Government-Created Scarcity:

Thinking About Broadcast Regulation And the First Amendment[1]

By Tracy Westen[2]

"[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them."

— Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

Introduction

Although *Red Lion Broadcasting* is often citied as justifying government regulation of broadcast content—specifically, in that case, under the FCC's personal attack doctrine, a corollary of its fairness doctrine—many efforts to describe the First Amendment theory in *Red Lion* are contradictory or unsatisfactory for various reasons. Attempts to articulate a coherent First Amendment rationale for the affirmative government regulation of broadcast programming[3] are often filled with puzzles and paradoxes.

Scarcity. Some cite broadcasting's alleged spectrum "scarcity" as a regulatory First Amendment rationale. But whether scarcity is defined in absolute terms (e.g., "there is just very little of it to go around") or a surfeit of demand over supply (e.g.,

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[3] There are significant First Amendment differences between "affirmative" and "negative" broadcast regulation. Affirmative regulations require broadcast licensees to transmit *more* speech than they would otherwise wish and include, for example, the equal opportunities doctrine, the recently departed fairness doctrine and children's television programming requirements. Negative regulations require broadcast licensees to transmit *less* speech than they would other wish and include, for example, restrictions on obscenity, indecency and commercials for certain products or services (e.g., lotteries). Although the constitutionality of affirmative and negative regulations both rest on various special characteristics of the broadcast media, this paper addresses the general constitutionality of affirmative program regulations.

"there are more who wish to broadcast than there are frequencies available"), it is difficult to explain why broadcast frequencies should be deemed any more scarce than other equally desirable yet limited commodities. The physical world of "shoes and ships and sealing wax," to quote Lewis Carroll, is inherently one of scarcity—there are inherent limits on their number, amount or availability. Are broadcast frequencies any different? Newsprint and brilliant ideas are scarce, but we would scarcely presume to regulate them.

Interference. Some cite the broadcast spectrum's susceptibility to "interference" as a basis for program regulation, yet these interference problems could be solved without program regulation. We could sell or auction off broadcast frequencies, for example, give the recipients a property right against interference and allow them to enforce those rights in the courts, just as we allow the courts to handle problems of property trespass (or "property interference").[4]

Public Property. Some maintain that a broadcaster's use of spectrum is analogous to someone's use of "public property" (e.g., as in "the public's airwaves"), and hence that use can be encumbered with content regulations. But, if anything, First Amendment doctrine has always viewed individual speech uses of governmentally owned public property as deserving the highest form of protection. Could individuals who use public parks for speech purposes be asked to present contrasting views on the issues of public importance that they raise?

Trustee. Some seek to describe broadcasters as "trustees" for the public, required to preserve on their behalf the full diversity of the broadcast marketplace of ideas. Yet by what process did these broadcasters become anointed as trustees? Could we merely define the *New York Times* as a "trustee" and then justify affirmative content regulation of its pages? And if not *The New York Times*, then why CBS or NBC?

In short, it is not immediately apparent why broadcast stations can legitimately be required to broadcast a rebuttal by a person attacked on one of its programs, see, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), but a daily newspaper of mass circulation cannot, see, e.g., *Miami Herald v. Tornillo*, 418 U.S. 241 (1974). Perhaps it was for this reason that the Supreme Court failed to insert even one footnote reference or citation to *Red Lion* in its *Tornillo* decision only five year later.

Despite these difficulties in explicating a rationale for the regulation of broadcast programming within the parameters of the First Amendment, such a rationale does exist. Indeed, it is contained within *Red Lion* itself, although it is not as apparent as might be wished. The foundation of this rationale derives from the special characteristics of the broadcast medium itself. To understand this, it is necessary to start with basics.

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[4] See, e.g., R.H. Coase, *The Federal Communications Commission*, 2 J. Law & Econ. 1 (1959).

Speech:
An Interference-Based Medium, Part I

> *"When two people converse face to face, both should not speak at once if either is to be clearly understood."*
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> — Red Lion Broadcasting Co., *supra*.

Speech is an interference-based medium, as anyone can attest who has attended a loud cocktail party or a Wolfgang Puck restaurant. The human voice uses a range of audible frequencies that are subject to interference by other voices. We have all learned various coping strategies to make ourselves heard in the face of such obstacles.

