one existing shops in the city of London with their fifty-three presses.<sup>21</sup>

Until 1695, the British Parliament required that all publications receive prior approval by a government censor. This was required for newspapers in the American colonies until 1720. Even after prior censorship ended in the United Kingdom and the United States, laws against sedition and blasphemous libel "remained in force and served as significant restraints on publication."<sup>22</sup>

In 20<sup>th</sup> century America, the FCC and its predecessors used their licensing powers to marginalize or shut down "propaganda" radio broadcasters that promoted

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<sup>19</sup> The Federal Radio Commission spent its first years reducing the number of broadcasters by a substantial amount. FRC FIRST ANNUAL REPORT at 2, 9 (1927) (opining that "at least 400" of 732 stations would have to be eliminated); FRC SECOND ANNUAL REPORT at 16 (1928) (noting that 62 stations were "deleted" wholly or partly because of FRC action). The Washington, D.C., Evening Star of July 20, 1937, at B-6, lists only four radio stations, all AM. The authoritative database of BIA Financial Network, Inc., now lists 26 within virtually the same AM frequency ranges.

<sup>20</sup> *Index Expurgatorius* was "a catalogue of books from which passages marked as against faith or morals must be removed before Catholics can read them." Webster's Revised Unabridged Dictionary (1913), <http://index.prohibitorius.word.sytes.org/> (visited Feb. 2, 2004).

<sup>21</sup> Ithiel de Sola Pool, *TECHNOLOGIES OF FREEDOM* at 14-15 (Harvard Univ. Press, Cambridge MA, 1983) ("Pool"). See also Theodore F.T. Plucknett, *A CONCISE HISTORY OF THE COMMON LAW* at 498-500 (Little, Brown & Co., Boston MA, 1956) (in Tudor England, "succeeding statutes settled a policy of treating printing as an overt act of treason" and in Stuart England, "the High Commission . . . took the view that all printing, however innocent, was a crime unless the work had been previously licensed").

<sup>22</sup> Richard D. Brown, *Early American Origins of the Information Age*, in Alfred D. Chandler, Jr., & James W. Cortada (Eds.), *A NATION TRANSFORMED BY INFORMATION: HOW INFORMATION HAS SHAPED THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT* at 40 (Oxford University Press, New York NY, 2000) ("Chandler & Cortada"). Other histories of governments using licensing powers to suppress speech are cited in *Near v. Minnesota*, 283 U.S. 697, 713-18 (1931). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 273-76 (1964) (detailing American discouragement of criminal libel actions by government officials against publications critical of them).



only the broadcasters' ideas.<sup>23</sup> According to some, the FCC's "Fairness Doctrine" was used more recently "to challenge and harass right-wing broadcasters"<sup>24</sup> and probably had the net effect of suppressing speech about controversial issues.<sup>25</sup>

In choosing the few persons who would be allowed entry into traditional broadcasting, the FCC considered the kinds of programming that would-be entrants would broadcast,<sup>26</sup> their technical and financial resources,<sup>27</sup> the closeness of their connections to the community they would serve,<sup>28</sup> and their races, ethnic origins and sexes.<sup>29</sup> The FCC also denied entry to certain persons who were already in the media -

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<sup>23</sup> See, e.g., FRC SECOND ANNUAL REPORT at 169 (1928) (sending a "word of warning" to "those broadcasting (of which there have been all too many) who consume much of the valuable time allotted to them under their licenses in matters of a distinctly private nature, which are not only uninteresting but also distasteful to the listening public"); FRC THIRD ANNUAL REPORT at 34 (1929) ("Propaganda stations . . . are not consistent with the most beneficial sort of discussion of public questions"); Susan J. Douglas, *INVENTING AMERICAN BROADCASTING, 1899-1912* at 316 ("the low power stations belonged to . . . labor unions") (The Johns Hopkins Univ. Press, Baltimore MD, 1989); Robert W. McChesney, *TELECOMMUNICATIONS, MASS MEDIA, & DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928-1935 passim* (Oxford Univ. Press, New York NY, 1993); Pool, *supra* note 21, at 125 ("the New York socialist station WEVD was given low power and relegated to a poor position on the dial, where it had to share time with eleven other stations. WCFL, the Chicago labor station, likewise had low power, so that its reception was interfered with by two Westinghouse stations").

<sup>24</sup> Fred W. Friendly, *THE GOOD GUYS, THE BAD GUYS & THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING* at 32-42 (Random House, New York NY, 1977).

<sup>25</sup> *Syracuse Peace Council*, 2 FCC Rcd at 5049-50 ¶¶ 42-51, citing *General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 169-90 (1985) ¶¶ 42-71. See also Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEG. STUD. 279, 299 (1997) ("Hazlett & Sosa") ("The evidence suggests that the 1987 elimination of the [Fairness Doctrine] had a pronounced effect on radio station formats -- in favor of informational programming"). 301 ("The data suggest that even in the absence of free entry, informational programming increased with the lifting of regulatory burdens. This is evidence that the old rules indeed provided a disincentive to broadcasting informational programs").

In *Red Lion*, the Supreme Court upheld the Constitutionality of the Fairness Doctrine in part because the FCC doubted that the Doctrine would suppress traditional broadcasters' discussion of controversial public issues. *Red Lion*, 395 U.S. at 393 ("if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications"). If the Court had known that the Fairness Doctrine would have such an effect, it is likely that the Court could not have upheld it.

<sup>26</sup> See, e.g., *Mid-American Broadcasting Corp.*, 12 F.C.C. 282, 291-93 (1947) ¶¶ 3-4.

<sup>27</sup> See, e.g., *Bamberger Broadcasting Service, Inc.*, 11 F.C.C. 1242, 1254 (1947) ¶ 3.

<sup>28</sup> See, e.g., *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 395-96 (1965).

<sup>29</sup> See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), *overruled*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992). For a history of the FCC's consideration of race, ethnicity, and sex in its traditional broadcast licensing decisions, see Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 297-304 (1991).

such as those who already owned broadcast licenses<sup>30</sup> or newspapers in the communities where they wanted to broadcast.<sup>31</sup>

Traditional broadcasters, once they entered, were liable to the Commission's continual surveillance concerning all these subjects. Surveillance was also possible when each license came up for renewal. Few licenses were ever revoked or denied renewal, but the FCC's surveillance was a Sword of Damocles over every traditional broadcaster's head. Though it seldom fell, it was never removed.<sup>32</sup>

FCC regulations required traditional broadcasters to broadcast content against their will<sup>33</sup> and forbade them to broadcast the content they wanted.<sup>34</sup> It is highly likely that any such regulations, if imposed on newspapers,<sup>35</sup> other print media, or cable television,<sup>36</sup> would be found to violate the First Amendment.

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<sup>30</sup> 47 C.F.R. § 73.3555.

<sup>31</sup> *Amendment of Sections 73.34, 73.240, & 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, & Television Broadcast Stations*, 50 F.C.C.2d 1046 (1975).

<sup>32</sup> Glen O. Robinson, *The FCC & the First Amendment: Observations on 40 Years of Radio & Television Regulation*, 52 MINN. L. REV. 67, 119 (1967).

<sup>33</sup> See, e.g., *Children's Television Report & Policy Statement*, 50 F.C.C.2d 1 (1974) (effectively requiring certain kinds of programming for children), affirmed, *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977).

<sup>34</sup> Examples are programs required by the now defunct Fairness Doctrine, *infra* note 41 & accompanying text, and "entertainment programming inappropriate for viewing by a general family audience" during the Family Viewing Hour, see *Writers Guild of America, West, Inc. v. ABC*, 609 F.2d 355, 358 n.2 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980).

<sup>35</sup> *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating, on First Amendment grounds, Florida statute requiring newspapers to publish without cost the reply of candidates whose integrity they criticize); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (invalidating, on First Amendment grounds, libel award for public official against critics of his official conduct); *Near v. Minnesota*, 283 U.S. 697 (1931) (invalidating, on First Amendment grounds, state statute that allowed enjoining a newspaper from publishing malicious, scandalous, or defamatory material). For decisions invalidating law forcing persons to make statements they do not wish to make, see *Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating, on First Amendment grounds, state statute requiring motor vehicle license plates to be embossed with state motto "Live Free or Die"); *Talley v. California*, 362 U.S. 60 (1960) (invalidating, on First Amendment grounds, city ordinance requiring disclosure of the author of handbills); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (invalidating, on First Amendment grounds, public school requirement that students salute the American flag).

A prohibition to a traditional broadcaster to broadcast a program would seem, at least, to go against the grain of Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326, which provides that "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." This statute did not save a 'propaganda' broadcaster when, in the 1930s, his license was denied renewal by the FRC in part because of his 'propaganda.' *KFKB Broadcasting Ass'n, Inc., v. FRC*, 47 F.2d 670, 672 (D.C. Cir. 1931). Perhaps, however, the statute extended only as far as then-

Many more regulations did not command or prohibit certain content explicitly, but had the same practical effect. Rules that required traditional broadcasters to broadcast certain content against their will effectively forbade them to broadcast what they wanted to broadcast at the same time.<sup>37</sup> Other indirect commands and prohibitions suggested certain kinds of programs,<sup>38</sup> required traditional broadcasters to actively ascertain<sup>39</sup> and satisfy<sup>40</sup> the wishes of their local communities, required discussion of national and local public issues in which differing sides had fair coverage (“The Fairness Doctrine”),<sup>41</sup> prohibited “unfair editorializing, . . . slanted news coverage, . . . [and] over-commercialization,”<sup>42</sup> and required racially diverse staffs<sup>43</sup> and the broadcast of programs created by “independent producers.”<sup>44</sup>

Arguably similar indirect regulation of newspapers and other non-broadcast “speakers,” even if couched in neutral terms, has been found to violate the First Amendment.<sup>45</sup> These and other fruits of The Scarcity Rationale put traditional

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prevailing free speech law, which generally protected speakers only against prior restraint. If so, perhaps this statute is ripe for broadening to be consistent with today's free speech law, which protects speakers against far more. See, e.g., cases cited *supra* note 22 & this note & *infra* note 45.

<sup>36</sup> *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (invalidating, on First Amendment grounds, federal statute putting unnecessarily restrictive regulation on sexually explicit cable TV shows).

<sup>37</sup> A print media outlet could, to comply with such regulations, print another page. A traditional broadcaster cannot broadcast 25 hours a day or prolong prime time by one hour, however.

<sup>38</sup> See, e.g., *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2314 (1960) (“The major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located, . . . have included: (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, [and] (14) entertainment programs”).

<sup>39</sup> See, e.g., *KCMC, Inc.*, 19 F.C.C.2d 109 (1969).

<sup>40</sup> See, e.g., *Leflore Broadcasting Co.*, 65 F.C.C.2d 556 (1977), *affirmed*, *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454 (D.C. Cir. 1980).

<sup>41</sup> *Red Lion*, 395 U.S. at 377. The *Red Lion* Court stated that the FCC may “requir[e] a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.” 395 U.S. at 389.

<sup>42</sup> *Cowles Florida Broadcasting, Inc.*, 60 F.C.C.2d 371, 420 (1976) ¶ 147, *reversed on other grounds*, *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979).

