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COMMENT

THE SPECTRUM SCARCITY DOCTRINE: A CONSTITUTIONAL ANACHRONISM

by Murray J. Rossini

THE spectrum scarcity doctrine constitutionally justifies extensive governmental regulation of the broadcast media.¹ The doctrine, first adopted by the Supreme Court in 1933² and recently perpetuated in 1984,³ assumes that the absence of regulation would result in a crowded chaos of signals within the limited electromagnetic spectrum.⁴ The doctrine further assumes that regulation of the electromagnetic spectrum ensures that the few recipients of broadcast licenses will use this scarce national resource in the public interest.⁵ Because of the special justification provided by the doctrine, almost all federal regulations of the broadcast media would constitute an abridgement of the first amendment if applied to print media.⁶

This Comment finds the spectrum scarcity doctrine unjustified in light of current technology.⁷ Broadcasting technology has developed rapidly with the advent and expanded use of cable television and communications satel-

1. See J. NOWAK, R. ROTINDA & J. YOUNG, *CONSTITUTIONAL LAW* 894-902 (2d ed. 1983) [hereinafter cited as J. NOWAK]; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 698 (1978).

2. *Federal Radio Comm'n v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933). The Supreme Court cited this case as authority for the spectrum scarcity doctrine in *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3116, 82 L. Ed. 2d 278, 289 (1984); however, commentators have not discussed *Nelson Brothers* in conjunction with the doctrine.

3. *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3116-17, 82 L. Ed. 2d 278, 289-90 (1984), discussed *infra* notes 38-50 and accompanying text.

4. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-90 (1969).

5. *Id.* at 391-400.

6. *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3116-17, 82 L. Ed. 2d 278, 289-90 (1984); see L. TRIBE, *supra* note 1, at 700; Bazelon, *The First Amendment and the "New Media"—New Directions in Regulating Telecommunications*, 31 *FED. COM. L.J.* 201, 202-03 (1979).

7. At least two authors have argued that the spectrum scarcity model has always portrayed an inaccurate picture of the broadcasting medium. See I. DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 151 (1983); Fowler & Brenner, *A Marketplace Approach to Broadcasting Regulation*, 60 *TEX. L. REV.* 207, 221-22 (1982). Other works criticizing the spectrum scarcity doctrine include E. DIAMOND, N. SANDLER & M. MUELLER, *TELECOMMUNICATIONS IN CRISIS: THE FIRST AMENDMENT, TECHNOLOGY, AND DEREGULATION* 9-12 (1983) [hereinafter cited as E. DIAMOND]; Bazelon, *supra* note 6, at 207; Fowler, *Forward*, 32 *CATH. U.L. REV.* 523-28 (1983); Goldberg & Couzens, "Peculiar Characteristics": *An Analysis of the First Amendment Implications of Broadcast Regulation*, 31 *FED. COM. L.J.* 1, 29 (1978); Powe, "Of the [Broadcast] Press," 55 *TEX. L. REV.* 39, 57 (1976).

lites.⁸ Television indisputably constitutes an important source of information in the United States. Whether measured in terms of economic⁹ or social¹⁰ influence, television broadcasting pervades society.

This Comment traces the historical development of the spectrum scarcity doctrine, briefly outlines the development and application of new broadcast technologies, and criticizes the doctrine in light of these recent technological developments. In particular, this Comment focuses on several developments in television technology and the incongruity between the availability of channels and the doctrine of spectrum scarcity. Finally, this Comment discusses two suggestions for reform of the system of broadcasting regulation. One proposal, a market approach, would make broadcast licenses freely transferable. Another suggestion, a structural approach, would enhance diversity by limiting the concentration of ownership in the television delivery system.¹¹

I. JUDICIAL ORIGIN OF THE DOCTRINE

A. Historical Background

The spectrum scarcity doctrine presently supports regulation of various forms of broadcasting media.¹² At its inception the doctrine justified only the regulation of radio.¹³ Before 1927 federal statutes controlled ship radio traffic¹⁴ and required a broadcaster to obtain a license from the Secretary of Commerce and Labor.¹⁵ In 1926 the government possessed no statutory authority for restrictions on frequency use, power, and hours of operation.¹⁶ The lack of regulations led to chaos in the radio industry.¹⁷ New stations used any frequency they pleased, and existing stations changed frequencies and increased their power at will.¹⁸ The Radio Act of 1927 attempted to control frequency usage.¹⁹ The Act created the Federal Radio Commission

8. See generally E. DIAMOND, *supra* note 7, at 21-49 (discussing various technological advances in broadcasting); Stern, Krasnow & Senkowski, *The New Video Marketplace and the Search for a Coherent Regulatory Philosophy*, 32 CATH. U.L. REV. 529, 532-61 (1983) [hereinafter cited as Stern] (reviewing innovations in video services).

9. In 1980 gross revenues from the broadcast industry exceeded 10 billion dollars. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1984, at 561.

10. Television viewing averaged over 23 hours per home per week in the United States in February 1983. NATIONAL ASS'N OF BROADCASTERS, BROADCASTING/CABLECASTING YEARBOOK 1984, at G-16.

11. See *infra* text accompanying notes 141-46.

12. See *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3116-17, 82 L. Ed. 2d 278, 289-90 (1984); Bazelon, *supra* note 6, at 203.

13. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 213 (1943) (limited radio spectrum made Radio Act of 1927 necessary); 73 F.C.C.2d 497, 500 (brief history of early history of radio regulation); I. DE SOLA POOL, *supra* note 7, at 113-16.

14. *National Broadcasting Co. v. United States*, 319 U.S. 190, 210 (1943).

15. *Id.*

16. *Id.* at 212. In 1926 an Illinois district court held that the Secretary of Commerce and Labor had no power to regulate radio. *United States v. Zenith Radio Corp.*, 12 F.2d 614, 618 (N.D. Ill. 1926); see also I. DE SOLA POOL, *supra* note 7, at 113 (history of need for broadcast regulation in 1930s).

17. *National Broadcasting Co. v. United States*, 319 U.S. 190, 212 (1943).

