

ABUNDANT MEDIA, VIEWER SCARCITY: A MARKETPLACE ALTERNATIVE TO FIRST AMENDMENT BROADCAST RIGHTS AND THE REGULATION OF TELEVISED PRESIDENTIAL DEBATES

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INTRODUCTION

The dramatic conclusion to the 2000 presidential election revealed a deeply divided nation. Voters split their choices throughout the country, sweeping out a host of Republican incumbents, while ending eight years of Democratic control in the White House. If the message sent to Washington was far from clear, so too was the motivation for the voters' choices. Although the candidates poured millions into commercials, Internet sites, and bus tours,¹ an undecided public focused on one campaign event: the debates. Despite the alternatives, and even with the inherent flaws, the live presidential debates became a singularly important source of information for American voters. Indeed, more than forty-six million households tuned in for the first debate, a number exceeding the first face-off between the candidates in 1996.²

The continued importance of the presidential debates, however, might soon prove insufficient to surmount the economics of network broadcasting. In the past decade, broadcast networks have watched viewers depart in record numbers, lured away by new technology and an ever-increasing array of media alternatives. With cable, satellite, and the Internet all vying for consumer attention, television networks continue to face slumping ratings and sagging profits.

Television networks have long questioned their role as guardians of the public interest. Today, with low-cost media alternatives eroding the television audience, the networks have launched a renewed attack on the Federal Communication Commission's policies on civic programming through court challenges, lobbying, and news editorials. In the 2000 election two networks, the National Broadcasting Company (NBC) and the FOX Network (FOX), stepped up their protests by simply refusing to air the first of the general election presidential debates. While sharp criticism rained down from the Commissioners, the ratings suggest that the American public welcomed the content choice. With no end to network troubles in sight, the 2004 elections

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1. According to the Federal Election Committee, of the candidates who remained in the race through the election, Democratic presidential hopefuls spent \$53,708,403, Republicans \$94,466,341, and other parties a combined total of \$14,428,180. Receipts of 1999-2000 Presidential Campaigns Through July 31, 2000, *available at* <http://www.fec.gov/finance/prec8.htm> (last visited Feb. 18, 2002). Candidates who withdrew before the election spent a combined total of \$342,963,864. *Id.*

2. *See infra* note 213 and accompanying text.

could lack any unified television coverage.

Preserving the historic importance of the televised presidential debates will require the Federal Communications Commission (FCC) and the Supreme Court to confront the foundation of broadcast regulation in the United States. Historically, the Court has supported the FCC's duty to protect the public interest, relaxing the protections of the First Amendment to permit content-based restrictions on broadcasters. The basis for this public interest role, however, rests firmly on the doctrine of spectrum scarcity to justify the governmental grant of broadcast monopoly power. Scarcity theories, long criticized as economically inefficient, have now been attacked as scientifically flawed and incompatible with the new digital world. Today, many argue that increased competition in broadcast media provides a better guarantee of the public interest than intrusive government oversight. Trusting the market, however, might ignore the unequal access to new broadcast technologies and trap large numbers of the American electorate behind the digital divide.

A legislative solution is an attractive but unlikely answer. The FCC's public interest power, which includes authority to regulate broadcast indecency, is difficult for politicians to attack directly without loss of political capital. Moreover, the 2000 presidential elections highlighted more pressing deficiencies in the voting process, problems that remain in the national spotlight.³ Administrative options within the FCC are equally unlikely, given its size, structure, and partisan composition.

Judicial intervention, sometimes criticized in other areas of national debate, is the best solution. The Supreme Court holds the unique responsibility of defining the First Amendment rights of broadcasters. The Court is both the historic arbiter of the Constitution and the modern source of the FCC's sweeping regulatory authority. A solution to the chaos of the First Amendment rights of broadcasters is necessary and available in the same economic analysis that supports the criticism of the current state of the law. This Article suggests that the First Amendment rights of broadcasters should be evaluated using the market power of the broadcast content to determine the degree of constitutional protection. This Article then applies this new standard of review to a model broadcast debate regulation, which compels the major television networks to provide live coverage of the general presidential debates.

Part I of this Article recounts the history of American broadcast regulation. Tracing the development of the FCC through statute and commentary, Part I outlines the doctrines of scarcity that underlie the FCC's public interest mission. Noting the economic irrationality of the scarcity theory and its conflict with First Amendment values, Part I concludes that scarcity does not justify continued federal oversight. Part II continues with a discussion of the past and present importance of live televised debates in the general presidential election.⁴ This

3. Edward Walsh & Dan Balz, *One Year Later, Election Reform Remains Elusive*, WASH. POST, Nov. 13, 2001, at A3.

4. Broadcast coverage of political debates has raised concerns outside the general presidential elections. Commentators have addressed problems regarding coverage of the

section also explains the 2000 presidential debates and the decision of NBC and FOX to decline live coverage.

With this background in mind, Part III offers a fresh solution based on the reasoning of the Supreme Court's two most recent First Amendment broadcasting decisions, *Reno v. ACLU*⁵ and *Turner Broadcasting System, Inc. v. FCC (Turner I)*.⁶ After an overview of the Court's content approach to speech, Part III explains the Court's forum-specific approach to the First Amendment in broadcasting. The Court's attention to the converging markets for broadcast speech suggests a finite future for the scarcity doctrine and a new technology-specific approach to the First Amendment in broadcasting. Part III then explains an alternative market-based approach to the First Amendment rights of broadcasters using the product and geographic market standards developed in antitrust economics. Market power, Part III argues, provides a dividing line between the scarce media of broadcast television and radio and the plentiful resources of the digital spectrum. Full First Amendment protections for only converged⁷ broadcast media, Part III concludes, will retain administrative regulation over lagging technologies while inducing broadcasters to speed the development of broadband.

Part IV constructs a model regulation compelling the coverage of the general presidential debates. After outlining the suggested goals of a debate rule, Part IV tests the model against the market-based First Amendment review. Despite the emerging alternatives to broadcast television and the competing sources of campaign information, Part IV concludes that national televised coverage of the general presidential debates comprises a single, powerful content market. Technological advancements and a national spirit of campaign reform could soon transform our understanding of broadcast political coverage. Until then, this

presidential primaries, and contests for seats in both houses of Congress. See, e.g., Jamin B. Raskin, *The Debate Gerrymander*, 77 TEX. L. REV. 1943 (1999). Others have noted the problems posed by the Supreme Court's decision in *Arkansas Education Television Commission v. Forbes*, 523 U.S. 666 (1998), which held that states may exclude so-called "third-party candidates" on neutral criteria such as the "public interest" in the candidate. See, e.g., Kyu Ho Youm, *Editorial Rights of Public Broadcasting Stations vs. Access for Minor Political Candidates to Television Debates*, 52 FED. COMM. L.J. 687 (2000); Keith Darren Eisner, Comment, *Non-Major-Party Candidates and Televised Presidential Debates: The Merits of Legislative Inclusion*, 141 U. PA. L. REV. 973 (1993). The general presidential election debates, however, "occur in the one campaign that commands considerable voter attention." Daniel H. Lowenstein, Commentary, *Election Law Miscellany: Enforcement, Access to Debates, Qualification of Initiatives*, 77 TEX. L. REV. 2001, 2010 (1999). Accordingly, there might be "no basis in evidence or in common sense for extrapolating from the importance of presidential general election debates a similar significance" to other debates. *Id.* Without addressing the merits of the comparison, this Article assumes that the general presidential election debates are indeed "major events," different in scope and meaning from other debates. *Id.* The analysis of this Article is limited accordingly.

5. 521 U.S. 844 (1997).

6. 512 U.S. 622 (1994).

7. See *infra* notes 247-48 and accompanying text.

Article suggests that federal oversight of the televised presidential debates is an appropriate and necessary limitation on the First Amendment rights of networks.

I. FEDERAL REGULATION OF THE AIRWAVES: A BRIEF HISTORICAL OVERVIEW OF DUTY AND THEORY

Broadcast regulation emerged from a combination of military pressure, international tragedy, and a limited understanding of technology. Given a broad statutory mandate by Congress, federal broadcast regulation sought to order the multitude of speakers rushing to the newly discovered airwaves.⁸ Throughout the Twentieth Century, the modest regulatory goal initially conceived by Congress developed a wide social mission through federal regulations aimed at improving the quality of public debate.⁹ During the same period, the analytic foundations for these concededly laudatory goals have been continually questioned and repeatedly marginalized. An examination of these foundations, based on the doctrine of scarcity, illustrates that additional control over broadcasting could strain First Amendment precedents despite the importance of preserving an informed electorate.

A. *The Early History: Ships, Radios, and Secretary Hoover*

Federal control of the American broadcast airwaves emanated from the tragedy of the *Titanic*.¹⁰ In the early 1900s, broadcast radio emerged as a commercial force in naval communications, primarily in the business of private shipping.¹¹ The *Titanic* disaster highlighted the growing concerns of the U.S. Navy that autonomous, unregulated radio broadcasters impeded the safe passage of military and commercial vessels, creating a state of chaos on the seas.¹²

8. See Marc Sophos, Comment, *The Public Interest, Convenience, or Necessity: A Dead Standard in the Era of Broadcast Deregulation?*, 10 PACE L. REV. 661, 666 (1990).

9. See LEE C. BOLLINGER, IMAGES OF A FREE PRESS 65 (1991).

10. See THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 5 (1994). Although the *Titanic* sent several distress calls in the hours before the ship disappeared, "amateur radio operators along the East Coast filled the air with questions, rumors, and, most of all, interference." *Id.*

11. See R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 1-2 (1959). The growth of maritime commerce led to the passage of the Wireless Ship Act of 1910, which required ships leaving a United States port with more than fifty passengers to be equipped with radio transmitters. Wireless Ship Act of June 24, 1910, ch. 379, 36 Stat. 629.

12. See S. REP. NO. 659, 61st Cong. § 3 (1912), reprinted in Coase, *supra* note 11, at 2. The Navy further claimed that "[c]alls of distress from vessels in peril on the sea go unheeded or are drowned out . . ." Coase, *supra* note 11, at 2. In addition, the ratification of the first international radio treaty in 1912 required the United States to develop uniform policies of broadcasting that were compatible with international use. See ROBERT L. HILLIARD, THE FEDERAL COMMUNICATIONS COMMISSION: A PRIMER 61 (1991). The combination of military pressure and international obligation moved Congress to action. See Mike Harrington, *A-B-C, See You Real Soon: Broadcast Media Mergers and Ensuring a "Diversity of Voices,"* 38 B.C. L. REV. 497, 503 (1997).

Congress responded by seizing the radio airwaves and requiring radio operators to seek licenses from the Department of Commerce. Spurred by the Navy, the Radio Act of 1912¹³ created a regulatory system that favored large-scale commerce,¹⁴ and not surprisingly, military defense.¹⁵

The 1912 Act, however, proved insufficient to control the rapid growth of the radio industry in the 1920s¹⁶ as private operators rushed to develop the new market.¹⁷ Seeking uniformity, then Secretary of Commerce Herbert Hoover began denying new commercial radio licenses.¹⁸ Soon after, Hoover's power to condition licenses under the 1912 Act was removed by court challenge,¹⁹ leaving the radio industry without effective federal oversight. As the Supreme Court later observed, the result was again "chaos."²⁰ Following a showdown between Secretary Hoover and the broadcasting industry,²¹ Congress passed the Radio Act

13. The Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302.

14. See KRATTENMAKER & POWE, *supra* note 10, at 6. The authors note that while ships were granted an exclusive portion of the broadcast spectrum, amateur operators were "relegated to oblivion." *Id.* See also Coase, *supra* note 11, at 3 (noting that under the 1912 Act, amateur broadcasters were limited to wavelengths less than two hundred meters).

15. See KRATTENMAKER & POWE, *supra* note 10, at 6. In particular, the 1912 Act allowed the military to seize all radio signals and equipment in wartime. *Id.*

16. Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 139 (1990) (reporting that by 1922 more than 576 broadcast stations were transmitting in the United States).

17. Karen Beth Gray, Note, *Fairness Doctrine Termination: Extinction of an Unenforceable Theory*, 22 SUFFOLK U. L. REV. 1057, 1058-59 (1988).

18. See KRATTENMAKER & POWE, *supra* note 10, at 9. Secretary Hoover had originally sought to broker wider industry regulation through a series of meetings between government agencies and commercial broadcasters called the National Radio Conferences. See Coase, *supra* note 11, at 4. Although the meetings produced a series of legislative recommendations, Congress adopted none of the proposals. See *id.*

19. *Hoover v. Intercity Radio, Inc.*, 286 F. 1003 (D.C. Cir. 1923). Secretary Hoover sought to limit the number of successful licensees by drafting detailed conditions into the applications. See Coase, *supra* note 11, at 4. In 1923, Secretary Hoover convened another meeting of the National Radio Conference, which concluded that the 1912 Act permitted the Secretary to regulate both the frequencies of radio broadcasts, and the hours of operation for radio licensees. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 n.4 (1969). Soon after, however, the Court of Appeals for the District of Columbia held that the Secretary's role in the licensing process under the 1912 Act was limited to the selection of the wavelength for the applicant. See *Intercity Radio*, 286 F. at 1007. Accordingly, the Act of 1912 reposed "no discretion whatever in the Secretary of Commerce," and made the issuance of a license "mandatory." *Id.*

20. *Red Lion*, 395 U.S. at 375.

21. See Hazlett, *supra* note 16, at 141. Although the *Intercity Radio* decision had limited the regulatory power of the Commerce Department, Secretary Hoover began refusing to process new applications in defiance of the court's order. See *id.* Hoover's actions were again disapproved by court decision, and his powers limited once more to only "the regulations in the Act itself." Coase, *supra* note 11, at 5 (discussing *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926));

of 1927²² and created a new agency, the Federal Radio Commission (FRC).²³ The 1927 Act marked the beginning of serious federal communications oversight.²⁴

In 1934, Congress tightened the regulation of broadcasting by replacing the FRC with the FCC.²⁵ Congress gave the new seven-member commission²⁶ wide regulatory power over all broadcast media, including radio, telegraph, and telephone.²⁷ Congress also carried over the FRC's basic mandate into the 1934 Act, empowering the FCC to issue broadcast licenses²⁸ for the "public interest, convenience, or necessity."²⁹

B. The Public Interest Standard Explained and Applied

The public interest standards of the Acts of 1927 and 1934 provided the FCC with general authority to protect the public interest.³⁰ The public interest doctrine was not an entirely new concept; it had been used elsewhere in federal legislation governing state-created monopolies³¹ and private control of public

see also Fed. Regulation of Radio Broad., 35 Op. Att'y Gen. No. 126, 129 (1926) (agreeing with the *Zenith* court's interpretation of the 1912 Act, and concluding that "[t]he power to make general regulations is nowhere granted by specific language to the Secretary").

Rather than continuing to challenge the regulatory limits imposed by the 1912 Act, Secretary Hoover "issued a statement abandoning all his efforts to regulate radio and urging that the stations undertake self-regulation." *NBC v. United States*, 319 U.S. 190, 212 (1943). With federal oversight removed, a flood of new broadcasters swarmed the airwaves, and "[m]ore than two hundred stations were established in the next nine months." Coase, *supra* note 11, at 5.

22. Radio Act of 1927, ch. 169, 44 Stat. 1162.

23. *Id.* § 3, at 1162.

24. *See* Timothy B. Dyk & Ralph E. Goldberg, *The First Amendment and Congressional Investigations of Broadcast Programming*, 3 J.L. & POL. 625, 628 (1987).

25. *See* Communications Act of 1934, ch. 652, 48 Stat. 1064.

26. *Id.* § 4(a), at 1066. In 1986, Congress reduced the FCC's membership to five. Pub. L. No. 99-334, 100 Stat. 513, 47 U.S.C. § 154(a).

27. *See* DONALD J. JUNG, *THE FEDERAL COMMUNICATIONS COMMISSION, THE BROADCAST INDUSTRY, AND THE FAIRNESS DOCTRINE: 1981-1987*, at 8 (1996). The 1934 Act, however, retained substantially all of the regulatory framework of the 1927 Act. *See* *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940). The FCC was permitted to issue licenses for three-year periods, where the license would benefit the public interest. Communications Act of 1934, ch. 652, § 307, 48 Stat. 1064, at 1083-84.

28. For an overview of the modern broadcast licensing process, *see* Timothy B. Dyk, *Full First Amendment Freedom for Broadcasters: The Industry as Eliza on the Ice and Congress as the Friendly Overseer*, 5 YALE J. ON REG. 299, 301-02 (1988).

29. Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064.

30. *See* BOLLINGER, *supra* note 9, at 63 (describing the public interest doctrine in broadcasting as "the most general mandate imaginable").

31. *See, e.g., United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 464 (1922) (holding that Section Three of the Clayton Act is not an unconstitutional restriction on the rights of patent

resources.³² The Supreme Court first explained the public interest standard of the Communications Acts in *NBC v. United States*, stating that the public interest doctrine assumes that broadcast regulation should “secure the maximum benefits . . . to all the people of the United States.”³³ Recounting the chaotic results that followed the narrow interpretations of the 1912 Act,³⁴ the Court concluded that Congress had premised the Act of 1927 on the belief that federal regulation was essential to avoid wasting the broadcast airwaves.³⁵ The 1927 Act thus established a “unified and comprehensive regulatory system” to manage broadcast traffic.³⁶

The Court added, however, that the 1927 Act “does not restrict the Commission merely to supervision of the traffic.”³⁷ The Court noted that the “dynamic” nature of radio necessitated broad legislative language capable of evolving with new developments in the broadcast medium.³⁸ The 1927 Act, according to the Court, delegated to the FCC the task of determining the “larger and more effective use of radio.”³⁹ The Court supported this broad interpretation by citing the physical limits of the broadcast spectrum, reasoning that because “[t]he facilities of radio are not large enough to accommodate all who wish to use them,” the FCC is authorized to determine “the composition of [the] traffic.”⁴⁰ The Court thus used the chaos of unregulated broadcasting⁴¹ to justify both procedural and substantive regulation of the airwaves.⁴²

holders, as Congress may prohibit “in the public interest the making of agreements which may lessen competition and build up monopoly”).

32. See, e.g., Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456, 477-78 (requiring the Interstate Commerce Commission to determine whether a proposed extension to a railroad is required for the “present or future public convenience and necessity”); *Bd. of Trade of Chicago v. Olsen*, 262 U.S. 1, 41 (1923) (holding that because the Chicago grain exchange is a business “affected with a public national interest” it is “subject to national regulation as such”); *Munn v. Illinois*, 94 U.S. 113, 126 (1876) (holding that when private property is devoted to a public interest, the owner “must submit to be controlled by the public for the common good, to the extent of the interest . . . created”).

33. *NBC v. United States*, 319 U.S. 190, 217 (1943).

34. See *supra* notes 13-21 and accompanying text.

35. *NBC*, 319 U.S. at 213.

36. *Id.* at 214. The Court specifically noted that “[r]egulation of radio was . . . as vital to its development as traffic control was to the development of the automobile.” *Id.* at 213.

37. *Id.* at 215-16.

38. *Id.* at 219-20.

39. *Id.* at 216. The Court viewed the 1927 Act as an unremarkable exercise of legislative delegation, defining “broad areas for regulation” and general “standards for judgment.” *Id.* at 219-20.

40. *Id.* at 215-16.

41. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

42. In *NBC*, the Court stated that the 1934 Act is not solely concerned with the regulation of broadcast traffic, but also “puts upon the Commission the burden of determining the composition of that traffic.” *NBC*, 319 U.S. at 215-16. In *CBS v. Democratic National Committee*, 412 U.S.

One proposition, however, does not necessarily lead to the next.⁴³ Congress had passed the 1927 Act to correct the market failures in broadcasting and had incorporated the public interest standard to avoid the restrictive judicial interpretations that led to the chaos of the early 1900s.⁴⁴ Neither goal necessarily required the FCC to become the public guardian of broadcast content. Despite this potential flaw, broader applications of the public interest doctrine⁴⁵ have continued to rely on the Court's reasoning in *NBC* and the Court's expanded discussion of the doctrine in *Red Lion Broadcasting v. FCC*.⁴⁶ This reasoning, described under the catchphrase "scarcity," remains the foundation for federal broadcast oversight⁴⁷ and thus must be considered as a likely source of authority for regulation of the presidential debates.

C. *The Many Faces of Scarcity*

More than fifty years ago the Supreme Court held that broadcasting enjoyed the protections of the First Amendment.⁴⁸ Despite this fact, Americans have comfortably accepted pervasive regulation of broadcasting, regulations that

94, 117 (1973), the Court further noted that although broadcast regulation had developed slowly, the FCC now acts as an "'overseer' and ultimate arbiter and guardian of the public interest." The Court has therefore interpreted the public interest doctrine as a "supple instrument for the exercise of discretion by the expert body." *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940). Ensuring that broadcasting serves the public interest, moreover, might allow the Commission to rest on "judgment and prediction" rather than pure factual determinations. *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978). Decisions of the FCC "regarding how the public interest is best served [are] entitled to substantial judicial deference." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981).

43. See, e.g., Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1191-92 (1973). Professor Jaffe argued that the 1927 Act sought only to address the judicial decisions prohibiting the Secretary of Commerce from limiting licenses in order to manage airwave traffic: "[T]he use of 'public interest' in the statute did not manifest a congressional intent to give the Commission general powers to 'regulate' the industry or to solve any 'problem' other than the problem of interference . . ." *Id.*

44. See Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 609-10 (1998). See also *supra* notes 19-21 and accompanying text.

45. See Stephen F. Varholý, *Preserving the Public Interest: A Topical Analysis of Cable/DBS Crossownership in the Rulemaking for the Direct Broadcast Satellite Service*, 7 COMM. L. CONSP. 173, 175-76 (1999) (describing the FCC's public interest duties as diversity of content and competition among broadcasters); see also William T. Mayton, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 EMORY L.J. 715, 716 (1989). Professor Mayton argues that the FCC developed its broad public interest mission not from statute, but from an internal agency belief that "progressive social change is best accomplished through government regulation . . ." *Id.* at 717.

46. 395 U.S. 367 (1969).

47. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 638-39 (1994).

48. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

would seem inappropriate in newsprint, books, or sidewalk speech.⁴⁹ The Court has upheld these regulations by creating a two-tiered system of First Amendment analysis. First, the Court differentiates between the protection afforded to broadcasting and physical media, and second, it varies the protection afforded within the broadcast media, including radio, network television, cable television, and the Internet. The Supreme Court's decisions rely heavily on assumptions regarding the physical aspects of broadcasting and the scarcity of electromagnetic space.

The scarcity doctrine is a seemingly simple concept, with origins in common sense, if not science. The chaos of early radio broadcasting stemmed from too many users and too few frequencies. Order was imposed by the 1927 Act, which allocated the broadcast spectrum through a licensing system that explicitly reserved the ownership of the airwaves for the public.⁵⁰ Broadcasters would have a mere right of access based on their willingness or ability to serve the public interest.⁵¹ At the same time, however, broadcasting was and is speech protected by the First Amendment.⁵² Limiting broadcast speech for orderly use or social gain would thus seem to conflict with constitutional protections.⁵³ Scarcity, therefore, became the necessary analytical "problem" to justify broadcast restraints.⁵⁴

The scarcity doctrine originated in *NBC*, where Justice Frankfurter described "certain basic facts" about radio broadcasting: "its facilities are limited," and "the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate"⁵⁵ The Court viewed this natural limitation as "unique," distinguishing broadcasting from other forms of speech.⁵⁶ Accordingly, government regulation was necessary to select which of the many speakers seeking access to the

49. See BOLLINGER, *supra* note 9, at 62.

50. 47 U.S.C. § 304 (1988). The statute states that

No station license shall be granted by the Commission until the applicant therefor shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

Id.

51. See Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, 15 J.L. & COM. 527, 528-29 (1996).

52. *Paramount Pictures*, 334 U.S. at 166 (holding there is "no doubt that . . . newspapers and radio . . . are included in the press whose freedom is guaranteed by the First Amendment").

53. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952). Although the Court has not held that every method of communication is "necessarily subject to the precise rules governing any other particular method of expression," it has also noted "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." *Id.*

54. *Id.* at 503 ("Each method [of speech] tends to present its own peculiar problems.").

55. *NBC v. United States*, 319 U.S. 190, 213 (1943).

56. *Id.* at 226.

airwaves should be admitted.⁵⁷

The Supreme Court reiterated its position on scarcity in *Red Lion*⁵⁸ and increased its reliance on government oversight as the only means of regulating broadcasters. Again citing the limits of the broadcast spectrum,⁵⁹ the Court found it “essential” that regulation allocate the airwaves among competing speakers.⁶⁰ Moreover, the Court held that *only* control by the federal government was sufficient.⁶¹ Whereas *NBC* concluded that some sort of regulation of the airwaves was necessary⁶² and that federal regulation of the airwaves was constitutional, *Red Lion* stated that no alternatives to governmental control were possible.⁶³

Courts⁶⁴ and commentators⁶⁵ have criticized the scarcity doctrines⁶⁶ articulated in *NBC* and *Red Lion* as inconsistent with basic principles of a free-market economy. First, as Professor Coase observed in 1959, the mere scarcity of an important resource does not normally justify government regulation.⁶⁷ The

57. See *id.* at 216 (holding that because the “facilities of radio are not large enough to accommodate all who wish to use them . . . [m]ethods must be devised for choosing from among the many who apply”).

58. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969).

59. See *id.* at 388.

60. *Id.*

61. See *id.* at 376.

62. See *NBC*, 319 U.S. at 213.

63. See *Red Lion*, 395 U.S. at 376 (“Without 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.”).

64. See, e.g., *Action for Children’s Television v. FCC*, 58 F.3d 654, 673-76 (D.C. Cir. 1995) (en banc) (Edwards, C.J., dissenting); *Telecomm. Research & Action Ctr. v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986).

65. See, e.g., Coase, *supra* note 11; KRATTENMAKER & POWE, *supra* note 10; Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687 (1997); Murray J. Rossini, *The Spectrum Scarcity Doctrine: A Constitutional Anachronism*, 39 SW. L.J. 827 (1985).

66. For a comprehensive discussion of the various forms of the scarcity rationale, see KRATTENMAKER & POWE, *supra* note 10, at 204-19, and Matthew L. Spitzer, *Controlling the Content of Print and Broadcast*, 58 S. CAL. L. REV. 1351, 1358-64 (1985).

67. Coase, *supra* note 11, at 14. Professor Coase summarized the economic criticism of the scarcity doctrine:

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

“chaos” throughout broadcasting prior to 1927 occurred because of an absence of property rights in the broadcast spectrum.⁶⁸ The marketplace, in turn, can allocate property rights without the government oversight condoned under *NBC* or thought mandatory under *Red Lion*.⁶⁹

Second, the entry barriers to broadcasting caused by the limits to the electromagnetic spectrum are present in analogous media, such as newsprint.⁷⁰ The Court seemingly agreed with this conclusion in *Miami Herald Publishing Co. v. Tornillo*.⁷¹ *Tornillo* involved a state statute requiring newspapers to print editorial replies from candidates personally or professionally assailed in the same paper.⁷² The Court observed that the scarcity of newspapers and the costs of starting an independent publication created an entry barrier sufficient to silence the speech of persons denied access to established papers.⁷³ Nonetheless, the scarcity of newspapers did not sway the Court’s conclusion that the First Amendment prevents governmental regulation of publishers⁷⁴ and forbids restrictions designed to foster a “responsible press.”⁷⁵ The Court’s acknowledgment of the limited resources intrinsic to both newspapers and broadcasting makes scarcity a tenuous ground for limiting the First Amendment rights of broadcasters.⁷⁶

Third, the physical limitations on the broadcast airwaves cited in both *NBC* and *Red Lion* might no longer exist.⁷⁷ Throughout the Twentieth Century, communications technologies began to travel beyond the electromagnetic spectrum. In 1950, cable reached only 14,000 televisions in America,⁷⁸ a figure that would rise to more than sixty-five million by 1998.⁷⁹ Direct broadcast

Id.

68. KRATTENMAKER & POWE, *supra* note 10, at 207.

69. Spitzer, *supra* note 66, at 1360-61.

70. See, e.g., WILLIAM W. VAN ALSTYNE, *FIRST AMENDMENT: CASES AND MATERIALS* 546-47 (1995).

71. 418 U.S. 241 (1974).

72. *Id.* at 244.

73. *Id.* at 251.

74. *Id.* at 258.

75. *Id.* at 256 (concluding that while a “responsible press is an undoubtedly desirable goal” it is “not mandated by the Constitution and like many other virtues it cannot be legislated”).

76. See *Telecomm. Research & Action Ctr. v. FCC*, 801 F.2d 501, 508-09 (D.C. Cir. 1986) (discussing the scarcity of physical media such as “newsprint, ink, delivery trucks, computers, and other resources that go into the production . . . of print journalism”).

77. Indeed, as Professor Thomas Hazlett has documented, physical spectrum scarcity may never have existed. See Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 926-31 (1997). Professor Hazlett noted that radio programming was delivered via cable by 1923, suggesting that technological alternatives to the electromagnetic spectrum existed concurrently with the emergence of broadcasting. *Id.* at 928-29.

78. FCC, *FACT SHEET: GENERAL INFORMATION, CABLE TV AND ITS REGULATION* (June 2000), available at <http://www.fcc.gov/mb/facts>.

79. *Id.*

satellites (DBS) are now installed in more than eighteen million homes, an increase of approximately two million subscribers since 2001.⁸⁰ Satellites offer radio listeners a similar array of programming choices without the regional limitations inherent in traditional radio broadcasting.⁸¹ Internet access now reaches an estimated fifty-four million American subscribers⁸² with 143 million people, or more than fifty-three percent of the population, using the Internet.⁸³

Formerly distinct industries such as telephony have converged⁸⁴ with broadcasting to offer new forms of digital programming. Convergence is leading to the growth of interactive television services⁸⁵ such as video-on-demand, email, gaming, and electronic commerce.⁸⁶ In addition, several cable and satellite providers⁸⁷ offer broadband technologies⁸⁸ capable of transmitting graphics,

80. *In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, FCC 02-338 (2002), 2002 WL 31890210 para. 58 [hereinafter *In re* Annual Assessment].

81. Amanda Barnett, *Radio About to Go Higher Tech*, at <http://www.cnn.com> (May 23, 2001). Satellite radio networks offer more than one hundred channels of programming, including news from companies such as FOX, National Public Radio, AP Radio, the BBC, and C-Span. *Id.* The first entrant into the market, XM Satellite Radio, has sold more than 25,000 subscriptions since its debut in November 2001, a record among new audio products in recent years. Laurie J. Flynn, *Satellite Radio Shows Growth*, N.Y. TIMES, Jan. 7, 2002, at C7. Industry analysts estimate that as many as twenty-five million people will subscribe to satellite radio by 2009. David Becker, *A Satellite Radio Field of Dreams*, CNET News (June 8, 2002), at <http://news.com.com/2100-1033-803900.html>.

82. *In re* Annual Assessment, *supra* note 80, para. 89.

83. ECONOMICS AND STATISTICS ADMINISTRATION & NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET 10 (2002) [hereinafter ESA, NATION ONLINE], available at <http://www.ntia.doc.gov/ntiahome/dn/index.html>.

84. As commonly understood, convergence “refers to the coming together of several formerly distinct services and industries . . . into a single, digital marketplace.” William T. Lake et al., *Telecommunications Convergence*, in TELECOMMUNICATIONS CONVERGENCE: IMPLICATIONS FOR THE INDUSTRY AND FOR THE PRACTICING LAWYER 11 (2000). The Supreme Court discussed the importance of convergence in *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 627 (1994), noting “convergence between cable and other electronic media . . . [places] the cable industry . . . at the center of an ongoing telecommunications revolution”

85. *In re* Annual Assessment, *supra* note 80, para. 170. The FCC defines interactive television as “a service that supports subscriber-initiated choices or actions that are related to one or more video programming streams.” *In re* Nondiscrimination in the Distribution of Interactive Television Services Over Cable, 16 F.C.C.R. 1321, 1323 (2001) [hereinafter *In re* Interactive Television].

86. *In re* Annual Assessment, *supra* note 80, para. 170; see also *In re* Interactive Television, *supra* note 85, at 1323-28.

87. *Id.* (describing interactive programming, including high-speed Internet access and interactive television).

88. Karen Kornbluh, Editorial, *The Broadband Economy*, N.Y. TIMES, Dec. 10, 2001, at A21

video, and data at more than four times the speed of dial-up telephone modems.⁸⁹ Convergence is now more than technological theory, with pundits and executives united in praising the economic and social promise of a single media pipeline.⁹⁰

Finally, local broadcasters have demonstrated new uses for the existing electromagnetic spectrum. Low-power radio frequencies capable of reaching one to two miles are now up for auction,⁹¹ and low-power television offers local access outside of metropolitan areas.⁹²

These rival technologies challenge the basis of the scarcity doctrine.⁹³ If

(defining broadband as “the generic term for high-speed, high-capacity, always-on data networks”).