<sup>43</sup> See, e.g., *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 23 F.C.C.2d 430 (1970).

<sup>44</sup> See, e.g., *Review of the Prime Time Access Rule, § 73.658 (k) of the Commission's Rules*, 11 FCC Rcd 546 (1995).

<sup>45</sup> See, e.g., *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) (invalidating, on First Amendment grounds, city ordinance that gave Mayor unlimited discretion in granting and denying permits to place newsracks on public property); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (invalidating, on First Amendment grounds, state sales tax on some, but not all, newspapers and magazines); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) (invalidating, on First Amendment grounds, state tax on ink and paper used in publishing certain newspapers).

broadcasting, and especially its contents, under far more government control than any comparable business in the United States since the end of prior censorship in the colonial era.

### III. The Supreme Court's Challenge to the Scarcity Rationale

In 1984, the Supreme Court asked whether The Scarcity Rationale was still valid:

The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. . . . We are not prepared, however, 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.<sup>46</sup>

In 1985 and 1987, in two decisions ending The Fairness Doctrine, the Commission attempted to send such a signal.<sup>47</sup> These signals may have become blurred because vestiges of The Fairness Doctrine remained in effect until 2000.<sup>48</sup> This paper takes up where the Commission's 1987 decision left off and concludes that The Scarcity Rationale no longer serves as a valid justification for the government's intrusive regulation of traditional broadcasting.

### IV. The Scarcity Rationale Is Invalid

#### A. The Scarcity Rationale Has No Basis in Either Physics or Economics

##### 1. Physics

The Scarcity Rationale appears to assume that there is a physical thing, like land and water, of which there is a scarce amount. What is commonly called "the radio frequency spectrum," however, has no discrete physical existence. When traditional broadcasting occurs, what happens is a new movement of electrons. The electrons already exist, move, and make up the world around us. "The whole art of signaling by radio is to cause movement of a large-enough mob of electrons in unison in one place (the *transmitting aerial*) so that they have a detectable effect on electrons in another place

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<sup>46</sup> *League of Women Voters*, 468 U.S. at 376 n.11.

<sup>47</sup> *General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145, 196-221 (1985) ¶¶ 81-131; *Syracuse Peace Council*, 2 FCC Rcd at 5053-55 ¶¶ 66-82 (in ¶ 74, "we no longer believe that there is scarcity in the number of broadcast outlets available to the public").

<sup>48</sup> See *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872 (D.C. Cir. 1999), 229 F.3d 269 (D.C. Cir. 2000).

(the *receiving aerial*).<sup>49</sup> Traditional broadcasting can be compared aptly to the creation of a wave in water, which is an activity, a perturbation on the surface of the water, but is not the water itself.<sup>50</sup> As Professor and former FCC Commissioner Glen O. Robinson has stated, “The ‘spectrum’ is merely a way of describing the forms of electromagnetic radiation; it is not a thing but a force (or more precisely a ‘disturbance in the force,’ to employ Star Wars terminology).”<sup>51</sup> Thus, to the extent that The Scarcity Rationale assumes that there is a tangible thing, radio spectrum, of which there is a scarce amount, the Rationale is simply incorrect as a matter of scientific fact.

Nor, as noted above,<sup>52</sup> does the movement of electrons require the government to choose the persons who make them move or the messages thus conveyed. Indeed, to suggest such a role for government may have dangerous consequences. When a traditional telephone call occurs on copper wire, the same movement of electrons that occurs on “The People’s Airwaves” occurs within the phone wire. It has never been suggested, however, that the FCC limit the number of persons who may have telephone conversations or regulate what they say.<sup>53</sup> A similar kind of movement occurs in face-to-face conversation, when sound waves from a speaker’s mouth enter the listener’s ear. The First Amendment, it is safe to assume, would bar any government from licensing only a few individuals to talk and from regulating what they say.

The Scarcity Rationale thus appears to be based on fundamental misunderstandings of physics.

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<sup>49</sup> Jim Sinclair, *HOW RADIO SIGNALS WORK: ALL THE BASICS PLUS WHERE TO FIND OUT MORE* at 2 (McGraw-Hill, New York NY, 1997) (italics in original).

<sup>50</sup> John R. Pierce & Michael Noll, *SIGNALS: THE SCIENCE OF TELECOMMUNICATIONS* at 118 (Scientific American Library, New York NY, 1990).

<sup>51</sup> Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 *DUKE L.J.* 899, 912 (1998) (“*New Age*”).

<sup>52</sup> See *supra* page 2.

<sup>53</sup> *New Age*, *supra* note 51, 47 *DUKE L.J.* at 912 n.50 (“if the radio spectrum can be described as public property, then public ownership would equally extend to telephone and cable television transmissions which, of course, use the same radio spectrum as broadcasters even though they transmit over shielded conduit rather than in open air. I know of no one who argues that public ownership extends to telephonic or cable transmissions, however”).

## 2. Economics

Both the *NBC* and *Red Lion* Courts stated that spectrum (or spectrum allocated to traditional broadcasting) is scarce in the sense that it is finite.<sup>54</sup> There is also, at any given time, a finite amount of land, wood, and many other resources.<sup>55</sup> The U.S. government does not, however, control all the land in the United States and license its use for free to a few persons who promise to use it in approved ways.<sup>56</sup> Guitars are made from trees that grew on government land, but the government does not limit the supply of guitars and license a few for free in each area to persons who promise to play certain kinds of music on them. At times in American history, paper has been in very short supply, but government has not considered either licensing newspapers or granting rights of access to them.<sup>57</sup> Thus, the fact that possible spectrum use is finite makes a weak foundation for The Scarcity Rationale and for any regulation of spectrum use beyond allocation and “traffic control.”

There may be no shortage of possible spectrum use today, in fact. The FCC’s Spectrum Policy Task Force recently found, according to “[p]reliminary data and

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<sup>54</sup> *NBC*, 319 U.S. at 213; *Red Lion*, 395 U.S. at 388. As the above discussion of “Physics” shows, it would be more accurate to say that, given the technology in use at any time, there is a maximum amount of use of the spectrum (movement of electrons) that can occur without interference that will make intelligible communication impossible.

<sup>55</sup> In *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 & n.3 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987) (“*TRAC*”), the Court of Appeals for the District of Columbia Circuit echoed the observation of Nobel laureate Professor Ronald Coase that

it is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor, and capital are all scarce, but this, of itself, does not call for government regulation. It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resource. But the way this is usually done in the American economic system is to employ the price mechanism, and this allocates resources to users without the need for government regulation.

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

<sup>56</sup> Rather, the United States has a generally free market in land, subject only to government ownership of some land, regulatory systems such as zoning and eminent domain, and common law actions such as trespass and nuisance.

<sup>57</sup> Throughout the colonial era and well after the adoption of the First Amendment, there were very few newspapers, and during the American Revolution there was a “paper famine.” During and after World War II, newsprint was rationed and this seems to have forced some publications to curtail or cease operation. Government did not, however, require the surviving publications to grant access to writers who were thus silenced or engage in other content-based regulation of the print media. *Syracuse Peace Council*, 2 FCC Rcd at 5068 n.202; *Supplies for a Free Press: Hearings Before the Subcomm. on Newsprint of the Senate Select Comm. on Small Business*, 82d Cong., 1st Sess. (1951); Edwin Emery & Michael Emery, *THE PRESS & AMERICA: AN INTERPRETIVE HISTORY OF THE MASS MEDIA* at 83 (Prentice-Hall, Inc., Englewood Cliffs NJ, 1984); Morris L. Ernst, *THE FIRST FREEDOM* at Exhs. A, I (Macmillan Co., New York NY, 1946); Alfred McClung Lee, *I THE DAILY NEWSPAPER IN AMERICA: THE EVOLUTION OF A SOCIAL INSTRUMENT* at 15-24 (Routledge/Thoemmes Press, London UK, 2000).

general observations” that “portions of the radio frequency spectrum are not in use for significant periods of time.”<sup>58</sup> Earlier, the FCC had UHF television and FM radio licenses sitting on its shelves for decades and could not give them away. In other words, even if the supply of spectrum is finite, the demand for it may not be infinite.<sup>59</sup>

It is also incorrect to imply that because the possible spectrum use is finite at any moment, there is a fixed maximum usage in the long term. A finite amount of land can accommodate more and more persons as technology makes it possible to build higher buildings. With busses, paved roads, and better engines, more people and goods can be moved along the same road. Throughout the history of radio, new techniques and technologies have enabled more and more communications to occur via spectrum use. Recently announced techniques and technologies of this type include secondary markets, “overlay” and “underlay” rights, easements, “commons” models, Ultra Wide Band, Software Defined Radios, Frequency Agile Radios,<sup>60</sup> Digital Television<sup>61</sup> and Digital Radio.<sup>62</sup> Thus, scarcity is not an inherent barrier to more users and communication, but an horizon that continually recedes as inventions advance.

Perhaps most damaging to The Scarcity Rationale is the recent accessibility of all the content on the Internet, including eight million blogs,<sup>63</sup> via unlicensed spectrum and WiFi and WiMax devices.<sup>64</sup> The Scarcity Rationale, based on the scarcity of channels, has been severely undermined by plentiful channels. It may not survive the arrival of technologies that free a speaker from needing a dedicated channel at all.

The Supreme Court, in the passages from *NBC* and *Red Lion* quoted above on pages 1 and 2, hinted at another form of scarcity -- that traditional broadcast spectrum is scarce in the sense the demand for it exceeds the supply. That ‘scarcity’ is largely the result of decisions by government, not an unavoidable fact of nature. The government’s decisions about spectrum allocation (especially for traditional broadcasting), channel

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<sup>58</sup> Spectrum Policy Task Force, REPORT (“Spectrum Task Force Report”) at 10 (Nov. 2002), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-228542A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf). (“preliminary measurements indicate that, while some bands are heavily used . . . many other bands are not in use or are only used part of the time”). See also J.H. Snider & Max Vilimpoc, *Reclaiming the ‘Vast Wasteland’: Unlicensed Sharing of Broadcast Spectrum*, New America Foundation Spectrum Policy Program, Spectrum Series Issue Brief #12 at 2 (on average, 90% of television broadcast spectrum is unused today, either because it is “guard band” to prevent interference or because it is unassigned), <http://www.newamerica.net/index.cfm?pg=article&DocID=1286> (visited July 2, 2004).

<sup>59</sup> Richard A. Posner, *PUBLIC INTELLECTUALS: A STUDY IN DECLINE* (“Posner”) at 133 (Harvard Univ. Press, Cambridge MA, 2001) (“natural resources are not in infinite supply, but this is irrelevant, since demand is not infinite”).

<sup>60</sup> Spectrum Task Force Report, *supra* note 58, at 40, 46-56.

<sup>61</sup> See Digital Television (DTV), <http://www.fcc.gov/dtv/> (visited Feb. 3, 2004).

<sup>62</sup> See Press Release, *FCC Selects Digital Radio Technology* (Oct. 10, 2002), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-227261A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-227261A1.pdf) (visited Nov. 7, 2003).

<sup>63</sup> Technorati, *What’s happening on the Web right now?*, <http://www.technorati.com> (visited March 11, 2005).