18. *Id.*

19. Radio Act of 1927, Pub. L. No. 632, 44 Stat. 1162-74 (current version at 47 U.S.C. §§ 81-121 (1976)).

and empowered it with wide-ranging regulatory powers.²⁰ The Communications Act of 1934 incorporated the basic provisions of the Radio Act of 1927.²¹

B. *The Origin of the Judicial Doctrine of Broadcast Spectrum Scarcity*

The Supreme Court initially addressed the issue of first amendment protection of broadcasters in *National Broadcasting Co. v. United States*.²² The case included a challenge to a regulation promulgated by the Federal Communications Commission (FCC) under the authority of the Communications Act of 1934. Specifically, the National Broadcasting Company (NBC) challenged the FCC's chain broadcasting regulations that prohibited certain marketing practices²³ of the large radio networks. At this time NBC and Columbia Broadcasting Systems together controlled eighty-five percent of the total nighttime radio voltage.²⁴ The chain broadcasting regulations prohibited the exclusive affiliation of a radio station with one network and one network's ownership of two radio stations in areas in which such ownership resulted in a substantial restriction of competition.²⁵

Noting the FCC's statutory authority to make special regulations applicable to radio chain broadcasting²⁶ and Congress's intent to safeguard the public interest by enacting the Communications Act of 1934,²⁷ the Court rejected the first amendment attack on the chain broadcasting regulations on first amendment grounds.²⁸ The Court held that because not all of those who desired a broadcasting license could be accommodated, a denial of a license did not constitute a denial of free speech.²⁹ This holding laid the theoretical foundation for the spectrum scarcity doctrine.³⁰

20. The Act empowered the Commission to classify radio stations, prescribe services to be rendered by each class, assign bands and frequencies, and make regulations necessary to carry out provisions of the Act. *Id.* § 4.

21. Communications Act of 1934, Pub. L. No. 416, 48 Stat. 1064 (current version at 47 U.S.C. §§ 151-609 (1976)).

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

23. The regulations sought to correct eight network practices that tended to perpetuate control in the two major broadcasters, CBS and NBC. The practices included (1) exclusive affiliation of stations; (2) territorial exclusivity; (3) a long term of affiliation; (4) options of the networks over local air time; (5) ineffective rights of local stations to reject network programs; (6) network ownership of stations; (7) dual network operation; and (8) the control by networks of station rates. *Id.* at 198-208.

24. *Id.* at 198.

25. *See supra* note 23.

26. 319 U.S. at 215.

27. *Id.* The FCC's basic philosophy underlying chain broadcasting regulations states that due to the naturally limited number of radio channels, those persons who have licenses must put their channels to the most effective use. *Id.* at 218.

28. *Id.* at 226.

29. *Id.* at 226-27. Several commentators have identified this section of the *National Broadcasting Co.* holding as the key language on the spectrum scarcity doctrine. *See* J. NOWAK, *supra* note 1, at 895; Goldberg & Couzens, *supra* note 7, at 26; Powe, *supra* note 7, at 45. Although commentators have chosen the language in this part of the holding, the FCC's basic philosophy stated in note 27 *supra* presents a clearer statement of the Court's holding.

30. *See* J. NOWAK, *supra* note 1, at 895; Goldberg & Couzens, *supra* note 7, at 26.

C. *Modern Development of the Doctrine*

Although the court recognized federal power to regulate broadcast media in *National Broadcasting Co.*, the Court did not fully consider the extent of the government's regulatory authority until *Red Lion Broadcasting Co. v. Federal Communications Commission*.³¹ In *Red Lion* the Court employed the spectrum scarcity doctrine to uphold the general fairness doctrine.³² The fairness doctrine requires radio stations to offer free reply time to persons individually attacked and for rebuttals to political editorials aired by the station.³³

Red Lion challenged the fairness doctrine, alleging that the rules abridged its first amendment right to use its radio frequency in any way it wished.³⁴ The Court rejected this argument, finding that nothing in the first amendment prohibited the government from requiring a broadcaster to share its frequency with others and to conduct itself as a fiduciary for the public by broadcasting views representative of those in its community.³⁵ Justice White, writing for the Court, rejected *Red Lion's* argument that modern technology provided many more radio frequencies, eliminating the need for government regulations requiring broadcasters to serve the public interest.³⁶ Thus, in 1969 the Court reaffirmed the spectrum scarcity doctrine as the theoretical justification for the Communications Act of 1934.³⁷

In 1984 the Supreme Court perpetuated the doctrine in *Federal Communications Commission v. League of Women Voters*.³⁸ The League of Women Voters brought suit against the FCC to challenge section 399 of the Public Broadcasting Act of 1967. This section prohibited any noncommercial educational broadcasting station that received a grant from the Corporation for Public Broadcasting from editorializing.³⁹ The federal district court overturned the prohibition, stating that section 399 could survive constitutional scrutiny only if it served a compelling governmental interest.⁴⁰

31. 395 U.S. 367 (1969).

32. *Id.* at 377; see also Canby, *The First Amendment Right to Persuade: Access to Radio and Television*, 19 U.C.L.A. L. REV. 723, 728 (1972) (author derives a right of public access to broadcast media from goal of first amendment to provide diversity of public views); Comment, *The Fairness Doctrine: Protection for a Scarce Public Resource*, 14 ST. MARY'S L.J. 1083, 1094 (1983) (author defends fairness doctrine as enhancing public's first amendment rights).

33. 395 U.S. at 372-74; see Comment, *supra* note 32, at 1087-93.

34. 395 U.S. at 387. The broadcasters sought to be protected by the first amendment to the same extent as publishers. Publishers are not required to give equal weight to opposing views. *Id.*; see *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). The Court held Florida's right of reply statute, which granted political candidates equal space to answer criticisms and attacks on their records by newspapers, unconstitutional under the first amendment. *Id.*

35. *Red Lion*, 395 U.S. at 389.

36. *Id.* at 393. The Court declared that "scarcity is not entirely a thing of the past." *Id.* The development of new technology brought not only new ways to meet current demand but also new demand. The Court cited conflicts between "vital functions" such as defense preparedness and experimentation in methods of averting mid-air collisions through radio warning devices. *Id.*

37. *Id.* at 395.

38. 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984).