89. *In re Inquiry Concerning the Deployment of Advanced Telecomm. Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Development Pursuant to Section 706 of the Telecommunications Act of 1996*, 15 F.C.C.R. 20,913, 20,920 (2000) [hereinafter *In re Deployment*]. The FCC defines high-speed Internet access as the “capability of supporting, in both the provider-to-customer (downstream) and the customer-to-provider (upstream) directions, a speed . . . in excess of 200 kilobits per second (kbps) in the last mile.” *Id.* However, high-speed Internet access remains limited with just over fourteen million broadband subscribers as of June 2002. *In re Annual Assessment*, *supra* note 80, para. 88.

90. See, e.g., Seth Schiesel, *AOL Plans the Digital Smorgasbord*, N.Y. TIMES, June 11, 2001, at C1. Steve Case, then chairman of AOL Time Warner, predicted that convergence will knit together “the PC, the TV, the telephone and the stereo to allow people to be entertained in better ways, to be educated in better ways, to communicate in better ways, to change people’s lives.” *Id.*; see also PETER HUBER, *LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM* 23 (1997) (“The telecom is being transformed into a network of networks, an intricately interconnected matrix of wireless, [and] satellite . . . with multiple overlapping and complementary providers, and no single dominant center.”). Nonetheless, convergence is still in its infancy and vulnerable to continuing setbacks in the marketplace. Susan Stellin, *A Device to Link Old Media to the Web Struggles to Make Good on the Promise of an Internet Revolution*, N.Y. TIMES, Jan. 15, 2001, at C4 (noting that “one of the biggest challenges that has always stood in the way of convergence is the need to persuade so many different participants to mold their behavior or business strategy to an unknown technology”).

Moreover, the American media consumer has shown a marked disinterest in some of the earliest, and most promoted, forms of convergence. Microsoft’s highly touted WebTV, which permits television viewers to navigate the Internet over television screens, proved a commercial disappointment. Saul Hansell, *Clicking Outside the Box*, N.Y. TIMES, Sept. 20, 2000, at H1. One industry executive, Michael Willner, then president of Insight Communications, blamed the failure on the users, lamenting that “[p]eople want their information spoon-fed to them,” and will therefore not embrace technologies requiring an active television viewer. *Id.* Others have suggested that the problem rests not with the audience, but with the programmers, arguing that “[c]onsumer[s] are slow to adopt broadband because, while there may be an infinite number of channels, there is still nothing on.” Lawrence Lessig, *Who’s Holding Back Broadband?*, N.Y. TIMES, Jan. 8, 2002, at A17.

91. FCC, Major Initiatives, at <http://www.fcc.gov/major.html> (last visited Mar. 30, 2002).

92. PRACTICING LAW INSTITUTE, *NEW PROGRAM OPPORTUNITIES IN THE ELECTRONIC MEDIA* (George H. Shapiro ed., 1983).

93. An alternative to the scarcity doctrine—sometimes known as the prior grant theory—has

wired or wireless signals can circumvent any limitations in the electromagnetic spectrum,⁹⁴ broadcasting may shed its unique status within the First Amendment. Despite the modern advances to date, however, the scarcity doctrine has proven surprisingly resilient in the Supreme Court.⁹⁵ The Court has consistently held that the physical scarcity of the broadcast airwaves underlies the Radio Act of 1927 and the Communications Act of 1934⁹⁶ and justifies a less rigorous degree of scrutiny than otherwise demanded by the First Amendment.⁹⁷ Specifically,

been equally criticized. This theory, first articulated by the Supreme Court in *Red Lion*, holds that broadcasters enjoy their market position through “a preferred position conferred by the Government,” or a governmentally created monopoly. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400 (1969). The prior grant theory assumes that subjecting broadcasters to regulatory oversight is a suitable trade-off for the benefits of their dominant market position. *Id.* at 391. The prior grant theory, however, fails to explain the continuing role of federal oversight over broadcast industries that now enjoy vigorous competition. Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 226-27 (1982). Moreover, as noted by Professors Krattenmaker and Powe, the prior grant doctrine “proves too much,” seemingly justifying a suspension of constitutional protections on any public forum in which the government claims ownership. KRATTENMAKER & POWE, *supra* note 10, at 228.

94. Hazlett, *supra* note 77, at 929. Professor Hazlett notes bluntly:

The ability to substitute wired frequencies for wireless spectrum space should be self-evident today, when consumers and businesses choose daily between the rival forms of communications transmissions—for example, when deciding whether to use a TV antenna or satellite dish versus a cable TV hook-up, or placing a telephone call via a landline versus a cellphone (or cordless phone).

Id. Professor Hazlett’s observation is supported by recent developments in the telecommunications industry, where the increased demand for spectrum space caused by wireless technologies has led to new ways to “increase the capacity and the efficiency of the available spectrum.” Editorial, *Space Invaders*, WALL ST. J., June 5, 2001, at A26.

95. KRATTENMAKER & POWE, *supra* note 10, at 218 (concluding that “only the Supreme Court had anything good to say about scarcity” in the 1970s (quoting Daniel Polsby, *Candidate Access to the Air*, 1981 SUP. CT. REV. 223)). In *League of Women Voters*, the Court acknowledged the prevalent criticism of the scarcity doctrine and stated that reevaluation would require “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.” *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376 n.11 (1984). The Court reiterated this position in *Turner I*. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002) (stating that “[t]he Supreme Court has already heard the empirical case against” the scarcity doctrine, and still “declined to question its continuing validity” (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 638 (1994))).

Professor Hazlett has suggested that the scarcity doctrine’s inherent ambiguity is itself the reason for its durability. Hazlett, *supra* note 77, at 929. By characterizing scarcity as an “objective fact,” without addressing competing technologies, the *Red Lion* opinion makes “empirical falsification” impossible. *Id.*

96. See *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978).

97. See *League of Women Voters*, 468 U.S. at 374-75.

three decisions from the 1990s summarize the Court's current position on broadcast scarcity.

In *Metro Broadcasting, Inc. v. FCC*, the Court considered FCC regulations enhancing licensing opportunities for minority owners.⁹⁸ In upholding the regulations, the Court acknowledged that scarcity justifies governmental restraints on licensees that favor both viewpoints and speakers.⁹⁹ The Court viewed the need for government selection of broadcasters as "axiomatic," citing and echoing the scarcity arguments made in *NBC* and *Red Lion*.¹⁰⁰ Nearly fifty years after its birth, the scarcity doctrine received strong affirmation in *Metro Broadcasting*.

Limits to the scarcity theory, however, emerged in two later decisions. In *Turner Broadcasting System, Inc. v. FCC (Turner I)*, the Court analyzed a statute requiring cable television providers to transmit local broadcast television channels to subscribers without charge.¹⁰¹ The Court, in dicta, stated that the "less rigorous" First Amendment scrutiny applied to broadcast regulations is premised on "the unique physical limitations of the broadcast medium."¹⁰² The Court then distinguished electromagnetic broadcasting from cable television stating, "cable television does not suffer from the inherent limitations that characterize the broadcast medium."¹⁰³ Any possible physical limitations in cable broadcasting, therefore, are insufficient to alter the normal protections of the First Amendment.¹⁰⁴

Three years later, in *Reno v. ACLU*, the Court used the reasoning of *Turner I* to distinguish the Internet from broadcast television.¹⁰⁵ The Court found that the Internet could not be considered a scarce resource, given its ability to provide a "relatively unlimited, low-cost capacity for communication of all kinds."¹⁰⁶ The Internet, the Court illustrated, can transform any speaker into a "town crier" and any user into "a pamphleteer."¹⁰⁷ Relaxed First Amendment scrutiny was therefore unnecessary.¹⁰⁸

Conclusions about the current state of the scarcity doctrine are difficult. The decisions in *Metro Broadcasting* and *Turner I* affirming the vitality of the doctrine have aged rapidly during the explosive growth of new media at the close of the last century. Moreover, the Court's piecemeal exclusion of cable and Internet broadcasting appears to be on a collision course with science. Finally,

98. 497 U.S. 547, 552 (1990).

99. *Id.* at 566-67.

100. *Id.* at 567.

101. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 631-32 (1994).

102. *Id.* at 637. The Court noted, however, that the broadcast cases "are inapposite" to the cable television context. *Id.* at 638-39.

103. *Id.* at 639.

104. *Id.*

105. 521 U.S. 844, 869-70 (1997).

106. *Id.* at 870.

107. *Id.*

108. *Id.*

the acknowledgment in *Turner I* that convergence has removed old distinctions within the various broadcast media¹⁰⁹ would appear to undermine whatever remaining analytic force scarcity once held. Taken together, these decisions suggest that the physical scarcity doctrine will not satisfy future regulations on broadcast speech.¹¹⁰

D. Fairness and Equal Time: The Regulation of Broadcast Politics

Scarcity theories are important to a discussion of the broadcasting of presidential debates because the regulation of broadcast media has developed through interaction between the FCC and the Supreme Court.¹¹¹ The deferential scrutiny applied to the FCC's broadcast policies has permitted a wide range of regulations addressing social issues such as indecency¹¹² and diversity.¹¹³ Likewise, the FCC has promulgated a series of regulations designed to increase public involvement in the democratic process and political elections.¹¹⁴

Section 315(b)(1) of the Communications Act of 1972, for instance, allows candidates for political office to purchase broadcast airtime at the "lowest unit charge" offered to other purchasers for the same time and period.¹¹⁵ The lowest unit charge rule was intended to prevent broadcasters from exercising their market power to extract additional profits from candidates and to maintain the availability of the broadcast forum.¹¹⁶

A second doctrine required broadcasters to give candidates for federal office

109. *Id.* at 627.

110. Then Commissioner, now Chairman of the FCC, Michael K. Powell voiced similar doubts on the modern (as well as historical) values of the scarcity rationale, commenting "that if scarcity was ever a defensible explanation it is certainly farcical in the modern digital era, which is marked by abundance." Michael K. Powell, Remarks Before the Media Institute, Accepting Freedom of Speech Award (Oct. 20, 1999), available at <http://www.fcc.gov/Speeches/Powell/spmkp905.html> (last visited Mar. 17, 2002).

111. See BOLLINGER, *supra* note 9, at 66.

112. See generally *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

113. FEDERAL COMMUNICATIONS COMMISSION, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 15 (1946) ("[I]t has long been an established policy of . . . the Commission that the American system of broadcasting must serve significant minorities among our population, and the less dominant needs and tastes . . .").

114. STEVEN J. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA 72-80 (1978).

115. 47 U.S.C. § 315(b)(1) (1994).

116. See Angela J. Campbell, *Political Campaigning in the Information Age: A Proposal for Protecting Political Candidates' Use of On-Line Computer Services*, 38 VILL. L. REV. 517, 550 (1993). Former Chairman of the FCC Reed Hundt has argued that the rule "fails in practice" because broadcasters steer candidates to higher-priced time periods. Press Release, FCC, FCC Chairman Reed Hundt Calls on FCC to Launch Major Free Time Initiative (Sept. 12, 1997), available at http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1997/nrmc7065.html (advocating the use of "low, even zero" cost rates for candidates with a cap on the amount of airtime that could be purchased).

“reasonable access” to broadcast time to advocate their candidacy.¹¹⁷ The reasonable access doctrine sought to increase voter education through broadcast appearances¹¹⁸ and alleviate concerns over insufficient broadcast coverage.¹¹⁹ Despite the intrusion into the broadcasters’ editorial decisions, the Supreme Court upheld the reasonable access rules as a permissible licensing condition.¹²⁰

In addition, the FCC has long required broadcasters to provide equal access to the airwaves to all “legally qualified”¹²¹ political candidates, when any one of them is granted broadcast time. The equal time provision was first adopted in the Radio Act of 1927¹²² and carried over into the 1934 Act¹²³ to prevent the potential bias of a broadcast station providing exclusive coverage to a single candidate.¹²⁴ In 1959, Congress amended the statute to exempt news coverage of candidates,¹²⁵ swiftly rejecting the FCC’s narrower interpretation of the statute.¹²⁶ In 1960, Congress temporarily suspended the equal time rule¹²⁷ to permit the first televised

117. 47 U.S.C. § 312(a)(7) (1990).

118. S. Rep. No. 92-96, at 20 (1971), *reprinted in* 1972 U.S.C.C.A.N. 1773, 1774 (noting that Congress intended “to give candidates for public office *greater access to the media* so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters”) (emphasis in original). *But see infra* notes 175-76 and accompanying text.

119. *See Kennedy for President Comm. v. FCC*, 636 F.2d 432, 442 (D.C. Cir. 1980).

120. *CBS v. FCC*, 453 U.S. 367 (1981).

121. 47 U.S.C. § 315(a) (1994). The 1934 Act does not define which candidates are “legally qualified,” and thus the applicability of § 315(a) depends on state, federal, or local law requirements for candidacy. FCC, Rules Applicable to All Broadcast Stations, 47 C.F.R. § 73.1940 (2001); *see also* Lili Levi, *Professionalism, Oversight, and Institution-Balancing: The Supreme Court’s “Second Best” Plan for Political Debate on Television*, 18 YALE J. ON REG. 315, 376 n.193 (2001).

122. Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162, 1170.

123. 47 U.S.C. § 315 (1982).

124. Thomas Blaisdell Smith, Note, *Reexamining the Reasonable Access and Equal Time Provisions of the Federal Communications Act: Can These Provisions Stand if the Fairness Doctrine Falls?*, 74 GEO. L.J. 1491, 1497 (1986).

125. The amendment was prompted by the FCC’s decision that network coverage of routine news events involving one candidate for office triggered equal time obligations for all other qualified candidates. SIMMONS, *supra* note 114, at 46-47 (discussing the FCC’s decision in *In re Petitions of CBS and NBC for Reconsideration and Motions for Declaratory Rulings or Orders Relating to the Applicability of § 315 of the Communications Act of 1934, as amended, to Newscasts by Broadcast Licensees*, Interpretive Op., 26 F.C.C. 715 (1959)).

126. KRATTENMAKER & POWE, *supra* note 10, at 67.

127. Act of Aug. 24, 1960, Pub. L. No. 86-677, 74 Stat. 554. Broadcasters lobbied for the suspension of the equal time regulation in part because the amendments to the equal access doctrine in 1959 failed to clarify broadcasters’ duties under the statute. *See* ERIK BARNOUW, *THE IMAGE EMPIRE: A HISTORY OF BROADCASTING IN THE UNITED STATES VOL. III* 161-62 (1970). The lobbying effort was also launched because of lingering network hostility to the duties imposed by the equal time rule. In particular, the networks were “unwilling to give time away to the major parties’ presidential candidates under circumstances that would force them to give equal opportunities to numerous minor-party candidates.” David M. Rice, *Network Television as a*

presidential debates.¹²⁸ Finally, in 1975, the Commission dismantled the equal time rule by classifying political campaign debates as “bona fide news events” within the 1934 Act’s exception,¹²⁹ paving the way for modern television election coverage.¹³⁰

However, the fairness doctrine, the most sweeping restriction designed by the FCC, still impeded full media coverage of election politics. The fairness doctrine, in the words of the Supreme Court, “imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage.”¹³¹ Less a doctrine than a direction, the fairness concept grew from the earliest days of the FRC through a series of individual complaints and rulings.¹³² Congress formally, but perhaps unintentionally, adopted the doctrine in the 1957 amendments to the equal time provisions.¹³³ As codified, the fairness doctrine required broadcasters to air all sides of controversial public issues, irrespective of the broadcasters’ own interest in covering such material.¹³⁴ Again citing the scarcity theory, the Supreme Court upheld the fairness doctrine as constitutional and extended the government unique latitude to regulate broadcasting.¹³⁵ Despite swift and sustained criticism,¹³⁶ the fairness doctrine remained in force until the

Medium of Communication, in NETWORK TELEVISION AND THE PUBLIC INTEREST 198 (Michael Botein & David M. Rice eds., 1980).