<sup>64</sup> See, e.g., *WiMax May Pose Fresh Challenge to Broadband*, REUTERS/EXTREME TECH.COM (Feb. 28, 2005), available at 2005 WLNR 3195092.

bandwidth, interference protection, local coverage and other technical matters make licenses fewer than they otherwise would be.<sup>65</sup> A second and perhaps even more fundamental decision by which government makes traditional broadcast licenses scarce is to give them – very valuable things in many cases – away for free.<sup>66</sup> If a valuable thing is given away for free, it should not be surprising that the demand exceeds the supply.<sup>67</sup>

In sum, the Scarcity Rationale ignores basic principles of resource allocation, recent field measurements, history, the progress of technology, and economics.

### B. The Scarcity Rationale, If It Ever Had Validity, Is Invalid in Today's Media Marketplace.

Since the development of The Scarcity Rationale, the number of broadcasters and channels has increased many fold.<sup>68</sup> Any consumer of traditional television and radio for the last forty years knows this intuitively, and studies prove it. Most notably, the FM radio and UHF television dials have become thoroughly populated in almost all markets. Nationally, the number of full-power traditional television and radio stations

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<sup>65</sup> For example, the channels for VHF TV could have accommodated six or seven TV channels with nationwide coverage areas. The FCC, however, decided that local coverage was a paramount national goal and so adopted a channel assignment plan that gave most communities fewer channels. *Amendment of § 3.606 of the Commission's Rules & Regulations*, 41 F.C.C. 148, 169 (1952) ¶ 68; Roger G. Noll, Merton J. Peck, & John J. McGowan, *ECONOMIC ASPECTS OF TELEVISION REGULATION* at 100-01, 116-20 (The Brookings Institution, Washington DC, 1973); Bruce M. Owen, Jack H. Beebe, & Willard G. Manning, Jr., *TELEVISION ECONOMICS* at 123-24 (Lexington Books, Lexington MA, 1979) (“Owen *et al*”).

<sup>66</sup> Since the 1990s, the FCC has granted many licenses by auction. The FCC thus joined the other parts of the government that have for decades auctioned (and otherwise sold for money) rights to consume government-controlled resources such as land and the timber, petroleum, and minerals on that land.

<sup>67</sup> In the United States, the only stage at which traditional broadcast licenses were given away for free was when the FCC issued them to the initial licensees. (Second licenses for Digital TV are temporary.) Almost all who received free licenses from the government later sold them, often for large sums of money. The overwhelming majority of licenses for traditional broadcasting are held today by persons who paid a market price for them. *Syracuse Peace Council*, 2 FCC Rcd at 5055 ¶ 79; *The Lott Resignation & Its Consequences*, TELECOMMUN. POL. REV., at 2 n.1 (Dec. 23, 2002). In the secondary market for licenses, as in most of the U.S. economy, the price mechanism operates.

<sup>68</sup> This fact struck one court as early as 1986:

Broadcast frequencies are much less scarce now than when the scarcity rationale first arose in [NBC], and it appears that currently ‘the number of broadcast stations . . . rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectively be carried.’ *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C. Cir.), *cert. denied*, 464 U.S. 1008 . . . (1983). Indeed, many markets have a far greater number of broadcasting stations than newspapers.

*TRAC*, 801 F.2d at 508 n.4 (first ellipsis in original). See also *Banzhaf*, 405 F.2d at 1100 (“It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of . . . the modern proliferation of broadcasting outlets”).



has risen from 7,411 in the year *Red Lion* was decided to 15,273 at the end of 2004.<sup>69</sup> One typical market -- Kansas City, Missouri -- went from 18 traditional radio stations and 3 traditional television stations in 1960 to 40 and 9 in 2000.<sup>70</sup> In contrast, today Kansas City has only two general circulation newspapers.<sup>71</sup>

The FCC has also overseen the creation of new broadcast media such as DBS service and low power FM. Many Digital Television broadcasters are broadcasting two or more channels of content ("multicasting")<sup>72</sup> and two DARS systems offer hundreds of channels in every market.<sup>73</sup> The FCC also allows broadcast-type operations by licensees in Instructional Fixed Television Service, Multipoint Distribution Service, and Multichannel Multipoint Distribution Service. Although these allocations have not been used for broadcasting on a large scale, there is no legal or regulatory barrier to such uses. Many spectrum bands are being used to transmit news and information to Personal Digital Assistants, cellular phones, other radio receivers,<sup>74</sup> and personal computers with WiFi and WiMax connections.

Even more new channels have appeared on media that do not use radio.<sup>75</sup> The first was cable television, whose growth in number of channels has dwarfed traditional broadcasters.<sup>76</sup> No less important are the Internet (narrowband and broadband); players

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<sup>69</sup> Compare *Broadcast Station Totals as of December 31, 2004*, News Release dated Feb. 10, 2005, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-256657A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-256657A1.pdf) (visited March 11, 2005) ("2005 News Release") with *Broadcast Station Totals for January 1969*, News Release dated Feb. 20, 1969, <http://www.fcc.gov/mb/audio/totals/pdf/19690131.pdf> (visited March 11, 2005).

<sup>70</sup> Scott Roberts, Jane Frenette & Dionne Stearns, *A Comparison of Media Outlets & Owners for Ten Selected Markets (1960, 1980, 2000)*, Table 3, Media Bureau Staff Research Paper #1, Media Ownership Working Group (Sept. 2002) ("MOWG Paper #1").

<sup>71</sup> These are the Kansas City Star and the Kansas City Kansan. StartSpot Network, *Kansas City News*, <http://www.headlinespot.com/local/kansascity.htm> (visited Feb. 2, 2004).

<sup>72</sup> PBS, *PBS Digital Programming*, <http://www.pbs.org/digitaltv/multiNS.html> (visited March 11, 2005).

<sup>73</sup> Sirius Satellite Radio, *Channel Guide*, <http://www.sirius.com/pdf/channelguide.pdf> (visited March 11, 2005); XM Satellite Radio, *Full Channel Listing*, [http://www.xmradio.com/programming/full\\_channel\\_listing.jsp?sort=number](http://www.xmradio.com/programming/full_channel_listing.jsp?sort=number) (visited March 11, 2005).

<sup>74</sup> See, e.g., *WRAL Gets on the (Cell) Phone*, TV Technology, <http://www.tvtechnology.com/dailynews/one.php?id=2613> (visited Dec. 23, 2004); *Digital/Technology Notes*, PUBLIC BROADCASTING REP. (Oct. 29, 2004) ("Digital TV-equipped cellphones will probably enter the U.S. market by 2007, Texas Instruments CEO Richard Templeton told analysts"), available at 2004 WL 64312863; Yuki Noguchi, *Cell Phone Industry Embraces Content*, Technology & Science, [washingtonpost.com Highlights, MSNBC](http://www.washingtonpost.com/Highlights/MSNBC), <http://www.msnbc.msn.com/id/4582621/> ("For the business crowd, it's a chance to watch CNBC") (visited March 23, 2004); *Cable*, COMMUN. DAILY (Mar. 25, 2003) (Weather Channel announces it will use mobile phones and e-mail to notify subscribers of approaching storms), available at 2003 WL 5754442.

<sup>75</sup> Posner, *supra* note 59, at 133 ("substitutes exist or can be devised for virtually any resource").

<sup>76</sup> In 1959, the Commission estimated that there were 500,000 subscribers to cable TV nationwide and that few cable TV systems had more than 7 channels. *The Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, & TV "Repeaters" on the Orderly Development of Television Broadcasting*, 26 F.C.C. 403, 407-08 (1959) ¶¶ 10-11. In 1980, the Kansas City market had cable TV and the cable systems had an average capacity of 22 channels. In 2000, those systems had an average capacity of 42 channels. *MOWG Paper #1*, *supra* note 70, at Table 4. Today, cable systems often carry hundreds of channels. *General Motors Corp. &*

of video cassettes, compact disks and DVDs; and the automatic transmission of news headlines and other information to personal computers and other wired terminals.<sup>77</sup> The decades since The Scarcity Rationale took shape have also seen the growth, in the print media, of direct mail solicitation on a large scale and thousands of specialty magazines. Another old medium, the feature-length movie, was used in a Presidential race for the first time in 2004 in the highly successful *Fahrenheit 9/11*.<sup>78</sup> These new and old technologies, though they do not use radio, perform the same function of providing channels for the dissemination of information, news, opinion, and entertainment.

From the success the new broadcasters and media have achieved,<sup>79</sup> it appears that American consumers find them useful. Popular content and consumers' "ears and eyeballs" continue to move from traditional broadcasters to newer, more channel-rich media. DARS recently won the popular Howard Stern away from traditional radio broadcasting and added major league baseball to its lineup.<sup>80</sup> Equally important, the new channels of broadcasting make available amounts and kinds of content -- both information and entertainment<sup>81</sup> -- that were unavailable to American consumers in the decades when The Scarcity Rationale took shape.<sup>82</sup> A partial list includes the programs

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*Hughes Electronics Corp.*, 19 FCC Rcd 473, 502 (2004) ¶ 55. See also *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report ("Eleventh Cable Competition Report"), FCC 05-13, MB Docket No. 04-227 at 25 ¶ 37 (released Feb. 4, 2005) (cable operators offer a "digital tier" of service that can fit from 6 to 12 video channels into the capacity previously used to provide just 1 standard channel).

<sup>77</sup> See, e.g., *Akimbo Working With [Consumer Electronic] Manufacturers on Internet-Based TV Service*, COMMUN. DAILY at 2 (Oct. 25, 2004) (describing a service, <http://www.akimbo.com/>, that hopes to make CNN available via Internet to PCs, PVRs, DVDs, and other consumer electronics receivers).

<sup>78</sup> *Fahrenheit 9/11*, Internet Movie Database, <http://www.imdb.com/title/tt0361596/> (visited Oct. 19, 2004).

<sup>79</sup> Cable and DBS systems serve 89 million homes, 73% of American adults are now online, and more Internet connections are broadband than narrowband. *Eleventh Annual Cable Competition Report*, *supra* note 76, at 115; Harris Interactive, *More Than Four in Ten Internet Users Now Have Broadband -- Doubled in Two Years*, [http://www.harrisinteractive.com/harris\\_poll.index.asp?PID=492](http://www.harrisinteractive.com/harris_poll.index.asp?PID=492) (visited Sept. 13, 2004) (number of American adults using broadband at home almost doubled in the last two years, according to research by Harris Interactive; although users are still disproportionately young and well off, the trend is towards users mirroring the total population of the US); Nielsen//NetRatings, *U.S. Broadband Connections Reach Critical Mass, Crossing 50 Percent Mark for Web Surfers, According to Nielsen//NetRatings*, [http://www.nielsen-netratings.com/pr/pr\\_040818.pdf](http://www.nielsen-netratings.com/pr/pr_040818.pdf) (visited March 11, 2005).