39. *Id.* at 3111, 82 L. Ed. 2d at 283.

40. *League of Women Voters v. FCC*, 547 F. Supp. 379, 384 (C.D. Cal. 1982). The dis-

First, the Supreme Court analyzed the standard of scrutiny appropriate for broadcast media. The Court found the compelling governmental interest standard inappropriate for broadcast regulation.⁴¹ Citing *Red Lion*, the Court stated that the differences between the print and broadcast media justified the application of different first amendment standards.⁴² Thus, although the district court's compelling standard applies to print media regulation,⁴³ courts may uphold broadcast regulation only when draftsmen have "narrowly tailored [the regulations] to further a substantial governmental interest."⁴⁴ Second, a sharply divided Court⁴⁵ found that the government failed to meet the substantial governmental interest standard; thus, the law violated public broadcasters' first amendment rights.⁴⁶ The majority expressly based the substantial governmental interest⁴⁷ standard on the spectrum scarcity doctrine,⁴⁸ upholding the doctrine as one of the well-established fundamental principles guiding the Court in its evaluation of broadcast regulation.⁴⁹ In a footnote the Court directly addressed the spectrum scarcity doctrine. Making the definitive statement on the status of the doctrine today, the Court stated:

The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. . . . We are not prepared, however, to reconsider our long

trict court followed the compelling governmental interest standard usually applied to restrictions of speech regarding public issues, relying on nonbroadcast media cases that applied this standard. *Id.*; see *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (Massachusetts law prohibiting certain corporations from making expenditures to influence votes of elected officials violated first amendment); *Mills v. Alabama*, 384 U.S. 214 (1966) (Alabama law prohibiting the publishing of editorials on election day held unconstitutional).

41. 104 S. Ct. at 3115, 82 L. Ed. 2d at 289.

42. *Id.* at 3116, 82 L. Ed. 2d at 290. The Court restated the scarcity doctrine, citing several cases. In *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 799-800 (1978), the Court reiterated the scarcity doctrine, upholding the FCC rule that barred common ownership of a newspaper and broadcasting stations in certain communities. In *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 101-02 (1973), the Court held that petitioners, the Democratic National Committee, did not have a right to disregard the FCC's fairness doctrine and purchase advertising time from broadcasters to publicize its views on the Vietnam War.

43. 104 S. Ct. at 3115, 82 L. Ed. 2d at 289. The Court stated that expression of editorial opinion on matters of public importance requires the most exacting degree of first amendment protection and that an editorializing ban like § 399, if applied to the print media, would not survive scrutiny. *Id.*

44. *Id.* at 3118, 82 L. Ed. 2d at 292.

45. *Id.* at 3106, 82 L. Ed. 2d at 283. Justice Brennan wrote the opinion for the Court, in which Justices Marshall, Blackmun, Powell, and O'Connor joined. Justice Rehnquist filed a dissenting opinion, in which Chief Justice Burger and Justice White joined. Justice Stevens filed a separate dissenting opinion.

46. *Id.* at 3129, 82 L. Ed. 2d at 305-06.

47. *Id.* at 3118, 82 L. Ed. 2d at 292.

48. *Id.* at 3116, 82 L. Ed. 2d at 289-90.

49. *Id.* The three fundamental principles that guided the Court in evaluating the editorializing ban included the spectrum scarcity doctrine, the aim of providing balanced presentations over the broadcast media, and the protection of journalists' first amendment rights to the fullest extent consistent with their public duties. *Id.*

standing 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.⁵⁰

II. VIDEO TECHNOLOGIES

Two related but distinct assumptions form the basis for the spectrum scarcity doctrine. First, the doctrine assumes that broadcast media must operate on the electromagnetic spectrum.⁵¹ Second, the doctrine assumes that the spectrum cannot be expanded by compressing more signals into the spectrum.⁵² The first assumption ignores cable television, which offers video services similar to ultrahigh frequency (UHF) or very high frequency (VHF) television by sending a signal by wire rather than through the broadcast spectrum.⁵³ The second assumption ignores the development of compression techniques,⁵⁴ which demonstrate the inherent flexibility of the electromagnetic spectrum.⁵⁵ The next section surveys the regulatory and technical developments in the following areas of video technologies: cable television, direct broadcast satellites, low power television, and the development of techniques that will permit more efficient use of the broadcast spectrum.

A. Cable Television

1. *Regulation.* The FCC began regulating cable television in the mid-1960s.⁵⁶ From the mid-1960s until 1979 the FCC actively regulated the cable industry to promote nationwide television service.⁵⁷ In 1979, however, the Supreme Court limited the Commission's jurisdiction over cable television.⁵⁸ The Court struck down rules that required cable systems with more than 3,500 subscribers to provide access channels, to provide two-way communications, and to increase the capacity of their services to twenty channels.⁵⁹ After 1979 the Commission allowed cable operators to carry distant signals and syndicated programs.⁶⁰ Today the FCC rules prohibit duplica-

50. *Id.* at 3116, 82 L. Ed. 2d at 289.

51. See *Red Lion*, 395 U.S. at 389; *National Broadcasting Co.*, 319 U.S. at 218.

52. The spectrum scarcity doctrine implicitly assumes the impossibility of spectrum expansion. Application of technology, however, can multiply the number of channels in the spectrum. See I. DE SOLA POOL, *supra* note 7, at 151-54; Fowler & Brenner, *supra* note 7, at 222.

53. See Stern, *supra* note 8, at 551.

54. See I. DE SOLA POOL, *supra* note 7, at 152-54. Multiplexing, compression, and sub-carrier operations are methods of providing more than one service at a time over the same spectrum allocation. *Id.*

55. For one author's description of methods to multiply channels, see *id.*

56. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1030 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979). The court found that FCC cable rules that required mandatory channel capacity, equipment, and access to the public exceeded the Commission's jurisdiction. 571 F.2d at 1030; see Stern, *supra* note 8, at 567-68.

57. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1031 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979); Stern, *supra* note 8, at 567.