128. See *infra* notes 160-71 and accompanying text.

129. 47 U.S.C. § 315(a)(4) (1994). The bona fide news event rule exempted four types of political broadcasts from the reasonable use rule, including any “bona fide newscast,” “bona fide news interview,” “bona fide news documentary,” or “on the spot coverage of bona fide news events” such as political conventions. *Id.* § 315(a)(1)-(4). Following the 1960 debates, the Commission ruled that political debates sponsored by “nonbroadcast entities” or independent third parties, covered live, were bona fide news events within the statutory exemption. *In re* Petitions of the Aspen Inst. Program on Communications and Soc’y & CBS, Inc. for Revision or Clarification of Comm’n Rulings Under Section 315(a)(2) & 315(a)(4), 55 F.C.C.2d 697 (1975), *aff’d sub nom.*, Chisholm v. FCC, 538 F.2d 349 (D.C. Cir. 1976). The “nonbroadcast entity” requirement was abandoned in 1983. *In re* Petitions of Henry Geller & Nat’l Assoc. of Broads. & the Radio-Television News Dirs. Assoc. to Change Comm’n Interpretation of Subsections 315(a)(3) and (4) of the Communications Act, 95 F.C.C.2d 1236 (1983), *aff’d sub nom.*, League of Women Voters Educ. Fund v. FCC, 731 F.2d 995 (D.C. Cir. 1984).

130. See Youm, *supra* note 4, at 695.

131. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369 (1969). The extensive scholarly attention devoted to the fairness doctrine is outside the scope of this Article.

132. Thomas G. Krattenmaker & L.A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 152 n.7.

133. *Red Lion*, 395 U.S. at 380 (concluding “the amendment vindicated the FCC’s general view that the fairness doctrine inhered in the public interest standard” of § 315).

134. BRUCE M. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT* 116 (1975).

135. *Red Lion*, 395 U.S. at 375.

136. Not surprisingly, much of the criticism was generated by the broadcast industry itself.

mid-1980s, when the FCC agreed to revisit the analytical foundation for the rule.

In 1985, the FCC responded to criticism of the fairness doctrine, issuing a report on its continuing viability.¹³⁷ The Commission found that the fairness doctrine worked to limit broadcast coverage of controversial issues in order to minimize the amount of reply time devoted to opposing sides of a public concern.¹³⁸ The FCC further concluded that the theory of spectrum scarcity that supported the *Red Lion* decision no longer justified “per se” regulation of broadcasters, “particularly rules which affect the constitutionally sensitive area of content”¹³⁹ The FCC conceded that the fairness doctrine was an “unnecessary and detrimental regulatory mechanism,” given the growth of new information sources, the intrusion into broadcast editorial privileges, and the lack of a demonstrated public benefit.¹⁴⁰ The FCC soon formally abandoned the fairness doctrine,¹⁴¹ with the last two small public interest duties, the personal attack¹⁴² and political editorial rules,¹⁴³ repealed by writ of mandamus in 2000.¹⁴⁴

The philosophical bases for broadcast regulations thus reveal both historical misconceptions and modern inconsistencies. The scarcity rationale, questioned as scientifically flawed from its inception,¹⁴⁵ is now clearly minimized by the

See BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* 247 (6th ed. 2000).

137. General Fairness Doctrine Obligations of Broadcast Licensees, 50 Fed. Reg. 35,418 (Aug. 30, 1985).

138. *Id.* at 35,423. The Commission further noted that broadcasters faced heavy economic burdens in complying with the fairness doctrine including costs of defending against administrative challenges. *Id.* at 35,435. While the costs alone were not sufficient to justify eliminating the doctrine, no “countervailing justifications” offset the hardships, as no additional public interest programming was produced. *Id.*

139. *Id.* at 35,422. The Commission described the constitutional concerns as contravening “fundamental constitutional principles” and according a “dangerous opportunity for governmental abuse” *Id.* at 35,446.

140. *Id.* at 35,445-46.

141. *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987), *on remand*, *In re Compl. of Syracuse Peace Council Against Television Station WTVH Syracuse, New York*, 2 F.C.C.R. 5043 (1987).

142. The personal attack rule stated that “if an attack is made on someone’s integrity during a presentation of views on a controversial issue of public importance, the licensee must inform that person . . . and provide a reasonable opportunity to respond.” *In re Repeal or Modification of the Personal Attack and Political Editorial Rules*, 15 F.C.C.R. 19,973, 19,973 n.2 (2000) (citing 47 C.F.R. § 73.1920 (2000)).

143. The political editorial rule stated that if a broadcast station airs an editorial supporting a “legally qualified candidate,” the broadcaster must provide a “reasonable opportunity” for opposing candidates to respond. *Id.* (citing 47 C.F.R. § 73.1930 (2000)).

144. *Radio-Television News Dirs. Ass’n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000). The nearly two-decade struggle over the fate of the fairness doctrine is beyond the scope of this Article. A helpful summary of the battle is presented in Ian Heath Gershengorn, *The Fall of the FCC’s Personal Attack and Political Editorial Rules*, 19 COMM. LAW 7 (2001).

145. Hazlett, *supra* note 77, at 926-31.

development of broadband, cable television, satellite, the Internet, and proprietary on-line networks.¹⁴⁶ As competition grows in the media marketplace, consumers will find substitutes to the network monopolies that satisfy their once ignored niche tastes. Competition, therefore, will produce the diverse array of speakers promised by regulation but never achieved.

In the narrow context of political campaigns, however, the public interest principle retains more viability. The growth of broadcast network alternatives has stimulated content competition, and the entry of new competitors has decreased the marginal costs of programming. But broadcast technology remains costly,¹⁴⁷ and new consolidation within the broadcast markets threatens to restrict market entry anew.¹⁴⁸ One premise of the 1927 Act thus remains relevant, as unequal access to broadcast technology could unfairly advantage a single candidate.¹⁴⁹ Particularly in the general presidential elections, wide access to

146. See *supra* notes 77-89 and accompanying text.

147. See Debora L. Osgood, Note, *Expanding the Scarcity Rationale: The Constitutionality of Public Access Requirements in Cable Franchise Agreements*, 20 U. MICH. J. L. REFORM 305, 327-32 (1986) (advocating the application of the scarcity doctrine to cable television by analyzing scarcity in an economic, rather than physical context).

148. See, e.g., *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001). In *Time Warner*, the D.C. Circuit found that FCC rules capping the number of subscribers serviced by a cable television company and limiting the amount of programming produced by the cable company that may be shown on its own networks violate the cable companies' First Amendment rights. *Id.* The decision allows major cable providers such as AOL Time Warner to expand their national markets, possibly at the expense of independent producers. Stephen Labaton & Geraldine Fabrikant, *U.S. Court Ruling Lets Cable Giants Widen Their Reach*, N.Y. TIMES, Mar. 3, 2001, at A1. Similarly, the FCC modified broadcast regulations to allow the four major broadcast networks to own or operate emerging networks such as UPN or the WB. Press Release, FCC, FCC Eliminates the Major Network/Emerging Network Merger Prohibition from Dual Network Rule (Apr. 19, 2001) (on file with author).

149. Commentators have noted that the Supreme Court's decision in *NBC*, and the development of the scarcity doctrine itself, may have been motivated by this concern. P.M. Schenkkan, Comment, *Power in the Marketplace of Ideas: The Fairness Doctrine and the First Amendment*, 52 TEX. L. REV. 727, 742 (1974). Schenkkan argues that the Court used scarcity as a means of explaining its true concern, a monopolization of the broadcast medium by a few, favored speakers. *Id.* In support, he notes Justice Murphy's dissent in *NBC* centered not on spectrum scarcity alone, but on the danger of allowing the scarce spectrum to become "a weapon of authority and misrepresentation." *Id.* at 742-43 (quoting *NBC v. United States*, 319 U.S. 190, 228 (1943) (Murphy, J., dissenting)).

Scholars, however, have also noted that any perceived concentration of power in the hands of a few network broadcasters "has been broken by deregulation and technology." KRATTENMAKER & POWE, *supra* note 10, at 222. Moreover, concentrating broadcast regulation in the hands of a single administrative monopoly is not necessarily a more satisfying protection against possible abuse. See HUBER, *supra* note 90, at xiv ("[I]n 1934 . . . the United States folded all federal authority over both wireline and wireless communication into a new, superpowerful communications commission Germany got an FCC too, even bigger and more effective than

information on the candidates remains essential to our system of participatory, indirect democracy.

II. DEBATES IN THE MODERN PRESIDENTIAL ELECTION

Within the hierarchy of speech values,¹⁵⁰ the Supreme Court has singled out campaigns for public office as a core value protected by the First Amendment.¹⁵¹ Candidates for public office engage in a wide variety of direct and indirect speech, including rallies, fundraisers, and orchestrated news events.¹⁵² Elevated above all these events, however, the candidate debates occupy a central place in American politics.¹⁵³

A. *Presidential Debates, Before and After Television*

Candidate debates date back to at least 1788, when James Madison campaigned for election to the House of Representatives.¹⁵⁴ History records the epic confrontations between Stephen A. Douglas and Abraham Lincoln, when a captivated nation listened to the candidates duel on the future of slavery, unification, and federal governance.¹⁵⁵ As answers to contemporary social questions developed into political party allegiance, the public debates provided a peaceful forum for airing disputes within government.¹⁵⁶

ours. . . . Our own commission never got that bad, but it got bad enough”). Huber’s allusion, however melodramatic, does point to the problem: “[H]istory teaches that the fear said to justify regulation of speech exists all too often only in the minds of the regulators.” KRATTENMAKER & POWE, *supra* note 10, at 224.

150. Although the Court has never formally established a hierarchy of First Amendment values, it has acknowledged a tiered value system on numerous occasions. *E.g.*, *Connick v. Myers*, 461 U.S. 138, 145 (1983) (noting that “speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values, and is entitled to special protection” (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980))).

151. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971) (“[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.”). The Court has reiterated this position in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995), and *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976).

152. Mark C. Alexander, *Don’t Blame the Butterfly Ballot: Voter Confusion in Presidential Politics*, 13 STAN. L. & POL’Y REV. 121 (2002).

153. The Supreme Court has stated that “[d]eliberation on the positions and qualifications of candidates is integral to our system of government, and electoral speech may have its most profound and widespread impact when it is disseminated through televised debates.” *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 676 (1998); *see also* Raskin, *supra* note 4, at 1944.

154. KATHLEEN HALL JAMIESON & DAVID S. BIRDSSELL, *PRESIDENTIAL DEBATES: THE CHALLENGE OF CREATING AN INFORMED ELECTORATE* 34 (1988).

155. *See generally* THE LINCOLN-DOUGLAS DEBATES (Harold Holzer ed., 1993).

156. JAMIESON & BIRDSSELL, *supra* note 154, at 40 (“[D]ebate[s] became a release valve for the pressures of constituency and faction [T]he cycle of debate offered clash without disaster and simultaneously affirmed the value and legitimacy of the political structure that made debate

Although political debates had long been printed and distributed along the campaign trail,¹⁵⁷ broadcasting promised a new era of open democracy. Herbert Hoover's insistence on radio regulations designed for public benefit drew upon his belief that broadcasting would revolutionize political debates.¹⁵⁸ Until the emergence of broadcasting, the candidates often viewed presidential debates as dangerous. Broadcasting changed this pattern, allowing candidates to speak to a national audience.¹⁵⁹

The arrival of television transformed the presidential debates into the seminal event in election politics.¹⁶⁰ Television seemed to hold the power to electrify American politics, reuniting citizens with Washington by providing live access to the candidates.¹⁶¹ Although televised political coverage was common by 1960, presidential candidates were still wary of violating the age-old maxim against appearing alongside a rival.¹⁶² Broadcasters, however, saw an important public service opportunity in providing free airtime to the candidates.¹⁶³ In 1960, eager

possible.”).

157. *Id.* at 51 (explaining that candidates such as Lincoln and Daniel Webster published debate speeches in pamphlets and newspaper editorials).

158. *Id.* at 84 (“Hoover believed that radio would revolutionize ‘the political debates that underlie political action [by making] us literally one people upon all occasions of general public interest.’”). *See also* Krasnow & Goodman, *supra* note 44, at 608 (quoting Hoover’s belief that the “ether is a public medium, and its use must be for public benefit”).

159. In the early years of radio, presidential candidates largely ignored the possibilities offered by the new broadcast format. *See* CNN, THE DEBATES ‘96, PRESIDENTIAL DEBATE HISTORY, HOW WE GOT THEM, AND WHAT THEY MEAN, at <http://cgi.cnn.com/ALLPOLITICS/1996/debates/history> [hereinafter CNN, THE DEBATES ‘96] (last visited Apr. 19, 2002). Prior to the debates of 1960, only one presidential election debate was broadcast over radio, a single Republican primary contest in Oregon between Thomas Dewey and Harold Stassen. *Id.*; *see also* COMMISSION ON PRESIDENTIAL DEBATES, DEBATE HISTORY: 1948 DEBATES, at <http://www.debates.org/pages/debhis48.html> (last visited Apr. 12, 2002) (estimating forty to eighty million listeners tuned in to the one hour debate on outlawing the Communist Party in the United States).

160. Keith Darren Eisner, Comment, *Non-Major Party Candidates and Televised Presidential Debates: The Merits of Legislative Inclusion*, 141 U. PA. L. REV. 973, 974-75 (1993). The first televised presidential debate occurred during the 1956 Democratic primary in Florida between candidates Adlai Stevenson and Estes Kefauver. COMMISSION ON PRESIDENTIAL DEBATES, DEBATE HISTORY: 1956 DEBATES, at <http://www.debates.org/pages/debhis56.html> (last visited Apr. 12, 2002). For a detailed account of the debate, *see* JAMIESON & BIRDSELL, *supra* note 154, at 92-93.

161. Angus Campbell, *Has Television Reshaped Politics?*, at <http://www.mbcnet.org/debateweb/html> (last visited Apr. 5, 2002) (quoting former CBS president Dr. Frank Stanton as remarking “[t]elevision, with its penetration, its wide geographic distribution and impact, provides a new, direct and sensitive link between Washington and the people”).

162. Earl Mazzo, *The Great Debates*, at <http://www.mbcnet.org/debateweb/html> (last visited Apr. 6, 2002); *see also* CNN, THE DEBATES ‘96, *supra* note 159 (noting that prior to 1960 the “most vocal group advocating debates were political underdogs wanting to share the stage with incumbents”).

163. CNN, THE DEBATES ‘96, *supra* note 159.

to convince Congress to eliminate the equal-time provision of the 1934 Act,¹⁶⁴ the major networks volunteered dozens of free hours to each candidate in the weeks preceding the general election.¹⁶⁵ After private negotiations, the networks agreed to a live unified broadcast without sponsorship or commercial interruption.¹⁶⁶ United by the possible permanent repeal of the equal-time rule,¹⁶⁷ the level of cooperation among the networks to air the unprecedented event was unusually high. As a result, when Kennedy and Nixon took to the stage, nearly every television station in the country carried the event.¹⁶⁸

The national reaction to the first Kennedy-Nixon debate was enormous¹⁶⁹—a record audience of over sixty-six million households.¹⁷⁰ Richard Nixon proclaimed that “debates between the presidential candidates are a fixture,” and predicted that “in all the elections in the future we are going to have debates.”¹⁷¹ Yet televised presidential debates nearly disappeared from the political landscape in subsequent years.¹⁷² No presidential debates were held between 1960 and 1976,¹⁷³ and the televised debate re-emerged only after painstaking negotiations between the candidates.¹⁷⁴ Equally disappointing was the impact of the televised

164. See *supra* notes 122-30 and accompanying text.

165. Editorial, *Senate Suspends § 315, Now it's up to the House to Follow Suit*, BROADCASTING, July 4, 1960, available at <http://www.mbcnet.org/debateweb/html/history/1960/section315.htm> [hereinafter Editorial, *Senate Suspends*] (last visited Apr. 2, 2002).

166. Editorial, *Sponsorship of TV Debates?*, BROADCASTING, Aug. 8, 1960, available at <http://www.mbcnet.org/debateweb/html/history/1960/sponsorship.htm> (last visited Apr. 2, 2002). Although prominent advertisers lined up to provide exclusive sponsorship, CBS seized the public relations opportunity to decline the revenue, proclaiming “we . . . want to make this our own contribution because we believe there is no single act of self-government that is more important than the quadrennial choice of our national leadership.” *Id.* The other networks quickly followed.

167. See Editorial, *Senate Suspends*, *supra* note 165 (stating that the suspension of the equal-time provision required the FCC to report on the results of the suspension during the 1960 election and to “recommend any legislation it thinks necessary” to repeal the rule permanently).