<sup>80</sup> *XM Snares Major League Baseball for Multi-year Satellite Deal*, COMMUN. DAILY at 8 (Oct. 21, 2004); Seth Sutel, *Source: XM Satellite Radio Signs Deal With Baseball*, Yahoo!Finance (Oct. 19, 2004), [http://biz.yahoo.com/ap/041019/baseball\\_satellite\\_radio\\_2.html](http://biz.yahoo.com/ap/041019/baseball_satellite_radio_2.html) (visited Oct. 20, 2004); Frank Ahrens, *Stern's Move to Satellite Radio Is a Signal Event*, WASH. POST at E-1 (Oct. 8, 2004); *Howard Stern & SIRIUS Announce the Most Important Deal in Radio History*, Yahoo! Finance, [http://biz.yahoo.com/prnews/041006/nyw109\\_1.html](http://biz.yahoo.com/prnews/041006/nyw109_1.html) (visited Oct. 6, 2004).

<sup>81</sup> Some of this "entertainment" contains information on public affairs, such as the Free Tibet and Farm Aid concerts on MTV and VH-1. World Tibet Network News, *Musicians rally for Tibet's Freedom (June 11, 1999)*, [http://www.tibet.ca/wtnarchive/1999/6/11\\_1.html](http://www.tibet.ca/wtnarchive/1999/6/11_1.html) (visited Apr. 24, 2003); VH1.Com, *Review: Farm Aid Raises Money & More* (Sept. 18, 2000), [http://www.vh1.com/artists/news/1124203/09182000/nelson\\_willie.jhtml](http://www.vh1.com/artists/news/1124203/09182000/nelson_willie.jhtml) (visited Apr. 24, 2003).

<sup>82</sup> It seems that additional channels, by reducing the number of persons who listen to any one channel, make it socially permissible to broadcast content that was too controversial in the previous world of fewer channels. For example, when TV was added to radio and the mass audience migrated from radio to TV, it

shown on educational broadcast stations, which were few before the 1970s,<sup>83</sup> public broadcasting on both TV<sup>84</sup> and radio;<sup>85</sup> all news and talk channels on radio,<sup>86</sup> and hundreds of channels on cable TV and DBS service,<sup>87</sup> especially ones broadcasting non-mainstream opinions that were seldom heard in earlier decades;<sup>88</sup> channels of programming directed at racial, ethnic, religious, and other groups who were not significant enough to interest traditional broadcasters in the era of few channels.<sup>89</sup>

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became possible for the first time for radio stations to discuss previously taboo subjects such as sexually transmitted diseases. Erik Barnouw, *THE GOLDEN WEB: A HISTORY OF BROADCASTING IN THE UNITED STATES, VOL. II - 1933-1953* at 288-89 (Oxford University Press, New York NY, 1968). The mass audience's move from radio also enabled the creation of entirely new content, rock'n'roll, on the newly shunned medium. Bravo Profiles, *Rock & Roll Invaders: The Story of AM Radio* (Bravo! Channel television broadcast, Apr. 16, 1998, and Sept. 18, 2002). Finally, when FM channels, with their better quality transmission of music, gained precedence over AM in the 1980s and 1990s, AM again saw the flowering of talk radio.

<sup>83</sup> William F. Baker & George Dessart, *DOWN THE TUBE: AN INSIDE ACCOUNT OF THE FAILURE OF AMERICAN TELEVISION* at 216-33 (Basic Books, New York NY, 1998); Erik Barnouw, *THE IMAGE EMPIRE: A HISTORY OF BROADCASTING IN THE UNITED STATES, VOL. III - FROM 1953* at 70-73 (Oxford Univ. Press, New York NY, 1970); Owen *et al.*, *supra* note 65, at 155-56.

<sup>84</sup> Public broadcasting's programs that concentrate on information, news and opinion include Frontline, The News Hour with Jim Lehrer, NOW (formerly with Bill Moyers), and Washington Week. PBS, *Programs A-Z*, <http://www.pbs.org/> (visited Feb. 3, 2004).

<sup>85</sup> National Public Radio's programs that concentrate on information, news and opinion include All Things Considered, The Diane Rehm Show, Fresh Air® with Terry Gross, Morning Edition®, Talk of the Nation, and Wait Wait . . . Don't Tell Me! NPR, *NPR Programs*, <http://www.npr.org/about/programs/allnprprograms.html> (visited Feb. 3, 2004).

<sup>86</sup> Hazlett & Sosa, *supra* note 25, at 295 ("The share of informational programming on FM increases from 4.64 percent in 1975 to 7.39 percent in 1995. The more dramatic increase is in the AM band, where the share of informational programming goes from 4.29 percent to 27.60 percent. Particularly impressive is the increase in AM informational share from 7.11 percent in 1987 to 27.60 percent in 1995").

<sup>87</sup> The better known cable and satellite channels that concentrate on information, news and opinion are CNN, Headline News, CNNfn, CNBC, MSNBC, Fox News, and C-SPAN I-III. CNN and C-SPAN are also broadcast on some radio stations. In the recently concluded Presidential campaign, the mainstream media at first ignored the Swift Boat Veterans until blogs, Fox News, and other cable news channels covered them. Ultimately, the group's accusations became important in the campaign. MSNBC News, *The Vets Attack* (Nov. 15, 2004), <http://www.msnbc.msn.com/id/6420967/site/newsweek/> (visited Nov. 7, 2004).

<sup>88</sup> The regular guests on radio and cable TV political talk shows range from Katrina vanden Heuvel, Editor of The Nation Magazine, to Terry Jeffries, Editor of Human Events. See also Air America Radio, <http://www.airamericaradio.com/pub/globalDefault.htm> (visited July 2, 2004); Deep Dish T.V. Network, <http://www.deepdishtv.org/pages/aboutus.htm> (visited July 2, 2004); Freespeech TV: What Democracy Looks Like, <http://www.freespeech.org/fsitv/fscm2/genx.php?name=home> (visited July 2, 2004); Sharon Theimer, *Seeking Louder Voice, Gun Lobby Shops for News Outlet*, PHILADELPHIA INQUIRER at A-9 (Dec. 9, 2003) (National Rifle Association planning to buy a traditional broadcast station).

<sup>89</sup> Best known among these are the cable TV network Black Entertainment Television, <http://www.bet.com> (visited Dec. 22, 2004). BET has several channels, including one for jazz and another for gospel, and is popular enough to make its founder the United States' first African-American billionaire. See *Eleventh Cable Competition Report*, *supra* note 76, at 123 (Table C-2); Steve Raabe, *Forbes' Tally of Billionaires Sheds Wealth; Coloradans on List Trimmed to Six*, DENVER POST at C-01 (Feb. 28, 2003). Comcast and Radio One have launched a news, entertainment, sports and talk TV network geared toward African-Americans. Megan Larson, *TV One Taps Tom Joyner: New Black Network Launches Today with Run of Radio Show*, ADWEEK MAG. NEWSWIRE (Jan. 19, 2004), available at 2004 WL 65139470.

More new content is available on the Internet, of course -- billions of web pages, both portals such as The Drudge Report, the personal web pages of millions of individuals, small organizations, and bloggers such as andrewsullivan.com,<sup>90</sup> Daily Kos,<sup>91</sup> and kausfiles.<sup>92</sup> The latter have a potentially transformative potential for the dissemination of not only opinion, but also facts and news in competition with "mainstream media."<sup>93</sup> Almost all of the millions of persons who operate portals and web pages would have been unable to gain access to the traditional broadcast media,

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Comcast has launched a comparable Spanish-language channel, Cable Latino. DARS provider Sirius has OutQ, a channel geared towards gay persons. In 2003, a channel aimed at American Muslims began broadcasting. Andrea Figler, *ICN Adds a Channel, But Gets Squeezed*, CABLE WORLD at 4 (Nov. 27, 2003), available at 2003 WL 7582811; *Cable*, COMMUN. DAILY at 10 (Feb. 19, 2004); *Build Programming, Listeners Will Come*, SATELLITE NEWS (Sept. 22, 2003), available at 2003 WL 7817115; *First U.S. Muslim TV Channel Hits Airwaves*, Local6.com, <http://www.local6.com/news/3963483/detail.html> (Dec. 1, 2004) (visited Dec. 6, 2004). See also Thomas Hazlett, *Digitizing "Must-Carry" under Turner Broadcasting v. FCC (1997)*, 8 SUP. CT. ECON. REV. 141, 190-93 (Tables 8 & 9) (2000) (listing more such channels). In old media, the circulation and advertising revenues of Spanish-language newspapers are rising sharply even as English-language circulation declines. *The State of the News Media 2004, Overview - Economics & Audience*, Journalism.org, [http://www.stateofthenewsmedia.org/narrative\\_overview\\_economics.asp?media=1&overview\\_audience.asp?media=1](http://www.stateofthenewsmedia.org/narrative_overview_economics.asp?media=1&overview_audience.asp?media=1) (visited March 16, 2004).

<sup>90</sup> See <http://www.andrewsullivan.com/> (visited April 7, 2003).

<sup>91</sup> See <http://www.dailykos.com/> (visited Apr. 9, 2004).

<sup>92</sup> See <http://slate.msn.com/id/2080972/> (visited April 7, 2003).

<sup>93</sup> Concerning the revolutionary potential of blogs, see *Transparency & the news: Notes from Aspen, BuzzMachine* by Jeff Jarvis (July 19, 2004), [http://www.buzzmachine.com/archives/2004\\_07\\_19.html#007533](http://www.buzzmachine.com/archives/2004_07_19.html#007533) (visited July 20, 2004); *Bloggling Andrew Sullivan*, BuzzMachine by Jeff Jarvis, Nov. 15, 2003, [http://www.buzzmachine.com/archives/2003\\_11\\_15.html](http://www.buzzmachine.com/archives/2003_11_15.html) (visited July 20, 2004). Professor Frederick Turner of the University of Texas at Dallas described the activities of blogs in the recent 60 Minutes controversy (see *infra* note 128) as

an extraordinary example of what chaos and complexity theorists call spontaneous self-organization. Out of a highly communicative but apparently chaotic medium an ordered, sensitively responsive, but robust order emerges, acting as an organism of its own. Suddenly a perfectly-matched team of specialists had self-assembled out of the ether. . . . [T]housands of minds could act as neurons in a sort of super-intelligence -- an intelligence with not merely cognitive, but moral characteristics.

Frederick Turner, *The Bogosphere & the Pajamaheddin*, Tech Central Station (Sept. 21, 2004), <http://www.techcentralstation.com/092104G.html> (visited Oct. 21, 2004). Professor Glenn Harlan Reynolds of the College of Law of the University of Tennessee stated about the 60 Minutes controversy that

With the documents on the internet, tens of thousands of people, with expertise in everything from computer typesetting to early 1970s military jargon were able to look at the memos, form their own opinions and communicate them widely. CBS had a staff of (perhaps) dozens working on these documents . . . for a few weeks. After the broadcast, however, tens of thousands of people were looking at the documents, bringing far more man-hours . . . to bear.