58. *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

59. *Id.*

60. Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663, 813-15 (1980); see Stern, *supra* note 8, at 568.

tion of network and sports programs,⁶¹ protect cable system operators from exorbitant franchise fees,⁶² and require cable systems to carry local broadcast signals.⁶³ The Commission's rules of equal time, fairness, and obscenity apply to those cable systems that engage in the origination of cablecasting.⁶⁴

2. *Cable Technology and its Application.* Commentators attribute cable television's rapid growth to improvements in technology.⁶⁵ Refinements in cable technology have increased the capacity of a single cable to fifty-two channels.⁶⁶ The development of fiber optics promises further improvements in the efficiency and quality of cable services.⁶⁷ Presently approximately 5,800 operating cable systems exist in America, with another 1,939 franchises approved but not yet built.⁶⁸ Although most systems carry twelve channels, systems constructed after March 1972 must carry a minimum of twenty channels.⁶⁹ One estimate states that cable reaches perhaps 95 million people, representing approximately forty percent of the households in the United States that have television.⁷⁰

B. Direct Broadcast Satellites

Direct broadcast satellite (DBS) video delivery systems make use of signals transmitted from earth to high-powered geostationary satellites (direct broadcast satellites). The direct broadcast satellite then transmits television signals to individual homes equipped with a dish to receive them.⁷¹ These signals reach even remote areas inaccessible to conventional UHF and VHF broadcast signals.

1. *Regulation.* The Federal Communications Commission issued interim regulations for DBS service in 1982.⁷² The interim rules sought to create two regulatory categories for DBS owners: broadcasters and programmer-customers. Broadcasters who retained control over the content of their DBS transmissions received the same treatment as national broadcasters under

61. 47 C.F.R. §§ 76.67, .92 (1984).

62. *Id.* § 76.31.

63. *Id.* §§ 76.57, .59, .61.

64. *Id.* §§ 76.205, .209, .215. Because cablecasters are brought under the fairness and equal access regulations, the discussion of the first amendment rights of those who run video delivery systems in the conclusion of this Comment, *infra* notes 167-74 and accompanying text, applies to cablecasters. These rules seem open to constitutional attack because they have no basis in the spectrum scarcity doctrine. Cablecasting utilizes wire instead of the electromagnetic spectrum.

65. Stern, *supra* note 8, at 551.

66. *Id.* Future estimates of cable capacity run as high as 200 channels per cable line. *Id.*

67. *Id.* at 554.

68. NATIONAL ASS'N OF BROADCASTERS, *supra* note 10, at D-3.

69. *Id.*

70. *Id.* Approximately 3,250 cable systems produce and cablecast from their own studios. *Id.* The number of people in the United States served by cable increased from 16 million in 1980 to 25 million in 1983. U.S. DEP'T OF COMMERCE, *supra* note 9, at 563.

71. For an excellent discussion of the technology and future importance of DBS, see National Ass'n of Broadcasters v. FCC, 740 F.2d 1190, 1195-97 (D.C. Cir. 1984).

72. *Id.* at 1197. The interim rules created the DBS broadcast service. *Id.* Direct Broadcast Satellites Report & Order, 90 F.C.C.2d 676 (1982) [hereinafter cited as DBS Order].

the FCC rules.⁷³ The FCC rules applicable to broadcasters require that broadcasters provide reply time to federal political candidates⁷⁴ and provide access to federal political candidates during their campaigns.⁷⁵ The rules allow a DBS owner to choose to act as a common carrier instead of as a broadcaster.⁷⁶ The DBS common carrier must offer the services of his DBS indiscriminately to the public.⁷⁷

Another category created by the rules, programmer-customers, also falls within common carrier rules.⁷⁸ Programmer-customers lease, rather than own, DBS satellites from common carrier owners and send programming via DBS satellite to individual homes.⁷⁹ As the originator of programming the programmer-customer retains control of the DBS signal.⁸⁰

In *National Association of Broadcasters v. Federal Communications Commission*⁸¹ the United States Court of Appeals for the District of Columbia affirmed the interim rules in part, but struck down that part of the order that exempted customer-programmers from the access and equal time doctrines found in the Broadcasting Act.⁸² The court found that the Commission departed from its statutory mandate by exempting common carriers from the regulatory constraints that Congress had chosen to impose on broadcasters to protect the public interest.⁸³ The court, however, upheld the remaining interim rules, including an exemption for DBS owners from the Commission's rules that bar ownership of more than seven television stations and ownership of an interest in stations that have overlapping broadcast areas.⁸⁴ The Commission has yet to issue permanent rules.

2. *DBS Technology and Its Application.* DBS video service, not yet operating but projected to begin in the near future, utilizes powerful geostationary satellites that transmit directly to small, inexpensive earth terminals.⁸⁵ Direct broadcast satellites send signals up to forty times more powerful than communications satellites in use today.⁸⁶ A two-foot wide dish in the back

73. *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1200-01 (D.C. Cir. 1984); DBS Order, 90 F.C.C.2d 676, 708 (1982).

74. *See* DBS Order, 90 F.C.C.2d 676, 709 (1982) (imposing 47 U.S.C. § 315 on DBS systems). The equal time doctrine, which applies to all broadcasters, requires equal access to air time for qualified candidates for federal office. Communications Act of 1934, 47 U.S.C. § 315 (1982). The fairness doctrine, on the other hand, requires a balanced presentation of controversial issues of public interest. 47 C.F.R. § 73.1910 (1984).

75. 47 U.S.C. § 312(a)(7) (1982).

76. DBS Order, 90 F.C.C.2d 676, 708-09 (1982).

77. *Id.* at 708-11.

78. *See id.*

79. *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1200 (D.C. Cir. 1984); DBS Order, 90 F.C.C.2d 676, 708-11 (1982).

80. *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1200 (D.C. Cir. 1984); DBS Order, 90 F.C.C.2d 676, 708-11 (1982).

81. 740 F.2d 1190 (D.C. Cir. 1984).

82. *Id.* at 1222. For a discussion of the access and equal time doctrines promulgated by the Communications Act of 1934, see *supra* notes 73-75 and accompanying text.

83. 740 F.2d at 1200-03.

84. *Id.* at 1208.