168. Mazzo, *supra* note 162 (“Almost every station carried the debates simultaneously, and in most places there were no alternative programs.”).

169. Special Report, “*Great Debate*” *Rightly Named, Nixon, Kennedy Set a Precedent That Will Be Hard to Abandon*, BROADCASTING, Oct. 3, 1960, at 88, available at <http://www.mbcnet.org/debateweb/html/history/1960/rightlynamed.htm> (last visited Apr. 5, 2002) (proclaiming the “whole course of political campaigning has been changed by a single broadcast”).

170. COMMISSION ON PRESIDENTIAL DEBATES, DEBATE HISTORY: 1960 DEBATES, at <http://www.debates.org/pages/debhis60.html> (last visited Mar. 20, 2002).

171. STEPHEN BATES, THE FUTURE OF PRESIDENTIAL DEBATES (1993), at <http://www.annenberg.nwu.edu/pubs/debate> (last visited Apr. 1, 2002). But see *infra* note 179.

172. Susan E. Spotts, *The Presidential Debates Act of 1992*, 29 HARV. J. ON LEGIS. 561, 563 (1992).

173. CNN, THE DEBATES ‘96, *supra* note 159.

174. BATES, *supra* note 171 (noting that the 1976 debates between Jimmy Carter and Gerald Ford required “haggling over timing, format, questioners, camera angles, risers, notes, stools, props, and a host of other issues”).

debates on political involvement. The televised debates, as well as television coverage of politics and campaigns in general, did not increase voter turnout¹⁷⁵ or voter interest in the elections.¹⁷⁶ The much-anticipated revolution in American democracy, it appeared, would not be televised. The seeming failure of televised debates to invigorate the electorate defies a single explanation. Instead, the problems of the televised debates are political, technological, and historical.

First, presidential candidates may have no political incentive to debate their opponents. The great debates of 1960 occurred only because the broadcast networks lobbied the candidates, Congress, and the FCC intensively. Vice President Nixon enjoyed the advantages of national recognition and understood that Senator Kennedy would benefit from merely sharing the stage.¹⁷⁷ Then, as now, a presidential underdog could win valuable momentum by merely “holding his own” in the debates and avoiding “visibly serious blunders.”¹⁷⁸ In many contests, therefore, the leading candidate has more to lose in the debates and a strong motivation to decline a televised confrontation.¹⁷⁹

Second, candidates tend to narrow their messages during televised debates

175. Campbell, *supra* note 161. Campbell reported on research concerning voter turnout in the era of televised politics. Noting that the “most commonly accepted indicator of public involvement in politics is the turnout in national elections,” Campbell found that:

In fact, there has been only a slight rise in the turnout figures during the last ten years.

In the presidential elections of 1952, 1956, and 1960 the turnouts—that is, the proportions of adult citizens who voted—were considerably higher than in the elections of 1944 and 1948, but if we drop back to the period just before the war we find that the turnouts in 1936 and 1940 were almost as high as they have been in the most recent elections. There has been a small proportionate increase in the presidential vote during the television era, although it has fluctuated and at its lowest point in 1956 (60.4 percent) exceeded by only a percentage point the high of the pre-television period.

Id.

176. *Id.* Campbell presented the findings of an ongoing study investigating voter interest between 1952 and 1960. The sampling found a large fluctuation of voter interest, but also noted a “tremendous increase in television coverage” during these same years. The findings, Campbell explains, are important because if “television had demonstrated a unique capacity to activate political interest among its viewers we should find a substantial increase in the number expressing high interest over the 1952 to 1960 period. This we do not find.” *Id.*

177. Mazzo, *supra* note 162 (noting then Vice President Nixon was acutely aware of his advantage over the relatively unknown Senator Kennedy, and thus reluctant to provide prestige to a lesser-known opponent).

178. *Id.* (discussing Senator Kennedy’s advantage in the 1960 debates). Forty years later, Republican candidate George W. Bush enjoyed the same advantage against his more seasoned rival Vice President Albert Gore, Jr. Richard L. Berke, *Debates Put in Focus Images and Reality*, N.Y. TIMES, Oct. 19, 2000, at A29 (quoting democratic strategist David Axelrod who noted “I think Bush gained the most of [the debates] just by surviving”).

179. BATES, *supra* note 171. Thus, despite his enthusiasm for televised debates in 1962, Richard Nixon refused to debate his challengers in 1968 and 1972, concluding “[i]t’s poor tactics when you’re running so far ahead.” *Id.* (quoting Spiro Agnew).

to appeal to a national audience. Traditionally, non-televised debates have been “free-flowing,” without pre-set questions and intrusive moderation.¹⁸⁰ This unstructured, adversarial format was a product of the limited audience. Like most political rallies, a close-knit network of insiders usually attended the live debates.¹⁸¹ Broadcasting, in contrast, cuts across the social spectrum reaching all levels of income, education, and political involvement.¹⁸² Candidates gained access to a national audience, but could no longer assume they spoke only to the faithful. The candidates responded by modifying their message for the broadcast medium. The adversarial format of the traditional debate was merged with question-and-answer sessions¹⁸³ and press conferences¹⁸⁴ to create an often stale mix of substance and showmanship. Not surprisingly, viewers frequently found programming alternatives more appealing.¹⁸⁵

Third, the televised debates are burdened by the inherent limits of television. Television viewing is a largely passive activity.¹⁸⁶ Its importance in the political process is often “the ease with which television news falls into its audience’s laps. . . .”¹⁸⁷ Candidates are forced into the difficult position of finding the highest plane of dialogue consistent with the education and interest of the audience.¹⁸⁸ Unable to easily define this target, candidates concluded that winning the televised debates requires satisfying the media instead of the viewers.¹⁸⁹ In turn, television journalism, predisposed to “drama and visual

180. JAMIESON & BIRDSELL, *supra* note 154, at 87.

181. See PAUL TAYLOR, *SEE HOW THEY RUN, ELECTING THE PRESIDENT IN AN AGE OF MEDIAOCRACY* 245 (1990); see also Alexander, *supra* note 152, at 125 (noting campaign rallies are “packed with supporters” and “designed to motivate the faithful”).

182. TAYLOR, *supra* note 181, at 244.

183. JAMIESON & BIRDSELL, *supra* note 154, at 102.

184. *Id.* at 118.

185. The problem of viewer attrition is not new. Researchers noted that even viewership of the great debates of 1960 waned in areas where alternatives were broadcast. See Mazzo, *supra* note 162 (estimating viewership of the debates dropped between fifteen and twenty percent in areas where local affiliates carried alternatives to the first Nixon/Kennedy debate).

186. TAYLOR, *supra* note 181, at 244. Taylor notes that “[w]atching television is a passive, low-intensity activity—‘chewing gum for the eyes’—which requires less concentration than reading a book or newspaper.” *Id.*

187. *Id.*

188. JAMIESON & BIRDSELL, *supra* note 154, at 15 (“The audience for presidential debating is far less directed and accountable The audience probably employs some set of standards, but these are informal and inexplicit. . . .”). Taylor thus concludes that the television audience “is broader, less educated, less sophisticated and less interested in public affairs than the readership of newspapers.” TAYLOR, *supra* note 181, at 244.

189. See Bob Davis & Jackie Calmes, *Debaters Decoded: A Viewer’s Guide to Tomorrow’s Words*, WALL ST. J., Oct. 2, 2000, at A1. The authors summarize the goals of the modern presidential candidate in each televised debate: “to introduce themselves to Americans who have been too bored to pay attention to the presidential race, avoid embarrassing missteps, and make each other look bad.” *Id.*

imagery,”¹⁹⁰ tends to focus on which candidate “won” the contest rather than the substance of the issues discussed.¹⁹¹ Candidates fearing the stigma that accompanies a perceived “loss” are forced to spend countless hours preparing for each debate in an effort to appear “poised and confident.”¹⁹² The viewers are then treated to endless predictions and post-debate opinion polls,¹⁹³ little of which assists an informed debate on the candidates’ ability to govern.¹⁹⁴

Finally, televised debates often offer nothing new. Commentators have noted that the “essential problem of all political communication is the character of the public demand for it.”¹⁹⁵ Television, like all media, has the capacity to reach a demographically diverse audience and thus augment the education of all voters.¹⁹⁶ Researchers observe, however, that the primary consumers of political television, including the presidential debates, are usually the most informed segments of society.¹⁹⁷ Social scientists agree, noting that televised debates largely reinforce voter preference.¹⁹⁸ The debate audience, therefore, is frequently comprised of the same group that follows the election most closely in other media such as newspapers and radio.¹⁹⁹

190. LYNDA LEE KAID, POLITICAL PROCESS & TELEVISION, MUSEUM OF BROADCASTING AND COMMUNICATIONS, ENCYCLOPEDIA OF TELEVISION, available at <http://www.mbcnet.org/debateweb/html> (last visited Apr. 5, 2002).

191. See, e.g., Editorial, *Winner of Debate is American Public*, CHI. SUN-TIMES, Oct. 4, 2000, at 55 (concluding the first 2000 presidential debate failed to “settle the presidential election” because neither “candidate scored a knockout, and neither committed a candidacy-killing mistake”).

192. PBS, DEBATING OUR DESTINY: PREPARING FOR THE DEBATES, available at <http://www.pbs.org/newshour/debatingourdestiny/debate-prepping.htm> (last visited Apr. 10, 2002) (on file with author); see also Alexander, *supra* note 152, at 127 (noting that preparing for the debates “is one of the most intense exercises that a campaign endures”).

193. See Jackie Calmes & Jeanne Cummings, *Bush Tries to Score a Few Points After the Bell; Polls Give Gore Debate Edge, but Rival Pounces on Exaggerations*, WALL ST. J., Oct. 5, 2000, at A28 (discussing the results of “[s]nap opinion polls” favoring the Vice-President’s performance in the first televised debate).

194. See Richard L. Berke & Kevin Sack, *In Debate 2, Microscope Focuses on Gore*, N.Y. TIMES, Oct. 11, 2000, at A1.

195. Campbell, *supra* note 161.

196. *Id.*

197. *Id.*

198. See Peter R. Schorott, *Electoral Consequences of “Winning” Televised Campaign Debates*, 54 PUB. OP. Q. 567, 568 (1990) (citing research indicating that “voters adopted the issue position taken by their preferred candidate” following broadcast debates). Social scientists have labeled this process as “‘group polarization’ in which like-minded people in an isolated group reinforce one another’s views, which then harden into more extreme positions.” Alexander Stille, *Adding Up the Costs of Cyberdemocracy*, N.Y. TIMES, June 2, 2001, at B9. Televised debates help overcome these “selective attention barriers” by exposing the partisan audience to the views of the opposing candidate. JAMES B. LEMERT ET AL., NEWS VERDICTS, THE DEBATES, AND PRESIDENTIAL CAMPAIGNS 199 (1991).

199. Campbell, *supra* note 161. Campbell cites this overlap in viewership to explain the small

Each of these problems has contributed to a steady decline in presidential debate viewership.²⁰⁰ By 1992, the presidential debates were no longer “must see television” as viewership dropped to under thirty-seven million households, fewer than half the homes of just sixteen years earlier.²⁰¹ While the presidential debates still serve an important function,²⁰² they have not revolutionized the substance or structure of the presidential election.²⁰³

B. The 2000 General Election Debates

During the 2000 elections, the networks finally lost interest. Faced with declining ratings and vigorous competition from cable television, satellite, and the Internet, NBC and FOX decided not to broadcast the first of three scheduled presidential debates. NBC cited a legal obligation, claiming its broadcast contract with Major League Baseball required it to preempt the debate to cover the playoffs.²⁰⁴ FOX offered simple economics, choosing to offer a highly

increase in voting following the 1960 televised debates. Voter turnout, Campbell notes, increased sharply between the 1932 and 1936 presidential elections, the same period when broadcast radio began its rapid national expansion. *Id.* By the 1960 elections, however, “90 percent of the population reported listening to radio and 80 percent read a daily newspaper.” *Id.* Televised debates, therefore, merely complimented the existing political reporting, increasing the depth, but not the scope, of voter education.

200. The average national viewership for the presidential elections remained above sixty million households between 1960 and 1992. COMMISSION ON PRESIDENTIAL DEBATES, DEBATE HISTORY: 1976 DEBATES, at <http://www.debates.org/pages/debhis76.html> (last visited Mar. 20, 2002) (reporting 69.7 million viewers in 1976); COMMISSION ON PRESIDENTIAL DEBATES, DEBATE HISTORY: 1980 DEBATES, at <http://www.debates.org/pages/debhis80.html> (last visited Mar. 20, 2002) (reporting 80.6 million viewers); COMMISSION ON PRESIDENTIAL DEBATES, DEBATE HISTORY: 1984 DEBATES, at <http://www.debates.org/pages/debhis84.html> (last visited Mar. 20, 2002) (reporting 65.1 million viewers); COMMISSION ON PRESIDENTIAL DEBATES, DEBATE HISTORY: 1992 DEBATES, at <http://www.debates.org/pages/debhis92.html> (last visited Mar. 20, 2002) (reporting 62.4 million viewers).

201. COMMISSION ON PRESIDENTIAL DEBATES, DEBATE HISTORY: 1996 DEBATES, at <http://www.debates.org/pages/debhis96.html> (last visited Mar. 20, 2002) [hereinafter 1996 DEBATES].

202. Scholars have noted that televised presidential debates have “become a beacon of sanity in the electoral process,” in comparison to campaign commercials. Ed Bark, *Defining Moments: Audience Will Be Watching Debates Carefully, Pros Say*, DALLAS MORNING NEWS, Oct. 2, 2000, at 1A (quoting Professor Marc Landy); see also Editorial, *Debates Give Voters Insight Into Election*, SAN ANTONIO EXPRESS-NEWS, Oct. 3, 2000, at 6B (“The debates are vital because they give the candidates a chance to deliver their message without being filtered by the media.”).

203. *Johnson v. FCC*, 829 F.2d 157, 164 (D.C. Cir. 1987) (stating that televised debates are “only one of the great number of avenues for candidates to gain publicity and credibility with the citizenry”); Alexander, *supra* note 152, at 127; Spotts, *supra* note 172, at 563.

204. Howard Kurtz, *NBC Tosses Debate Choice to Affiliates; Stations Can Pick Between Politics and Playoffs*, WASH. POST, Sept. 30, 2000, at C1.

publicized action adventure premiere.²⁰⁵ FCC Chairman William E. Kennard quickly issued a scathing condemnation of the networks' decisions,²⁰⁶ and Commissioner Susan Ness echoed his sentiment.²⁰⁷ Public criticism ranged from outrage to satire,²⁰⁸ but industry executives defended the move as a simple business decision consistent with the demonstrated interests of the marketplace.²⁰⁹ More tellingly, the viewers tuned out the debates and turned on the alternatives. While the baseball game failed to draw solid ratings, FOX's *Dark Angel* premiere packed in more than seventeen million households, easily beating CBS's debate coverage and nearly topping ABC's debate coverage as well.²¹⁰ Although the combined network and cable viewership ultimately demonstrated a significant national interest in the elections,²¹¹ the week-end ratings showed that America's political appetite was largely confined to *The West Wing*.²¹²

The 2000 presidential debates reveal two important dimensions to the modern American voter. First, as industry pundits have recognized, viewers seek programming alternatives. Given the option to choose professional sports, Hollywood hype, or presidential candidates, many network viewers opted out of the debates. Second, despite the poor network showing, the first debate reached more homes than either of the presidential debates held during the 1996 general elections.²¹³ The low network viewership masked a larger audience watching the debates on cable television channels and premium satellite stations.²¹⁴ Viewers,

205. Don Kaplan, *Sexy Angel Sinks Debate: Titanic Creator Launches Ratings Winner*, N.Y. POST, Oct. 5, 2000, at 94.

206. William E. Kennard, Editorial, *Fox and NBC Renege on a Debt*, N.Y. TIMES, Oct. 3, 2000, at A27.

207. Press Release, FCC Commissioner Susan Ness Decries Decisions of NBC and FOX Networks not to Air the First Presidential Debate (Sept. 29, 2000) (on file with author).

208. Stephen Hess, *Reschedule This Pesky Election*, USA TODAY, Oct. 2, 2000, at 8A (arguing that the presidential elections should be held in February, "between the Super Bowl and the NCAA [basketball] tournament").

209. See, e.g., Kaplan, *supra* note 205 (quoting television analyst Marc Berman, who stated "[a]nytime you have political programming—even the presidential debates— . . . the other networks will benefit It happens every time, and it made very good sense for Fox . . .").