Glenn Harlan Reynolds, *Media dinosaurs, your game is up*, The Australian, [http://www.theaustralian.news.com.au/common/story\\_page/0,5744,10859477%5E7583,00](http://www.theaustralian.news.com.au/common/story_page/0,5744,10859477%5E7583,00) (visited Sept. 23, 2004).

much less grow large on it. The Internet, in contrast, gives them easy entry and access to a far larger audience, namely billions of screens and the people watching them, at a fraction of the cost of earlier media.<sup>94</sup> The Internet also makes available, at any time and any place, including schools and libraries, content such as newspapers,<sup>95</sup> magazines,<sup>96</sup> radio stations<sup>97</sup> and TV programs<sup>98</sup> that were previously available only in small areas, or to small numbers of subscribers, or at certain times. With the Internet, small groups of persons who have a common cause or information to share and were previously isolated can find each other and communicate among themselves and potentially to a massive audience.<sup>99</sup> Such small groups had no access to channel-poor traditional media and, therefore, were unable to find each other, much less communicate with each other, have access to a mass audience, and affect national and local affairs.<sup>100</sup> Through file-sharing

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<sup>94</sup> Matt Drudge is the epitome of the ease of entry into, and the possibilities of growth on, new media. Despite being "low tech" -- mostly black ink on white paper -- it now receives between 200 and 300 million "hits" a month. Mr. Drudge's previous job was at a cash register in a gift shop. See <http://www.drudgereport.com/> (visited Dec. 22, 2004); VikingPhoenix.com, *Biography: Matt Drudge*, <http://vikingphoenix.com/public/rongstad/bio-0002/MattDrudge.htm> (visited Apr. 7, 2003).

<sup>95</sup> See, e.g., The Washington Post, <http://www.washingtonpost.com/> (visited Feb. 3, 2004).

<sup>96</sup> See, e.g., Newsweek, <http://msnbc.msn.com/id/3032542/> (visited Feb. 3, 2004).

<sup>97</sup> These include pre-Internet radio stations such as WBUR-FM, <http://www.wbur.org/> (visited Feb. 3, 2004), and stations that broadcast only on the Internet, such as PoCreations Radio, <http://www.pocreations.com/> (visited Feb. 3, 2004).

<sup>98</sup> See, e.g., MSNBC News, <http://www.msnbc.msn.com/id/3096434/> (visited Feb. 3, 2004).

<sup>99</sup> See, e.g., Michael Hardt & Antonio Negri, *EMPIRE* at 299 (Harvard Univ. Press, Cambridge MA, 2000) ("The Internet . . . is the prime example of this democratic [horizontal and deterritorialized] network structure"); see also Todd Gitlin, *The Great Media Breakdown*, *MOTHER JONES* at 57, 58 (Nov./Dec. 2004) ("In a digital world, there's easier access to multiple sources of facts and analysis than ever before"). Earlier, the same populist welcome was given to channel-rich cable TV and DBS service. Edward S. Herman & Noam Chomsky, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* at 307 (Pantheon Books, New York NY, 1988):

The rise of cable and satellite communications, while initially captured and dominated by commercial interests, has weakened the power of the network oligopoly and retains a potential for enhanced local-group access. There are already some 3,000 public-access channels in use in the United States, offering 20,000 hours of locally produced programs per week, and there are even national producers and distributors of programs for access channels . . . Grass-roots and public-interest organizations need to recognize and try to avail themselves of these media (and organizational) opportunities.

Internet bulletin boards and chat rooms, for example, also allow geographically dispersed persons with rare diseases to communicate with each other about their symptoms, progress, and daily impressions. See, e.g., Castleman's Dialogue, [http://www.castlemans.org/dialogue\\_toc.htm](http://www.castlemans.org/dialogue_toc.htm) (visited Feb. 3, 2004).

<sup>100</sup> Steve LeBlanc, *Cahill Admits Underestimating Ads' Impact*, Excite News, <http://apnews.excite.com/article/20041216/D870HQ4G1.html> (visited Dec. 17, 2004) (campaign managers for Sen. Kerry and President Bush "agreed that the Internet and other emerging news technologies have transformed the political process by making it more democratic and encouraging more people to become involved").

technologies, the Internet also makes available vast amounts of entertainment that was previously unobtainable except through purchase or hearing on radio.<sup>101</sup>

In sum, the decades since The Scarcity Rationale took shape have seen an explosion in the number of distribution networks and channels, both via radio and other media – more traditional broadcasters, cable television, DBS, DARS, Internet, WiFi and WiMax – and in the mass of content that fills them. By no rational, objective standard can it still be said that, today in the United States, channels for broadcasting are scarce.

In contrast, recent decades have seen a decline in the number of daily newspapers in the United States.<sup>102</sup> Today, they are scarce compared to broadcasters and other media.<sup>103</sup> If scarcity is the basis for the intrusive government regulation described in Section II above, then newspaper outlets, not broadcast stations, deserve greater attention.<sup>104</sup>

### C. Variations of The Scarcity Rationale Are Also Invalid

In what seem attempts to shore up The Scarcity Rationale, several other rationales have been advanced to justify government's intrusive regulation of, and limit First Amendment protection for, traditional broadcasters. The most important aspect they all have in common is that none of them asserts any scarcity of radio spectrum.

*The People's Airwaves Rationale.* The regulation of traditional broadcasters is sometimes justified by the term "The People's Airwaves": "Broadcast regulation has, from its inception, been based on the premise that the airwaves belong to the people, licensed to be used in the public interest, convenience and necessity."<sup>105</sup>

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<sup>101</sup> See, e.g., Gnutella.com, <http://www.gnutella.com/> (visited Dec. 5, 2004). A new file-sharing program, BitTorrent, has the capacity to allow the quick downloading of television shows. Clive Thompson, *The BitTorrent Effect*, WIRED MAGAZINE (Jan. 2005), available at <http://www.wired.com/wired/archive/13.01/bittorrent.html> (visited Jan. 3, 2005).

<sup>102</sup> See, e.g., Newspaper Association of America, *Number of U.S. Daily Newspapers*, <http://www.naa.org/info/facts04/dailynewspapers.html> (visited Dec. 22, 2004).

<sup>103</sup> In 2003, there were approximately 1,460 daily newspapers published in the United States, see *supra* note 102. There are approximately ten times that number of traditional broadcast stations, not to mention channels of cable TV and DBS service. See, e.g., 2005 News Release, *supra* note 69.

<sup>104</sup> See *supra* note 68. The same might be said of cable systems, of which there is only one in most communities, and DBS systems and major political parties, of which there are only two. I do not suggest traditional broadcast regulation for any of these media. Such regulation would need to overcome major First Amendment objections, see *supra* note 35.

<sup>105</sup> See, e.g., *The Fairness Doctrine & Other Issues*, REPORT OF THE SPECIAL SUBCOMMITTEE ON INTERSTATE & FOREIGN COMMERCE, HOUSE OF REPRESENTATIVES at 1 (May 9, 1969), quoted in *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 67 (D.C. Cir. 1972) (Bazelon, C.J., dissenting), cert. denied, 412 U.S. 922 (1973); Ralph Nader, *In an Honest Debate*, in Robert W. McChesney & John Nichols, OUR MEDIA, NOT THEIRS: THE DEMOCRATIC STRUGGLE AGAINST CORPORATE MEDIA at 12 (Seven Stories Press, New York NY, 2002) (alleging "the fact that the people, not the multinational communications corporations, own the airwaves").

The premise is incorrect. No law states that the airwaves (to the extent that they exist at all, see pages 8 and 9 above) are owned by “The People.” No law, in fact, states that the airwaves are owned by any person. Section 301 of the Communications Act, to the extent that it mentions ownership of “channels of radio transmission,” explicitly prohibits it. The statute does grant the federal government, to the exclusion of any state government and individual, *control* over the medium.<sup>106</sup>

Moreover, The People’s Airwaves Rationale is a dubious basis for the kinds of regulation described in Section II. Even if the federal government did own the radio spectrum, that alone should not grant the federal government the kinds of regulatory powers described in Section II. The United States Postal Service is part of the federal government, but is not therefore allowed to license persons before they may send mail or, short of obscenity, regulate the words they write.<sup>107</sup> Most likely, some newspapers and musical instruments are made from trees that grew on government land. No one would claim that they are therefore made of The People’s Wood and that the federal government may regulate the content of those newspapers or require that the music played on the instruments address controversial public issues and express differing views. Residents of government housing and employees of public universities do not, because they use public resources, lose their First Amendment rights. Local governments, for their part, control the roads and sidewalks on which newspapers are delivered and sold, but local governments are not therefore authorized to regulate newspapers.<sup>108</sup> Indeed, in granting access to public forums such as sidewalks and parks, the Constitution carefully limits government officials’ right to prefer some speakers and some messages over others.<sup>109</sup> Finally, even if the airwaves did belong to the people, the same cannot be said of traditional broadcasters’ land, transmitters, buildings, studio equipment, personnel, and audiences gained through years of sending out popular content. Those things belong exclusively to the broadcasters and their shareholders.

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<sup>106</sup> 47 U.S.C. § 301 states that Title III’s purposes are “to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, . . .”

<sup>107</sup> See, e.g., *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946). See also Llewellyn White, *THE AMERICAN RADIO: A REPORT ON THE BROADCASTING INDUSTRY IN THE UNITED STATES FROM THE COMMISSION ON FREEDOM OF THE PRESS* at 199 (Univ. of Chicago Press, Chicago IL, 1948) (“Beyond a minimal concern for obscenity and profanity . . . , the Post Office Department does not concern itself with the contents of the books, magazines, and newspapers which the taxpayers help to deliver. Why should the broadcasters’ reliance on a publicly owned circulation medium place them in a different category?”).

<sup>108</sup> See *TRAC*, 801 F.2d at 509:

A publisher can deliver his newspapers only because government provides streets and regulates traffic on the streets by allocating rights of way. Yet no one would contend that the necessity for these governmental functions, which are certainly analogous to the government’s function in allocating broadcast frequencies, could justify regulation of the content of a newspaper to ensure that it serves the needs of the citizens.

See also authorities cited *supra* notes 45, 53.

<sup>109</sup> See, e.g., *Thomas v. Chicago Park District*, 534 U.S. 316, 322-24 (2002); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Marsh v. Alabama*, 326 U.S. 501 (1946).

Thus, The People's Airwaves Rationale is both incorrect as a matter of law and illusory as a rational basis for the kinds of regulation described in Section II.

*The Dangerous Power Rationale.* Scarcity alone does not always create power. A business can be scarce -- the only gourmet restaurant or bicycle shop in a small town -- and still not have the power to force consumers to patronize it or pay exorbitant prices.

The *Red Lion* Court clearly believed that traditional TV broadcasters in 1969 had not only scarce licenses, but also dangerous power over viewers. Broadcast technology, the *Red Lion* Court stated, "supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news."<sup>110</sup> But for the Fairness Doctrine and other regulations, the Court warned, "station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed."<sup>111</sup> The Court listed as sources of traditional broadcasters' power "their initial government selection . . . before new technological advances opened new opportunities for further uses[. . . ]ong experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement."<sup>112</sup>

In the same year, Chief Judge Warren Burger of the United States Court of Appeals for the District of Columbia Circuit ("the D.C. Circuit") spoke of "[t]he infinite potential of broadcasting to influence American life"<sup>113</sup> Several years later, the Supreme Court stated that it was simple "reality that in a very real sense listeners and viewers constitute a 'captive audience.' . . . As the broadcast media became more pervasive in our society, the problem has become more acute."<sup>114</sup> The Court quoted approvingly from the D.C. Circuit's expression of fear about the power of traditional broadcasters:

In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. . . . It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.<sup>115</sup>

Not all observers agree that traditional broadcasters ever had dangerous power. To some, the idea that the American people are easily hypnotized by "subliminal,"

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<sup>110</sup> *Red Lion*, 395 U.S. at 386 n.15.