85. E. DIAMOND, *supra* note 7, at 44-46; Stern, *supra* note 8, at 541.

86. Stern, *supra* note 8, at 541-44.

yard will enable individual users of the service to receive DBS transmissions.⁸⁷ The FCC has granted conditional construction permits for eight DBSs.⁸⁸ Each DBS system will eventually be capable of providing as many as three channels to each of the nation's time zones.⁸⁹ Since a single DBS signal will eventually reach the entire continental United States, DBS video systems rank superior to current broadcast delivery systems.⁹⁰ The eventual uses and applications of DBS technology could provide the future telecommunications market with its most significant broadcast tool.⁹¹

C. Low-Power Television

Low-power television uses vacant UHF and VHF channels to broadcast at lower power levels.⁹² The technology to broadcast at lower power levels originated in the 1950s. Prior to 1982, however, FCC rules prohibited a low-power station from originating its own programming.⁹³

The new low-power television rules, promulgated in 1982,⁹⁴ permit low-power stations to originate programming, broadcast prerecorded tapes or movies, and transmit broadcast signals received from a distant source, such as from a satellite.⁹⁵ As of 1983, the FCC had received 7,900 applications for low-power television stations under the new rules.⁹⁶ The applications exhibited great diversity, including proposals for sports, news, religious, public affairs, and minority-oriented programming.⁹⁷ The economic entry barrier to low-power television broadcasting is much smaller than for conventional television broadcasting. The low-power station can cost as little as \$50,000; conventional stations, on the other hand, cost \$1,000,000 or more.⁹⁸

D. Technology Allowing More Efficient Use of the Broadcast Spectrum

In addition to cable and DBS technologies, technologies to utilize more efficiently the electromagnetic broadcast spectrum are emerging.⁹⁹ Two

87. *Id.* at 542.

88. *Id.*

89. *Id.*; see also *National Ass'n of Broadcasters*, 740 F.2d at 1195 (DBS capable of providing channels over the entire continental United States). Circuit Judge Mikva provides an excellent description of the workings of DBS. *Id.*

90. *Id.*

91. *See id.*

92. Stern, *supra* note 8, at 538.

93. *Id.* at 539-40.

94. *Low-Power Television Service*, 51 RAD. REG. 2D (P & F) 476, 476 (1982).

95. *See* 47 C.F.R. § 74.731 (1984). *Id.* §§ 74.701-.784 contain regulations governing low-power television and television translator stations.

96. Stern, *supra* note 8, at 539.

97. *Id.* Among the applicants are the Citizen Television System, backed by Ralph Nader; Neighborhood Television, an affiliate of Sears, Roebuck & Co., which has proposed a system of low-power stations to show country-western and rural programs; and the United Auto Workers. *Id.*

98. Stern, *supra* note 8, at 540. While a low-power station costs much less than a conventional UHF or VHF station, it has a correspondingly smaller range. Current limitations on the power levels of the low-broadcast station limit its reach to a twenty-mile area. *Id.*

99. I. DE SOLA POOL, *supra* note 7, at 152-54; Stern, *supra* note 8, at 560-61.

technologies, digital transmission and compression, seek to add channels to the available electromagnetic spectrum.¹⁰⁰ Digital techniques, currently under development by AT&T, ITT, and others, convert audio and video signals from analog "wave" form to on-off impulses.¹⁰¹ Digital transmission permits the spectrum to carry several signals across the frequency range now used for one television signal.¹⁰² Compression techniques utilize a coding scheme that encodes a transmission into less information, which correspondingly requires less space on the frequency.¹⁰³ Although still in its infancy, compression technology could make rapid progress with proper funding.¹⁰⁴ The application of this technology, although multiplying the number of channels on the spectrum, remains quite expensive.¹⁰⁵

Although admittedly in early stages of development, both digital and compression techniques should prove significant. These new technologies demonstrate that the electromagnetic spectrum can potentially carry two, four, even eight or more channels in the space it takes to carry one television signal today.¹⁰⁶ Indeed, the advent of this technology brings into question one of the basic assumptions of the spectrum scarcity doctrine.¹⁰⁷

III. RESULTANT CRITICISM OF THE DOCTRINE

Today the Supreme Court uses the spectrum scarcity doctrine as the principal constitutional justification for applying a less stringent standard of review to alleged encroachments on the first amendment rights of broadcasters as compared with the publishers of print media.¹⁰⁸ Extensive deregulation of cable has occurred.¹⁰⁹ The FCC promulgated comparatively little regulation of direct broadcast satellites.¹¹⁰ The regulations requiring fairness on public issues and equal time for political candidates apply, however, to conventional VHF and UHF television,¹¹¹ DBS,¹¹² and cable.¹¹³

The Court appears to have accepted and developed the spectrum scarcity doctrine based on a factual conclusion regarding the nature of broadcast communication.¹¹⁴ The view that the electromagnetic spectrum is very limited springs from assumptions of outdated technology. Modern technologies

100. I. DE SOLA POOL, *supra* note 7, at 154.

101. Stern, *supra* note 8, at 560-61.

102. *Id.*

103. See I. DE SOLA POOL, *supra* note 7, at 153-54.

104. See *id.*

105. See *id.* at 154. The deregulation of the broadcast industry could provide the economic incentive for the rapid development of these techniques. See Fowler & Brenner, *supra* note 7, at 222 ("[t]echnology is an independent variable that makes scarcity a relative concept").

106. See I. DE SOLA POOL, *supra* note 7, at 154; Stern, *supra* note 8, at 560-61.

107. *National Broadcasting Co.*, 319 U.S. at 218, clearly sets forth the assumption that the number of radio channels is limited by natural forces.

108. *League of Women Voters*, 104 S. Ct. at 3115-16, 82 L. Ed. 2d at 288-89.