One strategy typically involves raising one's voice—increasing its volume or amplification, as it were.[5] This can be of limited utility, for it becomes ineffective if others respond in kind. One could also use bullhorns or various methods of electronic amplification, but again, if others adopt the same technique, communication becomes more difficult.

A second strategy involves lowering one's voice, moving closer to the person with whom one is conversing and talking more confidentially.[6] This can be successful up to a point—in loud restaurants, perhaps, but not at rock concerts.

A third strategy, and one that we have all learned so well it is virtually unconscious, might be simply described as using the rules of polite conversation. At their most basic, these rules involve the following: I speak, then you speak, then I respond, then you respond, etc. In groups, of course, this process becomes more intricate, but most of us have thoroughly mastered it by adulthood and rarely think about it.[7] In essence, we have learned how to share the frequencies occupied by the human voice. We might call this strategy *channel sharing*. Put in these terms, all human speech occupies just one broad channel, the equivalent of one broadcast frequency.[8]

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[5] Early radio broadcasters often increased their power to drown out stations on the same frequency. One can still experience this phenomenon today by taking an automobile trip in the Southwestern deserts and listening to one radio station drown out another as one travels closer to it.

[6] The FCC uses this technique to separate stations around the country on the same frequency by lowering their broadcast power so they do not interfere with each other.

[7] Children, it should be noted, must learn this technique; it does not seem to be genetically inherited. Young children frequently interrupt adult conversations without apparently realizing that they are breaking a code of conversation.

[8] Human hearing operates in the spectrum between 20 and 20,000 Hertz. If we could "tune" our vocal chords as well as our ears to transmit and receive sounds in smaller segments of this band, presumably two voice conversations in a room could occur without either pair of conversants hearing the other (e.g., one conversation might occur in the 1,000 to 2,000 Hertz band, and the other in the 15,000 to 16,000 Hertz band). Sadly, humans have never developed this capacity for such fine tuning of communication.

Our ordinary conversation speech strategies are so familiar to us that we have forgotten how rule-bound our conversations are. In a college classroom, for example, students will rarely ask, "Why is the teacher doing all the talking?" It is assumed in such a context that the teacher will set the conversational rules, calling upon students when he wishes, and occupying the remainder of the available spectrum space himself.

In formal settings, however, such as town hall meetings, city council meetings, legislative debates and Supreme Court oral arguments, more formal conversational rules are needed. Because control over audible speech frequencies in such settings is tantamount to political power, democracies apply a second-order set of rules to them. These seek roughly to equalize the time available to all similarly situated speakers, so that all may be given an equal opportunity to communicate with their audiences. These rules can be highly detailed—such as in Roberts Rules of Order.

Perhaps the most important aspect of these rules, for our purposes, is an apparent paradox: that to maximize freedom of speech in such formal settings, it is first necessary to curtail it. The time allocated to one speaker in a legislative debate must be limited in order to allow others to speak. Put almost in Orwellian terms, freedom of speech in interference-based forums such as city council meetings requires "censorship." The speech of one must be time limited in order to give others a chance to speak.

The Supreme Court may be the closest we have to an actual "shrine" to the First Amendment. Yet the bailiff's gavel, which raps the proceedings into silence at the start of oral arguments, is a form of court enforced censorship. If a member of the audience continues a voluble conversation with a neighbor—exercising his First Amendment speech rights, as it were—he will be forcibly ejected from the proceeding. Moreover, in oral arguments, each advocate is given a time limit—say, a half an hour—so that others will also have a chance to speak. Could one such advocate successfully argue that he needs at least an hour to present his arguments fully, and that the Court would be violating his First Amendment speech rights were it to deprive him of that amount of time? Clearly not.[9]

What relation does this discussion have to the problems of broadcast regulation?