<sup>111</sup> *Id.* at 392.

<sup>112</sup> *Id.* at 400.

<sup>113</sup> *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969).

<sup>114</sup> *CBS v. DNC*, 412 U.S. at 127-28. The Court quoted with approval Secretary of Commerce Hoover's statement in 1924 that "the radio listener does not have the same option that the reader of publications has -- to ignore advertising in which he is not interested . . ." *Id.* at 128.

<sup>115</sup> *Id.*, 412 U.S. at 128, quoting *Banzhaf*, 405 F.2d at 1100-01.



“pervasive propaganda” borders on the insulting. Mr. Justice Douglas, in his 1973 concurring opinion in *CBS v. DNC*, quoted with approval the statement that

[t]he implication that the people of this country -- except the proponents of the theory -- are mere unthinking automatons manipulated by the media, without interests, conflicts, or prejudices is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American public.<sup>116</sup>

Indeed, American television viewers have persistently acted in ways that belie the power of the incumbent “Big Networks” to make them watch whatever the Networks show. Not many years before *Red Lion*, there were only two Big TV Networks, NBC and CBS. Despite their long experience in broadcasting, confirmed habits of viewers, network affiliation, and other advantages in program procurement, ABC won enough viewers to become the third “Big Network.” Decades later, Fox overcame the same allegedly insuperable obstacles and became the fourth “Big Network.” In 2002, HBO surpassed the “Big Four Networks” when its most popular show was on.<sup>117</sup> This year, more Americans watched the Republican National Convention on cable’s FoxNews channel than on any traditional TV broadcaster.<sup>118</sup> The 2004-05 season of traditional TV began with, “[f]or the first time, . . . cable controlling a larger share of viewers than the networks” and with “[s]ome advertisers . . . questioning the value of buying commercials on networks that lose more viewers every year.”<sup>119</sup>

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<sup>116</sup> *CBS v. DNC*, 412 U.S. at 152 n.3, quoting Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness & Access*, 85 HARV. L. REV. 768, 786-87 (1972) (“Jaffe”). See also *Superior Films, Inc. v. Department of Education*, 346 U.S. 587, 589 (1954) (concurring opinion of Mr. Justice Douglas):

Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas. On occasion one may be more powerful or effective than another. . . . Which medium will give the most excitement and have the most enduring effect will vary with the theme and the actors. It is not for the censor to determine in any case.

<sup>117</sup> Gary Levin, *Viewers mob HBO to see ‘Sopranos’ opener*, [http://www.usatoday.com/life/television/2002-09-17-hbo-sopranos\\_x.htm](http://www.usatoday.com/life/television/2002-09-17-hbo-sopranos_x.htm) (visited Apr. 9, 2003) (HBO show has more viewers than any simultaneous major network show); see also *TV, Radio, Cable & Programming*, TELECOMMUN. POL. REV. at 11 (Feb. 29, 2004) (final episode of HBO’s “Sex and the City” reportedly drew 11 million viewers).

<sup>118</sup> Lisa de Moraes, *In a Tuesday Night Showdown, Fox News Channel Outdraws the Big Three*, [Washingtonpost.com](http://washingtonpost.com/wp-dyn/articles/A54789-2004Sep1.html), <http://washingtonpost.com/wp-dyn/articles/A54789-2004Sep1.html> (visited Sept. 2, 2004).

<sup>119</sup> Bill Carter, *As Season Begins, Networks Struggle in Cable’s Shadow*, N.Y. TIMES at 1 (Sept. 19, 2004) (noting that Mitsubishi had reduced its prime-time network advertising from \$120 million to nothing and that “the networks have lost almost a quarter of their audience in the last decade”). Other sources, perhaps using different measurements, state that cable surpassed traditional broadcasters in 2002. *By the Numbers, Briefly*, TELECOMMUN. POL. REV. at 7 (Dec. 28, 2003) (citing BROADCASTING & CABLE).

I believe that the first-quoted words in the text above overstate the share of traditional television because they count as viewers of “the networks” viewers who watch CBS, NBC, etc., on cable TV and DBS. In testing The Scarcity Rationale, what matters is the transmission medium (traditional broadcast vs. cable, DBS, Internet), not the content stream (CBS, NBC vs. CNN, ESPN).

Both Republican and Democratic managers of the recent Presidential campaign “agreed that the Internet and other emerging news technologies have transformed the political process by making it more democratic and encouraging more people to become involved.”<sup>120</sup>

Whatever merit The Dangerous Power Rationale may have had when there were only three Big Networks, it has far less today. Several new networks have emerged on traditional broadcast channels,<sup>121</sup> cable TV (with systems averaging many dozens of channels<sup>122</sup>) is the primary multi-channel video medium,<sup>123</sup> and DBS now serves more than 23 million households with more than one hundred channels.<sup>124</sup> The fear that big media owners would broadcast only their own opinions and silence others, which the *Red Lion* Court voiced,<sup>125</sup> has not proved true on today's multi-channel media.<sup>126</sup> Traditional broadcast TV is used by a small and dwindling percentage of households,<sup>127</sup> and recent controversies have dented its major news operations' reputation for objectivity.<sup>128</sup> The vast majority of American households pay money to avoid traditional TV and get other channels.<sup>129</sup>

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<sup>120</sup> Steve LeBlanc, *Cahill Admits Underestimating Ads' Impact* (Dec. 16, 2004), <http://apnews/excite.com/article/20041216/D870HQ4G1.html> (visited Dec. 17, 2004).

<sup>121</sup> These are UPN (which is commonly owned with CBS), WB, Paxson and PBS on traditional TV; and, on radio, Clear Channel, Cumulus, Citadel, Infinity (which is commonly owned with CBS), and NPR.

<sup>122</sup> See, e.g., *Eleventh Cable Competition Report*, *supra* note 76, at 17 ¶ 24.

<sup>123</sup> *Id.* at 115 (Table B-1).

<sup>124</sup> *Id.* at 38-39 ¶ 54, & at 40 nn.306, 307.

<sup>125</sup> See text accompanying note 111 *supra*.

<sup>126</sup> The conservative Rupert Murdoch has operated DirecTV for about a year, but there has been no allegation that other views have been deleted from its channels. Recently, the reputedly conservative Clear Channel radio chain began broadcasting the liberal Air America on several of its stations. See, e.g., *Clear Channel brings Air America to Albuquerque airwaves*, *New Mexico Bus. Weekly* (Aug. 30, 2004), <http://albuquerque.bizjournals.com/albuquerque/stories/2004/08/30/daily5.html> (visited Oct. 19, 2004); Jesse Walker, *The Profit Motive: Clear Channel discovers the liberal demographic*, *reasononline*, <http://www.reason.com/links/links090704.shtml> (visited Sept. 28, 2004). Indeed, any observer of traditional TV on the one hand and cable and DBS on the other will see that a cacophony of different viewpoints and opinions is heard on the latter, channel-rich media, although each cable and DBS system is controlled by one company.

<sup>127</sup> *Eleventh Cable Competition Report*, *supra* note 76, at 115 (Table B-1 stating data that only approximately 15% of American households that can receive traditional TV broadcasting use it as their primary video medium). Traditional radio broadcasters have been losing audiences also, allegedly to “Napster, computers, and the CD business generally.” *TELECOMMUN. POL. REV.*, July 7, 2002, at 14.

<sup>128</sup> See, e.g., *Drudge Report* (Oct. 8, 2004), *ABC News Political Director Memo Sparks Controversy: Both Sides Not 'Equally Accountable'*, <http://www.drudgereport.com/mh.htm> (printing a memo by ABCNEWS Political Director that allegedly shows inclinations against President Bush) (visited Oct. 19, 2004); James P. Pinkerton, *The day CBS News got 'blogged' down*, *Newsday.com*, Sept. 14, 2004, <http://www.newsday.com/news/columnists/ny-vppin143966771sep14,0,5921308.column> (describing allegations that CBS's 60 Minutes show presented forged documents critical of President Bush's service in the Texas Air National Guard) (visited Oct. 14, 2004); James P. Pinkerton, *As Rather goes, so goes network news*, *Newsday.com*, Sept. 21, 2004, <http://www.newsday.com/news/columnists/ny-vppin213979566sep21,0,7100958.column> (same, and

With all the new broadcast channels, the “confirmed habits of . . . viewers” have become less confirmed, and the former dominance of the Big Networks over viewers is largely dissipated. For example, the first Presidential debate in 1960 drew more than 70 million viewers, but the first one in 2004 drew only about 62 million despite a substantially larger population. 90 million viewers saw the last game of the 1959 World Series; only 31.5 million watched the last game of the 2004 World Series.<sup>130</sup> What are pervasive today are not comatose couch-potatoes,<sup>131</sup> but hand-held remotes for easy shifting among hundreds of channels, electronic program guides for searching out your favorite kind of content, “time-shifting” devices such as Video Cassette Recorders that enable viewers to see programs when they wish, escape from advertising via devices such as TiVo, as well as all the new media and receivers described above.

The Big Networks still garner significant audiences and advertising revenues,<sup>132</sup> although undoubtedly a substantial share of their viewers sees them via cable TV and DBS service. Their large audience shares, moreover, may be more the result of their skill at winning the mass audience than of their use of radio waves or the industry structure of fifty years ago. Popularity, fairly won in a competitive market, provides a dubious basis for the kinds of regulation described in Section II.

A variant of The Dangerous Power Rationale is that traditional broadcasting has a unique “immediacy.” In the words of the FCC of 1983, “Implicit in the ‘scarcity’ rationale . . . is an assumption that broadcasters, through their access to the radio spectrum, possess a power to communicate ideas through sound and visual images in a

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quoting Tom Rosenstiel, Director of the Project for Excellence in Journalism, as speaking of “the end of the era of network news”) (visited Oct. 21, 2004). New media's reputation for objectivity has also been questioned. See, e.g., *Outfoxed: Rupert Murdoch's War on Journalism*, <http://www.outfoxed.org> (movie about alleged conservative bias on FoxNews channel) (visited Oct. 19, 2004).

<sup>129</sup> See *Dead Air*, FORBES MAGAZINE at 138 (Nov. 25, 2002), available at 2002 WL 23192722 (quoting former FCC Chief Economist Thomas Hazlett describing traditional TV as “a product that 88% of the population pays money to avoid”).