109. See *supra* text accompanying notes 56-63.

110. See *supra* text accompanying notes 71-84.

111. See *supra* text accompanying notes 74-75.

112. See *supra* text accompanying note 82.

113. See *supra* text accompanying note 64.

114. See *Red Lion*, 395 U.S. at 388.

disprove these assumptions.¹¹⁵

With the development of DBS, digital techniques, compression techniques, and low-power television, actual scarcity on the broadcast spectrum will soon disappear.¹¹⁶ The development and application of cable technology relieves the electromagnetic spectrum of the burden of carrying many and varied video channels. Even the relative scarcity of the conventional broadcast spectrum has little significance for the home viewer who also has access to cable.¹¹⁷

The current number of broadcast outlets far exceeds the number of circulated daily newspapers.¹¹⁸ Almost all cities have at least three major television stations, whereas an average of only one of twenty-five cities has competing daily newspapers.¹¹⁹ Considering the number of channels presently available and the additional channels that will become available through technological advances,¹²⁰ one may conclude that the scarcity on which the doctrine was based no longer exists, at least from the perspective of the user.¹²¹

The Court uses the term spectrum scarcity to mean that the demand for broadcast licenses exceeds the supply.¹²² An excess demand for economically valuable free licenses would not surprise an economist. Such demand would occur whenever the government offered a cost-free income-producing license.¹²³ As one writer has observed, if the government created a commission to allocate cost-free newsprint to those who served the public interest, but restricted sales to others, a situation of scarcity of newsprint would result.¹²⁴ In this sense scarcity describes a condition created in part by the government's displacement of market forces.¹²⁵ In a market in which modern technology has provided television users with many video channels, the

115. See *I. DE SOLA POOL*, *supra* note 7, at 151-88.

116. See Bazon, *supra* note 6, at 207. Judge Bazon states that advances in technology offer the promise of virtually unlimited access to the living room. *Id.*

117. See *I. DE SOLA POOL*, *supra* note 7, at 155-56; Fowler & Brenner, *supra* note 7, at 226. FCC Chairman Fowler states that in locations where new high capacity cable systems are in operation, no scarcity exists in the television spectrum. *Id.* Implicit in this statement lies the assumption that UHF and VHF constitute methods of delivery in one large home television market, not separate markets. The assumption has merit.

118. Powe, *supra* note 7, at 56.

119. *Id.* at 57. This statistic gains importance if one assumes less scarcity in a market of high inter-media competition.

120. The scarcity concept can no longer justify the lower standard of review that applies to alleged encroachments on the first amendment rights of publishers. See Fowler, *supra* note 7, at 523-28.

121. Professor Powe states that "[t]he principal barrier to market entry, whether print or broadcast, is economic." Powe, *supra* note 7, at 57.

122. See *Columbia Broadcasting System, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (Court upheld affirmative statutory right of reasonable access to use of broadcast stations to candidates for federal office); *Red Lion*, 395 U.S. at 388-90 (Court upheld obligation under fairness doctrine to provide reply time).

123. See Fowler & Brenner, *supra* note 7, at 221-22; Powe, *supra* note 7, at 57.

124. Powe, *supra* note 7, at 57-58.

125. Stern, *supra* note 8, at 562. The authors state that the FCC television allocation plan has perpetuated spectrum scarcity, citing NETWORK INQUIRY SPECIAL STAFF, FEDERAL COMMUNICATIONS COMM'N, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION 14-30 (Oct. 1980).

scarcity that results from governmental regulation cannot justify artificial restrictions on the video market. The critics of the scarcity doctrine have proposed alternative justifications for the regulation of the broadcast industry.¹²⁶ The incumbent chairman of the Federal Communications Commission has made perhaps the most important proposal, to base new broadcasting regulations on a marketplace approach.¹²⁷

IV. SUGGESTIONS FOR REFORM

A. *The Market Approach*

The leading proponent of the marketplace approach to broadcast regulation is Federal Communications Commission Chairman Mark Fowler.¹²⁸ Chairman Fowler has proposed a regulatory scheme radically different from the one currently in place.¹²⁹ The market proposal would make broadcast licenses freely transferable.¹³⁰ Ways to apply this approach include lottery or granting existing holders of licenses the new freely transferable license.¹³¹ The market approach seeks to deliver the broadcast license into the hands of the highest value user.¹³² The Fowler proposal would also relax current restrictions on multiple ownership of stations.¹³³

The FCC currently limits the number of media outlets through multiple ownership rules.¹³⁴ The multiple ownership rules bar a person from being a stockholder, officer, or director in more than seven broadcast stations of the same broadcast service.¹³⁵ A person having an interest in eight AM radio stations would violate the rules, whereas a person owning seven AM, seven FM, and seven TV stations would not. The FCC has proposed to eliminate the multiple ownership rules under its market approach scheme.¹³⁶

Although the FCC's totally hands-off approach does guarantee the broadcaster freedom from unconstitutional abridgements of his right to free

126. See *infra* text accompanying notes 128-46.

127. See Fowler & Brenner, *supra* note 7, at 242-56.

128. *League of Women Voters*, 104 S. Ct. at 3116, 82 L. Ed. 2d at 289.

129. See Fowler & Brenner, *supra* note 7, at 242-56.

130. *Id.* at 242-44; see E. DIAMOND, *supra* note 7, at 57-109. The author of this section of the book discusses the economic and regulatory theory of the marketplace approach to broadcast regulation.

131. Fowler & Brenner, *supra* note 7, at 242-43.

132. See *id.* at 209-10. FCC Chairman Fowler argues that the FCC should rely on the individual broadcaster to ascertain the needs of the public through normal market forces. *Id.*

133. *Id.* at 245-46. The Fowler proposal also calls for the abandonment of the fairness doctrine and political speech rules, although he concedes that the FCC might assign access obligations for political candidates and political referenda. *Id.*

134. *In re* Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations. Report and Order, 18 F.C.C. 288, 294-95 (1953).

135. *Id.* at 295-97. The rules are often called the 7/7/7 rules. Comment, *An Alternative Proposal to the FCC's Proposed Amendment: Broadcast Media Concentration Rules*, 14 GOLDEN GATE U.L. REV. 399, 400 n.7 (1984).