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[9] To carry the analogy further, the Supreme Court has ruled in Buckley v. Valeo, 324 U.S. 1 (1976), that money is tantamount to speech in the context of campaign contributions, and that the amount of money a candidate spends on his campaign cannot be limited without a significant or compelling governmental interest. Should the Supreme Court be required to allow advocates to *pay* for their oral advocacy time? Would it be deemed a violation of an advocate's First Amendment rights to prevent him from purchasing substantially large amounts of time—perhaps hours or even days? Clearly, time allocation rules are necessary in any speech forum, and depriving one of unlimited time to speak in order to allow others to be heard cannot, without more, be thought of as violating the First Amendment.

Broadcasting:
An Interference-Based Medium, Part II

> *"Rather than confer frequency monopolies on a relatively small number of licensees, . . . the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week."*
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> — Red Lion Broadcasting Co., *supra*.

Broadcasting and speech are both interference-based media. Two stations on the same frequency, in the same geographical area and with enough power substantially to reach each other, will interfere with each other's signal, so that it is difficult to understand either one. This describes the early days of radio.[10]

Just as humans have created tacit speech rules to maximize opportunities for all to speak, so has the government created rules to rationalize and provide for efficient use of the broadcast spectrum. It is worth deconstructing this process into explicit steps, however, both to elucidate the process and to disentangle from it the frequently confused First Amendment rhetoric of scholars and the courts.

The allocation and regulation of broadcasting frequencies in this country has required the following steps:

(1) Reservation of spectrum for broadcast speech. First, the government must reserve sufficient portions of the spectrum for "public" broadcast speech, as opposed to "private" speech (police, fire, ship-to-shore, etc.), and to impose penalties for violating these regulatory borders. This conclusion may seem quite unexceptional, yet it is worth stopping for a moment to consider its First Amendment implications.

The FCC's regulatory division of spectrum has not been challenged in court under a First Amendment theory. Let us, therefore, hypothetically assume that an individual has filed a First Amendment action against the FCC, arguing that it has allocated too much spectrum for police communications and too little for broadcasting, thereby depriving the plaintiff of an opportunity to speak via the broadcast spectrum. What level of First Amendment scrutiny would a court apply to this claim?[11]

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[10] "Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that . . . [w]ithout government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." Red Lion, *supra*.

[11] If an advocate before the Supreme Court filed an analogous law suit, arguing that the Court had abridged his speech rights by giving him only a half hour instead of a full hour to present the merits of his case, the reviewing court would also have to choose the appropriate level of scrutiny (strict, intermediate or reasonable basis) to evaluate his claims.

Strict scrutiny—requiring a "compelling" governmental interest and the "least restrictive" implementing means possible—would not seem to be applicable, for the plaintiff's opportunity to speak is not being restricted because of the content of his message. Intermediate scrutiny—requiring a "substantial" governmental interest and "reasonably tailored" means—might apply, but the governmental action in question, unlike an imposition of must-carry rules on either cable television systems[12] or individuals bearing draft cards,[13] for example, is not one in which the government is balancing speech against non-speech interests. Instead, where one set of speech interests (the plaintiff's) is balanced against other valid set of speech interests (the police's), it would seem most plausible to apply reasonable basis scrutiny. One set of speech interests would not appear to warrant greater scrutiny (and justification by a higher governmental burden of proof) than the competing speech interest.[14]

In other words, the FCC's division of spectrum between public and private users should only be overturned if it is arbitrary or otherwise lacks a reasonable basis. It is difficult to see why the First Amendment should be construed to give the plaintiff in this hypothetical greater speech rights, while giving the police diminished speech rights.

(2) Allocation of Broadcast Spectrum between Competing Types of Uses. Second, within the spectrum reserved for broadcast speech, the FCC must decide how to divide that spectrum between, for example, radio and television, AM and FM radio, and VHF, UHF and digital television. Again, it would be difficult to envision a plaintiff mounting a successful First Amendment challenge to such non-content related spectrum allocations—arguing, for example, that it would violate his First Amendment rights not to delete one AM frequency and open up an additional FM frequency for the plaintiff to use. The courts would probably reject such a challenge under the reasonable basis test.