210. *Id.*

211. Lisa de Moraes, *The Real Loser on Debate Night: NBC's Baseball Strikes Out*, WASH. POST, Oct. 5, 2000, at C7. The first debate reached approximately 46.6 million viewers, exceeding the total for the first presidential debate in the 1996 general election. *Id.*

212. *The Week's TV Ratings*, S.F. CHRON., Oct. 11, 2000, at C4 (reporting NBC's fictional series *The West Wing* ranked first in viewership for the week of the first presidential debate).

213. de Moraes, *supra* note 211 (reporting that viewership for the first debate of the 2000 general election averaged 46.6 million households); 1996 DEBATES, *supra* note 201 (reporting that viewership for the first debate of the 1996 general election averaged 46.1 million households, and 36.3 million households for the second debate).

214. Compare Kaplan, *supra* note 205 (using network totals to predict that total debate viewership would be less than 35 million), with de Moraes, *supra* note 211 (reporting actual

therefore, demonstrated a preference for both debate alternatives (content) and network alternatives (forum) for the candidates' speech.²¹⁵ These conclusions suggest that any regulation compelling the live unified broadcast of the debates must carefully consider the relevant market for debate coverage, an analysis addressed in Part III.

III. OUT OF THE CHAOS: A MARKET APPROACH TO THE CONSTITUTIONAL ANALYSIS OF BROADCAST REGULATIONS

The Supreme Court's decisions in *NBC*, *Red Lion*, and *Tornillo*, and the economic criticism of the scarcity rationale are debates about content. *Red Lion*'s deferential review and *Tornillo*'s intense scrutiny are both sufficient to manage broadcast traffic. Criticism of the public interest doctrine in broadcasting arises from the Supreme Court's First Amendment non-broadcast jurisprudence, which has long assumed that the First Amendment's core values are most prohibitive of government regulations based on content.²¹⁶ Although criticism of broadcast regulation often reaches the system of federal licensing itself, it is the content-based restrictions permitted in broadcasting, premised on the scarcity theory, that draw the greatest fire.

A. A "Quick-Look":²¹⁷ *The Determinative Role of Content in First Amendment Analysis*

The concern over content-based restrictions is deeply rooted in the decisions of the Supreme Court. Content-based restrictions, the Court has explained, seek to differentiate speakers solely on the basis of their perspectives, views, or beliefs.²¹⁸ Content-based restraints raise numerous conflicts with First Amendment values, distorting public debate toward a government-favored position and fostering a paternalistic intolerance for speech not sanctioned by the

viewership of 46.6 million).

215. Thomas W. Hazlett, *Digitizing "Must-Carry" Under Turner Broadcasting v. FCC*, 8 SUP. CT. ECON. REV. 141, 186 (2000). Professor Hazlett notes that during the 2000 election, all but one of the eighteen debates held during the presidential primaries and general election were carried live on national cable television networks. *Id.* at 186-87.

216. See, e.g., *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95-96 (1972); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (holding that content-based restrictions are "presumptively invalid").

217. The determinative role of content in the speech cases is analogous to the "quick-look" doctrine in antitrust law. The Supreme Court has recognized that an abbreviated economic analysis, known as a "quick look" is appropriate in cases where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect . . ." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); see also Jay P. Yancey, Comment, *Is the Quick Look Too Quick?: Potential Problems with the Quick Look Analysis of Antitrust Litigation*, 44 U. KAN. L. REV. 671 (1996).

218. Helgi Walker, *Communications Media and the First Amendment: A Viewpoint-Neutral FCC is Not Too Much to Ask For*, 53 FED. COMM. L.J. 5, 6 (2000).

state.²¹⁹ The specter of government controlled speech taints the First Amendment's role in the "search for political truth"²²⁰ by encouraging one public viewpoint at the expense of all others.²²¹ Therefore, assuming the type of content restrained is of sufficient value,²²² the First Amendment provides a near-absolute shield against government regulation outside the broadcast industry.²²³

In contrast, content-neutral restraints may be upheld where the government demonstrates that the regulation effectively promotes a substantial interest unrelated to viewpoint suppression.²²⁴ Some commentators still view content-neutral restraints as potential threats to public debate capable of limiting access to sources of information and thereby skewing the discourse towards a single result.²²⁵

Not all commentators have accepted the Court's corollary content doctrines, which allow for reduced judicial scrutiny where the government regulates in a neutral manner without regard to the speaker's viewpoint.²²⁶ Moreover, by

219. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 55-57 (1987).

220. *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 538 (1980) ("To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.").

221. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

222. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194-95 (1983) (discussing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). In *Chaplinsky*, the Court held that certain types of speech are considered to have low social value, and thus are only provided minimal constitutional protection. *Chaplinsky*, 315 U.S. at 571-72.

223. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

224. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 70 (1981); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Although content-neutral restraints must limit their incidental restrictions on speech, the regulation need not be the least restrictive method of achieving the government's goal. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

225. Stone, *supra* note 219, at 55.

226. Critics have noted that the Court's stated reasons for strictly scrutinizing content-based restrictions are logically applicable to content-neutral restraints. Professor Martin Redish has argued that while content-based restrictions can undermine the democratic process by impeding voter education, content-neutral regulations will likely have the same effect. Martin H. Redish, *The Content Restriction in First Amendment Analysis*, 34 STAN. L. REV. 113, 128 (1981). In addition, he notes that requiring speech restraints to target all information without regard to content ultimately "reduces the sum total of information or opinion disseminated." *Id.* Similarly, Professor Erwin Chemerinsky argued that the Court has used the content-neutral exception to uphold restrictions on speech that adopt a favored viewpoint, even if neutrally applied. Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49 (2000). Professor Chemerinsky discussed, for example, the Court's decision in *Forbes* holding that minor party candidates for political office may be excluded from broadcast debates. *Id.* at 56-57. The Court found that the exclusion of minor party candidates was a content-neutral restriction, based on the likely success of the candidate, and not the candidate's views. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998). Professor Chemerinsky argues that the distinction between major and minor candidates,

removing certain classes of speech such as “fighting words”²²⁷ or obscenity²²⁸ from First Amendment protection, the Court itself engages in an explicit content analysis.²²⁹ Despite the criticism, however, the content doctrine has been consistently reaffirmed by the Court and is unlikely to be abandoned.

The broadcast cases depart from the content model of the First Amendment, causing the doctrinal tension between print and electronic media.²³⁰ Content-based restrictions, the Court reasoned in *NBC*, are essential for broadcast regulation because the selection of broadcasters on anything other than a lottery system requires a content choice.²³¹ While a lottery system managed through property rights and capital was possible, the *Red Lion* Court feared the threat of private information monopoly.²³² If content-based decisions were essential, the *Metro Broadcasting* Court concluded, the choice should at least serve the socially beneficial purposes of “public interest, convenience, or necessity.”²³³ Forged in the era of national socialism,²³⁴ the Court’s content-based broadcast doctrine was thus born.

B. A Reasonable Rule for the Future of Broadcasting Analysis

Identifying content-based restraints as the problem with the broadcast cases does not, however, help select among the proposals for reconciling *NBC*, *Red Lion*, and *Tornillo*. Critics of the scarcity theory have called for a direct overruling of *Red Lion*, leading to a single broadcast standard under the holding of *Tornillo*.²³⁵ This proposal, however, ignores the Supreme Court’s concern

however, only existed because of the government-imposed evaluation of the public interest in each candidate’s views. Chemerinsky, *supra*, at 59-60.

227. *E.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

228. *E.g.*, *Miller v. California*, 413 U.S. 15 (1973).

229. *See, e.g.*, *Young v. Am. Mini Theatres*, 427 U.S. 50, 66 (1976) (plurality opinion stating that the First Amendment’s protection “often depends on the content of the speech”).

230. It should be noted that this departure applies to regulations of the broadcast industry structure, and not to regulations aimed directly at broadcast content. *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002).

231. *NBC v. United States*, 319 U.S. 190, 216-17 (1943). The *NBC* Court reasoned that If the criterion of “public interest” were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of “public interest, convenience, or necessity.”

Id.

232. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 391, 400-01 (1969).

233. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 567 (1990).

234. HUBER, *supra* note 90, at 5.

235. *See, e.g.*, *Telecomm. Research & Action Ctr. v. FCC*, 801 F.2d 501, 509 (D.C. Cir. 1986) (predicting that “the Supreme Court will one day revisit this area of the law and . . . eliminate the

with administrative flexibility. Broadcast technologies are dynamic and changing, ill-suited to inflexible judicial standards.²³⁶ The Court has implicitly acknowledged that Congress has passed the issue of broadcast management to the FCC and the courts with practically no guidance.²³⁷ The Court has thus expressed that both the fact-finding powers of Congress and the daily involvement of administrative agencies in media management are important resources that should be consulted in defining the accepted doctrinal limits of broadcast speech.²³⁸

Each of these aspects of the current system of broadcast regulation provides limits on proposals for reform. Outright abolishment of the FCC might be consistent with normal free-market economics²³⁹ but is highly unlikely in the near future.²⁴⁰ The modern FCC is a massive bureaucracy, comprised of more than 2000 full-time employees serving in twenty-nine divisions.²⁴¹ The agency's maze of administrative, technical, and support responsibilities requires an annual budget of more than \$200 million.²⁴² Although preserving a bureaucracy because of its size is hardly laudable, the Court is unlikely to dismantle an agency of this scope by removing the scarcity underpinning in one ruling. Congress is similarly unlikely to abolish the FCC because the agency's regulation of indecency and obscenity is too easily exploited during elections.²⁴³ Finally, the growth of new media itself argues for at least a limited federal regulatory presence if only to order and direct the growing amounts of communication traffic.²⁴⁴

distinction between print and broadcast media, surely by pronouncing *Tornillo* applicable to both . . .").

236. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973) ("[S]olutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.").

237. *Id.* at 103 ("[W]hen we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem.").

238. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665-66 (1994) ("Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic" as cable broadcasting (quoting *Walters v. Nat'l Assoc. of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985))).

239. LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 182-85 (1999).

240. Joseph D. Kearney, *Will the FCC Go the Way of the ICC?*, 71 U. COLO. L. REV. 1153 (2000) (discussing alternatives to abolishing the FCC, including a congressional reduction of the agency's authority, or self-reduction by the FCC itself).

241. *Id.*

242. HUBER, *supra* note 90, at 5.

243. Henry Goldberg & Michael Couzens, "*Peculiar Characteristics*": *An Analysis of the First Amendment Implications of Broadcast Regulation*, 31 FED. COMM. L.J. 1, 42 (1978). Goldberg and Couzens stated the question bluntly, arguing that the role of the First Amendment in broadcasting is "not a question of constitutional law, and probably never has been." *Id.*

244. Self-directed reorganization by the FCC itself, of course, remains possible. See Roger

A possible solution, however, is presented by the Court's holdings in *Turner I* and *Reno*. In both cases, the Court revealed that the scarcity doctrine is not applicable to all media.²⁴⁵ The decisions suggest that similarly plentiful communications media, such as wireless, 3G,²⁴⁶ and DBS, should also be subject to traditional First Amendment scrutiny. Having cited the virtues of convergence,²⁴⁷ the Court's broadcast doctrine may now be on a technological timetable that will use the arrival of broadband services to mark the close of the scarcity era.²⁴⁸

*C. Moving Broadcasting Back to the Marketplace of Ideas:
Using Broadcast Market Power to Determine First Amendment Scrutiny*

Although convergence theory should ultimately underlie the Supreme Court's review of broadcast regulation, the scarcity doctrine remains the current standard of constitutional analysis. While the broadcast networks will continue to question their public interest duties, some issues of public concern are likely to trigger new regulatory efforts. Network broadcast coverage of the general presidential debates, for instance, is an important social interest and a potentially popular political target. The 2000 presidential race prompted immediate calls for reform of all aspects of the election process.²⁴⁹ Television received particular attention, largely due to the broadcast networks' practice of projecting the winner of each state.²⁵⁰ Overhauling the American voting system, however, is a

M. Golden, *Gauging Michael Powell*, LEGAL TIMES, May 30, 2001, available at <http://www.law.com> (last visited April 1, 2002) (quoting FCC Chairman Michael Powell's desire for reform: "[W]e are in the process of systematically reviewing and thinking through what is the optimal, organizational model for the commission").

245. See *supra* notes 101-08 and accompanying text.

246. See FCC, THIRD GENERATION ("3G") WIRELESS, available at <http://www.fcc.gov/3G> (last visited Apr. 15, 2002). 3G systems use radio frequencies to provide Internet, multimedia, and voice communications to wireless and mobile receivers. *Id.*

247. See *supra* note 84.

248. Nicholas Negroponte summarized the past and future of a converged broadcast media: In analog days, the spectrum allocation part of the FCC's job was much easier. It could point to different parts of the spectrum and say: this is television, that is radio, this is cellular telephony, etc. Each chunk of spectrum was a specific communications or broadcast medium with its own transmission characteristics and anomalies, and with a very specific purpose in mind. But in a digital world, these differences blur or, in some case, vanish: they are all bits. They may be radio bits, TV bits, or marine communication bits, but they are all bits nonetheless, subject to the same commingling and multi-use that define multimedia.

NICHOLAS NEGROPONTE, BEING DIGITAL 54 (1995).

249. Katherine Q. Seelye, *Nation Awash in Ideas for Changing Voting*, N.Y. TIMES, Jan. 28, 2001, at I12.

250. Katharine Q. Seelye, *Congress Plans Study of Voting Processes and TV Coverage*, N.Y. TIMES, Feb. 9, 2001, at A20.

complicated and politically treacherous task.²⁵¹ As swift reform appears unlikely,²⁵² FCC action involving the broadcast network debates presents an attractive alternative.

A regulation of presidential debate coverage on the broadcast networks would force the Supreme Court to confront the scarcity doctrine directly. Although the majority opinion in *Turner I* suggests that the Court is open to reform,²⁵³ long-standing decisions such as *NBC* and *Red Lion* are particularly likely to command adherence from the proponents of *stare decisis*. Moving beyond scarcity before the arrival of convergence thus requires an approach that combines the administrative deference of *Red Lion* with the recognition of emerging market alternatives to broadcasting noted in *Turner I* and *Reno*.

A suitable alternative may exist in the Supreme Court's antitrust decisions. In the area of antitrust law, the Court has recognized that the once strict categorical analysis of potentially anti-competitive actions has been replaced by a more searching inquiry into the harms resulting from the restraint.²⁵⁴ Similarly, under the First Amendment, avoiding the strict scrutiny applied to content-based restraints does not guarantee constitutionality, but merely subjects the regulation to something less than the "most exacting level of First Amendment scrutiny."²⁵⁵ Evaluating broadcast speech likewise requires "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint."²⁵⁶ As the Court reiterated in *Turner I*, the special interests permitting broadcast regulation do not

251. Editorial, *Election Reform Stalls*, N.Y. TIMES, Apr. 30, 2001, at A18.

252. Katharine Q. Seelye, *Voting System Changes Lag, Experts on Elections Warn*, N.Y. TIMES, Apr. 4, 2001, at A18; Katharine Q. Seelye, *Little Change Forecast for Election Process*, N.Y. TIMES, Apr. 26, 2001, at A14.

253. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 638 & n.5 (1994) (noting that "courts and commentators have criticized the scarcity rationale since its inception"). A more direct assault on scarcity is found in Justice Blackmun's concurrence in *CBS v. Democratic National Committee*, 412 U.S. 94, 158 n.8 (1973). Justice Blackmun noted that scarcity "may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*." *Id.* (Blackmun, J., concurring).

254. See *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 779 (1999).

255. See *Turner Broad. Sys., Inc.*, 512 U.S. at 661. This lesser or intermediate standard derives from the oft-quoted Supreme Court decision in *United States v. O'Brien*, which permits content-neutral restraints furthering an important government interest unrelated to speech suppression, narrowly tailored to limit incidental speech restraints. 391 U.S. 367, 377 (1968). See also *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989) (explaining the application of narrowly tailored restraints).

256. *Cal. Dental*, 526 U.S. at 781. Justice Souter's explanation of this standard in antitrust law appears readily applicable to broadcast speech restrictions:

The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if . . . analyses in case after case reach identical conclusions.

Id.