136. *In re* Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, General Docket No. 83-1009. Notice of Proposed Rule Making, Adopted September 22, 1983: Released: October 20, 1983, 49 Fed. Reg. 49438 (1983). Comment, *supra* note 135, at 401 n.13.

speech, the Commission would allow a concentration of ownership in media outlets.¹³⁷ If one individual owned the media outlets in a given market, that person could monopolize the channels of political speech.¹³⁸ This concentration of influence in the hands of a few has the real potential of limiting the diversity of views that a citizen can hear.¹³⁹ Although the spectrum scarcity doctrine rests on an outmoded technical assumption, this fact does not emasculate its constitutional premise that the first amendment seeks to provide a free marketplace of ideas.¹⁴⁰

B. *The Structural Approach*

The structural approach to broadcast regulation seeks to promote diversity through non-content-based regulations.¹⁴¹ Under this approach the FCC does not analyze the content of the speech, but focuses on and limits the structure of the ownership and control of the media.¹⁴² The FCC now has a rule that uses the structural approach by requiring that those who seek to own or control both newspaper and broadcast outlets divest themselves of the broadcast outlet.¹⁴³

Presently the courts and the FCC primarily regulate television as a product sub-market in a national geographic market. Television constitutes but one competing media delivery system. The courts and the FCC, therefore, should expand the media product market to include TV, radio, newspaper, and possibly other sources and should seek to narrow the geographic market to appropriate metropolitan regions.¹⁴⁴ Because all of these media have an impact on a viewer in any one market, this approach would necessitate an analysis of the ownership or control of all media outlets in any market.¹⁴⁵ One commentator suggests that the FCC borrow the rules of antitrust law as a methodology to hold a case of media concentration unlawful.¹⁴⁶

Although an interesting and worthwhile proposal, the antitrust methodology and its eventual application to media regulation may prove quite costly and difficult. As threshold questions, the courts would necessarily address

137. See Note, *Old Wine in New Bottles: Replacing the Fairness Doctrine with Enforced Competition in the Media*, 3 CARDOZO ARTS & ENTERTAINMENT 143 (1984).

138. *Associated Press v. United States*, 326 U.S. 1, 23 (1945) (newspaper wire service not immune from antitrust laws).

139. Note, *supra* note 137, at 143.

140. *Red Lion*, 395 U.S. at 390 (regulations requiring access for political candidates would ensure that the public receives opposing political views). For a discussion of how antitrust actions by the Federal Trade Commission may also ensure the broadcast of opposing political views, see *infra* notes 141-46.

141. See Bazelon, *supra* note 6, at 209. Where Judge Bazelon refers to content-based regulations he points to those that require the FCC to evaluate the content of programming such as the fairness doctrine. *Id.* at 206.

142. *Id.* at 209.

143. *In re* Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 F.C.C.2d 1046, 1099-1106 (1975), *aff'd sub nom.* FCC v. National Citizen's Comm. for Broadcasting, 436 U.S. 775 (1978); see Note, *supra* note 137, at 145.

144. *Id.* at 143-52.

145. *Id.*

146. See *id.*

the proper identification of the geographic and product markets. The anti-trust burdens of per se and rule-of-reason analysis would complicate the regulatory problem, especially in the application of such market identification and analyses to difficult first amendment issues. Although a profitable tool for analysis, a wholesale adaptation of antitrust rules into the regulation of media appears too costly and uncertain to be an attractive substitute for the present system.

In adopting the structural approach, the FCC should make the rules simple to understand and inexpensive to administer. The rule against the ownership of more than seven outlets of the same media service exemplifies such a rule. A rule numerically limiting the ownership of multiple media outlets in one media market, although not ideal, would serve as a measure of protection against the monopolization of the media outlets.

C. Other Constitutional Justifications for Applying Different First Amendment Standards to the Video Media

The equal time doctrine and the fairness doctrine apply to VHF, UHF, cable, and DBS.¹⁴⁷ The Supreme Court in *League of Women Voters*¹⁴⁸ recently explained that the constitutional basis of these regulations is the spectrum scarcity doctrine. Congress does have the plenary authority under the commerce clause to regulate the video marketplace.¹⁴⁹ The fairness doctrine and the reply doctrine, embodied in the Communication Act, restrain free speech and therefore come into tension with the first amendment.¹⁵⁰ Once the Court recognizes that the spectrum scarcity doctrine has lost its factual basis, the Court logically must either overturn these provisions or find a new constitutional basis.¹⁵¹

An examination of the Court's treatment of the same regulation applied to the print media demonstrates the tension between the equal time doctrine and the first amendment. The equal time doctrine requires that broadcast stations give equal air time to all bona fide candidates for public office.¹⁵² A unanimous Court in *Miami Herald Publishing Co. v. Tornillo*¹⁵³ struck down a Florida statute granting a political candidate's right to reply. The Court found the statute's requirement an impermissible infringement on the news judgment of newspaper editors.¹⁵⁴ In stark contrast to this approach, *Red Lion*¹⁵⁵ upholds the similar FCC fairness doctrine on the basis of the spectrum scarcity.¹⁵⁶

147. See *supra* text accompanying notes 110-13.

148. 104 S. Ct. at 3116, 82 L. Ed. 2d at 289.

149. *Id.*

150. See L. TRIBE, *supra* note 1, at 697 (Professor Tribe notes the juxtaposition of the Court's treatment of the first amendment rights of broadcasters and publishers); Bazelon, *supra* note 6, at 204.

151. See Fowler, *supra* note 7, at 525-27.

152. See *supra* note 74; Powe, *supra* note 7, at 50-51.

153. 418 U.S. 241, 242 (1974).

154. *Id.* at 258.

155. 395 U.S. 367 (1969).

156. *Id.* at 389.

1. *Impact Theory*. The Court also supports a less stringent standard for regulations affecting first amendment rights of broadcasters¹⁵⁷ on the premise that broadcast has a pervasive impact on the lives of all Americans.¹⁵⁸ This rationale correlates to the power theory. The power theory postulates that because the broadcast medium is the source of a majority of America's news, regulation must ensure that it promote the common good.¹⁵⁹ The impact theory conflicts with the holding in *Tornillo*,¹⁶⁰ in which the Court took pains to discuss and reject the power or impact theory for the print media.¹⁶¹ To justify broadcast regulation on the basis of the impact theory the court must find broadcast media more persuasive than print media.