(3) Allocation of Broadcast Spectrum by Funding Mechanisms. Third, the FCC must consider how much spectrum to reserve for commercial versus non-commercial educational broadcasting users. Assume a 24 station FM radio market in which the FCC has reserved 4 frequencies for non-commercial educational broadcast stations and 20 for commercial stations. Assume further that all the commercial frequencies are occupied, but that two of the non-commercial frequencies are vacant. Could a new commercial applicant mount a successful First Amendment challenge to this scheme, arguing that the FCC improperly allocated too much spectrum space for

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[12] See Turner Broadcasting System v. FCC, 117 S. Ct. 1174 (1997).

[13] See United States v. O'Brien, 391 U.S. 367 (1968).

[14] Assume, for example, that a City Council gave each citizen 5 minutes to speak before it on a proposed regulation, and it allocated two hours for the entire hearing (allowing a total of 24 citizens to speak). This would mean that the 25th individual wishing to speak would receive no time at all. Assume that this 25th citizen filed suit, arguing that the City's allocation of time improperly abridged his First Amendment rights. The appropriate response would presumably be that allocating 4 minutes to each speaker, thus giving the 25th speaker time to speak, would curtail the speech of the first 24, thereby possibly preventing them from addressing the merits of their position in sufficient depth. A court asked to resolve this question might legitimately apply reasonable basis scrutiny, since there is no apparent reason why the 25th speaker's speech interests would be entitled to greater scrutiny than the first 24.

educational broadcasting, thereby depriving the plaintiff of an opportunity to engage in commercial speech? It is difficult to see how a court would use the First Amendment to take spectrum away from one user in order to give it to another potential user.

In this instance, however, the plaintiff might make the additional argument that the FCC has engaged in a form of content-discrimination—that a distinction between non-commercial and commercial broadcasting can only be made by reference to the station's program content—and hence that strict scrutiny should apply. Again, it seems probable that a court would apply reasonable basis scrutiny to reject plaintiff's argument, since the FCC made its spectrum allocation decision without reference to any particular program or viewpoint.[15]

(4) Allocation of Spectrum by Time Division. In the early days of radio, the FRC and FCC occasionally allocated one frequency to two applicants—and in some instances to both a commercial and a non-commercial applicant. Each would receive the right to operate on the same frequency, for example, 12 hours a day.[16] Today, there is no reason, either in spectrum physics or constitutional law, why the FCC might not follow a similar course—dividing, for example, one broadcast frequency among two applicants, giving each 12 hours a day; or dividing one frequency among seven applicants, giving each one day of the week.[17]

The FCC might even create a common carrier system, the ultimate time division scheme, in which the licensee assigned the frequency would be required by law to make it available to any applicant who wished to use it on a first-come, first-served basis. Under such a system, practical notions of spectrum "scarcity" would vanish. Every individual would have a "right" to broadcast, just as every individual has a "right" to stand in line for admission to the Museum of Modern Art in New York. Sooner or later, with patience and enough money, every individual could be a broadcaster, if only for a limited time period.[18]

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[15] Compare Turner Broadcasting System v. FCC, 117 U.S. 1174 (1997). Is there a limiting case here—for example, an FCC allocation of 23 frequencies for non-commercial applicants and 1 for a commercial applicant, where only 2 of the non-commercial frequencies were occupied and dozens of commercial applicants are waiting in the wings? Even in this case, a successful plaintiff would have to argue, not that he had a right to a broadcast frequency, but that he had a right to engage in *commercial* broadcasting, a somewhat more difficult case to make.

[16] Commercial licensees ultimately squeezed out their non-commercial partners, successfully arguing to the FCC that they should be given more and more of the station's time allotment, since they could use it more "efficiently" (i.e., they could broadcast longer hours, given their access to advertising revenues, whereas non-commercial broadcasters could not fill their allotment of house due to a lack of funding). See R.W. McChesney, Telecommunications, Mass Media, & Democracy: The Battle for Control of U.S. Broadcasting, 1928-1935 (Oxford Univ. Press, 1994).

[17] Although these various applications for one frequency could each operate their own transmitter, it would make commercial sense for them to share a transmitter, studio and facilities in a manner similar to newspapers' Joint Operating Agreements.

[18] Under such a system, the FCC might also require the licensee to make available some portion of time on a free or substantially reduced cost basis, much like it authorizes local franchising authorities to require cable television systems to provide public access channels today.