<sup>130</sup> *Baseball leads Fox to Nielsen win*, CNN.com International Entertainment (Oct. 27, 2004), <http://edition.cnn.com/2004/SHOWBIZ/TV/10/27/niensens.ap/> (visited Dec. 6, 2004); Arthur Spiegelman, *TV Debates Loom Larger in Presidential Race*, Boston Globe (Oct. 11, 2004), [http://www.boston.com/news/politics/debates/articles/2004/10/11/tv\\_debates\\_loom\\_larger\\_in\\_presidential\\_race/](http://www.boston.com/news/politics/debates/articles/2004/10/11/tv_debates_loom_larger_in_presidential_race/) (visited Oct. 19, 2004); Greenfield at Large, *The Waning Influence of the Networks & When Does a Potential Tragedy Become a Laughing Matter* (“Greenfield”), aired Aug. 23, 2001, available at <http://www.cnn.com/TRANSCRIPTS/0108/23/gal.00.html> (visited Sept. 7, 2001). The same fragmentation of audience has occurred in radio broadcasting with the end of a few dominant “general interest” stations and the advent of many “format-driven” stations, and in the print media with the demise of general interest magazines such as *Life*, *Look*, *The Saturday Evening Post*, and *Collier's*, and the appearance of thousands of specialty magazines. *Greenfield*, *supra* this note.

<sup>131</sup> See John Thorne, Peter W. Huber, & Michael K. Kellogg, FEDERAL BROADBAND LAW § 1.2.1 at 7-8 (Little Brown & Co., New York NY, 1995).

<sup>132</sup> See, e.g., *Basic cable clobbers networks in July*, Entertainment Television (July 30, 2003), <http://www.poe-channels.com/stories.php?poeurlid=24885> (visited Dec. 23, 2004); Shirley Brady, *Cable Ratings Keep Climbing*, CABLE WORLD at 4 (Mar. 31, 2003) (“Through March [2003], ad-supported cable networks garnered a 46.7 prime-time household rating, compared to 43.7 for CBS, NBC, ABC and Fox”).

manner that is significantly different from traditional avenues of communication because of the immediacy of the medium.”<sup>133</sup>

This idea was debunked by the D.C. Circuit in 1986:

the deficiencies of the scarcity rationale as a basis for depriving broadcasting of full first amendment protection, have led some to think that it is the immediacy and the power of broadcasting that causes its differential treatment. Whether or not that is true, we are unwilling to endorse an argument that makes the very effectiveness of speech the justification for according it less first amendment protection. More important, the Supreme Court's articulation of the scarcity doctrine contains no hint of any immediacy rationale. The Court based its reasoning entirely on the physical scarcity of broadcasting frequencies . . . . This “immediacy” distinction cannot, therefore, be employed to affect the ability of the Commission to regulate . . . .<sup>134</sup>

*The Broadcaster of Last Resort Rationale.* Traditional broadcasters were most important when they were present in virtually every American home and no other broadcasters were. Today, the overwhelming majority of American households have chosen to leave traditional TV for cable and DBS service -- fee-based, channel-rich, relatively unregulated offerings of video (and, increasingly, audio) content. As many as three quarters of homes in the U.S. use Internet access<sup>135</sup> and almost all the rest have access to the Internet in schools and libraries and/or at work. One or more of these new technologies is physically available to virtually all the homes that have not yet adopted them.

But is traditional broadcasting still the only medium for low income, rural, or other “Have Not” households? If so, there might be a Broadcaster of Last Resort Rationale for the government to make traditional broadcasting available where, due to geography and/or economics, it would not normally spread. Evidence, however, undermines that premise. Two groups of Americans that have lower than average incomes and assets – African-Americans and Hispanics – appear to be significant consumers of cable TV and DBS service. Black Entertainment Television, for example, is

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<sup>133</sup> *Amendment of Parts 2, 73 & 76 of the Commission's Rules to Authorize the Transmission of Teletext by TV Stations*, 53 Rad. Reg. 2d (P&F) 1309, 1324 ¶ 59 (1983), *affirmed & reversed in part on other grounds*, TRAC, *supra* note 55.

<sup>134</sup> TRAC, 801 F.2d at 508, citing *Red Lion*, U.S. 395 at 390. For other Supreme Court statements that justify regulation of traditional broadcasters not on dangerous power, but on physical scarcity of frequencies, see *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 639-40 (1994), citing *League of Women Voters*, 468 U.S. at 377, *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 799 (1978), and *Red Lion*, *supra* this note.

<sup>135</sup> 75% of U.S. Homes Have Web Access, CNNMoney (March 19, 2004), [http://www.cnn.com/2004/03/18/technology/home\\_internet.reut/index.htm?cnn.=yes](http://www.cnn.com/2004/03/18/technology/home_internet.reut/index.htm?cnn.=yes) (visited March 19, 2004); *Internet in More Homes Than Cable TV*, Local6.com (Feb. 25, 2004), <http://www.local6.com/technology/2872965/detail.html> (visited Feb. 26, 2004).

available only on those new media and is highly successful.<sup>136</sup> DBS has won large numbers of Spanish-speaking US households.<sup>137</sup> A study in the mid-1990s found that the demand for cable service “is only slightly sensitive to household income.”<sup>138</sup> The largest DBS provider has stated that its subscribers are more likely than cable TV subscribers to live in rural areas.<sup>139</sup> Internet access has been available for several years in the vast majority of public libraries and classrooms.<sup>140</sup> Thus, the notion that cable TV, DBS service, and Internet are unavailable to or unaffordable by Have Not American households is questionable, at best.

Even if there were a Broadcaster of Last Resort Rationale for government to bring broadcasting to Have Not households, the regulations described in Section II above may not be the best way to effect it. A better way may be to subsidize subscription by Have Not households to cable TV, DBS service, and Internet access. The vast majority of American households prefer these media. The new media also contain local news and public affairs content that traditional broadcasting lacks -- regional networks such as New England Cable News Network, county-specific "public, educational, and government" ("PEG") channels on cable TV,<sup>141</sup> and vast numbers of neighborhood-oriented web pages. These new outlets for local news and public affairs content not only supplement traditional broadcasters, they serve territories (large regions and small neighborhoods) that traditional broadcasters cannot, or do not, serve. Bringing Have Nots on board the new technologies may be more efficient, not to mention more generous, than relegating them to an obsolescent technology.

*The Fiduciary or Trustee Rationale.* It is sometimes asserted that traditional broadcasters are fiduciaries or trustees who must act not in their own interest, but for

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<sup>136</sup> See *supra* note 89.

<sup>137</sup> See, e.g., Sean Bratches, *Cable Needs to Build Strong Ethnic Base*, MULTICHANNEL NEWS (Oct. 28, 2002), available at 2002 WL 16553423 (“Cable’s top multichannel competitors have been quick to seize the opportunity to increase market share by delivering more Spanish-language programming to the growing Hispanic market. Direct-broadcast satellite providers DirecTV Inc. and EchoStar Communications Co. each offer 20 or more channels of Hispanic programming. And they are getting the desired results: DBS penetration is 14.4 percent among Hispanic households, a ratio that’s on par with the general market percentage”).

<sup>138</sup> Robert W. Crandall & Harold Furchtgott-Roth, *CABLE TV: REGULATION OR COMPETITION* at 147 (The Brookings Inst., Washington DC, 1996). Accord, Robert Kieschnick & B.D. McCullough, *Why do people not subscribe to cable television? A review of the Evidence* (Sept. 1998 draft), available at [www.tprc.org/abstracts98/kieschnick.pdf](http://www.tprc.org/abstracts98/kieschnick.pdf) (“the evidence examined suggests that while household income is an influence on a household’s decision to subscribe to cable television, it is not a significant influence”).

<sup>139</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 26901, 26930 n.180 (2002) ¶ 59.

<sup>140</sup> U.S. Department of Education, *Internet Access in U.S. Public Schools Up for Seventh Straight Year*, <http://www.ed.gov/PressReleases/09-2002/09242002b.html> (visited Apr. 8, 2003); Charles Lane, *Justices to Hear Internet Porn Case*, THE WASH. POST at A-08 (Nov. 13, 2002).

<sup>141</sup> See, e.g., 47 U.S.C. § 531; Arlington Independent Media, <http://www.channel33.org/arlingtonmedia/> (visited Feb. 3, 2004).

the public.<sup>142</sup> No statute expressly places fiduciary duties on traditional broadcasters, however.<sup>143</sup> It is questionable why traditional broadcasters should be fiduciaries. The imposition of a fiduciary duty is a conclusion, the result of something that provokes it. As shown above, two facts that might provoke fiduciary duties – the enjoyment of scarce resources or the dangerous power that traditional broadcasters may have had fifty years ago – no longer exist. Also, being a fiduciary may be unrelated to scarcity.<sup>144</sup> One can be a fiduciary as to an asset that is plentiful, such as shares of a publicly traded corporation.

*The Condition Rationale.* In some circumstances, the government may grant a benefit or privilege only on condition that its recipient give up a constitutional right. For example, plea bargaining, in which prosecutors propose light punishment if the defendant foregoes his or her Constitutional right to trial by jury, is an accepted part of this country's criminal justice system.<sup>145</sup> When the FCC auctions a license for broadcasting,<sup>146</sup> it conditions delivery of the license on payment of the winning bid. Might the Commission instead condition receipt of the license on "payment in kind," specifically acceptance of regulations that resemble those described in Section II above and limit the broadcaster's First Amendment freedoms?

The issue of when the government may lawfully condition a benefit on its recipient relinquishing a constitutional right is both complex<sup>147</sup> and beyond the scope of

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<sup>142</sup> *League of Women Voters*, 468 U.S. at 377 ("our cases have taught that, given spectrum scarcity, those who are granted a license to broadcast must serve in a sense as fiduciaries for the public by presenting 'those views and voices which are representative of [their] community and which would otherwise, by necessity, be barred from the airwaves,'" quoting *Red Lion*, 395 U.S. at 389); *CBS v. DNC*, 412 U.S. at 117 ("very early the licensee's role developed in terms of a 'public trustee' charged with the duty of fairly and impartially informing the public audience"); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966) ("A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations"), 425 F.2d 543, 548 (D.C. Cir. 1969) ("broadcasters are temporary permittees -- fiduciaries -- of a great public resource and they must meet the highest standards which are embraced in the public interest concept").

<sup>143</sup> See *supra* note 106.

<sup>144</sup> *Radio-Television News Directors Ass'n*, 184 F.3d at 883 n.9 ("the 'trustee' theory -- which derives from the government's granting of private property rights in public resources -- is distinct from theories premised on the scarcity of broadcast spectrum").

<sup>145</sup> See *New Age*, *supra* note 51, 47 DUKE L.J. at 921.

<sup>146</sup> See, e.g., FCC Wireless Telecommun. Bur., *Auction 25, Closed Broadcast*, <http://wireless.fcc.gov/auctions/25/> (visited Apr. 9, 2003).

<sup>147</sup> See, e.g., *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188-90 (1999) (upholding First Amendment challenge to application of statute that prohibits advertising about privately operated commercial casino gambling where such gambling is legal), *Rust v. Sullivan*, 500 U.S. 173 (1991) (rejecting First Amendment challenge to regulations that prohibit health professionals in government-funded family planning programs from discussing abortion with their patients, and limiting *League of Women Voters*, *supra* note 17). See also *New Age*, *supra* note 51, 47 DUKE L.J. at 921 (calling the subject of 'unconstitutional conditions' "the true Okefanokee of constitutional law"). In *Syracuse Peace Council*, the FCC rejected the idea that forcing traditional broadcasters to forego their First Amendment rights should be an incident to their acceptance of a license. *Syracuse Peace Council*, 2 FCC Rcd at 5055 ¶80. The Commission did, however,

this paper. Experience with the regulations described in Section II, however, teaches several lessons about their prudence and practicality.