“readily translate” into other communication markets.²⁵⁷ A narrower focus on the specific broadcast markets restrained by a regulation would provide the flexibility to accommodate new technical innovations without deregulating the entire broadcast industry in a single step.²⁵⁸

Accordingly, the Supreme Court should adopt the market analysis that guides the evaluation of monopolization cases under the Sherman Antitrust Act²⁵⁹ as the standard for reviewing speech restrictions on broadcast television networks. Speech restraints in markets regarded by First Amendment precedent as scarce, such as broadcast network television and broadcast radio, would be evaluated under the reduced First Amendment scrutiny articulated in *NBC* and *Red Lion*. In contrast, restraints in markets that are regarded by precedent as abundant, such as cable television and the Internet, would be evaluated under strict or intermediate scrutiny, depending on whether the regulation is content-based.²⁶⁰ Where the regulated content is found in scarce and abundant media, the level of constitutional protection, and thus the level of scrutiny, will depend on which market carries the majority of the speech at issue. Courts would determine the “primary market” for the content by using the market power tests employed in antitrust cases.²⁶¹

A market power²⁶² approach to broadcast regulation has significant advantages over the current First Amendment tests. A market approach adds the full protection of the First Amendment to speech primarily carried in media that lack the distinctive characteristics of the electromagnetic spectrum.²⁶³ Regulations on speech found primarily in media with the distinct characteristic of spectrum scarcity²⁶⁴ can still be deferentially reviewed to allow narrow federal

257. See *Turner Broad. Sys., Inc.*, 512 U.S. at 639 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983)).

258. Flexible regulations are critical in this area, as “technological advances have a habit of moving more rapidly than government policy.” R. Michael Senkowski et al., *Broadband: Flying Blind*, *LEGAL TIMES*, May 14, 2001, at 33 (noting the “Internet has emerged as a center of commerce, news, and entertainment in the relatively brief span since enactment of the Telecommunications Act of 1996”).

259. 15 U.S.C. § 2 (1994).

260. See *supra* notes 218-25 and accompanying text.

261. See, e.g., U.S. DEP’T OF JUSTICE AND THE FTC, *HORIZONTAL MERGER GUIDELINES* (1992) (establishing definitions for determining the amount of market power a firm possesses for a specific product) [hereinafter *DOJ GUIDELINES*].

262. LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 22 (2000). In antitrust economics, market power is defined as “the seller’s ability to raise and sustain a price increase without losing so many sales that it must rescind the increase.” *Id.*

263. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376 (1984) (noting broadcasting regulations “involve unique considerations,” justifying a departure from the First Amendment protections provided to other forums).

264. *Id.* at 377 (“The fundamental distinguishing characteristic of the new medium of broadcasting that, in our view, has required some adjustment in First Amendment analysis is that

intervention for social programs.²⁶⁵ A market-based standard for determining the scrutiny of broadcast restraints begins to realign the First Amendment protections of broadcasters with all other media and gradually removes the government's role in content choice.²⁶⁶ Most importantly, a market-based analysis provides broadcasters with maximum First Amendment protection over content distributed through multiple media outlets. Broadcasters are thus given a clear incentive to speed the convergence of media through broadband technologies,²⁶⁷ a goal already mandated by Congress in the Telecommunications Act of 1996.²⁶⁸

Ample guidelines for this analysis already exist because the principles of

'broadcast frequencies are a scarce resource [that] must be portioned out among applicants'." (quoting *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973))).

265. *CBS*, 412 U.S. at 157-58 (Blackmun, J., concurring). Justice Blackmun argued that the "Commission has a duty to encourage a multitude of voices but only in a limited way, viz.: by preventing monopolistic practices and by promoting technological developments that will open up new channels." *Id.*

266. The Supreme Court has stated that eliminating content-based restrictions is the central purpose of the First Amendment. *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 538 (1980).

267. Although deployment of broadband has moved slowly, Kornbluh, *supra* note 88, United States Internet users are showing new interest in high-speed Internet capacity, as "consumers are switching from dial-up to broadband faster than new households are getting dial-up." Saul Hansell, *Can AOL Keep Its Subscribers in a New World of Broadband?*, N.Y. TIMES, July 29, 2002, at C1; see also Jim Hu, *More Consumers Hooked on Broadband*, CNET News (Jan. 15, 2003), at <http://news.com.com/2100-1033-980737.html> (reporting a fifty-nine percent increase in broadband use in the United States in 2002).

268. *In re Deployment*, *supra* note 89, at 20,915 (discussing Telecommunications Act of 1996, Pub. L. No. 104, § 706, 110 Stat 56 (1996)). In 2001, broadband deployment received fresh legislative attention in a host of bills in the House and Senate. The bills shared a common format, hoping to entice regional telecommunications carriers to hasten broadband implementation by exempting high-speed services from the provisions of the 1934 Act. See Broadband Internet Access Act of 2001, H.R. 267, 107th Cong. (2001); Internet Freedom-Broadband Deployment Act of 2001, H.R. 1542, 107th Cong. (2001); Broadband Competition and Incentives Act of 2001, H.R. 1697, 107th Cong. (2001); American Broadband Competition Act of 2001, H.R. 1698, 107th Cong. (2001); Broadband Internet Access Act of 2001, S. 88, 107th Cong. (2001); Broadband Deployment and Competition Enhancement Act of 2001, S. 1126, 107th Cong. (2001). In 2002, the House approved a measure aimed at speeding broadband development, by lifting restrictions that prohibit phone companies from offering high-speed Internet access "without first opening their local markets and permitting smaller rivals to lease their equipment." Stephan Labaton, *Broadband Bill Advances, But Its Survival is Doubtful*, N.Y. Times, Feb. 28, 2002, at C4 (discussing the Internet Freedom-Broadband Deployment Act of 2001, H.R. 1542, 107th Cong. (2001)). FCC Commissioner Kevin Martin has similarly signaled that the FCC intends to move quickly in the coming years to accelerate broadband deployment. Stephen Lawson, *FCC Commissioner Calls for Quick Decisions*, available at <http://www.itworld.com/Man/2697/> IDG020124fccsupernet (last visited Jan. 24, 2002).

market power are well developed in antitrust law.²⁶⁹ Market power is measured by determining the relevant geographic and product markets for a particular good or service.²⁷⁰ The geographic market is the region in which consumers can reasonably seek alternatives to the product or service in question.²⁷¹ The product market includes all goods or services that are reasonably interchangeable with the product in question.²⁷² Although elasticity will normally locate substitute products or regions of competition,²⁷³ the Supreme Court has held that in some instances a single product brand can comprise the entire relevant market.²⁷⁴ Therefore, market analysis seeks to find whether a seller possesses sufficient power over a marketplace to reduce the output of supply and trigger price increases above the normal competitive level. If consumers can readily shift their consumption to competing markets without great additional expense,²⁷⁵ the two markets are considered the relevant area of competition.²⁷⁶

These basic parameters can be applied to determine the First Amendment scrutiny of a broadcast regulation restraining speech in both scarce and abundant markets.²⁷⁷ In step one, the geographic market for the regulation is determined by evaluating the “area” in which consumers can reasonably access alternatives to the broadcast medium restrained. For instance, a decision by the FCC denying the application of a licensee to erect a radio tower²⁷⁸ is largely limited to the surrounding few miles around the proposed transmitter. As consumers are unlikely to travel to distant communities for a similar radio broadcast, the geographic market would likely be drawn narrowly. In contrast, a regulation

269. The foundations of market power measurement date back at least to Judge Learned Hand’s opinion in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

270. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-29 (1961) (defining the relevant market as the “area of effective competition”).

271. *United States v. Grinnell Corp.*, 384 U.S. 563, 574 (1966).

272. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

273. Elasticity measures a seller’s market power as the percentage of decline in demand for the seller’s product in response to an increase in the price of the product. SULLIVAN & GRIMES, *supra* note 262, at 22-23. Where a seller lacks market power, an increase in price will cause buyers to stop purchasing the seller’s product, denoting an elastic market. *Id.* Where the seller holds significant market power, buyer demand will not significantly decline in response to price increases, signaling an inelastic market. *Id.* For a discussion of the economic models of elasticity, see Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 ANTITRUST L.J. 363 (1998).

274. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481-82 (1992).

275. *Id.*

276. DOJ GUIDELINES, *supra* note 261, at 65.

277. It is crucial to note that the following examples are based on presumptions concerning consumer behavior in situations arising in several First Amendment broadcast decisions. In antitrust cases, the definition of the relevant market is an issue of expert economic opinion and cannot normally be determined by laypersons. See *id.* (discussing the modeling of a hypothetical marketplace).

278. See *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 139-40 (1940); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 471 (1940).

excluding certain candidates for political office from participating in a debate held on a state public television channel²⁷⁹ impacts a broader market. As consumers here may access the broadcast debate throughout the state, the geographic market would extend to at least the state borders.

In other cases, the geographic broadcast market might be national. Regulations specifying the type of programming that may be broadcast among affiliated radio stations²⁸⁰ or a generalized public service requirement such as the fairness doctrine²⁸¹ affect consumers throughout the United States.²⁸² Finally, a regulation similar to the Communications Decency Act, which prohibited offensive transmissions over the Internet,²⁸³ controls a virtually unlimited geographic market.

Step two of the analysis determines the marketplace for the broadcast product regulated. Selecting the relevant product requires determining the content subject to the restriction, a more complicated problem than geography. As in antitrust analysis, a court must consider both the content that is directly regulated and any competing content that is “reasonably interchangeable.”

For instance the regulation requiring cable providers to carry local broadcast television addressed in *Turner I* assumed that local television broadcasters were essential sources of information and entertainment.²⁸⁴ The majority, however, found insufficient evidence that local broadcasters would be harmed without access to the cable television subscribers.²⁸⁵ From a market perspective, the Court concluded that the relevant product market for broadcast information and entertainment might not be limited to local television.²⁸⁶ It is important to recall that products need not be identical “or even perfect substitutes” to occupy the same product market.²⁸⁷ Dissimilarities between traditional broadcast content and new media alternatives should not necessarily preclude the use of a broadcast product market that encompasses both. While some broadcast products might consist of a single outlet, others might span the spectrum of modern communications.

At step three, the market power of the relevant product in the relevant geographical area is quantified. Precise indicators of market power will vary by

279. See *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 671-72 (1998).

280. See *NBC v. United States*, 319 U.S. 190, 194 n.1 (1943).

281. See *supra* notes 131-44 and accompanying text.

282. A narrower geographic market might be present where the broadcast entity operated in only a specific number of cities. See, e.g., *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 370 (1984) (examining claims brought by the Pacifica Foundation, a nonprofit radio corporation broadcasting in five metropolitan markets).

283. See *Reno v. ACLU*, 521 U.S. 844, 850 (1997).

284. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663-64 (1994).

285. *Id.* at 664-68.

286. *Id.* at 663 (“[C]able and other technologies have ushered in alternatives to broadcast television.”).

287. ROGER D. BLAIR & DAVID L. KASERMAN, *ANTITRUST ECONOMICS* 108 (1985).

context, but some guidelines are possible.²⁸⁸ Control of only thirty-three percent of a broadcast market should likely be insufficient to show market power, as the majority of consumers are able to access alternative content.²⁸⁹ Control of ninety percent of a market, in contrast, demonstrates a lack of content alternatives and market dominance.²⁹⁰ Control of a slight majority of the market estimated at sixty-four percent might suggest a decline in broadcast diversity, and depending on the context, market power.²⁹¹ In a First Amendment context, however, the ultimate question to be resolved is whether the majority of broadcast market power resides in an electromagnetic spectrum. Only regulations primarily restraining broadcasting in the scarce media are evaluated under the relaxed First Amendment standards of *NBC* and *Red Lion*. Market power residing in all other media markets demonstrates consumer alternatives outside the electromagnetic spectrum and forecloses any application of the scarcity doctrine. These economically abundant media retain full First Amendment protection and are considered under the traditional content-based distinction discussed above.²⁹²

This basic sketch of a First Amendment market analysis demonstrates that the law of antitrust economics provides a sound foundation for evaluating broadcast restraints. Indeed, scholars have previously demonstrated that there is nothing logically inconsistent between antitrust and free speech rationales in the area of broadcast restraints on program content,²⁹³ and market power concerns underscore the speech issues confronted in *Turner I*.²⁹⁴ Although application of this model will undoubtedly vary with facts and context, the basic reasoning is simple enough to be codified by the FCC and manageable enough for routine judicial application. In Section IV, this market model is tested against a new regulation, which compels broadcast television networks to provide live coverage of the general presidential election debates.

288. Although *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), is regarded as the leading judicial opinion on market power, most courts now rely on the more detailed economic balancing of the DOJ Merger Guidelines. The *Alcoa* formula, using market shares of ninety percent, sixty-four percent, and thirty-three percent, is thus included only as one possible standard.

289. *Id.* at 424.

290. *Id.* at 425.

291. *Id.* at 424.

292. See *supra* notes 218-25 and accompanying text.

293. Owen M. Fiss, *The Censorship of Television*, 93 NW. U. L. REV. 1215, 1228 (1999). Professor Fiss states that in general, "a highly competitive industry is a step toward freedom insofar as it proliferates sources of information." *Id.*

294. *Id.* at 1228-29. Professor Fiss notes that on one level, the must-carry provisions at issue in *Turner I* and a subsequent case, *Turner Broadcasting System, Inc v. FCC*, 520 U.S. 180 (1997) (*Turner II*), attempted to preserve competition in the television industry by ensuring that broadcast television could access the cable television market, and thus the cable television audience. Fiss, *supra* note 293, at 1228-29.

IV. REGULATING THE DEBATE MARKET: EVALUATING THE
CONSTITUTIONALITY OF COMPELLED NETWORK DEBATE COVERAGE
USING A MARKET-BASED FIRST AMENDMENT THEORY

A regulation compelling broadcast television networks to cover the general presidential election debates is a useful example for applying a market-based First Amendment analysis. The presidential debates combine the two concepts cited by the Supreme Court in *Turner I* as most likely to warrant restriction of broadcast speech. First, the presidential debates have historically aired on network television, the medium the Court described as a “principal source of information . . . for a great part of the Nation’s population.”²⁹⁵ Second, the debates serve to educate the voting public, a goal that *Turner I* implied was “a governmental purpose of the highest order.”²⁹⁶ A regulation designed around these considerations would force the Court to consider a speech restriction on content that served a concededly important public interest, partially aired in the forum that is still firmly controlled by caselaw decided on the basis of spectrum scarcity.

A. Some Suggested Goals for a Broadcast Debate Regulation

It is difficult and unnecessary to speculate on the precise language of a possible debate regulation. Certain provisions, however, are likely to be essential. These provisions are not an exhaustive list or a minimum set of requirements.²⁹⁷ Instead, these guidelines reflect the current format of the presidential debates and some recurring problems in their coverage:

1. Unified Coverage: Traditionally, all four of the major television networks have aired the general presidential debates. This unified coverage is necessary to reduce viewer attrition,²⁹⁸ which appears to occur when even minor programming alternatives are offered.²⁹⁹ Technological alternatives, such as offering only “split-screen” coverage of the debates, would be similarly prohibited.
2. Live Coverage: Political commentary has become a media staple. Within minutes of the final question, analysts descend on the airwaves with evaluations, criticisms, and of course, the announcement of the victor. While commentary can serve a legitimate journalistic function, viewing the recap

295. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994).

296. *See id.* (discussing public affairs and educational programming in general).

297. Further, these recommendations do not address more substantive matters, such as question selection, choice of moderator, or format.

298. *See* CNN, *Fourteen Million Opt for “Dark Angel” Over Debate*, Oct. 5, 2000, at <http://asia.cnn.com/2000/ALLPOLITICS/stories/10/04/debate.tv.ap> (last visited Apr. 7, 2002) (quoting Dan Rather’s characterization of the first 2000 presidential debate as “pedantic, dull, unimaginative, lackluster, humdrum—you pick the words”).

299. *See supra* note 185 and accompanying text; *see also* NEWTON N. MINOW ET AL., PRESIDENTIAL TELEVISION 8 (1973) (explaining the impact of a politician “appearing simultaneously on most major television channels, so that alternative viewing choices are sharply limited . . .”).