The conclusion that broadcast media has more impact than print media requires the finding of several facts, including a finding that the broadcast media has a major role in shaping human behavior. This conclusion rightly belongs to the fields of psychology or physiology. Because the impact theory looks to the political influence of the broadcaster, the Court must also determine the political and social influence of the broadcaster's audience as opposed to the readers of print. To determine the political influence of the viewing audience, the researcher must determine the number of viewers who are actual or potential voters. Future advances in the fields of psychology, demographics, and political science may threaten the currently accurate factual foundation of any constitutional impact doctrine.

2. *First Amendment Goal of Diversity of Views*. Judge Bazelon and others have suggested that in addition to protecting free speech, the first amendment seeks to contribute to a diversity of political dialogue.¹⁶² The first amendment seeks to create an uninhibited market place of ideas,¹⁶³ according to this view.¹⁶⁴ The Court in *Red Lion* explicitly adopted this rationale

157. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). In this case the Court upheld the FCC's informal sanction of a radio station resulting from the playing of a humorous monologue containing offensive words at 2:00 p.m. The Court noted that the broadcast media has a uniquely pervasive presence in the lives of Americans and found the first amendment rights of the audience superior to those of the broadcasters. *Id.* at 748.

158. *Id.*; Fowler & Brenner, *supra* note 7, at 227-28; Powe, *supra* note 7, at 58-60.

159. Powe, *supra* note 7, at 58-60.

160. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The Court found Florida's right to reply statute that grants a political candidate the right to equal space to answer a newspaper's criticism and attacks on his record unconstitutional. *Id.* at 258.

161. The Florida Supreme Court, from which this case was appealed, held that free speech was enhanced and not abridged by the statute because it furthered the "broad societal interest in the free flow of information to the public." *Tornillo v. Miami Herald Publishing Co.*, 287 So. 2d 78, 82 (Fla. 1973). The State of Florida argued on appeal that the right of reply statute was necessary to correct abuses that would be the natural result of "vast accumulations of unreviewable power in the modern media empires." *Tornillo*, 418 U.S. at 250. The Court implicitly rejected this argument, holding that the statute violated the first amendment rights of print editors. *Id.* at 258.

162. Bazelon, *supra* note 6, at 203. This goal is served by the first amendment's prohibition on the federal government from suppressing unpopular views. *Id.*

163. *Red Lion*, 395 U.S. at 390.

164. Commentators have construed this aim of the first amendment as providing an affirmative right of access to the media. This "right to persuade" over the airwaves is discussed in the following articles: Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Canby, *supra* note 32, at 736-39; Lange, *The Role of the Access Doctrine*

for broadcast regulation.¹⁶⁵ The fairness doctrine withstood constitutional attack because the Court adopted this theory to justify an infringement into the editorial function of broadcasters.¹⁶⁶

V. CONCLUSION

In 1984 the Supreme Court reaffirmed the spectrum scarcity doctrine in *League of Women Voters*.¹⁶⁷ Although noting that the doctrine has come under criticism, the Court declined to reconsider its long-standing approach without some signal from Congress or the FCC. That signal would tell the Court that technological developments have advanced enough to justify some revision of broadcast regulation.¹⁶⁸ In light of the stinging criticism of the doctrine by FCC Chairman Fowler¹⁶⁹ and FCC proposals to Congress for broadcast regulation reform,¹⁷⁰ that the Court did not consider the FCC's position is troubling.¹⁷¹

The Court's footnote 11 from *League of Women Voters* evades the point. Without the spectrum scarcity rationale the fairness and equal time doctrine lose their constitutional justification.¹⁷² A unanimous Court in *Tornillo* considered and rejected the impact and diversity of views arguments that the State of Florida sought to apply to the print media.¹⁷³ The Court could support the equal time and fairness doctrines by concluding that broadcasters have more impact than publishers on the public.¹⁷⁴ This rationale does not justify encroaching upon the free speech rights of broadcasters. The

in the Regulation of the Mass Media: A Critical Review and Assessment, 52 N.C.L. REV. 1 (1973).

165. *Red Lion*, 395 U.S. at 390.

166. The Court in *Red Lion* held the interest of the government to ensure a fair representation of views paramount to the right of broadcasters to exclude whomever they wished from access to their radio frequencies. *Id.* at 389. The Court embraced the view that the first amendment should promote a diversity of views, with the now famous words: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Id.* at 390.

167. See *supra* text accompanying notes 38-50.

168. 104 S. Ct. at 3116, 82 L. Ed. 2d at 289.

169. See Fowler, *supra* note 7, at 523-28.

170. The FCC proposed a package of legislative reforms in 1981. The FCC believes that these reforms could be adopted without changing the Communications Act. These reforms are known as Track I and Track II. Track I recommended implementation of the market approach by lottery and was introduced in H.R. 5008, 97th Cong., 1st Sess. (1982). Track II advocated the elimination of the doctrine of fairness and political speech rules and was introduced in H.R. 5584 and H.R. 5585, 97th Cong., 2d Sess. (1982). Fowler & Brenner, *supra* note 7, at 242 n.155.

171. FCC Chairman Fowler obviously would not have agreed with the government position in *League of Women Voters*, 104 S. Ct. at 3106, 82 L. Ed. 2d at 278.

172. See *supra* text accompanying note 151.

173. *Tornillo*, 418 U.S. at 247-58.

174. One commentator has reported that his review of the original research on the persuasive power of television reveals that television's power in shaping American's beliefs and opinions has limits. He hypothesizes that the potential power of television flows from its ability to further persuade segments of society who need little persuasion, rather than create new opinions. See Powe, *supra* note 7, at 59.

accuracy of the impact rationale today may have little to do with circumstances twenty or fifty years from now.

When the Court bases a constitutional doctrine on a factual conclusion based on evolving technology, that doctrine will eventually become outmoded. Congress sought to regulate broadcasting in 1934. In 1945 the Court upheld the Communications Act of 1934 against a first amendment challenge, based on the spectrum scarcity rationale. The factual basis for this doctrine has disappeared. This conclusion will prove quite obvious when new technology brings DBS and the compression techniques into the marketplace. Congress may retain into the foreseeable future provisions of the Communications Act such as the equal time and political speech requirements. If the Court seeks to uphold these provisions it must look beyond the outmoded spectrum scarcity doctrine. The Court should apply a constitutional principle unwedded to factual conclusions about the rapidly developing technological capacity of modern industry.