First, now that there are several media other than traditional TV and radio by which to reach listeners and viewers,<sup>148</sup> conditions placed only on them are not so easily characterized as over-reaching by the government, ‘an offer that a would-be broadcaster cannot refuse.’ The same basic fact, however -- the large number of channels of media today and the variety of content being broadcast on them -- cuts the other way also. The predicate for a regulatory mandate that certain desirable programs be broadcast is the market’s failure to produce those programs. That predicate is much more difficult to prove today than it was when most Americans had only three TV channels, and makes a weaker basis for depriving speakers of their First Amendment rights.

On a more practical level, some mandates, if they were seriously enforced, could tax the finite resources of the Commission and might produce no benefit for consumers. For example, if the Commission required traditional broadcasters to transmit “educational” programs, it might be extremely laborious for the Commission to write a meaningful and objective definition of “educational,” apply it to the weekly broadcasts of thousands of stations, and impose attention-getting sanctions on the stations that came up short. Content mandates that welcomed public complaints would be of even more dubious effect. The Fairness Doctrine, for example, provoked thousands of complaints to the Commission annually in the 1970s.<sup>149</sup> Only a small fraction of them were, or could realistically be, given serious consideration.<sup>150</sup> A significant effect of the Fairness Doctrine may thus have been to create expectations among many members of the public, the overwhelming majority of whom were disappointed by the Commission’s inevitable inaction.

In the unlikely event that traditional broadcasters were effectively required to broadcast unpopular or unprofitable content, they might simply migrate to other, less regulated media. The vast majority of consumers, who want to be entertained, would probably follow, perhaps leaving traditional broadcasters little viewed and their spectrum wastefully used.

The practical difficulties outlined above are not trivial. They should make government search for more efficient ways to promote the content that the market does

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opine that it could lawfully impose some kinds of regulation on traditional broadcasters under the “public interest” standard of the Communications Act without violating their Constitutional rights. *Id.* at ¶81.

<sup>148</sup> See *supra* Section IV.B (describing, *inter alia*, cable TV and phone- and cable-based Internet access).

<sup>149</sup> Henry Geller, THE FAIRNESS DOCTRINE IN BROADCASTING: PROBLEMS & SUGGESTED COURSES OF ACTION at 23 (Rand Corp., Santa Monica CA, 1973) (“Geller”) (in 1972, over 2,800 Fairness Doctrine complaints); Jaffe, *supra* note 116, 85 HARV. L. REV. at 779 & n.49 (citing BROADCASTING Magazine, Dec. 27, 1971, at 21, to the effect that in 1970 the FCC received over 60,000 Fairness Doctrine complaints).

<sup>150</sup> Geller, *supra* note 149, at 23 note † (in fiscal 1971, the Commission received 2,000 Fairness Doctrine complaints, based on which it made only 168 inquiries to stations and issued only 69 rulings, only 5 of which were adverse to the broadcaster).

not produce and that the American people need.<sup>151</sup> Government creating that content itself and broadcasting it on its own channels, which is one function of educational and public broadcasting, may be one such way. Another are PEG channels on cable television.

#### D. The End of The Scarcity Rationale May Affect the Basis for Regulation of Indecent Broadcast Content.

The rationales for the Commission's regulation of traditional broadcasters' indecent content have been that traditional broadcasters are uniquely pervasive and 'invade the home,' where unsupervised children are liable to be exposed to indecent content;<sup>152</sup> the Commission's authority in this area is not expressly premised on The Scarcity Rationale.<sup>153</sup>

The facts that render The Scarcity Rationale invalid, however, may also undercut the rationales for the Commission's regulation of indecent broadcast content. Most importantly, many new broadcasters have appeared in recent decades.<sup>154</sup> Cable television<sup>155</sup> and Internet access<sup>156</sup> are almost universally available to American

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<sup>151</sup> When the regulations described in Section II were in effect, their inefficiencies led to criticism even among experts who were thought generally to favor government regulation. See, e.g., David L. Bazelon, *The First Amendment & the "New Media" - New Directions in Regulating Telecommunications*, 31 FED. COMMUN. L.J. 201, 209 (1979) ("The key, in my view, is to move away from 'behavioral' regulation toward what I call 'structural' regulation of the media"). See also *supra* note 116 (citation to opinion of Mr. Justice Douglas).

<sup>152</sup> *Pacifica*, 438 U.S. at 748 ("the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen . . . in the privacy of the home . . ."), 749 ("broadcasting is uniquely accessible to children"); *Action for Children's Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) ("Unlike cable subscribers, who are offered such options as 'pay-per-view' channels, broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters. Thus they are confronted without warning with offensive material"), *cert. denied*, 516 U.S. 1043 (1996). See also *Palmetto Broadcasting Co.*, 33 F.C.C. 265, 298 (1961) ¶ 7 ("unlike the acquisition of books and pictures, broadcast material is available at the flick of a switch to young and old alike, to the sensitive and the indifferent, to the sophisticated and the credulous"), *affirmed*, 33 F.C.C. 250 (1962), *reconsideration denied*, 34 F.C.C. 101 (1963), *aff'd sub nom. Robinson v. FCC*, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964).

<sup>153</sup> Indeed, scarcity and pervasiveness seem mutually contradictory. *New Age*, *supra* note 51, 47 DUKE L.J. at 946.

<sup>154</sup> See *supra* notes 68-101, 117-29.

<sup>155</sup> See *Eleventh Cable Competition Report*, *supra* note 76, at 12-13 ¶¶ 18-19 (showing that cable television is accessible to 95% of occupied American homes with a television, according to a reputable source). See also *Denver Area Educ. Telecommun. Consortium, Inc. v. FCC*, 518 U.S. 727, 744-45 (1996) ("Cable television broadcasting . . . is as 'accessible to children' as over-the-air broadcasting, if not more so. . . . Cable television systems . . . have established a uniquely pervasive presence in the lives of all Americans") (quotation marks omitted) (plurality opinion).

<sup>156</sup> Reliable reports in 2001 and 2002 stated that broadband Internet access was available by cable modem or DSL to 75-80% of the homes in the United States. *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, 17 FCC Rcd 4798, 4803 n.24 (2002) ¶ 9, *affirmed in part & vacated in part on other grounds, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *cert. granted*, 125 S. Ct. 654 (2004). It is



households. The signals of radio-based new media such as DBS and DARS are as pervasive as traditional broadcasters'. Although these new media require households to choose them, endure installation, and pay monthly fees, the overwhelming majority of households happily do all those things. If traditional television still invades the home in some unique way, the invasion leaves most American households not anxious, but indifferent.

If new media are now as pervasive and invasive as only traditional broadcasters once were, should the new media's content be supervised as only the latter have been? To expand such supervision to the new media would risk reducing adults to only content fit for children – a failing of potentially Constitutional dimensions.<sup>157</sup> It may be, on the contrary, that the spread of new media, with hundreds of new channels, should cause regulation of indecency in traditional broadcasting to end. If what is pervasive today is hundreds of channels and billions of web pages, no one channel, show, or page is as pervasive as the Big Networks' shows were in the heyday of their three-member oligopoly.<sup>158</sup> Also, new technology has created, along with many new channels and web pages, new applications such as the V-Chip and blocking that allow households to regulate the content available in the home more directly and more personally.<sup>159</sup> These new applications empower consumers who wish their homes to be free of indecent content while allowing others to access their content of their choosing free from government intervention and oversight.

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safe to believe that the number has grown since 2002 and that the percent to which narrowband access is available is larger.

<sup>157</sup> *Butler v. Michigan*, 352 U.S. 380, 383 (1957), saying, of a law that made it a crime to make available for the general reading public a book that would have a potentially deleterious influence upon youth, that its effect

is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society. We are constrained to reverse this conviction.

<sup>158</sup> In the early 1960s, the owned and affiliated stations of the three Big Networks accounted for an 87% share of the usage of TV sets in US homes. By the early 2000s, their share was down to 31%. Jonathan Levy, Marcelino Ford-Levine & Anne Levine, *Broadcast Television: Survivor in a Sea of Competition*, FCC Office of Plans & Policy Working Paper Series #37, September 2002, Table 25 at 62, citing Media Dynamics, TV DIMENSIONS 2001 REPORT (2001), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-226838A2.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A2.doc) (visited July 9, 2004). The most popular TV show of 1960-61, Gunsmoke, was watched by about 17 million homes in a country of about 53 million homes – almost a third of all homes. The most popular show in mid-2004, CSI, was watched by about 11.5 million homes in a country of an estimated 110 million homes – little more than a tenth of all homes. THE WORLD ALMANAC & BOOK OF FACTS 2003 at 406 (World Almanac Books, New York NY, 2003); Bureau of the Census, U.S. Department of Commerce, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, PART 2, Chapters N-Z, Series R 93-105 at 796 (Kraus International Publications, White Plains NY, 1989); *Television*, <http://course1.winona.edu/jbovinet/Web%20Transfer/Trivia%20Stuff/Television2.htm> (visited July 8, 2003); *Yahoo!TV*, <http://tv.yahoo.com/nielsen> (visited July 8, 2004).

<sup>159</sup> Admittedly, there is no blocking product for AM and FM radio programs except for the traditional ones (the tuning knob, the off button, and the garbage can).

## V. Conclusions

The Scarcity Rationale was intellectually questionable from its inception. Moreover, even its proponents knew it might not be needed long. The *Red Lion* Court realized that new technologies may require changes in old ideas.<sup>160</sup> The technologies that have appeared since *Red Lion*, as well as other factors described above, have nullified The Scarcity Rationale. It no longer provides a rational basis for regulating traditional broadcasters in the ways described in Section II.

Government remains strongly interested in American media and in ensuring that news, information, opinion (especially about local issues) and entertainment reach all Americans.<sup>161</sup> Government also has antitrust interests in promoting competition in the sale of advertising and the creation and purchase of programming. The interment of The Scarcity Rationale need not frustrate any of those interests. On the contrary, it could re-focus attention on the media of today, its shortcomings (if any), and remedies for them that will solve today's problems rather than those of a channel-poor and fortunately bygone time.

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<sup>160</sup> *Red Lion*, 395 U.S. at 386-87 & n.15 ("the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions"), 388 ("only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized *in the present state of commercially acceptable technology*") (italics added), 397-99 (describing recent developments in radio spectrum use and explaining their effect on Constitutional principles applicable to traditional broadcasters). See also *CBS v. DNC*, 412 U.S. at 102 ("the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence"), 131 ("the Commission noted . . . that the advent of cable television will afford increased opportunities for the discussion of public issues").

<sup>161</sup> The Supreme Court stated in *Associated Press v. United States*, 326 U.S. 1, 20 (1945) that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, . . ." Chandler & Cortada, *supra* note 22, is a book-length description of the United States government's interest in these matters from the colonial era to the present.