- before viewing the candidates risks alienating the audience. Airing the debates as they occur thus ensures that substance precedes spin.³⁰⁰
3. Full Length Coverage: The value of the debates is the opportunity to examine a candidate's responses to a wide range of issues. Airing only a portion of the presidential debate necessarily involves selecting which of the topics covered is sufficiently trivial for preemption.
 4. Running Time: More debate is not necessarily better debate. The presidential debates have generally run between one and one and one half hours.³⁰¹ The one-hour running length is a reasonable standard that avoids losing viewers as the debate progresses.
 5. Free Television: Although declining in recent years, broadcast television continues to account for more than fifty percent of prime time viewing.³⁰² In order to reach this majority of viewers, network debate coverage would be limited to the free television spectrum rather than a network-owned cable channel.
 6. Commercial Sponsorship: Although network sponsorship of the debates is little more than a historic accident,³⁰³ declining outside sponsors avoids the intrusive interruption of commercials. While sponsorship could be arranged without commercial pause, the unseemly sight of a corporate icon hovering over the nation's next leader is inconsistent with the importance of the election. If necessary at all,³⁰⁴ advertisements should be limited to short

300. The concept of live television itself, however, may soon become antiquated with the rise of personal video recorders, or "PVRs." PVRs operate like traditional videocassette recorders, using high-capacity hard disk drives for storage in place of magnetic tape. David Pogue, *State of the Art; Recorders to let you Tame TV*, N.Y. TIMES, Apr. 5, 2001, at G1. PVRs provide a digital "buffer" between the broadcast signal and the viewer by storing up to thirty minutes of programming as it airs. See <http://www.tivo.com> (last visited Jan. 1, 2002). PVRs are thus able to customize even live television, allowing viewers to skip or re-watch segments as desired.

More importantly, PVRs, in conjunction with digital cable or satellite television services, allow viewers to choose programs weeks before they are broadcast. Pogue, *supra*. While home recorders are not new, PVRs add the element of "time-shifting," as owners pre-select their viewing by content, and not broadcast time. As one commentator writes, "[y]ou'll never know or care when a particular program was on, or on what channel; you will just know that when the little light on the front of the PVR is on, something you requested is ready to play." *Id.* As the popularity of PVRs grows, the preemptive power of unified broadcasting will vanish, as viewers will be able to watch a disk full of their favorite programming rather than the live offerings scheduled for a given timeslot. PVRs are now installed in an estimated one million homes, with future sales expected to reach fifteen million within five years. *In re Annual Assessment*, *supra* note 80, para. 94.

301. See generally COMMISSION ON PRESIDENTIAL DEBATES: DEBATE HISTORY, available at www.debates.org (last visited Apr. 30, 2002) (listing running times for all televised presidential debates).

302. *In re Annual Assessment*, *supra* note 80, para. 80.

303. See *supra* note 166 and accompanying text.

304. Prohibiting advertising might not be unreasonable given that broadcasters still "profit immensely from election campaigns." THOMAS E. PATTERSON, *THE VANISHING VOTER* 175 (2002).

segments no more than a few minutes at the beginning and close of each debate.³⁰⁵

7. Preemption of Sports: Perhaps most importantly, the model regulation must address the numerous network contracts with professional sports franchises. Sporting events are typically broadcast under long-term and highly profitable exclusive contracts. A model regulation must therefore supersede the networks' obligations under these contracts by exempting performance.³⁰⁶

Each suggestion seeks to minimize the networks' financial hardships during the broadcasts, while preserving the educational benefits of minimal programming alternatives.

*B. The Test Applied: Determining the Relevant Broadcast Market
for the General Presidential Debates*

Predicting market competition without careful economic analysis risks public policy choices that stifle market growth and yield inefficient regulation.³⁰⁷ Abstract broadcast market scrutiny is equally difficult given the constant changes in technology. The First Amendment scrutiny applied to a broadcast debate regulation will thus depend largely on the circumstances surrounding its enactment. Where are the viewers? What are people watching? How do televisions, computers, and even radios receive information? Each answer depends entirely on how we divide the broadcast spectrum in the future.³⁰⁸

In 2000, for instance, candidates for public office spent more than one billion dollars on television advertising. *Id.*

305. JOHN ELLIS, NINE SUNDAYS: A PROPOSAL FOR BETTER PRESIDENTIAL CAMPAIGN COVERAGE 26 (Joan Shorenstein Barone Center on the Press, Politics and Public Policy, John F. Kennedy School of Government, Harvard University 1991). This innovative proposal suggested a system of ninety-minute prime-time debates each Sunday for nine weeks, rotating among the major networks and independent news stations. *Id.* at 4. The proposal recognized the need to induce networks to sponsor the debates by permitting limited advertising sales: "if handled correctly, commercials should not diminish the value of the broadcast. Viewers and voters are sophisticated enough to understand the need for commercial sponsorship." *Id.* at 26. *But see* PATTERSON, *supra* note 304, at 174. Professor Patterson argues that the "Nine Sundays" plan is unduly burdensome, and proposes a less ambitious alternative requiring the networks to devote a single prime-time hour to each candidate for an interview hosted by the network's news anchor. *Id.* at 173-74.

306. The proposal would also require restrictions preventing minor networks from offering substitute coverage. One possibility is to require sports franchises to agree that any preempted event would be aired on a substitute channel of the network's choosing, allowing for subcontracting to a rival network, or more likely, an in-house cable station.

307. *See generally* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

308. *See* Hazlett, *supra* note 77, at 927 (noting that any definition of broadcast technology can be altered by "further subdivision of time, power, or bandwidth coordinates"); *see also* LESSIG,

For the present, therefore, we are limited to the model of a broadcast television debate designed in 1960. This model, discussed above in the guidelines for a suggested regulation,³⁰⁹ allows a short inquiry into the First Amendment restrictions that may govern actual promulgation.

The market-based approach begins by defining the market for the general presidential debates geographically and as a product. Defining the relevant geographic market is a straightforward task, as the proposed regulation addresses only the presidential election, rather than contests for state-specific offices. Accordingly, a national geographic market is appropriate. Next, the possible product market is defined, beginning narrowly³¹⁰ and assuming that broadcast network television is the relevant medium. A market limited to only broadcast television could be too narrow, avoiding television's overlap with other media. Excerpted transcripts of the debates, for instance, are commonly published in national newspapers³¹¹ and Internet databases.³¹² Viewers may also watch the debates on the Internet,³¹³ cable television,³¹⁴ or premium DBS services.³¹⁵ Non-broadcast resources, however, lag behind as widely used alternatives for debate audiences.³¹⁶ While access to Internet and cable has exploded, studies evidence a digital divide that limits the spread of information technologies in low-income

supra note 239, at 184 (describing broadcast technologies modeled on computer networks that avoid overlapping signals and allow endless amounts of content); Lee Gomes, *Boomtown: Visionaries See a Day When Radio Spectrum Isn't Scarce Commodity*, WALL ST. J., Sep. 30, 2002, at B1 (discussing "open spectrum" technologies).

309. See *supra* notes 297-306 and accompanying text.

310. DOJ GUIDELINES, *supra* note 261 (explaining that the relevant market model begins with "the smallest group of products" that might satisfy consumer demand).

311. See, e.g., *The 2000 Campaign: Exchanges Between the Candidates in the Third Presidential Debate*, N.Y. TIMES, Oct. 18, 2000, at A26; *The 2000 Campaign: Second Presidential Debate Between Gov. Bush and Vice President Gore*, N.Y. TIMES, Oct. 12, 2000, at A22; *The 2000 Campaign: Transcript of Debate Between Vice President Gore and Governor Bush*, N.Y. TIMES, Oct. 4, 2000, at A30.

312. See, e.g., C-Span.org, Presidential Debates 2000, at <http://www.c-span.org/campaign2000/presdebates.asp> (last visited Apr. 27, 2002) (archiving all of the presidential and vice-presidential debates from the 2000 election, along with commentary, discussion boards, and general election statistics).

313. See 1996 DEBATES, *supra* note 201 (containing downloadable video of the 1996 presidential debates). IBM and Sony Electronics plan to convert 115,000 hours of video produced by CNN since 1980 into a computerized database. Susan Stellin, *CNN Video Archives to Become Digital Database*, N.Y. TIMES, Apr. 23, 2001, at C8. The system will allow "the sale of news video material to the public on a pay-per-view basis on the Internet or through high-speed interactive cable systems." *Id.*

314. See *supra* note 214 and accompanying text.

315. Press Release, EchoStar Communications Corp., EchoStar's DISH Satellite Television Offers 504 Hours of Free Air Time to U.S. Presidential Candidates (Oct. 2, 2000) (on file with author).

316. See *supra* note 214 and accompanying text.

and rural regions.³¹⁷ Broadcast television, at present,³¹⁸ remains the most prevalent medium for debate access throughout the nation.³¹⁹ Without evidence of more widespread consumer use of new media, the initial product market is limited to broadcast television.

The market-based approach must also consider the general presidential debates as a product. The market again begins narrowly, including only the live debates before considering reasonably interchangeable debate alternatives. Considering the presidential debates a separate product market might ignore consumer habits. Media studies suggest that the debate audience is largely comprised of viewers who closely follow all developments in the election.³²⁰ The debates may also be interchangeable with campaign advertisements, live rallies, stump speech coverage, or the candidates' web sites.³²¹ Yet the presidential debates—however marginalized by appeals to showmanship—remain unique in their ability to convey both the style and substance of the candidates.³²² Viewers watching the debates merely to reinforce their initial candidate choice are still held captive in front of competing viewpoints easily skimmed over in print.³²³ And image does matter. The visual presentation of the candidates without protection from staff members or the safety of a teleprompter, offers insight into a candidate's ability to think clearly and respond decisively.³²⁴ Even with

317. See William E. Kennard, *The Digital Divide*, at www.fcc.gov/commissioners/kennard/col051298.html (last visited Apr. 15, 2002); ESA, NATION ONLINE, *supra* note 83, at 11-29 (outlining demographic factors in computer and Internet usage in the United States). Economic barriers to new technology are referred to as "switching costs" and are recognized as a limitation on consumer alternatives sufficient to narrow the relevant market to a single product or area. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481-82 (1992).

318. One legislative initiative in 2001 sought to encourage broadband development in rural areas. Rural Broadband Deployment Act of 2001, S. 1127, 107th Cong. (2001). The Rural Broadband Deployment Act would exempt carriers providing advanced telecommunications services in areas with a "population less than 50,000 located outside of a metropolitan statistical area," from the Communications Act of 1934. *Id.* The bill defined advanced telecommunications services as the "capability to transmit information at no less than 384 kilobits per second in at least one direction." *Id.*

319. PATTERSON, *supra* note 304, at 175. Professor Patterson notes that the flood of viewing options offered by new media might increase the relative importance of the networks because "[a]s the number of channels grows, viewers stop surfing and limit their search to selected ones." *Id.*

320. See Campbell, *supra* note 161.

321. Both presidential candidates maintained their own campaign web sites during the election. Archived copies are available at <http://www.georgewbush.com> and <http://www.algore2000.com>.

322. Alexander, *supra* note 152, at 125-26.

323. LEMERT ET AL., *supra* note 198.

324. JAMIESON & BIRDSELL, *supra* note 154, at 15 (discussing the "often maligned but nonetheless important characteristic of . . . image"); see also MINOW ET AL., *supra* note 299, at 4 ("Not speeches on the stump, not speeches from the rear platform of trains, not courthouse square handshaking, not newspapers, not magazines, not books, and not even radio can confront so many people with the president's face and with his words at the moment he utters them.").

advances in technology, therefore, the live presidential debate should remain its own product market.³²⁵

Using this market-based analysis, a model presidential debate regulation should be viewed as limited to the live candidate debates broadcast nationally on network television. The First Amendment scrutiny applied to the regulation then depends on the amount of content regulated in this relevant market. Using the total viewership for the first general presidential debate of the 2000 campaign as a benchmark, approximately thirty-five million households of the 46.6 million households watching relied on broadcast television coverage.³²⁶ Broadcast television thus carried more than seventy-five percent of the presidential debate audience, a market share strongly suggesting market power within the scarce broadcast medium.³²⁷ With viewership concentrated within the traditional television spectrum, the relaxed First Amendment standards of *NBC* and *Red Lion* should be applied to review any regulation of the presidential debates.

These relaxed standards triggered by the market-based First Amendment analysis suggest that the FCC could compel the major broadcast television networks to cover the general presidential debates. In turn, the public interest goals of voter education and informed election discourse are likely sufficient regulatory concerns to pass the deferential First Amendment review required under precedent.

A broadcast debate regulation would not, of course, survive constitutional challenges indefinitely. As noted, cable television accounted for roughly twenty-five percent of the households tuning in for the first presidential debate of 2000. If convergence keeps pace, the major broadcast networks will offer but one of the many options for viewing campaign debates. In the meantime, the relaxed First Amendment scrutiny applied to a current debate regulation ensures continued network television coverage and preserves a national voter audience for emerging media alternatives.

CONCLUSION

As government control of broadcast speech approaches its seventy-fifth year, two pressing problems have emerged. Broadcast networks face mounting competition from communications media, decreasing their willingness to perform public interest duties assigned by the FCC. What network television invented in 1960, the presidential debate, it may dismantle by means of defection before

325. See PATTERSON, *supra* note 304, at 164. Professor Patterson argues that the drama of the live debates uniquely satisfies the political interests of the average voter, because “[v]oters are not like students in a classroom,” but “more like the crowd at a ball game.” *Id.* at 164-65. Accordingly, “[t]he more exciting the game, the more attention spectators pay. And the more attention they pay, the more they understand what’s happening on the field.” *Id.* at 165.

326. *Supra* note 211.

327. See *supra* notes 288-91 and accompanying text (assuming that a market share greater than sixty-four percent likely demonstrates market power).

2004.³²⁸ The presidential debates are neither perfect nor essential to American democracy. But they are an important part of our political tradition, adding a symbolic, and sometimes substantive, focus to the selection of our highest office.³²⁹ Simultaneously, the same technologies that have triggered competition in the communications industry are quickly eroding the already doubtful scientific basis of the FCC's most powerful regulatory schemes. Today, if not in 1927, broadcast media are not scarce.

Politics makes legislative solutions difficult to craft: no member of Congress is eager to voice support for an end to regulation of broadcast obscenity and media indecency. Administrative solutions are promised,³³⁰ but the sheer size and power of the FCC make change difficult.³³¹ While the courts remain hesitant to intrude, reform is possible within the normal confines of judicial review.

A market-based approach to the First Amendment rights of broadcasters is a sensible, familiar alternative to the current two-tiered system of constitutional review. A market-based approach to the First Amendment adds a sophisticated set of guidelines suitable for agencies, broadcasters, and courts. Market-based First Amendment rights preserve the traditional deference to agency regulation in broadcast television and radio. At the same time, emerging technologies are accorded the robust speech protection of the common law First Amendment. New media are given the freedom to flourish, while old media are given a reason to catch up.

A regulation compelling the broadcast coverage of presidential debates is a fitting forum to welcome the new First Amendment rights of broadcasters. While remnants of scarcity concerns still control, federal oversight of the debates is appropriate. As the broadcast marketplace of ideas begins to rely on the economic market, the legal and scientific gap that separates Twentieth Century

328. Post-election news coverage of presidential politics supports this trend. On November 8, 2001, President George W. Bush delivered his second televised address to the nation regarding the United States' war on terrorism. Despite the obvious importance of the event, only ABC carried the speech live. *Bush Loses in Network Battle of "Survivor"*, available at <http://www.cnn.com/2001/showbiz/TV/11/08/networks.snub.bush/index.html> (last visited Nov. 8, 2001). NBC and CBS each decided to air their popular prime time properties "Friends," and "Survivor," while FOX left the programming decision to the local affiliates. *Id.*

329. The importance of televised debates is gradually emerging in other countries as well. See Steven Erlanger, *German Candidates Unscathed After First Televised Duel*, N.Y. TIMES, Aug. 26, 2002, at A3.

330. Roger M. Golden, *Gauging Michael Powell: What Can Business Expect from a New FCC Chairman Promising Change?*, LEGAL TIMES, May 18, 2001, at 32. Chairman Powell stated that "[w]ith increasingly converged services, it is difficult to rationally label and, thus, assign regulatory treatment to an innovative provider, product or service." *Id.*

331. Yochi J. Dreazen, *FCC's Powell Quickly Marks Agency as His Own*, WALL ST. J., May 1, 2001, at A28. Chairman Powell has criticized the FCC's public interest doctrine as "about as empty a vessel as you can accord a regulatory agency and ask it to make meaningful judgments." *Id.* In contrast, FCC Commissioner Gloria Tristani saw no ambiguity in the agency's duty, citing "70 years of good, clear case law about the public interest standard." *Id.*

jurisprudence from Twenty-first Century technology can be crossed. Compelled debate broadcasts, like scarcity, must ultimately give way to the reality of a converged media. That future will validate the First Amendment's core commitment to public debate and usher in a new era of digital democracy.