Could a plaintiff challenge such FCC time divisions, arguing that he had a First Amendment right to receive *more time* than others—more than 12 hours a day in a split frequency, for example, or more than one day a week in a seven-day allocation scheme, or more time than anyone else under a common carrier scheme? Again, it would seem that reasonable basis scrutiny would generate a "No" answer. One applicant, having been awarded 12 hours out of 24, for example, would seem to have no particular First Amendment right to obtain more—at a cost of reducing his co-tenant's time to, say, six hours. Whatever the policy merits of any particular FCC time allocation, therefore,[19] it would not seem to be subject to compelling or even intermediate scrutiny.

Government-Created Scarcity: A First Amendment Rationale for Broadcast Regulation

> *"It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press."*
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> — Red Lion Broadcasting Co., *supra*.

We have now arrived at the crux of the matter. What is apparent is that traditional notions of spectrum "scarcity" are misconceived. The broadcast spectrum is not inherently more or less scarce than a wide range of other tangible and intangible commodities. There are physical limits on the spectrum needed to present one's argument in a city council meeting or Supreme Court oral argument (two cannot speak at once), just as there are physical limits on the spectrum needed to broadcast (two cannot broadcast on the same frequency and in the same location at once). What is critical for our purposes, however, is the way the government has chosen to divide up the opportunities for speaking—whether before the Supreme Court or a broadcast audience.

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[19] It could be argued, for example, that a common carrier system is inherently defective under the First Amendment, since it would prevent any one licensee from building up a coherent body of programming (as a newspaper can create a coherent body of text), and that divisions of spectrum in force today, which give almost total control to one licensee, are constitutionally required. Whatever the merits of such arguments on a policy level, it seems doubtful that they would rise to a constitutional level, in which a court could be asked to strike down a common carrier allocation system on First Amendment grounds. This is primarily because such a spectrum allocation balances one set of speech rights against another. A common carrier system of broadcast speech might deprive one speaker of the substantial amounts of broadcast time that today's licensees possess, but this would be counter-balanced by the First Amendment benefits resulting from a system in which thousands or millions of citizens would be given their first right to speak over the broadcast media.

The most fundamental decision in the FCC's entire scheme of allocation is its decision to give one applicant an entire frequency—instead, for example, of splitting a frequency between two licensees (e.g., one during the day and one during the night), or between seven licensees (one for each day of the week), or creating a common carrier system in which anyone could, for a specified amount of time, become a broadcaster by simply purchasing the time to become one. *The broadcast spectrum is scarce because the government has chosen to give it to just a few speakers, instead of many, not because of its inherent physical characteristics or the intensity of demand for its utilization.*

The FCC's "rules" of speech allocation in an interference-based medium, in other words, tilt substantially in favor of a very few fortunate licensees, who are able, also according to these rules, to control virtually all of their frequency's time, twenty-four hours a day, to the general exclusion of other speakers.[20] This *government created scarcity* may be perfectly reasonable, and even good frequency allocation policy,[21] but it also provides the theoretical basis for the government's regulation of broadcast programming.

Take, for example, the problem of political broadcasting time. Various proposals have been made to require broadcast licensees to provide political candidates with free time in which to present their views to the electorate.[22] Broadcast licensees have typically responded, invoking analogies to newspapers and the print media, that such a regulation would deprive them of their First Amendment rights editorially to control the content of their station's programming.

Conceptually, however, the First Amendment would certainly seem to allow the FCC to give a broadcaster a license to use his frequency 24 hours a day for most of the year, but withhold, say, one hour a day from that licensee's control during the 60 day period before a national election. During this 60 day period, the FCC could require this hypothetical licensee to turn off its transmitter one hour each day, during which hour the government would simultaneously turn on its transmitter tuned to the same frequency. The government could then make that hour equally and publicly available to all candidates in the election on a first-come, first-served (common carrier) basis.

Could a broadcast licensee successfully argue that the First Amendment gives it a constitutional right to broadcast 24 hours a day, the year around, and that the government would be violating that right if it withheld one hour a day during the 60 day period prior to an election? Clearly not. The government would be able to justify withholding that hour (or not granting it to the licensee in the first instance) on the need to create new speech opportunities for dozens or hundreds of candidates who might otherwise be barred

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[20] See CBS v. DNC, 412 U.S. 94 (1973), deferring to the FCC's allocation scheme in which virtually all editorial control over each frequency is given to individual licensees, subject only to such regulations as the FCC's fairness doctrine.

[21] The FCC's allocation scheme is not necessarily a bad one; indeed, it may be the most reasonable method for providing high quality diverse programming. The current scheme does, however, have profound implications for the constitutionality of program regulations (see discussion below).

[22] See separate paper by Westen, A Proposal: Media Access for All Candidates and Ballot Measures.

from presenting their views to the electorate. This is classic channel sharing, as referenced by *Red* Lion. Such a balancing of speech rights would surely pass reasonable basis scrutiny.

Now let us assume that the government might reasonably conclude that such a system would be inefficient—requiring the government to operate thousands of transmitters across the country, duplicating in every community all the existing licensees' transmitters, just so political candidates could broadcast their views on the government's transmitters for one hour a day during a 60 day period prior to an election. Instead, could the require its existing licensees to make *their* transmitters available for such a purpose? Under what conditions would such a requirement be constitutional?

The answer requires a distinction between two questions: whether the government can require the licensee to share its *frequency* with others, and whether the government can require the licensee to share its *broadcast facilities* with others? Clearly the FCC could require a licensee to relinquish (or not obtain in the first instance) one hour a day for each of the 60 days before an election so that the government could turn on its transmitters and allow candidates to use them on the broadcasters' frequencies (see discussion above). Indeed, the FCC might contend that, conceptually, it had never given the licensee that time as part of its license.

Could the FCC also require the licensee to turn over the use of its transmitter and other facilities (studios, cameras, editing systems, etc.) for candidates to use? The answer would also seem to be "Yes," under two possible scenarios.

First, the FCC might reasonably conclude that licensees must make their facilities available to candidates in partial exchange for the value of their spectrum, which they have essentially received without payment. Under this approach, the value of the licensee's spectrum would first be estimated, then the rental value of the licensee's facilities would be deducted. So long as the value of the frequency exceeded the value of the rentals, there would be no charge.[23]

Second, and alternatively, the FCC might deem licensees to have made an implicit choice: that they would rather accept a system under which they would occasionally be required to provide the free use of facilities and channel capacity to political candidates for a short time during the year, than they would accept a system in which they had *no control* over programming—as in a common carrier regime. In other words, in exchange for giving licensees considerably *more* than they might otherwise be entitled (i.e., virtually complete control over their frequency for most of the year), the government would be entitled to ask for something in exchange—the periodic and limited use of their frequency for public interest purposes.

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[23] See, e.g., paper by Charles Firestone, The Spectrum Check Off Approach, in which licensees would be offered a choice: pay for their spectrum and allow the candidates to buy time with public funds (derived from the spectrum fee), or not pay for their spectrum and provide candidates with offsetting free time.

The history of the 1934 Communications Act suggests support for this second scenario. Broadcasters wanted assurances from Congress that they would have a wide range of editorial rights and *not* be treated as common carriers; in turn, Congress wanted a commitment from the broadcasters that they would provide programming in the public interest (e.g., equal opportunities for political candidates, etc.). This 1934 version of "let's make a deal" generated two important legal provisions: the prohibition on "common carrier" regulation (in Section 3(h) of the Act), and the better known requirement that broadcasters operate in the "public interest."

What is not generally understood is that Section 3(h) serves as the illustrative linchpin in the government's system of *government-created or legally-created "scarcity"* in broadcasting. When Congress in 1934 prohibited the FCC from ever adopting a common carrier system for broadcasters, this effectively prevented the vast majority of the American public from ever having the right to speak directly over the broadcast medium in their own words or moving images.[24] The government made this concession to the broadcasters in exchange for their commitment to provide some measure of public interest programming.

These two scenarios differ significantly. In the first scenario, the costs of the use of the licensee's facilities are offset against the value of the licensee's free use of spectrum. In the second scenario, the use of the licensee's facilities, either by outside speakers such as political candidates, or by the licensee on behalf of outside audiences as in children's programming, is offset against the value of the licensee's receiving almost total control over his allocated spectrum (in contrast with the diminished value of that spectrum to the licensee under a common carrier system).[25]

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[24] By analogy, it would be as if a City Council announced that, in the interest of conserving time, in the future only a few carefully selected spokespersons for the community ("trustees") would be able to present testimony before it on matters of public interest, but it would require these spokespersons to fairly reflect all the views of the community. If such a system were implemented, it would be a mistake to attempt to justify it on the basis of "spectrum scarcity" in city council meetings. Instead, it would simply be an alternative set of rules (not a desirable one, perhaps) for allocating interference-based spectrum.

[25] The law of "unconstitutional conditions", though never thoroughly developed by the Court, might also be useful here. In *Sherbert v. Verner*, 374 U.S. 398 (1963), for example, the Supreme Court invalidated, on First Amendment grounds, the dismissal of a government employee for failing to work on a Saturday (the employee was a Seventh Day Adventist whose religion prohibited work on Saturdays). The Court ruled that a Saturday work requirement imposed an unconstitutional burden upon a protected constitutional right. A broadcast licensee might argue that a requirement that he present the views of others over his own facilities for a relatively brief period of time prior to an election amounts to an unconstitutional condition placed on his speech (use of the spectrum). The appropriate rebuttal is to point out that in *Sherbert v. Verner*, the government was asking an employee to give up a constitutionally protected right (practice of religion) in exchange for an economic opportunity (employment). The Court held that employment cannot be so burdened. In the broadcasting case, however, licensees are being asked to give up control over a small portion of their speech facilities in order to maximize the speech rights of others. In this situation, the constitutional equities favor the rights of the outside speaker and the audiences that wish to hear him. The "condition" imposed is a speech-favoring condition, an analysis more appropriate to an interference-based medium (see discussion above).

Conclusion

> *"A licensee . . . has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens."*
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> — Red Lion Broadcasting Co., *supra*.

What is interesting about this famous Supreme Court statement is how clearly it does *not* apply to newspapers or the print media. It would be difficult, in light of the *Tornillo* decision, to paraphrase thus: "A newspaper . . . has no constitutional right to be the one who holds the right to print or to monopolize *that newspaper* to the exclusion of his fellow citizens."

It might be possible to interpret the first clause as holding only that anyone, whether a potential broadcaster or newspaper publisher, has an equal right to *seek to become* a broadcaster or publisher. The second clause, however, is more difficult. Virtually every Supreme Court decision on the subject would reject the conclusion that a newspaper publisher has no constitutional right to "monopolize" his newspaper "to the exclusion of his fellow citizens." As the Court said in *Tornillo*, the function of a newspaper editor is to edit, and that inevitably results in its excluding the views of others as the editor sees fit.

The appropriate way to understand the validity of this second clause from *Red Lion*, in the context of broadcasting, is to read it in the context of "government-created scarcity." A broadcast licensee has no constitutional right to monopolize the frequency he has received from the FCC because, along with that frequency, the broadcaster has also received a government-created legal right to exercise almost total control over it and exclude virtually anyone it wishes from its use. In exchange for this near absolute grant of editorial control, the government can legitimately require that a licensee, within reasonable policy parameters, "share" its frequency with others, either by turning it over to them for short periods of time (as with political candidates under Section 315), or by producing programming on their behalf (as with children's television programming). By contrast, although a newspaper publisher uses scarce newsprint to publish, that newsprint has not been made scarce by any action of the government in order to divide up an interference-based medium with other potential users, nor could the government attempt to do so since printing does not utilize an interference-based medium.[26]

In short, *Red Lion's* basic assumptions only make sense in the context of an interference-based medium, which the government has rationalized not by opening it to all under, say, a common carrier policy, but instead by giving licenses almost total

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[26] If trees were struck by a sudden plague, making newsprint physically scarce, would the government be able to limit the number of newspaper published, and in so doing require publishers to "share" their facilities with others, so that all views could be expressed? Since the market place of supply and demand would rationalize this newsprint by questions of cost, this might not be necessary.

editorial control over their frequency in exchange for “public interest” programming obligations on behalf of listening or viewing audiences.